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# **Primary Dispute Resolution for Legal Aid Clients in Australia**

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It is a fact of modern Australian life that 40% of marriages end in divorce. That is, there are about 55,000 divorces granted each year. Half of these marriage break-ups involve children. The stress and grief consequent upon the split up of families leads to many flow on effects. Practical, legal and emotional issues have to be dealt with. The consequence can be much conflict, with children suffering most in this conflict.

Resorting to the courts has been the traditional method of resolving family law disputes. However, in Australia, there is considerable disquiet about the family law system, and in particular, the court process. There have been two major reports on the family law system, which set out some of the issues of concern and possible solutions. The first report was in July 2001 by the Family Law Pathways Advisory Group "Out of the Maze - Pathways to the Future for Families Experiencing Separation". The work on the recommendations of the Family Law Pathways Advisory Group was overtaken by the parliamentary report in 2003 "Every Picture Tells a Story". The Commonwealth Government has since announced major reforms.

Family law is a Commonwealth Government responsibility in Australia. The *Family Law Act 1975* is Commonwealth legislation. State Legal Aid Commissions receive funding for the provision of family law services. It is a requirement of this funding that Priorities and Guidelines promulgated by the Commonwealth Government are followed. In earlier years, the Commonwealth Government was less prescriptive of its expectations. Since 1997, with the adoption of a so-called purchaser/provider approach, the Commonwealth Government will only fund Commonwealth matters i.e. matters governed by Commonwealth legislation.

Seeking to resolve private family disputes by legal action has long been criticised as being expensive and, more often than not, tending to exacerbate the problems. The notion of a "without prejudice" conference with lawyers present has been effective in civil law disputes. Community justice centres were the first to successfully utilise mediation services for resolution of neighbourhood disputes. Learning from these early foundation stones, in 1985 Legal Aid Queensland decided to commence mediation services on a trial basis. It was a process that quickly became used for resolution of family disputes. Initially, there was debate about including such a service in the legal aid program. However, the secret in the ultimate success was that private lawyers were paid for their professional services and thus more accepting of the benefits of the approach. Also, the compulsory nature of the process was accepted. A grant of legal aid was available for conferencing only, opposed to legal aid for court proceedings. Panels of lawyers and social workers to chair the mediation sessions were developed, as well as a training program.

The impetus of the program came in 1990 when the Commonwealth Government made funding available for a program of Early Intervention Conferences. From December 1990, applicants for legal aid in custody and access matters were required to proceed through the Early Intervention Conference Program before any other grant could be made. The procedure was that once identified as suitable for the program, applicants were required to attempt to engage the other party in a counselling session with the assistance of a third party to attempt to resolve the dispute. If the parties were unable to resolve the dispute they were invited to attend an Early Intervention Conference.

The process for the Early Intervention Conference was that it was chaired by a solicitor assisted by a social worker. Each party could be represented by their own solicitor and if eligible for legal aid funded for the conference. At the conference, the parties were

encouraged to speak for themselves and to speak directly to the other party. The aim was to determine the issues in dispute and to resolve them if possible. At the completion of the conference if the parties reached agreement legal aid was given to file consent orders. If the parties could not reach agreement, a recommendation was made by the chairperson whether either or both parties had merit to continue to be funded for legal aid.

A key ingredient for the early success of the program was that a training program of three days duration by two leading academics and trainers in alternative dispute resolution. Over seventy chairpersons and social workers were initially trained.

Also, in addition to funding training for chairpersons, the Commonwealth funded a program evaluation by the Key Centre for Strategic Management at Queensland University of Technology.

Further, a conference coordinator and a conference organiser were appointed. The appointment of full-time officers dedicated to the program ensured its success.

Legal Aid Queensland over the nineties continued to increase its commitment to the family law conferencing program. The settlement rate remained in the high 70's and it was considered that the process was cost effective and led to a high level of client satisfaction.

Other jurisdictions did not as readily adopt a family law conferencing program. Tasmania and Western Australia conducted family law conferencing on a smaller scale. New South Wales in the late nineties adopted and commenced a program. South Australia opted more for a counselling approach with in-house family law counsellors. In the remaining jurisdictions clients were referred out to external services.

The Commonwealth Government is committed to promoting alternatives to litigation. Indeed, the Family Law Act was amended to refer to the concept of "primary dispute resolution". Impetus was given to primary dispute resolutions by the provision in the 1999-2000 Commonwealth Government Budget of \$15.7m over three years for increased dispute resolution in family law matters through counselling, mediation and conferencing in legal aid commissions. The Commonwealth policy is that applicants for legal aid services are required to use primary dispute resolution services before any grant of legal assistance is made for court proceedings and assistance for litigation is pursued only as a last resort. The only caveat is that primary dispute resolution is not to be used in inappropriate circumstances e.g. where a party's capacity to participate in the process is impeded, for example, through the existence of a history of domestic violence.

The 2002-2003 Commonwealth Budget made available \$1m per annum for primary dispute resolution.

In November 2000, Phase One of a National Evaluation of Primary Dispute Resolution Programs in Legal Aid Commissions was completed by the Socio-Legal Research Centre, Griffith University and the Justice Research Centre, Law Foundation of New South Wales. The evaluation provides a comprehensive examination of the various primary dispute resolution programs in legal aid commissions as existed in 2000. The report was supportive of the concept of legal aid conferences. Its recommendations and conclusions have had a significant impact upon the development and enhancement of primary dispute resolution programs in Legal Aid Commissions. The report was instrumental in the development of

increased funding which resulted in an increase in primary dispute resolution options e.g. family law conferencing, property arbitration and Indigenous mediation in Legal Aid Queensland. The recommendation for clear and measurable goals has been accepted by Legal Aid Commissions, with the quality of data improving. Formalised intake processes have been introduced with applicants being screened and referred to conferencing only where it is appropriate. Also, a formalised intake approach ensures a consistent approach. Monitoring for compliance with the intake process also occurs. Conference programs have matured so that attendance does not mean settlement is mandated. Training of stakeholders has been recognised as integral to maintaining the quality of services provided.

### **Conference Model**

The family law conference model operating in Queensland has been adopted in other Australian jurisdictions. Some modifications have been made in some states and some examples are discussed later. As the Queensland model has been the model other jurisdictions have developed from, it is discussed now in more detail.

Legal Aid Queensland's conferencing model is a facilitated process where the clients have the opportunity to relate their concerns and issues to the other party and attempt to open communication and to reach agreement in relation to their family circumstances.

Parties are generally represented by solicitors at the conference, whose role is to assist the parties through the conference process while ensuring that the parties are able to raise the issues important to them, as well as provide legal advice and reality testing for the family law conferences.

The discussions are conducted by the chairperson whose role is to assist all parties to the conference to explore the issues in a structured environment. The chairperson helps the parties discuss their issues and explore options for resolution.

The chairperson is also required to make recommendations in relation to future funding of the client's matter, in the event that resolution is not reached.

Attendance at a conference is not mandatory; however a party must provide reasonable cause for non-participation. This is consistent with the requirements under the Commonwealth Funding Guidelines.

Generally speaking, funding is provided for both parties to be represented at the family law conference. However if a party is not funded, due to ineligibility for legal assistance, they may attend with a privately funded solicitor, or unrepresented.

Parties may have a support person at the conference if they choose to do so. Support persons do not typically play an active role in the conference and are usually not permitted within the room whilst a conference is underway; rather they stay outside the room and act as a support during breaks. In certain circumstances through their presence may be permitted.

Issues referred to family law conferencing include residence, contact, specific issues and property matters. Property matters have not been funded to a conference in isolation, but may be discussed in conjunction with a child issue.

In cases where property does not resolve at conference that issue may be referred to the Property Arbitration Program for resolution.

### **Purpose of Family Law Conferencing**

The purpose of family law conferencing is to facilitate the resolution of the parties' family law issues by providing a forum where people in dispute can talk to each other in a supported environment and thereby have the opportunity to resolve their problems themselves.

As the focus of the program is to provide an opportunity for clients to reach an early resolution of their dispute, the majority of conferences held are early intervention conferences, consistent with the Commonwealth Priorities and Guidelines which require consideration of a primary dispute resolution intervention prior to a matter being funded for litigation.

However, a conference may be called at anytime in the course of a matter. For example a conference may be called by a child representative prior to trial, in an attempt to resolve the dispute. In addition, at each funding stage consideration is to be given to the possibility for a primary dispute resolution intervention.

### **Intake Program**

In November 2000 a report written as part of the National Evaluation of Primary Dispute Resolution Programs in Legal Aid Commissions ("Hunter Report") identified a significant defect in Legal Aid Queensland's Family Law Conferencing Program in that it lacked a formalised and consistent intake process.

The lack of an Intake Program exposed clients to a risk of exposure to conferences that were either inappropriate to convene, formatted incorrectly or lacked sufficient support mechanisms to ensure the clients were empowered to negotiate settlement.

In response to this deficit Legal Aid Queensland designed and implemented a formalised intake procedure. This process was created following state-wide consultations with all relevant stakeholders, including preferred suppliers, conference chairpersons, special interest groups, Legal Aid Queensland staff and various other specialists.

The goals of the Intake Program are to:

1. Create the opportunity for Legal Aid Queensland to be well informed about issues relevant to the parties and which might directly impact on how a conference may be best conducted, including identifying applications for which conferencing may not be appropriate.
2. Introduce a mechanism for ensuring that legal representatives are well informed about issues that may impact upon the conference process, and are able to recommend appropriate strategies to best meet client needs.
3. Better inform conference chairpersons of issues relevant to the parties and thus assist in preparing for and moderating the conference process.

4. Provide clients with a structured and clear vehicle for disclosing issues of concern which are relevant to an effective conferencing experience.
5. Enhance the quality of the conferencing program by improving the capacity to match conference processes with client needs.
6. Improve the capacity for sustainable agreements as a result of effective conferencing arrangements.

### **Intake Process**

The following process outlines the various stages of 'intake' during the life of a standard conference file.

1. Application is referred to Conference Organiser for assessment after referral from a Grants Officer or counter staff.
2. A client assessment sheet will issue to the applicant requesting brief details of the characteristics of the relationship. This will be an enclosure to the initial invitation letter which is issued by the Grants Officer.
3. Upon return of this questionnaire, the Conference Organiser will decide whether, on the information available, the matter is appropriate to conference. The Conference Organiser may contact the applicant if clarification is required, or may abandon the conference if this is indicated by the information obtained.
4. If the Conference Organiser deems the matter appropriate to conference a letter will issue to the other party in the dispute. This letter will advise them that the applicant has requested a conference and invite the other party to contact Legal Aid Queensland. This letter will also include a preliminary client assessment sheet for completion by the other party and return to Legal Aid Queensland.
5. In cases where the Court has appointed a Child Representative, they will also be invited to attend the conference. They will also be requested to provide feedback on whether a conference is appropriate to the case. The Child Representative is not required to complete an assessment sheet.
6. Once all client feedback has been received the Conference Organiser will assess the matter again, taking into account all of the information available. If the Conference Organiser determines that conference is not appropriate then the application will be excluded from the Primary Dispute Resolution process.
7. If deemed appropriate, the Conference Organiser will issue a financial grant of aid to allow solicitors to act in the matter. As part of the conference funding the practitioner is required to complete and return the 'Solicitor Assessment Sheet'. This questionnaire is more in depth than that completed by the parties initially. It is envisaged that this will be a tool that allows the practitioner to raise these difficult issues with their clients.

Practitioners must complete and return the Solicitor Assessment Sheet, together with their opinion in relation to suitability for a conference. A date will not be allocated for holding the conference until receipt of both parties' Solicitor Assessment Sheet.

8. Once all responses are received the Conference Organiser will decide whether the matter is appropriate to conference, and what form the conference should take and advise the parties and their solicitors accordingly.

The Conference Organiser may also contact the parties by telephone to gain further information that may assist in providing the most appropriate service to the parties.

## **Conference Formats**

Legal Aid Queensland provides a range of format options designed to respond to client needs.

Format options available include:

- Face-to-Face
- Telephone Shuttle
- Shuttle
- Video
- Telephone
- Co-chair

In cases where domestic violence is alleged the default format is shuttle conference. This may revert to a face-to-face conference if all parties agree, but only in circumstances where the conference chairperson satisfies themselves that all parties have reached this decision freely. This policy is outlined in Best Practice Guidelines for working with clients affected by domestic violence.

Telephone conferences are generally held in cases where distance is an issue or in cases where allegations of domestic violence are more suitably addressed by this format. A variant of this format that is becoming increasingly utilised is the telephone shuttle conference. This is generally used in cases where the client elects to conference their matter but does not wish to hear the other parties' voice.

Video conferencing is an option offered to clients, but is seldom utilised. This format is currently the subject of a project aimed at making the service more accessible to clients and their solicitors.

The co-chair format is reserved for those cases where the issues are complex or multiple parties are involved. A typical example of a matter where co-chair format is utilised is cases where a child representative has been appointed. In co-chair conferences the chairs assigned are usually a social worker (or other social scientist) and a lawyer.

It is the responsibility of the conference organiser to determine, on the information gathered during the intake process, what the most appropriate format for a conference is, and to make arrangements accordingly. In cases where the information supplied is not sufficient then the

conference organiser is required to make suitable investigations before formatting the conference.

### Chairperson Panel

Legal Aid Queensland has formed a panel of suitably qualified chairpersons. In order to gain entry to the panel a practitioner must demonstrate the following qualifications:

1. Hold a degree in Social Work (and are members or eligible for immediate membership of the Australian Association of Social Workers), Psychology (and are registered or eligible for immediate full registration with the Psychologists Board of Queensland) or Law (or is otherwise eligible to obtain a practicing certificate issued by the Queensland Law Society).
2. Have completed at least five days of mediation training (including one course of duration of three days) which is recognised by Legal Aid Queensland or alternatively successfully completed a post-graduate tertiary course in mediation and provide copies of certificates evidencing completion of the above.
3. Have practiced either as a Barrister, Solicitor, Social Worker or Psychologist for not less than three years. In exceptional circumstances, the Selection and Review Committee may reduce the years of practice required for consideration of the application to a lesser period.
4. Lawyers must establish a demonstrated knowledge of and expertise in the practice of family law and social workers or psychologists must establish demonstrated knowledge and expertise with separated families in conflict.
5. Demonstrate a sound knowledge of the conference model, Legal Aid Queensland procedure, and dispute resolution process and standards.
6. Demonstrate well-developed communication and interpersonal skills.
7. Provide the name and contact details of at least two referees who can comment on the applicant's knowledge and expertise.
8. Nominate the metropolitan and/or regional area/s in which the applicant wishes to chair conferences.

The Chairperson Panel is currently under review and all chairs have been required to reapply for entry onto the panel. This has allowed Legal Aid Queensland to regulate its panel and ensure current chairpersons are committed to the Primary Dispute Resolution process.

### Administrative Structure

The Conferencing Program is managed by a Primary Dispute Resolution coordinator, with assistance from the Primary Dispute Resolution Program Development Officer.

Conferences are organised by the conference organisers. Each regional office has one designated Conference Organiser with the exception of Brisbane which has two full time Conference Organisers. Two regional offices, Inala and Mt Isa do not have Primary Dispute Resolution staff. Conferences for the Mt Isa area are administered by the Townsville office.

Conference Organisers are responsible for ensuring that the Intake Process is followed and for formatting and scheduling the conferences appropriately.

In cases where a conference is not appropriate the Conference Organiser excludes the matter from conferencing, and refers the file to the Grants Officer for further assessment.

Conference Organisers are offered training in the form of quarterly telephone conferences for discussion of conferencing issues, a yearly Conference Organisers Conference for more intensive training and are also offered training on an ad hoc basis when required. They are also given training as part of the Primary Dispute Resolution Unit's annual training circuit.

### Fee Structure

Practitioners who represent clients at family law conferences are allocated seven hours professional time. This allocation includes two hours of preparation (pre-conference interview including initial advice and completion of intake material), four hours of conference time and a further hour for completion of post-conference tasks such as explaining the conference outcome and completion of consent orders.

Conference Chairpersons are allocated 4 and ½ hours representing thirty minutes preparation time and four hours of conference time.

The fee rate is \$120 per hour.

In some cases an extension of these allocations is required to finalise the issues. These extensions must be sought and approved by the Conference Organiser or Grants Officer prior to exceeding the allocation. Outlay extensions are also available if required.

### Performance

Performance of the Conferencing Program is subject to ongoing monitoring in relation to its performance.

The following is a breakdown of the Conferencing Program performance for the last four years. Legal Aid Queensland tracks these figures on a monthly basis and these are reported to the Commonwealth each month.

#### **Comparison of Request v Conferences Held**

<b>Year</b>	<b>Requests</b>	<b>Held</b>	<b>Conversion %</b>
2000-2001	6319	3012	47.66
2001-2002	5646	2663	47.16
2002-2003	4792	2721	56.78
2003-2004	4540	2172	47.84

#### **Comparison of Conference Held v Settlement**

<b>Year</b>	<b>Held</b>	<b>Settled</b>	<b>Settlement %</b>
2000-2001	3012	2338	77.62
2001-2002	2663	2114	79.38

2002-2003	2721	2100	77.17
2003-2004	2172	1747	80.43

### Quality Control - Benchmarking

Performance is tracked in relation to time from receipt of the initial application to the date of the conference being held.

The benchmark target is 80% of conferences held within 40 calendar days of the initial grant of aid.

The benchmark was created in response to expressed concerns of many stakeholders during development of the Intake Program. Many stakeholders feared that the administrative steps put in place to ensure conferences held were suitable and formatted correctly may cause undue delays in the organisation stage.

Comparative reports have been run to compare the time from application to holding a conference both pre-intake and post the implementation of the intake program.

The results demonstrate that the time to organise a conference has been extended by approximately two weeks. Given the benefits that the intake program provides to clients Legal Aid Queensland believes that the extended organisational period is offset by the certainty that the conference held is appropriate.

### **Client Satisfaction**

Both Legal Aid Western Australia and Legal Aid Queensland conducted client satisfaction surveys in 2004 for their conferencing programs.

The Western Australia survey client satisfaction level is 79%, being the highest level of satisfaction amongst the various family law client groups. In general, clients felt satisfied with the lawyer who represented them. 89% of clients understood well the advice which their lawyers gave them, with the rest (11%) understanding the advice a little. Most clients (88% felt their lawyers listened when they were explaining their situation. Over 80% of respondents felt that the Chairperson explained the conference process, identified relevant issues, and made communication easier. The majority of conferences resulted in an agreement being reached (88%) of all the agreements which were made, 67% are still working between the two parties.

The Queensland survey showed that overall satisfaction with the conferencing service is reasonably high. Around 61% of clients who used the service were extremely satisfied. Suggested improvement included not rushing the process and giving the clients a few more options. The most important attribute impacting on overall satisfaction is that the lawyer followed up with communication after the conferencing process. Overall, clients (particularly female clients) strongly believe that the Chairperson explained the conference process in an easy to understand manner. Clients also generally felt that the Chairperson identified the relevant issues, clarified each party's interest and also enable good communication between the parties.

## **Durability of Agreements**

One of the unknowns about primary dispute resolution is the durability of agreements reached as a result of a family law conference.

The issue of durability was touched upon in Phase One of the National evaluation of Primary Dispute Resolution Programs in Legal Aid Commissions. It was recognised that agreeing a definition of “durability” is an issue. Further, that not all agreements reached following a conference could be expected to endure for a number of reasons:

- parties have difficult personalities;
- the dispute is intractable;
- circumstance change e.g. introduction of a new partner;
- new issues arise that parties are unable to resolve themselves;
- one party reneges on the agreement.

The durability of the agreement is comparable to outcome derived from any other form of dispute resolution, including the Family Court of Australia.

The 1992 evaluation of Legal Aid Queensland’s conferencing program concluded that the durability of conferencing agreements was comparable to that of court ordered arrangements with the main determinant of durability being the nature of the relationship between the parties. Residence agreements tended to survive but contact agreements had only a 50% chance of survival after 6 - 12 months.

The Legal Aid Commission of New South Wales has commissioned a study “Settlements reached at legal aid conferencing - do they stick?” Dr Tom Altobelli (Law Faculty) and Dr Natalie Bielzen (Social Science Faculty) are undertaking the study. Two cohorts of participants in conferencing will be compared with two matched cohorts of litigated cases. Using telephone interviews, the effectiveness and durability of settlement reached on both conferencing and litigation will be established. Data will be gathered through file review and interviews.

## **Other Jurisdiction Developments**

In circumstances where the Family Court would require independent evidence of the wishes of a child or children in relation to the child welfare issues in a dispute, Legal Aid Western Australia does not conference such matters unless that evidence is available from an appropriate independent source. Where relevant evidence is not available from a family report or a mental health professional who has been counselling the children, a report is obtained as to children’s wishes from a qualified social worker or psychologist. The report writer will speak with each party, any new partners and the children. The report is distributed to the parties’ solicitors and the chairperson a few days prior to the conference.

The Australian Capital Territory conducts a Family Law Review Conference which adopts a Shuttle Conciliation Model. The conference convenor may give expert advice on content and process, suggest alternatives and encourage agreement. The conference is convened by an experienced family law solicitor who moves between the conference room and the parties who are placed in separate rooms. The party’s solicitor shuttles between their clients’ room

where they take instructions/present proposals and the conference room where they meet with the convenor. It is an indirectly negotiated process as the negotiation is done through the parties' solicitors.

New South Wales is conducting a relaxed means test conferencing pilot program with the aim of including parties not normally eligible for funding under Commission policy with an evaluation upon completion.

Victoria introduced on 1 September 2004 Roundtable Dispute Management (RDM). All parties accessing RDM must be legally represented and at least one party in receipt of a grant of legal aid. Clients follow a five-stage pathway:

1. Application: If a matter appears appropriate for RDM, lawyers will apply for an RDM grant of aid with a memo addressing the merits of the matter and VLA's Guidelines and forward it, with supporting financial documentation, to the Grants Assessment Unit of VLA. Those lawyers participating in the family law Simplified Grants Process will complete the required checklist recommending the matter is suitable for RDM and forward the checklist and application form in the usual manner.
2. Assessment: Once an RDM grant of assistance is provided, RDM provides the parties and their lawyers with an information kit. Lawyers will complete and return two forms, the 'Lawyer's Summary Form' and an 'Agreement to Participate'. In the meantime a Case Manager will contact each party by telephone to assess their willingness to participate in the RDM process, collect preliminary information in relation to the nature of the dispute and ensure that all parties have secured legal representation.

Based on the information gathered, the Case Manager will assess whether the matter is suitable to proceed further through the RDM process based on risk, urgency and safety criteria. An assessment will also be made as to the most appropriate family law conference format to be adopted.

3. Preparation: This phase of the RDM process provides the parties with information education and preparation for the family law conference. Each party attend their Preparation Session consisting of a group education component and a face-to-face meeting with their Case Manager. The parties attend their Preparation Session on separate days. Their lawyer is not required to attend.
4. Resolution: The core component of the resolution phase is the family law conference. Facilitated by a Conference Chairperson, the family law conference is attended by each party, their respective lawyers and a Child Representative if one has been appointed. The family law conference may combine a number of dispute resolution strategies to meet the needs of each client, the stage of the matter and the nature of the dispute. Conference Chairpersons ensure that family law conference negotiations remain settlement oriented and child focused and lawyers play a critical role in achieving this outcome. At the conclusion of the family law conference proposed Consent Orders can be drafted reflecting the agreement reached.

The RDM grants of assistance available include funding for preparation, attending the family law conference and preparation of Consent Orders.

5. Follow-Up: Subsequent to the family law conference, the Case Manager will contact each party to ensure:

- Parties are referred to allied support services where required;
- The parties are given the opportunity to provide feedback on their experience of the RDM service;
- Parties have a subsequent consultation with their lawyer if necessary.

### **Indigenous Mediation**

New South Wales and Queensland have developed Indigenous mediation models. New South Wales had the Aboriginal and Torres Strait Islander Family Mediation project (ATSIFAM) designed to meet the needs of Indigenous Australian, in family disputes in Dubbo and the South West Sydney regions. The pilot commenced in April 2002 and concluded in December 2003. The pilot was evaluated by Professor Chris Cuneen, Institute of Criminology Law Faculty, University of Sydney. The findings were:-

- Data and client interviews indicated a high level of satisfaction with the program;
- There were five referrals and twenty-three progressed to mediation;
- The disputes mediated involved child contact and residence, spousal relationship and parent/child or parent/adolescent relationships;
- Three quarters (75%) of the mediators reached an agreement. A further 13% had achieved a narrowing of the issues; and
- On average, the cost of mediation was sixteen times higher than the average legal aid commission mediation

Due to the cost implications, ATSIFAM has not continued.

Legal Aid Queensland conducted in 2002-03 an Indigenous Mediation Feasibility Study. The consultation found that a need for primary dispute resolution services within Indigenous communities existed. Two communities were identified, Lockhart River and Yarrabah. The community of Yarrabah has confirmed their willingness to participate in the Indigenous Mediation Program. An external consultant has been engaged to develop a training package for the community mediators.

### **Property Arbitration**

#### **Arbitration Model**

Arbitration is a process in which the parties in dispute present arguments and evidence to a neutral third party, (the arbitrator), who will then make a determination. Determinations made by the arbitrator operate in accordance with law as outlined under the Family Law Act 1975.

Legal Aid Queensland's Arbitration Program operates as a streamlined process, which is, the arbitrator is provided with all relevant information and makes a determination on the

information provided. The parties provide initial information to Legal Aid Queensland, which is then forwarded to the other party. The parties may then file a response to the information. In some circumstances the arbitrator may request clarification or additional information to assist the decision making process.

The parties provide their submissions in writing. There is no right of physical attendance by the parties at the arbitration; however they have the option of providing oral submissions by telephone. These are limited to twenty minutes for each side, the total time allocated for the matter is one hour. The arbitrator has ten minutes at commencement and conclusion of the session to ask questions and address the parties. The parties may choose to waive this right if they wish.

Following receipt of all relevant information the arbitrator will issue a decision. This will issue within 28 days of receipt of all information.

Upon determination the arbitrator issues notification of their decision, and their reasons, to Legal Aid Queensland, who then forwards the decision to the parties.

The decision of the arbitrator is binding upon being issued. It may then be filed with the Court in the form of consent orders and these are fully enforceable.

### Entry Options

There are three methods by which matter may enter the Property Arbitration Program.

- Direct Application - clients may apply for funding for property arbitration or property settlement generally. Their matter will first be assessed against the eligibility criteria and, if suitable, will enter the Property Arbitration Program. If the matter is not suitable to arbitrate then the matter is assessed under the standard Commonwealth Funding Guidelines as they apply to property proceedings litigation.
- Family Law Conference Referral - the clients have participated in a family law conference in relation to child matters and property settlement has been identified as an unresolved issue. The Conference Chairperson has the option to refer the property issue to the Property Arbitration Program to provide the parties assistance to resolve the issue.
- Court Ordered Arbitration - the parties have property settlement proceedings before the Court. The Court has the power to refer the matter to Legal Aid Queensland's Property Arbitration Program by consent.

### Eligibility Criteria

- Parties were married (defacto matters may not enter the Property Arbitration Program at this time).
- Separation is final - For the purpose of the Property Arbitration Program this is demonstrated by a separation period of six weeks. This differs from the Commonwealth Funding guidelines for litigation which requires a six month separation period.

- Equity Limits - The net equity in the matter must be between \$10,000 and \$200,000 to qualify for entry. This figure includes current superannuation entitlements.
- Financial eligibility - At least one party must be financially eligible for funding by Legal Aid Queensland.

### Exclusion Criteria

- Unvalued business - Matters where there is a business within the property pool, where the value of the business is unknown or in dispute, may not enter the Property Arbitration Program. However, if the parties can reach an informed agreement as to the value of the business then the matter may enter.
- Unsecured third-party claim - In cases where either party assert that a third party has an interest in the property pool and the issue is disputed. If the parties can not reach agreement in relation to this issue the matter may not enter the Property Arbitration Program, as there is no mechanism for the calling of third-party evidence.
- Discrete issues - In cases where the parties are in agreement in relation to the value and distribution of the property pool, save for a specific, low value asset.
- Debt - Matters where the property pool is in negative equity may not enter the program.
- Child residence - In cases where child residence is in dispute the matter may not enter the program. Once residence is resolved the matter may be reassessed for entry.
- Capacity to file - At the end of the arbitration process the parties are required to formalize the award in the form of consent orders. If the parties do not have the capacity to initiate property proceedings then the matter may not enter the Property Arbitration Program. Usually the exclusion criteria are triggered by cases where the parties are divorced and the twelve month time limit for filing has expired.

### Administrative Structure

The Property Arbitration Program is managed centrally from the Brisbane office of Legal Aid Queensland. Applications for aid are lodged in the usual manner and assessed for entry by the local Grants Officer. If the matter is suitable for arbitration, aid will be approved and the file is then forwarded to Brisbane for ongoing management.

The Property Arbitration Program is administered by the Primary Dispute Resolution Program Development Officer.

### Fee Structure

Practitioners representing clients in the Property Arbitration Program are allocated fourteen hours professional time. This allocation includes twelve hours for the arbitration process and a further two hours for post arbitration tasks such as explaining the award and completion of consent orders.

Arbitrators are allocated seven hours to examine the material, hear oral submissions and complete the arbitral award.

Outlay funding is available within the Property Arbitration Program for the following purposes:

- Real Estate Valuation (One per property in dispute)
- Medical Reports
- Conveyancing
- Superannuation fund fees (in relation to completing Superannuation Information Forms)

### Performance

The Property Arbitration Program has been in operation since 5 November 2001. It was confirmed as 'core business' of Legal Aid Queensland on 30 June 2002 following the successful pilot of the program.

Since the commencement, the program has received and completed referrals as follows:

<b>Year</b>	<b>Referrals</b>	<b>Arbitral Awards Issued</b>	<b>Files Settled Without Award</b>
2001/2002	91	1	2
2002/2003	385	12	42
2003/2004	230	23	44

The above figures demonstrate that not only do matters resolve through completion of the arbitration process and the issue of an award, but also that the process provides a mechanism through which parties can have meaningful negotiations and resolve their property disputes without litigation.

### Panels

#### **Arbitrators**

The Property Arbitration Program has formed a panel of arbitrators consisting mainly of senior counsel. The program enjoys a high level of commitment from its panel of arbitrators.

There are currently eleven arbitrators on the panel who are suitably qualified under the Family Law Regulations. Accordingly Legal Aid Queensland's panel requirements are:

1. Admission as a solicitor or barrister of the Supreme Court of Queensland;
2. Either:
  - (a) Accreditation as a family law specialist and recognition as such by the Queensland Law Society; or
  - (b) Practice as a legal practitioner for at least five years and at least 25% of the work done in that time has been in relation to family law matters;
3. Completion of specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators including copies of any certificate obtained;

4. Proof of inclusion in a list, kept by the Law Council of Australia, of legal practitioners who are prepared to provide arbitration services under the Family Law Act 1975 (Commonwealth) (as amended).
5. Demonstrated participation or attendance in specialist arbitration training in accordance with (3) above, no earlier than 1 October 1998.

### **Valuers**

Legal Aid Queensland has also formed a panel of valuers who are suitably qualified to provide real estate valuations. Valuers on this panel contract with Legal Aid Queensland to provide valuations for a fixed fee of \$300 plus expenses.

Criteria for entry onto the panel are:

1. Membership with the Australia Property Institute;
2. Holder of current Professional Indemnity Insurance;
3. A commitment to e-commerce; and
4. Be prepared to execute an agreement with Legal Aid Queensland and comply with the conditions thereof.

### **User Pays Process**

The arbitration process where a client is participating on a “user pays” basis is substantially the same.

A User Pays client is required to pay an up front fee (currently \$957.00) to Legal Aid Queensland. This is held in trust and applied against any costs incurred on the User Pays participant’s behalf. Generally the fee covers:

- ½ Arbitrator Fee
- ½ Valuation Fee
- Medical report allowance

A User Pays participant must be represented by a lawyer throughout the course of the arbitration at their own expense. They are required to advise Legal Aid Queensland of details of their representative.

### **Conference Resolution Support Intervention (CRSI)**

Conference Resolution Support Intervention (CRSI) is a two hour post-conference intervention with a qualified social worker to assist parties to implement the agreement made at their family law conference.

This process is designed to assist with practical matters rather than as a therapeutic process. It is hoped that through offering post-conference support to parties, agreements reached can be sustained for longer periods, reducing the need for subsequent conferences or the incidence of breakdown of agreements.

Parties may request referral to the process or may be nominated by their solicitors or the conference chairperson. To participate clients' are required to complete a request form which provides updated contact details and authorises release of certain file material to the assigned social worker.

In the early stages of implementation this intervention is telephone based so as to allow access to all of Queensland. Future enhancements to the process could include expansion to in-person meetings, and video conference formats.

The content of the interviews are to be confidential under the same provisions as the conference itself.

Factors that lend themselves to such an intervention include agreements requiring:

- Supervised contact arrangements;
- Conditional agreements (drug testing, parenting courses, anger management etc);
- Excluded third parties;
- Special car requirements;
- High parental conflict; etc.

Following the intervention the social worker will be required to provide an outline level report of the issues covered in the discussions. (i.e. the main issues covered, active referrals made and the like). All material provided to the social worker is to be returned, along with the social worker's account.

The intervention is designed to be child focused and enhance the outcomes for children affected by conferencing agreements by providing education and active referrals to assist the parties.

### **Commonwealth Government Direction**

The considerable disquiet in the Australian community about the family law system is evidenced by the 1,700 submissions to the House of Representatives Standing Committee on Family and Community Affairs wide ranging inquiry into child custody arrangements in the event of family separation. In December 2003 the Committee released its report "Every Picture Tells a Story". This report had a strong focus on the importance of reducing conflict between separated parents and on separated fathers having greater involvement with their children. It emphasised the need for practical steps to reducing parenting disputes.

In July 2004, the Prime Minister released a statement responding to the Committee's report and proposing major reforms to the family law system. The statement emphasised the need to provide families with better ways to resolve relationship disputes and to reduce the emotional costs to families and children of conflict and separation. The reforms outlined will mean the most significant changes to the family law system since 1975.

A focus of the reforms is to provide ways of resolving conflict without going the adversarial path. A new network of Family Relationship Centres is to be established to help families to develop parenting plans and resolve disputes as early as possible after separation. Changes

to the law will promote the objective of both parents having a meaningful role in their children's lives. Shared parental responsibility will be the starting point in most cases. Parents will have to try to resolve their disputes before they can take a parenting matter to court. Less adversarial court processes are to be introduced.

A discussion paper was issued and comment sought by January 2005. At this stage it is uncertain what effect the proposal will have on legal aid funding for family law. The bulk of family law expense in the legal aid system is for the more difficult cases, particularly trials. So, apart from reform of the court process, the casework aspect is unlikely to change dramatically. Family law conferencing could be affected, but it is felt that this will be a gradual process, as the seventy-five Family Relationship Centres will take some time to establish. Also, the volume of family law disputes is such that the level of activity is unlikely to diminish.

In the legal aid arena, the Commonwealth Government has supported with funding the National Legal Aid Primary Dispute Resolution Working Group. This Group meets annually and has led to not only interchange of ideas, but also enhancements in the programs conducted by the Legal Aid Commissions. Best practice elements and benchmarks have come out of the discussions. The Commonwealth Government is seeking to develop best practice standards for primary dispute resolution, which will impact on Commissions' primary dispute resolution programs.

## **Conclusion**

The family law arena is one of constant turbulence and change. Since the introduction of the Family Law Act 1975, there has been constant tinkering, both substantively and procedurally. The tinkering has been motivated by public pressure from pressure groups and also the desire to perfect the system. The realisation has now come from the Commonwealth Government that litigation in the family law arena should be the avenue of last resort. Fortunately, for legal aid clients for more than a decade, an alternative to litigation has been available and which has been successful. It remains to be seen how the legal aid approaches will work in with the Commonwealth Government's direction.