C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 11 February 2008

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Witnesses

Mr I. Goodhardt, manager, and
Ms M. Henham, manager, Family Mediation Centre

The CHAIR — First of all, I welcome Meg Henham and Ian Goodhardt and thank them very much for coming to speak to us this afternoon on our reference. I am required to advise that the hearing operates under the auspices of the Parliamentary Committees Act. That means the conversation is subject to parliamentary privilege, which basically means you are at liberty to say virtually anything you like and you will not have litigation taken against you by anybody who may be offended. But if you say the same things, obviously, outside the confines of this hearing, then you will not be afforded the same protection. Hansard staff are recording the conversation. A few days after the meeting you will be sent a copy of the transcript, and you can make changes to that of a minor nature, just to make clarifications but obviously not to change the substance of it.

We have half an hour. The meeting is pretty informal, but we will give you some time to set up. You obviously have a PowerPoint presentation to take us through. We have some questions as well that we will raise with you. It is over to you.

Overheads shown

Ms HENHAM — We have just got a brief PowerPoint presentation. Just a little bit about the Family Mediation Centre: we are actually one of the longest providers of family dispute resolution of Victoria, set up by the A-G's department in 1985 as a pilot program. We have got five branches — we operate in Gippsland, Moorabbin, outer east in Ringwood, Frankston and Narre Warren. We see about 2500 clients a year. Out of the CALD communities there are about 56 different countries, and we have 10 different programs.

Our core business is really in mediation in family law matters — property disputes and parenting matters. We see both married and domestic partners. We put quite a big emphasis on intake and screening assessment for family violence issues, power differentials, ability to negotiate any mental health, drug or alcohol issues before we actually get two people in the same room together.

Traditionally we have operated from a co-mediation model, where we have a gender balance of male and female mediators. Increasingly that becomes more and more difficult, simply because of resourcing issues. We would very rarely settle matters in one 2 or 3-hour session. We would usually have multiple sessions with the parties. We use both mediation and conciliation models — so facilitative models — and also may provide advice in parenting matters, based around research and potential court outcomes.

We piloted the child inclusive practice in family law mediation— and I will talk a bit more about that later. All our practitioners are registered to provide FDR services. We are also able to issue the certificates in matters where people attend and whether they reach agreement, whether they have made a genuine effort et cetera. We have a dedicated Chinese FDR program catering to the needs of Chinese speakers, Teo Chiew and Mandarin.

We have a program which we call our CoMET program, which is a mixture of mediation and therapy. We would generally use that program where there has been long-term involvement with the family courts — repeated litigation, the revolving door-type matters — where there is entrenched conflict and certainly the children are at risk of damage through that. That is a longer term process, so we would see parties over maybe nine months in that program.

The next one is the child inclusive, which again we piloted with Dr Jenn McIntosh, whom you may of heard of, where we offer a separate consultation for children. That really provides them with a voice in the process. The consultant will come back, give feedback to parents, and hopefully the parents will take on board some of the themes or concerns. We end up having an agenda for children. We have found that really useful and beneficial to both children and families.

We run post-separation parenting groups. Most of our participants from those are referred from the Federal Magistrates Court. They are quite a challenging group to deal with. Many of them do not wish to be there. But with the evaluations that we have done on the programs, we have found a significant shift in the reduction in conflict, post-separation, which has been really good. As you can see, it revolves around conflict resolution skills, problem solving, communication et cetera.

Mr GOODHARDT — We also have a Men and Family Relationships program. This is essentially a counselling program to address primarily the needs of men who are going through separation or family transition, who can find it more challenging often than women do. Although this program sees women and it does couples and family work as well, the focus of it is on men.

We have mediation between parents and their adolescent children. It is a form of family therapy. It can be with intact families where the adolescents are exhibiting challenging behaviour. It can also be with separated families, particularly where one parent has lost contact with the children for a period of time. Sometimes this program is helpful in re-establishing contact between children and an estranged parent.

We also have a financial counselling program. That just kind of fits in with our core work. Quite often the time of separation presents particular financial challenges to people as the costs of living to households clearly place a strain on everybody's budget. And we are a registered training organisation. We have done training for many years with the new vocational graduate diploma in family dispute resolution. We were one of the first organisations to become registered specifically to teach that program, which we will start doing later this year. We are also registered to provide skills recognition. That used to be called recognition of prior learning under the VET system to enable people to gain these qualifications.

We do workplace mediation. We do not do a tremendous amount of workplace mediation, but we are available, and we have done some commercial organisations, but mainly, as you see there, in nursing homes, schools and so on and community-based organisations. The last program we have run in the past but we are not running at the moment because the funding was curtailed — it was a program of school-based mediation at various levels in schools, where we provided school students with training, mediation and established peer mediation programs in a number of schools. You can see there the various types of disputes that was used to address. All our programs are federally funded, with the exception of this one, which was state funded, but now we do not have that program any more.

The CHAIR — So you do not have the school-based mediation any longer?

Mr GOODHARDT — No. We still have the personnel who are now doing other things because the funding for that program was withdrawn, but that was the only state-funded program that we used to run.

We are a reasonably sized and certainly a very experienced organisation in this area. It was interesting reading your discussion paper and the table that you have on page 16 of the providers of ADR. Just for your interest, we were interested to note that there was not a single mention in that table of any family dispute resolution, which clearly is quite a big part of the alternative dispute resolution process .

The CHAIR — We will remedy that in our final report.

Mr GOODHARDT — Of course we are not the only organisation doing it, but it is quite an important area of ADR. So that is our organisation.

The CHAIR — Thank you both for that presentation. Perhaps if I could start off. You have listed all of the categories of the areas that you work in. I wonder for the committee's benefit if you could perhaps take an example and talk to us, with a model in mind, about how a group that comes to you are processed through — how they might find out about you; how you would deal with them initially; and just step us through that process, remembering I guess that our vantage point is the consumer, and one of the things we are trying to look at is ways of making those pathways easy for people. So if you have got good models, that is important for us to know. Often that is best communicated by thinking about how an individual steps through your organisation.

Ms HENHAM — I guess probably talking about our core program would be useful, I think, because it is our largest program. We would get referrals from courts: the Family Court, the Federal Magistrates Court, Legal Aid, community legal centres; a majority of solicitors are high on our referral list as well. They will initially tell people about what we do in family dispute resolution and explain that we would see them separately first. So we would have an intake assessment interview maybe for 1 to 1½ hours where we take background details. As I was saying before, it is quite a thorough assessment.

We have tools that we use for assessing any family violence issues, people's capacity, as I said, to negotiate. We may do some coaching in those intake sessions to help people clarify the issues and what they want to get out of the process. We also talk about the process of meeting with the second party. We talk about what happens in the dispute resolution session: how long the process is likely to be; that we do not provide them with legal advice but we would certainly recommend that they seek legal advice throughout the process, pre, during and post. We do not have solicitors in the room, but, as I said, they certainly resource their clients around their legal entitlements, which we obviously do not do within the session itself.

We do the same with the second party, all going well. In that we have decided that this matter is suitable for FDR, we would then arrange the joint sessions, which are generally 2 hours long. So it is quite a detailed assessment that we do.

The CHAIR — Okay, you talked about how long it takes. Can you just remind me of the time you said on average.

Ms HENHAM — It would depend; if it is just children's matters, we might average three sessions. If the children are involved, that is an additional session with a feedback session to the parents.

The CHAIR — What is the resolution rate?

Ms HENHAM — That is interesting, because Ian and I were doing some figures just last week. With children I think it is 76 per cent — there we go, 74.

Mr GOODHARDT — Knowing your interest in compulsory programs versus voluntary programs, mediation traditionally has always been a voluntary process. If you were to speak to family mediators about the impacts of having people compelled to come into this process, because they need to get into the process so they can get the certificates so they can make an application to the court, mediators would probably tell you that the level of complexity has gone up. The type of clients that we are getting has very significantly changed, so we wondered whether this has had an impact on the agreement rate. So we had a look at our own figures, and we found actually that it has not, which we actually were very surprised about.

I think what has happened — Meg was talking before this session started — is that something we did not look at was that one of the things we had to do at the intake, which we are legally required to do at the intake, is to make an assessment as to whether family dispute resolution is appropriate in each case. We think — and we have not looked at this to see the figures — that probably we are saying more cases are inappropriate than we used to say, because the numbers that these percentages are from are about the same. But we know that our numbers have gone very significantly higher, so the number that is actually getting into a joint session and going through to reach agreement or at least conclude that process, for that to be the same, it must be that we are filtering out more people than we used to because the number coming through our door has gone up. So it is difficult to know, but you asked about the rate — that is kind of about the rate that we have, and it is not very different from that either.

Mr BROOKS — Can I just follow on with a question. The ones that you filter out, as you say, go straight into the court system, is that how it works?

Mr GOODHARDT — Yes. Since July of last year one of the pieces of paper you need to be able to file an application at the Family Court is the certificate from a family dispute resolution practitioner which says one of four things. It says mediation took place and both people genuinely tried to resolve matters, or one person or both people did not genuinely try, or it did not take place either because one person refused or failed to participate, or, finally, it was judged to be unsuitable by the practitioner involved. That is where that comes in. Once we give a judgement that it is not suitable they can just take that paper and file an application directly with the court.

The CHAIR — I just wanted to know also about costs to the parties.

Ms HENHAM — Thirty dollars is the flat fee for the initial intake session. It is a sliding scale; it is $1.20 per $1000 of gross annual income per year. However, having said that we would waive fees and where necessary negotiate, so it is accessible.

Mr GOODHARDT — We never refuse services on financial grounds alone; we always negotiate.

Mr BROOKS — I have a couple of questions. One concerns those success rates or the agreement rates. Have you got any work on or have you done any research into whether they are sticking?

Ms HENHAM — Their sustainability?

Mr BROOKS — Yes.

Ms HENHAM — Unfortunately not; we just have not have the resources. But that is certainly something that we would like to do: look at families 3 months down the track, 6 months, 12 months, and even longer.

Mr BROOKS — One of the issues we have discussed with a number of witnesses to this hearing has been in mediation, getting the power balance right. I would imagine in these circumstances there would be a lot of situations where there is an imbalance in the relationship between the two parties. How do you address that? You talked before about having legal advice to both parties. Do you ensure that both parties have legal advice, and how do you try to keep some balance in that mediation process?

Ms HENHAM — It is a fine balance because often there are power differentials — in most relationships anyway. As I said before, it is really about empowering someone to talk on their own behalf; resourcing them and making sure they have got not only legal advice but other resources they might need, be they financial or housing et cetera. There is the coaching aspect — what might you do if this comes up in the mediation; so we can talk about strategies to empower that person because litigation is not always empowering for clients either. But at the end of the day, even if the client says to me, 'I want to proceed', if I feel that client is going to be put at risk or disadvantaged then obviously we would not proceed.

Mr GOODHARDT — The training that I have had with domestic violence services leads me to slightly modify the position. Not all practitioners — we are all kind of on the same page but not quite on the same place on the same page. I operate from the premise that if you treat someone who has been a victim of violence as if they are not capable of making their own decisions — in other words, you ignore the decisions they make and override them — then in a certain way you are treating them in the same way as the person who has abused them has treated them. I am always trying to make an agreement with the person. If I am worried about somebody, I will be quite open and say, 'I really think you ought to think carefully about this process. I don't think it is going to work for you'. I cannot think of a case where my feeling has been 'You really must not do this' and the person has been really determined to do so. For some people who have been abused it can be a very empowering thing to be able to sit in a room with their abuser and just declare what has happened to them, and that might be the first time that they have been able to do that. With somebody whom you might think is probably not suitable, if it is done in the right way — and we put certain protections in place and we say 'We will call breaks or you can give me a signal that you need a break or call a private session or whatever it may be' — —

Ms HENHAM — Or shuttle.

Mr GOODHARDT — Or shuttle, whatever. I have been involved in cases where this has happened; women have found it a very liberating and a very empowering thing to be able to name, to the person who has treated them that way, exactly what has happened.

Mr CLARK — Can I move to the topic of the role of legal advisers in the family dispute resolution process. I understand they are not involved in the process that you run, and I would be interested in your views for and against. I know there is a view that often lawyers are part of the problem and not part of the solution in family disputes. On the other hand there is a view that people might not be able to make properly informed or advised decisions if their lawyers are excluded. Also I know there are some lawyers who work under what I gather is called collaborative law which is a far more inclusive and problem-solving role for lawyers than the traditional adversarial role. Bearing in mind all of those considerations, what is your assessment of the role that legal advisers can and should play in family dispute resolution?

Ms HENHAM — I find that if the lawyers are not in the room it enables the parties to do their own work, have their own negotiations. It does not mean they cannot go out of the room, get on the phone and check with their lawyer at any time. My fear is that the lawyers may tend to take over the negotiation on behalf of the client. I guess it is a form of mediation. I am aware of collaborative law and I think that certainly has its strengths. Certainly in the work we do it is preferable that the lawyers are not in the room so that the parties can do, as I said, their own negotiations and own the outcomes. It is their agreement; it is not their lawyers' agreement.

Mr GOODHARDT — The agreements that we reach in mediation are not legally binding at the point where the parties leave the room, so we always encourage people to go away and to check this over. If they want to make it legally binding you tell them how to do that. In the models of mediation with which I am familiar in practising, if there is a lawyer in the room what mediators will normally do is treat that person as another party. It is a mistake to assume that what is in the lawyer's mind and what is in the original party's mind are always the same thing. When you treat the lawyer as another party you often find that the two parents are kind of saying the same thing and the lawyer might be the one who you need to kind of bring on board. It is an interesting dynamic that is set up, and lawyers do not always say exactly what their clients want them to say. That is the way that we deal with

it. I do not have a huge amount of experience in dealing with the situation, but that is normally the recommendation.

Mr FOLEY — In regard to the broad, diverse cultural community you deal with, how do you find the process, particularly in regard to newer communities, more vulnerable communities, refugee communities and that sort of thing, particularly the impact on the kids as you focus there? I suppose equally with your work in schools, your work with children, as you have outlined, the impact of the principles of restorative justice issues on them as sometimes possibly victims, and sometimes I am sure going through that process creates issues for them as well and they might have other problems elsewhere. Have you dealt with those principles at all in how your operation works, both with the family and in the schools and those kinds of issues? Have you got any insights into those issues?

Ms HENHAM — In terms of accessibility to newer groups in the community I think mediation as a model is irrelevant to many new communities — communities such as the Somali community who do not have the notion of nuclear family likely we do. I think that is something that all of these types of services need to work on. That is about not necessarily employing staff who are part of those communities, but maybe training community members so they can go back into those communities and do the work. Although, as I said, we see many cultural backgrounds, I think there are a lot of groups that do not access our services because we are not relevant enough for them. With indigenous communities, for example, we have a small percentage of indigenous clients, but it is certainly small. Even with the newer refugee communities I would say that I have not seen any in the past year. I think that is a real pity, and we need to address that.

Mr FOLEY — In regard to youth and the restorative programs, both with them as potential victims and any other problems they might have in schools, do you get into any of that sort of work?

Ms HENHAM — I am not familiar enough to answer to that question. I do not know about restorative justice. It is not my — —

Mr GOODHARDT — The work we have done in schools — and I was not directly involved in doing this work; you would have to speak to the staff who were doing it — was mainly around a peer mediation model rather than a restorative justice model. Members of a class were trained in the principles of how to be a mediator, and if a dispute broke out between class members, whatever it might be, whether it was a bullying question or somebody giving harm to somebody or whatever it may have been, one or other of the class members would step in as the mediator and hear what this person said or that person said on the issues in a traditional settlement–oriented mediation model. That worked quite well and the kids responded well to that way of dealing with things. It often worked better for them than getting an adult to come and sort it out, and it solved the problems of snitching and all those things that kids do not like to do. So that was the way in which our model worked in schools as opposed to being what you referred to a restorative justice model.

Mr O'DONOHUE — Just on that, what reason was given for the state government cutting the funding for that program?

Ms HENHAM — I do not know because I did not have a lot to do with that program.

Mr GOODHARDT — I think they just had other priorities. It was called CRES — conflict resolution education in schools.

Ms HENHAM — The funding kept changing. It was the department of health, then it was the department of education, then the department of youth; so each year it seemed to go to a different department and it was a real pity when they de-funded the program.

The CHAIR — When was that? When did it wind up?

Ms HENHAM — Last year. If you can start these programs in primary school — most of them were directed at secondary school students, year 10 students — when the children are young, just learning these principles — —

Mr GOODHARDT — It changes the whole way that these children view conflict as they grow up. So if it were done on a really widespread scale, it could have quite a significant societal impact.

Mr O'DONOHUE — Colin asked you before about how many of the agreements which you facilitated stand the test of time, and I noted that you unfortunately have not done that analysis. You said your agreements are not legally binding. Have you had a chance to analyse how many of the agreements that you facilitate are turned into legally binding agreements? Would you have an anecdotal feel for that?

Mr GOODHARDT — Anecdotally I would say that most of them are. Most people will go away with an agreement that they have reached that we give them on paper. We use printing whiteboards and we write it up on the whiteboard and print it out for them and sometimes they ask us to type it up in a slightly more formal form, for a parenting plan. My sense is that most people will then take that to their lawyer and have it written up as a consent order, particularly if it is property.

Ms HENHAM — I was just going to say property. Definitely. With parenting matters I would say it is fifty-fifty as to who will go with the parenting plan and who will go with the consent.

The CHAIR — We are regrettably out of time. We had a whole lot more questions and we could have spent the rest of the afternoon working through them, but that is not to be. I hope you will be open to Kerryn and Kate contacting you to get some response to some of the other issues we were going to raise with you. That would be useful. On behalf of the committee I would like to thank you both very much for coming in.

Ms HENHAM — Thank you for giving us the time.

Witnesses withdrew.