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 — 25 February 2008

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Mr W. Ibbs, Acting Manager, Roundtable Dispute Management Service, and
Mr A. Lawrie, Policy Officer, Law Reform, Victoria Legal Aid.

The CHAIR — Welcome. The discussion this afternoon, as you would know, operates under the Parliamentary Committees Act and you are afforded parliamentary privilege, so no action could be taken against you for whatever you say here, but if you say some of the same things outside it would be a different story. Hansard will be recording what we say this afternoon. You will be sent a draft transcript of that after the meeting and you can make any minor or technical changes to it but basically the substance of it stays that way it is as a record of the discussion.

Thank you for sending in the material for us that you did. We have had a look at it and we have some issues that we have written down that we want to take up with you in discussion. What we have found to be successful is we turn it over to you. You run us through how are you are responding to the references, the discussion paper or whatever and then we will jump in and have a bit of discussion. We have until after 2.30 p.m., so we have a bit over 30 minutes. Is that all right?

Mr IBBS — Thank you. I thought I would perhaps take you through a little bit about how roundtable dispute management works because it might provide some context for some of the issues that you are deliberating about. RDM is an in-house service that is delivered by Victoria Legal Aid. It is a Commonwealth Government scheme and people who are eligible for a grant of assistance are funded, and if it is in the family law jurisdiction the matter is assessed as whether it is a suitable matter for dispute resolution.

RDM has been operating since about 2004. It is open to the general public to take on referrals. It is all about family law issues, about property and children's matters mainly — probably about 90 or 95 per cent of matters are children's matters. For eligible people it serves as a forum to try to resolve all of their issues rather than going to court. It certainly falls within alternative dispute resolution.

It is a conciliation forum in the sense that the chairpersons, who are on an independent panel, try to assist the parties to reach a resolution that is in the best interests of the children, taking into account the overall context of the Family Law Act and relevant other acts as well. The chair tries, if you like, to operate in a facilitative framework, an empowering framework, for parties, but also tries to guide parties in terms of what may be in the best interests of the children in certain aspects, and also to look at whether the arrangements that come out of an agreement are ones that are going to be able to be translated into perhaps an agreement before a family law consent order of some description or of that nature.

As I say, we have been operating for the last four years, since 2004, and in that time the Family Law Act has changed. The number of referrals coming to RDM has been increasing because of the mandatory nature of dispute resolution, which I understand is one of the issues that you are trying to explore as well as whether it should be or should not be. I think one of the successes of RDM is the fact that it does involve lawyers in the dispute resolution process.

One of the parties is always legally aided, which means they have a grant of assistance for legal aid. We have taken the view at Legal Aid that we will not force the other party to be legally aided, but we strongly encourage them to have legal assistance throughout the entire process as well. To that end in something like 75 per cent of matters both parties are represented in a legal aid conference and in about 25 per cent of them one party is legally represented and the other person chooses to not have legal representation in the conference.

As I say, it is predominately for children's issues and the outcomes from RDM are quite successful. We have been collecting statistics the last few years and the average is something like about 85 per cent either fully or partially settle. Partial settlements are things such as where people have second or third conferences to maybe test out an agreement for the children to see if it is working for the kids. Also, to see whether parties comply with certain agreements that they have come to in order that they can finally finalise matters. Some matters obviously do not resolve after a first conference as well, and those matters go on to further litigation or possibly partially resolve and partially litigate.

The CHAIR — One of the really valuable things about having people such as yourself come in is that you can talk about what is actually happening on the ground and the interactions amongst people and how they experience what is happening. Obviously the data and things like that we can pull down from other sources. Do you work as a conciliator yourself?

Mr IBBS — Yes, I do. A chairperson we call ourselves.

The CHAIR — A chairperson, sorry.

Mr IBBS — It is okay.

The CHAIR — Thank you, I stand corrected. Could you step us through the process of how you work, what you do and what the experience of it is?

Mr IBBS — Yes, from the clients' and from our point of view as well it is sort of a five-stage model and the actual conference itself is one step in a process. I think that is important to say. One of the parties gets a grant of assistance and then what happens is the matter is referred — —

The CHAIR — Why does that party get it?

Mr IBBS — Because the Commonwealth will fund certain matters. Firstly, there is a means test around a person's income and then it also has to have merit, so it means it has to be a matter that is substantial and falls within the guidelines of the Commonwealth.

The CHAIR — Okay.

Mr IBBS — There is a certain amount of funding that they get.

Mr DONNELLAN — how would you decide whether both of them meet the means test. How is that sorted out because then you would have to have the wisdom of Solomon I guess and decide who — how do work in those situations?

Mr IBBS — There is a common myth around if one is funded the other cannot be, but in fact both parties can. We have a very extensive range of private legal firms who are empanelled legal aid people that operate. So if an in-house lawyer — someone from Ringwood or somewhere like that — is representing a client, then another lawyer from that area who is on our panel, who is an independent lawyer, can also represent the other party.

Mr DONNELLAN — Thank you.

Mr IBBS — Often you have both parties legally funded, as I said, to come into the conference. Just stepping you though it: one of the important aspects about our program I think is that both parties can be legally represented, either for legal advice — but certainly in the conference itself — and also to assist them with writing up the agreements. They get the benefit I suppose of that advocacy right through the process but also of support. Often the most important person at the conference is not the convener of the mediation or of the conference, because they only meet them on one or two occasions for a number of hours, but it is their legal practitioner with whom they have a relationship for months or, in some cases, years. To have that person there and to be involved throughout the process is a real advantage to actually settling it and settling it permanently rather than having the advice right there and then on the day.

People get referred into RDM and they are allocated a case manager. What the case manager does is assess the matter for appropriateness, so they would look to see if there were family violence or urgency issues, and whether the balance of power is such that the parties can represent themselves in the mediation. If there is a lawyer with them, of course, some of those balance of power issues are not quite as substantial as if they were representing themselves. If the lawyer is there clearly some people who perhaps otherwise could not have participated do participate in the conference.

They screen out certain matters and we have a screening out checklist that we use which we have developed with the leading women's Domestic Violence and Incest Resource Centre — one of the peak groups for domestic violence in Victoria. We have developed screening mechanisms to look at when matters may not be appropriate, when intervention orders might preclude involvement or whether the matter in fact needs further investigation and perhaps what we call a family report, which means it needs actually more forensic investigation to establish some facts. When there are child abuse allegations it may be referred out to child protection so that we know the outcome of that investigation before we will proceed to a conference or not — those sorts of things.

Mr DONNELLAN — How do you deal with, say, mental illness because that is obviously a difficult one for either side to suggest or prove and so forth and sometimes it may or may not inflame the situation and you are trying obviously to get a conciliated outcome? How do you deal with situations like that? I can think of examples

of people I know, both female and male, on both sides where one of them is quite literally, and I am reasonably certain, mentally ill.

Mr IBBS — But there has been no diagnosis in those persons?

Mr DONNELLAN — Of course. If there has been a pattern of behaviour, they would have been caught, but they are actually good at — how do you deal with something like that?

Mr IBBS — That is the beauty of having a case management system and also lawyers; they make their own assessment of their client in terms of their capacity. But also the case manager will ask questions around mental illness of both parties. Usually what happens is that if one party is not forthcoming about the situation, the other party will be. These people have years of experience, so the issue will come up.

We will not be able to make a formal diagnosis of what the issue is, of course, but what happens is that we ask for reports, if there are any, to establish what the capacities of the parties are and its impact on their capacity as parents; so sometimes there are reports or case managers who are allocated to the case. If we get those reports, the chairperson who runs the conference has that available to them as the parties do and we can take it into account. Sometimes what we investigate is if they are on medication, what the effects of that medication is, any doctors reports and things like that.

If there are case managers or social workers involved in the case, we ask them to come along as professional support persons in the case as well. They can sit in a private room with the party and give them support, give advice to the chairperson and perhaps to the lawyer as well as to how the client is managing.

At the end of the day too, with mental illness cases, I think the situation is that chairpersons who are looking at getting an outcome are not neutral to the best interests of children, and if there are major issues there they will want to explore that pretty widely. Sometimes what comes out of a conference is not a final recommendation or a final agreement; it might be an interim agreement where people actually have to seek out an assessment from a qualified psychiatrist or other mental health professional, or you put in place supervised contact with a report from a contact centre, and other measures to make sure an agreement is not just putting children at risk in any way but also give an opportunity to perhaps gather further information and test out something to see if it works for the parties involved.

So that is one of the good things about ADR — you can get information. But if you do not have it there available, then maybe at a second conference when you do have that information and you can test out an arrangement that is safe, and then have further information and maybe make a final agreement, in as much as children's agreements can ever be final, down the track, say, in three months time or six months time. Does that not make sense?

Mr DONNELLAN — No, that is good.

Mr IBBS — The case manager makes an initial assessment as to whether the matter is suitable and will issue a family dispute resolution certificate to say the matter is not suitable if in fact the department needs a judicial determination or the lawyers to negotiate at arms-length. But if the matter is suitable they will contact the other party, engage the other party and receive any information from the lawyers involved to make sure that all the information is available and prepare and coach both parties to actually be involved in the conference, tell them exactly what is going to happen, what the chairperson's role is, making sure they have contacted their lawyer and they are getting all the legal advice they need to prepare them to be more child-focused for the dispute. If you are looking at other sorts of dispute resolution, I think it is preparing the parties for a conference and screening out that triaging, if you like, at the front end, and preparing people properly and giving them good legal advice, which ends up that you get a more lasting result at the actual conference.

The CHAIR — What are the range of issues that people bring to the table?

Mr IBBS — The conference itself is about 3½ hours and we do them all over Victoria. The lawyers come along, the parties and any support people.

The range of issues we deal with are — up until last week I think it was that we were dealing with property matters, but we are not at the moment due to some funding shortages with property — child maintenance issues for over 18 children and also pre-1990 child support matters; so for anyone who separated before 1990 the Child Support

Agency was not open then — you know what I am talking about there — so those people have to get a Family Court order rather than going through the Child Support Agency and we deal with those matters.

Most of the matters we deal with, 90 per cent of the matters we deal with, are parenting issues and the parenting issues are to do with where the children live, parental responsibility and all of the time the children spend with their parents or relatives. We deal with mostly parents and the other parent, but oftentimes with grandparents and extended family as well or other carers; relocation disputes where people are either travelling a long way away to disrupt the current court orders, or interstate; people wanting to travel overseas and those sorts of things; and contact enforcement orders or the enforcement of an arrangement as well come to us.

The CHAIR — Okay, so it is the breadth.

Mr IBBS — That is the breadth of things as well.

The CHAIR — You go through the process and then you sit for 3½ hours — that is, if it is a single session.

Mr IBBS — Yes, if it is.

The CHAIR — Then how is the matter wrapped up?

Mr IBBS — How it is wrapped up at the end of that is that the parties — and could I say to you that many of the conferences that we have, probably 50 per cent or more are shuttle negotiations, either by telephone or on the same premises by the chairperson moving between rooms. It is very important to tailor your arrangement to deal with the particular issues of the parties. It is wrapped up by the lawyers drafting minutes of consent on the day. If there is only one lawyer, then that lawyer will draft the minutes on behalf of every body. If the party is not represented, we strongly advise them not to sign anything on the day, and in those cases that I am aware of the majority do not. We ask them to get some independent advice before they actually sign the document on the day.

The CHAIR — What about after-conference compliance?

Mr IBBS — We do not have, at the moment, a long-term follow-up in terms of where they re-litigate those sorts of things. It is interesting, as I know from the Family Court experience because I worked there for nearly 13 years, oftentimes coming out of the conference that does not settle, it often settles afterwards because they needed to go away and think through the consequences, and they finally settle. Then some of those that you have settled fall over.

Mr DONNELLAN — Unsettled.

Mr IBBS — Unsettled, as it were, and some of them end up going to court, but because you have narrowed the issues and because they have had an opportunity to talk about the issue, it settles earlier in the process than it may well otherwise have.

We do not have the numbers. I know the Attorney-General is actually looking at follow-up studies right now across the sector in ADR to look at what the long-term stickability of agreements is. It is a difficult matter because, in terms of your inquiry, it depends on the client group. With some matters, if you like, once you have made a decision that is pretty much it; you know that it is going to stick.

The same for property matters: once you have made the order, if there has been no appeal, the house is transferred, the cars are transferred, the names are transferred, or whatever it is, it is settled. But with children's matters it is quite different because it is never settled in the sense that as children grow older, arrangements should change appropriately. Particularly with legal aid matters I think our clients are often in crisis and they have other life issues so an arrangement that might be working for 6 to 12 months may not necessarily work because of alcohol issues or other mental health issues. People move houses because of their financial situation and disadvantage.

Mr FOLEY — Your submission focuses on the need for education campaigns to promote alternate dispute resolution across a number of groups. We have a specific reference on marginalised communities and you talked about that. You talked about the legal profession as well — that it needs to be more ingrained. And then, more broadly, the Victorian community needs to be empowered and educated as to ways and means of doing that.

In terms of the experience that Victoria Legal Aid brings to each of those, are there any particular perspectives or suggestions you would have on any of those three groups?

Mr IBBS — Yes, it is interesting. There is the mandatory question versus the education question on each, and probably both are true depending on the jurisdiction you are looking at, I would say. I think it is critical — and we have done it — to educate the profession for a safer RDM, for instance. We went throughout Victoria and had a travelling show. We went out and spoke to the profession about how RDM worked, what its costs and benefits were, what their role would be in it, how it worked under the Legal Aid Act, referrals and a discussion forum as well. They turned up in great numbers for that, and that led to an increase of knowledge and also referrals to the service.

The other thing is accessibility. You have to get out there and be able to deliver from where the people are to get access to a service. The other thing we have done is access people to the in-house family lawyers. What we have done is given a series of half-day lectures on family dispute resolution — the mediation techniques. That was followed up by a three-day workshop, which we are just doing now, to all of the in-house people because, as I said, these skills are relevant to us as professionals. We have got our advocacy skills and we will add our dispute-resolution skills to that and tie them in. I think those sorts of initiatives increase the skill of practitioners in the actual conference process but make it more accessible to the client, because they are the key gatekeepers for us. We do not get any referrals outside of the lawyers; that is how they come. It is about repeat play as well. The more you get to come into the process lawyers who are skilled, who feel confident in the chairpersons, who believe the mediation is a fair process and the outcomes are in line with what may happen if they went to court, and they get good feedback from their clients — —

The more you get those repeat players, the more success you have, so it takes time to build.

Mr FOLEY — What about at the other end of the food chain that feeds into you of the more marginalised, at-risk communities who come through legal aid? How do you get the messages of your service out to them through an educational mechanism?

Mr IBBS — Legal aid is working on that whole issue of access to more marginalised groups as we speak. Obviously we have people who are biased to legal aid on these sorts of matters, but we could certainly do more in that area. A lot of our clients are first and second generation, so people do access our service from non-English-speaking backgrounds, and a number of our people need to have interpreters. Both parties will have separate interpreters during our conferences. That is quite common. It would be fair to say that we probably could do more to access those communities and bring them into the tent, as it were, as well. Do you have any comment on that, Alistair?

Mr LAWRIE — Only to say that I think the telephone information service and the interpreter services that go with that are probably the key way that Legal Aid manages to provide that service. But, again, that relies on the community being aware that those services are there. It is a pretty difficult one to overcome.

The CHAIR — You were talking in your submission, in the context of some parties being reluctant to use ADR, about some kind of a consumer-affairs-type promotion — a campaign — as a way of addressing this.

Mr IBBS — Yes.

The CHAIR — Do you want to talk about it?

Mr IBBS — I think it is useful. If that happened you would have to target different ethnic communities through radio and particular ways to get into those communities and their peak bodies. You have a generalist campaign, but I think it is that on-the-ground community work that is likely to get in there and actually get the trust of the service and get the connection to the right people. The federal government now is spending many millions of dollars promoting alternative dispute resolution in a national campaign for their family relationship centres. I think that is critical as well. I do not think you must do 'and' and 'both'. You must do that broad spectrum of education across the community, but also that community work to get into the more marginalised area. That is something the government is spending significant resources in to back up their law reforms.

Mr FOLEY — But that is essentially a compulsory pre-litigation model. Is that the way to go, or has that got some up hills and down dales on it?

Mr IBBS — I am not against it and I am not for it. In family law it works pretty well, and I think the reason for that is that family law is predominantly about — and where the compulsory nature comes in — children; it is not compulsory for property. What the government has tried to do is say, 'Litigation generally as the most common means of trying to resolve disputes in families is not appropriate'. Going to court and an adversarial nature perhaps widens the dispute for the vast majority of Australian families. The idea is to try to settle it early and try to increase the cooperation and mutual responsibility for kids. It is only when those parents are unable with assistance to do that that you have to look to the courts to protect kids or to put in place arrangements.

The CHAIR — Are we doing enough to empower communities, individuals and families to settle and to resolve their own disputes?

Mr IBBS — Once again, I am not familiar enough across the Victorian jurisdiction. I would say they certainly are in the federal; that is happening. I can only answer your question by pointing to what happened in 1995, I think it was. There were changes and reforms to the Family Law Act, which changed the terminology. 'Custody' was referred to as 'residence', and 'access' was referred to as 'contact'. The idea was to promote the use of ADR as dispute resolution, but it did not back up those reforms back then with resources to actually do it and for the qualifications of the mediators to be best practice. It did not advertise and promote in the media this whole change of culture, and the legislation did not make it mandatory. For all of those reasons it actually failed. A lot of words changed and the intent was there, but it actually did not shift the culture. So, are we doing enough? Yes, I would say, but it takes a lot of resources to change the culture. Would that be fair to say?

Mr LAWRIE — Yes.

The CHAIR — I am sorry to say, but I reckon we are just on time. It has passed us very quickly, it seems. Thank you both very much for coming. As I said earlier, a copy of the transcript will be sent to you, and I dare say that Kerryn and Kate will be in touch with you if there are matters that we need to follow up. We had a whole raft of questions, and we have not got through very many of them. Your answers have been very comprehensive. Thanks very much.

Witnesses withdrew.