

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT**

**THE FAMILY DISPUTE RESOLUTION PROCESS**

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**March 2003**

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## Report

# The family dispute resolution process

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# Preface

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1. Recommendations made by the Law Reform Commission of Hong Kong have brought about key changes to our laws affecting the family. The Commission's 1991 report on illegitimacy,<sup>1</sup> which proposed reforms to regularise the status of children, was implemented in 1993 in the Parent and Child Ordinance (Cap 429).<sup>2</sup> Two years later, the Commission's proposals for a new divorce regime<sup>3</sup> resulted in major changes to the Matrimonial Causes Ordinance (Cap 179).<sup>4</sup> One area which has remained largely untouched however, despite major developments overseas, is Hong Kong's law on the guardianship and custody of children, which dates back to the late 1970s.

2. In recent years, Hong Kong, like many other jurisdictions, has seen a dramatic rise in its rate of divorce.<sup>5</sup> The serious impact that the legal process itself is recognised to have on families undergoing divorce, particularly where arrangements for children must be made, has led jurisdictions like the United Kingdom and Australia to comprehensively recast their laws in this area.<sup>6</sup> Other jurisdictions are also now considering what reforms may be necessary.<sup>7</sup>

3. The topic of guardianship and custody of children was referred to the Law Reform Commission by the Attorney General and the Chief Justice in April 1995 in the following broad terms:

*“to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate.”*

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1 HKLRC, *Illegitimacy*, Topic 28, December 1991.

2 Ordinance No 17 of 1993.

3 HKLRC, *Grounds for Divorce and Time Restrictions on Petitions for Divorce Within Three Years of Marriage*, Topic 29, November 1992.

4 *le*, the Matrimonial Causes (Amendment) Ordinance (Ord No 29 of 1995).

5 In 1972, 354 divorce decrees absolute were granted in Hong Kong. By 1980, the figure had risen to 2,087. In 1990, 5,551 decrees absolute were granted, and in 2000, the figure had soared to 13,058. (Figures supplied by the Judiciary of the HKSAR.)

6 In England, the Children Act 1989; in Scotland, the Children (Scotland) Act 1995; and in Australia, the Family Law Reform Act 1995. (Though see also a recent follow-up study on the Australian reforms by University of Sydney and Family Court of Australia, *The Family Law Reform Act 1995: The First Three Years* (Jan 2001).)

7 *le*, (New Zealand) NZ Ministry of Justice consultation paper, *Responsibilities for Children – Especially When Parents Part: The Laws About Guardianship, Custody and Access*, (Aug 2000); (Canada) Canadian Parliamentary Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (Dec 1998), *The Government of Canada's Response to the Report* (May 1999), Dept of Justice Canada, *Federal Provincial Territorial Consultations on Custody, Access and Child Support in Canada* (Mar 2001).

4. In May 1996, the Commission appointed a sub-committee chaired by the Hon Ms Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. The members of the sub-committee are:

<b>Hon Ms Miriam Lau, JP</b> <b>Chairperson</b>	Sole Practitioner Miriam Lau & Co
<b>H H Judge de Souza</b> <b>Deputy Chairman</b>	Judge District Court
<b>Miss Rosa Choi</b>	Assistant Principal Legal Aid Counsel Legal Aid Department
<b>Ms Bebe Chu</b>	Partner Stevenson, Wong & Co, Solicitors
<b>Ms Robyn Hooworth</b> (up to 28 August 2001)	Mediator
<b>Mr Anthony Hung</b>	Partner Lau, Kwong & Hung, Solicitors
<b>Ms Jacqueline Leong, SC</b>	Barrister
<b>Dr Athena Liu</b>	Associate Professor Faculty of Law University of Hong Kong
<b>Mr Thomas Mulvey, JP</b>	Director Hong Kong Family Welfare Society
<b>Mrs Cecilia Tong</b>	Regional Officer (Retired) Social Welfare Department
<b>Ms June Wee</b>	Barrister
<b>Miss Wong Lai-cheung</b>	Counsellor

5. The first secretary to the sub-committee was Ms Paula Scully, who was appointed Chairperson of the Guardianship Board of Hong Kong in February 1999. Ms Scully was succeeded as sub-committee secretary by Ms Michelle Ainsworth, who was appointed Deputy Secretary of the Commission in April 2000.

6. In the course of its detailed consideration of the law and practice in this area, the sub-committee identified a number of key topics for review. These included the approach of the law and the courts to custody and access arrangements for children, guardianship arrangements for children on the death of one or both parents, international parental child abduction and the use of alternative dispute resolution processes in family cases.

7. The sub-committee published an extensive consultation paper on *Guardianship and Custody* in December 1998 addressing these topics and setting out a wide range of proposals for reform. Fifty-one submissions were received during the three-month consultation exercise. Those who responded included members of the legal profession, social workers, welfare organisations, youth groups, women's groups, counsellors, mediators, educational institutions, government departments and private individuals. The list of respondents is at Annex 2. We are grateful to all those who commented on the consultation paper.

8. In January 2002, the Commission published its report on *Guardianship of Children*, the first in a series of four reports under this reference. A second report, on *International Parental Child Abduction*, was published in April 2002. This report, the third in the series, covers the alternative dispute resolution aspect of the reference.<sup>8</sup>

### ***Format of this report***

9. Chapter 1 of this report examines the various types of dispute resolution process used in family cases. The chapter focuses particularly on the mediation process, and explains the principal features of mediation and how it differs from other dispute resolution processes. Chapter 2 of the report reviews the current situation in Hong Kong with regard to the resolution of family disputes and outlines the relevant court process as well as the support services which are now in place. Chapters 3 and 4 look at relevant family dispute resolution models which have been adopted in other jurisdictions.

10. Our conclusions and recommendations for reform are set out in Chapters 5 to 8 of this report.

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8 In due course the Commission will be publishing a fourth and final report under this reference, on custody and access.

# Chapter 1

## Introduction to the family dispute resolution process

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*“Divorce is a significant life event which not only affects the male and female parties involved but also impacts on the development and well-being of children. Family disputes arising from divorce, if not satisfactorily settled, add agony to every party. In the past, family disputes were usually settled through litigation. Over the last two decades, however, mediation has emerged as an alternative approach to dispute resolution.”<sup>1</sup>*

1.1 This report considers the way in which child custody and access disputes are dealt with under the dispute resolution processes available in Hong Kong. We also examine the court process itself and the various support services that have been established to assist in family proceedings.

1.2 In this chapter, we introduce the different approaches to family dispute resolution, comparing, in particular, the key features of adversarial litigation on the one hand and mediation on the other.<sup>2</sup>

### The adversarial process

#### ***Negotiation and settlement***

1.3 Research in the area of civil litigation indicates that the principal institution of the law is not trial, but settlement out of court,<sup>3</sup> as the prospect of avoiding trial *“provides the leverage or threat that pushes opposing parties into settlement discussions and agreements.”<sup>4</sup>*

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1 Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr 2002), at para 1.

2 In preparing this chapter, we have been greatly assisted by the content of an unpublished dissertation by Ms Paula Scully, former Secretary of the Sub-committee of Guardianship and Custody, entitled "Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems" (April 1996).

3 Williams, *Legal Negotiation and Settlement* (1983), at 1.

4 Williams, above, at 1-2.

One writer has noted that:

*“Because we know that roughly 95 percent of all civil litigation settles, the smart client and competent attorney must focus on how early in the litigation process a fair settlement can be reached in these cases.”*<sup>5</sup>

1.4 Often the lawyer’s method of effecting settlement under the adversarial system is to adopt a highly competitive approach to the negotiation with the other party which is based strongly on a ‘we win, you lose’ strategy. This approach, which has been described as “*turbo-charged negotiation*,”<sup>6</sup> often sees the lawyers for the parties negotiating with each other at arm’s length while the parties themselves are kept out of any face-to-face negotiation with each other. The lawyer tends to become “*the primary interpreter to the client of what is fair, based upon what might happen in court.*”<sup>7</sup>

### ***The adversarial system and family disputes***

1.5 The Irish Law Reform Commission, in its review of the family court structure in Ireland, examined the arguments for and against an adversarial approach and noted that:

*“ ... The adversarial approach is said to be the most effective way to test the credibility of a witness’s evidence by virtue of the process of cross-examination and examination-in-chief. Second, the adversarial system mitigates the risk of excessive judicial interference in the conduct of a family law case.”*<sup>8</sup>

The Commission went on to observe, however, that:

*“The main arguments against the adversarial system in family law are that it may have a further polarising effect on the parties, and will not always provide the court with the full range of facts which it needs to make informed decisions in areas such as financial provision and child custody.”*<sup>9</sup>

1.6 It is our view that in most child custody and access disputes, the best interests of the child cannot be met by lawyers actively promoting combative attitudes between the child’s parents and overseeing the filing of acrimonious affirmations in court. As one writer in this area has stated:

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5 Wulff, “A Mediation Primer,” in Donovan, Leisure, Newton & Irvine, *ADR Practice Book* (1990).

6 Donovan, Leisure *et al*, above, at para 7.2.

7 Erickson, “The Legal Dimension of Divorce Mediation,” in Folberg & Milne (ed), *Divorce Mediation; Theory and Practice*, (1988).

8 Irish Law Commission, *Family Courts* (Consultation Paper, Mar 1994), at para 4.13.

9 Same as above.

*“[B]y any standard of common sense, as well as the accumulated research data showing that children need ... a cessation of inter parental conflict, the adversarial process must rank very low as a method of making satisfactory and lasting post divorce parenting arrangements ... .”<sup>10</sup>*

Another has commented that the adversarial system is thought by many, “to curdle the opportunity to help families in distress ... to adjust and to move on in co-operation in relation to their continuing shared responsibilities.”<sup>11</sup> We understand in this regard that the Hong Kong Family Court is already quasi-inquisitorial in its approach in relation to matters concerning children.

## **Mediation as a family dispute resolution process**

1.7 The negative impact of the adversarial process on family relationships can be minimised by encouraging the use of alternative dispute resolution methods at an early stage, so that only the most entrenched cases go to trial.<sup>12</sup> In many countries, the preferred method of alternative dispute resolution in family cases is mediation.

### ***Features of mediation***

1.8 Mediation is guided by an assumption that parties can reach agreement, and that their solution will be unique and does not need to be governed by fixed principles of law. Mediation utilises negotiation techniques, with the mediator facilitating and guiding the parties’ own negotiation process. The atmosphere in mediation is non-adversarial. The mediator controls the process in a way that allows the parties to show mutual respect for each other, but the mediator himself has no decision-making power. Ground rules have been agreed in advance which minimise confrontation.<sup>13</sup>

1.9 In contrast to the negotiation style under the adversarial system, the focus in family mediation is to define the issues affecting the parties in mutually co-operative terms, based on what *the couple* thinks is fair, and taking into account *their interests* rather than their rights.

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10 Saposnek, *Mediating Child Custody Disputes* (1983), at 13-17.

11 Fricker, “Family law is different,” in *Family Law* (Jun 1995) 306, at 308.

12 Also, time factors are critical for a child, so early settlement, or, if that is not possible, an early hearing, should be encouraged.

13 This is not to say that mediation does not allow the ventilation of emotion; however, mediation can allow this to happen in a safe and non-threatening way.

## **Mediation contrasted with counselling and therapy**

1.10 It is useful to distinguish the respective roles of mediators, counsellors and therapists. The public, and indeed lawyers, often confuse their different roles and services. One common error is to assume that counselling is only relevant when a party wishes to reconcile; another is to think that a mediator acts as a counsellor.

1.11 The features of these services do overlap in various ways. Basic principles of mediation, such as empowerment, consideration of the best interests of all family members, co-operative problem-solving and equitable distribution of assets, are compatible with the theory and practice of marital and family therapy.<sup>14</sup> Client responsibility, prevention of emotional damage and fair-play are some of the values of therapists. The emphasis on communication skills is common to both counselling and mediation.

1.12 There are significant ways, however, in which family mediation is distinct from counselling or therapy. Robinson has noted:

*“In counselling and psychotherapy the orientation is often towards understanding the past as a way of managing the present. In family therapy the focus is usually on the present as a way of managing the future differently. In mediation the orientation is distinctly future- oriented.”*<sup>15</sup>

He added that the mediator works to:

*“help the couple both retain and redistribute more equitably the power between them, usually as regards the children and the money, while in psychotherapy and family therapy the practitioner assists the individual to take more power and the family to find ways of using it more effectively and mutually.”*<sup>16</sup>

1.13 Mediation has different goals to therapy. The goal of therapy, including divorce counselling, is *“to help the individuals resolve emotional problems so as to become more comfortable and functional in their lives.”*<sup>17</sup> The focus of mediation is on decision-making that achieves the optimum result for both parties.

1.14 Family mediation also differs in its process. Where the mediator assesses the process to formulate strategies to facilitate decision-making, *“the therapist makes a more extensive assessment to promote insight and change in behaviour.”*<sup>18</sup> Mediation provides the opportunity to the parties to

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14 Kaslow, “The psychological dimension of divorce mediation,” in Folberg & Milne, *Divorce Mediation - Theory and Practice* (1988), at 87.

15 Robinson, *Family Transformation through Divorce and Remarriage* (1991), at 189.

16 Same as above.

17 Brown, “Divorce mediation in a mental health setting,” in Folberg and Milne (1988), above, at 131.

18 Same as above.

express, in a controlled environment, their underlying concerns and frustrations which may be blocking negotiations. This does not turn it into therapy. The couple are not there to go over the past and work out unresolved emotional issues. (Indeed, mediation may have to be postponed until these issues are resolved by working with a therapist or counsellor.) As Marriott and Brown have stated:<sup>19</sup>

*“family mediation is a process in its own right, and it is clear that there should be no hidden agenda to provide therapy or counselling for people whose contract is for family mediation; nor is it likely that properly trained family mediators will confuse these roles.”*

### **Functions of the mediator**

1.15 The various functions which a mediator is intended to fulfil are set out below.<sup>20</sup> These are divided into procedural, substantive, and communicative functions.

#### *Procedural functions:*

- (1) Using joint or separate meetings with the parties
- (2) influencing the climate and duration of meetings
- (3) chairing meetings and keeping order
- (4) maintaining sequential discussion and grouping of issues, and
- (5) adjourning meetings if a party needs time to cool off, or is not ready to continue with the process.

#### *Communicative functions:*

- (1) Maintaining open and clear communication
- (2) translating and transmitting information
- (3) exploring alternative solutions advanced by the parties
- (4) communicating the rigidities of positions
- (5) communicating a party's commitment to an agreement, and
- (6) communicating movement between the parties.

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<sup>19</sup> Marriott & Brown, *ADR Principles and Practice* (1993), at 190.

<sup>20</sup> Scully (1996), above, at 122-123.

*Substantive functions:*

- (1) Determining priorities of the parties
- (2) reality-testing
- (3) deflating extreme positions
- (4) developing the habit of reaching agreement
- (5) assessing the consequences of an impasse against the values of the remaining issues
- (6) finalising and ratifying the agreement, and
- (7) monitoring the agreement.

***Conceptual roles of the mediator***

1.16 A more conceptual framework has also been suggested to describe these various aspects of the role of mediator:<sup>21</sup>

- (1) *The opener of communication channels.* The parties may not be used to communicating openly or freely. The mediator will facilitate opening and keeping communication channels open.
- (2) *The legitimizer.* The mediator helps each of the parties to recognise the rights of the other to be involved in the process.
- (3) *The process facilitator.* The mediator provides the procedure, guides the exercising of the ground rules, and acts as referee.
- (4) *The trainer.* Mediation can be a subtle process of educating those parties who lack confidence in the art of negotiating.
- (5) *The resource expander.* The mediator provides assistance to the parties to expand their settlement options and linking them with outside experts such as accountants and lawyers.
- (6) *The problem explorer.* The mediator assists them to adopt creative strategies to problem solving that are mutually satisfactory.
- (7) *The agent of reality.* The mediator maintains the reasonableness and practicality of implementation of the proposals for settlement.

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21 As suggested by mediation trainers, CDR Associates, of Boulder, Colorado, US: see same as above, at 121.

- (8) *The leader.* The mediator takes the initiative to keep the negotiations flowing.

### ***Common misconceptions about the role of the mediator***

1.17 Lawyers commonly have a number of misconceptions concerning the role of the mediator in the dispute resolution process, such as:<sup>22</sup>

- (1) The mediator's job is to give each party an assessment of the strengths and weaknesses of their legal claims
- (2) the mediator plays a passive listening role and hopes to generate settlement by promoting understanding and empathy among the litigants
- (3) because the mediator is impartial, he will prod each party to make a comparable number of concessions, and
- (4) a mediator is only interested in a settlement and does not care whether its substantive terms are fair.

### ***The merits of mediation***<sup>23</sup>

1.18 The merits of mediation identified by researchers<sup>24</sup> include:

- (1) economical decisions<sup>25</sup>
- (2) rapid settlements
- (3) mutually satisfactory outcomes<sup>26</sup>

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22 Same as above, at 123.

23 In addition to the material presented here, see further research material appearing in HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper on Guardianship and Custody* (Dec 1998), at Chapter 7.

24 See, especially, Pearson & Thoennes, "Mediation of contested child custody disputes," *Colorado Lawyer*, (1982) vol 11(2), at 337-355.

25 The research on costs generally supports the claim that a mediated settlement is likely to be less costly than settlement achieved through adversarial means: see HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 7.26.

26 Pearson & Thoennes (1982), above. The writers report that, in one survey 77% of the parties expressed extreme satisfaction with mediation. No more than 40% in any of the mediation or adversarial samples reported being satisfied with the court process. See also HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 7.24.

- (4) high rate of compliance<sup>27</sup>
- (5) workable and implementable decisions<sup>28</sup>
- (6) comprehensive agreements
- (7) teaches creative problem-solving strategies and procedures
- (8) greater degree of control and predictability of outcome
- (9) personal empowerment<sup>29</sup>
- (10) as mediation is a win/win strategy, there is a greater chance of the parents achieving an amicable continuing relationship for the children<sup>30</sup>
- (11) interest-based mediation agreements can result in a settlement that is more satisfactory than a compromise decision in which the parties share losses and gains
- (12) mediated settlements tend to hold over time,<sup>31</sup> and
- (13) irrespective of the different programs or locations in the world, the studies show a high degree of client satisfaction.

Kelly has concluded that:

*“the real value of mediation lies in its ability to affect the quality and future direction of the spousal relationship, particularly with regard to the ability to co-operate after divorce and the more realistic perception of each other’s anger.”<sup>32</sup>*

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27 McEwen and Maiman and Pearson and Thoennes found that parties are more likely to follow through with a mediated settlement than comply with those imposed by a third party decision maker like a judge: see McEwen & Maiman, “Mediation in Small Claims Court: Achieving Compliance Through Consent,” *Law & Society Review* (1984) vol 18(1), at 11-50 and Pearson & Thoennes, “Mediating and Litigating Custody Disputes: A Longitudinal Evaluation,” *Family Law Quarterly* (1984) vol 17, at 497-524. Further, if re-litigation is a criterion for compliance, only 4 to 12% re-litigated: Irving & Benjamin, *Family Mediation: Theory and Practice of Dispute Resolution* (1987).

28 As the implementation details are included in a mediation agreement (compared to a court order, where, whether the order is by consent or not, implementation details are often omitted), this can enhance the likelihood of compliance: see: Bingham, *Resolving environmental disputes: A decade of experience* (1986, Conservation Foundation).

29 Cook, Rochl and Shepard found that people who had negotiated their own settlement felt more powerful than those who used others to negotiate for them: see *Neighbourhood Justice Centers Field Test: Final Evaluation Report* (1980).

30 See HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 7.25.

31 Pearson & Thoennes (1984), above, found that if a dispute were to occur later, the parties were more likely to utilise a co-operative way of problem-solving than to use an adversarial approach.

32 Kelly, “Mediation and Adversarial Divorce: Initial Findings from a Longitudinal Study,” in Folberg & Milne (1988), above, 447 at 453.

### **Factors in the effectiveness of mediation**<sup>33</sup>

- 1.19 The conditions under which mediation is most effective are:
- (1) The parties have a history of co-operation and problem-solving
  - (2) the parties do not have a long history of adversarial relations or prior litigation
  - (3) the parties have been able to agree on some issues
  - (4) their mutual hostility and anger is moderate or low
  - (5) they have an ongoing relationship
  - (6) their desire for settlement of the dispute is high
  - (7) the parties accept the intervention and assistance of the mediator
  - (8) there is external pressure to settle (time, unpredictable outcome, diminishing benefits)
  - (9) there are adequate resources to effect a compromise, and
  - (10) the parties have some leverage on each other (ability to reward or harm).

### **Contra-indicators to the use of mediation**<sup>34</sup>

1.20 Researchers note that there appears to be a double-standard operating between expectations of litigation and those of mediation. Thoennes and Pearson have observed:

*"[L]itigation is expected to produce only a settlement whereas mediation – in some cases, only **two hours** in duration – is expected, in addition, to transform intense marital conflict into affectionate cooperation, and intense distress into positive post divorce family adjustment."*<sup>35</sup>

1.21 It is recognised that mediation is not the panacea for all ills. Mediators accept that not all disputes are appropriate for mediation and that litigation will continue to have a role for certain types of cases. These include cases where there is:

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33 See HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 7.20.

34 See HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 7.29.

35 Thoennes & Pearson, "Response to Bruch and Mclsaac," *Family and Conciliation Courts Review* (1992) vol 30(1), at 142-143.

- (1) domestic violence
- (2) threatening behaviour followed by an unwillingness to negotiate
- (3) a lack of communication and trust
- (4) dominance and power imbalance
- (5) an unresolved separation
- (6) a history of psychiatric illness
- (7) alcohol or drug abuse, or
- (8) child sexual abuse.

1.22 Despite these difficult areas where mediation may not be an appropriate option for the parties, the mediation process remains a highly suitable one for many couples who are undergoing divorce and endeavouring to make the best possible arrangements for their children's future. Compared to the adversarial process, where the parties take a back seat to their lawyers, and the process culminates in a decision being imposed on them by a third party (judge), mediation has the potential to allow the parties themselves to decide what is in dispute, to put across their own respective points of view, and to come to their own unique agreement based on mutual best interests.<sup>36</sup>

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<sup>36</sup> Hewitt (ed), Liu, McDonagh, Melloy and Warren, *Hong Kong Legal Practice Manuals: Family* (1998), at paras 1.6-1.7.

## Chapter 2

### Family dispute resolution – The current situation in Hong Kong

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*“Divorce is a growing problem in Hong Kong. The number of divorce cases has increased sharply over the past two decades. In 1981, ... couples filed 2,811 divorce petitions. The figure rose to 6,767 in 1990 and to 13,737 in 2001. According to the Hong Kong SAR Judiciary, 13,425 divorce Decrees Absolute were granted in 2001, six times the number (2,060) granted in 1981.”<sup>1</sup>*

2.1 It has been observed<sup>2</sup> that approximately ten percent of the total number of divorce cases which arise each year in Hong Kong involve disputes which need to be settled in ancillary proceedings in court. It has also been noted that a large amount of public money is spent annually on legal aid costs to assist couples seeking divorce.<sup>3</sup> Potentially cheaper and speedier methods of resolving family disputes have therefore been actively pursued in Hong Kong in recent years, the principal model being mediation.

2.2 This chapter begins by outlining the existing court process related to divorce and child custody matters. In the second part of this chapter we examine the non-adversarial support services now available in Hong Kong to assist in the resolution of family disputes.

### The adversarial system – the court in practice

#### *Standard procedures in divorce*

2.3 The usual steps taken in the legal process of divorce are set out below.<sup>4</sup> The arrangements to be made in respect of the children are obviously an integral part of this divorce process.

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1 Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr 2002), at para 4.

2 Hong Kong Polytechnic University (2002), above, at para 5.

3 Same as above. The example given is that in 2000-2001, approximately one-third (\$144 million, or 36%) of the total civil legal aid cost was spent on about 5,000 disputed and non-disputed matrimonial cases.

4 For a useful discussion of the relevant court procedures, see Hewitt (ed), Liu, McDonagh, Melloy and Warren, *Hong Kong Legal Practice Manuals: Family* (1998), especially Chapters 7 and 9.

- (1) The applicant spouse first files a petition for divorce in the Family Court Registry or the parties make a joint application for divorce.<sup>5</sup>
- (2) Where a petition has been filed, the respondent spouse is served with the petition and may reply to it.
- (3) In some cases there may be urgent applications for interim orders such as interim custody, access or maintenance.
- (4) Affidavits may be filed at this stage.
- (5) The matter then comes into the court list for a *decree nisi*.
- (6) Usually the divorce decree itself is undefended, though there may be disputes concerning property, maintenance, custody or access. If the divorce is undefended, the petitioner will be called to verify the accuracy of the petition and the statements concerning the arrangements for any children. This is in open court. The respondent may or may not attend. If he does attend, the judge will confirm whether the respondent wishes to defend the proceedings.
- (7) If there has been agreement on custody, access and other matters, the judge can approve the agreement and make final orders.
- (8) Six weeks after the granting of a *decree nisi*, an application for the *decree absolute* can be made. The *decree absolute* will issue approximately two months later.

#### *Where the parties agree*

2.4 Before a *decree absolute* can be granted, the court must be satisfied with the arrangements for the children.<sup>6</sup> (In cases where the parties have reached agreement, however, there is concern that long divorce lists may mean that the judge has little time to consider the arrangements for the children, particularly as social inquiry reports are not prepared for the court where the parties agree.)

#### *Where there is no agreement*

2.5 If no agreement has been reached on custody or access, the case will be adjourned to a call over date. At the call over, the court gives directions on what steps should be taken before the case is ready for

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5 See sections 11, 11A and 11B of the Matrimonial Causes Ordinance (Cap 179).

6 See section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192).

hearing,<sup>7</sup> such as whether the preparation of a social welfare officer's report, or the expert report of a child psychologist, is required.

2.6 It is preferable that affidavits are not lodged until after the social welfare officer's report or the psychologist's report is available. This is because some cases will settle as the parties will decide to abide by the recommendation of the social welfare officer's report.

2.7 At the next call over, the report will be available to the judge and the parties. The social welfare report, which can take some months to prepare,<sup>8</sup> is prepared by one of the officers attached to the Family and Child Protective Services Units (formerly the Child Custody Services Unit) of the Social Welfare Department. The social welfare officer will meet the family and see the child separately with each parent and the officer's report is based on his observations and assessment. While the report is awaited the status quo is maintained, which can operate to the disadvantage of the spouse who does not have physical custody.

2.8 While the court will seek reports from a social welfare officer, it will not generally seek a psychiatric report. Where an examination is felt to be necessary for a special reason, then the particular expertise required to assist the court will be readily apparent and the court will be able to make an appropriate order.

#### *Procedure after social welfare officer's report received*

2.9 If the matter settles after the submission of the social welfare officer's report, then an order can be made by consent. If it still has not settled, the court will give directions as to what affidavits or affirmations should be filed, and for the attendance of the social welfare officer or psychologist for cross-examination. A mutually convenient date for the contested hearing will be allocated by the court registry after filing of the affidavits date.

#### *Pre-trial reviews*

2.10 Order 25 of the High Court Rules provides for a Summons for Directions, which can be used to establish pre-trial reviews. Pre-trial reviews or settlement conferences provide for meetings between the parties and the judge, with or without their lawyers, to help identify the issues that are actually in dispute. Such meetings can also be used to encourage a settlement of the dispute, though this does not seem to be used in Hong Kong for that purpose. The judge's role in this situation is that of a facilitator.

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7 Warren and Francis, *Divorce and Separation in Hong Kong* (1995), at 86.

8 Same as above. However, Social Welfare Department have informed us that the current time is six to eight weeks.

### *Contested custody cases*

2.11 While those cases which are not settled are in the minority, they usually involve more bitterness. Children can have a symbolic significance which makes this type of litigation bitter and protracted.<sup>9</sup> It can lead to subsequent child abduction. Delay over a custody battle worsens the trauma for both children and spouses.

### *Variation*

2.12 Because the court has jurisdiction to ensure that the welfare of the child is the paramount consideration, it is possible to apply to vary a custody or access order even if this was made by consent. Justification for such a variation can include, for example, a change in the living arrangements of the parent by remarriage or the need for more flexible arrangements as the children grow older.

## **Development of non-adversarial dispute resolution for family proceedings in Hong Kong**

### ***Early initiatives***

2.13 One of the earliest developments in this area was the establishment of the Marriage Mediation Counselling Project in 1988 by the Hong Kong Catholic Marriage Advisory Council.<sup>10</sup> This was followed in 1989 by proposals from the Hong Kong Council of Social Service Task Group for the setting up of a court conciliation co-ordinator at the family court.<sup>11</sup> In 1992, the Law Reform Commission recommended that the Government should give priority to publicising family mediation and conciliation services in Hong Kong, as well as give consideration to the future expansion and development of such services.<sup>12</sup>

2.14 Some years later, there was still little sign of official development in the area of family mediation.<sup>13</sup> What had been happening instead was that a small group of lawyers and social workers had been, *"responding to the needs and problems of separating and divorcing couples by undergoing specialist training in family mediation or dispute resolution, and by offering*

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9 Wallerstein and Blakeslee, *Second Chances: Men and Women a decade after divorce* (1989).

10 See The Hong Kong Marriage Advisory Council, *Evaluative Research Report on the Marriage Mediation Counselling Project* (Oct 1991).

11 See Hong Kong Council of Social Service Task Group on Family Court, *Proposals on the Establishment of a Family Court in Hong Kong* (1989), at 15-17.

12 HKLRC, *Grounds for Divorce and the Time Restrictions on Petitions for Divorce Within Three Years of Marriage*, Topic 29, Nov 1992, at paras 8.33-8.41 and 9.11.

13 There was, however, development of mediation in relation to non-family matters, with the establishment, in January 1994, of the Hong Kong Mediation Council (HKMC). The HKMC was set up within the Hong Kong International Arbitration Centre.

*mediation service through their employing agencies or through private practice.*<sup>14</sup>

2.15 The idea of introducing alternative dispute resolution for Hong Kong family cases was raised again in 1996 by the Chief Justice's Working Group looking into matrimonial proceedings.<sup>15</sup> Unfortunately, it was concluded that it was premature at that time to establish a court annexed mediation scheme, but that the option should be examined again, "*when a reasonable pool of professionally qualified mediators was available in Hong Kong.*"<sup>16</sup>

### ***Chief Justice's Working Group on a pilot scheme for mediation***

2.16 In 1997, both the Hong Kong Family Welfare Society and Resource: The Counselling Centre launched divorce mediation services. In October of that year, the Chief Justice convened a Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong ("the Working Group on the Pilot Scheme").

### ***Our Consultation Paper***

2.17 In December 1998, we released our Consultation Paper on guardianship and custody of children, which included a number of recommendations on court-annexed mediation and mediation generally (which are, of course, the subject of this report).<sup>17</sup> Our proposals on court-annexed mediation were broadly in line with the final recommendations of the Working Group on the Pilot Scheme which issued its report in April 1999.<sup>18</sup>

### ***Recommendations of the Working Group on the Pilot Scheme***

2.18 The recommendations of the Working Group on the Pilot Scheme, which led to the subsequent implementation of the Scheme, are summarised below.<sup>19</sup>

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14 Hong Kong Polytechnic University (2002), above, at para 3.

15 See *Report of the Working Group to Review Practices and Procedures Relating to Matrimonial Proceedings* (Aug 1996), Part XII. (The Working Group was chaired by HH Judge Hartmann, as he was then.)

16 As subsequently referred to in: *Report of the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong* (1999), at para 1.1. (This later Working Group was also chaired by The Hon Mr Justice Hartmann.)

17 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), Chapter 12 and Chapter 15 (Parts G and H).

18 Working Group to Consider the Pilot Scheme (1999), above. (A number of the members of the LRC Sub-committee were also members of the Chief Justice's Working Group.)

19 Working Group to Consider the Pilot Scheme (1999), above, at Part VIII (summary of recommendations).

### *Three-year pilot study*

2.19 The Working Group recommended that a three-year pilot scheme should be run to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong.

### *Information sessions and mediation*

2.20 It was recommended that information and mediation sessions should be provided to litigants under the pilot scheme on a voluntary, not compulsory, basis. Accordingly, the litigants' attendance at the sessions would not be compulsory.

### *Choice of service providers*

2.21 The Working Group recommended that litigants should be given the choice of mediators from a list of those qualified, including mediators from the Social Welfare Department, non-government organisations and those from private practice.

### *Funding and costs of the service*

2.22 The Working Group recommended that funding should be provided to the Social Welfare Department, non-government agencies and mediators in private practice for the provision of mediation services. It was also recommended that a balance should be struck between the need to ensure that the scheme operated in a cost-effective manner and the importance of providing a quality mediation service.

2.23 The Working Group recommended that a certain number of mediation sessions should be provided free of charge under the pilot scheme to encourage litigants to try the service.

### *Support services for the scheme*

2.24 It was recommended that a post of full-time Mediation Co-ordinator, with the support of a full-time secretary and a clerk, should be created. It was also recommended that the Mediation Co-ordinator's Office should be accommodated in the Family Court to give a clear indication to legal practitioners and litigants of the court's full support for mediation.

2.25 The Working Group recommended that there should be a lead-in period of six months before the commencement of the pilot scheme to enable the Mediation Co-ordinator to prepare information leaflets on mediation and organize activities to promote awareness and understanding of the service among family judges, the legal profession, court registry staff, the government departments concerned, social welfare agencies and members of the public.

### *Promotion of mediation – obligation on lawyers*

2.26 As lawyers were expected to be the chief agents for referral to mediation, it was recommended that lawyers should be obliged to advise their clients of the availability of mediation services and to give information leaflets on mediation prepared by the Co-ordinator to their clients. As proof of this, it was recommended that lawyers should be required to file with the court a "Certificate as to Mediation" form. It was recommended that the Certificate should be introduced by way of a Practice Direction issued by the Chief Justice.

### *Steering committee*

2.27 The Working Group recommended that a steering committee should be appointed by the Chief Justice to oversee the implementation of the pilot scheme.

### *Evaluation of the scheme*

2.28 It was recommended that, at the end of the second year, an interim evaluation of the scheme should be conducted by an independent research team. It was also recommended that a full evaluation of the scheme should be carried out at the end of the three-year period.

## **Implementation of the Pilot Scheme on Family Mediation**

2.29 The implementation of the Working Group's recommendations began soon after the release of its report, with the setting up of the Mediation Co-ordinator's Office at the Wanchai District Court in June 1999. In May 2000, the Pilot Scheme on Family Mediation, funded and monitored by the Judiciary, was officially launched.

### ***The process of referral to mediation under the scheme***

2.30 Outlined below is a description of how the Pilot Scheme operates in the various situations which might arise in divorce proceedings.<sup>20</sup>

#### *Before litigation begins*

1. The Mediation Co-ordinator may receive requests for information and/or referral from one or both spouses before litigation has commenced.

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<sup>20</sup> This description is closely based on the explanation of the process presented by the Working Group in its report. See: Working Group to Consider the Pilot Scheme (1999), above, at Appendix F.

2. If one spouse alone seeks assistance, the Mediation Co-ordinator will issue a letter to the other spouse inviting that party to participate under the scheme. If the other party is willing to attempt mediation, the Mediation Co-ordinator will invite both parties to attend an information session.
3. If both parties seek mediation, the Mediation Co-ordinator will arrange for them to attend an information session. In these circumstances, mediation will be conducted without the court being involved.
4. If the other party refuses to attend an information session or thereafter to attempt mediation, the Mediation Co-ordinator will inform the other party of this. Again, the court will not be involved.

*When matrimonial proceedings are instituted*

1. When one spouse consults a solicitor and decides to institute matrimonial proceedings, the solicitor will be required to:
  - (a) advise the petitioner of the availability of mediation and how it may assist in the proceedings; and
  - (b) give the information leaflet on mediation prepared by the Mediation Co-ordinator to the petitioner.
2. As proof that the solicitor has fulfilled these requirements, the solicitor will be required to file a "Petitioner's Certificate as to Mediation," duly signed by the petitioner and the solicitor, when the divorce petition is filed.
3. If the petitioner indicates a wish to attempt mediation and is legally represented, the solicitor will file the Certificate with the Mediation Co-ordinator. If the petitioner is not legally represented, the Family Court Registry will file the Certificate with the Mediation Co-ordinator.
4. The Mediation Co-ordinator will write to the other party to seek his or her consent to participate. If the other party consents, the Mediation Co-ordinator will arrange for both to attend an information session. If the other party refuses to attend an information session or thereafter to attempt mediation, the Mediation Co-ordinator will inform the petitioner or his or her solicitor of this.
5. The petitioner or the petitioner's solicitor should serve on the respondent, in addition to the Petition, the information leaflet on mediation, the *signed* "Petitioner's Certificate as to Mediation," and the "Respondent's Certificate as to Mediation" form.
6. The respondent will be required to complete the "Respondents Certificate as to Mediation" form. If the respondent indicates a wish to attempt mediation, the Registry will refer the request to the

Mediation Co-ordinator who will then contact the petitioner to seek consent. If the petitioner consents, arrangements will be made for both to attend an information session. If the petitioner refuses to attend an information session or thereafter to attempt mediation, the Mediation Co-ordinator will inform the respondent of this.

7. When a petitioner acting in person files a petition at the Registry, the Registry staff will hand to the petitioner the information leaflet on mediation together with the “Petitioner’s Certificate as to Mediation” form. If the petitioner indicates a wish to attempt mediation, the above procedure will apply.
8. If the spouses make a joint application, the Registry will give them the “Applicants’ Certificate as to Mediation” form to complete.

*After litigation has commenced*

1. During the course of litigation, either party may file an “Application for Mediation” with the Mediation Co-ordinator. If one party files the application, the Mediation Co-ordinator will send a letter inviting the other party to participate. If the other party consents, both will be invited to attend an information session. If the other party refuses to attend an information session, or thereafter to attempt mediation, the Mediation Co-ordinator will inform the party requesting mediation of this
2. A party’s application for mediation will not lead to an automatic stay in the legal proceedings. For example, parties who agree to divorce but do not agree on ancillary matters may proceed to obtain the *decree nisi* for their divorce while they are seeking to resolve other matters through mediation. Trial dates may still be set and pleadings completed while mediation takes place.

*After mediation has been completed*

1. The Mediation Co-ordinator should submit a report to the court giving the results of the mediation. Such reports shall be couched in neutral language advising the judge that –
  - (a) mediation was sought but neither party attended an information session
  - (b) one or both parties attended information sessions and thereafter no referral to mediation was made
  - (c) there was a meeting with the Mediation Co-ordinator or the mediator who considered that this case was not suitable for mediation
  - (d) mediation did take place but the parties were unable to resolve any issues

- (e) mediation did take place and the parties were able to resolve certain issues (eg, divorce, custody and access, maintenance, financial matters generally).

### *The role of judges in mediation*

2.31 While a judge may encourage parties to attempt mediation in appropriate cases, the judge should at all times maintain his neutrality as he will adjudicate cases after litigants have attempted mediation but the outcome has not been successful. A judge should therefore not be seen to be working hand in hand with the Mediation Co-ordinator, nor should there be any inference that he may be biased either for or against one party because of the outcome of mediation.

### ***Evaluation of the pilot scheme***

2.32 In accordance with the recommendations of the Working Party on the Pilot Scheme, a consultancy study was commissioned part-way through the scheme to evaluate a number of aspects of the service provided. The issues to be addressed in the evaluation included:<sup>21</sup>

- who made use of the scheme?
- was it known about by the public?
- how had the scheme been implemented?
- how efficient and effective was the scheme?
- how satisfied were its users?

### ***Interim report's findings and recommendations***

2.33 The Interim Report on the Pilot Scheme, published in April 2002, made a number of findings and recommendations.<sup>22</sup>

#### *Statistics on service usage and mediation outcomes*

2.34 The study found that:

- Between 2 May 2000 and 13 November 2001, as many as 1,670 people attended 294 information sessions through the service. The researchers comment: *“The attendance rate is a reasonably good one, considering the facts that disputing couples could also turn to mediation services outside the Pilot Scheme and*

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21 Hong Kong Polytechnic University (2002), above, at para 10.

22 Same as above, at 5 to 32; see also the Interim Report's Executive Summary.

*that there were many cases which simply did not require mediation.*<sup>23</sup>

- 87.8% of the attendees went through initial assessment in the Mediation Co-ordinator's Office (MCO),<sup>24</sup> which resulted in 547 cases being referred out for mediation service (ie, roughly three-quarters): to SWD (28.7%), to NGOs (33.8%), and to private practitioners (37.5%).<sup>25</sup> At the time of the study, there were 55 mediators on the MCO's register: two were from the Social Welfare Department (SWD), 29 from non-government organisations (NGOs), and 26 in private practice.<sup>26</sup>
- Around 60% of the cases had completed initial assessment for suitability for mediation, and had been referred to mediators by the MCO, within a month. About 75% of the cases took less than 3 months for the mediators to complete.<sup>27</sup>
- Of the 458 cases completed (ie, mediators acted on and closed the cases) between 2 May 2000 and 13 November 2001, 71.4% reached full agreement and another 8.5% partial agreement.<sup>28</sup>
- By-sector analysis showed that SWD mediators had the highest (81%) full agreement rate and took the least number of hours to conclude a mediated case.<sup>29</sup>
- On average, it took 10.18 hours to reach a full agreement, 14.35 hours to reach a partial agreement and 6.3 hours to reach no agreement between the parties using the mediation service. On average, it took SWD mediators 6.8 hours and NGO mediators 10.02 hours and mediators in private practice 11.45 hours to conclude a mediated case.<sup>30</sup>

### *Level of user satisfaction with the scheme*

2.35 Overall, the study indicated that:

- *Mediation saved users' time and money.* The service was efficiently arranged and free; the service providers were professional and accessible; and, when agreements were reached, there was no litigation.<sup>31</sup>

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23 Same as above, at para 33.

24 Same as above, at para 34.

25 Same as above, at para 39.

26 Same as above, at para 36. It was noted (at para 39) that the two full-time Social Welfare Department mediators "had a disproportionate share of cases referred from MCO."

27 Same as above, at paras 40 to 42.

28 Same as above, at paras 44 and 45.

29 Same as above, at para 48.

30 Same as above, at paras 49 and 50.

31 Same as above, at para 58a and 58c.

- *Mediation provided users with a good educational experience on how to proceed constructively with divorce.*<sup>32</sup>
- *Mediation reduced tension for both parties once an agreement was reached.* Once an agreement was reached and uncertainties dispelled, the tension between couples tended to reduce, leaving the parties more prepared to relate to each other. This helped with co-parenting.<sup>33</sup>
- *Mediation facilitated dialogue on matters related to divorce.* Some users observed that mediators could help them express their views and positions more freely and non-antagonistically in the presence of their spouses than without the mediators being present.<sup>34</sup>

2.36 The study also revealed a variety of statistics in relation to the user satisfaction with the mediation service.

- Almost 80% of the respondents indicated that they were “satisfied” or “very much satisfied” with the mediation service they received<sup>35</sup>
- More than 60% of the respondents agreed that they were able to discuss disputed issues with their spouses through mediation in a peaceful and reasonable manner<sup>36</sup>
- More than 80% of the respondents reported that their mediators had been neutral and impartial in the course of the mediation service<sup>37</sup>
- Nearly all of the respondents replied in the negative when asked if their mediators had ever made decisions for them.<sup>38</sup>

#### *Public perceptions of the service*

2.37 In order to gauge public perceptions of the Pilot Scheme, the researchers carried out two opinion polls; the first, in September 2000, sampled 828 persons; the second, in January 2002, sampled 915 persons. In relation to questions noted below, the researchers found that:

- *How many know about the Pilot Scheme on Family Mediation and how?* In the first survey, about 25% of the respondents had heard of the scheme. In the second survey, the figure had

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32 Same as above, at para 58b.

33 Same as above, at para 58d.

34 Same as above, at para 58e.

35 Same as above, at para 52.

36 Same as above, at paras 55 to 56.

37 Same as above, at para 57a.

38 Same as above, at para 57d.

reduced to 21.1%, “*reflecting, perhaps, the fact that publicity on the Pilot Scheme had tapered off during the period.*”<sup>39</sup>

- The importance of the media in promoting the Scheme was pronounced. Most of those who had heard of the Scheme had done so through television or radio (73% in the first survey and 69% in the second), or through newspapers or magazines (38% in the first survey and 33% in the second). The researchers note that, “*In both surveys, only a small percentage of the respondents gained knowledge of the Scheme from social service or legal professionals.*”<sup>40</sup>
- *The public perception of family mediation compared to family litigation.* 68% of the respondents in the first survey, and 75.2% in the second, believed more time could be saved through family mediation than litigation.<sup>41</sup> Nearly 74% of respondents in the first survey, and 81.1% in the second, believed that family mediation could reduce financial costs.<sup>42</sup>
- 61.6% of respondents in the first survey, and 68.6% in the second, believed that family mediation did less harm to family relationships than litigation.<sup>43</sup> 71.3% of respondents in the first survey, and 80.3% in the second, believed that family mediation provided divorcing parties with more opportunities to express their views and concerns in the dispute resolution process.<sup>44</sup> It was also generally believed that “*disputing couples communicated better with each other in the presence of a mediator*” (70% in the second survey – less than 10% said no).<sup>45</sup>
- Less than half (47.8%) of respondents in the first survey, and just over half (53.6%) in the second, believed that agreements reached through family mediation were sustainable.<sup>46</sup>
- On the other hand, the researchers comment that: “*As an adversarial process, litigation often aggravates the already poor relationship between the divorcing parties. This in turn hinders their co-operation in their parental roles in the post-divorce stage.*” Compared with family litigation, 62.9% of respondents in the first survey, and about 70% in the second, believed that

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39 Same as above, at para 14.

40 Same as above, at para 15.

41 Same as above, at para 17.

42 Same as above, at para 18.

43 Same as above, at para 19.

44 Same as above, at para 20.

45 Same as above, at para 22.

46 Same as above, at para 21.

family mediation helped the divorcing parties co-operate better in their parental roles.<sup>47</sup>

- Almost 80% of respondents in the first survey, and 86% in the second, preferred family mediation to litigation as a means of settling family disputes arising from divorce. *“Only 6.6% and 2.8% of the respondents in the first and second surveys respectively regarded otherwise.”*<sup>48</sup>
- Consistent with this positive view, *“an overwhelming majority of the respondents in both surveys agreed that family mediation should be further promoted as a means to resolve family disputes.”* 85.6% in the first survey, and 97.8% in the second, endorsed the service.<sup>49</sup>
- On the issue of whether family mediation should be further promoted, the researchers comment: *“These are very positive results, suggesting that the public was generally receptive to the idea of family mediation as an alternative approach to resolving divorce disputes. The results also suggest that support of the Pilot Scheme had been growing over time.”*<sup>50</sup>

### *Viability of the scheme*

2.38 The study concluded that there was considerable evidence that family mediation was a viable option for family dispute resolution in Hong Kong. The study therefore recommended that the Administration should consider continuing to fund the scheme for family mediation service on a long-term basis.<sup>51</sup>

### *Voluntary or compulsory*

2.39 The study noted that, although amongst mediators there was sympathy for the idea that mediation should be made compulsory, this would be at odds with the voluntary nature of the service, and was an issue which needed to be very carefully considered. It was recommended, however, that applicants for legal aid in matrimonial cases should be required to attend information sessions at the Mediation Co-ordinator’s Office.<sup>52</sup>

### *Name of the service*

2.40 The name of the mediation service was found to be an issue, as it appeared that the service was sometimes mistaken for a marital

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47 Same as above, at para 23.

48 Same as above, at para 24.

49 Same as above, at para 25.

50 Same as above, at para 26.

51 Same as above, at paras 88 to 90 and 112a.

52 Same as above, at paras 91 to 94 and 112b.

reconciliation service. It was therefore recommended that the name of the service should be changed to overcome this potential for misunderstanding.<sup>53</sup>

### *Screening of cases*

2.41 It was recommended that there was a need to reconsider the process of screening cases and the role of the Mediation Co-ordinator in this process. This was to ensure that the approach for screening cases into the system was not too inclusive, as this might run the risk of admitting significant numbers of unsuitable applicants.<sup>54</sup>

### *Pluralistic or unitary model of service*

2.42 The study noted that different service providers (ie, mediators drawn from Social Welfare, NGOs and private practitioners respectively) appeared to appeal to different categories of users. It was therefore recommended that the current “pluralistic” model of service should be maintained, rather than a unitary model, dominated by just one type of service provider.<sup>55</sup>

2.43 It was also recommended that mediation should be maintained as an option for couples throughout the entire divorce and ancillary proceedings process, whether or not they had chosen to receive it at an earlier stage.<sup>56</sup>

### *Avoiding conflict between the mediator and the legal aid lawyer's role*

2.44 The researchers observed that “cross-talk” between family mediators and the legal aid lawyers representing the litigants could be an issue, as the work of the lawyers often conflicted with that of the mediators. It was therefore recommended that, for legal aid clients, a serial mode of service (whereby undertaking mediation preceded the provision of legal service) was preferred to both services running concurrently.<sup>57</sup>

### *Fee-charging for service*

2.45 The study found that provision of a totally free mediation service might not be in the best interests of the users, and that some fee-charging was acceptable and might increase the motivation of service users to make better use of the service. It was therefore recommended that, if family mediation were to be offered on a long-term basis, a fee-charging mechanism could be introduced for users able to afford the service.<sup>58</sup>

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53 Same as above, at paras 95 to 97 and 112h.

54 Same as above, at paras 98 to 100 and 112i.

55 Same as above, at paras 101 to 105 and 112j.

56 Same as above, at paras 106 and 112k.

57 Same as above, at paras 106 to 107 and 112l.

58 Same as above, at paras 109 to 111 and 112h(*sic*).

## **Family dispute resolution – where to from here?**

2.46 We have seen from the preceding discussion that utilizing non-adversarial means of resolving family disputes, particularly through referral to mediation, is now a strongly developing trend in Hong Kong. In the remainder of this report, we examine how this emerging approach might be further refined, particularly in relation to its interface with the adversarial family litigation process.

## Chapter 3

# The family dispute resolution system in England and Wales

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*"As a non-adversarial dispute resolution process, family mediation is guided by the assumption that separating and divorcing couples can reach an agreement fair to both parties through their own negotiation. It has gained acceptance over the years and is now practised in a growing number of countries .... "*<sup>1</sup>

3.1 In our Consultation Paper, we reviewed in detail the non-adversarial dispute resolution approaches adopted in various jurisdictions, including: England;<sup>2</sup> Australia and New Zealand;<sup>3</sup> Canada and the United States;<sup>4</sup> Mainland China, Japan and Singapore.<sup>5</sup> In this report, we focus on the dispute resolution systems of England and Wales, and, in the next chapter, Australia and New Zealand, as a number of our final recommendations are based on particular aspects of these systems.

### Background: the value of mediation

3.2 Before embarking on our review of these overseas models, it is useful to reiterate the objectives of the mediation process as outlined in Chapter One. Parker and Parkinson note that mediation encourages direct communication between the spouses and encourages them to negotiate future arrangements for the children.<sup>6</sup> Mediation can help where an

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1 Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr 2002), at para 2.

2 See HKLRC Subcommittee on Guardianship and Custody, *Consultation Paper on Guardianship and Custody* (Dec 1998), at Chapter 8. Paras 8.4-5, 8.9-11, and 8.19-8.36 of that chapter were substantially adopted from an unpublished dissertation by Paula Scully, (then) Secretary of the Sub-committee, entitled "Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems" (Apr 1996).

3 See HKLRC Subcommittee on Guardianship and Custody (1998), above, at Chapter 9. Paras 9.22-3, 9.27-8, 9.31-5, 9.39, 9.44-7, 9.56-63, 9.76-9.89, 9.92-5, and 9.107-108 of that chapter were substantially adopted from Scully (1996) above.

4 See HKLRC Subcommittee on Guardianship and Custody (1998), above, at Chapter 10.

5 Same as above, at Chapter 11.

6 Parker & Parkinson, "Solicitors and Family Conciliation Services-a basis for professional co-operation," *Family Law* (1985) vol 15, 270 at 272.

“emotional” divorce has not yet taken place in conjunction with the legal and financial divorce. If the “emotional divorce” does not take place then the spouses may “*remain enmeshed in conflict with harmful consequences not only for themselves but also for their children*”.<sup>7</sup>

3.3 Parker and Parkinson stress early intervention, as “*research clearly indicates that if access is not agreed at an early stage it is more difficult to establish regular access subsequently, after contact has been broken between the children and the parent who left home.*”<sup>8</sup> Another research finding was that the arrangements parents make at the time of separation generally set the pattern for the future.<sup>9</sup> Parker and Parkinson suggest that mediation should take place while the parties await a grant of legal aid or a court hearing date to be set. They conclude that:

*“ideally [mediation] and legal advice should proceed in tandem, each helping the other to provide the maximum assistance to couples in the process of separation and divorce.”*<sup>10</sup>

3.4 The writers also note that suggestions about children’s needs and feelings may be more acceptable to parents if they are offered by a neutrally placed mediator who has an explicit professional concern for the family as a whole.<sup>11</sup>

3.5 Davis has suggested that the introduction of formal mediation appointments by the court is important, because such procedures “*provide a tangible manifestation of the court’s commitment to a settlement seeking approach.*” Other commentators note that mediation should not be seen merely as an efficient processing of a dispute. As most cases settle anyway, mediation should be assessed in terms of its impact on the timing and quality of divorce settlements.<sup>12</sup>

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7 Same as above.

8 Same as above, at 273.

9 Mitchell, *Children in the middle* (1985).

10 Parker & Parkinson (1985), above, at 274.

11 Same as above.

12 In 1989, a research team from Newcastle University had carried out a study on child-focused mediation (see Ogus, Walker and Jones-Lee, *Report to the Lord Chancellor on the costs and effectiveness of conciliation in England and Wales* (Mar 1989)). Its findings (at 43) were that: 62% of the clients attending the mediation services surveyed were concerned only with child contact. 60% of the mothers had sole custody and 8% of the fathers had sole custody. In 28% of cases, the children lived with both parents and in 4% they shared time between the parents. The researchers (at 42) expressed concern as to the limited amount of time spent in comprehensive mediation addressing children’s issues. If the parties presented pre-arranged plans for the children they would generally be accepted, but financial pre-arranged plans were usually opened up for further discussion. The average time for a child focused mediation was 3 hours compared to 12.7 hours for comprehensive mediation (see 48-49).

It was noted that the clients in child focused mediation were less satisfied with the outcome than the clients in comprehensive mediation - 38% were satisfied and 26% were dissatisfied. In comprehensive mediation, over 50% were satisfied and 18% were dissatisfied. However, in looking at the broad objectives of mediation, beyond just focusing on the outcome, higher satisfaction was noted. In the child focused mediation, 61% agreed that it protected the best interests of children (5% disagreed), and it “sorted out custody and access” in 60% (10% disagreed). It also helped improve communication (53%) (though 12% disagreed) and it clarified areas of disagreement (59%) (6% disagreed).

## England and Wales

### *Children Act 1989*

3.6 English family laws, especially since the Children Act 1989, “have been moving away from the traditional adversarial notions of rights and justice towards that of welfare.”<sup>13</sup> The changed emphasis on incompatibility rather than fault is more likely to promote negotiation.<sup>14</sup> In principle, it should also lead to a reduction in the number of contested cases that the adversarial system would otherwise have to deal with.<sup>15</sup>

3.7 The focus of the English system has been on encouraging mediation as a way of resolving matrimonial disputes *before* proceedings for divorce get under way. The arrangements for the children will be expected to be determined before a divorce order can be applied for or made. The fact that such arrangements have been made will also be evidence that the marriage has broken down irretrievably.

#### *Practice direction*

3.8 To reflect the changes of the Children Act 1989, a Practice Direction was issued in 1992 which provides that a district judge, at any time while considering arrangements for children, can direct that the parties attend a “conciliation” appointment.<sup>16</sup> Under the terms of the Practice Direction, the district judge attends with the parties and their legal advisers. If the dispute is not settled at the initial meeting before the district judge and welfare officer, the parties alone attend before the welfare officer. If the conciliation is unsuccessful, the Practice Direction provides that:

*“the district judge will give directions (including time-tabling) with a view to the early hearing and also disposal of the application. In such cases the district judge and court welfare officer will not be further involved in that application.”<sup>17</sup>*

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13 Davis, “Conciliation and the Professions,” *Family Law* (1983) vol 13, at 6.

14 Mediation has had a long history in England. As far back as the Finer Committee report in 1974 (*Report of the Committee on One-Parent Families* (1974)), “conciliation” was recommended as an established part of the divorce court process. The conciliation movement gathered momentum in the 1980’s. The Booth committee in July 1985 (The Hon Mrs Justice Booth, *Report of the Matrimonial Causes Procedure Committee* (1985)) endorsed the value of out of court conciliation, and, with the publication of its report, a clear line of demarcation was drawn between conciliation services and the activities of welfare officers.

15 Davis (1983), above. This has not necessarily been proven true in practice, however: see discussion in ‘More recent developments’ below in this chapter.

16 *Practice Direction (Family Division: Conciliation)* [1992] 1 WLR 147. Applications for orders for residence (similar to custody) or contact (similar to access) under section 8 of the Children Act 1989 would be compulsorily referred for an appointment. An application for a ‘prohibited steps’ (actions which the other party would not be able to take) or ‘specific issue’ (a particular point on which the court has made a determination) order would be referred only if the applicant requested it. A summons for wardship where orders under section 8 were sought, could also be referred for a conciliation appointment.

17 *Practice Direction (Family Division: Conciliation)* [1992], above.

3.9 If the conciliation appointment has been concluded, the district judge who had been considering the arrangements for the children will issue a certificate that the court has complied with section 41 of the English Matrimonial Causes Act 1973.<sup>18</sup>

#### *Impact of the special procedure*

3.10 The special procedure system, under which undefended divorces were granted without the parties' attending, applies to the vast majority of divorce petitions.

3.11 Initially, a children's appointment system was also introduced, so that the children's upbringing could be fully investigated.<sup>19</sup> However, in a schedule to the Children Act 1989, the children's appointment provision was abolished.<sup>20</sup> Now the arrangements for the children are examined in private, "*and almost invariably in the absence of the parties or their representatives by a district judge whose role is greatly circumscribed*".<sup>21</sup>

### **Family Law Act 1996**

3.12 In 1995, the Lord Chancellor's Department, in a White Paper, *Looking to the Future - Mediation and the Ground for Divorce*,<sup>22</sup> suggested the following reforms:

- (1) a "no fault", "process over time" divorce process should be introduced
- (2) there should be increased information about the divorce process through mandatory divorce information sessions
- (3) couples would be expected to use mediation rather than litigation to resolve their disputes about divorce and ancillary matters
- (4) couples in receipt of legal aid would have to use mediation unless they come within exclusion criteria (for example, violence), and
- (5) legally-aided clients will have limited access to legal advice and no representation on the basis that mediation will have resolved their disputes.

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18 Provision is also made that urgent applications will be referred to the district judge of the day to decide whether the parties are to be referred to conciliation: see same as above.

19 English Matrimonial Causes Rules 1977, SI 1977/ 334, rules 33(3) and 48.

20 English Children Act 1989, Schedule 12, para 31.

21 Cretney, "Family Law - a bit of a racket," *New Law Journal* (Jan 1996), 91 at 93.

22 (April 1995: Cmnd 2799), HMSO. The department had published a Consultation Paper of the same name in December 1993 (Cmnd 2424).

3.13 The Family Law Act 1996 was framed to implement the proposals contained in the White Paper. Part I of the Act deals with the general principles of the legislation and Part II with changes to the substantive law on divorce and separation.<sup>23</sup> Part III introduced amendments to the Legal Aid Act 1988 to include legal aid for mediation in family matters.<sup>24</sup>

3.14 Although the legislation was enacted in July 1996, the timetable for its implementation was anticipated to be much later. This was to give time for various pilot projects on information sessions and mediation to proceed and be evaluated.<sup>25</sup> The first information meeting pilot project commenced in June 1997 in five locations. More pilots were launched in October 1997 and January 1998.<sup>26</sup>

### *Information meeting*

3.15 Section 5 of the Family Law Act 1996 provides that a statement of marital breakdown must be filed by a party or the parties before a marriage will be taken to have broken down irretrievably.

3.16 Section 8 of the Act provides that the party making such a statement must attend a compulsory information meeting not less than three months before making the statement,<sup>27</sup> and that the other party must attend before making any application with respect to a child of the family to the court or contesting any application.

3.17 It was intended that further details of the scheme were to be contained in subsidiary legislation. In particular, the regulations would specify what information about marriage support services, the importance of the welfare of the child, mediation, the availability of independent legal advice, legal aid, and the divorce process would be furnished to the parties at the section 8 information sessions.<sup>28</sup> It was also provided that parties would have the opportunity of attending a marriage counsellor after the information meeting.<sup>29</sup>

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23 This Part of the Act has never been brought into force, and may, in due course, be repealed: see discussion under 'More recent developments' below in this chapter.

24 Part III of the 1996 Act (which amended the Legal Aid Act 1988 in relation to the provision of state-funded mediation) has since been repealed and incorporated into the Funding Code for the Community Legal Service (which replaced the former Legal Aid Board) following repeal of the 1988 Act by the Access to Justice Act 1999: see Schedule 15, Part I, Access to Justice Act 1999. See also discussion under 'More recent developments' below in this chapter.

25 An Advisory Board on Family Law was established to advise on the implementation and operation of the Family Law Act 1996, including the mediation and information meeting pilots.

26 The findings from these pilot schemes are summarised below in this chapter under 'More recent developments.'

27 Exceptions were to be prescribed in the regulations. In Parliament the Lord Chancellor gave examples such as the house-bound, the disabled, those who risked violence by going to a particular place and those in custody.

28 English Family Law Act 1996, Section 8(9).

29 English Family Law Act 1996, Section 8(6)(b).

3.18 Under the Family Law Act scheme, parties were to receive relevant information through three possible avenues: the section 8 information meetings noted above, as well as through lawyers<sup>30</sup> and the courts who could refer the parties for an information meeting about mediation.<sup>31</sup> This latter information meeting was distinct from the information meeting provided under section 8,<sup>32</sup> and was more like a preliminary meeting prior to an intake session for mediation. Its purpose was to enable *“an explanation to be given of the facilities available to the parties for mediation ... and of providing the parties with an opportunity to agree to take advantage of those facilities.”*<sup>33</sup>

### **Legal aid for family mediation**

3.19 In England, mediation was perceived as the preferred method of dispute resolution for divorce and children’s cases, which had for some time been consuming a disproportionate share of the legal aid budget. The Lord Chancellor therefore proposed in a green paper on legal aid<sup>34</sup> that suppliers of mediation would be eligible for contracts for legal aid services.<sup>35</sup> It was intended that funding for this scheme would come from monies diverted from the legal aid funding of litigation.

*“The Government does consider ... that family mediation is both more effective and more suited to resolving the kinds of problems that arise in most family cases than representation in negotiations by solicitors, or litigation.”*<sup>36</sup>

### **Refusal to mediate**

3.20 Mediation would not be compulsory but advisers would have to record acceptable reasons for refusal to mediate.<sup>37</sup> Acceptable reasons would be listed in guidelines and include cases involving domestic violence or care orders.<sup>38</sup> So, *“point blank refusal to mediate would not be considered a good reason, and the solicitor [on legal aid] would not be able to represent a client*

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30 Section 12(2) of the Act gives power to the Lord Chancellor to make rules requiring a legal representative to certify whether he has informed his client about the availability of mediation and marriage support services, and whether he has given his client names and addresses of persons who can help with reconciliation and mediation.

31 English Family Law Act 1966, Section 13.

32 English Family Law Act 1966, Section 8(6) defines an information meeting to mean: *“a meeting organised for the purpose of providing those attending with relevant information about matters which may arise in connection with the provisions of, or made under, this Part or Part III and giving an opportunity to attend a marriage counsellor and encouraging the parties to attend him or her.”*

33 English Family Law Act 1996, Section 13 (a) and (b).

34 Lord Chancellor’s Department, *Legal Aid - Targeting Need* (1995: Cmnd 2854).

35 The implementation plan for piloting of franchise contracts by the Legal Aid Board for family mediation services commenced in May 1997: see Legal Aid Board, *Franchising family mediation services* (Feb 1997).

36 Lord Chancellor’s Department (1995), above, at para 9.7.

37 Same as above, at paras 9.7 and 9.8.

38 Same as above, at para 9.8.

who could offer no reason for their decision not to choose to mediate.”<sup>39</sup> This approach was taken because research had indicated that at least one party usually started off by refusing even to consider mediation, but once they had visited a mediation service and had received a personal explanation of how mediation worked and of its benefits, they would change their minds and would be willing at least to attempt mediation.<sup>40</sup>

### **Family Law Act 1996 and mediation**

3.21 The provisions relating to mediation were contained in Part III of the Act.<sup>41</sup> Section 27(3) of the 1996 Act provided that legal aid for mediation would not be granted unless “*mediation appears to the mediator suitable to the dispute and the parties and all the circumstances.*” The Act also provided that a person should not be granted legal representation unless he had attended a meeting with a mediator to determine the suitability of mediation and if it was suitable, “*to help the person applying for representation to decide whether instead to apply for mediation.*”<sup>42</sup> Relevant exceptions were proceedings under those parts of the Children Act 1989 which dealt with protection. Provision was made in section 28(3) for the legally assisted person to pay a contribution towards the costs of mediation.

3.22 Much of the detail involved in legal aid for family mediation was left to the regulations.<sup>43</sup> These provided that the mediator should assess the means of the client before providing mediation. Notwithstanding any privilege between them, the mediator was not precluded from disclosing to the Legal Aid Board any information which related to mediation provided to a legally assisted person which would enable the Board to discharge its functions.<sup>44</sup>

3.23 The Act stipulated that any contract for the provision of mediation should require that the mediator comply with a code of practice.<sup>45</sup> The mediator would be required to:

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39 Same as above.

40 Same as above, at paragraph 9.11.

41 As noted in an earlier footnote, Part III of the 1996 Act (which amended the English Legal Aid Act 1988 in relation to the provision of state-funded mediation) has since been repealed and incorporated into the Funding Code for the Community Legal Service (which replaced the former Legal Aid Board) following repeal of the 1988 Act by the English Access to Justice Act 1999: see Schedule 15, Part I, Access to Justice Act 1999. See also discussion under 'More recent developments' below in this chapter.

42 Section 15(3F)(b) of the English Legal Aid Act 1988 as inserted by section 29 of the Legal Aid Act 1996. It was proposed that the implementation of section 29 would be piloted in two areas initially which would assist in planning implementation throughout the country.

43 The English Legal Aid (Mediation in Family Matters) Regulations 1997, (SI 1997; 1078) in force on 1 May 1997.

44 Same as above, at Rule 5.

45 An example would be the mediator ensuring that parties participate freely and not influenced by fear of violence or harm: see section 13B(7) of the Legal Aid Act 1988 as inserted by section 27 of the Family Law Act 1996.

*“have arrangements designed to ensure that the parties are encouraged to consider:*

- (a) the welfare, wishes and feelings of each child; and*
- (b) whether and to what extent each child should be given the opportunity to express his or her wishes and feelings in the mediation.”<sup>46</sup>*

### **Access to Justice - the Woolf reports**

3.24 The changes in England proposed in the family dispute resolution system and the legal aid system were paralleled by changes proposed in the civil justice system of the courts.

3.25 Lord Woolf, in his interim report on the civil justice system in England and Wales,<sup>47</sup> criticised the present court system as being unequal, expensive, uncertain, slow, complicated, fragmented and adversarial. He stated that, *“the key problems are cost, delay and complexity which stem from the uncontrolled nature of the litigation process.”<sup>48</sup>*

3.26 Although Lord Woolf did not deal specifically with reform of the family court system in his interim report, his proposed reforms have relevance for case management, and for making alternative systems of dispute resolution (ADR) available, and for encouraging their use. The first pertinent recommendation is:

*“Where there is a satisfactory alternative to the resolution of disputes in court, use of which would be an advantage to the litigants, then the courts should encourage the use of this alternative; for this purpose, the staff and the judiciary must be aware of the forms of ADR which exist and what can be achieved.”<sup>49</sup>*

3.27 Lord Woolf recognised that *“the role of ADR can be of great value to the parties and the court in achieving expedition and in the saving of expense to the parties and the saving of resources for the court.”<sup>50</sup>* His objectives included that:

- (a) the parties should settle their disputes before resorting to court whenever it is reasonable to do so. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage, and*

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46 Section 13B(8) of the English Legal Aid Act 1988 as inserted by section 27 of the Family Law Act 1996.

47 *Access to Justice*, Interim Report to the Lord Chancellor (Jun 1995).

48 Same as above, at 1.

49 Same as above.

50 Same as above, at Chapter 18, para 25.

- (b) where there is an appropriate ADR mechanism which is capable of resolving a dispute more economically and efficiently, then the parties should be encouraged not to commence or pursue proceedings until after they have made use of that mechanism.<sup>51</sup>

### *Legal Aid*

3.28 Lord Woolf recognised that the absence of legal aid for ADR might be a reason for its relatively low use. He suggested that the use of an ADR scheme, if available, should be taken into account when a legal aid certificate for court was being considered.<sup>52</sup>

3.29 In his final report, *Access to Justice*,<sup>53</sup> Lord Woolf recommended legal aid funding for pre-litigation resolution of disputes and for ADR. It was proposed that at the case management conference and pre-trial review, the parties should be required to state whether the question of ADR had been discussed and, if not, why not, and if so, with what result. In deciding on the future conduct of a case, it was proposed that the judge should be able to take into account the litigant's unreasonable refusal to attempt ADR. Additionally, the court should take into account whether the parties behaved unreasonably in the course of ADR.

3.30 Lord Woolf recognised that lawyers may interpret a suggestion to use ADR as a sign of weakness. Therefore, he encouraged judges to suggest to the parties that substantial costs might be avoided by the use of ADR. This was only to occur when the parties had not discussed ADR. Lord Woolf reserved for consultation the question of whether an unreasonable refusal to resort to ADR should be a relevant factor in deciding costs. In his final report he suggested that orders for costs should reflect not only the outcome of proceedings, but also the way in which the parties or their legal representatives had conducted their cases.

3.31 Other recommendations included that the Lord Chancellor and the Court Service should treat as one of their responsibilities promoting the benefits of ADR to the public. Lord Woolf's reports stressed the need for the system to become more responsive to the needs of litigants. This would be achieved by providing more information to litigants through leaflets, videos, telephone helplines and information technology. Court staff should provide information and help to litigants on how to progress their cases, and there would be ongoing monitoring and research on litigants' needs.<sup>54</sup>

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51 Same as above, at Chapter 4, para 7.

52 Same as above, at Chapter 18, para 35.

53 This was issued on 26 July 1996.

54 Since then, the Lord Chancellor's Department has published a comprehensive booklet in plain English, *Resolving Disputes Without Going To Court*, and the important study, *Paths to Justice: What People Do and Think About Going to Law* (1999) by Prof Hazel Genn, has been completed.

## ***Response of the Law Society***

3.32 The English Law Society conceded that it may be legitimate to require parties to consider mediation before using the courts in circumstances where mediation could be justified on the ground of cost effectiveness and where it did not undermine public confidence.<sup>55</sup>

### *Restrictions on access to justice*

3.33 The Law Society accepted that *“the state’s obligation to provide an authoritative means of resolving disputes need not imply unrestricted access to the courts for all disputes.”*<sup>56</sup> However, in the Society’s view, any restriction must apply to all potential litigants not just to those who are legally aided. In their view, this would ensure equal access to justice and avoid alternative schemes degenerating into second-rate alternatives used only by the poor.<sup>57</sup> To ensure fairness, which requires equal access and choice, compulsory mediation was unacceptable, however.<sup>58</sup>

### *Settlement by lawyers*

3.34 The Law Society urged more measures to promote earlier settlements.<sup>59</sup> In defence of solicitors, it said that if they were only motivated by money, they would not settle 95% of cases, albeit at a late stage. The Society acknowledged that court-door settlements were particularly inefficient as they do not save very much in costs unless the trial was scheduled to last some weeks, as brief fees and cancellation fees for experts often still had to be paid.<sup>60</sup>

### *Court-annexed mediation*

3.35 The Law Society was disappointed that Lord Woolf did not make specific recommendations on a court-based pilot project in mediation. In the Society’s view, until there was more research into ADR, and a wider network of mediators available, a judge would not be able to properly assess a litigant’s refusal to undergo ADR.<sup>61</sup> The Law Society recommended that proper funding should be provided for experimental schemes on court-annexed mediation, *“to gather enough experience to demonstrate what benefits can be secured.”*<sup>62</sup>

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55 "Making Justice Work," English Law Society submission to the Lord Chancellor’s Department’s fundamental review of expenditure on civil litigation and legal aid (June 1994), at para 2.11.

56 English Law Society (1994), above, at para 3.27.

57 Same as above, at para 3.28.

58 Same as above, at para 2.12.

59 The English Law Society’s first submission to Lord Woolf’s Review of Civil Justice, March 1995.

60 English Law Society (1994) above, at para 8.1.

61 “The Law Society’s Provisional Response,” Aug 1995, at para 9.

62 English Law Society (1994), above, at para 3.24.

## **More recent developments**

### *Part II of the Family Law Act 1996*

3.36 In January 2001, the Lord Chancellor announced<sup>63</sup> that Part II of the Family Law Act 1996, which had not yet been implemented, did not meet Government objectives of saving marriages or helping divorcing couples to resolve problems with a minimum of acrimony. The announcement said that the Government would therefore ask Parliament to repeal Part II of the Act in due course.

3.37 As we noted earlier in this chapter, the provisions of Part II of the Family Law Act 1996 proposed to change the arrangements for divorce so that a no-fault, "process over time" procedure would be introduced to replace the existing system. However, the Government has now concluded that *"[t]he complex procedures in Part II would be likely to lead to significant delay and uncertainty in resolving arrangements for the future."*<sup>64</sup> The Government was concerned that this delay would not be in the best interests of either couples or their children. The Lord Chancellor was quoted as saying that:

*"The Act's complexity is likely to cause a great deal of uncertainty over the divorce process which will be unhelpful for families at what is always a difficult and emotional time."*<sup>65</sup>

### *Information meetings*

3.38 Also central to Part II of the Act were the compulsory information meetings proposed under section 8 of the Act, which were intended (as it proved, perhaps unrealistically) to serve the dual purpose of helping couples either to save their marriages or to end them with minimum distress and acrimony. In relation to these, the announcement stated that:

*"Different types of information meetings have been tested in pilot schemes for two years. But the research concludes that none of the six models of meeting was good enough for the implementation of Part II on a nationwide basis."*<sup>66</sup>

3.39 The research had indicated that, although those attending the meetings had valued the provision of information, the particular models of

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63 See press release issued by the Lord Chancellor's Department, "Divorce Law Reform - Government Proposes to Repeal Part II of the Family Law Act 1996" (16 Jan 2001, No 20/01), available at <http://www.lcd.gov.uk/pressnfr.htm>.

64 Same as above.

65 Same as above.

66 Same as above. The information meetings pilot schemes were launched in June 1997. Six models of information meeting were piloted. The programme was completed in June 1999, when the Lord Chancellor confirmed that preliminary results of the English pilot schemes were disappointing. The Final Evaluation Report was presented to the Lord Chancellor by the Newcastle Centre for Family Studies in September 2000: see Newcastle Centre for Family Studies (Research Director: Prof Janet Walker), *Information Meetings and Associated Provisions within the Family Law Act 1996* (2001).

information meetings that were piloted in England were not effective in helping most people to save their marriages (one of the emphasised objectives of the meetings), as the meetings came too late. The evidence showed that the meetings tended to incline those who were uncertain about their marriage towards divorce. Other shortcomings with the information meeting models that were piloted were that:

*"They were too inflexible to provide people with information tailored to their personal needs. In addition, in the great majority of cases, only the person petitioning for divorce attended the meeting, but marriage counselling, conciliatory divorce and mediation depend for their success on the willing involvement of both parties."*<sup>67</sup>

3.40 In terms of the way forward, it was stated that:

*"The Government will build on the evidence provided by research to consider how best to provide families experiencing relationship difficulties, in particular those with children, with the information and support that they want at the time that they need it."*<sup>68</sup>

#### *Publicly funded family mediation*

3.41 In addition to the pilot studies which were carried out on information meetings, a research study was commissioned by the English Legal Services Commission (formerly the Legal Aid Board) to monitor the mediation component of the Family Law Act reforms.<sup>69</sup> The various objectives of this study<sup>70</sup> included determining:

- the relative benefits and cost effectiveness of contracting for the provision of publicly funded and quality assured family mediation services through different supplier arrangements available in England;
- the level of quality assured legal advice necessary to support publicly funded family mediation and the most cost effective arrangements for providing it;

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67 Lord Chancellor's Department Press Release (Jan 2001), above.

68 Same as above. Lord Irvine went on to state that: *"The Government has taken forward a wide range of measures over the past three years to help families, including establishing the new Children's Fund and the Children and Family Courts Advisory and Support Service, improving maternity and parental leave arrangements, and increasing funding for marriage and relationship support to a total of 5 million pounds per annum by 2002-2003."* It was footnoted in the press release that the decision regarding Part II did not affect section 22 of the 1996 Act, which relates to the funding of marriage support services and remains in force.

69 See: Prof Gwynn Davis, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (2001). (See also the *Summary Report* to the report.)

70 Same as above, at para 2.1.

- the relative costs/benefits, both for the assisted person and the taxpayer, of the provision of publicly funded mediation and supporting legal advice, compared with the current arrangements.

3.42 The study made an extensive series of findings based on the particular English mediation services environment that was tested. These findings are summarised below:

#### *Types of cases*

- 85% of cases referred to mediation providers involved disputes about arrangements for children. 33% had financial or property disputes as one of the components. Disputes over children tended to dominate the caseloads of not-for-profit services, while lawyers dealt with a preponderance of financial issues.<sup>71</sup>
- 70% of the mediation cases in the English study were referred by solicitors (some in response to the statutory requirement and some voluntarily). 12% were referred by the court and the rest (18%) self-referred.<sup>72</sup>
- Conversion from “intake” (ie, initial referral) to actual mediation:
  - Resulting from section 29 referrals – 30%;
  - Other solicitor referrals – 61%
  - Court referrals – 65%
  - Self referrals (often by one party alone) – 52%.<sup>73</sup>
- Under the particular conditions of the English study, the advent of public funding for mediation did not appear to have an immediate impact on the volume of mediation activity. The statutory requirement that legal aid applicants *explore* the possibility of mediation did lead to a significant increase in the number of cases referred to mediation providers (ie, “intake” cases), although overall, the increase in mediation uptakes was found to be modest.<sup>74</sup>

#### *The mediation experience*

- People's experience of mediation was found to be positive on the whole. It was noted that there was a tendency for the not-for-profit sector to score higher on questions relating to children issues, and for the for-profit sector to score higher on financial disputes (most notably in respect of mediator understanding).<sup>75</sup>

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71 Same as above, at para 8.1.

72 Same as above, at para 11.1.

73 Same as above, at para 16.1.

74 Same as above, at para 7.1.

75 Same as above, at para 17.1.

- Mediation on children issues drew quite high levels of customer satisfaction (35% found mediation “very helpful”; a further 35% found it “fairly helpful”; 51% thought the mediator had understood their situation “very well”; a further 27% thought the mediator had understood “fairly well”; 71% said that they would recommend mediation to others experiencing a dispute about children).<sup>76</sup>
- “Fear of violence”, whilst featuring in a great many of these cases, appeared for the most part to be overcome in mediation. Women's responses to the mediation experience were, on the whole, slightly more positive than those of men.<sup>77</sup>

### *The mediation process*

- The mediators involved in the study appeared to accept the principle that they determined suitability of cases, which was largely equated with willingness of the parties to participate. It was found that, as it was common practice for only one party to attend an intake appointment, judgement of suitability for mediation could be only provisional at that stage.<sup>78</sup>
- In approximately 50% of cases in the English study, the experience of mediation (as distinct from “intake”) was confined to just one mediation session. The bulk of the remaining cases involved two or three mediation appointments. The researchers commented that this pattern probably reflected the predominance of “children only” mediations, most of which seemed to involve just the one meeting.<sup>79</sup>
- The nature of the mediation process was strongly influenced by the issues under discussion. Mediation on property/finance was so different from mediation on children issues that it was not clear that the skills required were of the same order.<sup>80</sup>
- Family mediators were expected to remain impartial as between the parties and neutral as to the outcome. They were also supposed, as far as was possible, to redress imbalances of power between the parties and to protect children's welfare. (The researchers noted that there appeared to be some logical inconsistency between these objectives.<sup>81</sup>) Mediators generally refrained from directly expressing opinions, but certainly in child-related disputes imposed “parameters of the permissible.”<sup>82</sup>

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76 Same as above, at para 17.3.

77 Same as above, at para 17.2.

78 Same as above, at para 15.4.

79 Same as above, at para 18.1.

80 Same as above, at para 18.5.

81 Same as above, at para 18.6.

82 Same as above.

- There were no cases in the study where children were included in mediation sessions, or where the mediator saw the children. However, the children's perspectives were routinely discussed. Mediators varied in the extent to which they focused on the children's futures, or treated these as incidental to reaching an agreement between parents.<sup>83</sup>
- The researchers found that there appeared to be a problem in the English mediation services sector in relation to the variety of expertise brought to bear. The researchers commented that this had implications for the development of a consistent service.<sup>84</sup> They also noted that, *“The issue of termination of mediation following upon a failure to reach agreement requires further consideration ... as there appears to be little attempt to consider with the parties their possible future options.”*<sup>85</sup>

#### *Mediation agreement rates*

- Within the context of the English mediation services sector, the researchers observed that the positive responses to “softer” measures of appreciation of mediation did not necessarily translate into the “hard” measure of agreement.<sup>86</sup> The researchers commented: *“That is not to say that mediation has not made a worthwhile contribution. It is probably inappropriate to seek to apply the apparently all or nothing measure of ‘agreement’ to a relatively brief intervention in respect of issues (such as a child’s contact with the non-resident parent) which almost inevitably call for continued negotiation.”*<sup>87</sup>

#### *The cost of each mediation case paid for by the government*

- The English study found that over the period of the pilot there had been massive variation by supplier in terms of the cost of each mediation case paid for by the Commission. *“The modal cost amongst not-for-profit suppliers is of the order of £700 per mediation case, whilst the modal cost amongst for-profit suppliers is some £1,200 per case. Not-for-profit suppliers have tended, over the period of our monitoring, to have lower costs per case than have for-profit suppliers.”*<sup>88</sup> The researchers commented that it was

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83 Same as above, at para 18.10.

84 Same as above, at para 18.12. The researchers found that the unevenness of expertise was most noticeable in relation to property and financial issues, based on evidence on the not-for-profit sector: same as above.

85 Same as above, at para 18.11.

86 The study found that, according to mediation providers, mediation in respect of children issues resulted in ‘agreement’ in some 50% of cases, whilst in financial disputes the agreement rate was of the order of 34%. They also found that, of those who reported that they had reached a measure of agreement at mediation, 59% said that they thought they would be able to modify this as necessary in the future: same as above, at paras 19.1 and 19.4.

87 Same as above, at para 19.3.

88 Same as above, at para 22.1.

likely that following the pilot, the mediation cost per case would fall, and there would also be a convergence across all suppliers. This was largely, they stated, "because we would expect [that] the government would not be prepared to invest large sums in return for low case volumes to the degree that it felt bound to do with the mediation pioneers."<sup>89</sup>

#### *Impact of mediation upon applications for legal aid*

- The researchers observed that: "[I]f we confine ourselves to the question of the impact of mediation upon legal aid certificates issued, although there appears at first sight to be a mediation effect, when methods are adopted to correct for variations in case mix the evidence no longer supports this.<sup>90</sup> ... We found that when everything is factored in – including age, sex, income, and the presence of children - the impact of mediation upon the award of legal aid falls to zero."<sup>91</sup>
- This is a somewhat controversial finding and the researchers noted that this was the picture reflected in this particular set of data. They further qualify their finding by adding: "However, much depends on the means by which cases are selected and referred to mediation. A better system of case assignment, and a more efficient referral mechanism, with mediation being integrated into the early stages of legal proceedings, could have some impact upon the demand for lawyer services, although we should not expect this impact to be anything but modest.<sup>92</sup> ... It has to be emphasised that this analysis leaves on one side the potential benefits of mediation – principally the parties' satisfaction with process and outcome."<sup>93</sup>

#### *The impact of mediation upon lawyer costs*

- Similarly in relation to lawyer costs, the researchers found that their particular data indicated that mediation brought downward pressure to bear on lawyer costs to a very limited extent only,<sup>94</sup> although they note that it is important to appreciate that achieving an impact upon lawyer costs, "is just one of the expectations which one might have of mediation."<sup>95</sup>

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89 Same as above, at para 22.2.

90 Same as above, at para 23.8.

91 Same as above, at para 23.7.

92 Same as above, at para 23.9.

93 Same as above, at para 23.8.

94 Same as above, at para 24.4.

95 Same as above, at para 24.3.

### *Problems in comparing mediators and lawyers*

- A further controversial finding from the English study was that, overall, the response of the English test subjects to solicitors was even more positive than their response to mediation. From this, the researchers extrapolated: *“There is clear evidence that the presentation of solicitors as aggressive troublemakers (with mediation, in comparison, as the embodiment of reasonableness and compromise) is a caricature which deserves now to be regarded as of historical interest only. Solicitors’ partisanship remains, however, an important feature, and is highly valued by those facing these particular stresses.”*<sup>96</sup>
- The researchers also observed that one of the arguments advanced in support of mediation was that it was a preferable strategy for dealing with children issues because parents had to continue to negotiate, and the experience of mediation helped them to do that. In the particular context of the English study however, the results suggested that the longer-term impacts of mediation and solicitor negotiation might be similar. The researchers commented: *“This finding casts doubt on one of the claims made on behalf of mediation, namely that it improves the parties’ capacity to negotiate together in the future.”* They added, however, the qualifying comment that: *“Given that mediation is in so many instances a relatively fleeting intervention, this is perhaps not surprising.”*<sup>97</sup>

### *The need to develop independent measures of value*

- The researchers made the significant observation that the study was conducted within a “legal-centric” environment. They stated: *“Debates concerning the respective roles of lawyers and mediators in divorce do not for the most part reflect coherent conceptions of value.”* They noted that the commonly employed measures of “success” when reviewing mediation and lawyer services were: a) diversion from contested legal proceedings; and b) the conclusion of those proceedings without resort to trial. The researchers commented that these were not adequate measures of value. They stated: *“The question: ‘To what extent are things now better?’ tends not to be asked, although it ought to be asked of both lawyer and mediation services.”*<sup>98</sup>
- They continued: *“Legal advice and representation is the dominant model, with mediators being asked to prove themselves through their ability to deliver (at least part of) what lawyers deliver, but at reduced cost.”* They commented that [within the context of the English mediation services sector]: *“It is probably more appropriate*

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96 Same as above, at para 20.1.

97 Same as above, at para 21.1.

98 Same as above, at para 29.1.

*to regard mediation as an aid to private communication – in which case we should not expect it to have much impact upon the demand for legal services.*<sup>99</sup>

- The researchers conclude under this head that [in the English context at least] there is little prospect of mediation replacing lawyers. They state: *“That is not to say that mediators cannot provide a valuable service to some couples, but unfortunately the policy debate has tended to focus upon diversion from legal services. Our evidence suggests that in order to have a significant impact upon the volume of legal activity, and upon legal costs, these matters have to be tackled directly.”*<sup>100</sup>

#### *The future of mediation*

- Based on the findings of the English study, the researchers made the (what would appear, somewhat sweeping) assertion that government support for family mediation *“reflects professional enthusiasm, with little regard to the low client base.”* They suggested that this has come about because, *“the ‘story’ of mediation – its association with reasonableness and compromise – is appealing,”* and also that *“government has accepted the mediators’ argument that spiralling legal costs can be cut through diverting cases to mediation.”*<sup>101</sup>
- In relation to this last point, the researchers suggested that mediation should not be judged by whether it can reduce the cost of lawyers as, in their view, this *“is not a realistic expectation.”*<sup>102</sup> They noted that mediation could be a cost-effective option in resolving some disputes at a particular point - where both parties commit themselves to the process.<sup>103</sup>
- They recommended that the effective utilisation of mediation called for good case selection and, secondly, for a system of referral which would secure the engagement of both parties. They noted that timing was critical. *“There is plentiful evidence, in the UK and abroad, that mandatory referral to mediation which follows immediately upon the parties seeking legal help is not effective as a means of securing legal settlement. Equally there is evidence that court-sponsored mediation which follows earlier attempts to negotiate on a bi-partisan basis can indeed ‘work’ in these terms.”*<sup>104</sup>

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99 Same as above, at para 30.2.

100 Same as above, at para 30.5.

101 Same as above, at para 31.1.

102 Same as above, at para 31.2.

103 Same as above, at para 31.3.

104 Same as above, at para 31.4.

- The researchers noted that "section 29," the statutory requirement for lawyers to inform their clients about mediation, was not, as it currently operated, an effective means of getting those who might benefit from mediation to consider it at what was, for them, the right time. The researchers noted: *"If we are to have mandatory referral to mediation, or mandatory consideration of the mediation option, this needs to be embedded more firmly within legal proceedings."*<sup>105</sup>
- In their conclusions, the researchers suggested two possible strategies as the way forward for mediation services. The first would be a system comprising an initial court assessment, which would rule out patently unsuitable cases, *"followed by mandatory referral to mediation (mandatory in the sense that further legal aid and court resources would not be forthcoming until mediation had been attempted)."*<sup>106</sup>
- A second strategy suggested by the researchers might be *"to promote mediation as a genuine alternative to litigation. Separating couples might be informed of its existence, and its potential benefits. One could conceive of a number of potential 'information points', without requiring people to attend a special meeting for this purpose."* They suggested that mediation on this level would be judged *"by its ability to provide a service which people value."* They noted that government sponsorship was compatible with this. They added that in their view, however, *"it would be unrealistic to expect these services to have much impact upon the demand for lawyer advice, negotiation and representation."* They concluded that: *"[m]ediation would be supported as a separate, parallel system, with its own distinctive and worthwhile features."*<sup>107</sup>

## Conclusion

3.43 The English reforms in this area are still clearly in the process of development. While the findings of their recent research studies are of general interest, they must be viewed, of course, within the particular context of the English family dispute resolution system and their mediation services sector. It would therefore be inappropriate to draw any direct correlations between survey findings in England and our system here in Hong Kong which has its own unique cultural conditions and legal framework.

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105 Same as above, at para 31.5.

106 Same as above, at para 31.5.

107 Same as above, at para 31.6.

## Chapter 4

# The family dispute resolution system in Australia and New Zealand

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4.1 In the previous chapter, we reviewed the developments that have taken place in England in recent years with respect to family dispute resolution. In this chapter, we focus on how family dispute resolution systems have evolved in Australia and New Zealand.

## Australia

### *Jurisdiction*

4.2 There is a division of view as to whether a Family Court should have a unified jurisdiction which includes all matters affecting a family, from taking children into care to divorce matters. The Family Court of Western Australia, for example, has jurisdiction over federal and state matters while in other states the state court only deals with such aspects of family law as, for example, family violence orders or children in care. Broadly speaking, in Western Australia the Registrar or magistrate hears undefended divorce lists, directions, applications for interim orders of custody and access, injunctions, maintenance and summary access proceedings. This leaves the judges to hear defended property, custody and access proceedings for final orders, defended divorce proceedings, contempt of court, Hague Convention applications and other interim matters of a complex nature.<sup>1</sup>

### *Aims and objectives of the Family Court*

4.3 In the 1993-94 Program Performance Statement of the Attorney General's Portfolio, the objectives of the Family Court were defined as being *"to serve the interests of the Australian community by providing for the just and equitable administration of justice in all matters within the court jurisdiction."*<sup>2</sup> In furtherance of those ends, waiting times were established for

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1 Family Law Council report, *Magistrates in Family Law* (Jul 1995), at para 2.14.

2 Attorney General's Portfolio, Program Performance Statement 1993-1994, at 160.

certain stages of proceedings,<sup>3</sup> and the Family Court simplified its forms to make them more user-friendly.<sup>4</sup>

4.4 The need to enhance the “*just and equitable administration of justice*” has led to an increasing emphasis on alternatives to litigation as a means of resolving family disputes. This was reflected in the report of the Joint Select Committee of the Commonwealth Parliament on the Family Law Act,<sup>5</sup> which recommended that:

*“100 the provisions of the Courts (Mediation and Arbitration) Act 1991 be expanded to encourage and implement the development of alternative dispute resolution mechanisms, not within the existing adversarial system but as realistic alternatives available at any time.*

*101 agreements made between parties using alternative dispute resolution processes should not be subject to scrutiny or approval of the courts prior to signature by the parties.*

*102 the legislation [should] provide for the review by the Family Court of any agreement reached between the parties in the event that there is a dispute in relation to agreements reached, such review to be subject to a time limit.*

*103 the Family Court of Australia and the legal profession [should] take an active role in identifying matters which may be more suitable for resolution by alternative disputes resolution mechanisms.”*

4.5 In its 1994 report on *Access to Justice, An Action Plan*, the Access to Justice Advisory Committee proposed a Draft Court Plan which included the following objectives:

- (1) to adopt consistent simplified procedures and practices which set performance standards and minimise delay and costs to litigants;
- (2) to ensure equitable access to court services for all potential clients;
- (3) to promote fairness and the avoidance of bias;

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3 Same as above, at 163.

4 This was also in response to a report from the court: see *Report of the Simplification of Procedures Committee* (1993).

5 *The Family Law Act 1975: Aspects of its Interpretation and Operation* (1992), recommendations at 320.

- (4) to ensure staff are aware of and meet customer needs effectively; and
- (5) to ensure that the availability of resources reflects court priorities in access to justice and customer service.<sup>6</sup>

### ***Mediation and the Access to Justice Report***

4.6 The Access to Justice Advisory Committee's remit was to seek ways to enhance access to justice and make the legal system fairer, more efficient, and more effective. One aspect of their study was consideration of the role which could be played by mediation. The Committee recognised that there were arguments against the use of court-annexed mediation,<sup>7</sup> but recommended that these be taken into account in:

*“the framing of official programs intended to encourage resort to ADR. This can be achieved, at least to some extent, by encouraging appropriate training for mediators and establishing screening processes to identify parties whose disputes are unsuitable for mediation”.*<sup>8</sup>

#### *Arguments against court-annexed mediation*

4.7 The Access to Justice report outlined the arguments against court-annexed mediation as follows:

- (1) *“It is claimed that courts are places of public authority, where judges make decisions that are enforced by sanctions. These qualities are ... inherently incompatible with the philosophy of ADR, which is based on the consensual resolution of disputes.”*<sup>9</sup>

The report's response was that this was not an argument against court-annexed mediation itself, but rather against courts having the power unilaterally to refer parties to mediation.<sup>10</sup>

- (2) The involvement of judges in ADR will erode respect for the judiciary: *“ADR attached to courts devalues the very nature of judicial decision-making and changes the focus of courts as sovereign decision-makers.”*<sup>11</sup>

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6 These are strategies 1a-1e of the “Draft Court Plan”: see Access to Justice Advisory Committee, *Access to Justice, An Action Plan* (1994), at para 15.14.

7 They outlined these as privatisation of disputes, power imbalances, cost savings by government, and second class justice.

8 Access to Justice Advisory Committee (1994), above, at para 11.6.

9 Same as above, at para 11.45.

10 They noted that no Federal court has the power to so refer, without the consent of the parties.

11 Street, “The Court system and Alternative Dispute Resolution Procedures,” in *Australian Dispute Resolution Journal* (1990) vol 1, 5 at 10.

- (3) Some techniques of mediation, such as private caucus sessions with each party, are inconsistent with the judicial process, which must be public and scrupulously fair to both sides.<sup>12</sup>

The Chief Justice of the Federal Court responded by saying that in the five years that it had been available, no complaints had been received that the ADR system allowed improper access to the Court.<sup>13</sup>

#### *Arguments in favour of court-annexed mediation*

4.8 The arguments in favour of court-annexed mediation identified by the Access to Justice Advisory Committee were:

- (1) Reduction of costs, as disputes are settled earlier. As a result, the court's capacity to cope with its caseload will be increased,
- (2) ADR gives an opportunity to make better use of existing resources, and
- (3) It enhances the acceptability and quality of decisions.<sup>14</sup>

4.9 The Access to Justice Advisory Committee concluded by endorsing the Joint Select Committee's recommendation of a shift to ADR in family matters, "*provided that appropriate steps continue to be taken to minimise the risk of gender bias in mediations in family law matters.*" They acknowledged that ADR made a substantial contribution to access to justice, and stressed that adequate resources should be made available to implement their recommendations.<sup>15</sup>

#### *Standards and evaluation*

4.10 Even though the Committee did not agree with an official accreditation scheme, it did consider that the Australian government should:

*"take such measures as are consistent with the independence of the judiciary to ensure the quality, integrity, accountability and ... accessibility of the ADR programs offered in the Family Court, ... and through the Family Mediation Program."*<sup>16</sup>

4.11 The Committee recommended that this obligation could best be fulfilled by establishing a specialist ADR body to advise government and the courts on ADR policy issues, including minimum standards for their

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12 Street, "The Courts and Mediation - a Warning," in *Australian Dispute Resolution Journal* (1991) vol 2, at 203.

13 See "Comment" (1993) 67 ALJ 941, 942.

14 Access to Justice Advisory Committee (1994), above, at para 11.49.

15 Same as above, at para 11.2.

16 Same as above, at para 11.52.

programmes. This body should also consider establishing a national database containing information about programmes, agencies, practitioners and training.<sup>17</sup> Most importantly, the Australian government must ensure that federal ADR programmes were regularly and rigorously evaluated to ensure that they were achieving their objectives without systemic disadvantages for any user groups.<sup>18</sup> The evaluation would include a comparison with unstructured negotiation outside the court system, and with conventional litigation through the court system itself. The evaluation should also address client satisfaction and the cost effectiveness of the programmes in comparison with other modes of dispute resolution.

#### *Goals of court-annexed mediation*

4.12 The Committee noted the concern expressed by the New South Wales Law Reform Commission,<sup>19</sup> that the guidelines for the operation of court-annexed schemes should ensure that case management and reduction of court delays are not the sole, or primary, reasons for implementation of ADR programmes. If this were so, there would be a danger that parties might be coerced into mediation.

4.13 The Committee recommended that the principles set out in the Society of Professionals in Dispute Resolution's (SPIDR) report on *National Standards for Court-Connected Mediation Programs* should form the basis of the minimum standards for Federal programmes.<sup>20</sup> These standards would be included in court charters, which would specify standards of service to be provided to members of the public.<sup>21</sup>

#### *Implementation of the Access to Justice report*

4.14 The Federal government issued a "Justice" statement in May 1995 in which it committed itself to making dispute resolution services more widely available. Funding was allocated to 24 new family mediation services throughout Australia over a four-year programme. Funding was also allocated to expand community based family mediation services. In a national poll in July 1995, only 17% of Australians were aware of the availability of family mediation services. In December 1995 a community education programme was launched to inform the community about the availability of such services. A National Alternative Dispute Resolution Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the expansion of alternative dispute resolution.

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17 This was first proposed by the New South Wales Law Reform Commission, in their report, *Training and accreditation of mediators* (Sep 1991).

18 Access to Justice Advisory Committee (1994), above, at para 11.53.

19 New South Wales Law Reform Commission (1991), above.

20 SPIDR reported in 1991: see Access to Justice Advisory Committee (1994), above, at para 11.59, where the principles are outlined.

21 Access to Justice Advisory Committee (1994), above, at para 15.1.

## **Australian Family Law Reform Act 1995**

4.15 The Government responded to reform proposals by shifting the focus of the family law system from litigation to non-adversarial dispute resolution processes.<sup>22</sup> The Family Law Reform Act 1995 (the 1995 Act) reflected this shift, and came into force in 1996.

4.16 The 1995 Act provided a mechanism for community based counselling and mediation organisations to become approved organisations under the Family Law Act 1975. The immunity, confidentiality and admission provisions that already protected court mediators were extended to these approved organisations. Increased budget provisions were made to implement the legislation. Section 13E placed a duty upon the Minister to publish a list of approved organisations.

4.17 The 1995 Act introduced the term “primary dispute resolution” to refer to arbitration, counselling and mediation. This was intended to emphasise that these were the primary, rather than the “alternative,” dispute resolution processes for family law disputes.<sup>23</sup>

## **Counselling services of the Family Court**

### *Counselling*

4.18 The Family Law Act 1975 made provision for court counselling services to support the family, both before and during the court process, and to assist them to adjust to court orders.<sup>24</sup> All counsellors attached to the court programme, or in approved counselling organisations, are now called family and child counsellors to emphasise the child’s needs.

4.19 A party to a marriage can seek counselling from a family and child counsellor by applying to the Family Court by notice. Such an application can be made without any other proceedings being taken.<sup>25</sup> On receiving the notice, the court service “*shall arrange ... for the parties to be interviewed ... for the purpose of ... the improvement of their relationship to each other or to any of the children.*”<sup>26</sup> There are also provisions for a parent or a child to seek such counselling from the court service,<sup>27</sup> or a person may request the service direct from a family and child counsellor without a notice.<sup>28</sup>

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22 It issued a report - *The Family Law Act 1975 : Directions for Amendment* (1993).

23 Section 14E of the Family Law Act 1975 (the 1975 Act), as inserted by the Family Law Reform Act 1995 (the 1995 Act).

24 Same as above, at section 14.

25 Same as above, at section 15.

26 Same as above, at section 15(2).

27 Same as above, at section 62E.

28 Same as above, at section 62D, as substituted by the 1995 Act.

4.20 If, when making an order or granting an injunction, the court considers it to be in the interests of the parties or their children to attend upon a family and child counsellor, the court must direct or advise either or both parties to so attend.<sup>29</sup>

4.21 The court can also advise parties to attend counselling if it may improve their relationship to each other or to any of their children.<sup>30</sup> The court must consider whether or not to advise the parties in proceedings, other than those relating to children under Part VII, of counselling to assist them and their children to “*adjust to the consequences of marital breakdown.*”<sup>31</sup>

### *Conciliation counselling*

4.22 The 1975 Act contains provisions for a party to proceedings about children to seek counselling to discuss their care, welfare and development, and to try to resolve the differences between the parties.<sup>32</sup> Conciliation counselling differs from mediation. Conciliation counselling is designed to encourage a couple to talk together to reduce conflict and to encourage agreement of practical issues, particularly issues concerning residence and contact. Conciliation counselling has broader aims than mediation, in that it can include counselling to help parents and children to adjust to the separation and work through their anger and hurt. Section 65L provides that counsellors may be required to supervise or assist compliance with parenting orders by, for example, supervising contact:

*“It is a process whereby separating parents are encouraged and assisted to make joint decisions about the future welfare of their children ... Counsellors are required to maintain a focus on the best interests of the children and to educate parents accordingly.”*<sup>33</sup>

### *Conciliation conference*

4.23 Section 62F of the Family Law Act 1975 gives a discretion to the court, in relevant proceedings,<sup>34</sup> to direct parties to participate in a “conciliation conference” to endeavour to resolve their differences, and to discuss a child’s care, welfare and development. It is also possible to have voluntary conciliation counselling prior to issuing proceedings. Subject to certain exceptions, a parenting order cannot be made unless the parties have

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29 Same as above, at section 16A, as substituted by the 1995 Act.

30 Same as above, at section 16B, as substituted by the 1995 Act.

31 Same as above, at section 16C.

32 Same as above, at section 62C, as substituted by the 1995 Act.

33 Brown, “The Family Court’s Conciliation Programme” (1992), quoted in Davies *et al*, “A study of client satisfaction with Family Court Counselling in cases involving domestic violence,” *Family and Conciliation Courts Review* (Jul 1995) vol 33, 324.

34 This is concerning the care, welfare and development of a child who is under 18.

attended a conciliation conference.<sup>35</sup> The clients only have to agree that they will attend together, not that they will actually conciliate.<sup>36</sup> However, the parties are under an obligation to make *bona fide* endeavours to reach agreement.<sup>37</sup> Failure to attend a conciliation conference when ordered by the court can be regarded as contempt of court.<sup>38</sup>

4.24 If no agreement is reached, or if a person fails to attend the conference, the counsellor or welfare officer will report that fact to the court.<sup>39</sup> Evidence of anything said at these conferences is not otherwise admissible in any court.<sup>40</sup> However, the counsellor does send a memorandum to the court indicating the outcome of the conciliation counselling and offering guidance on future management of the case. This does not disclose privileged information.<sup>41</sup>

4.25 Property matters must also be referred to a conciliation conference before a registrar, and it is possible for both children's and property matters to be considered at a joint conciliation conference conducted by registrars and counsellors.<sup>42</sup>

### *Welfare reports*

4.26 There are provisions under section 62G(1) of the 1975 Act for the court to order welfare reports. The court can order the parties to attend before a welfare officer for the preparation of the report. This report may be received in evidence.<sup>43</sup> Different counsellors are used for this function, some courts going so far as to employ outside agencies to make the reports.<sup>44</sup>

### **Court-annexed mediation**

4.27 Section 19A of the Family Law Act 1975 empowered potential litigants to apply to the Family Court for the appointment of a "*family and child mediator*."<sup>45</sup> Section 19AA allows a person to make such a request direct to a family and child mediator. The court is under an obligation to provide this assistance if it has such a service. Section 19B gave power to the Family

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35 Section 65F of the 1975 Act, as substituted by the 1995 Act. The exceptions are orders by consent, interim or urgent orders, where attendance would be impracticable or there are special circumstances such as family violence.

36 Charlesworth, Turner and Foreman, *Lawyers, Social Workers and Families* (1990), at 185.

37 Order 24 r 1(3) of the Family Law Rules.

38 *R v Cook; Ex p Twigg* (1980) 147 CLR 15.

39 See section 62F(5) of the 1975 Act, and Charlesworth *et al* (1990), above, at 51.

40 Section 62F(8) of the 1975 Act and Order 24(5) of the Family Law Rules.

41 Brown, "Developing and implementing Family Court Services: The Family Court of Australia", paper presented at the Second World Congress on Family Law and the Rights of Children and Youth (Jun 1997), at 17.

42 Same as above.

43 Section 62G(8) of the 1975 Act and Order 25(5) of the Family Law Rules.

44 Hall, "Newcastle revisited by way of the Antipodes," *Justice of the Peace* (1990) vol 24, at 154.

45 The Courts (Mediation and Arbitration) Act 1991 added Part IIIA to the Family Law Act 1975 and this was further amended in the 1995 Act.

Court to refer proceedings to a mediator with the consent of the parties. The court has an obligation to advise the parties to seek the help of a family and child mediator if it considers that this may help the parties to resolve their dispute.<sup>46</sup> The court may adjourn the proceedings to enable attendance at mediation.<sup>47</sup>

4.28 Mediation was first made available in 1992, and is now available in a number of cities.<sup>48</sup> Mediation may be conducted by a single mediator.<sup>49</sup> Mediators are drawn from the ranks of those with either a legal or social science background.<sup>50</sup>

#### *Duty to provide information and advice*

4.29 Both lawyers and judges are placed under a duty to consider the possibility of a reconciliation.<sup>51</sup> They are also required to consider whether or not to advise persons who are considering instituting proceedings about the primary dispute resolution methods that could be used to resolve any matter in dispute.<sup>52</sup> There is a similar requirement in respect of counselling for the parties and their children to adjust to the consequences of marital breakdown,<sup>53</sup> and counselling to adjust to the consequences of Part VII orders.<sup>54</sup>

4.30 The lawyer for the applicant must provide a court approved document which sets out particulars of any mediation and arbitration facilities available at the Court or elsewhere.<sup>55</sup> The lawyer for the applicant must also serve it on the respondent.<sup>56</sup> If the parties are not represented, court staff are under a similar duty.<sup>57</sup> Lawyers may refer clients directly to the mediation service.

#### *Information sessions*

4.31 If mediation is requested by one of the parties, then the Director of Family Mediation of the Family Court may direct both parties to attend an "information session".<sup>58</sup> Parties may also be ordered to attend information

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46 Section 19BA(1), as inserted by section 17 of the 1995 Act.

47 Section 19BA(2), as inserted by section 17 of the 1995 Act.

48 Including Melbourne, Dandenong, Adelaide, Brisbane and Sydney.

49 Order 25A(2)(a).

50 Access to Justice Advisory Committee (1994), above, at para 11.17.

51 Sections 14 and 14CD of the 1975 Act.

52 Sections 14C, 14F and 14G of the 1975 Act.

53 Section 16C(3) of the 1975 Act.

54 Section 62B(3) of the 1975 Act.

55 Order 25A, rules 21(2) and (4). This is a document referred to in section 19J(2) of the 1975 Act which must be given to the parties on request to the appropriate officer of the Family Court, or when persons propose to institute proceedings.

56 Order 25A, rule 21(4) of the Family Law Rules.

57 Section 19 J(2) of the 1975 Act and Family Law Rules, Order 25 A, rule 21(3).

58 See Order 25A, rule 3 of the Rules.

sessions if the court or registrar is of opinion that "*it would be advantageous to do so.*"<sup>59</sup> These sessions are run by a registrar (a lawyer) and counsellor. They outline the range of options available for resolving disputes and:

*"give a more detailed overview of the mediation process. Educational components are also included covering the separation process, communication patterns, children's reactions to separation in the context of child development, couple suitability for mediation and the range of issues that can be mediated."*<sup>60</sup>

4.32 By way of example of the process in action, at an information session attended in Brisbane in February 1995, members of the court counselling service used flip charts to provide information, and answered questions on the legal and psychological process. There were information packs available on the divorce process.

#### *Intake interview*

4.33 After the information session, if the couple request mediation, then a mediator will interview the parties "*to ascertain the willingness and ability of each party to participate in the mediation process.*"<sup>61</sup> The Director of Family Mediation of the Family Court has stated, "*a reasonable power balance in the relationship between the people seeking an agreement is essential to constructive negotiation.*"<sup>62</sup> The first mediation session is arranged at a joint pre-mediation interview, which also discusses any information that may need to be shared and sets agendas for the mediation sessions.

#### *Safeguards*

4.34 Order 25A, rule 5, of the Family Law Rules provides some safeguards by setting out factors to be taken into account in deciding whether a dispute is suitable for mediation:

- "(a) the degree of equality (or otherwise) in the bargaining power of the parties;*
- (b) the risk of child abuse (if any);*
- (c) the risk of family violence (if any);*
- (d) the emotional and psychological state of the parties;*

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59 Order 24 (5)(1) of the Rules.

60 Gibson, "Mediation of Family Disputes in the Family Court of Australia", Paper at the Fifth National Family Law Conference, Perth (Sep, 1992).

61 Access to Justice Advisory Committee (1994), above, at para 11.19. See Order 25A rule 4 of the Rules. The court mediator can also direct the parties to attend an interview.

62 Gibson, "Mediation of Family Disputes in the Family Court of Australia," 20 September 1993, at the launch of the service.

- (e) *whether one of the parties may be using the mediation option to gain delay or some other advantage; and*
- (f) *any other matter relevant to the proposed mediation.”*

4.35 Gibson suggested two further factors should be taken into account, though these are not included in rule 5:

- (1) whether one of the parties has impaired functioning due to alcohol or drug abuse, psychiatric illness or mental instability, and
- (2) whether there is a history of broken agreements affecting trust.

4.36 If mediation is deemed unsuitable, then Order 25, rule 6 provides that the parties will be informed of the other primary dispute resolution methods available. The mediator is required under Order 25A, rule 12, to advise the parties that they should obtain legal advice as to their rights, duties and obligations, at the commencement of mediation, and at any other time if the mediator considers it appropriate, and at the conclusion of mediation and before any agreement becomes legally binding. The mediator can direct the parties to prepare or produce any documents that the mediator considers necessary or appropriate.<sup>63</sup>

### *Goals*

4.37 The goals of mediation are set out in Order 25A, rule 10(1)(a), of the Family Law Rules:

*“... a decision making process in which the court mediator assists the parties by facilitating discussion between them so that they may:*

- (i) *communicate with each other regarding the matters in dispute; and*
- (ii) *find satisfactory solutions which are fair to each of the parties and (if relevant) any children; and*
- (iii) *reach agreement on matters in dispute ... .”*

4.38 Anything said in a mediation conference or meeting to a court mediator, community or private mediator is not admissible in court.<sup>64</sup> A family and child mediator has the same protection and immunity as a Judge of the Family Court in the performance of his functions.<sup>65</sup>

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63 Rule 10 (2) of the Rules.

64 Section 19N of the 1975 Act.

65 Section 19M of the 1975 Act.

## ***Lawyer's involvement in mediation***

4.39 Order 25A, rule 11 of the Family Law Rules provides that parties may be accompanied by their lawyers. Altobelli argued there is a greater chance of settlement where lawyers are involved in the process.<sup>66</sup> He referred to the case conferencing scheme, operated by the Legal Aid Commission of New South Wales at the Parramatta registry of the Family Court, where there is co-mediation with a family lawyer mediator and social scientist mediator:

*“Legal representatives are an integral part of the mediation conference. Anecdotal evidence points to the significant contribution played by legal representatives in assisting the parties to achieve settlement.”*<sup>67</sup>

4.40 This is borne out by a New South Wales study, referred to by Altobelli, which found that 71% of cases with active lawyer participation settled. Unfortunately, those cases which do not settle take up a disproportionate amount of court time, resulting in delays of 12 to 24 months before a hearing in the case of the Sydney registry.<sup>68</sup>

## ***Mediation pilot project evaluation (1994)***

4.41 In 1992 a pilot mediation project (the Family Court Mediation Service) was established in Melbourne to provide comprehensive mediation services in addition to the existing conciliation services. The service was “comprehensive” in that any issue in dispute could be made the subject of mediation. Referrals under the project were voluntary. In 1994, the success of the pilot project was assessed in a report issued by the Family Court of Australia Research and Evaluation Unit.<sup>69</sup>

### ***Comprehensive mediation***

4.42 The fact that the pilot project provided a comprehensive service allowed issues relating to both children and property to be mediated at the same time. The evaluation report found that there was a higher proportion of cases resolved where more than one issue was brought to mediation. Eighty-eight per cent of multiple issue disputes reached agreement, compared to 73% for single issue disputes. Only a small number of cases were mediated in which only issues relating to children were considered.

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66 Altobelli, “Mediation in family law,” Australian Family Lawyer.

67 Altobelli, above.

68 Altobelli, Talk on “Australian Mediation” to the Mediation Group, Hong Kong on 8th August 1994.

69 Bordow and Gibson, *Evaluation of the Family Court Mediation Service* (Mar, 1994) Family Court of Australia Research and Evaluation Unit, Research Report No 12.

### *Reasons for choosing mediation*

4.43 The evaluation report found that a critical factor which persuaded parties to resort to mediation was a desire to avoid court proceedings and their associated costs. Sixty-eight per cent chose mediation to avoid court costs and the adversarial nature of litigation, though 75% were prepared to go to court if mediation did not settle the matter.<sup>70</sup>

### *Satisfaction*

4.44 Of the 82% of cases that achieved some measure of settlement in mediation, 71% settled all matters in dispute and 11% settled one major matter. Eighty-seven per cent of clients reported satisfaction that the decision reached at the mediation was a fair one. Seventy-nine per cent felt that each party had an equal influence over the agreement, while 78% said that the mediated agreement was close to the legal information they were given before the process began.

4.45 Only 5% felt that the mediators had pressured them into agreement. Nineteen per cent felt that they would have reached a more favourable settlement by going to court. The report noted that, though there were inconsistencies, mediation did improve the post-dispute climate and had beneficial effects on the adjustment of members of separating families. The high level of settlement rates showed that the voluntary nature of the referral to mediation seemed to have encouraged the parties to come to agreement, and certainly did not make them take the process less seriously.

### *Durability of agreements*

4.46 Follow-up interviews some eight months after agreement confirmed that 86% of agreements were still in place. Of the 14% that were not, most were re-negotiated through a lawyer, with only one case requiring court intervention. In contrast, 42% of clients who failed to reach a mediated agreement needed a court hearing.<sup>71</sup> This data is supported by other researchers, who have found a “survival rate” of mediation agreements of between 50% and 88%.<sup>72</sup> The Australian statistics on litigation rates for mediated cases are also consistent with other research studies, which found litigation arose in between 4% and 12% of mediated cases which had reached agreement, and between 17% and 35% of cases where mediation had failed.<sup>73</sup>

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70 Same as above, at 5.

71 It is interesting to note that 31% of those who failed to reach agreement subsequently recorded a consent order, and only 27% contested the issues that had been raised in mediation. Same as above, at 92.

72 Same as above, at 93. The report refers to Irving & Benjamin, (1987); Pearson & Thoennes, (1984) amongst others.

73 Mclsaac (1981), above; Pearson & Thoennes (1984), above; and Irving & Benjamin (1987), above.

4.47 Thirteen months after mediation, a study in the evaluation report of court records revealed that: “Less than 5% of successfully mediated cases, compared to 27% of those who failed to reach a mediated settlement, had turned to court for adjudication ....”<sup>74</sup> Of those who did achieve a mediated agreement, 23% had resorted to litigation unrelated to the mediated issues.<sup>75</sup>

#### *Sources of referral*

4.48 The evaluation report concluded that:

*“While mediation should remain voluntary, the role and referral criteria used by the important gatekeepers to the service (legal profession, courts and other non-legal organisations) must be more clearly understood and, if necessary, more standardised. To enhance client-initiated contact there is a need for public education about the existence, purpose and benefits of mediation as an alternative dispute resolution strategy.”*<sup>76</sup>

4.49 It should be noted that 51% of the referrals were from a solicitor<sup>77</sup> or legal aid, 24% were from the family court staff, and 13% from other agencies, which included legal advice centres. Sixty-five per cent of female clients and 54% of male clients had consulted or retained a lawyer at the time they attended mediation.<sup>78</sup>

#### *Timing of mediation*

4.50 The evaluation report found that mediation is most successful when carried out before proceedings have issued. In one research study referred to in the evaluation report, those who attempted mediation prior to involvement with the court recorded a success rate of 79%, compared with 44% for those mediated after court proceedings had terminated.<sup>79</sup>

4.51 The Family Court survey concluded that:

*“couples with current court applications have a significantly reduced chance of a successful outcome. The presence of a ‘litigation shadow’ is not conducive to positive outcomes and has the potential to interfere with the couple’s capacity to be reasonable and conciliatory on the issues under discussion.”*

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74 Bordow & Gibson (1994), above, at 7.

75 These related to divorce proceedings concerning old matters. See further, same as above, at 92.

76 Same as above, at 8.

77 Section 16A of the Family Law Act 1975 then stated that the Family Court and legal practitioners had an obligation to direct the parties’ attention to facilities provided by the court to assist them and their children to adjust to marital breakdown. This had, no doubt, an influence on early referral to mediation by lawyers. The report was completed before the amendments to the 1975 Act introduced by the 1995 Act.

78 Bordow & Gibson (1994), above, at 6.

79 Same as above, at 24.

## *Comments on Family Court evaluation*

4.52 The Access to Justice Advisory Committee found the evaluation report on the Family Court Mediation Service pilot project encouraging, but noted that “*it did not attempt to ascertain why combined property and custody disputes appear to have a higher rate of settlement than matters raising only one of those issues.*”<sup>80</sup> The Committee indicated that a possible explanation was that given by Neely,<sup>81</sup> that women may be pressurised by their husbands to compromise their property entitlements in order to gain custody. The committee also criticised the fact that the research “*did not include any comparative analysis of other mediation programs.*” They warned that as the co-mediation model is unique, care must be taken with comparisons with other models.<sup>82</sup>

## ***Federally funded family mediation - Melbourne evaluation (1995)***

4.53 Since 1988, the Legal Aid and Family Services Division (LAFS) of the Commonwealth Attorney General’s Department has funded a Family Mediation Program, administered by community organisations who provide family and child mediation services. There are 17 such services.

4.54 In January 1995, LAFS issued a report which reviewed the effectiveness of the Family Mediation Program as compared to the Family Court Mediation Service, and profiled the different client groups.<sup>83</sup> The review was conducted in a similar manner to the evaluation of the Family Court Mediation Scheme carried out by Bordow and Gibson, referred to earlier in this chapter. It evaluated two agencies funded by the LAFS, Marriage Guidance Victoria and the Family Mediation Centre, together with the Family Court mediation service.

### *Costs*

4.55 Unfortunately, the survey was unable to make reliable comparisons with the costs of litigation. The only way this could be assessed would be by matching mediation and non-mediation cases right through the court system.<sup>84</sup> The clients attending mediation at one particular centre had lower incomes and these reported that legal costs, even though moderate in some cases, impacted significantly on them.<sup>85</sup>

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80 Report of the Access to Justice Advisory Committee, *Access to Justice, An Access Plan* (1994), at para 11.26.

81 “The primary caregiver parent rule; child support and the dynamics of greed” (1984) 3 *Yale Law and Policy Review* 168.

82 Access to Justice Advisory Committee (1994), above, at para 11.26.

83 Attorney General’s Department, *Federally-Funded Family Mediation in Melbourne - Outcomes, Costs and Client Satisfaction* (Jan 1995).

84 Same as above.

85 Same as above, at xv.

### *Sources of referral*

4.56 An average of 50% of clients came to the agencies by referral, rather than by personal choice.<sup>86</sup> The source of referral varied according to the agency. For example, solicitors and Legal Aid were the highest source of referrals to the Family Court service (51%) and to the Family Mediation Service (47%).<sup>87</sup> The mediation scheme attached to the Family Court attracted a higher proportion of referrals from lawyers than the other agencies. It should also be noted that the staff there provided seminars for lawyers to “*participate in legal education programs and encourage feedback from legal practitioners.*”<sup>88</sup> In total, out of a sample of 55 cases from agencies other than the Family Court mediation service, 21 were referred by solicitors or Legal Aid. Family or friends accounted for 11% of referrals, self/media were 9% and the Family Court referred only 4% to other agencies.<sup>89</sup>

### *Expectations*

4.57 What was surprising were the clients’ expectations of mediation in the non-Family Court mediation agencies. Only 8% of men, and 15% of women, had an expectation of a fair agreement. The highest expectation (43% for men and 29% for women) was that there would be an “*impartial third person and a neutral, stable environment.*” The next highest expectation (12% for men and 26% for the women) was to improve communication. In contrast, the Family Court mediation service was dominated by an expectation of a fair agreement (48% for men and 46% for women). The figures for the “*impartial third person and a neutral, stable environment*” criteria were 21% for men and 19% for women.

4.58 Clients were asked what factors they believed had prevented them from working out their problems between themselves. The highest figures related to the ex-partner’s attitude. Lawyers were cited as a factor in preventing resolution of the dispute by between 12% and 15% of men and between 0% and 5% of women, varying with the agency attended. The “*children’s wishes*” were cited in relation to one agency by 12% of men and 5% of women. Only 12% to 19% agreed that they would have reached a more favourable settlement by going to court. An average of 75% felt that the mediation agreement was “*close to the legal information they had received*” about the parameters of settlement.

### *Agreements on child-related issues*

4.59 In the combined sample of 27 cases from the two non-Family Court mediation services, 41% reached full agreement, 37% partial agreement and 22% did not reach agreement.<sup>90</sup> Only five cases in this

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86 Same as above, at 42.

87 Same as above, at 43.

88 Same as above, at xviii.

89 Same as above, at 43.

90 Same as above, at 51.

sample involved custody disputes. Forty per cent of the sample reached full agreement on child-related issues, 40% reached partial agreement, and 20% did not reach agreement. With access disputes, 77% of the sample cases from the two non-Family Court mediation services reached full agreement, 8% partial agreement and 15% no agreement.

4.60 In the Family Court mediation service, in a sample of 66 cases, 88% reached full agreement and 8% reached partial agreement. Ninety-four per cent of custody disputes reached full agreement, 3% partial agreement and 3% no agreement. Ninety-two per cent of access disputes in the sample from the Family Court mediation service reached full agreement, 7% partial agreement and 1% no agreement.

### *Satisfaction*

4.61 When satisfaction was measured in respect of child related issues, the highest rate of satisfaction was reported in response to a question, *"I felt that the agreement regarding children was practical, realistic and workable."* This varied between 64% and 87%, depending on the agency attended. Between 42% and 75% agreed with the statement, *"mediation helped us to agree about the time children will spend with the parent they don't live with."*

4.62 Clients recorded very high rates of satisfaction with the professional skills and impartiality of the mediators, the adequacy of information received and with the impact of mediation on their relationship. Over 75% reached agreement. Those taking part in the survey *"reported a significant shift in their perceived dependence on lawyers and the courts in the handling of new problems relating to their separation."*<sup>91</sup> Improvements for children were reported by 40% of the follow-up sample, compared with 37% in the Family Court survey of 1994.<sup>92</sup> Ninety per cent of clients in the follow-up sample stated that they would be willing to use mediation services again.

### *Durability of agreements*

4.63 In a six-month follow-up survey, changes to agreements concerning parenting issues were made in 31% of cases. Sixty per cent of those who changed their agreement were responding to the changing needs of their children. Overall, 14% of those who reached agreement said that the agreement had since broken down.

## ***Federally funded family mediation - Sydney evaluation (1996)***

4.64 In 1996, LAFS commissioned an evaluation of the Sydney Family Court Mediation Section,<sup>93</sup> and community mediation services. The

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91 Same as above, at xi.

92 Same as above, at 84.

93 This had been established in 1993.

latter consisted of the Centracare Family Mediation Program, the Couple and Family Mediation Service of Relationships Australia (NSW), and the Unifam Family Mediation Service.<sup>94</sup>

### *Costs and funding of mediation*

4.65 There was strong endorsement by the clients interviewed that the main reason for choosing mediation was the wish to avoid additional legal costs. Perceptions of relatively low costs appeared to be an attractive reason for many clients to choose mediation. For some, however, costs were problematic. A few referred to the double burden of paying for mediation which failed to resolve the dispute and then paying for litigation.

4.66 To compare the cost of mediation with the cost of litigation in the Family Court, a method of costing was adopted that identified the tasks, personnel, time and costs for each step in the two methods of dispute resolution. For litigation, the estimated cost of personnel in the Family Court amounted to A\$902.51.<sup>95</sup> This figure compared with estimates of A\$479.32 and A\$627.70 for non-Family Court mediation, depending upon which model of mediation was adopted. For mediation in the Family Court Mediation Section the estimate was A\$884.35.<sup>96</sup>

4.67 Recommendation 12 of the Sydney evaluation report concluded that:

*“Continued Federal Government funding of family mediation is important as it will continue to provide an incentive to use services which produced good outcomes that hold up over time. Because for some families with children, costs associated with the divorce itself can be a critical factor in determining post-separation physical and emotional survival, subsidised family mediation services should be seen as a sound low cost investment in the future of separating families.”*

### *Reasons for referral*

4.68 Custody was an issue for 29% of men and 31% of women, though 50% of both identified parenting issues as the reason for going to mediation. Surprisingly for those who see mediation as predominantly dealing with parenting issues, property disputes were an issue for 68% of males and 72% of females. Nearly half the cases were referred by solicitors of the Legal Aid Commission. A further 23% were self-referred.

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94 Moloney, Fisher, Love and Ferguson, *Managing Differences: Federally - Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction* (July 1996). For LAFS.

95 This estimate does not include the costs leading to a final judicial determination because in this case it has been assumed that the matter settled at the formal negotiation stage of each process.

96 Staff costs are higher in the Family Court. For example, a mediator (Deputy Registrar) and a mediator (counsellor) have been cost at A\$43.31 per hour and A\$33.29 per hour respectively. This compares with a staff mediator in the non-Family Court mediation agencies costs at A\$24.00 per hour.

## *Satisfaction*

4.69 Satisfaction with the professionalism of the mediators, their perceived impartiality, the quality of the mediator-client relationship and the perception of being heard was very high. Almost all clients agreed that they had received enough information to protect their own best interests during mediation.<sup>97</sup> Despite some negative criticisms of the mediation process, “*the overwhelming sense of the replies is one of strong positive endorsement for the unique features of mediation.*”<sup>98</sup>

## *Agreement rates*

4.70 Full agreement was reached in 44% of cases. A further 39% of cases reached partial agreement and 17% failed to reach agreement. For custody disputes, full agreement was reached in 74% of cases. Agreement was reached for access in 60% of cases and in 61% of parenting disputes.

## *Durability of agreements*

4.71 When those who had concluded mediation agreements were followed up by the researchers three months later they indicated that there were changes to the agreement in 33% of cases, mainly in respect of parenting issues. Only 8% of these changes were due to a breakdown of the agreement. Forty per cent sorted out the changes themselves and 25% were assisted by their lawyers. Twelve and a half per cent received help from further mediation or counselling. Mediation contributed to a more positive relationship with the other parent in 34% of cases.<sup>99</sup>

4.72 Three months after conclusion of the mediation, an application to contest matters dealt with in the mediation agreement had been filed in court in only 11% of cases. Only 2% of cases had completed a contested hearing. The researchers concluded: “*The figures suggest that low numbers of mediated cases progress through to contested lists and very low numbers complete a contested hearing.*”<sup>100</sup>

## ***Domestic violence and mediation***

4.73 Concern has been expressed as to whether screening procedures at intake are sufficient to identify cases that are unsuitable because of domestic violence.

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97 Moloney, Fisher, Love & Ferguson (1996), above, Summary of the 1996 report, at 15.

98 Same as above, at 17.

99 The figures for Bordow and Gibson’s 1994 research was 40% and 43% for the 1995 study.

100 Moloney, Fisher, Love & Ferguson (1996), above, Summary of the 1996 report, at 24.

4.74 A 1996 research study by LAFS<sup>101</sup> recommended that the mediation agencies must recognise:

*“the high prevalence of violence or abuse ... by ensuring that all mediators and other staff are appropriately trained in understanding and identifying issues relating to family violence; all agencies should have intake, referral, mediation, follow-up and other procedures appropriate to the needs of clients whether or not clients proceed to mediation”.*<sup>102</sup>

### **Domestic violence policy of the Family Court**

4.75 There is a duty on approved mediators to consider the risk of child abuse and family violence in deciding whether to mediate or not.<sup>103</sup> The obligation to report abuse is confined to child abuse.<sup>104</sup> The guidelines indicate that if there is current violence, the parties will not be accepted for mediation. If it is not current, but there has been a strong history of family violence, the parties will not usually be accepted for mediation unless the victim can convince the mediator that he or she is able to negotiate on a reasonably equal footing. The policy states that *“it is inappropriate to deny the mediation service to the survivor of violence if that individual can beneficially use the service to deal with a dispute.”*<sup>105</sup>

### **Legal aid for family cases**

4.76 A number of Legal Aid Commissions (including those in Queensland, Victoria and New South Wales) have developed mediation and conferencing schemes in which family law clients must participate as a condition of a grant of legal aid. In the Northern Territory, legal aid applicants must attend the Family Court Counselling service. The Legal Aid Commissions in the Australian Capital Territory, South Australia, and Tasmania will not normally provide assistance unless there are genuine attempts to settle a dispute.<sup>106</sup> Where there is no in-house mediation conferencing scheme, cases are referred by Legal Aid Commissions to the mediators at the Family Court. The Legal Aid Commission of New South Wales indicated that 70% of the disputes referred to mediation conferencing in their pilot project were resolved.<sup>107</sup>

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101 Legal Aid and Family Services Division of the Attorney General's Department, *Research/Evaluation of Family Mediation Practice and the Issue of Violence* (Aug 1996).

102 Executive Summary, same as above, at iv.

103 Order 25A Rule 5 of the Family Law Rules.

104 Section 67ZA of the Family Law Act 1975 as substituted by the 1995 Act.

105 “Family Court of Australia Mediation - Family Violence Policy and Guidelines” (Jan 1993), at para 2.25.

106 Same as above, at para 11.39 and footnote 65.

107 Annual report 1994, at 3.

## ***Legal aid conferencing in Queensland***

4.77 The legal aid conferencing scheme in Queensland is a compulsory process for a family law legally aided client which provides an opportunity for disputants, with their solicitors present, to resolve a dispute.<sup>108</sup> A conference can be held when Family Court counselling has been exhausted, where there is a willingness to negotiate, and where it is cost effective. Conferencing is a combination of mediation, conciliation and arbitration. It is conciliation in the sense that the chairman manages the negotiation and makes recommendations. It is arbitration in that, in the absence of settlement, the chairman makes a recommendation regarding the right of each party to continue to receive legal aid funding and it is mediation in that the chairman is a neutral third party attempting to facilitate settlement of the dispute.

4.78 In 1992/3, 849 conferences were held for family law disputes. Of these, 444 (or 65.4%) settled by way of a recommendation for legal aid to file consent orders, or a recommendation of “no aid” as the parties preferred no further legal action. From 1 July 1993 to 30 March 1994, there were 636 conferences, out of which 326 fully settled and 84 partly settled.

### ***Legal aid conferencing procedures***

4.79 Conferences are held after the receipt of a legal aid application and once means eligibility has been determined, but before the commencement of proceedings. Where resolution is not reached, a report on the legal merits is provided by the chairman of the conference to the Legal Aid Office to assist in the determination of future funding. The 1994 guidelines provided that aid might be suspended.

4.80 A conference can be heard at any time during the dispute. Until the conference is held, legal aid is temporarily suspended. The parties are invited to attend a conference before any other grant of legal aid is made and before proceedings are issued. A conference can also take place a few weeks before trial. Chairmen have “been trained in mediation techniques”. They are solicitors, barristers or social scientists who have practised professionally for two years at least. The conference may be co-chaired by two chairmen from different professional backgrounds. *“The combination of mediation techniques and professional expertise proves most helpful for clients who have difficulty in accepting the advice given to them by their solicitor.”*<sup>109</sup>

### ***Child abuse or domestic violence***

4.81 In cases involving domestic violence, telephone conferencing is offered, or the parties are kept in separate rooms. In such cases, or cases involving child abuse or psychiatric illness, a member of the Department of

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108 This information was given by Donna Cooper, Conference Co-ordinator, during a visit to Brisbane in February 1995, and also in written notes prepared by Bernadette Rogers.

109 Rogers, *Legal Aid Office (Queensland) Conferencing Program* (1993).

Family Services and the Separate Representative for the child shall attend. The 1994 guidelines indicated that normally cases are excluded from conferencing if there are current proceedings dealing with allegations of child sexual abuse, or a domestic violence non-contact order is in existence, or where a power imbalance between the parties is apparent.

#### *Involvement with solicitors*

4.82 Clients generally attend conferences with their solicitors and this is encouraged as it ensures that “*clients have support and appropriate advice when they make decisions.*”<sup>110</sup> Involving solicitors also educates them on the process so that they can properly prepare their clients and promote the process to their clients. Rogers noted that it is the experience of all Legal Aid Commissions that it is often difficult to convince both parties to voluntarily enter the process. She stressed that preparation for the conferences and a positive attitude by intake officers and solicitors were critical for the success of the programme.

#### *Early Intervention Conferencing*

4.83 Early Intervention Conferencing (EIC) was designed to assess the impact of requiring clients in custody and access disputes to attend a conference before being given legal aid. Williams noted that as the fiscal constraints on the Legal Aid Office grew, so too did the use of conferencing as a filter mechanism.<sup>111</sup>

4.84 Between December 1990 and April 1992, the Queensland scheme was independently evaluated by Williams. The first stage of Williams’ research involved an interview with the parties, their lawyers and the chairman immediately after the EIC. The second stage involved a survey of legal aid clients six to 12 months after the EIC. Williams found that clients considered the process “*fair and understandable, yielding decisions in the best interests of the children.*”<sup>112</sup> The solicitors and chairmen “*overwhelmingly supported the applicability of conferencing for custody and access matters,*” that is EIC’s.

4.85 Williams found that clients preferred to conference rather than appear in court, so that, even though there was a mandatory requirement to attend a conference, “*there was a strong element of voluntary participation making the activity mediation-like.*”<sup>113</sup> The clients agreed that the conference had enhanced their understanding of the dispute, their legal rights and the other party’s position. However, a significant number reported that their relationship with their ex-partner after the conference had deteriorated. Williams commented that “*a better understanding of the disputes and legal*

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110 Same as above.

111 Williams, Discussion Paper, *Conferencing in Family Law; a Discussion of the Process and Evaluation at the LAO*, Brisbane, 1992.

112 Same as above.

113 Same as above, at 5.

*rights does not guarantee durability of a workable post-cohabitation relationship.*” Williams concluded that conferences are more likely to settle if the solicitors involved are supportive of the process.

#### *Follow-up study*

4.86 A follow-up survey found no significant decline in support for conferencing. It found that the durability of agreements was relatively high.<sup>114</sup> Three-quarters of those interviewed indicated that their agreement was still in place, though there were some problems with custody and access. Of the custody agreements, 90% were working. About two thirds of respondents said that their access agreements were still working six to 12 months later. Williams commented that this appeared to depend more on the relationship between the parties than the mechanism used to reach agreement.

4.87 Over two-thirds of the parties said they would recommend the conference process to others. The success of the process depended equally on professional input and the process itself. Williams commented:

*“the quality of the conference process and the outcome it achieves are a function of the quantity and quality of the resources committed by the legal and social work professions, as much as the attributes of the clients themselves”.*<sup>115</sup>

Williams found those professionals involved in the process overwhelmingly supportive of conferencing for custody and access matters.

#### *Legal Aid Settlement Conferences*

4.88 In November 1994, the Legal Aid Office announced the establishment of a scheme for Settlement Conferences. These would be similar to the existing Legal Aid Conferences, but intended for those cases which fell outside the current custody/access guidelines. Legal aid could be granted where the parties had not been separated in the preceding 6 weeks; where there was no “genuine” dispute about custody;<sup>116</sup> where a previous agreement reached at a legal aid conference had not been adhered to;<sup>117</sup> where aid was sought to vary custody orders less than two years old or to vary existing access orders; or where there was not strictly a “denial” of access.<sup>118</sup>

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114 This is because many of the parties had left the addresses so they could not be followed up.

115 Williams (1992), above, at 8.

116 Where it is considered that it would promote the interests of the children and where there is an access issue attached.

117 This would be where there has been a substantial change in circumstances since the last conference.

118 This is if attempting resolution will promote the children’s interests.

### *Access mediation scheme*

4.89 The Legal Aid office in Brisbane also operates a voluntary “Access Mediation” scheme run by in-house social workers.<sup>119</sup> It targets those who are outside the guidelines for a Legal Aid or Settlement Conference. However, they must complete counselling first if they have already commenced it. The scheme is also for those who want to update access arrangements already reached in a Legal Aid Conference, Settlement Conference, or by a consent order, or where the wishes of children over the age of 12 are the major factors.

## **New Zealand**

### ***Conciliation counselling***

4.90 The New Zealand Family Court was established in 1981. Alternative dispute resolution processes have developed quite differently in New Zealand to those in Australia. The first level of dispute resolution is counselling at the court or privately. If this does not settle the matter, then a mediation conference is held, the aim of which “*is to demonstrate to a couple that settlement of the dispute is their responsibility.*”<sup>120</sup> If the mediation conference fails to bring resolution to the dispute, then the final step is adjudication.

4.91 Counselling is available on request by one of the spouses,<sup>121</sup> or by “mandatory referral” after an application for a separation order.<sup>122</sup> Discretionary counselling is available when the court considers, at any stage of the proceedings, that such counselling may promote reconciliation or conciliation.<sup>123</sup> Section 10(4) of the Family Proceedings Act 1980 provides that a judge may direct referral to conciliation counselling in an application under the Guardianship Act 1968 relating to custody of a child.

4.92 However, counselling can be dispensed with if the Family Court judge gives a direction that violence has been used or threatened against a spouse or child, or if delay or other reasonable cause exists.<sup>124</sup> The

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119 Dispute Resolution Newsletter, Issue No 1 (Nov 1994).

120 Wilson, “Alternative Dispute Resolution,” *Auckland University Law Review* (1993) vol 7 (2), 362, at 363.

121 Family Proceedings Act 1980, section 9.

122 Family Proceedings Act 1980, section 10. Section 19 places a duty on the court in all proceedings between a couple and proceedings concerning custody or access, to consider the possibility of reconciliation or conciliation, and to take such further steps as may assist in promoting reconciliation, or conciliation.

123 Family Proceedings Act 1980, section 19.

124 Family Proceedings Act 1980, section 10(3).

counselling takes place through marriage guidance or private counsellors, but outside the court premises.<sup>125</sup>

### *Duty of lawyers*

4.93 Referral to conciliation counselling may also come from legal advisers who have a statutory duty to encourage conciliation.<sup>126</sup> The solicitor must certify, on setting down any family proceedings or custody matter, that he has carried out his responsibilities to ensure that the spouse:

“(a) *is aware of the facilities that exist for promoting reconciliation and conciliation, and*

*(b) [takes] such further steps as in the opinion of the barrister or solicitor may assist in promoting reconciliation or, if reconciliation is not possible, conciliation”.*<sup>127</sup>

### *Research on conciliation counselling*

4.94 In 1987, 35% of requests for conciliation counselling came through a solicitor.<sup>128</sup> Maxwell’s research found that positive outcomes were more likely when there had been joint sessions; when the referral was made under section 9; and when there were six or more sessions.<sup>129</sup> Many disputes were settled at the conciliation counselling stage, which can “*incorporate mediatory efforts as well as pure counselling.*”<sup>130</sup> In a 1987 sample of cases, 77% of couples reached full or partial agreement in conciliation counselling. Between 1982 and 1988, requests for conciliation counselling increased from one third to one half of the counselling case load. “*This increase in the voluntary use of conciliation has paralleled a decline in the volume of defended court hearings.*”<sup>131</sup> However, only 43% reached agreement after the court had referred the parties to conciliation counselling.

### **Counselling Co-ordinator**

4.95 The Family Courts Act 1980 established the post of Counselling Co-ordinator, whose duty (set out in section 8) is to facilitate the proper

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125 Approximately 25-30% is provided by marriage guidance counsellors, 55% by private practitioners and the rest by community agencies. See Maxwell, *Family Court Counselling Services and the changing New Zealand family* (1989) Family Court Counselling Research Report No 1, at 62.

126 Family Proceedings Act 1980, section 8.

127 Family Proceedings Act 1980, section 8(a) and (b) respectively.

128 Chart, “Some New Zealand initiatives in Alternative Dispute Resolution”. Commonwealth Law Ministers Conference, Auckland (1990), at 605.

129 Section 9 of the Family Proceedings Act 1980 provides for counselling at the request of either party to the marriage.

130 Davidson, “Family Court Counselling and Mediation: the vexed question of standards and personnel in New Zealand” (1986) 1 FLB 73, at 75.

131 Maxwell (1989), as above, at 54.

functioning of the Family Court and of counselling and related services, such as mediation.<sup>132</sup> Section 8(3) provides that the Co-ordinator is an officer of the court.

4.96 One of the Family Court Judges<sup>133</sup> has stated that the Counselling Co-ordinator has played a pivotal role in the Family Court and has been critical to its success. Judge Cartwright noted that “*in all parts of New Zealand where there is a counselling co-ordinator attached to the Family Court the level of judicial work in Court has dropped markedly.*” The Co-ordinator had humanised the “otherwise bureaucratic face of the Court”. The lawyers had also taken advantage of the service by referring clients to the Co-ordinator for appropriate referral to a counsellor or other agency.<sup>134</sup>

#### *Referral for counselling*

4.97 There are 40 Co-ordinators based at 24 Family Courts who make referrals to 500 individuals or agencies throughout New Zealand. Counselling is provided by marriage guidance counsellors (between 25% and 30%), private practitioners with social work or clinical psychology experience and training (55%) and a variety of community agencies.<sup>135</sup>

4.98 The Co-ordinator can refer cases for counselling when it is apparent that there will be a contested dispute. Virtually all custody, access, guardianship and domestic violence applications are referred for counselling or mediation. Proceedings are held in abeyance, unless there are very urgent applications, until the counsellor advises the court that counselling cannot resolve the dispute.

4.99 A research report by the Policy and Research Division of the Department of Justice<sup>136</sup> found that very few people refused to attend, though wives complained of a reluctance by men to attend. One Co-ordinator said that 90% of clients she had referred for counselling had attended.

4.100 One shortcoming of the existing law highlighted by the Co-ordinators is the fact that section 9 cannot be used for those whose marriage has been dissolved because referral must be “in respect of the marriage.” Co-ordinators recommended that referral should also be available for disputes over custody and access which arise after divorce.

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132 In some countries, like New Zealand and Ireland, the courts are subsumed under a Department of Justice. In Hong Kong the courts are independent of the Department of Justice.

133 Her Honour Cartwright, “The New Zealand Family Court in operation: legislation,” *Commonwealth Law Bulletin* (Jan 1986), at 239-40.

134 Same as above, at 240.

135 Information disclosed in Maxwell (1989), above.

136 Harland, *Counselling Co-ordinator’s Group Discussion* (1991) Family Court Custody and Access Research Report (No 5).

### *Case management and the Co-ordinator*

4.101 The case manager's role is to ensure that the case progresses smoothly by supervision of the process at every stage. A practice note from the Principal Family Court Judge designated the Counsel for the Child (who is the child's separate representative) as the case manager in every proceedings. Notwithstanding this clear direction, in a research report on the Family Court Judges,<sup>137</sup> four of the judges saw the Co-ordinator as having the role of case manager.<sup>138</sup>

4.102 There is therefore considerable practical importance in the early appointment of Counsel for the Child to ensure effective management of the case. The research noted that Counsel for the Child is sometimes only appointed at a very late stage, after the appointment has been suggested by the family counsellor in the case. If the Co-ordinators had more time to assess the case at an early stage, they could have made recommendations for the appointment of Counsel for the Child at the outset of the proceedings.

### *Mediation and the Co-ordinator*

4.103 It is important to note that the Co-ordinator also refers cases to mediation, though the legislation does not in fact mention this service. Chart's report<sup>139</sup> noted that the bulk of counselling work involved conciliation with a view to reaching settlement. Indeed, Maxwell found that 77% of couples reached full or partial agreement through these referrals.<sup>140</sup> It is unfortunate that the terminology still uses only the terms "counselling" and "conciliation" rather than also including mediation.

4.104 The Boshier report<sup>141</sup> called for a separate Family Conciliation Service in which mediation counselling would be available to assist the mediation process if necessary. The Counselling Co-ordinators would have a key role, being responsible for "*early classification and referral of cases and public education.*" Extra clerical assistance would enable them to concentrate on client contact, case assessment and referral, liaison with professional groups and public education activities.

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137 *A Survey of Family Court Judges* (Oct 1993) Report No 6.

138 This confusion as to the role of the Co-ordinator extended to other areas. The research report found that many of the judges thought that the Co-ordinator played additional roles such as arranging or advising on specialist referrals and Counsel for the Child. Other roles thought to fall within the Co-ordinator's area of responsibility included emergency counselling and providing information to the public.

139 Paper to the Commonwealth Law Ministers Conference "Some New Zealand Initiatives in Alternative Dispute Resolution," Auckland 1990.

140 See Maxwell (1989), above.

141 This is summarised in Boshier, "New Zealand Family Law Report," *Family and Conciliation Courts Review* (April 1995) vol 33, No 2, at 182-193.

## **Mediation conference**

4.105 Where the parties have been unable to resolve their problems with a court counsellor, spouses who have made an application for a separation or maintenance order,<sup>142</sup> or an application for custody or access to a child,<sup>143</sup> are able to request a mediation conference, or it may be requested by a Family Court judge.<sup>144</sup> The registrar then sets a time and place for the conference, which takes place in a courtroom, special conference room or the judges chambers. *“While attendance is compulsory, the parties cannot be compelled to actively participate.”*<sup>145</sup> Section 17 of the Family Proceedings Act 1980 gives power to direct attendance at mediation but it has rarely proved necessary to invoke this power.<sup>146</sup> The parties’ lawyers can attend with them if the clients so request.

4.106 The mediation conference is often preceded by the preparation of specialist reports. These reports are available to the Chairman (who is a Family Court Judge), the lawyers, and usually the parties. If this does not resolve the matter, a hearing date may be set. Even then, cases are sometimes resolved at a pre-trial conference.

4.107 Between 1982 and 1988, the number of counselling referrals increased from 37.5% to 78.6%, while the number of mediation conferences dropped from 26% to 14.8%.<sup>147</sup> Section 14(2) of the Family Proceedings Act 1980 provides that the objectives of the mediation conference are the identification of the matters at issue between the parties and the resolution of those issues by agreement. The family court judge who chairs the conferences can make binding orders if agreement is reached. If there is no agreement, section 16 allows the same judge to adjudicate at the subsequent hearing of the case unless he withdraws or the parties request him to do so.

## **Conclusion**

4.108 There have clearly been interesting developments in this area in Australia and New Zealand. In Australia in particular, the combination of funding for community mediation programmes and for Family Court programmes shows some recognition by the Federal Government of the research results that mediating in the “shadow of the law” may not be as successful as early intervention prior to the issue of proceedings.

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142 Section 13(1)(a) of the 1980 Act.

143 Section 13 (1)(b) of the Family Proceedings Act 1980.

144 Chart, “Some New Zealand Initiatives in ADR”, Paper to the 1990 Meeting of the Commonwealth Law Ministers.

145 Section 13(2)(b) of the Family Proceedings Act 1980.

146 Chart (1990), above, at 606.

147 Maxwell (1989), above, at 52.

## Chapter 5

# Recommendations for reform – Court based support facilities for family mediation

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### Introduction

5.1 The choice of approaches for the resolution of child custody disputes is between the traditional adversarial process and the alternative dispute resolution process, most commonly associated with mediation. We have outlined these different approaches in Chapters 1 and 2 of this report.

5.2 As we noted in Chapter 2, Hong Kong has seen significant developments recently in the area of mediation with the implementation of the Pilot Scheme on Family Mediation at the Family Court.<sup>1</sup> There have also been new proposals for the reform of the civil litigation system generally from the Chief Justice's Working Party on Civil Justice Reform.<sup>2</sup>

5.3 In line with these initiatives, our approach in considering the reforms that may be necessary in this area has been to focus on how to minimise the adversarial nature of family proceedings and how to shorten potential delays in the processing of family cases through the courts.

5.4 Our review has included:

- (a) the court-based support services to facilitate family mediation in Hong Kong, which are the subject of this chapter;
- (b) family mediation services generally in Hong Kong, which are examined in Chapter 6; and
- (c) the family litigation process itself, as well as other related matters, which are discussed in Chapter 7.

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1 See Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr 2002).

2 See Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform – Interim Report and Consultative Paper* (Nov 2001).

5.5 In arriving at our final recommendations on court based support services, which are the subject of this chapter, we have revisited our earlier proposals for reform contained in the Consultation Paper on *Guardianship and Custody*,<sup>3</sup> and have also considered recommendations advocated by others looking into this area.<sup>4</sup>

5.6 As will be seen from the discussion below, a number of these earlier recommendations have already been provisionally implemented through the Pilot Scheme on Family Mediation at the Family Court. We nonetheless consider it worthwhile, where appropriate, to reiterate our endorsement of these recommendations, in order to add our voice to those advocating the future expansion of the Pilot Scheme on Family Mediation into a permanent service.<sup>5</sup> There are also areas where our proposals diverge from those implemented under the Pilot Scheme. We therefore take the opportunity here to highlight these differences. We trust that these alternative or supplementary proposals may also be considered by the Administration in the context of its long-term strategy planning for mediation in family litigation.

## Task Group on establishment of a family court

5.7 In our Consultation Paper,<sup>6</sup> we generally approved and adopted the recommendations of the report of the Task Group on a Family Court,<sup>7</sup> which stated that “*conciliation and counselling are the services that are ... at the root of establishing a proper Family Court system.*”<sup>8</sup> The Task Group’s report had recommended that an office should be provided at the Family Court for conciliators and counsellors to offer their services. Referral for counselling or conciliation might also be made to qualified persons outside the court. A Court Conciliation Co-ordinator would act as a liaison between the parties, their legal representatives, the court and conciliation agencies. The staff would liaise with the lawyers to “*guarantee an early settlement and efficient case management.*”<sup>9</sup> The Task Force considered that a conciliation

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3 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), Chapter 12 and Chapter 15 (Parts G and H).

4 See Hong Kong Council of Social Service Task Group on Family Court, *Proposals on the Establishment of a Family Court in Hong Kong* (1989); The Hong Kong Marriage Advisory Council, *Evaluative Research Report on the Marriage Mediation Counselling Project* (Oct 1991); Hong Kong Law Reform Commission, *Report on Grounds for Divorce and the Time Restrictions on Petitions for Divorce within Three Years of Marriage* (1992: Topic 29); *Report and Recommendations of The Chief Justice’s Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and Related Matters* (Aug 1993); *Report of the Working Group to Review Practices and Procedures Relating to Matrimonial Proceedings* (Aug 1996); *Report of the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong* (Apr 1999).

5 See Hong Kong Polytechnic University (2002), above, at para 112(a).

6 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.51 and 15.94.

7 Hong Kong Council of Social Services Task Group (1989) above.

8 Same as above, at para 7.

9 Same as above, at para 7.1.3.

service based in the court would help parties to deal with the emotional, practical and legal aspects of their dispute and to negotiate a settlement.<sup>10</sup>

5.8 Although we preferred the terms “mediation” and “mediators” to “conciliation” and “conciliators,” we recommended in our Consultation Paper<sup>11</sup> that, in line with the approach of the Task Group, mediation should be an integral part of the Family Court system.<sup>12</sup> We noted that providing support by allocating more resources to promoting mediation, information sessions and parent education would complement the court process. In particular, we felt that it was necessary to connect these support services and resources to the court system to ensure court accessibility and accountability. We also recommended that these family litigation support services should be government funded.<sup>13</sup>

5.9 On consultation, these recommendations were endorsed by most of the respondents who commented on this area. One respondent noted that mediation proposals generally may be difficult to implement where the parties were hostile towards each other. Another respondent submitted that the recommendation on Government funding for the proposed services would have extensive cost and resources implications. We have taken note of these respondents’ concerns while endorsing our original approach.

#### **Recommendation 1**

**We generally approve and adopt the recommendations on support services of the report of the Task Group on a Family Court, but prefer to adopt the terms “mediation and mediators” rather than “conciliation and conciliators.”**

**We recommend that providing access to mediation services should be an integral part of the Family Court system.**

**We consider that providing support for mediation, by allocating more resources to promoting mediation, providing information sessions and parent education, complements the court process. We recommend that these resources to provide support for mediation should be government funded and provided within the Family Court system.**

10 Same as above, at para 2.4. See also Elsie Leung (now Secretary for Justice), “Divorce, what next?” *Hong Kong Lawyer* (Jan 1990), 53, at 54, which contained similar proposals and Wright “Alternative Dispute Resolution and Case Management,” *Hong Kong Lawyer* (Sep 1994), 18, at 19.

11 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.51 and 15.94.

12 Same as above, at paras 12.102 and 15.114.

13 Same as above, at paras 12.51 and 15.94.

## Pilot project for court based family mediation scheme

5.10 With a view to establishing mediation as a permanent method of dispute resolution, we recommended in our Consultation Paper that a pilot project on court-annexed mediation should be launched at the Family Court.<sup>14</sup> We elaborated both on how the scheme should be established and what it should provide, and observed that it should be, “an experimental undertaking of limited scope and duration prior to the implementation of a full-scale scheme.”<sup>15</sup>

5.11 In particular, we recommended that:

- a working party should be established to plan and implement a pilot project for court-annexed mediation<sup>16</sup>
- a management committee should be established to oversee the implementation of the pilot project<sup>17</sup>
- mediation and other dispute resolution services should be more widely promoted to the public,<sup>18</sup> through solicitors<sup>19</sup> and the courts, and that specific information sessions on these services should be made available to the public at the Family Court<sup>20</sup>
- the court should have powers to encourage parties to attempt mediation<sup>21</sup>
- counselling conferences, to assist parties to overcome emotional difficulties hindering dispute resolution, should also be introduced into the family litigation process<sup>22</sup>
- the post of a Support Services Co-ordinator should be created whose duty would be to facilitate the proper functioning of the services that would support the Family Court dispute resolution system<sup>23</sup>

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14 Same as above, at paras 12.102 and 15.114.

15 Same as above, at para 12.100.

16 Same as above, at paras 12.99 and 15.113. This recommendation was overtaken by events when, in October 1997, the Chief Justice established the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong, chaired by The Hon Mr Justice Hartmann. We welcomed this development.

17 Same as above, at paras 12.110 and 15.116.

18 Same as above, at paras 12.54 and 15.95.

19 Same as above, at paras 12.65, 12.67, 12.69 and 15.100-15.102.

20 Same as above, at paras 12.64-12.65, 12.67 and 15.99-15.102.

21 Same as above, at paras 12.72-12.73, 12.76, 15.103-15.104 and 15.106.

22 Same as above, at paras 12.80-12.81, 12.85 and 15.107-15.109.

23 Same as above, at paras 12.85 and 15.109.

- accommodation should be provided at the Family Court to facilitate early referral to appropriate services<sup>24</sup>
- screening guidelines for family mediation should be introduced for cases involving domestic violence and child sexual abuse<sup>25</sup>
- the pilot project on court-annexed mediation should be independently evaluated<sup>26</sup>
- the Working Group established by the Chief Justice to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong should consider our recommendations on mediation, case management and our suggested pilot project, to determine how these might assist in the formulation of their own recommendations.<sup>27</sup>

5.12 Following the publication of our Consultation Paper, and the subsequent publication of the *Report of the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong*,<sup>28</sup> a pilot scheme for mediation at the Family Court was established and launched in May 2000.

## **Our proposals for court based family mediation**

5.13 The details of those of our recommendations on court based mediation which remain relevant are set out below.

### ***Information on family dispute resolution support services***

5.14 We recommended in our Consultation Paper that the courts should do more to put parents in touch with support services. We observed that more publicity and education of the public was needed to encourage families to go for assistance to local family service centres or other agencies at an early stage of conflict or when problems were first encountered. We recommended that the Family Court should provide information relating to court processes, support services and alternatives to litigation. We also commented that leaflets such as the Information Kit on Marriage should be available at the Family Court itself and in the lobby of the High Court Building.

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24 Same as above, at paras 12.54 and 15.95.

25 Same as above, at paras 12.116 and 15.119.

26 Same as above, at paras 12.117 and 15.120.

27 Same as above, at paras 12.104 and 15.115. It should be noted that a number of the members of the Chief Justice's Working Group were also members of our Sub-committee.

28 Working Group to Consider a Pilot Scheme for Family Mediation (1999), above.

5.15 In relation to mediation specifically, we observed that as this was a relatively new service, mediation needed considerable publicity if it was to be used as a credible alternative to the adversarial process.<sup>29</sup> We therefore proposed that the court should be under a duty to actively promote mediation and the Chief Justice should approve a document which set out the benefits and procedure for mediation. As with other forms of alternative dispute resolution, we recommended that information pamphlets should be available at the Family Court and the family services centres which should include information on the availability of, and encouragement to use, mediation as an alternative to litigation. We also considered that information on mediation services should be included in pamphlets such as the Information Kit on Marriage, and that the pamphlets and the Information Kit should be periodically updated.

5.16 These recommendations on the promotion of dispute resolution alternatives were widely supported by our respondents to the consultation exercise.

#### **Recommendation 2**

**We recommend that the courts should do more to put parents in touch with support services. More publicity and education of the public is needed to encourage families to go for assistance to local family service centres or other agencies at an early stage of conflict or when problems are first encountered.**

**We recommend that the Family Court should provide information relating to court processes, support services and alternatives to litigation, including mediation.**

**We recommend that the court should be under a duty to actively promote mediation and that the Chief Justice should approve a document which sets out the benefits and procedure for mediation.**

**We recommend that pamphlets should be produced which include information on the availability of, and encouragement to use, mediation as an alternative to litigation. Such information pamphlets on mediation should be included in the Information Kit on Marriage.**

**We recommend that such information pamphlets, including the Information Kit on Marriage, should be available at the Family Court, the lobby of the High Court Building and at family services centres. We also recommend that these pamphlets should be periodically updated.**

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29 HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 12.60.

## ***Obligation on solicitors***

5.17 Many countries put solicitors under a statutory obligation to inform and encourage their clients to consider the possibility of reconciliation and, failing that, counselling and mediation.<sup>30</sup> Form 2A of the Matrimonial Causes Rules (Cap 179) requires the solicitor for the petitioner to certify whether or not he has discussed with his client the possibility of a reconciliation, and whether or not he has provided his client with the names and addresses of persons qualified to help effect a reconciliation.<sup>31</sup>

5.18 We recommended in our Consultation Paper that solicitors should be obliged to inform and encourage their clients to consider the possibility of reconciliation, and that the applicant (and the respondent when he is served with the pleadings) should be informed of the nature and purpose of counselling and mediation and offered a list of services for reconciliation, counselling and mediation. This information would be in a pamphlet approved by the Family Court.

5.19 On consultation, all but one of the respondents who commented on this recommendation supported it. The objecting respondent considered that obliging the solicitor to encourage his client to consider reconciliation was encouraging the lawyer to play amateur psychologist or sociologist which was not his role. We considered this view but did not agree with it as the thrust of the recommendation was to ensure that clients were *informed* about alternative, non-adversarial dispute resolution services.

### **Recommendation 3**

**We recommend that solicitors should be obliged to inform and encourage their clients to consider the possibility of reconciliation.**

**We recommend that the applicant (and the respondent when he is served with the pleadings) should be informed of the nature and purpose of counselling and mediation and offered a list of services for reconciliation, counselling and mediation. This information should be in a pamphlet approved by the Family Court.**

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30 Australia, New Zealand, Canada, and Ireland. Section 12 of the English Family Law Act 1996 gives power to the Lord Chancellor to make rules requiring legal representatives to inform parties of the availability of marriage support services and mediation and to give names and addresses of persons qualified to effect a reconciliation or in connection with mediation.

31 See Rule 12 of the Matrimonial Causes Rules (Cap 179, subsid leg).

## **Information sessions**

5.20 Information sessions illustrate the range of options for managing disputes and:

*“give a more detailed overview of the mediation process. Educational components are also included covering the separation process, communication patterns, children’s reactions to separation in the context of child development, couple suitability for mediation and the range of issues that can be mediated.”<sup>32</sup>*

5.21 We recommended in the Consultation Paper that a voluntary information session should be introduced, which would be a service open to everyone. It would be attended by the parties before the filing of the petition in the majority of cases. It would encompass elements of the United States parent education programmes and the Australian information sessions.

5.22 We envisaged that, at the information session, parties could receive information and advice about family support services and alternatives to litigation such as mediation. Information to educate parents on the psychological process of divorce and its effect on children would also be included, by way of oral presentation, video and information packs. The presentation would be made by persons with counselling and mediation training. Clients should also be informed by solicitors, the Legal Aid Department and the Duty Lawyer Service of the availability of information sessions. The information on such services could be contained in a pamphlet approved by the Family Court.

5.23 These proposals were widely supported by respondents to our consultation exercise and some additional suggestions were received. One respondent emphasised that the information session presentations should be available in Cantonese, English and Putonghua, and that the comprehensive information kits should be in both Chinese and English. It was also suggested that separate language information sessions should be available, and that they should be held frequently, perhaps every one or two weeks in each language, as it might be preferable for the parties to go to separate sessions. One respondent also proposed that security personnel should be provided at the information sessions. We have considered these suggestions and agree that they have merit.

5.24 Another issue for respondents was whether or not the information sessions should be compulsory. We have considered the views of those respondents who advocated that information sessions should be compulsory for all divorcing parties, but have concluded that (save for the court’s powers in relation to referring parties to attend information sessions,

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32 Gibson, “Mediation of Family Disputes in the Family Court of Australia,” paper at the Fifth National Family Law Conference, Perth, September 1992.

which is discussed further below), we do not agree with the approach of making attendance compulsory.

#### **Recommendation 4**

**We recommend the introduction of a voluntary information session, which would be a service open to everyone. It would be attended by the parties before the filing of the petition in the majority of cases.**

**We recommend that at the information session, parties could receive information and advice about family support services and alternatives to litigation such as mediation. Information to educate parents on the psychological process of divorce and its effect on children would also be included, by way of oral presentation, video and information packs. The information session would encompass elements of the United States parent education programmes and the Australian information sessions.**

**We recommend that the presentation would be made by persons with counselling and mediation training.**

**We recommend that clients should also be informed by solicitors, the Legal Aid Department and the Duty Lawyer Service of the availability of information sessions. The information on such services could be contained in a pamphlet approved by the Family Court.**

#### ***Referral to information sessions***

5.25 Encouragement by those involved in the family dispute resolution system, whether solicitors, judges, or indirectly, social workers, is necessary to ensure that as many parties as possible receive the benefit of attending information sessions.

5.26 We therefore recommended in the Consultation Paper that solicitors should be placed under an obligation to inform their clients about the availability of the information session.

5.27 We also recommended that the judges of the Family Court should have the power to refer the parties to attend an information session. We proposed that this would not be an order as such, but would be a power to suspend or adjourn further progress on the proceedings pending such attendance.

5.28 On consultation, most of the respondents who commented on this recommendation supported it. However, one consultee expressed concern over the court's power to suspend further progress on the proceedings pending the parties' attendance at the information session. The consultee's objection was that, in order to promote alternative processes of dispute resolution, this proposal could effectively deny parties their access to litigation. After some discussion on this objection, we came to the view that it would be preferable to modify the proposal to give the court the power to *order* the parties to attend an information session, as this would give the parties so ordered the right to appeal against the judge's decision, if they considered it necessary.

#### **Recommendation 5**

**We recommend that solicitors should be placed under an obligation to inform their clients about the availability of the information session.**

**We recommend that the Family Court judges should have the power to order the parties to attend an information session.**

### ***The court's powers in relation to mediation***

5.29 We recommended in the Consultation Paper that the voluntary mediation recommendations of the report of the Chief Justice's committee on court-annexed mediation<sup>33</sup> should be adopted, to the effect that the court should only be able to order the parties to attend mediation if they agree. We noted that Section 15A of the Matrimonial Causes Ordinance (Cap 179) allows the court to adjourn if there is a reasonable possibility of reconciliation. We proposed that there could be a similar provision to encourage mediation.

5.30 We recommended in the Consultation Paper the introduction of a provision along the lines of section 19A of the Australian Family Law Act 1975 empowering potential litigants or parties to file a notice in the Family Court seeking the appointment of a mediator. We also recommended that a provision should be enacted that where the parties agreed to go to mediation, but could not agree on a mediator, the court could appoint a suitable mediator. We considered that judges should not become directly involved in mediation but proposed that if one party did not consent to adjourn the case for mediation then the judge could use his best endeavours to encourage mediation.

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<sup>33</sup> *Report and Recommendations of The Chief Justice's Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and related matters* (Aug 1993).

5.31 We further recommended that, before a case was set down for hearing, the parties should provide a certificate to satisfy the court that mediation was or was not considered, or that it was not appropriate.

5.32 On consultation, these recommendations received general support from the respondents who commented on them, although one respondent expressed concern that introducing mediators into the process where parties were very hostile would only prolong the proceedings, as the parties would need to go to court in any event. This view was noted, but we concluded that mediators would generally not waste time trying to mediate in such cases, and would simply report back to the court either that mediation had been attempted but was not successful, or that mediation was not an appropriate option.

5.33 We also noted a second respondent's view that there was some potential contradiction in the role of the judge who, on the one hand, was not intended to be involved in the mediation process in any way, while on the other, might be called upon to encourage the parties to mediate. We do not agree that this raises a significant conflict.

#### **Recommendation 6**

**We recommend the adoption of the voluntary mediation recommendations of the report of the Chief Justice's committee on court-annexed mediation, to the effect that the court should only be able to order the parties to attend mediation if they agree. Section 15A of the Matrimonial Causes Ordinance (Cap 179) allows the court to adjourn if there is a reasonable possibility of reconciliation. There could be a similar provision to encourage mediation.**

**We recommend a provision on the lines of section 19A of the Australian Family Law Act 1975 empowering potential litigants or parties to file a notice in the Family Court seeking the appointment of a mediator.**

**We also recommend that a provision be enacted that where the parties agree to go to mediation, but cannot agree on a mediator, the court may appoint a suitable mediator.**

**We agree that judges should not become directly involved in mediation. However, if one party does not consent to adjourn the case for mediation, then the judge should be able to use his best endeavours to encourage mediation.**

**We also recommend that before a case is set down for hearing, the parties should provide a certificate to satisfy the court that mediation was or was not considered, or that it was not appropriate.**

## ***Issue of compulsory powers***

5.34 We noted in our Consultation Paper that there was some merit in giving power to a judge to refuse to set down an action until the parties had certified to the judge that they had attempted some form of mediation. We also proposed that a judge should have power to recommend that the parties attempt to resolve matters through mediation, and if necessary in exceptional cases, to require them to do so. However, we did not agree that mediation should be compulsory at this time. We welcomed submissions from consultees on whether or not proposals on compulsory mediation contained in the report of the Chief Justice's committee on court-annexed mediation<sup>34</sup> should be adopted for the resolution of custody disputes.

5.35 The issue of whether or not mediation should be compulsory proved to be a controversial one on consultation. Although most of the respondents supported the recommendation *not* to make mediation compulsory, we noted that some support was expressed for the opposite view. We concluded, however, that there would need to be very cogent arguments put forward before we could endorse mandatory mediation, as cases will arise where it is simply not an appropriate option to pursue. We are also of the view that the quality and content of the information sessions on mediation might prove to be an important factor in encouraging parties to make use of the mediation process.

### **Recommendation 7**

**We do not consider that mediation should be made compulsory. However, we recommend that the judge should have the power, in appropriate cases, to refuse to set down an action until the parties have certified to the judge that they have attempted some form of mediation.**

## **Additional proposals on court based mediation**

5.36 We have noted earlier in this chapter that, although the Pilot Scheme on Mediation in the Family Court has reflected many of our proposals in this area, some significant differences remain. We set out these alternative or supplementary proposals below, and trust that these may also be considered by the Administration in the context of the long-term implementation plans for mediation at the Family Court.

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<sup>34</sup> *Report and Recommendations of The Chief Justice's Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and related matters* (Aug 1993).

### ***'Working party' to take account of special needs of children***

5.37 In relation to our early proposal for a working party to be set up to consider whether court-annexed family mediation should be established in Hong Kong, we advocated that the working party should *"look closely at the special needs of children, and how best to protect them in mediation and in the family court."*<sup>35</sup> We also noted that this *"has implications for what type of Family Court would best balance the needs of the litigants, their children, the Judiciary and the court administration."*<sup>36</sup> We remain of the view that the special needs of children should be carefully and specifically considered in the future planning and development of family mediation and the family litigation system generally in Hong Kong.

### ***Counselling conference***

5.38 In our Consultation Paper, we proposed the introduction of mandatory counselling conferences in addition to mediation.<sup>37</sup> "Conciliation counselling," as it is termed in Australia, has broader aims than mediation, in that it can include counselling to help parents and children adjust to marital separation and to work through their anger and hurt. Conciliation counselling takes place at a conciliation conference with a court counsellor. It is designed to reduce conflict and encourage agreement on practical issues, particularly issues concerning custody and access. The court counsellors are social workers or psychologists specially trained in dealing with relationship breakdown. Parents are encouraged to make use of these processes to avoid having a contested hearing which only entrenches the conflict between them.

5.39 We noted in our Consultation Paper that section 62F of the Australian Family Law Act 1975<sup>38</sup> gives a discretion to the court, in relevant proceedings,<sup>39</sup> to direct parties to a conciliation conference to discuss a child's care, welfare and development, and to try and resolve the parties' differences. The rationale is that a mandatory counselling conference gives all parties the opportunity to resolve some of the issues that block parents from focusing on the best interests of the children. If parties settle their differences at a counselling conference, they can then proceed to have a consent order drawn up and the need for mediation is avoided.

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35 HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 12.99.

36 Same as above.

37 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.80-12.81 and 15.107-15.108.

38 As substituted by the 1995 Act. The rules of court were amended in 1995. See Order 24 relating to conciliation conferences.

39 This concerns the care, welfare and development of a child who is under 18. A parenting order cannot be made unless the parties have attended a conciliation conference, though there are exceptions including orders by consent and interim or urgent orders where attendance would be impracticable or there are special circumstances such as family violence: see section 65F Australian Family Law Act as substituted by the 1995 Act.

5.40 We recognise the merit of conciliation conferences as a process of dealing, not only with the legal process of divorce, but also with the emotional process, which otherwise is largely ignored by our legal system. We therefore recommended in the Consultation Paper<sup>40</sup> that a process similar to the Australian conciliation conference should be introduced, but we preferred the term “counselling conference” in order to avoid any confusion with mediation. We recommended that the conferences could be run by counsellors<sup>41</sup> and should be publicly funded.

5.41 We recommended that the counselling conference should be a necessary stage in the court process and would be seen as an integral part of the case management process of the court system. We recommended that the Support Services Co-ordinator should advise the judge in writing as to whether the parties had or had not attended the counselling conference, so that the next stage in the process could be initiated.<sup>42</sup>

5.42 We also recommended that if there were disputes between parents both on children’s issues and financial matters, a joint counselling conference should be held to deal with such issues together.<sup>43</sup>

5.43 Respondents who commented on these recommendations during the consultation exercise observed the need to clearly distinguish between counselling and mediation conferences. It was noted that the primary purpose of mediation was to assist with resolving practical issues in dispute between the parties, while the purpose of counselling was to help resolve emotional problems and blockages.

5.44 Although most of the respondents in this area welcomed the recommendations on counselling, one organisation commented that resort to counselling conferences should be confined to appropriate cases only, and should not be made a mandatory part of the case management process of the court system. Whilst we note this respondent’s view, we maintain our original approach that participation in a counselling conference should be a necessary part of the family litigation process.

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40 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.80 and 15.107.

41 We had included in the terms of our original recommendation the wording “mediators or” before “counsellors” (see HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.81 and 15.108). In hindsight, we agree with the view of one of our respondents that this could cause confusion with the mediation process, thus we now confine the intended role to “counsellors” only.

42 Same as above, at paras 12.80 and 15.107.

43 Same as above, at paras 12.81 and 15.108.

## **Recommendation 8**

**We recommend the introduction of a process similar to the Australian conciliation conference, but prefer the term “counselling conference” in order to avoid any confusion with mediation.**

**We recommend that the counselling conference be a necessary stage in the court process. It would be seen as an integral part of the case management process of the court system.**

**We recommend that the Support Services Coordinator should advise the judge in writing as to whether the parties have or have not attended the counselling conference, so that the next stage in the process can be initiated.**

**We recommend that the conferences should be run by counsellors. We recommend that the conferences should be publicly funded.**

**If there are disputes between parents on both financial and children’s issues, then there should be a joint counselling conference dealing with such issues together.**

## ***Support Services Co-ordinator***

5.45 We recommended in our Consultation Paper that the post of “Support Services Co-ordinator” should be created, whose duty would be to facilitate the proper functioning of the services that support the Family Court dispute resolution system.<sup>44</sup> A similar post of Mediation Co-ordinator has of course been created under the Pilot Scheme. However, the role of Support Services Co-ordinator, as envisaged under our recommendations, was a broader one, extending beyond mediation to counselling conferences and referral of parties to counselling outside the court.<sup>45</sup>

5.46 Under our proposed model, the Support Services Co-ordinator would assess the needs of the parties for counselling, a counselling conference or mediation. The Co-ordinator would refer suitable cases to the appropriate persons, whether Social Welfare Department counsellors or mediators, community mediation or counselling services, professional mediators and counsellors, or other support services.

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44 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.85 and 15.09.

45 We also noted in our original recommendation that, “*We prefer the term ‘Support Services Co-ordinator’ (SSC) to that of ‘Conciliation Co-ordinator’ used in the report of the Task Group on a Family Court to avoid confusion with reconciliation.*”

5.47 We also proposed that there would need to be more than one Support Services Co-ordinator, as they would also co-ordinate referrals to the information sessions and counselling conferences. Reports of progress could be made to the Support Services Co-ordinator who would also liaise with legal representatives. In order to make the appropriate referrals, the Co-ordinator could look at affidavits or information sheets, or interview the parties if necessary. The Co-ordinator would obtain feedback from clients and the professionals involved so as to assess any need for improvement in the delivery of family litigation support services. The Co-ordinator would also liaise with the staff of the Social Welfare Department who provide reports to the court on the parties.

5.48 All of the respondents to the consultation exercise who commented on this proposed role of the Support Services Co-ordinator expressed support for it.

#### **Recommendation 9**

**We recommend that the post of Support Services Co-ordinator be created whose duty would be to facilitate the proper functioning of the services that will support the Family Court dispute resolution system.**

**The Support Services Co-ordinator's task would extend beyond mediation to counselling conferences and referral of parties to counselling outside the court.**

### ***Support services accommodation at the Family Court***

5.49 We proposed in our Consultation Paper that the accommodation for the Family Court should include comfortable consultation rooms to protect the privacy of the parties and their children. It was our view that this would improve the settlement environment of the court. We also suggested that there should be an office for counsellors and mediators who could be available for clients during normal office hours, and also to assist the court on the dates when there were call-over lists. We noted that the advantage of having such staff on duty at the court was that this may be more effective in achieving resolution than having the two sets of lawyers negotiating at the "door of the court" at a call-over or hearing.<sup>46</sup>

5.50 Most consultees who responded under this head during the consultation exercise supported these proposals, although a variety of qualifying observations were made. One respondent emphasised that a clear

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<sup>46</sup> We also observed, however, that bargaining on the morning of a hearing should diminish if issues and settlement conferences, as discussed in Chapter 6 of this report, were to be introduced.

distinction needed to be maintained between counselling services and mediation services. We certainly endorse this view. It was also commented that non-Government and private mediation services should not be excluded from being promoted through the courts. Other respondents considered that only the Support Services Coordinator and his support staff should be permanently housed at the family court, and that mediators and counsellors should simply *have use* of facilities at the court. Another respondent said that some distance should be maintained between the court and the support services (as under the present Pilot Scheme arrangement, where only the Mediation Co-ordinator's office is housed at the court) so that mediation itself would be conducted elsewhere. We note these comments.

#### **Recommendation 10**

**We recommend the provision of accommodation at the Family Court for counsellors and mediators which would facilitate early referral to appropriate services.**

### ***Screening and matching cases for mediation***

5.51 The writers Benjamin and Irving suggested that the critical question for policy makers was not whether mediation was useful, but how to use it to the best advantage by matching clients with the specific service model best suited to their needs.<sup>47</sup> They recommended a screening process to achieve this end. They observed that if the referral and intake service did not make an appropriate “diagnosis,” then the “treatment” suggested might be inappropriate and cause more problems and expense for the system. However, when the characteristics of a case were matched to the appropriate dispute resolution process, then processes such as mediation and counselling conferences would be seen as complementing the formal court system. This would also increase the choice for the consumer and the professionals that advise them.<sup>48</sup>

### ***Domestic violence and sexual abuse guidelines***

5.52 The New Zealand Boshier report<sup>49</sup> recommended that “*ordinarily, where an application for domestic protection is made and where it is coupled*

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47 “Research in Family Mediation,” *Mediation Quarterly* (Fall 1995) vol 13(1) 53, at 73.

48 Another writer has commented that: “*The availability of an effective alternative and a user friendly process may also have the effect of making lawyers more responsible and accountable in examining their own procedures and in effecting improvements.*” see Finlay, “Family Mediation and the Adversary Process,” *Australian Journal of Family Law* (1993) vol 7(1), 63, at 69.

49 Summarised in Boshier, “New Zealand Family Law Report,” *Family and Conciliation Courts Review* (Apr 1995) vol 33 (2) 182-193.

with a guardianship application, mediation is inappropriate.”<sup>50</sup> The report also recommended that::

*“cases involving actual sexual abuse allegations should not be referred to the Family Conciliation Service,<sup>51</sup> at least until the allegations were properly investigated and only then with the parties’ agreement and judge’s review of any agreement reached.”<sup>52</sup>*

5.53 We therefore recommended in the Consultation Paper that guidelines for cases of domestic violence and child sexual abuse should be established to screen cases for family mediation on a similar basis to the Australian and New Zealand guidelines. All of the respondents who commented on these proposals during the consultation exercise expressed support for them.

#### **Recommendation 11**

**We recommend that guidelines for cases of domestic violence and child sexual abuse should be established to screen cases for family mediation on a similar basis to the Australian and New Zealand guidelines.**

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50 Same as above, at para 11.5.4.

51 That report had recommended a separate and distinct Family Conciliation Service working alongside the judicial branch of the Family Court.

52 Boshier (1995), above, at para 12.5.2.

## Chapter 6

### Recommendations for reform – Family mediation services generally

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#### Introduction

6.1 In the previous chapter, we outlined our recommendations on court based support services to facilitate family mediation in Hong Kong. We noted that a number of our earlier recommendations in this area had been implemented with the establishment of the Pilot Scheme on Family Mediation at the Family Court.

6.2 In this chapter, we focus on our more general recommendations related to the role of mediators. The objective of these recommendations is to ensure that mediation here operates in accordance with clear guidelines and adequate resources, so that the integrity of the process and the quality of services will be maintained.<sup>1</sup>

#### Training of mediators

6.3 In the New Zealand context, the Boshier report recommended that mediation should be assured of a high profile in the Family Court system by an insistence on “*high standards of selection, training, supervision and accreditation of mediators and ongoing accreditation requirements.*”<sup>2</sup>

6.4 We observed in the Consultation Paper that we agreed with the emphasis of the Boshier report, and recommended that high standards of selection, training, supervision and accreditation should be required of family mediators participating in any mediation scheme operating through the Family Court.<sup>3</sup>

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1 See: New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (1991: Report No 67), at 70.

2 As summarised in Boshier, “New Zealand Family Law Report,” *Family and Conciliation Courts Review* (Apr 1995) vol 33 (2) 182-193, at para 5.7.7.

3 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), at paras 12.111 and 15.117.

6.5 During our consultation exercise, all of the responses which referred to these recommendations expressed support for them.

**Recommendation 12**

**We recommend that high standards of selection, training, supervision and accreditation should be required of family mediators participating in any mediation scheme operating through the Family Court.**

## **Accreditation**

6.6 The Hong Kong Mediation Council, (formerly known as the "Mediation Group") of the Hong Kong International Arbitration Centre has approved a system of accreditation for qualified family mediators. A panel of such mediators is now established.<sup>4</sup> It is hoped that all qualified family mediators, whether private, community mediators or mediators from the Social Welfare Department will be accredited by this system to ensure the consistency and quality of standards. Having this system approved by government and the Judiciary would make it easier for agencies to receive government funding or subvention.

6.7 We therefore recommended in the Consultation Paper that the current system of accreditation of qualified family mediators should be approved by government and the Judiciary.<sup>5</sup> This recommendation was supported by all of the respondents who commented in this area.

**Recommendation 13**

**We recommend that the current system of accreditation of qualified family mediators should be approved by government and the Judiciary.**

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4 As at October 2002, there were 94 accredited mediators on the HKIAC Family Panel: see list appearing at <http://www.hkiac.org/enpanelam2.html>.

5 Same as above, at paras 12.112 and 15.118.

## Social welfare officers and mediation

6.8 In our Consultation Paper, we observed that, following the advent of mediation services through the Family Court, there was a need to clarify the roles of social welfare officers in order to avoid confusion between their original investigative role and the new role of mediator if performed by a social welfare officer.<sup>6</sup> We noted that the role of the social welfare officer as investigator or expert to the court is separate from a counselling or mediation role. We therefore recommended that social welfare officers who were professionally qualified mediators participating in the mediation service operating through the Family Court should be separate from the social welfare officers who carry out the service of executing social investigations and preparing reports for the courts.<sup>7</sup> We also recommended that the Social Welfare Department should establish appropriate guidelines to separate these functions.

6.9 On consultation, all but one of the respondents who commented on this recommendation supported it. The respondent who objected appeared to assume that the recommendation advocated that social welfare officers should simultaneously fulfil two distinct functions, one as investigators or experts to the court, the other as mediators. To clarify, the intent of our recommendation was that those social welfare officers who acted as investigators or court experts should not act as mediators.

### **Recommendation 14**

**The role of the social welfare officer as investigator or expert to the court is separate from a counselling or mediation role. We therefore recommend that the social welfare officers who are professionally qualified mediators participating in the mediation service operating through the Family Court should be separate from those social welfare officers who carry out the service of executing social investigations and reports for the Family Court.**

**We recommend that the Social Welfare Department establish appropriate guidelines to separate these functions.**

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6 Same as above, at para 12.92.

7 Same as above, at paras 12.94 and 15.110.

## Other professions and mediation

6.10 Equally, a qualified mediator should not embark on counselling the client, or otherwise engage in therapeutic tasks, as there will be a confusion of roles. There also needs to be a clear separation of function between a lawyer acting as a mediator and acting in the capacity of a solicitor or barrister.

6.11 We recommended in the Consultation Paper<sup>8</sup> that other professionals involved in counselling or therapy, whether working in government or non-governmental agencies, or privately, should adopt similar guidelines. We also recommended that the Law Society and the Bar Association should draw up appropriate guidelines to ensure the separation of the roles of lawyers acting as lawyers from lawyers acting as mediators.

6.12 On consultation, all of the respondents who commented on these recommendations expressed support for them.

### **Recommendation 15**

**Other professionals involved in counselling or therapy, whether working in governmental or non-governmental agencies or privately, should adopt similar guidelines.**

**We also recommend that the Law Society and the Bar Association should draw up appropriate guidelines to ensure the separation of roles of lawyers acting as lawyers, from lawyers acting as mediators.**

## Experts' reports

6.13 The New Zealand Boshier report recommended that, in difficult cases, some means of obtaining specialist input from psychologists or senior social workers, while a mediation was ongoing, might be needed.<sup>9</sup> This would be *“to help the parties focus on the needs and wishes of the children”*<sup>10</sup> and might assist in settlement.

6.14 We therefore recommended in the Consultation Paper that family mediators should have access to facilities to obtain an expert's report,

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8 Same as above, at paras 12.96 and 15.111.

9 Boshier (1995), above.

10 Same as above, at para 5.7.9.

with the parties' consent, to assist in difficult cases concerning disputes over children.<sup>11</sup> This recommendation was widely supported on consultation.

### **Recommendation 16**

**We recommend that family mediators have access to facilities to obtain an expert's report, with the parties' consent, to assist in difficult cases concerning disputes over children.**

## **Privilege and confidentiality**

6.15 "Privilege" is the right of a party to prevent statements or documents being brought into evidence. The Law Commission of England and Wales recommended that a statutory privilege should be conferred on statements made during mediation.<sup>12</sup> The Law Commission proposed that statements made which indicated a risk of harm to a child would be privileged but not confidential.<sup>13</sup>

6.16 In 1993, the Court of Appeal in England recognised that mediation,<sup>14</sup> though not forming part of the legal process, was, as a matter of practice, "*becoming an important and valuable tool in the procedures of many Family Courts.*"<sup>15</sup> Thus, there was great importance in the "*preservation of a cloak over all attempts at settlement of disputes over children.*"<sup>16</sup>

6.17 The view was expressed that mediation would not work unless the parties approached the process in an open manner, prepared to give and take, and make admissions and gestures to reach an accord. If instead the "*parties remain in their entrenched positions, no armistice will be reached in no man's land.*"<sup>17</sup> Mediation could not be successful unless the parties could conduct the meeting off the record. The parties must be "*confident that their concessions and admissions cannot be used as weapons against them if [mediation] fails and full-blooded litigation follows.*"<sup>18</sup>

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11 HKLRC Sub-committee on Guardianship and Custody (1998), at paras 12.97 and 15.112.

12 The English Law Commission used the term "conciliation": see *Family Law; Ground of Divorce*; (Law Com No 192: 1990), at para 5.29.

13 Same as above, at paras 5.29 to 5.48.

14 Again, the term "conciliation" was used: see *In re D (Minors)* [1993] 2 WLR 721, at 728.

15 Same as above.

16 Same as above.

17 Same as above, at 724, *per* Sir Thomas Bingham.

18 Same as above.

6.18 This form of privilege is similar to the rule that communications made “without prejudice” protect communication made in a *bona fide* attempt to negotiate a dispute.<sup>19</sup> However, it is actually a privilege derived from the principle that, “*where a third party receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties’ agreement.*”<sup>20</sup> This was then a new category based on the public interest in the stability of marriage.

6.19 The English Court of Appeal concluded that:

*“evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely to cause serious harm to the well-being of a child .... [A trial judge] will admit it ... only if, in his judgment, the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation.”*<sup>21</sup>

6.20 The Hong Kong Court of Appeal gave some support to mediation and conciliation when it held in *W v W*<sup>22</sup> that the evidence given by a psychologist as a mediator and conciliator about the relationship between the spouses was privileged.

6.21 The term “privilege” is used in the sense that a person has the right in certain circumstances to withhold information from a court. The term “confidentiality” is used in the sense that a communication or information is recognised in law as being a ground for claiming privilege before the court. Confidentiality is essential in mediation to protect the integrity of the process, the parties’ interests and to encourage settlement through full disclosure. The Code of Practice adopted by the Hong Kong Mediation Council, *Guidelines for Professional Practice of Family Mediators*, imposes an obligation of confidentiality on the mediator to protect the information revealed by parties in the mediation process, except in certain defined circumstances.<sup>23</sup> It also indicates that the mediator will claim privilege if he or she is summonsed to attend court.

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19 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, at 1299G.

20 Sir Thomas Bingham in *In re D*, above, at 726, relying on *McTaggart v McTaggart* [1949] P 94 and *D v NSPCC* [1978] AC 171.

21 Same as above, at 729.

22 [1994] 1 HKC 430. In that case, the wife had waived her privilege by referring to opinion and advice contained in the conciliator’s affidavit. Nonetheless, the Court considered that the court below should not have heard the evidence from the conciliator without the clear and unequivocal agreement of both parties. The court confirmed that the privilege given to conciliation in matrimonial cases was a privilege based on the public interest in the stability of marriage and needed to be protected. Accordingly, the court ordered the editing of the affidavit.

23 This is where the information discloses an actual or potential threat to human life or safety.

6.22 The Law Commission of England and Wales recommended that a statutory privilege should be conferred on statements made during conciliation procedures. Statements made which indicated a risk of harm to a child would be privileged but not confidential.<sup>24</sup> The Civil Evidence (Family Mediation) (Scotland) Act 1995 provides for the inadmissibility of evidence as to what occurred at a family mediation conducted by accredited family mediators.<sup>25</sup>

6.23 Various countries provide in primary or subsidiary legislation or practice directions for privilege for settlement or conciliation conferences.<sup>26</sup> As noted above, there is also a common law privilege based on the public interest in the stability of marriage.<sup>27</sup> The Hong Kong Court of Appeal held in *W v W*<sup>28</sup> that the evidence given by a psychologist as a mediator and conciliator about the relationship was privileged.<sup>29</sup>

6.24 There are precedents in Hong Kong for statutory privilege. Part II of the Labour Relations Ordinance (Cap 55) provides for conciliation to resolve employment disputes. If the dispute is not settled, a conciliation officer shall make a report to the Commissioner, setting out the facts agreed between the parties and those that appear to be in dispute.<sup>30</sup> The Commissioner can then refer the dispute to a special conciliation officer who is a senior officer of the labour relations division. Section 9 of the Ordinance provides privilege to the communications:

*“anything communicated to a conciliation officer or special conciliation officer in connection with the performance of his functions under this ordinance shall not be admissible in evidence in any proceedings before an arbitration tribunal or board of inquiry, except with the consent of the person who communicated it to the conciliation officer or special conciliation officer.”*

6.25 Section 80(6) of the Disability Discrimination Ordinance (Cap 487) provides that:

*“Evidence of anything said or done by any person in the course of conciliation under this section (including anything said or done*

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24 Law Commission of England and Wales, *Family Law, Grounds of Divorce* (1990: Law Com No 192), at paras 5.29 to 5.48.

25 It implemented a Scottish Law Commission report, *Report on Evidence: Protection of Family Mediation* (1992: Scot Law Com No 136).

26 Section 18 of the New Zealand Family Proceedings Act 1980 and section 19N of the Australian Family Law Act 1975 provide privilege for conciliation conferences. See the English *Practice Direction (Family Division: Conciliation Procedure)* [1982] 1 WLR 1420. In Ontario, Newfoundland, the Yukon, Quebec and Saskatchewan, legislation protects the confidentiality of disclosures made during mediation by a court-appointed mediator from admission in evidence without the consent of the parties.

27 Sir Thomas Bingham in the case of *In re D (Minors)*, above, at 726.

28 [1994] 1 HKC 430.

29 This was in reliance on *In re D (Minors)*, above.

30 Labour Relations Ordinance (Cap 55), section 4.

*at any conference held for the purposes of such conciliation) is not admissible in evidence in any proceedings under this Ordinance except with the consent of that person.*<sup>31</sup>

6.26 For the removal of doubt, we recommended in the Consultation Paper the introduction of a statutory provision giving privilege to all qualified family mediators similar to that provided in the Civil Evidence (Family Mediation) (Scotland) Act 1995.

6.27 On consultation, all of the responses we received on this recommendation indicated general support for it, but reservations were expressed by some consultees regarding the extent of client confidentiality and privilege in cases where child abuse came to light. We took careful note of this concern and reviewed the terms of our original recommendation. In particular, we looked again at the model proposed by the English Law Commission.

6.28 It was noted that the English Law Commission had recommended that statements made during the course of a mediation process should be privileged;<sup>32</sup> they had added a specific rider, however, that statements made which indicated a risk of harm to a child should be privileged but not confidential.<sup>33</sup> Consequently, in cases where a mediator came to learn that a child was being abused, and one or both parties to the mediation wanted to keep this information confidential, the mediator would be entitled to report the abuse to the relevant authorities.

6.29 This would not mean, however, that the mediator could subsequently be compelled to give evidence about the matter in court. The Commission noted that in practice, once the information was passed to the authorities, an investigation would take place and it was upon that, rather than the initial referral, that any subsequent proceedings would be based.<sup>34</sup> The Commission concluded that:

*"It is a matter of judgment whether the welfare of the child would be better protected by compelling the [mediator] to give evidence in such proceedings or by the greater frankness which an absolute privilege would encourage during the conciliation or mediation process. ... We consider that, on balance, the welfare of any children would be better protected by an absolute privilege, given that the codes of practice of the relevant professionals include a provision to the effect that confidence will not be maintained in respect of matters relating to protection of children, such as allegations of abuse."*<sup>35</sup>

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31 This is similar to Section 84(6) of the Sex Discrimination Ordinance (Cap 480).

32 Law Commission of England and Wales (1990), above, at para 5.44.

33 Same as above, at para 5.48.

34 Same as above.

35 Same as above.

6.30 In this context, we note that, included in the standard-form Agreement to Mediate for the Hong Kong Pilot Scheme on Family Mediation at clause 5(e) is the statement that:

*"The Mediator shall keep confidential all information and/or documents given to him/her during the course of mediation unless such information discloses an actual or potential threat to human life or safety."*

6.31 There is also a statement in the Hong Kong *Guidelines for Professional Practice of Family Mediators – Code of Practice*, at clause VI(c)(ii), that one of the exceptions to the confidentiality duty normally imposed on mediators is:

*"When the information discloses an actual or potential threat to human life or safety. Any information divulged shall be limited to what is absolutely necessary."*

6.32 Having reconsidered our earlier position in this area in the light of concern expressed by some of our consultees, we are now of the view that an approach along the lines of the English Law Commission's recommendations is generally to be preferred. As noted earlier, the Commission recommended that a statutory privilege should be conferred upon statements made by parties during the course of the mediation process; however statements which indicated a risk of harm to a child should be privileged but not confidential. We consider that this approach strikes a suitable balance between, on the one hand, preserving the integrity of the mediation process and promoting full disclosure between the parties to advance settlement, and, on the other, protecting children and others from threats to their safety.

**Recommendation 17**

**For the removal of doubt, we recommend a statutory provision conferring privilege on statements made during the course of any mediation.**

**Further, we recommend that, whilst statements made during the course of any mediation process should, in general, be both privileged and confidential, statements which indicate a risk of harm to human life, particularly to a child, should be privileged but not confidential.**

## Immunity from liability

6.33 Many Australian statutes provide immunity and protection from civil liability to mediators operating in court annexed mediation schemes or government agencies. The justification for providing this is that it may hinder the development of mediation if a mediator could be sued for negligence.<sup>36</sup> It is also assumed that mediators attached to a court or approved organisation comply with certain standards of quality and accountability which reduce the chance that they will be sued. Section 19M of the Australian Family Law Act 1975 provides:

*“A family and child mediator... has, in performing the functions of such a mediator... the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.”*

6.34 We therefore recommended in the Consultation Paper<sup>37</sup> that a provision granting immunity along similar lines to section 19M of the Australian Family Law Act 1975 should be introduced to protect qualified family mediators. All of the respondents who commented on this recommendation during the consultation exercise supported it.

### **Recommendation 18**

**We recommend the introduction of a provision on similar lines to section 19M of the Australian Family Law Act 1975 granting immunity to protect qualified family mediators.**

## Legal advice

6.35 Under Order 25A, Rule 12, of the Australian Family Law Rules, the mediator is required to advise the parties that they should obtain legal advice as to their rights, duties and obligations at the commencement of the mediation process, and at any other time if the mediator considers it appropriate. This advice should also be given at the conclusion of mediation and before any agreement becomes legally binding.

6.36 We recommended in our Consultation Paper that a provision along the lines of Order 25A, rule 12 of the Australian Family Law Rules

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36 Boule, *Mediation: Principles, Process, Practice* (1996) 254.

37 HKLRC Sub-committee on Guardianship and Custody (1998), at paras 12.136 and 15.126.

should be adopted in Hong Kong.<sup>38</sup> This proposal was supported by all of the respondents who commented on it during consultation.

### **Recommendation 19**

**We recommend the adoption of a provision along the lines of Order 25A, rule 12, of the Australian Family Law Rules, which requires mediators to advise clients that they should obtain legal advice as to their rights, duties and obligations.**

## **Legal aid and mediation**

6.37 We noted in our Consultation Paper<sup>39</sup> that the English Family Law Act 1996 included statutory authority for the Legal Aid Board (now the Legal Services Commission) to provide mediation services. The Act also provided that legal aid for representation would not be granted unless the person had attended a meeting with a mediator to determine the suitability of mediation.

6.38 In our Consultation Paper<sup>40</sup> we recommended that there should be statutory provision for legal aid to be made available for mediation of guardianship, custody and access disputes in Hong Kong. Legal aid in Hong Kong is currently available only in respect of the provision of legal representation in any proceedings,<sup>41</sup> and we are aware that our proposal to extend legal aid to mediation therefore represents a change in the underlying basis for the legal aid scheme. In our view, however, this would promote early settlement between parties and would potentially have a positive impact on that large part of the legal aid budget which is currently spent on family disputes.<sup>42</sup> In contrast to the approach followed in England, however, we do not propose that legal aid should be denied if mediation has not been attempted.

6.39 We further recommended in our Consultation Paper that, once that legislation was enacted, the Legal Aid Department should establish a

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38 Same as above, at paras 12.137 and 15.127.

39 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 8.22-8.24.

40 Same as above, at paras 12.128 and 15.124.

41 See section 6, Legal Aid Ordinance (Cap 91).

42 As we note in Chapter 2, fnote 3, above, in 2000-2001, approximately one-third (\$144 million or 36%) of the total civil legal aid cost was spent on about 5,000 disputed and non-disputed matrimonial cases: see Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr 2002), at para 5.

proper scheme for the funding of family mediation which would include education, publicity and screening of potential cases.

6.40 On consultation, all of the respondents who commented on this recommendation expressed support for it. We note the reservation of one consultee, however, that funding mediation through legal aid would have significant cost and resource implications, and that the determination of this issue should, in any event, await the outcome of the Pilot Scheme on mediation at the Family Court. We note these comments but remain of the view that mediation should be legally-aided.

#### **Recommendation 20**

**We recommend that there should be statutory provision for legal aid to be made available for mediation of guardianship, custody and access disputes.**

**We further recommend that, once such legislation is enacted, the Legal Aid Department should establish a proper scheme for the funding of family mediation that will include education, publicity and screening of potential cases.**

### **Child's voice in the mediation process**

6.41 One writer has observed that, in New Zealand, the majority of custody, access and guardianship disputes were resolved by counselling and mediation and yet there was no legal requirement for the child's views to be taken into account in these processes.<sup>43</sup> Obtaining the child's views could be done directly, by the mediator interviewing the child, or indirectly, by another worker interviewing the child. It was noted that there were special protocols that needed to be drawn up as to the appropriateness of interviewing the child, and in what circumstances.<sup>44</sup>

6.42 Another writer has outlined the goals of giving attention to the child's voice as:

1. bringing the child into focus for family decision-making;
2. obtaining input from the child relevant to parental decisions;

43 Henaghan, "The 1989 United Nations Convention on the Rights of the Child", "Rights and Responsibilities," *Papers from the International Year of the Family, Symposium on Rights and Responsibilities of the Family* (Wellington, Oct 1994) 32, at 36.

44 Kelly, "The Voice of Children in the Mediation Process," notes from a Pre-Conference Workshop of the Second International Mediation Conference, Adelaide, January 1996.

3. providing impartial clarification and education for the child as needed; and
4. providing feedback to parents as the voice of the child.<sup>45</sup>

6.43 We noted in our Consultation Paper the mechanisms for listening to the views of the child in the litigation process. In particular, section 11(7) of the Children (Scotland) Act 1995 provided that the court:

*“taking account of the child’s age and maturity, shall so far as practicable*

- (i) give him an opportunity to indicate whether he wishes to express his views;*
- (ii) if he does so wish, give him an opportunity to express them; and*
- (iii) have regard to such views as he may express”.*<sup>46</sup>

6.44 We therefore recommended<sup>47</sup> the adoption of a provision on the lines of an amended section 11(7) of the Children (Scotland) Act 1995, to provide a mechanism for considering the children’s views in the mediation process. We also recommended that consideration be given to what mechanisms were needed to determine the child’s views, so that these could be brought to the mediator’s attention.

6.45 All of the responses on these recommendations during the consultation exercise were in support of them.

#### **Recommendation 21**

**We recommend the adoption of a provision on the lines of an amended section 11(7) of the Children (Scotland) Act 1995 to provide a mechanism for considering the views of the child in the mediation process.**

**We also recommend that consideration be given to what mechanisms are needed to determine the child’s views so that these can be brought to the mediator’s attention.**

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45 Same as above.

46 Section 11(7) of the Children (Scotland) Act 1995.

47 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.126 and 15.123.

## Arrangements for children

6.46 We considered in our Consultation Paper that it was necessary to set out how mediation agreements or parenting plans would fit into the existing court process.<sup>48</sup> A divorce petition and a statement as to the arrangements for the children,<sup>49</sup> which are filed in the court, are subject to the scrutiny of the judge to ensure compliance with section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192). A *decree absolute* cannot be made without the court being satisfied of these arrangements.

6.47 We proposed that the court would look at the mediation agreement or parenting plan and the statement as to the arrangements for the children. The procedure would be similar to dealing with a consent order or decree, and in fact, the mediation agreement may well be attached to a draft consent order. The parties would attend the court and the judge would ask them questions if he was not happy with the arrangements. The judge has a discretion to refuse to agree to the arrangements. This is reassuring to those who are concerned that parties may enter into arrangements in mediation or into parenting plans that do not meet the best interests of the children.

6.48 We therefore recommended in the Consultation Paper that rules of court should facilitate mediation agreements being converted into consent court orders.<sup>50</sup> We noted that this should assist both compliance with the terms of the agreement, and its enforcement in the event of the arrangements breaking down.

6.49 On consultation, all of the respondents who commented on this recommendation expressed support for it.

### **Recommendation 22**

**We recommend that rules of court should facilitate mediation agreements being converted into consent court orders. This should assist both compliance with the terms of the agreement, and its enforcement in the event of the arrangements breaking down.**

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48 Same as above, at paras 12.140-12.142.

49 Form 2B as provided for in rule 9(3) of the Matrimonial Causes Rules.

50 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.142 and 15.129.

## Parenting plans

6.50 In Washington State, a standard parenting plan form must be completed dealing with parental responsibility for the child's school year, holidays, birthdays and other major events.<sup>51</sup> Decision-making in the areas of education, religion and medical decisions must be outlined. In addition, parents must indicate which choice of dispute resolution they wish to adopt if there are future conflicts. This includes litigation, mediation and counselling.

6.51 Section 63C(2) of the Australian Family Law Act 1975, as inserted by the 1995 amendments, provides that a parenting plan may deal with residence (custody), contact (access), and maintenance of a child, and any other aspect of parental responsibility for a child. These plans are specifically tailored to the needs of a particular family and can then be registered with the court. This is a preferable form of dispute resolution to the traditional order which gives custody to the mother with a vague "reasonable access" clause in favour of the father, even if the order is by consent. The parenting plans can be drawn up by a mediator, counsellor, social welfare officer or solicitor.

6.52 We consider that the shift away from parental rights and adversarial processes and terms, to parental responsibility and more humanistic processes such as parenting plans, should be encouraged in Hong Kong for the best interests of the child. We therefore recommended in the Consultation Paper<sup>52</sup> the adoption of a provision for parenting plans which could be registered in the Family Court, similar to the provisions of the Australian Family Law Reform Act 1995. In favouring the Australian model, we prefer a more generally worded provision introducing parenting plans, to allow greater flexibility to the parties to tailor their parenting plan to suit their own situation. We think the Australian approach achieves this more readily than the Washington model. We noted in the Consultation Paper that a section 18 declaration under the Matrimonial Proceedings and Property Ordinance (Cap 192) would still be made which could have the parenting plan attached. We added that parenting plans should be encouraged, and there should be a grace period when they would be voluntary. We noted that they should only become mandatory at a later stage to ensure their use on a more extensive basis.

6.53 On consultation, the majority of respondents who commented on this recommendation expressed support for it. One respondent expressed the view that the use of such plans might promote expensive litigation where parties were hostile. Another respondent agreed that the plans should be introduced, but contended that there should be no grace period. We note these comments.

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51 Tompkins, "Parenting Plans - A Concept Whose Time Has Come," *Family and Conciliation Courts Review* (Jul 1995) vol 33(3), 286, at 296.

52 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 12.147 and 15.130.

### Recommendation 23

**We recommend the adoption of a provision for parenting plans (which could be registered in the Family Court) similar to the provisions of the Australian Family Law Reform Act 1995. A section 18 declaration under the Matrimonial Proceedings and Property Ordinance (Cap 192) would still be made which could have the parenting plan attached. Parenting plans should be encouraged, and there should be a grace period when they would be voluntary. They should only become mandatory at a later stage to ensure their use on a more extensive basis.**

## Enforcement of mediation agreements

6.54 Mediation is increasingly being used as an alternative way of resolving custody and access disputes when parties divorce, or when arrangements may need to be varied after the divorce as the children grow older.<sup>53</sup> Mediation is not legally binding unless the terms are incorporated into an agreement which can then be treated as binding provided there was independent legal advice given and no pressure was exerted by one party on the other. The memorandum of agreement should be clear as to whether it is binding on the parties or not, to avoid any subsequent dispute on this issue.<sup>54</sup> Also, the agreement to mediate may have provided that any agreement reached in mediation would not be binding unless reduced to writing and signed by the parties. In some agreements there may be a provision that the parties should obtain independent legal advice, and thereafter agree to be bound.<sup>55</sup> In addition, the mediation agreement can be incorporated into a court order by consent. It is useful if an agreement contains a clause setting out a procedure for enforcement if one of the parties were to default in complying with the agreement or order.

6.55 Any arrangements made by the parties in respect of a child, however, cannot be treated as legally binding without the court's approval under section 18 of the Matrimonial Property and Proceedings Ordinance (Cap 192). In reality, the court is unlikely to interfere with an agreement by the parties unless it appears to be against the welfare of the child. In particular, the court would regard any custody or access arrangements, whether contained in a mediation agreement, consent order, or other order, as being capable of variation if the interests of the child required it.

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53 See: *Report and Recommendations of The Chief Justice's Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and related matters* (Aug 1993).

54 Brown and Marriott, *ADR Principles and Practice* (1993), at 378.

55 The English Family Mediators Association agreement is similar to this provision.

6.56 If there are future disagreements about the interpretation of the consent order, the court will resist setting aside an agreement reached freely by the parties. The parties cannot appeal the consent order but must apply to have it set aside on the ground of variation of circumstances or duress or fraud. Godfrey J, in the Court of Appeal in *W v W* stated that:<sup>56</sup>

*“The court will treat a formal agreement, properly and fairly arrived at with the benefit of competent legal advice, as one which should be given effect to unless good and substantial grounds are shown for concluding that injustice would be done by holding the parties to its terms.”*

6.57 He referred to the situations where the court would examine the state of mind of the parties when they reached the agreement:

*“[Undue] pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of reaching agreement, are all relevant to the question of justice between the parties”.*<sup>57</sup>

6.58 Concern has been expressed by lawyers about parties entering into mediation agreements without legal advice. The Court of Appeal in *W v W*<sup>68</sup> confirmed that it would normally give effect to an agreement fairly arrived at which had the benefit of competent legal advice, unless there were substantial grounds for concluding that injustice had been done.

6.59 It has been suggested that parties who reach a mediation agreement without the benefit of independent legal advice risk having the court set the agreement aside unless there were to be amendments introduced to section 14 of the Matrimonial Proceedings and Property Ordinance (Cap 192).<sup>59</sup> Section 14 provides that a provision in a maintenance agreement restricting the right to apply to court for an order concerning financial arrangements, is void. In fact, section 15 of the Ordinance gives the court power to alter the maintenance agreement.

6.60 We take the view that care needs to be taken in the drafting of mediation agreements concerning financial arrangements so that it does not appear that the jurisdiction of the court is being ousted. We do not see the need to amend section 14 of the Ordinance, however, and we have already recommended that parties should be encouraged to obtain independent legal advice before completing a mediation agreement.

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56 [1994] 1 HKC 430, at 437 (CA).

57 Lord Justice Ormrod in *Edgar v Edgar* [1980] 1 WLR 1410, at 1417.

58 [1994] 1 HKC 430.

59 This was in a submission by the Law Society to the Hong Kong International Arbitration Centre when it proposed establishing a family mediation service in 1992: see “Family mediation proposed,” *The New Gazette* (July 1992).

6.61 We therefore noted in the Consultation Paper that we did not see the need to amend section 14 of the Matrimonial Proceedings and Property Ordinance (Cap 192). On consultation, all the respondents who commented on this recommendation expressed support for it, except for one respondent who submitted that section 14 should be amended for the avoidance of any doubt regarding the enforcement of mediation agreements.

**Recommendation 24**

**We do not see the need to amend section 14 of the Matrimonial Proceedings and Property Ordinance (which provides that a provision in a maintenance agreement restricting the right to apply to court for an order concerning financial arrangements, is void).**

## **Community mediation**

6.62 The Social Welfare Department provides family services through 42 family service centres and there are at least 23 such centres in the non-government sector. There are 19 family activity and resource centres within existing community centres. They are an initial contact point for families. The family service centres and family activity and resource centres should publicise the availability of mediation services. Some family service centres (in both sectors) should be designated to provide mediation services to assist the resolution of family conflict before approaches are made to court and the conflict has become entrenched. Until mediation becomes well known it may be more appropriate to attach it to these centres which already provide counselling to families, who can then be a source of referral.

6.63 When a family relationship is in crisis, the legal system may be resorted to because it is perceived to be either the most appropriate or the *only* service available. More publicity and education of the public is therefore needed to encourage families to seek assistance from local family service centres at an early stage of conflict, or when problems are first encountered. These local centres would be staffed, *inter alia*, with professionally qualified mediators who would not provide the counselling services offered by the centre. This would assist the resolution of family conflict before approaches were made to court.

6.64 We therefore recommended in the Consultation Paper that community based family mediation services should be available to the public and that there should be more publicity and education to encourage early referral to such services. On consultation, all of the respondents to this recommendation expressed support for it.

#### **Recommendation 25**

**We recommend that community based family mediation services should be available to the public and that there should be more publicity and education to encourage early referral to such services.**

#### ***Approving community mediation***

6.65 The Australian Family Law Reform Act 1995 provided a mechanism for community based counselling and mediation organisations to become approved organizations under the Family Law Act 1975. Section 13E places a duty upon the minister to publish a list of approved organizations.

6.66 We therefore recommended in the Consultation Paper the enactment of legislative provisions similar to the provisions in the Australian Family Law Reform Act 1995, which provided a mechanism for community based counselling and mediation organisations to become approved organizations. We recommended that a similar scheme should be established in Hong Kong with funding provided by Government to approved organisations. The Government would work in partnership with such organisations with regard to the quality of the service, continuing supervision and training of the mediators and other relevant matters. These recommendations were supported by all of the respondents who commented in this area.

#### **Recommendation 26**

**We recommend the introduction of legislative provisions similar to the relevant provisions in the Australian Family Law Reform Act 1995 which provide a mechanism for community based counselling and mediation organisations to become approved organizations.**

**We recommend that a similar scheme be established in Hong Kong with funding provided by the Government to approved organisations. The Government would work in partnership with such organisations as regards the quality of the service, continuing supervision and training of the mediators and other relevant matters.**

## Chapter 7

### Recommendations for reform – The family litigation process and related matters

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#### Introduction

7.1 In the previous two chapters we set out our recommendations concerning court-based support facilities for family mediation and family mediation services generally. In this chapter, we focus on the family litigation process itself, as well as other related matters.

7.2 As we noted in the introduction to Chapter 5, there have, in recent years, been significant developments in the area of civil proceedings in Hong Kong, with the implementation of the Pilot Scheme on Family Mediation<sup>1</sup> and new proposals for reform of the civil justice system put forward by the Chief Justice's Working Party on Civil Justice Reform.<sup>2</sup> In line with these initiatives, our own approach to reform in this area has been to focus on how to minimise the adversarial nature of family proceedings, and how to shorten potential delays in the processing of these cases by the courts. As will be seen below, this latter consideration is particularly relevant to the recommendations set out in this chapter.

#### A new court process

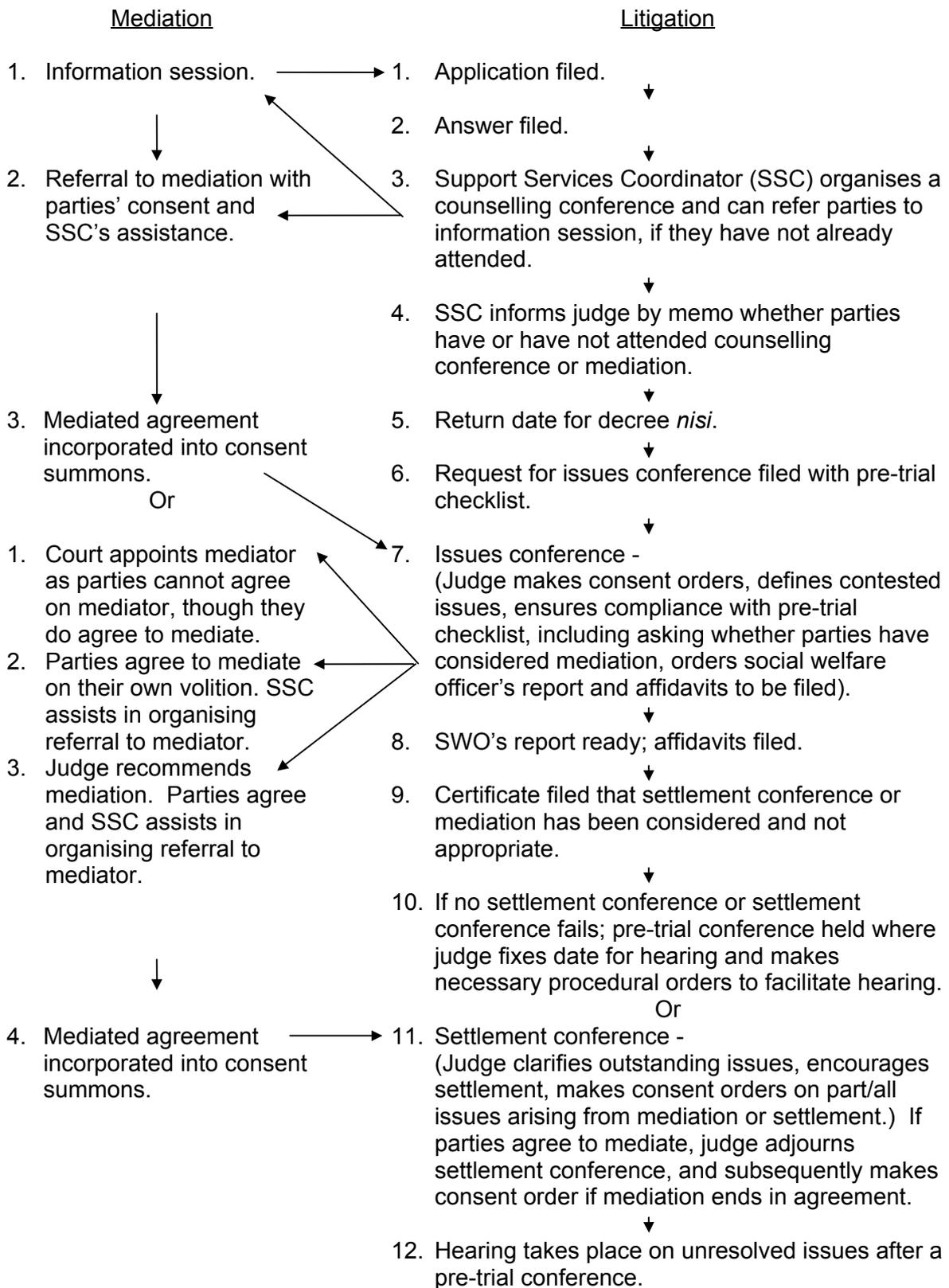
7.3 Underpinning many of our recommendations on family litigation is a new, streamlined court process for dealing with family cases. We have designed a Flow Chart (opposite) which outlines the steps in the new process we propose. A key feature in this new court process is the application of case management strategies. Accordingly, the steps set out in the Flow Chart are necessary steps in the management of family cases, with a time schedule set by the judge in consultation with the parties. The recommendations which relate to these steps in the new process are discussed below.

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1 See Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation: Interim Report* (Apr, 2002).

2 See Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform – Interim Report and Consultative Paper* (Nov, 2001).

## Proposed Case Management and Support Services Flow Chart for Dispute Resolution Process



## Case management and settlement

7.4 In relation to the current civil litigation system in Hong Kong, it has been observed by Chief Justice's Working Party on Civil Justice Reform that:

*"The present system obviously allows delays to result from the parties' own lack of readiness for the trial. While many parties and their lawyers conscientiously press cases ahead without delay, the party or lawyer who wants to drag his feet can easily bring about substantial delays. ..."*<sup>3</sup>

*"Underlying this unsatisfactory state of affairs is the adversarial design of the civil justice system which leaves it entirely up to the parties to progress the case without any time tables set or enforced by the court. Moreover, viewing itself as the impartial umpire, the court has adopted the policy of putting off the trial until it is sure that the parties are both quite ready to do battle."*<sup>4</sup>

7.5 One possible solution being considered by the Chief Justice's Working Party is to make case management part of the "overriding objective" of the civil procedure system and to adopt provisions setting out the court's case management powers. In this context, the Working Party's report<sup>5</sup> refers to part of the overriding objective which is contained in Rule 1 of the English Civil Procedure Rules (CPR). This states:

- "1.4 (1) *The court must further the overriding objective by actively managing cases.*
- (2) *Active case management includes –*
- (a) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*
  - (b) *identifying the issues at an early stage;*
  - (c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
  - (d) *deciding the order in which issues are to be resolved;*
  - (e) *encouraging the parties to use an alternative dispute resolution procedure if*

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3 See Chief Justice's Working Party on Civil Justice Reform (2001), above, at para 333.

4 Same as above, at para 334.

5 Same as above, at Executive Summary, para 35.

- the court considers that appropriate and facilitating the use of such procedure;*
- (f) *helping the parties to settle the whole or part of the case;*
  - (g) *fixing timetables or otherwise controlling the progress of the case;*
  - (h) *considering whether the likely benefits of taking a particular step justify the cost of taking it;*
  - (i) *dealing with as many aspects of the case as it can on the same occasion;*
  - (j) *dealing with the case without the parties needing to attend at court;*
  - (k) *making use of technology; and*
  - (l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently."*

7.6 In our Consultation Paper, we noted<sup>6</sup> that case management shifts the responsibility of managing cases from the lawyers to the judges and facilitates early resolution, reduces delay and backlogs, reduces the cost of litigation, and adds to the satisfaction of litigants.<sup>7</sup> We also noted that a settlement conference is one of the processes of case management that can encourage the right atmosphere for settlement at an early stage in the judicial process.

7.7 Such conferences can be operated by judges or registrars, though at the moment there are no registrars for management of family cases. More intervention by earlier case management may encourage settlement. The judges would also have more time to scrutinize the arrangements for the children which are the subject of consent orders. Boshier warned that case management techniques should be used as a means to effective dispute resolution and not as ends in themselves.<sup>8</sup> Program objectives of:

*“case management (and the reduction of court delay) should not be the sole or primary reason for implementation of a program, thereby reducing rather than enhancing the rights of the parties .... It is this objective which presents the greatest danger of coercion occurring.”<sup>9</sup>*

6 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper on Guardianship and Custody* (Dec 1998), at para 12.35.

7 See definition suggested in: Ontario Attorney General and the Chief Justice of the Ontario Court of Justice, *Civil Justice Review, First Report* (Mar 1995).

8 *New Zealand Family Law Report* ('Boshier report') summarised in an article of that name in *Family and Conciliation Courts Review* (1995) vol 33, no 2, 182-193, at para 7.2.3.

9 Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster Or Two Sides Of The Coin," *Journal of Dispute Resolution* (1993) vol 1, 1 at 71-2.

## **Practice Direction**

7.8 The Court of First Instance Construction List Practice Direction and checklist requires parties to inform the court, at the summons for directions stage, whether any, and if so what, attempts have been made to resolve the dispute or any part of it by mediation. This requirement does not entail disclosing the details of any mediation, only the fact of its having taken place.<sup>10</sup>

7.9 A pre-trial checklist must be completed, which asks the parties whether a pre-trial review would be useful. Each party is to receive a document, prepared with the approval of the Chief Justice, which sets out the benefits of mediation, explains how the services of a mediator can be obtained, and states that if the mediation is not successful this will not affect the litigation.

7.10 An Information Sheet must be completed which includes a question whether the lay clients have received this document from the Court. Some of the questions which focus on resolution are as follows:

### *Issues*

- “5.(a) Please provide a succinct list of issues in the case.*
- (b) Are any of them capable of resolution by agreement?*
- (c) Are any of the issues in the action suitable for trial as preliminary issues?...”*

### *Expert evidence*

- “7.(a) On what topic/issues may expert evidence be required?...”*
- (d) Is there scope for agreement?...”*

### *Trial*

- “8.(a) What is your present estimate of length of trial ?...”*
- 9. Would a pre-trial review be likely to be helpful?*
- 10. Is there any way in which the Court can assist the parties to resolve their disputes without the need for a trial/full trial?*
- 11. Have the lay clients received a copy of the notes from the court recommending mediation?*
- 12. Have the parties attempted a mediation procedure? If not, is it suggested that they should attempt a mediation*

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10 HKLD [1992] H 111.

*under the Hong Kong International Arbitration Centre's rules? Would they like the Court to assist in the appointment of a mediator or to appoint a mediator?*

13. *Have the parties been given details of the costs incurred to date and an indication of the fees likely to be incurred if this matter goes to a full hearing?"*

A pre-trial check list can also include questions such as:

- "1. Have you or counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by Alternative Dispute Resolution?*
- 2. Might some form of ADR procedure assist to resolve or narrow the issues in this case?*
- 3. Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by ADR?"<sup>11</sup>*

7.11 The Information Sheet must be lodged with the clerk of the construction judge not later than two days before the return date for the Summons for Directions. A copy must be given to each of the other parties.<sup>12</sup>

7.12 We therefore recommended in the Consultation Paper that procedures at the Family Court should be streamlined and that there should be continuous monitoring of the system by effective case management. We also recommended the introduction of a Practice Direction governing case management in the Family Court. Such a Direction would encourage more effective case management on an ongoing basis, and would encourage the diversion of cases from contested hearings to mediation. We did not think it was necessary at this juncture to decide the precise terms of such a Direction. However, the Construction List checklist and its associated Practice Direction might form a useful model for the Family List.<sup>13</sup>

7.13 We also recommended in the Consultation Paper that there should be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children.<sup>14</sup> We proposed that time limits should be imposed for the delivery of any affidavits associated with the case in order to minimize delay. We also recommended that judges should be given more control to reduce the costs and delay in the system. We considered that failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders.

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11 This is taken from the Commercial Court pre-trial checklist referred to in the "Practice Direction (Commercial Court: Alternative Dispute Resolution)," *The Times*, December 17, 1993 and reported in Order 72, r 11 of the *White Book*, at 1294.

12 HKLD [1992] H 111.

13 HKLRC (1998), above, at paras 12.38 to 12.39 and 15.89 to 15.90.

14 Same as above, at paras 12.47 and 15.93.

7.14 On consultation, all of the respondents who commented on this recommendation supported it, apart from one respondent, who suggested that the case management proposals should apply to more lengthy, complex cases only, otherwise they might potentially cause delay. We have noted this view.

#### **Recommendation 27**

**We recommend that procedures at the Family Court be streamlined and that there be continuous monitoring of the system by effective case management.**

**We recommend the introduction of a Practice Direction governing case management in the Family Court. Such a Direction would encourage more effective case management on an ongoing basis, and would encourage the diversion of cases from contested hearings to mediation. We do not think it is necessary at this juncture to decide the precise terms of such a Direction. However, the Construction List checklist and its associated Practice Direction form a useful model for the Family List.**

**We recommend that there should be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children. Time limits should be imposed for the delivery of any affidavits associated with the case in order to minimize delay.**

**We also recommend that judges should be given more control to reduce the costs and delay in the system. Failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders.**

## **Delay in family proceedings**

7.15 As with other types of litigation in Hong Kong,<sup>15</sup> there are delays in family cases in allocating a date for a full hearing. In defended family

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15 See Chief Justice's Working Party on Civil Justice Reform, above, at section E, paras 88 to 125. The Executive Summary to the report (at para 17) states: "*While delays are not of crisis proportions, the available statistics show that significant delays are encountered in various areas, particularly where contested interlocutory applications or interlocutory appeals occur.*"

proceedings in the District Court, the performance indicator<sup>16</sup> is 100 days from the issue of the petition to the setting down of the case for hearing. No separate indicator is set for the hearing of custody applications. The significant effect of the delay is that the *status quo* of the child custody arrangements is maintained, to the detriment of the parent seeking change.

7.16 We are also of the view that further delay may result from the operation of section 15 of the Legal Aid Ordinance (Cap 91), which provides for the stay of any proceedings pending an application for legal aid. We understand that the period of stay is a maximum of 42 days. This period is needed to investigate the means and merits of a legal aid application. Priority is given to emergency applications, but custody and access cases *per se* will not normally qualify for priority in a legal aid assessment unless there is some specific urgency in the matter. If legislation were in place to indicate that delay in such cases would be prejudicial to the best interests of the child, more resources would need to be allocated to divert these cases into a priority list for assessing the grant of a legal aid certificate.<sup>17</sup>

7.17 The principle that delay may prejudice the welfare of the child is given legislative recognition in England by provisions in sections 1 and 11 of the Children Act 1989. These statutory provisions<sup>18</sup> reflect the psychological need of a child to have certainty and to have an early decision made in relation to custody and access. Section 1(2) states:

*"In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."*

Section 11(1) states:

*"In proceedings in which any question of making a [custody or access] order, or any other question with respect to such an order, arises, the court shall ...*

*(a) draw up a timetable with a view to determining the question without delay; and*

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16 As at 2000: see HK Judiciary website, at <<http://www.info.gov.hk/jud/performance/index.htm>>. By contrast, the performance indicators for the "undefended list" and "special procedure list" in 2000 were 56 days and 30 days respectively. Note that recent changes to the Matrimonial Causes Rules (Cap 179, subsid leg) have expanded the scope of undefended family proceedings which may be included under the special procedure list: see Matrimonial Causes (Amendment) Rules 2001 (LN 270 of 2001), which came into operation on 25 January 2002 (see LN 13 of 2002).

17 The Legal Aid Department has submitted that section 15 of the Legal Aid Ordinance (Cap 91) need not cause delay, as the court, upon application by any parties, has power to override any stay of proceedings where appropriate.

18 In looking at the issue in Scotland, the Scottish Law Commission suggested that it was more appropriate to deal with the matter by rules of court: see Scottish Law Commission, *Report on Family Law* (1992, Report No 135, HMSO), at para 5.42.

- (b) *give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.*"

7.18 We therefore recommended in the consultation paper<sup>19</sup> that in order to promote the best interests of the child, priority must be given to the hearing of disputes concerning children (ie, custody and access, child abduction, wardship and guardianship). We recommended the introduction of statutory provisions along the lines of sections 1(2) and 11 of the Children Act 1989. We also recommended that, in the interim before legislation was enacted, target times should be set for the disposal of custody, access and guardianship disputes. These proposals were supported by all of the respondents to the consultation paper who commented in this area.

#### **Recommendation 28**

**To promote the best interests of the child, priority must be given to the hearing of disputes concerning children (ie disputes as to custody and access, child abduction, wardship and guardianship). We recommend the introduction of statutory provisions on the lines of sections 1(2) and 11 of the Children Act 1989 in England.**

**We recommend that, in the interim before legislation is enacted, target times should be set for the disposal of custody, access and guardianship disputes.**

## **Issues and settlement conferences**

### ***Issues conference***

7.19 The New Zealand Boshier report<sup>20</sup> recommended the introduction of an issues conference at an appropriately early time in the proceedings.<sup>21</sup> The issues conference would order relevant reports, make appropriate orders and directions and define the issues.<sup>22</sup> The New Zealand issues conference is similar to our call-over list in which directions are given.<sup>23</sup> The advantage of adopting the language of "issues conference" rather than

19 HKLRC (1998), above, at paras 12.6 and 15.82.

20 Boshier report (1995), above.

21 An issues conference could be organised once it was clear that the respondent had filed an Answer contesting the proceedings.

22 The parties would in advance have clearly defined the issues and the relief sought in a memorandum filed in court: Boshier report (1995), above, at para 6.5.7.

23 Though if the parties file a consent summons, there may be no need for a directions hearing.

retaining the language of “directions hearing”, reflects the fact that the issues conference will also deal with mediation and focus more on the issues outstanding between the parties. The issues conference, like the existing directions hearing, will be a necessary stage of the process.

### ***Family settlement conference***

7.20 Under the New Zealand proposals, once a report is available, a settlement conference would then be organised. The purpose of a settlement conference is be “*to permit a judge to explore settlement options, and if no settlement seems possible, to set down for hearing on terms which are appropriate to the case.*”<sup>24</sup> The family settlement conference would be convened when all relevant materials were before the court. The lawyers and parties would attend. At the conference, counsel should be able to advise on the legal and other costs to-date and the estimated cost if the matter were to proceed to a hearing.<sup>25</sup> If further directions were required between the issues conference and settlement conference (for example, because of non-compliance with directions or failure to disclose) then another conference might be called, but costs would be awarded against the unsuccessful party.<sup>26</sup>

7.21 Broadly speaking, both issues and settlement conferences are designed to enable the judge to explore the nature of the dispute and to assist the litigants in identifying options for resolution.<sup>27</sup> However, there should be a clear distinction drawn between the two types of conferences as they have different specific purposes. It is also useful to make provision for a further type of conference focusing on trial management, which would be a formal pre-trial review in the event that a settlement conference fails.

### ***Pre-trial conference***

7.22 The Saskatchewan Law Reform Commission suggested that a provision be inserted in custody legislation for pre-trial conferences. This provision combines the functions of issues conferences and settlement conferences as follows:<sup>28</sup>

“(A) *Upon first appearance before the court in an application for custody, or at any time prior to the hearing of the application, the court may direct a pre-trial conference*

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24 Same as above, at para 6.5.8.

25 The final report of Lord Woolf, on the extensive civil justice reforms proposed for England, suggested that the presence of clients at case management conferences, when past costs and future estimates are considered, “*will be a powerful incentive to adopt a realistic approach*”: see *Access to Justice* (Jul 1996, HMSO), at 82-86.

26 Boshier report (1995), above, at para 6.5.9.

27 Same as above, at para 7.2.8.

28 Saskatchewan Law Reform Commission, *Proposals on Custody, Parental Guardianship and the Civil Rights of Minors* (December 1981), at 17.

*before the judge or other person designated by the court, for the purpose of:*

- (i) resolution or narrowing of issues;*
  - (ii) disclosure of the nature of the evidence which will be presented at the hearing;*
  - (iii) encouragement of settlement or conciliation; and*
  - (iv) settling procedures to be adopted in the proceedings including appointment of amicus curiae, and directions of a custody investigation.*
- (B) (1) Upon consent of the parties, the pre-trial conference may be arranged by the registrar without an order of the court directing the conference.*
- (2) The pre-trial conference shall be conducted informally, in such manner as the judge or other person presiding at the conference may direct.*
- (3) The judge or other person who presides at a pre-trial conference shall prepare a memorandum of the matters agreed upon by the parties at the conference, and shall present the memorandum of such parties for their approval and shall file the memorandum.*
- (4) No evidence disclosed at the pre-trial conferences shall be admissible as an admission made at the conference, or as part of a transcript or record of the conference without the consent of the parties”.*

7.23 We recommended in the Consultation Paper that statutory provision should be made for issues and settlement conferences tailored to the needs of Hong Kong. We considered that there ought to be a clear distinction between issues and settlement conferences and that these conferences would be separate from mediation.

7.24 We recommended that a settlement conference should be a necessary step in the process, unless there was a certificate filed by a party or the parties that an attempt at settlement in a settlement conference was likely to be unsuccessful and that costs would be wasted by such attendance.<sup>29</sup>

7.25 We also recommended that, if no settlement conference took place, there would still be a conference similar to a directions hearing at which

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29 HKLRC (1998), above, at paras 12.45 to 12.46 and 15.91 to 15.92.

directions for trial would be ordered. In our view, the judge would still be able to suggest settlement at that stage.

7.26 We also recommended that no evidence disclosed at these pre-trial conferences should be admissible as an admission in any subsequent hearing or proceedings, or as part of a transcript or record of the conferences without the consent of the parties.

7.27 On consultation, most of respondents who commented on this recommendation supported it, apart from two respondents. One considered that the two distinct types of conference should not be necessary, or might cause undue delay to the proceedings. The other respondent thought that the proposed conferences might add unnecessary complexity to the proceedings.

7.28 We note the views of these respondents, but would emphasise that the purpose of issues and settlement conferences is to simplify, not to complicate, the proceedings. The intention is to give the court the power to utilize these conferences in appropriate cases - for example, in complex or contentious cases where the conferences may assist in narrowing down the issues for resolution.

7.29 We also note that it is our intention that the judge would always have the power to waive the holding of these conferences if he deemed it unnecessary in any particular case.

#### **Recommendation 29**

**We recommend that statutory provision be made for issues and settlement conferences tailored to the needs of Hong Kong.**

**There ought to be a clear distinction between issues and settlement conferences. These conferences would be separate from mediation.**

**We recommend that the issues conference be substituted for the call-over list.**

**A settlement conference would be a necessary step in the process unless there was a certificate filed by a party or the parties that an attempt at settlement in a settlement conference is likely to be unsuccessful and that costs would be wasted by such attendance.**

**If no settlement conference takes place, there would still be a conference similar to a directions hearing at which directions for trial would be ordered. The judge could still suggest settlement at this stage.**

**No evidence disclosed at these pre-trial conferences should be admissible as an admission in any subsequent hearing or proceedings, or as part of a transcript or record of the conferences without the consent of the parties.**

## **Social welfare officer's report**

7.30 Section 3(1)(i)(B) of the Guardianship of Minors Ordinance (Cap 13) provides that the judge shall give due consideration to “*any material information including any report of the Director of Social Welfare available to the court at the hearing.*” It is obviously crucial that delay be avoided as far as possible in the preparation of these “social investigation reports,” particularly when settlement is often postponed until the lawyers in the case have the opinion and recommendations of the report to hand. The Family and Child Protective Services Units of the Social Welfare Department therefore need to be adequately staffed so that there is minimal delay in preparing these reports.

7.31 On a related issue, some concern has been expressed by practitioners in Hong Kong as to the varying quality of social investigation reports furnished to the court. It is significant that other jurisdictions, such as Australia, insist on a minimum number of years of experience before a social worker is able to prepare reports for the Family Court.

7.32 We therefore proposed in the Consultation Paper that more resources needed to be put into the (then) Child Custody Services Unit to minimise delays in investigating and preparing reports for the court. We also recommended the introduction of a performance pledge that reports of social welfare officers should be completed as expeditiously as possible, but should in any case not take longer than six weeks. We further recommended that social welfare officers preparing reports for the Family Court should have a minimum of three years' experience in family and child care work, and that their training should include the preparation of court reports.<sup>30</sup>

7.33 There was wide support for these proposals on consultation. One respondent noted that some flexibility needed to be built into the proposed performance pledge, as the timing for the preparation of the report would depend on the overall processing time of each case. We do not object to this suggestion, provided the proposed six-week period would apply as a maximum in most cases.

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30 HKLRC (1998), above, at paras 12.10 to 12.11 and 15.83 to 15.84.

### Recommendation 30

**We recommend that more resources need to be put into the Family and Child Protective Services Units to minimise delays in investigating and preparing reports for the court. We also recommend a performance pledge that a report of the social welfare officer should be completed as expeditiously as possible, but should in any case not take longer than six weeks, except in exceptional cases.**

**We further recommend that social welfare officers preparing reports for the Family Court should have a minimum of three years' experience in family and child care work, and their training should include the preparation of court reports.**

7.34 As a further point under this head, it was also suggested during the consultation exercise that, in addition to any training that social welfare officers receive, **a handbook on the relevant law in this area**, including a glossary of relevant terms,<sup>31</sup> **should be prepared for those working on family cases. We hope that the Administration will give consideration to implementing this worthwhile suggestion.**

## Report of independent expert

7.35 Even though section 3(1)(i)(B) of the Guardianship of Minors Ordinance (Cap 13) provides that the judge shall give due consideration to "any material information," it may be that this does not adequately empower a judge to order an independent expert's report in the face of opposition from one of the parties. In our view, the court should be able to order a report from an expert such as a psychologist, registered social worker or child psychiatrist at the request of only one of the parties, and be able to order the other party to comply so that the expert can interview the children and both spouses.

7.36 At the moment, one spouse can veto the request so that only the social welfare officer's report can be ordered. This may be particularly important if allegations of physical or sexual abuse were made and medical or psychological examinations were needed. It should also be possible for the court, on its own initiative, to order an expert report from a person other than the social welfare officer.

7.37 We therefore recommended in the consultation paper that the court should have a power to order a report from an independent expert, such

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31 Including new terms for relevant court orders which are now commonly used overseas, such as "residence", "contact", "specific issues" and "prohibited steps".

as a psychologist, psychiatrist, paediatrician, registered social worker or other relevant expert.<sup>32</sup> Although one respondent expressed concern that giving the court power to order independent reports might increase the contentiousness of applications concerning children, all other respondents commenting on these recommendations expressed unequivocal support.<sup>33</sup>

### **Recommendation 31**

**We recommend that the court should have a power to order a report from an independent expert, such as a psychologist, psychiatrist, paediatrician, registered social worker or other relevant expert.**

## **Statistics and research**

7.38 There were 12,748 petitions for divorce filed in 2000.<sup>34</sup> There is no breakdown available of the proportion of family cases which relate to custody or property.<sup>35</sup> The Family Law Association has proposed that a database be established to identify how many custody cases are agreed or disputed to assist policy-making and law reform. The judiciary were reported to have supported this in principle but had reservations about manpower.

7.39 The dearth of statistics on the number of custody, access and guardianship proceedings that are issued, and how many are contested, needs to be addressed. It would be useful to have those statistics to identify the need for changing policy or increasing resources. Indeed, the Australian and New Zealand Family Courts have research divisions which produce research papers containing not only statistics but also analyses of consumer satisfaction, assessments of the impact of new laws, and general research on the operation of their Family Courts.

7.40 We also note that section 62 of the Personal Data (Privacy) Ordinance (Cap 486) gives a specific exemption from the provision of the data protection principles where data is kept for preparing statistics or carrying out research, the data is not used for any other purpose, and the resulting

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32 HKLRC (1998), above, at paras 12.14 and 15.85.

33 It was also noted by one of the respondents that the court should have the same power to order a report from an independent expert under matrimonial ordinances as was currently afforded under section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

34 *Hong Kong Judiciary Annual Report 2001*, at 57. For the year 2000, there were also 20,646 divorce cases brought forward from previous years, 12,237 divorce cases disposed of and 1,662 "inactive" cases.

35 "Divorce privacy to be respected," *Eastern Express* (26 Dec 1995).

statistics and research are not made available in a form that identifies the data subjects.

7.41 We therefore recommended in the consultation paper that it would be useful for the Law Reform Commission and for policymakers if statistics were kept, and research conducted, in the Family Court. We recommended that statistics on the number of custody, access or guardianship cases, including the numbers settled, and when they were settled, should be kept by the Family Court. This would assist in the planning of policies and their implementation.<sup>36</sup>

7.42 This proposal was strongly supported by the respondents to the consultation paper, although one respondent expressed the view that the matter should be left up to the Administration to consider whether it was feasible to resource a database of family cases.

### **Recommendation 32**

**It would be useful for the Law Reform Commission and for policymakers if statistics were kept, and research conducted, in the Family Court. We recommend that statistics of the number of custody, access or guardianship cases, including the numbers settled, and when they were settled, should be kept by the Family Court. This would assist in the planning of policies and their implementation.**

## **Availability of judgments and privacy**

7.43 We understand that family law practitioners are concerned about the paucity of judgments in family cases that are officially reported in Hong Kong. There are various reasons why this is so. Family cases are heard in chambers and there are some statutory provisions and a Practice Direction which restrict the availability of such judgments.<sup>37</sup>

7.44 If the court has given guidance on the interpretation of matrimonial ordinances in a previous case, having access to a report of that judgment may assist family law practitioners in advising their clients on possible courses of action, including the settlement of cases. It can encourage some consistency of approach, and enhance the predictability of

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36 HKLRC (1998), above, at paras 12.19 and 15.86.

37 Order 90 rule 4B of the Rules of the High Court (Cap 4, subsid leg) provides that an application to make a minor a ward of court may be disposed of in chambers. Rule 7 makes similar provision for guardianship cases. Certainly the practice is to consider disputes concerning children in chambers.

outcomes, which assists early resolution of issues in dispute. Even though there may be less reliance on precedents in guardianship and custody cases than in other areas of law,<sup>38</sup> it would still be useful to increase the number of reported judgments in this area.

7.45 Practice Direction No 25.1 (formerly No 27), *Reports on Chambers Proceedings*, provides that:

*“No report should be made of any proceedings (including the judgment) held in chambers (which are private proceedings) without the authority of the master or the judge before whom the proceedings were conducted.”*

If the master or the judge considers that it should be released for publication, the parties can make representations to him.

7.46 The *Report of the Working Party on Civil Proceedings conducted in private*<sup>39</sup> stated that Practice Direction (then) No 27 had fallen into disuse. Generally, most reasoned judgments were available in the High Court Library for public inspection. *“Judgments of an obviously confidential nature, such as those issued in camera, are not made available.”*<sup>40</sup>

7.47 The purpose of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap 287) is to regulate, *inter alia*, the publication of reports of judicial proceedings so as to prevent injury to public morals. Section 3 provides that it shall not be lawful to print or publish any particulars in proceedings for nullity, divorce or judicial separation, other than the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and counter-charges in respect of which evidence has been given; and the decision and the judgment of the court. Section 3(4) states that the section does not apply to the publishing of reports of proceedings by any *bona fide* series of law reports, or a publication of a technical character *bona fide* intended for circulation amongst members of the legal or medical profession.

7.48 Section 5(1) of the Ordinance provides that the publication of information relating to proceedings held in private is not contempt except where *“the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant.”* Despite this provision, subsection 2 proceeds to state that, without prejudice to subsection (1), the publication of the text of an order made by a court sitting in private shall not of itself be contempt except where the court expressly prohibits the publication.

7.49 Article 10 of the Hong Kong Bill of Rights, which incorporated the International Covenant on Civil and Political Rights into our domestic law,

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38 This is because the decision of the judge has to meet the best interests of that particular child.

39 *Report of the Working Party on Civil Proceedings conducted in private* (Mar 1997).

40 Same as above, at para 5.8.

in the Bill of Rights Ordinance (Cap 383), makes provision for public hearing of proceedings, but excludes the press and public “*when the interests of the private lives of the parties so requires.*” It also provides that any judgment shall be made public except where “*the proceedings concern matrimonial disputes or the guardianship of children.*”

7.50 In Hong Kong, some family judgments contain the full names and identifying details of the parties. Of course, some of these cases may have been appeals held in public in the Court of Appeal. In other unreported judgments which are released, the names of the parties on the front page of the judgment have been deleted, but sufficient identifying details are left in the body of the judgment, including names of witnesses, to facilitate identification of the parties and their children. We deplore this practice as it exposes the vulnerability of the parties, and in particular their children, to public scrutiny at a traumatic time in their lives when they are already trying to cope with divorce or separation. Leaving those details exposed in a judgment that may have been intended for release to legal practitioners only in the High Court Library does not prevent access by the press or an inquisitive member of the public.<sup>41</sup>

7.51 A striking example where former Practice Direction No 27 was not complied with concerned a child abduction case in which the female respondent murdered the child who was the subject of the proceedings and then committed suicide. A Hong Kong magazine published a photo of the front page of the judgment on which the full name of the child was revealed, as the court had not taken steps to delete the child’s name, though it had deleted those of the parents. The record number of the proceedings was also visible, making it easier for the judgment to be located by other members of the press.<sup>42</sup>

7.52 In Ireland, unreported or reported judgments are always released to practitioners and law reporters in the legal libraries with the names of the parties and their children deleted, except for the first initial (for example, “Murphy” becomes “M”). All identifying details, such as addresses, schooling, place of employment, and even the names of witnesses, are also deleted. This does not cause confusion as long as the correct date of the judgment is available. It would be useful to issue a Practice Direction regulating the release of family judgments so that, in addition to deleting the names of the parties, other identifying details would also be deleted from the judgments.

7.53 If all the identifying details were deleted then the judgments in disputes concerning children could be made more widely available to legal

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41 Pursuant to Order 63, rule 4(1)(a) of the Rules of the High Court (Cap 4, subsid leg), the public may, upon payment of a prescribed fee, search for, inspect and obtain a copy of, the originating process in a case filed in the court registry.

42 This, and similar incidents, prompted the Commission to note in its recent report on international parental child abduction that it might be necessary to introduce specific legislative provisions to prohibit the publication of information relating to parental child abduction cases, and also to prohibit the searching and inspection of the court file in these proceedings by members of the public: see HKLRC, *International Parental Child Abduction* (Apr 2002), at para 7.16.

practitioners, encouraging the growth of a family law jurisprudence and making more information available to solicitors and counsel advising clients on the way forward.

7.54 We therefore recommended in the consultation paper that a Practice Direction regulating the release of unreported judgments in disputes concerning children should be issued to encourage their increased availability to legal practitioners. We also recommended that, for the protection of children and their parents, all identifying details, including the names of parties and their children, addresses, schooling, place of employment, and even the names of witnesses, should be deleted (except for the first initial) from all such judgments, whether unreported or reported.<sup>43</sup>

7.55 On consultation, all of the respondents who commented on these proposals supported them.

### **Recommendation 33**

**We recommend that a Practice Direction regulating the release of unreported judgments in disputes concerning children be issued to encourage their increased availability to legal practitioners.**

**We also recommend that, for the protection of children and their parents, all identifying details, including the names of parties and their children, addresses, schooling, place of employment, and even the names of witnesses, should be deleted (except for the first initial) from all such judgments, whether unreported or reported.**

## **Code of conduct for family cases**

7.56 We recommended in our Consultation Paper that a Family Lawyers' Code of Practice should be adopted in Hong Kong. We proposed that this could include such principles as assisting constructive settlement and placing the best interests of children as a first priority. We noted that this may encourage earlier settlement by solicitors and/or referral to a mediator for the resolution of disputes on guardianship and custody. We note that there was wide support from our consultees for this proposal.

7.57 Subsequently, in July 1998, the Hong Kong Family Law Association (HKFLA) unanimously adopted its first Code of Conduct. The Hong Kong Code, though adapted for local conditions, was closely modelled

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<sup>43</sup> HKLRC (Dec 1998), above, at paras 12.30 and 15.87.

on the Solicitors Family Law Association's Code of Practice in England.<sup>44</sup> The then chairperson of the HKFLA commented that the Code, "*clearly defines the approach that we believe lawyers truly sympathetic to issues concerning families and family law should adopt.*"<sup>45</sup> Peaker notes:

*"The Code of Conduct is not an instant solution to all problems in the area of family law. However, experience has shown that with the introduction of the [English Code], substantial improvements have been made towards a more conciliatory, constructive, and cost effective way of dealing with the majority of family law matters."*<sup>46</sup>

7.58 The Hong Kong Code covers such matters as the family lawyer's relationship with the client,<sup>47</sup> dealing with the other party's solicitors,<sup>48</sup> dealing with the other party in person,<sup>49</sup> court proceedings<sup>50</sup> and children.<sup>51</sup>

7.59 Mulvey summarises the rationale behind the Code in the following terms:

*"It has long been acknowledged by practitioners and members of the judiciary that the adversarial system has to be tempered in divorce cases, where the interests of children and the high emotional content of the proceedings have to be taken into account. It is not enough simply to rely on the fact that our system is adversarial if conduct of a case in that way is damaging to clients."*<sup>52</sup>

Of the English Code, Fricker states:

*"It should become part of the family law culture for most parties to be induced into mediation where there are unresolved issues. The culture should be that litigation is perceived to be the last resort ... mediation should generally, within the legal profession and by the public, be perceived to be the most appropriate way to resolve most issues on which agreement has not been reached."*<sup>53</sup>

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44 Stephen Peaker, "The Hong Kong Family Law Association Code of Conduct," *Hong Kong Lawyer* (Nov 1998), 46-49, at 48. See also Thomas Mulvey, "The HKFLA Code of Conduct," *Hong Kong Lawyer* (Feb 1999), 4-5, at 4.

45 Then chair of HKFLA, Sharon Ser, quoted in Peaker (1998), above, at 46.

46 Peaker (1998), above, at 48.

47 HKFLA Code of Conduct for family lawyers, section 2.

48 Same as above, section 3.

49 Same as above, section 4.

50 Same as above, section 5.

51 Same as above, section 6.

52 Mulvey (1999), above, at 4.

53 *Family Law* (Apr 1994), vol 215.

7.60 The HKFLA noted that there had been difficulties in England in enforcing the Code, “*despite the fact that, as early as 1988, it had been endorsed by both the UK Judiciary and the Law Society.*”<sup>54</sup> Efforts were therefore made in the early days of the Code’s development in Hong Kong to have the Code not only recommended by the Law Society to its members, but also to have it made mandatory, so that breaches of it would be a disciplinary matter.<sup>55</sup> To-date, the Hong Kong Code remains voluntary, and “*is viewed as an encouragement or guide to good practice. There is no provision for, nor question of, mandatory provisions.*”<sup>56</sup>

7.61 In addition to the general Code of Practice for its members, the English Solicitors Family Law Association has also issued a Guide to Good Practice for Solicitors Acting for Children. This reflects the particular sensitivity of cases involving children, and the level of specialised experience required. The Guide supplements the Code and is intended to assist lawyers in interviewing and representing children.<sup>57</sup> The Foreword to the Guide states:

*“The voice of the child in both public and private law proceedings is of increasing importance .... A solicitor instructed by a child plays an essential part in the professional work which ensures a young person’s views are heard and considered with appropriate weight and with the respect to which they are entitled. ... This remains an area which falls outside the usual remit of our legal education and in these circumstances the best we can do is to share experiences and learn from each other. This Guide reflects just such an approach.”*<sup>58</sup>

7.62 We believe that there would be considerable value in adopting a similar Guide for solicitors in Hong Kong, in addition to the more general Code of Practice, and our Consultation Paper reflected this.<sup>59</sup> There remain a number of issues which we consider the Administration should invite the legal profession to address.

7.63 The first of these is whether the HKFLA’s existing Code of Conduct should be made mandatory, by formally incorporating it into the codes of the relevant professional bodies. The current voluntary nature of the Code means that it is simply a statement of principle of what is expected, with the only sanction for non-compliance being peer pressure from within the profession. If there is no power to sanction against breaches of the Code, and certain practitioners choose to flagrantly disregard it, this may have the unfortunate effect of devaluing the Code’s standing in the eyes of those to whom it is supposed to apply. We are aware, however, that there is

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54 Peaker (1998), above, at 46.

55 Same as above.

56 Mulvey (1999), above, at 5.

57 Solicitors Family Law Association, *Guide to Good Practice for Solicitors Acting for Children* (now 6th ed, 2002).

58 Same as above, at Foreword.

59 HKLRC (Dec 1998), above, at paras 12.34 and 15.88.

considerable sensitivity surrounding the issue of introducing a mandatory code into a specific area of practice, and that this is an issue which needs to be carefully considered by the legal profession.<sup>60</sup>

7.64 A second issue is whether the Code should be widened to apply (with appropriate adjustments) not only to solicitors, but also to the other disciplines working in the family litigation field (for example, barristers, mediators and social workers).<sup>61</sup> Again, we do not think that any decision should be taken on this question before there has been comprehensive consultation with the relevant professional bodies.

#### **Recommendation 34**

**We note with approval the introduction of the Hong Kong Family Law Association's Code of Conduct and believe this may encourage a more conciliatory approach by solicitors.**

**We recommend that, in addition, a Guide to Good Practice for Solicitors, modelled on the equivalent English Guide, should be adopted to provide specific guidance to those acting for children.**

**We further recommend that the Administration should consult the legal profession and other organisations working in this field as to:**

- (a) Whether the HKFLA's Code of Conduct should be made mandatory by incorporating it into the codes of the respective professional bodies; and**
- (b) Whether the HKFLA's Code of Conduct should be extended (with appropriate adjustments) to apply not only to solicitors but also to the other disciplines working in the family litigation field.**

## **Conclusion**

7.65 In conclusion, we note the pertinent comment of one writer in relation to the Hong Kong Code for family lawyers:

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60 In this context, we understand that in the past, the Family Law Committee of the Law Society has been of the view that there should not be formal sanctions available for enforcement of the HKFLA Code.

61 As represented in the membership of the HKFLA.

*“There will always be difficult, hostile, protracted, and expensive matrimonial cases where the Code may have little effect. However, for the majority of cases it is believed that the Code will offer an alternative approach that will result in cases being resolved more quickly and without undue cost and emotional strain.”<sup>62</sup>*

It is our hope that these same sentiments might be applied equally to all of the recommendations we have presented in this report.

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62 Peaker (1998), above, at 48.

## Chapter 8

### Summary of recommendations

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(The recommendations below are to be found in Chapter 5 of this report, on *Court-based support facilities for family mediation*.)

#### **Recommendation 1**

*(Task Group on establishment of a family court)*

- (a) We generally approve and adopt the recommendations on support services of the report of the Task Group on a Family Court, but prefer to adopt the terms “mediation and mediators” rather than “conciliation and conciliators.”<sup>1</sup>
- (b) We recommend<sup>2</sup> that providing access to mediation services should be an integral part of the Family Court system;
- (c) We consider that providing support for mediation, by allocating more resources to promoting mediation, providing information sessions and parent education, complements the court process. We recommend that these resources to provide support for mediation should be government funded and provided within the Family Court system.

#### **Recommendation 2**

*(Information on family dispute resolution support services)*

**We recommend<sup>3</sup> that:**

- (a) the courts should do more to put parents in touch with support services. More publicity and education of the public

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1 See Chapter 5 above, at para 5.9.

2 See Chapter 5 above, at para 5.9.

3 See Chapter 5 above, at para 5.16.

is needed to encourage families to go for assistance to local family service centres or other agencies at an early stage of conflict or when problems are first encountered;

- (b) the Family Court should provide information relating to court processes, support services and alternatives to litigation, including mediation;
- (c) the court should be under a duty to actively promote mediation and that the Chief Justice should approve a document which sets out the benefits and procedure for mediation;
- (d) pamphlets should be produced which include information on the availability of, and encouragement to use, mediation as an alternative to litigation. Such information pamphlets on mediation should be included in the Information Kit on Marriage;
- (e) such information pamphlets, including the Information Kit on Marriage, should be available at the Family Court, the lobby of the High Court Building and at family services centres;
- (f) these pamphlets should be periodically updated.

### **Recommendation 3**

*(Obligation on solicitors)*

**We recommend<sup>4</sup> that:**

- (a) solicitors should be obliged to inform and encourage their clients to consider the possibility of reconciliation;
- (b) the applicant (and the respondent when he is served with the pleadings) should be informed of the nature and purpose of counselling and mediation and offered a list of services for reconciliation, counselling and mediation;
- (c) this information should be in a pamphlet approved by the Family Court.

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<sup>4</sup> See Chapter 5 above, at para 5.19.

#### **Recommendation 4**

*(Information sessions)*

**We recommend<sup>5</sup> that:**

- (a) a voluntary information session be introduced, which would be a service open to everyone;**
- (b) an information session would be attended by the parties before the filing of the petition in the majority of cases;**
- (c) at the information session, parties could receive information and advice about family support services and alternatives to litigation such as mediation;**
- (d) information to educate parents on the psychological process of divorce and its effect on children would also be included, by way of oral presentation, video and information packs;**
- (e) the information session would encompass elements of the United States parent education programmes and the Australian information sessions;**
- (f) the presentation would be made by persons with counselling and mediation training;**
- (g) clients should also be informed by solicitors, the Legal Aid Department and the Duty Lawyer Service of the availability of information sessions;**
- (h) the information on such services could be contained in a pamphlet approved by the Family Court.**

#### **Recommendation 5**

*(Referral to information session)*

**We recommend<sup>6</sup> that:**

- (a) solicitors should be placed under an obligation to inform their clients about the availability of the information session;**

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5 See Chapter 5 above, at para 5.24.

6 See Chapter 5 above, at para 5.28.

- (b) Family Court judges should have the power to order the parties to attend an information session.

### **Recommendation 6**

*(The court's powers in relation to mediation)*

**We recommend<sup>7</sup> that:**

- (a) the voluntary mediation recommendations of the report of the Chief Justice's committee on court annexed mediation be adopted, to the effect that the court should only be able to order the parties to attend mediation if they agree;
- (b) a similar provision to section 15A of the Matrimonial Causes Ordinance (Cap 179) could be enacted to encourage mediation;
- (c) a provision on the lines of section 19A of the Australian Family Law Act 1975 should be enacted, empowering potential litigants or parties to file a notice in the Family Court seeking the appointment of a mediator;
- (d) a provision should be enacted that where the parties agree to go to mediation, but cannot agree on a mediator, the court may appoint a suitable mediator;
- (e) if one party does not consent to adjourn the case for mediation, the judge should be able to use his best endeavours to encourage mediation;
- (f) before a case is set down for hearing, the parties should provide a certificate to satisfy the court that mediation was or was not considered, or that it was not appropriate.

### **Recommendation 7**

*(Issue of compulsory powers)*

- (a) **We do not consider that mediation should be made compulsory;<sup>8</sup>**

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7 See Chapter 5 above, at para 5.33.

8 See Chapter 5 above, at para 5.35.

- (b) We recommend that the judge should have the power, in appropriate cases, to refuse to set down an action until the parties have certified to the judge that they have attempted some form of mediation.<sup>9</sup>

### **Recommendation 8**

*(Counselling conference)*

**We recommend<sup>10</sup> that:**

- (a) a process similar to the Australian conciliation conference be introduced, but prefer the term “counselling conference” in order to avoid any confusion with mediation;
- (b) the counselling conference be a necessary stage in the court process. It would be seen as an integral part of the case management process of the court system;
- (c) the Support Services Coordinator should advise the judge in writing as to whether the parties have or have not attended the counselling conference, so that the next stage in the process can be initiated;
- (d) the conferences should be run by counsellors;
- (e) the conferences should be publicly funded;
- (f) if there are disputes between parents on both financial and children’s issues, there should be a joint counselling conference dealing with such issues together.

### **Recommendation 9**

*(Support Services Co-ordinator)*

**We recommend<sup>11</sup> that:**

- (a) the post of Support Services Co-ordinator be created whose duty would be to facilitate the proper functioning of the

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9 Same as above.

10 See Chapter 5 above, at para 5.44.

11 See Chapter 5 above, at para 5.48.

services that will support the Family Court dispute resolution system;

- (b) the Support Services Co-ordinator's task would extend beyond mediation to counselling conferences and referral of parties to counselling outside the court.

### **Recommendation 10**

*(Support services accommodation at the Family Court)*

**We recommend the provision of accommodation at the Family Court for counsellors and mediators which would facilitate early referral to appropriate services.<sup>12</sup>**

### **Recommendation 11**

*(Screening and matching cases for mediation)*

**We recommend that guidelines for cases of domestic violence and child sexual abuse should be established to screen cases for family mediation on a similar basis to the Australian and New Zealand guidelines.<sup>13</sup>**

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12 See Chapter 5 above, at para 5.50.

13 See Chapter 5 above, at para 5.53.

(The recommendations below are to be found in Chapter 6 of this report, on *Family mediation services generally*.)

### **Recommendation 12**

*(Training of mediators)*

**We recommend that high standards of selection, training, supervision and accreditation should be required of family mediators participating in mediation scheme operating through the Family Court.<sup>14</sup>**

### **Recommendation 13**

*(Accreditation)*

**We recommend that the current system of accreditation of qualified family mediators should be approved by government and the Judiciary.<sup>15</sup>**

### **Recommendation 14**

*(Social welfare officers and mediation)*

**We recommend<sup>16</sup> that:**

- (a) the social welfare officers who are professionally qualified mediators participating in the mediation service operating through the Family Court should be separate from those social welfare officers who carry out the service of executing social investigations and reports for the Family Court;**
- (b) the Social Welfare Department establish appropriate guidelines to separate these functions.**

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14 See Chapter 6 above, at para 6.5.

15 See Chapter 6 above, at para 6.7.

16 See Chapter 6 above, at para 6.9.

### **Recommendation 15**

*(Other professions and mediation)*

**We recommend<sup>17</sup> that:**

- (a) other professionals involved in counselling or therapy, whether working in governmental or non-governmental agencies or privately, should adopt similar guidelines;**
- (b) the Law Society and the Bar Association should draw up appropriate guidelines to ensure the separation of roles of lawyers acting as lawyers, from lawyers acting as mediators.**

### **Recommendation 16**

*(Experts' reports)*

**We recommend that family mediators have access to facilities to obtain an expert's report, with the parties' consent, to assist in difficult cases concerning disputes over children.<sup>18</sup>**

### **Recommendation 17**

*(Privilege and confidentiality)*

**We recommend that:**

- (a) for the removal of doubt, a statutory provision be enacted, conferring privilege on statements made during the course of any mediation.<sup>19</sup>**
- (b) whilst statements made during the course of any mediation process should, in general, be both privileged and confidential, statements which indicate a risk of harm to human life, particularly to a child, should be privileged but not confidential.<sup>20</sup>**

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17 See Chapter 6 above, at para 6.12.

18 See Chapter 6 above, at para 6.14.

19 See Chapter 6 above, at para 6.32.

20 Same as above.

### **Recommendation 18**

*(Immunity from liability)*

**We recommend the introduction of a provision on similar lines to section 19M of the Australian Family Law Act 1975 granting immunity to protect qualified family mediators.<sup>21</sup>**

### **Recommendation 19**

*(Legal advice)*

**We recommend the adoption of a provision along the lines of Order 25A, rule 12, of the Australian Family Law Rules which requires mediators to advise clients that they should obtain legal advice as to their rights, duties and obligations.<sup>22</sup>**

### **Recommendation 20**

*(Legal aid and mediation)*

**We recommend<sup>23</sup> that**

- (a) there should be statutory provision for legal aid to be made available for mediation of guardianship, custody and access disputes;**
- (b) once such legislation is enacted, the Legal Aid Department should establish a proper scheme for the funding of family mediation that will include education, publicity and screening of potential cases.**

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21 See Chapter 6 above, at para 6.34.

22 See Chapter 6 above, at para 6.36.

23 See Chapter 6 above, at para 6.40.

## **Recommendation 21**

*(Child's voice in the mediation process)*

**We recommend<sup>24</sup> that:**

- (a) a provision on the lines of an amended section 11(7) of the Children (Scotland) Act 1995 be adopted to provide a mechanism for considering the views of the child in the mediation process;**
- (b) consideration be given to what mechanisms are needed to determine the child's views so that these can be brought to the mediator's attention.**

## **Recommendation 22**

*(Arrangements for children)*

**We recommend that rules of court should facilitate mediation agreements being converted into consent court orders. This should assist both compliance with the terms of the agreement, and its enforcement in the event of the arrangements breaking down.<sup>25</sup>**

## **Recommendation 23**

*(Parenting plans)*

**We recommend<sup>26</sup> that:**

- (a) a provision for parenting plans (which could be registered in the Family Court) be adopted, similar to the provisions of the Australian Family Law Reform Act 1995;**
- (b) a section 18 declaration under the Matrimonial Proceedings and Property Ordinance (Cap 192) would still be made which could have the parenting plan attached;**

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24 See Chapter 6 above, at para 6.45.

25 See Chapter 6 above, at para 6.49.

26 See Chapter 6 above, at para 6.53.

- (c) parenting plans should be encouraged, and there should be a grace period when they would be voluntary;
- (d) parenting plans should only become mandatory at a later stage to ensure their use on a more extensive basis.

#### **Recommendation 24**

*(Enforcement of mediation agreements)*

**We do not see the need to amend section 14 of the Matrimonial Proceedings and Property Ordinance (which provides that a provision in a maintenance agreement restricting the right to apply to court for an order concerning financial arrangements, is void).<sup>27</sup>**

#### **Recommendation 25**

*(Community mediation)*

**We recommend that community based family mediation services should be available to the public and that there should be more publicity and education to encourage early referral to such services.<sup>28</sup>**

#### **Recommendation 26**

*(Approving community mediation)*

**We recommend:<sup>29</sup>**

- (a) the introduction of legislative provisions similar to the relevant provisions in the Australian Family Law Reform Act 1995 which provide a mechanism for community based counselling and mediation organisations to become approved organizations;
- (b) that a similar scheme be established in Hong Kong with funding provided by the Government to approved organisations. The Government would work in partnership

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27 See Chapter 6 above, at para 6.61.

28 See Chapter 6 above, at para 6.64.

29 See Chapter 6 above, at para 6.66.

**with such organisations as regards the quality of the service, continuing supervision and training of the mediators and other relevant matters.**

(The recommendations below are to be found in Chapter 7 of this report, on *The family litigation process and related matters*.)

### **Recommendation 27**

*(Case management and settlement)*

**We recommend<sup>30</sup> that:**

- (a) procedures at the Family Court be streamlined and that there be continuous monitoring of the system by effective case management;**
- (b) a Practice Direction governing case management in the Family Court be introduced (possibly modelled along the lines of the Construction List checklist and its associated Practice Direction);**
- (c) there be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children;**
- (d) time limits should be imposed for the delivery of any affidavits associated with the case in order to minimize delay;**
- (e) judges should be given more control to reduce the costs and delay in the system;**
- (f) failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders.**

### **Recommendation 28**

*(Delay in family proceedings)*

**We recommend<sup>31</sup> that:**

- (a) to promote the best interests of the child, priority must be given to the hearing of disputes concerning children (ie disputes as to custody and access, child abduction, wardship and guardianship);**

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30 See Chapter 7 above, at para 7.14.

31 See Chapter 7 above, at para 7.18.

- (b) the introduction of statutory provisions on the lines of sections 1(2) and 11 of the Children Act 1989 in England;
- (c) in the interim before legislation is enacted, target times be set for the disposal of custody, access and guardianship disputes.

### **Recommendation 29**

*(Issues and settlement conferences)*

**We recommend<sup>32</sup> that:**

- (a) statutory provision be made for issues and settlement conferences tailored to the needs of Hong Kong;
- (b) there ought to be a clear distinction between issues and settlement conferences;
- (c) these conferences would be separate from mediation;
- (d) the issues conference be substituted for the call-over list;
- (e) a settlement conference would be a necessary step in the process unless there was a certificate filed by a party or the parties that an attempt at settlement in a settlement conference is likely to be unsuccessful and that costs would be wasted by such attendance;
- (f) if no settlement conference takes place, there would still be a conference similar to a directions hearing at which directions for trial would be ordered and the judge could still suggest settlement at this stage;
- (g) no evidence disclosed at these pre-trial conferences should be admissible as an admission in any subsequent hearing or proceedings, or as part of a transcript or record of the conferences without the consent of the parties.

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32 See Chapter 7 above, at para 7.29.

### **Recommendation 30**

*(Social welfare officer's report)*

**We recommend<sup>33</sup> that:**

- (a) more resources need to be put into the Family and Child Protective Services Units to minimise delays in investigating and preparing reports for the court;**
- (b) a performance pledge should be introduced that a report of the social welfare officer should be completed as expeditiously as possible, but should in any case not take longer than six weeks, except in exceptional cases;**
- (c) social welfare officers preparing reports for the Family Court should have a minimum of three years' experience in family and child care work, and their training should include the preparation of court reports.**

**Note:**

**We also wish to bring to the attention of the Administration the suggestion that, in addition to any training that social welfare officers receive, a handbook on the relevant law in this area, including a glossary of relevant terms, should be prepared for those working on family cases.<sup>34</sup>**

### **Recommendation 31**

*(Independent experts)*

**We recommend that the court should have a power to order a report from an independent expert, such as a psychologist, psychiatrist, paediatrician, registered social worker or other relevant expert.<sup>35</sup>**

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33 See Chapter 7 above, at para 7.33.

34 See Chapter 7 above, at para 7.34.

35 See Chapter 7 above, at para 7.37.

### **Recommendation 32**

*(Statistics and research)*

It would be useful for the Law Reform Commission and for policy makers if statistics were kept, and research conducted, in the Family Court. We recommend that statistics of the number of custody, access or guardianship cases, including the numbers settled, and when they were settled, should be kept by the Family Court.<sup>36</sup> This would assist in the planning of policies and their implementation.

### **Recommendation 33**

*(Availability of judgments and privacy)*

We recommend<sup>37</sup> that:

- (a) a Practice Direction regulating the release of unreported judgments in disputes concerning children be issued to encourage their increased availability to legal practitioners;
- (b) for the protection of children and their parents, all identifying details, including the names of parties and their children, addresses, schooling, place of employment, and even the names of witnesses, should be deleted (except for the first initial) from all such judgments, whether unreported or reported.

### **Recommendation 34**

*(Code of Practice for conduct of family cases)*

We note with approval<sup>38</sup> the introduction of the Hong Kong Family Law Association's Code of Conduct and believe that this may encourage a more conciliatory approach by solicitors.

We recommend that, in addition, a Guide to Good Practice for Solicitors, modelled on the equivalent English Guide, should be adopted to provide specific guidance to those acting for children.

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36 See Chapter 7 above, at para 7.42.

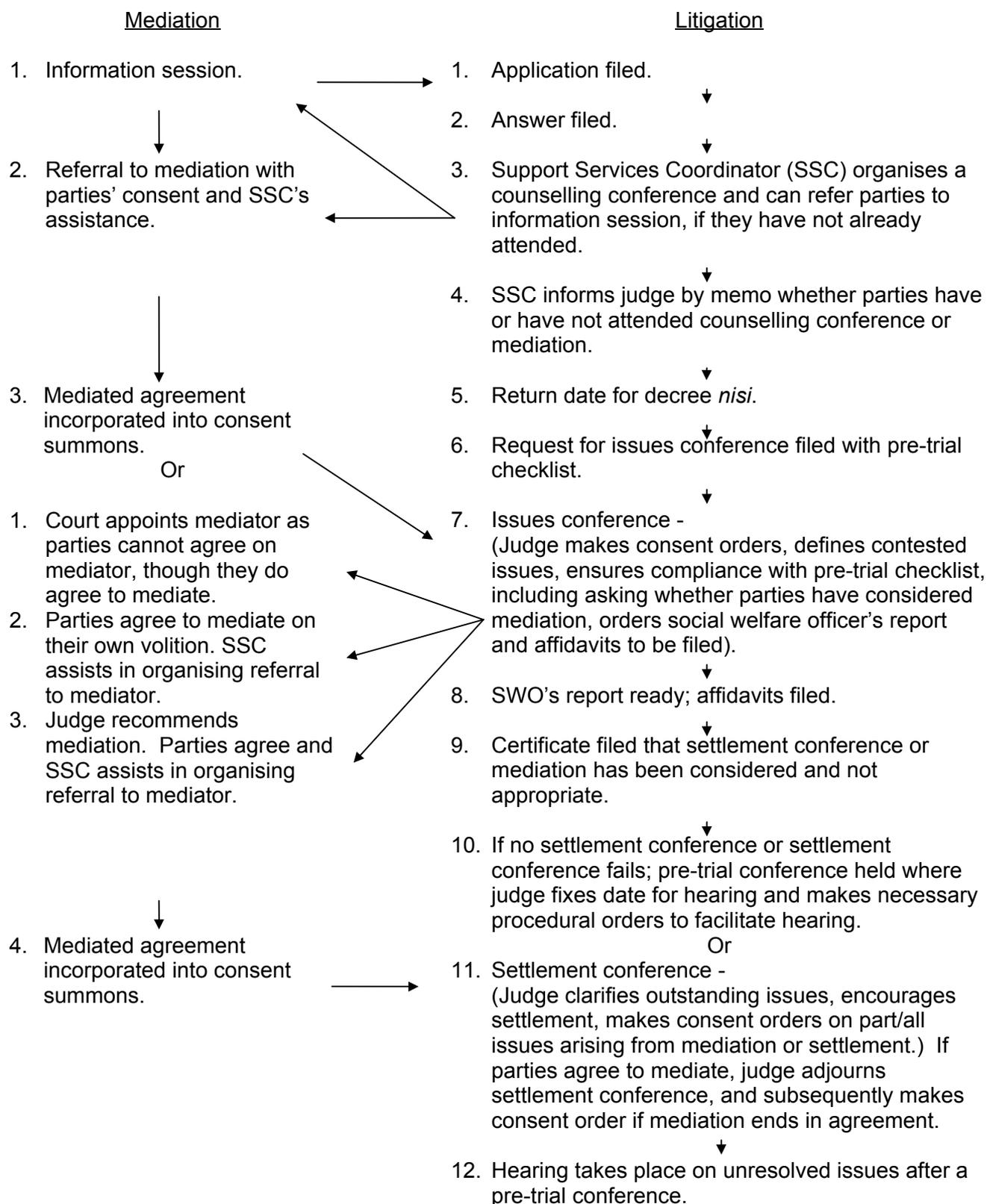
37 See Chapter 7 above, at para 7.55.

38 See Chapter 7 above, at para 7.64.

**We further recommend that the Administration should consult the legal profession and other organisations working in this field as to:**

- (a) Whether the HKFLA's Code of Conduct should be made mandatory by incorporating it into the codes of the respective professional bodies; and**
- (b) Whether the HKFLA's Code of Conduct should be extended (with appropriate adjustments) to apply not only to solicitors but also to the other disciplines working in the family litigation field.**

**Proposed Case Management and Support Services  
Flow Chart for Dispute Resolution Process**



**List of the Respondents to the Consultation Paper  
on Guardianship and Custody**

1. Against Child Abuse
2. Association for the Advancement of Feminism
3. Mr J J A Bosch and Ms SFM Wortmann
4. Caritas Family Service Project on Extramarital Affairs
5. Caritas – Hong Kong (Social Work Services)
6. Caritas – Hong Kong Family Service
7. Ms CHAN Tsz-ying, Hong Kong Family Welfare Society
8. Dr N Y Chau
9. Ms CHENG Mui-hung
10. Chinese YMCA of Hong Kong
11. Ms CHUNG Yuen-yee
12. City University of Hong Kong, Department of Public and Social Administration
13. Department of Justice, Civil Division
14. Department of Justice, Prosecutions Division
15. Director of Legal Aid
16. Director of Health
17. Director of Home Affairs
18. Director of Immigration
19. Director of Social Welfare
20. Ms Heather Douglas, Assistant Professor  
City University of Hong Kong, School of Law
21. Ms Andrea Gutwirth
22. Harmony House
23. Haven of Hope Christian Service
24. Hong Kong Association for the Survivors of Women Abuse
25. Hong Kong Bar Association
26. Hong Kong Family Welfare Society
27. Hong Kong Federation of Women
28. Hong Kong Federation of Women Lawyers
29. Hong Kong Student Aid Society

30. Hong Kong Women Development Association
31. Hong Kong Young Legal Professionals Association Limited
32. Hong Kong Young Women's Christian Association
33. Judiciary Administrator
34. Ms Helen Kong, Hastings & Co
35. Miss LO Lau-oi, Hong Kong Family Welfare Society
36. Official Solicitor
37. ReSource The Counselling Centre
38. Secretary for Home Affairs
39. Secretary for Housing
40. St John's Cathedral Counselling Service
41. The Boys' & Girls' Clubs Association of Hong Kong
42. The Hong Kong Catholic Marriage Advisory Council
43. The Hong Kong Committee on Children's Rights
44. The Hong Kong Council of Social Service
45. The Hong Kong Family Law Association
46. The Hong Kong Mediation Council
47. The Hong Kong Psychological Society
48. The Law Society of Hong Kong
49. The University of Hong Kong, Department of Social Work and Social Administration
50. The University of Hong Kong, Faculty of Law
51. Ms TSANG Wan-wai