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Professor P. Parkinson
Chairperson
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Robert Garran Offices
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7th July '06

Dear Sir,

Re: Collaborative Law and the Legal Aid System

We refer to your letter to us dated 28th March '06 about the terms of reference on Collaborative Law. National Legal Aid (NLA) thanks the Family Law Council for the opportunity to offer our perspective on the practice of Collaborative Law in the context of Australia's Legal Aid system.

NLA has also received the draft Collaborative Law Guidelines from the Family Law Council for comment. We have taken these draft Guidelines into account in this response.

Some background to, and a summary of, our perspective on the practice of Collaborative Law in the legal aid system follows:

Background

1. Overview of Collaborative Law and Legal Aid Primary Dispute Resolution Programs

Collaborative Law

NLA understands that Collaborative Law refers to a contractual commitment between lawyers and clients that they will not resort to litigation or threaten litigation to resolve a dispute. Each lawyer is retained to provide advice and representation regarding non-litigious resolution of the conflict and to focus on developing a negotiated, consensual outcome. Negotiations occur through a series of four-way meetings, involving both clients and both lawyers. Parties commit to act in good faith and to give complete, honest and open disclosure of information and assets. Experts may be included in the process where needed. If the clients decide that legal action is ultimately necessary to resolve the dispute, the contract stipulates that both collaborative lawyers must withdraw and the clients must instruct new lawyers in order to take the case to court.

Legal Aid Primary Dispute Resolution

The Legal Aid Commissions each have programs which offer primary dispute resolution (PDR). Commissions provided around 5,500 dispute resolution conferences last financial year, with very high settlement rates. The key business of Legal Aid PDR programs is the provision of conferences in matters where at least one party is eligible for a grant of aid. Conferences may be held as an early-intervention measure and as a litigation-intervention tool.

In a Legal Aid PDR Conference a neutral third-party chairperson assists the parties to identify the disputed issues, develop options, consider alternatives and reach an agreement. Often both parties to the Conference will be legally represented, either on a grant or aid or by a privately funded solicitor. The Conferences therefore provide people with an opportunity to actively participate in a negotiation session in the company of their lawyer.

If a Conference does not resolve in full settlement, the chairperson provides the Commission with a report including recommendations about whether each party's case has reasonable prospects of success and whether each party has made a reasonable attempt to resolve their dispute. This report is taken into account when the Commission is considering whether or not to extend the applicant's grant of aid, in line with the Merits Test set out in the Commonwealth Guidelines.

Legal Aid Queensland also operates a property Arbitration Program and maintains a panel of qualified Arbitrators in accordance with the Family Law Regulations. The program requires that at least one party to the Arbitration be legally aided, both must be legally represented. Parties enter into an agreement to be bound by the arbitral award. Parties exchange and provide the arbitrator with financial statements, as well as written submissions. Parties may also make oral submissions by a telephone link up. The parties do not meet face to face at any stage of the process. Arbitrators are then required to make an arbitral award in accordance with the provisions of the Family Law Act 1975. The award is then filed as a consent order.

2. Key features of the Collaborative and Legal Aid approach

Non-Litigious Resolution of Disputes

We understand that the primary aim of Collaborative Law is to provide clients with legal advice and assistance to negotiate resolution of their dispute without the overriding threat of Court action. The contract entered by the parties constructs a financial imperative to find a consensual resolution. Each party's costs will be significantly higher if they have to engage new lawyers to embark on Court-based resolution of the problem. Further, if only one party is responsible for the breakdown of collaboration, they will be responsible for the other party's legal costs.

This system mirrors Commission PDR Conferencing programs. Part of the function of the Chairperson in a Legal Aid dispute resolution Conference is to assess each party's prospects if the matter were to proceed to Court. Chairpersons also report on whether each party has made a reasonable attempt to resolve the dispute. A Commission then determines whether or not to fund litigation in accordance with the

Commonwealth Guidelines. Thus, there is a funding imperative to genuinely attempt to reach resolution through negotiations. In this way, a grant of aid provides a client with a similar imperative to resolve their dispute via negotiations as the collaborative contract does for private clients.

The Non-Litigious Mindset

Collaborative Law promotes a ‘paradigm shift’ from traditional positional bargaining towards interest-based negotiation, with the goal of achieving an enduring settlement for clients. In this approach, Collaborative Law allows the parties to negotiate in the spirit of mediation but with the benefit of legal advice and assistance.

Legal Aid lawyers have always had a strong commitment to settling disputes via negotiation. Such negotiation may occur through various means including letters, telephone conversations and, if appropriate, 4-way telephone or round-table settlement conferences. Cases may be settled prior to either party commencing proceedings or at any stage along the litigation pathway. Throughout negotiations, Legal Aid lawyers engage common dispute resolution techniques including identifying interests, generating options, encouraging clients to see the situation from the other party’s point of view and reality-testing a range of possible outcomes.

Collaborative Law changes the nature of the relationship between lawyer and client in a way that enables the lawyer to encourage and guide the client towards resolution. The Commonwealth Guidelines have a similar effect on the relationship between a Legal Aid lawyer and their legally aided client.

3. Potential issues for legal aid clients regarding Collaborative Law

Family violence

A high proportion of clients who seek assistance from Legal Aid Commissions have experienced family violence. Commissions have particular obligations under their funding agreements in relation to the use of primary dispute resolution processes in cases involving family violence and abuse. The relevant sections of the Guideline state:

(3) Participation in PDR Services is usually inappropriate where:

...

for family law matters relating to a child of the parties, there are any current reported allegations of child abuse, or investigations or court proceedings relating to child abuse are currently taking place

a party’s safety or ability to negotiate effectively is jeopardised by behaviour of the other party such as violence, intimidation, control or coercion, or a history of such behaviour...

Commissions conduct intake and screening processes to identify suitability of matters for dispute resolution conferences. A variety of strategies may also be invoked to address the dynamics of family violence and still allow clients to participate in conferences, eg conferences by telephone or on a ‘shuttle’ basis. All Conference chairpersons are required to have an in-depth understanding of domestic violence and

its impact on personal relationships, and are particularly sensitive to issues such as power imbalance between the parties.

The Collaborative Process outlined in Part 1 of the Draft Guidelines for Collaborative Family Law Practice ('the Draft Guidelines') provides for parties to take part in face-to-face 4-way meetings and for information and legal advice to be provided at such meetings, rather than in private lawyer/client meetings. It is not clear to us whether there is sufficient flexibility in the collaborative structure to take account of the issues of family violence.

NLA suggests that it would be beneficial if the Best-Practice Guidelines contained some additional guidance for practitioners about screening and managing family violence cases. Paragraph 3.2 of the guidelines states that it is not desirable to be prescriptive about the suitability of matters for collaborative law but that lawyers should take certain factors into account when assessing suitability. Family violence is listed as a 'problematic' factor. Paragraph 3.2 goes on to state that lawyers should consider whether the process can be modified so that it is 'safe'.

The Family Violence Consultation Report prepared by the Family Violence Committee of the Family Court of Australia in June 2003 states: 'the level of awareness of family violence issues by the legal profession is extremely variable'. Practitioners who provide non-adversarial dispute resolution services such as mediation and conciliation are likely to have undertaken training in relation to domestic violence as part of their general training. This is not necessarily the case for family lawyers. Accordingly, we believe it would be useful if the Guidelines contained more detailed information in relation to screening and managing family violence cases. For this purpose, we would recommend the Commonwealth-funded Resource Manual on Best-Practice in intake and screening for Domestic Violence Cases, prepared by Louise Lamont.

If it were not possible to utilise existing strategies to address domestic violence in Collaborative Law, Commissions are concerned that it would not be appropriate to use Collaborative Law in the many legal aid cases that involve family violence.

Other client issues

A significant number of legal aid clients have poor literacy and comprehension skills, and/or have disabilities and/or substance abuse issues such that the Collaborative Law Contract may present a particular challenge for them. NLA is concerned that the Collaborative Contract may involve spending large amounts of time with some clients, rather than using this time to progress negotiations. There could be ramifications for the client who may become frustrated and disillusioned with the process as a result of the detail of the contract. There are likely to be costs implications by reason of the time required to explain the Collaborative Contract to some clients.

4. Cost and resourcing issues for Legal Aid Commissions regarding Collaborative Law

NLA is concerned that the Collaborative process is likely to be more expensive than existing Legal Aid PDR Conference processes.

The diagram on page 2 of the Collaborative Law Draft Guidelines envisages a minimum of 7 steps in the collaborative process, namely: 1) Client Interview, 2) Client preparation meeting, 3) Lawyer-lawyer meeting, 4) Preliminary 4-way meeting, 5) Lawyer-client debrief, 6) Lawyer-lawyer debrief, 7) Subsequent 4-way meeting.

In contrast, early-intervention Commission PDR processes generally envisage one client preparation interview and one conference. There is provision for Commissions to conduct more than one conference or, if necessary, adjourn and reconvene a conference.

Legal Aid Commission PDR Conference processes therefore appear to us to be simpler and less expensive, whilst retaining many of the advantages associated with collaboration including:

- Allowing clients to negotiate with their lawyers ‘at their side’ to provide legal advice, assist communication, generate and reality-test options and encourage each party to see the other’s point of view.
- Allowing clients and their representatives to get a ‘shared story’ in terms of direct exchange of information and instructions.
- Allowing clients to work with lawyers who are committed to interest-based negotiation with the goal of reaching an outcome that will be acceptable to both parties.

Legal Aid Commission PDR Conferences can also offer the additional benefits of:

- Facilitation by a trained mediator
- Allowing participation by self-represented litigants, who often do not qualify for a grant of legal aid but cannot afford private representation
- Allowing for involvement of child-representatives where a matter has been diverted from the court system at some stage along the litigation pathway.

Cost of withdrawal from Collaboration

The model Collaborative Contract contained in the Draft Guidelines states that where a party terminates or withdraws from Collaboration, ‘that party shall pay all of the other party’s legal costs of the Collaboration including all Experts’/Arbitrators fees and other related expenses’. We recognise that this costs arrangement is an important aspect of the contract for private clients, who are committing their personal resources to the process and need to make the retainer as ‘strong’ as possible to keep both parties engaged in collaboration. Cost dis/incentives are different where one or both parties are legally aided and therefore not committing their own funds. If both parties are legally aided, Commissions already bear the burden of paying for the representation of each party and the cost of any expert reports, regardless of whether one party becomes responsible for negotiations breaking down.

If Commissions were to participate in Collaborative Law where only one party was legally aided, and the aided client withdrew from collaboration, the Commissions would not be in a position to pay the costs of the non-legally aided party. A client who has been in receipt of legal aid will have passed the Commissions’ means test and is therefore extremely unlikely to have the capacity to pay costs. If collaboration were to be practised in Commissions then it is suggested that it would be appropriate

to either amend the Collaborative Contract to take account of legally aided parties or for the funding to Commissions to be increased to enable adherence to the Contract.

Cost and availability of experts and arbitrators

The Commonwealth Legal Aid Funding Guidelines do not envisage the appointment of Experts to assist in the process when Commission PDR is conducted prior to Court proceedings. To include experts at an earlier stage in negotiations, as envisaged by section 7 of the draft collaborative contract, could add significantly to the cost of Commission programs.

Section 19 of the draft Collaborative Contract prohibits experts or arbitrators used in the collaborative process from appearing as witnesses in subsequent litigation, unless otherwise agreed by the parties and the Expert or Arbitrator. NLA is concerned about the additional time and money involved in getting a second expert's report in circumstances where collaboration breaks down and the matter proceeds to litigation. It would add significantly to Legal Aid costs if experts used in collaboration were excluded from subsequent proceedings, where at least one party continued to be legally aided.

The other aspect of the collaborative model that could be expected to create practical difficulties for Legal Aid clients is the limited availability of appropriate experts willing to undertake work at Legal Aid rates, particularly in small jurisdictions such as the Northern Territory, Tasmanian and the ACT and in regional areas. In some cases, it would also be impossible for clients to access an Expert or Arbitrator or an alternative Expert or Arbitrator if the parties were to proceed to litigation after a breakdown in collaboration.

Cost and availability of legal representatives

We understand that it is the essence of Collaborative Law that if collaboration breaks down, neither lawyer can represent their client in further court proceedings (Section 16 of the Draft Collaborative Contract). If either party to a failed collaboration were given a grant of aid to commence litigation, that party would need a new lawyer. At this stage, the party would have 'conflicted-out' the private firm or the Legal Aid Commission in-house practice whose lawyer had been representing them through the Collaboration. The Legal Aid Commission's grants unit would need to find a new firm willing to assist the client/s with litigation.

This aspect of collaboration is likely to lead to problems for all Commissions because the pool of lawyers willing to accept legally aided work is relatively small. This issue is most significant in some regional and remote areas where it is often difficult to find a lawyer to do work at legal aid rates. One reason for this is the ever-widening gap between legal aid payment rates and the standard fees charged by private practitioners. NLA is concerned that in some circumstances, it may not be possible for the parties to secure alternative representation after collaboration breaks down. This issue may be minimised if it were possible for the Collaborative Contract to be amended so that one party could continue with their existing representation if they were not responsible for the breakdown of the negotiations. However, this might undermine the spirit of the Collaborative Process.

Cost of determining responsibility for breakdown

Section 18 of the draft Collaborative Contract states that if lawyers cannot agree on who is responsible for collaboration breaking down, the parties shall arrange for a lawyer nominated by the President of the National Centre of Collaborative Law to make a determination. Commissions may be able to form their own assessment on this issue if the Collaboration involved two legally-aided clients. However, we are concerned that if only one party was legally aided, the Commission involved would need to allocate further funds to pay a representative from the NCCL to make this determination.

Grants of aid following breakdown

NLA is concerned about investing significant resources in a grant of aid for Collaboration and then having to fund the same client or clients to proceed to litigation if the Collaboration breaks down. Unless Legal Aid Guidelines were amended in such a way that participation in Collaborative Law deemed the client ineligible for further aid, there is a risk that Commissions would have to fund a new lawyer, at significant duplication of costs. NLA believes that to amend the Guidelines in this way would not be appropriate from a natural justice perspective. Nonetheless, funding a new lawyer to start ‘from the beginning’ with a client after a failed collaboration would require considerably more resources than current arrangements, where a client’s existing lawyer can be granted aid to commence court proceedings following an unsuccessful Legal Aid PDR conference.

Funding, Legal aid Guidelines and grants payments systems

The Commonwealth Legal Aid Guidelines and the Commissions grants payments systems would require amendment to provide for the practice of Collaborative Law. Some Commissions are not currently able to meet the need for legal assistance, which Directors know exists by reason of the number of applications received and refused each year. The resources available to each Commission dictate the extent to which community need is met. Currently, Legal Aid programs are therefore “availability” driven rather than “need” driven. In this context, unless enabling funding was forthcoming, it appears that the more resource-intensive nature of Collaborative Law could make large-scale provision of Collaborative Law unrealistic on a cost-benefit basis, particularly in smaller jurisdictions or regional areas.

Summary

NLA welcomes the concept of Collaborative Law as a contribution to the range of non-adversarial family law services including mediation, conciliation and arbitration.

Collaboration appears to offer benefits very similar to those provided by existing Commission Primary Dispute Resolution Conferencing Programs and the LAQ Arbitration Program. Concerns we have are that Collaborative Law is likely to be more resource intensive than Commission PDR Conferencing and LAQ Arbitration Programs and may not be suitable for some of our client base. Having said this, we would not want to exclude the use of Collaborative Law within Commissions where the clients and circumstances of a case were suitable, and have no doubt about the value of Collaborative Law for privately funded matters.

Please do not hesitate to contact us if you require any further information from us or would like to discuss this matter further.

Yours sincerely,

A handwritten signature in black ink that reads "Suzan Cox". The signature is written in a cursive style with a large, looped 'S' and a 'C' that extends into a long tail.

Ms Suzan Cox QC
Chairperson
National Legal Aid