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The Director of Research
Family Law Council
Robert Garran Offices
National Circuit
Barton, ACT 2600

23rd August 2007

Dear Sir or Madam,

Re: NLA Response to Family Law Council Discussion Paper
The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters

We refer to the Family Law Council Discussion Paper, The Answer from an Oracle: Arbitrating Family Law Property and Financial matters. National Legal Aid's (NLA) answers to the questions posed in that paper follow.

Question 1
Should the Family Law Act be amended to provide for discretionary court-ordered arbitration?

Under the current provisions of the Family Law Act ("the Act"), arbitration, whether court ordered or by private arbitration, must be a consensual process. NLA supports legislative amendments to the Act to further encourage the use of arbitration in appropriate cases.

NLA does not support any proposed amendments where arbitration could be ordered without the consent of at least one party.

In broad terms NLA is of the view that there should be a positive obligation on parties and the courts to consider the benefits of referring property and financial matters to arbitration. There are however some limitations on the way this should occur.

In general it would be of concern if parties who had elected to file proceedings in the Family Law Courts, should not ultimately have the right to have those courts make a final determination in relation to their property and financial matters. The removal of this choice from clients is of concern to NLA.

It is proposed that any amendments should place a positive obligation on the court to consider arbitration at appropriate stages during the litigation pathway. This could be considered by the court on the first court event and, in more simple matters, an order could be made. For other cases a referral may be more appropriate after discovery is completed.

By placing a positive obligation on the court to consider and enquire as to the appropriateness of arbitration in a particular matter, both the parties and their legal representatives will need to consider the benefits to be obtained by consenting to a referral.

While the discussion paper proposes that such a referral be solely at the court's discretion, it is submitted that the consent of at least one party should be required to the process. If the other party objects to the proposed referral, they should be given the opportunity to express their objections and the reasons why a litigation pathway is more appropriate. For example, a party may have concerns about full and frank disclosure of financial details and other issues which can only be addressed by utilising the court process.

It is submitted that if the court intends to refer a matter to arbitration in circumstances where both parties have not consented to the referral, clear guidelines should be developed to ensure only appropriate referrals are made so that a client has not been prejudiced by the failure of a judicial determination being made and the simplified arbitration process occurring.

It is also submitted that the decision whether or not to refer a matter to arbitration, if made without the consent of both parties, should be capable of review.

There is, in our submission, a benefit in ensuring that discrete issues, which may be appropriately referred to arbitration, are done so at an appropriate stage and as early as possible in the proceedings.

As submitted the referral of the whole dispute to arbitration should not occur without the consent of at least one party having been given and with the safeguards outlined previously having been put in place.

In relation to the referral of discrete issues, there is scope for this to occur at the discretion of the court alone within clearly defined boundaries but it is submitted considerable care should be taken before adopting this approach given the costs implications to clients.

Once the discrete issue was determined, the matter would then be referred back to the court for determination of the substantive issues. It is submitted that legislative amendments would be required to ensure the court hearing the substantive dispute was bound by the arbitral award made in relation to the discrete issue which had been referred to arbitration.

One of the primary reasons for choosing arbitration as an alternative to the litigation pathway is a reduction of legal costs. Arbitration provides a method

of resolving the dispute while maximising the property pool available for distribution to the parties. It should not become an additional procedural step for clients to overcome in the litigation pathway which adds costs and complexity to an already expensive process. This issue will need to be considered by courts when making such discrete referrals and clear guidelines established for such referrals.

Whether or not a referral of a discrete matter can be made to private arbitration, will depend upon the guidelines that the private scheme has developed. Currently some private schemes do not accept discrete issues and will only conduct arbitrations if the whole matter can be determined through the process in order to reduce the parties' costs and finalise the matter in a timely manner.

NLA supports the use of arbitration as an option to clients seeking to resolve their property and financial dispute other than by way of judicial determination.

Question 2
If discretionary court-ordered arbitration is introduced should the litigant or the government meet the costs of the arbitrator and the venue, or should it be shared in some proportion?

As no final model has been proposed, the costs associated with court-annexed arbitration cannot be quantified. If a court-annexed arbitration process were introduced, the fees payable to arbitrators should be at a rate that attracts and ensures a quality service. If not, the process will be resisted.

If a court-annexed service is proposed, then it should be the same as all other services provided by the court with no costs being directly incurred by the party towards the arbitrator, administrative support for the process or the venue.

Litigants do not contribute to the costs of the court in making a judicial determination and nor should they be required to meet the costs associated with court-annexed arbitration. Clients would remain responsible for meeting the costs of their legal representation during the court-annexed arbitration process.

Were a requirement imposed that clients of a court-annexed arbitration process meet these costs, this would do little to encourage it being viewed as an option to reduce costs.

In relation to private arbitration, the Family Law Regulations 1984 (the Regulations) make provision for equally sharing the costs of the arbitration unless the parties otherwise agree (Regulation 67H).

It is submitted that there should be no change to the costs provisions.

Question 3
Should fees be payable to arbitrators on a per matter rate, or on an hourly or daily rate? What would be the appropriate level of payment?

In relation to court-annexed arbitration and given the views expressed in response to question 2, NLA has no comment on the above.

In relation to private arbitrations, it is submitted that the market will determine the appropriate level of payment as the process becomes more widely used. The costs to be paid to arbitrators is a matter for negotiation and would form part of the terms of the arbitration agreement in accordance with the provisions of Regulation 67F.

Question 4
Should consensual arbitration be available without the parties funding the cost of the arbitrator?

As stated in response to question 2, if the referral to court-annexed arbitration was by consent then the parties would not be required to fund the cost of the arbitrator.

In relation to private consensual arbitrations, it is submitted the current provisions under the Regulations continue whereby the parties share these costs equally unless otherwise agreed.

Question 5
If a new arbitration scheme is introduced, is there a need for education about that scheme, and how should the education be funded?

In order to promote understanding and acceptance of any new scheme, education is required. This is important for potential clients of the new service, their legal representatives and other agencies who provide legal advice and assistance to clients such as community legal centres.

In a court-annexed arbitration scheme, it is submitted a similar education and information program should be conducted as was recently the case with the new family law reforms. Information/training sessions could include representatives from both the court and the Attorney-General's Department.

In addition to these sessions community education sessions for the public could occur in which the benefits of arbitration can be explained in particular its potential to be cost effective, flexible and timely in obtaining a decision finalising the dispute between the parties.

In relation to private arbitration schemes that are currently being conducted the benefits to be achieved in raising awareness of the program has been canvassed in the discussion paper.

Were other organisations to establish arbitration schemes then they would conduct the necessary education and training to raise awareness of this new service.

Question 6
If discretionary court-ordered arbitration is to be introduced, which model should be implemented and why?

NLA has no specific comments in relation to this issue as it is more appropriately addressed by the court when considering which model they would adopt under a court-annexed scheme.

Whichever model is adopted it is submitted it should provide clients in appropriate cases with a timely and cost effective way of resolving their dispute.

The discussion paper outlines the model adopted by Legal Aid Queensland (LAQ) after extensive consultation. Were other legal aid commissions to establish arbitration processes, the model adopted would need to meet their particular needs.

NLA submits that any proposed models should involve extensive consultation with relevant agencies and the profession.

Question 7
On a costs application after a rehearing of an arbitration, should section 117(2A) Family Law Act be amended to require the court to take into account whether or not the party who has sought the rehearing has done better than the result that that party achieved from the arbitration?

NLA supports the proposed amendment of the Act to require the court to take into account whether or not the party who has sought the rehearing has done better than the result that that party achieved from the arbitration.

It is submitted that the rehearing should be treated in the same way as an appeal. If the rehearing is as a result of an error by the arbitrator then a costs certificate should issue to the parties.

If the rehearing results in an outcome where the party who sought the rehearing is in no better position than under the arbitral award, the court should have the discretion to consider making an order for costs of the rehearing against that party.

Question 8
What can be done to improve implementation of consensual arbitration?

It is submitted that promotion of arbitration as an effective alternative to judicial determination of property matters can be improved by:

- The proposed legislative amendments referred to previously where the court positively considers referrals to arbitration at appropriate stages during the litigation pathway;
- The establishment of a court-annexed scheme which would provide more clients and practitioners with experience of the process and over time lead to more ready acceptance and confidence in the process;
- Other organisations, such as more legal aid commissions, implementing arbitration schemes to provide their clients with further alternatives for determination of their property matters;
- Effective education and training strategies being implemented by the courts and government to promote and raise awareness of the new services offered in particular the costs savings to clients rather than proceeding to a contested judicial hearing; and
- Arbitrators who are both well qualified and respected among the legal profession.

Once arbitration is recognised as an accepted method for resolving property matters through courts and other agencies, there would be a flow-on benefit to private matters and in all likelihood an increase in the number of private arbitrations that occur.

Question 9
Should parties be able to go to consensual arbitration and agree that any review be by way of rehearing de novo rather than by way of appeal on a question of law?

Whether this was an option available to the parties would depend on whether or not the process was court-annexed or by way of private consensual arbitration.

If court-annexed, whether this was an option would depend upon the model adopted by the court and the guidelines established by the court for implementation of the scheme. The central issue is whether the intended costs savings to clients and reduction of matters in the litigation pathway could be achieved if this was an option. It is submitted that for court-annexed arbitrations, the current position remain and that reviews remain on questions of law only.

In relation to private arbitrations, the parties should be at liberty to agree on the terms of the arbitration. If for example, the parties contracted as a term of the arbitration agreement that should both of them require a review of the arbitration then they could contract that it be by way of a rehearing de novo.

In circumstances where one party to a private arbitration was dissatisfied with the award then the review should be restricted to questions of law as is currently the case.

Question 10
What property and financial matters, if any, are never suitable for discretionary court-ordered arbitration?

It is submitted that while an exhaustive list cannot be provided of matters that are never suitable for arbitration, care would need to be taken when considering making referrals to arbitration in the following circumstances:

- In complex financial matters where substantial cross-examination of parties and experts is necessary;
- Where third party discovery is an issue or where third parties may intervene in the proceedings;
- Where there are concerns about abuse of process and failure to make full and frank disclosure of relevant financial information;
- Where there are concerns about dissipation and concealment of assets by one of the parties;
- Where there are concerns about power imbalances and the capacity of a party to participate in other than a judicial process due to factors which include family violence and mental health issues; and
- Specific applications such as applications under section 79A of the Act which should be subject to a judicial determination.

While these matters may not initially be suitable for arbitration, it is submitted that they may at a later time be appropriate once some of these issues were addressed and relevant information disclosed.

It is suggested that, for this reason, it is important that the court throughout the life of a matter positively consider arbitration as an alternative.

Question 11
What property and financial matters, if any, are never suitable for consensual arbitration?

Those matters appropriate for arbitration are identified in the provisions of the Act and it is submitted that in private consensual arbitration it is the parties who determine whether or not their matter should use this process.

It is submitted that no fetters should be placed on the right of the parties to determine the process they wish to utilise to resolve their dispute.

Should an organisation establish a scheme for delivery of private arbitration services then it should be left to that organisation to determine their own guidelines of inclusion and exclusion from their scheme in accordance with the Act.

As submitted in response to question 10, certain types of matters which would not be suitable for consensual arbitration would include section 79A applications. In circumstances where there are concerns as to coercion, fraud and similar factors, these should be judicially determined as in all likelihood extensive cross-examination would be required and the issues do not lend themselves to a more streamlined process.

If a court-annexed arbitration scheme were introduced, it is submitted that consideration should be given to amending the terms of section 13K of the Act to cover not only registered awards but also arbitral awards under the new regime.

Question 12
Should guidelines be developed to assist the determination of whether a particular matter is appropriate for referral to arbitration? If so, what should the guidelines include?

It is submitted that guidelines would need to be developed to determine whether a particular matter is appropriate for referral to arbitration under a particular scheme. Some of the factors which would need to be considered have been identified in response to question 10. These factors would need to be considered in the development of any guidelines.

In relation to court-annexed arbitration, it is submitted it is appropriate for the court to respond to this question.

In relation to private arbitrations it is submitted guidelines may need to give consideration of specific issues including:

- The types of matters that could be dealt with by the scheme i.e. monetary limits if applicable under already existing funding obligations or simple disputes where the asset pool comprises real estate, accumulated superannuation entitlements, chattels and/or liquid assets;
- The types of matters that would be excluded from the scheme i.e. third party claims, issues of complexity, debt;
- Identification of the process to be followed throughout the arbitration; and
- Whether the process is on the papers or oral evidence can be taken.

As outlined in the discussion paper such guidelines have already been established in relation to the arbitration program delivered by LAQ. While this scheme was developed after extensive consultation and was designed to satisfy both the legislative requirements and the funding obligations of LAQ, it is only one example of an operational model.

While this model meets the needs of LAQ and may be suitable for adaptation by other legal aid commissions, it may not be an appropriate model for the court to adopt or for government to legislate.

Any proposed model will need to meet the organisational requirements of the body operating the scheme and legislative requirements.

Question 13
Should the court have power to refer either the whole matter or particular aspects of a matter to arbitration?

In view of the answer to previous questions, NLA's position is that the court should have the power to refer a whole matter to arbitration with the consent of either both or at least one of the parties. As stated in response to question 1, if the court intends to refer a matter where both parties have not consented clear guidelines must be developed to ensure only appropriate referrals are made and that a party's position is not prejudiced by the failure for a judicial determination to occur. As submitted, this referral should be open to review.

In relation to the referral of discrete issues these should be eligible for referral at the court's discretion with the balance of the dispute to be referred back to the court once the arbitral determination on the discrete issue is made. Legislative amendment is required to limit the court's power to vary discrete issue arbitral awards when the matter is referred back.

As the purpose of arbitration is to provide parties with a speedier and less expensive method of having their dispute determined, appropriate guidelines for referral of discrete issues would need to be established to ensure only appropriate matters were referred to avoid another layer in the court process.

Were a referral of a discrete issue to occur, it is submitted that when the matter is referred back to the court for determination on the substantive issues, the matter should not loose its priority in the determination list. Matters should progress, or continue to progress, to a determination as quickly as possible and arbitration should not become a possible method for deferring the making of a final decision in the litigation pathway.

In relation to private arbitrations, whether referrals of discrete issues is possible will depend upon the inclusion criteria for that particular scheme. For some arbitration schemes that are, or may be established by legal aid commissions, there would be funding implications if discrete issues were accepted.

As a stand alone method of resolving the clients' outstanding property and financial matters, arbitration is an attractive option. As part of the court process for determining only part of the dispute, the funding benefit to a legal aid commission is reduced and the costs for the clients increased. For this reason LAQ's program does not accept discrete issues.

Question 14
When in the litigation process is it most appropriate to consider a referral to court-ordered arbitration?

As stated previously, each case must be considered on its own facts and these facts will determine the appropriate time, if any, for a referral to arbitration.

The legislative amendment proposed to place a positive obligation on the court to consider a referral to arbitration throughout the court process would encourage both clients and their legal practitioners to actively consider this option as well.

While it is suggested arbitration should be considered throughout the matter, it is particularly important it be considered at the beginning of a matter at the first court event, after full and frank discovery has been obtained and after the conciliation conference.

Question 15
Should the courts have power to order arbitration on the papers? If so, what guidelines should govern when a referral to arbitration on the papers is made?

NLA's position is that the court should have the power to order arbitration on the papers in appropriate circumstances under a court-annexed scheme. As to the relevant guidelines for the making of such referrals, this is an issue to be commented on by the courts. However, the complexity of the matters to be determined, whether issues of credibility were to be made and other such factors would influence such a referral.

In relation to private arbitrations, schemes already exist for determinations on the papers.

It is submitted that if an arbitration on the papers is to be considered, the consent of both parties to this streamlined process should be obtained and ideally both parties should be legally represented.

Question 16
Should arbitrators be allowed to refer questions of law back to the court?

NLA's position is that there should be no change to the provisions of section 13G of the Act and that arbitrators should be allowed to refer questions of law to the court.

Question 17
Should a judicial officer have a discretion to refuse to hear a question of law referred by an arbitrator if they are not satisfied that it would be an effective use of court time? If so, is there a need for guidelines, in legislation or otherwise, to govern relevant factors which should be considered when dealing with applications for leave to refer a question of law to the court?

NLA's position is that a judicial officer should not have the discretion to refuse to hear a question of law referred by an arbitrator. Under the current provisions of section 13G of the Act the court must either determine the question of law or remit the matter back to the arbitrator after determining that no question of law arises.

To provide the court with the discretion to refuse to hear such a referral would undermine the arbitration process and arguably the standing of the arbitrator in the eyes of the parties.

Given the small numbers of arbitrations in family law matters, clearly few referrals, if any, on questions of law are being referred to the court.

It is submitted that no change to the current legislative provisions be made and that if a referral is received, the court must make a determination on it.

Question 18
Should arbitrators be able to refer a matter to the court in any circumstances other than on a question of law?

NLA's position is that arbitrators should not be able to refer a matter to the court in any circumstances other than on a question of law.

To provide for such referrals would be adding to the complexity of the process, increase the length of time until the final determination of the matter, increase costs and reduce substantially the benefits to the parties of participating in the arbitration process.

It is submitted that it may be appropriate to give consideration to expanding the powers of the arbitrator under the provisions of regulations 67K (suspension), 67L (termination) and 67N (evidence) as the current provisions are somewhat limited.

Question 19
What rights and duties should an arbitrator have?

NLA's position is that there should be no change to the rights, duties and obligations of arbitrators as currently set out in the Regulations.

Question 20
Should arbitrators enjoy the same immunities as judges, or a more limited set of immunities such as immunity from actions for negligence?

NLA's position is that there should be no change to the current provisions and that arbitrators should continue to have the same immunities as judges in the performance of their functions as an arbitrator.

Question 21
Should all arbitrators be legal practitioners?

NLA's position is that there should be no change to the prescribed requirements for an arbitrator as set out in Regulation 67B. This view is consistent with the recent legislative reforms in family law which prescribe the qualifications necessary for those who are "advisors".

Question 22
Are the requirements prescribed in Regulation 67B of the Family Law Regulations adequate for the accreditation of arbitrators?

NLA's position as stated previously is that there should be no change to the requirements specified in Regulation 67B for the accreditation of arbitrators.

The reluctance by parties to use and the courts to promote arbitration as a viable method for determining family law property and financial matters may not necessarily be due to concerns about the quality of those who provide this service.

It is submitted that the lack of awareness of the availability of this process has contributed to the failure of both clients and legal practitioners to consider arbitration as a realistic option.

However suitable accreditation standards for arbitrators are necessary to ensure that those using the service can have confidence in it especially in Court annexed arbitration. As part of any proposed reforms it is submitted consideration should be given to prescribed ongoing training requirements for arbitrators as has recently been introduced for family dispute resolution practitioners.

In order to retain confidence in the quality and services of arbitrators the Court may wish to establish a panel of suitably qualified and recognised arbitrators. Other organisations who may wish to establish a private arbitration shceme could also give consideration to establishing their own panel and criteria for inclusion on it.

The legislative amendments proposed would place upon the court a positive obligation to consider arbitration at appropriate stages in the proceedings.

This change together with the establishment of appropriate guidelines should encourage more referrals to arbitration.

Question 23
Should the court have a discretion to nominate a particular arbitrator to hear a particular case?

NLA's position is that the court should have the ability to nominate a particular arbitrator to hear a particular case but that such referral, in a court ordered arbitration, should only occur with the consent of both parties and the nominated arbitrator.

In a court-annexed arbitration the court could refer the matter to a court arbitrator and the parties' consent to the appointment of a particular arbitrator would not be necessary.

In some instances an arbitrator may have specialist knowledge and experience which would be appropriate for a particular matter. The arbitrator should however have the ability to decline a referral.

Question 24
Should parties ordered to attend arbitration have the option to appoint a particular arbitrator?

In relation to court-annexed arbitration, the parties should not have the option to appoint a particular arbitrator any more than they have the ability to request that a particular judge hear their matter.

In relation to a private arbitration, the parties should have the capacity to nominate a particular arbitrator and this appointment would be with the consent of both parties.

If the private arbitration occurred under an established scheme then whether or not the parties had this capacity would be determined by the guidelines of the scheme.

Conclusion
Thankyou for the opportunity to provide this response to the Discussion Paper. Should you have any questions or require any further information please do not hesitate to contact us.

Yours sincerely,

Bill Grant OAM
Chairperson, National Legal Aid