

## Challenges Facing Today's Practitioners

Excerpt from *Mediation of Family Law Disputes in Australia - a paper given by Dale Bagshaw, University of South Australia at the recent 2nd International Family Law Conference, provided by Ross McSwan of Resolve.*

There is ongoing debate in Australia about whether mediation is possible in situations where there is unequal power, and to what extent it is ethical for a mediator to empower the weaker party.<sup>1</sup> In Australia there is generally an insistence on the use of separate lawyers to represent and advise clients in association with mediation, so that people know their legal rights and their options if they wish to give up mediation at any stage. Charlesworth notes that this is consistent with the legal perspective of justice "that is, justice as being consistent with legal rights, or what the law would allow." The social perspective of justice, which also influences family mediation in Australia, is "the sense of being treated fairly, being fully heard and given equal importance and dignity as the other parties and provided with a result not too far away from one's desserts".<sup>2</sup>

In 1995, Legal Aid and Family Services (LAFS) commissioned Keys Young to undertake a study into the issue of family violence and the practice of mediation, which was completed in June 1996<sup>3</sup>. Twelve of the current funded agencies participated in the study, at least one in each State and Territory, with a response rate of 47% for women and 27% for men. The survey indicated that the incidence of violence is high in relationships currently presenting to the agencies with almost three-quarters of the women reporting that they had experienced some type of violence or abuse. Client views of the process and/or outcomes of mediation were generally positive with men expressing higher levels of satisfaction than women. Women who had experienced substantial abuse sometimes found that mediation represented a positive experience of empowerment which could assist them in reaching a fair and reasonable agreement. A significant minority, however, reported not being asked by the agency about violence and abuse. A number of women disclosed domestic abuse for the first time, but their needs for information and

referral were not necessarily met. The degree of harassment, intimidation and threats of physical violence reported by women as occurring before, during and after mediation suggests that mediators need to be more aware of ways that men use mediation to continue the abuse and intimidation of their ex-partners. In a small number of cases mediators may have misjudged the appropriateness of a case for mediation at all, especially where there were issues of child access and custody. As an outcome of the study the first LAFS pilot training program for family mediators began in Sydney in April 1997<sup>3</sup>.

This important research indicated that abused women generally experienced less premediation anxiety, a more positive experience of the mediation process and a higher level of satisfaction with agreements where they:

- had been subject to emotional abuse or one-off physical threats or threats only
- had been separated from their ex-partners for a considerable time
- had received personal counselling (as opposed to *relationship* counselling)
- reported that they no longer felt intimidated by their ex-partner
- felt confident in their legal advice and knew what they could reasonably expect from settlement

and where *mediators*:

- asked specific questions about violence or abuse, including non-physical types
- offered women specific guidance in considering the possible impact of violence and abuse in the mediation process
- offered women separate time with the mediator before, during and after sessions
- worked as a gender-balanced co-mediation team
- demonstrated they understood the woman's concerns both within and outside the mediation session by

implementing specific strategies to deal with these concerns

- demonstrated they could control abusive behaviour within the session
- assisted women to deal with any harassment or intimidation which occurred outside the actual mediation session itself.<sup>4</sup>

Under the new Family Law Regulations family and child mediators are required to assess for appropriateness for mediation, considering family violence, the safety of the parties, the equity of bargaining power, the risk of child abuse, the emotional, psychological and physical health of the parties and any other matter the mediator considers relevant to the proposed mediation.<sup>5</sup>

### FOOTNOTES

1. H Astor & H Chinkin, *Dispute Resolution in Australia* (Butterworth, Sydney 1992); D Bagshaw, *Gender Issues in Mediation* (1990) FIRM National Conference, UK; W De Maria Social, "Work and Mediation: Hemlock in the Flavour of the Month" (1992) 45 *Australian Social Work*
2. S Charlesworth, "Mediation and Perceptions of Justice in Australia" in M J Meulders (ed), *Families and Justice* (Kluwer Academic Publishers, London, 1995), p.7
3. The definition of domestic violence adopted: "behaviour by the man, adopted to control his victim, which results in physical, sexual and/or psychological damage, force social isolation, or economic deprivation, or behaviour which leaves a woman living in fear." (National Committee on Violence Against Women, 1992)
4. LAFS has contracted consultants to conduct State-based domestic violence training and train-the-trainer programs over the coming months
5. Keys Young, *Research Evaluation of Family Mediation Practice and the Issue of Violence* (Legal Aid and Family Services, Commonwealth of Australia, July 1996). pg iii
6. Family Law Regulations (Statutory Rules 1996, no. 71) Regulation 62
7. To quote the Chief Justice of the Family Court of Australia "Some of the figures from our evaluation suggest that the people using mediation come from a different socio-economic group - the sort of people who might have read about mediation and who understand its possible benefits". (*Joint Select Committee Report, 1995*) pg 562