FAMILY LAW

Lip service or real changes?

ROSS HYAMS discusses the recent legislation relating to mediation and arbitration in the family court.

Will the *Courts (Mediation and Arbitration) Act* 1991 change the way family law disputes are conducted by lawyers? Does the legislation provide anything new? Or is it merely lip service to the trendy concepts of mediation, arbitration and conciliation? Before answering these questions, we need to understand the scope of the legislation. The changes to the *Family Law Act* now enable parties to ask for a mediator to be appointed to settle a dispute (s.19A) before commencing proceedings. A parent, child or party to the marriage may file a Notice Seeking Mediation (Form 68) in the Family Court. Following this:

- the parties will be directed in writing to attend an information session (Family Law Rules, Order 25A, r.3);
- they will then be interviewed by an approved mediator in order to determine whether the dispute is suitable for mediation (Order 25A, r.4);
- if the matter is suitable for mediation, the Principal Director of mediation will be so advised, and a time and date fixed for the first conference (Order 25A, r.7);

  if the matter is deemed to be unsuitable for mediation, the parties will be informed in writing and will be advised of other alternative dispute resolution procedures which are available (Order 25A, r.6(1)).

The legislation also provides that once proceedings have commenced, the court may still order that any or all of the matters be referred to mediation providing the consent of both parties is obtained (s.19B). Anything said or any admission made at such conferences is not admissible later in any court proceedings (s.19C).

In property proceedings, the court may also refer the matter to an approved arbitrator, whether or not the parties consent (s.19D). If an award is made at arbitration, a party to an award may register it in the court which referred the matter to arbitration. This award will then become an order of the court (s.19D(5)). Private arbitration is now also available in order to resolve a property dispute, and a court has the ability to make such orders as it thinks appropriate to facilitate the effective conduct of the arbitration (s. 19E).

Conduct of conferences

The Rules provide that a mediation conference must be conducted as a decision-making process in which the approved mediator assists the parties by facilitating discussion between them, so that they may:

- communicate with each other regarding the matters in dispute, and
- reach agreement on matters in dispute (Order 25A, r.10).

If the mediator considers that a mediation should not proceed, he or she has the following options:

- to adjourn the mediation;
- to refer either or both parties to counselling;
- to give directions to the parties that may assist in a later continuation of the mediation;
- to terminate the mediation (Order 25A, r.14).

A mediation is complete when the mediator considers it complete, one of the parties does not wish to continue, or a party files a notice in the court that the mediation has ended. When any of these events occur, the mediator must report the end of the mediation to the Principal Director of Mediation (Order 25A, r.15).

Sweeping reforms?

Will this legislation really change anything? In this writer's opinion, no. The majority of lawyers are brought up on a steady diet of litigation — for most, concepts of mediation and arbitration are completely foreign concepts used by legal service lawyers and social workers. How many family lawyers will send a potential client away to mediate a dispute themselves *before* issuing proceedings? The enlightened ones may, but these are the ones who have been recommending mediation and arbitration for ages anyway. For the mainstream practitioner, this legislation will simply not affect the conduct of a family law matter. Despite the fact that the Act has 'its heart in the right place', it appears to have gone about its aims in the wrong way. Most practitioners are not going to use mediation and arbitration unless they are forced to. Section 19B of the Act allows a matter to be referred to mediation once proceedings have commenced, but it must be *with the consent of the parties*. Of course, the client is going to rely on his/her practitioner for advice as to whether such consent should be given. For most lawyers, who do not understand and/or trust the mediation process, the answer simply will be 'no'. Exit the usefulness of s.19B.

This Act does not provide any real reform. Sweeping reforms to the conduct of family law matters will not occur until family law practitioners are compulsorily educated in alternative dispute resolution and will therefore choose this way of conducting proceedings, or until the legislation provides no choice.

Ross Hyams is Co-ordinator of Monash-Oakleigh Legal Service.