LWB 498

Dispute Resolution Practice

Exam Notes

2010 Sem 1

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# Week 1 – Introduction and the spectrum of disputes

## Historical origins of dispute resolution

### Aboriginal dispute resolution methods

Had their own form of dispute resolution for years based on customary law

Closeness and interconnectedness of the community meant that it was imperative that for disputes to be resolved quickly and without animosity

The process for dispute resolution was passed down from generation to generation

### The evolution of dispute resolution practice

**Before 1980**

In Australia, up until the early 1980s, litigation was considered to be the primary way to resolve legal disputes. The main “alternative” dispute resolution option used at that time was negotiation and often a lawyer would attempt to negotiate at the outset of taking on a client's legal matter. If negotiation failed they would then commence litigation which meant that they filed an application in the appropriate court to “commence legal proceedings”.

**Late 80’s to earl 90’s**

The focus in Australian legal dispute resolution began to change and a movement known at that time as “ADR” (*Alternative Dispute Resolution*) was introduced to Australia from the USA. This movement was actually not a new concept, it was based on ancient dispute resolution systems used in Asian countries and tribal communities for centuries.

**Present time**

Since that time the dispute resolution movement has grown to such an extent that the adversarial process of “litigation” (taking a matter to court), is now usually considered to be an option of last resort and is now considered by most legal practitioners to be just one of a variety of valid and appropriate types of dispute resolution that are available. Alternative approaches to dispute resolution have also been embraced within our legal system – even in the traditionally adversarial court system, where non-adversarial dispute resolution options such as conciliation, case appraisal, and mediation are regularly available.

It’s important to remember also, however, that of course some cases will present in which litigation may well be the most appropriate option. For example:

* Where fraud is alleged;
* Where an illegal activity is alleged;
* Where family or domestic violence has been perpetrated;
* Where a serious power imbalance exists; or
* Where there are allegations of child abuse.

## What is alternative dispute resolution?

Sir Laurence Street in “the Language of Alternative dispute Resolution”

Argues that it should be called “additional dispute resolution as opposed to alternative dispute resolution

Argues that it is not in competition with the established judicial system

Nothing can be alternative to the sovereign authority of the court system

This should be a mechanism that operates as an additional subsidiary process in the discharge of the sovereigns responsibility

These allow the court system to devote its precious time to the more solemn task of administering justice in the name of the sovereign

General definitions

Better way to describe it is to consider conciliation, negotiation, mediation, arbitration and litigation as, collectively, dispute resolution

More narrow consideration would be curial and non-curial dispute resolution or adjudicative or non-adjudicative dispute resolution

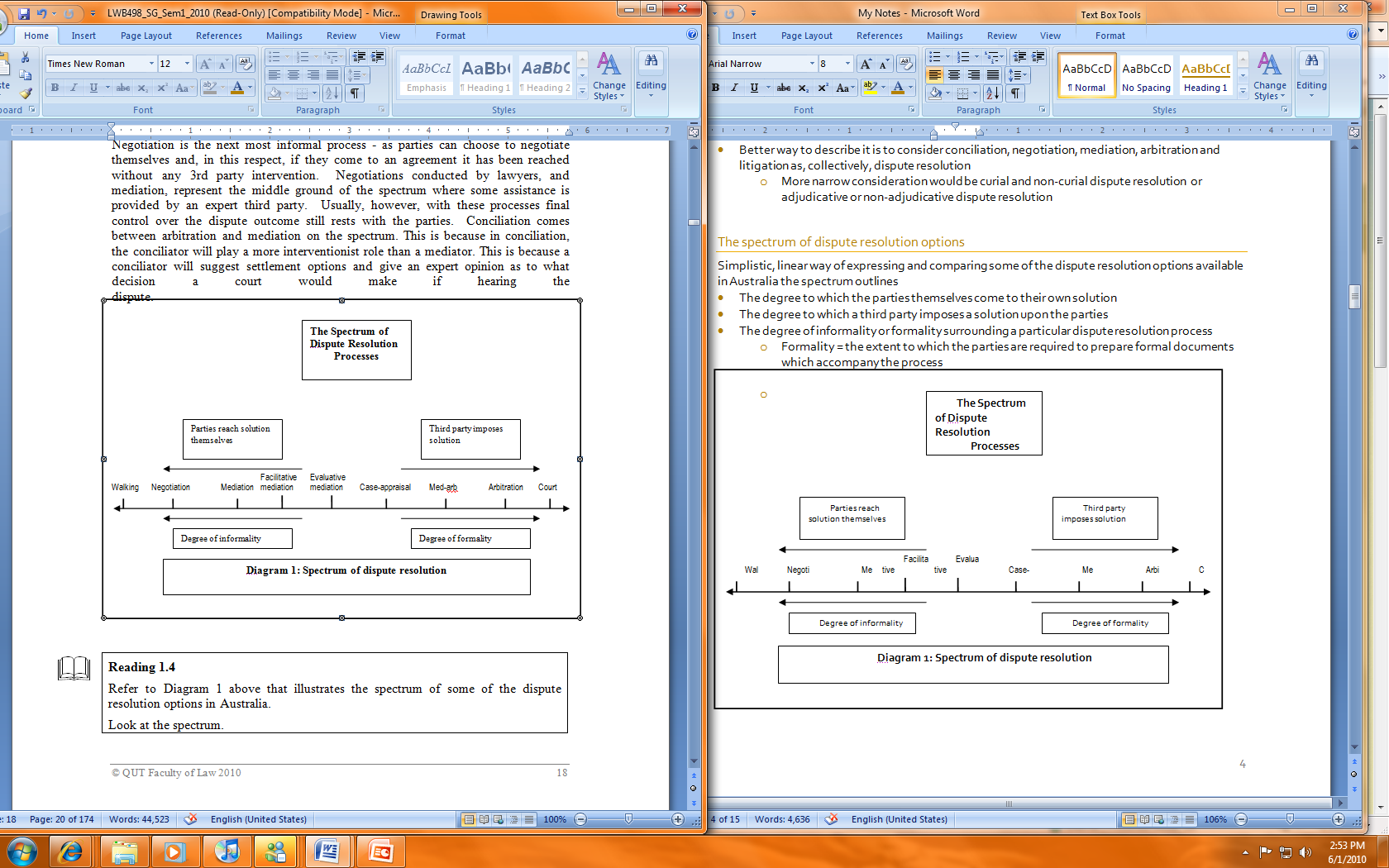
## The spectrum of dispute resolution options

Simplistic, linear way of expressing and comparing some of the dispute resolution options available in Australia the spectrum outlines

The degree to which the parties themselves come to their own solution

The degree to which a third party imposes a solution upon the parties

The degree of informality or formality surrounding a particular dispute resolution process

Formality = the extent to which the parties are required to prepare formal documents which accompany the process

### How does the spectrum work?

The spectrum covers a wide range of dispute resolution options; from at one end of the spectrum, walking away or negotiating a solution to, at the other end of the spectrum, arbitrating or litigating.

The most formal = Litigation

Where a decision is made by a 3rd party, being the judge.

At this end costs are higher

Takes much more time to get to the end of the process

Least formal = walking away

Walking away from the dispute is at the extreme opposite end of the spectrum as it is the most informal way of dealing with a dispute, that is, where a party decides not engage with the dispute or the other party at all.

At this end costs are cheaper

Might not be the best way to get what you want

Are you really resolving the dispute?

Lack of third party intervention

Negotiation is the next most informal process - as parties can choose to negotiate themselves and, in this respect, if they come to an agreement it has been reached without any 3rd party intervention.

Middle ground

Negotiations conducted by lawyers, and mediation, represent the middle ground of the spectrum where some assistance is provided by an expert third party. Usually, however, with these processes final control over the dispute outcome still rests with the parties.

Conciliation comes between arbitration and mediation on the spectrum. This is because in conciliation, the conciliator will play a more interventionist role than a mediator. This is because a conciliator will suggest settlement options and give an expert opinion as to what decision a court would make if hearing the dispute.

## Variables in the spectrum

* There are many different variables that determine a dispute resolution process. Some of the variables will be:
* The time the process takes to reach a conclusion.
* The cost of the process to parties.
* The degree of formality involved.
* The level of applicability of procedural rules.
* The level of preparation required.
* The level of formal documentation that is associated with the process.
* The levels of legal representation allowed/or required.
* The degree of third party intervention regarding the final decision/settlement outcome.
* The degree of consensuality:
* Whether parties can enter into the option voluntarily or whether they have been ordered by a court or legal aid commission to attend
* Whether parties determine their own agreement or whether a 3rd party imposes an agreement upon the parties

## A critical perspective on the spectrum

Astor and Chinkin:

The spectrum is useful but…

Focusing on a ‘continuum’ can distort an understanding of the internal diversity of processes.

Could be argued that mediation could fit over various areas in the spectrum as a result of varying costs, formality and level of consensuality

This means that different mediation styles could work at different points of the spectrum

We need to avoid over-simplistic approaches or under-estimating their complexity.

In some cases different DR methods can be used within the one process or in the one case but at different times

i.e. are not linear.

E.g. negotiation is used within mediation

## Types of dispute resolution processes – as included in the continuum

### Negotiation

The simplest example of negotiation is where two people talk together to see if they can resolve a dispute.

For example, you and your neighbor have a dispute about what type of fence to build between your properties. You want a chain wire fence and your neighbour wants a wooden picket fence. You both then decide to sit down and talk together to try and resolve your dispute; that is, negotiate. In law the most common occurrence of negotiation is when both parties' solicitors negotiate together by letter, telephone, email or in person to try to negotiate to resolve their clients' dispute.

### Mediation

This is where a 3rd party assists the parties to resolve their dispute.

In this case the 3rd party is independent and objective.

**The mediator's role** is to follow a set process called "mediation" which follows through certain steps to assist to control the communication process between the parties.

The usual process steps of mediation involve the following:

The mediator makes an opening statement explaining the mediation process, outlining some ground rules, explaining confidentiality and setting out the time-frame for the mediation;

Each party makes an opening statement stating what their issues are and what they are hoping to have resolved;

The mediator assists the parties in isolating the issues, particularly the common issues, deciding what the most important issues are, and then setting an agenda which is simply a list of issues to talk about (framed in neutral non-blaming language);

The mediator assists the parties to discuss each issue on the agenda one by one to see if agreement can be reached;

In the course of discussing the issues the mediator assists the parties to option generate to attempt to find solutions to areas of disagreement;

If the parties reach agreement, the agreement made is usually written up (if lawyers are present at the mediation the lawyers write up the agreement);

The parties may also agree to convert this informal agreement into a written legal document and file it in the appropriate court;

If the parties can’t reach full agreement they may draw up a list of what issues they have and haven’t resolved;

If the parties don’t reach agreement they may simply agree on what step to take next, for example, arrange a further mediation, have an expert determine an issue or file proceedings in court.

Do lawyers attend mediation:

Lawyers may or may not attend mediation with their client, some mediation processes do not allow lawyers, for example, family mediation at community centres such as Relationships Australia.

If clients engage in private mediation and agree to pay a private lawyer or expert in the area to mediate they can choose to have their lawyers present, however, the lawyers’ fees will add to the cost of the mediation session as the clients will have to pay for the cost of the mediator and the cost of their lawyers. Usually clients will share the private mediator’s costs 50/50 unless they come to some other arrangement.

### Conciliation

In this unit we will concentrate on the type of conciliation where a 3rd party assists the parties to come to a resolution of their legal dispute.

It generally differs from "mediation" in that the 3rd party is not an independent and objective person and the conciliator’s role is to offer his or her own views as to how the dispute should be resolved.

However, in this respect it comes close to what we describe in mediation as “evaluative mediation”

Conciliation in the family court

In the Family Court parties can attend a conciliation conference and a judicial officer called a “Registrar” conducts the conference where the matter concerns financial issues.

A Family Consultant (social scientist) will also attend if the case also involves parenting issues.

The parties attend and, if they are legally represented, their lawyers also attend with them.

The aim of the conference is to see if some or all of the issues can be settled and the Registrar will voice his/her opinion of what they think will happen if the matter proceeds to court.

Due to the cost and time associated with going to court (including lawyer costs) conciliation’s main aim in a court setting is to encourage parties to settle their dispute, if at all possible, to avoid incurring the further legal costs of proceeding to a trial.

### Case appraisal

This is where an independent 3rd party is given all of the relevant information in relation to both parties’ cases and then makes a recommendation about what would happen if the matter proceeded to court.

The aim of this process is to encourage parties to settle early rather than to incur further legal costs in proceeding to trial.

This process can occur outside of the court process, however, in some courts it can be part of the court process.

Case appraisal is one of the dispute resolution methods utilised by the Queensland civil courts, the Supreme and District Court (see Rules 334-345 of the *Uniform Civil Procedure Rules 1999*).

#### Case appraisal information sheet from the courts website

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Case appraisal  How does case appraisal work?  Case appraisal involves the following steps:   |  |  | | --- | --- | | 1 | A case appraiser listens to the cases of both parties, as presented by themselves or their lawyers. | | 2 | The case appraiser assesses the merits of each case and comes to a decision about the dispute. | | 3 | The decision is then put in writing and a copy is given to each party. | | 4 | The case appraiser files a certificate with the registrar, together with a copy of the decision. |   What happens at case appraisal?  The case appraiser will meet with you and the other party to decide how the appraisal will progress. The appraiser may ask you to deliver witness statements and submissions before conducting a hearing.  The appraiser reads the documents sent by the parties and listens to the case presented by the parties (or their lawyers).  After assessing the merits of each case the appraiser will come to a decision about the dispute and put that decision in writing.  If a party is not happy with the case appraiser’s decision, they can elect to go to trial in the usual way.  If you elect to go to trial and the judge’s decision is more favourable to the other party, you must pay the other party’s costs for both the trial and the case appraisal, unless the court orders otherwise.  How do I elect to go to trial?  You or your lawyer must file a [Form 37](http://www.courts.qld.gov.au/Forms/UCPR/UCPR-f-37-070614.doc" \t "_blank) - Notice of election to go to trial (UCPR) with the **registrar no more than 28 days after the case appraiser’s certificate is filed.**  Can the decision of a case appraiser be enforced by the court?  The court can enforce the decision only if you apply to the court for an order giving effect to it.  This can be done when the 28 days allowed for filing a [Form 37](http://www.courts.qld.gov.au/Forms/UCPR/UCPR-f-37-070614.doc" \t "_blank) - Notice of election to go to trial (UCPR) have passed, or earlier if both parties agree.  Last updated 21 April 2010 |

### Med-arb

* Also see page 336/37 of the text book
* This is a combination of mediation and arbitration.
* The most common example is a *Legal Aid Family Law Conference*.
* When a party applies for legal aid for a family law dispute they will usually be granted legal aid for a conference.
* The conference is firstly similar to a mediation chaired by a lawyer or social worker (although some would argue it is closer to conciliation).
* If the parties don't reach agreement the chairperson who has acted as the mediator writes a report that is used by the Legal Aid Grants officer to decide whether a party should receive further legal aid funding after the conference.
* It is this recommendation as to whether legal aid is granted which is the “arbitration” part of the conference.
* Normally used by statutory bodies dealing with consumer or injury claims or administrative appeals

### Arbitration

This is an alternative to a court process. It is really a private alternative to a decision being made by a judge in a court.

Parties agree to go through a process where they pay a private barrister or retired judge to decide their matter for them.

It can be a simple process where all relevant information is put in writing and the "judge", that is, the arbitrator, makes a decision based on all of the written information.

In this respect it could be called arbitration “on the papers”.

Or it can be a more complicated process similar to a court hearing where the parties can prepare detailed documents which mimic court documents and the arbitration hearing also mimics a court hearing.

In this respect the parties would also give oral evidence (tell their story by being asked questions by their barrister and the other party’s barrister). They would also be cross-examined by the opposing barrister.

The simplicity or complexity of the process used will depend on the type of matter, how much money the parties want to spend and the process that the parties and their lawyers feel comfortable with and is appropriate for their type of legal dispute.

### Litigation

Litigation refers to making an application in court and proceeding with your dispute through the court system.

There is usually a high degree of formality attached with proceeding in such a manner as the court will require that documents be filed containing relevant information.

Each different court has its own procedural rules which determine what documents need to be field and in what form.

They also determine how the case will be managed through the court system. In a court you are also usually bound by the rules of evidence which determine what information can be put before the court and in what manner. We will critically examine the concept of litigation and the adversarial

## Forums for Dispute Resolution

Forums (service providers) can be :

Formal or informal

Privately funded or publicly funded

Attached to formal court/tribunal/commission processes

Resulting from legislation

Private provider or attached to government department or community organisation.

eg. courts, government depts, community agencies, legal aid commissions, private lawyer mediators, mediators with other quals

Our focus is generally on DR connected with legislation eg. *Family Law Act 1975* (Cth)

## Civil Disputes in Queensland

### “Mediation”

There are two ways in which parties can be referred to mediation under the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”):

Either by consent order **(r 318)** or

By referral by the court **(r 319).** The form of the consent order is governed by *Supreme Court of Queensland Act* *1991* (Qld), s 101.

Once a referral has been made several consequences automatically flow:

Subject to order of the court, the dispute and all claims made in the dispute are stayed until 6 business days after the report of the ADR convener (mediator) certifying the finish of the ADR process is filed **(r 321);** and

The referring order must detail the list of requirements in **r 323.**

|  |
| --- |
| Uniform Civil Procedure Rules 1999 (Qld)  323 Referral of dispute to appointed mediator  (1) A referring order for a mediation must--  (a) appoint as mediator--  (i) a specified mediator; or  (ii) a mediator to be selected by the parties; or  (iii) if all parties agree, a person who is not a mediator; and  (b) include enough information about pleadings, statements of issues or other documents to inform the mediator of the dispute and the present stage of the proceeding between the parties; and  (c) set a period beyond which the mediation may extend only with the authorisation of the parties or estimate how long the mediation should take to finish; and  (d) state how the mediator is to be informed of the appointment; and  (e) require the parties, if the mediation is not completed within 3 months of the date of the referring order, to provide a report setting out the circumstances of the matter to the registrar who may refer the matter to the court for resolution.  (2) The order must also--  (a) set the ADR costs or estimate the costs to the extent possible; and  (b) state the percentage of ADR costs each party must pay; and  (c) provide to whom and by when the ADR costs must be paid.  (3) Instead of setting or estimating the appointed mediator's fee, the order may direct the parties to negotiate a fee with the appointed mediator.  (4) A person appointed as mediator under sub rule (1) (a) (iii) is taken to be a mediator for the mediation and issues incidental to the mediation.  (5) The order must be made in the approved form.  (6) A mediator must have regard to an amended |

A party will be found to impede an ADR process if they fail to **(r 322):**

Attend at the process;

Participate in the process; or

Pay the amounts specified as the ADR costs in the referring order.

The mediator has wide discretion (**r 326),** for example the mediator may gather information about the nature and facts of the dispute in a way that the mediator decides; the mediator may decide whether a party may be represented at the mediation and, if so, by whom; and during the mediation may see the parties, with or without their representatives, together or separately.

The mediator must start the mediation as soon as possible and try to finish within 28 days of being appointed - **r 324.**

The parties must act reasonably, genuinely, and help the mediator complete the mediation within the time specified in the referring order- **r 325.**

The mediator may abandon the mediation where they consider further efforts at mediation will not lead to resolution of the dispute or an issue in the dispute, but they must:

Inform the parties of their intention; and

Give the parties an opportunity to reconsider their positions.

The mediator can seek advice from independent 3rd parties **(r 328).** Where the advice involves extra cost the mediator must obtain:

the agreement of the parties; or

leave of the court, in which case the court must also order the parties to pay the extra cost and state to whom any by when the payment must be made.

The mediator must disclose the substance of the advice to the parties.

In the event that the mediation resolves the proceeding, consistent with the *Supreme Court Act 1991* (Qld), s 107 the agreement must be placed in a sealed container with appropriate markings **– (r 329).**

Upon completion of the mediation the mediator must file a certificate in the approved form (**Form 35**). The limitations on the content of the certificate appear in **r 331.**

Where the mediation is successful a settlement agreement will result. Where the mediation is unsuccessful the proceeding will move forward to trial in ordinary way without any inference being drawn against any party because of the failure to settle at mediation. The costs of the mediation will be costs in the dispute (**r 351**).

## Workplace and Industrial Disputes

Workplace disputes can fall into two main groups:

those between the employer and employee/s, and

those between employees.

As legal professionals you may find yourselves acting for either the employer or employee in a dispute.

### Employer/employee disputes

Some disputes between employers and (especially groups of) workers are often visible to the public because they can end in a public manifestation of conflict (public demands and clashes in the media, threats, strikes etc). These disputes reinforce our traditional understanding of disputes through parties adopting adversarial practices and taking up long-held positions. Unions have to date played an important role in terms of protecting the rights of employees as a group, however recent developments such as enterprise bargaining and individual contracts are much less focused on industry-wide union awards and stress the possibility of differences in workers' entitlements from workplace to workplace and within workplaces.

### Disputes between employees

These disputes can often be very stressful because:

People spend a large part of their day involved in work or work-related tasks

Such disputes relate to ongoing relationships with work colleagues that must be dealt with daily

They often relate to strongly entrenched personal characteristics or background personal issues.

Employee-employee disputes may result from:

Personal prejudices based on sex, sexuality, race, politics or religious affiliation

Lack of communication

Inadequate work structures that put pressure on workers or their families

financial pressures

psychological problems or alcohol and drug problems

Issues of power and competition between workers.

## Queensland Industrial Relations Commission

If you have a dispute that you take to the Commission usually **a conciliation conference will be held first**, and, if the case **does not settle** at conciliation it will **proceed to a hearing**. A conference is generally informal and private while a hearing is formal and can be attended by members of the public.

A conciliation conference is a discussion, with the assistance of a Commission Member, the purpose of which is to try to resolve the issues between the parties.

|  |
| --- |
| Conciliation Conference at the Queensland Industrial Relations Commission  The conciliation conference:  Either party may choose to be represented by an industrial advocate, an employer or employee organisation or another person of their choice, or they may choose to represent themselves. On some occasions a party may choose to be represented by a solicitor but in these instances, the solicitor will have to seek leave from the Commission Member to appear on their behalf…..  Once all parties are present, the Commission Member will normally ask the applicant for a brief statement describing what the dispute is about. It is a good idea to have this prepared in advance. He/She will then ask the respondent to make a statement in response.  The Commission Member may also ask questions of either party in order to clarify matters or to obtain further information. He/she may also have private discussions with each of the parties or chair discussions with both parties around the conference table.  During the course of the conference, the Commission Member may make recommendations and suggestions to help resolve the dispute.  These extracts have been taken from  Information Sheet titled: Dispute Resolution through the Queensland Industrial Relations Commission available at http://www.qirc.qld.gov.au/prod\_form\_leg/factsheets/fs\_disputes.htm |

## Discrimination and Harassment Disputes

Discrimination disputes can occur in a variety of settings. They can occur in the workplace, reflecting the interconnection between economic issues and discriminatory treatment based on gender or race. Such disputes may affect a wide variety of people ranging from women, Indigenous people, people from non-English speaking backgrounds, gays, lesbians, people with physical and intellectual disabilities.

Discrimination or harassment in a workplace setting by an employer can involve the use of certain practices that reinforce the underprivileged status of a particular employee. Discriminatory or harassing behavior by a fellow employee can often be explained by the expression of a pre-existing prejudice, which provides the perpetrator with a sense of power.

Such disputes can be taken to the:

The Queensland Anti-Discrimination Commission, or

The Human Rights and Equal Opportunities Commission

### Queensland Anti-Discrimination Commission

|  |
| --- |
| Background The Anti-Discrimination Commission Queensland helps people to resolve complaints about discrimination, sexual harassment, public vilification and victimisation. This is usually done at a conciliation conference. Complaints that cannot be resolved may go to the Anti-Discrimination Tribunal for a public hearing and decision about whether there has been a breach of the Anti-Discrimination Act 1991 (the Act).  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) What is a conciliation conference? The aim of the conference is to allow everyone involved to discuss the complaint and find a way to resolve it.  A conciliation conference is a meeting between the person/s complaining (the complainant/s) and those they are complaining about (the respondent/s). If the respondent was at work when the complaint arose, their employer is usually also a respondent.  A conciliator from our office will set a date for the conference and run the meeting.  You must attend the conciliation conference.  The conference will usually be at our office.  The conference can be with everyone meeting face to face, with the conciliator talking to each party in separate rooms or, if needed, with some or everyone connected by phone.  All discussions at the conference are confidential and private. Even if the complaint goes to a public hearing, the Tribunal cannot be told what was said at the conference.  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) Who can come to the conference? The conference is between all parties - the complainant/s and the respondent/s. The conciliator will assist the parties to resolve the complaint.  Please tell us if you want an interpreter.  You can ask to bring a support person to the conference. Your support person can give you moral support but cannot speak at the conference. The support person should be someone who is not involved in the complaint. For example, no witnesses or people who investigated the complaint.  You can ask to bring a solicitor to the conference to give you advice. You will usually still be asked to talk for yourself about what happened.  If a company or organisation is a party, their representative can come to the conference. That representative should have authority to decide how to settle the complaint.  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) What does the conciliator do? The conciliator will help all parties discuss the complaint and resolve it but will not decide whether there has been a breach of the Act.  The conciliator can ask questions to gather more information but will not take sides.  The conciliator can tell all parties about the law, point out the strengths and weaknesses of the complaint and response and provide information about the process.  The conciliator can tell all parties about previous cases and what kind of outcomes are likely but will not advise you what to ask for or offer in settlement.  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) What happens at the conference? The complainant/s will be asked to talk about what happened and what effect it had on them.  The respondent/s will be asked to talk about what happened, what they did about it and to respond to what the complainant said.  The parties will be asked to talk about how to resolve the complaint.  You can ask the conciliator to stop the conference so you can talk privately with your support person and/or solicitor or just to give you time to think.  The conciliator can talk to each person separately if they think this might help to resolve the complaint.  If the parties agree how to settle the complaint, the conciliator will write up the agreement for everyone to sign and it is then binding.  If the parties cannot agree, the conciliator with tell you about any right you may have to ask to go to the [Anti-Discrimination Tribunal](http://www.adcq.qld.gov.au/tribunal/about.html) and have a public hearing to decide the complaint.  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) How can I prepare for the conference? Think carefully about all the points you want to make at the conference. You can make notes and bring them.  Think about what the other party might say and be ready to explain, ask or answer any questions.  Before the conference, collect and give the conciliator any documents (for example, witness statements, diary notes, references) that might help resolve the complaint. The conciliator will pass these on to everyone else.  Think about how you want to resolve the complaint. If you are unsure about what options there are, phone the conciliator well before the conference or get legal advice.  [[return to top of page.](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm%23pagecontent)](http://www.adcq.qld.gov.au/pubs/allaboutconilconf.htm" \l "pagecontent) Checklist Please use the checklist to help prepare for the conference.  TELL the conciliator if you want an interpreter or have other special needs.  ASK the conciliator if you want a support person or solicitor at the conference.  DECIDE the main points you want to make.  CONSIDER the other party's side of the story.  GET legal, financial or other advice, if required.  ACCESS our website to read about what happened in similar cases so you can see what outcome is realistic.  CONSIDER what would resolve the complaint and tell the conciliator.  ARRANGE your time so you are available for the conference for about three hours.  GIVE all important documents to the conciliator.  ASK the conciliator if you have any questions or need more information. |

## The use of conciliation in the Queensland Industrial Relations Commission and Queensland Anti-Discrimination Commission

* Conciliation is something that is used when there is a complaint
  + I.e. where there is one aggrieved party who up to a certain point didn’t consider there to be an issue but who may either voluntarily or by statute take part in a conciliation process the aim of achieving resolution
* May be used in these circumstances because you tend to need someone who is an expert in the relevant area who can offer advice and solutions as to the manner of resolution

## Consumer Disputes

Consumers occupy a position outside the business environment, and they do not necessarily have any prior economic relationship with the business they are in dispute with. Traditionally, the common law always viewed the consumer transaction (for the purchase of goods or services) as a contract between freely consenting parties. Thus the right to sue a manufacturer was strictly limited by whether or not the parties had a contractual relationship. With the development of the laws of negligence sparked by the landmark case of *Donoghue v Stevenson* [1932] AC 562, consumers gained increased legal rights based on the general duty of manufacturers and service-providers to the world at large; not just to those it entered contracts with.

In addition to this, over the last three decades in Australia we have seen the proliferation of a range of consumer protection legislation. Examples include the *Trade Practices Act 1974* (Cth), the *Insurance Contracts Act* *1984* (Cth), the *Fair Trading Act* *1989* (Qld), *Credit Act* *1987* (Qld) and *Consumer Credit* *Act* *1994* (Qld). These Acts create both substantive private rights for the consumer and public rights of enforcement by the state. In most cases, the consumer is more interested in restitution for their personal interest than retribution by the state.

The inherent nature of consumer disputes involves: a disparity in power between the individual consumer and the institutional seller consumer ignorance concerning technical aspects of the product and their legal rights financial stakes being relatively small for business, but having a large impact on consumers.

## Neighborhood disputes

Neighbourhoods are foundational elements of our societal structure and organisation, and although they are sub-sets of city or town environments, they are far more than just a geographical dimension.

Critical urban geographers such as David Harvey (*Social Justice and the City*, London: Edward Arnold, 1973) have emphasised the importance of processes of urbanisation in structuring spatial relationships. He sees our social space as being carved up by (usually) economic relationships (though other power relationships can also manifest themselves).

The neighbourhood represents a spatial zone in which a range of disputes occur. There is a specifically local dimension to these disputes, but it is important to recognise that neighbourhood disputes are embedded in social structures and cannot be studied in isolation from the other structural factors affecting the lives of the participants. So with this in mind we need to consider the context of neighbourhood disputes—the neighbourhood—and what it means to society today.

The concept of neighbourhood involves:

a notion of locality which takes in a particular area of land where a community of people live, work and/or travel through

a notion of 'spatial proximity'. This involves the nearness of participants in the neighbourhood to each other; and a sense of community-space felt by the participants in the neighbourhood.

Where geographical development occurs unevenly as a result of investment, development and planning decisions, the importance of particular geographical spaces such as neighbourhoods can be lost. With this comes the danger of losing the sense of community, allegiance and loyalty that has traditionally been ascribed to neighbourhood communities.

Conflict in the neighbourhood involves a range of social forces and influences in the practice of our daily lives, and neighbourhood disputes tend to expose the interconnectedness of all aspects of social existence.

Participants in neighbourhood disputes are not limited to those who live or work in a particular area but may include those who feel an attachment to an area. Similarly, members of a neighbourhood may feel some sense of the area in which they live without identifying as members of a neighbourhood. A neighbourhood is larger than the small number of people we personally know to be our neighbours but narrower than the idea of the community of a whole city.

It could be argued that there is now less of a sense of community in neighbourhoods these days. And this has a significant impact on the sort of conflict and types of disputes that arise between neighbours, but also – and more importantly—it impacts on how neighbours resolve their disputes.

Keep this context in mind as we consider the range of categories that constitute neighbourhood disputes:

**Property** (common or adjoining properties, **boundaries and limits of territory, fences**, tenancies, ownership of disputed property...etc.).

**Intrusion** (noise, **trees**, children, smells, water/substance leakage, concerns about **privacy**).

Obstruction/limitation of light or access to property.

Environmental and health concerns.

Moral territoriality: conflicts about offensive behaviour or language.

Fears about security of one's position within the neighbourhood and the consequences of change.

**Criminal behaviour and threats to security.**

Disputes over the primary purpose of the neighbourhood. This raises the prospect of community political activism and the differing concerns of businesses and residents. Often these disputes hinge on the extent to which there is democratic control over the processes of urbanisation.

Intra-community conflict: conflict between groups within the community.

Some important issues relevant to neighbourhood disputes

Neighbourhood disputes are often strongly felt because there may be a close geographical proximity to a living or recreational space.

Neighbourhood disputes may easily develop into criminal disputes because of this proximity.

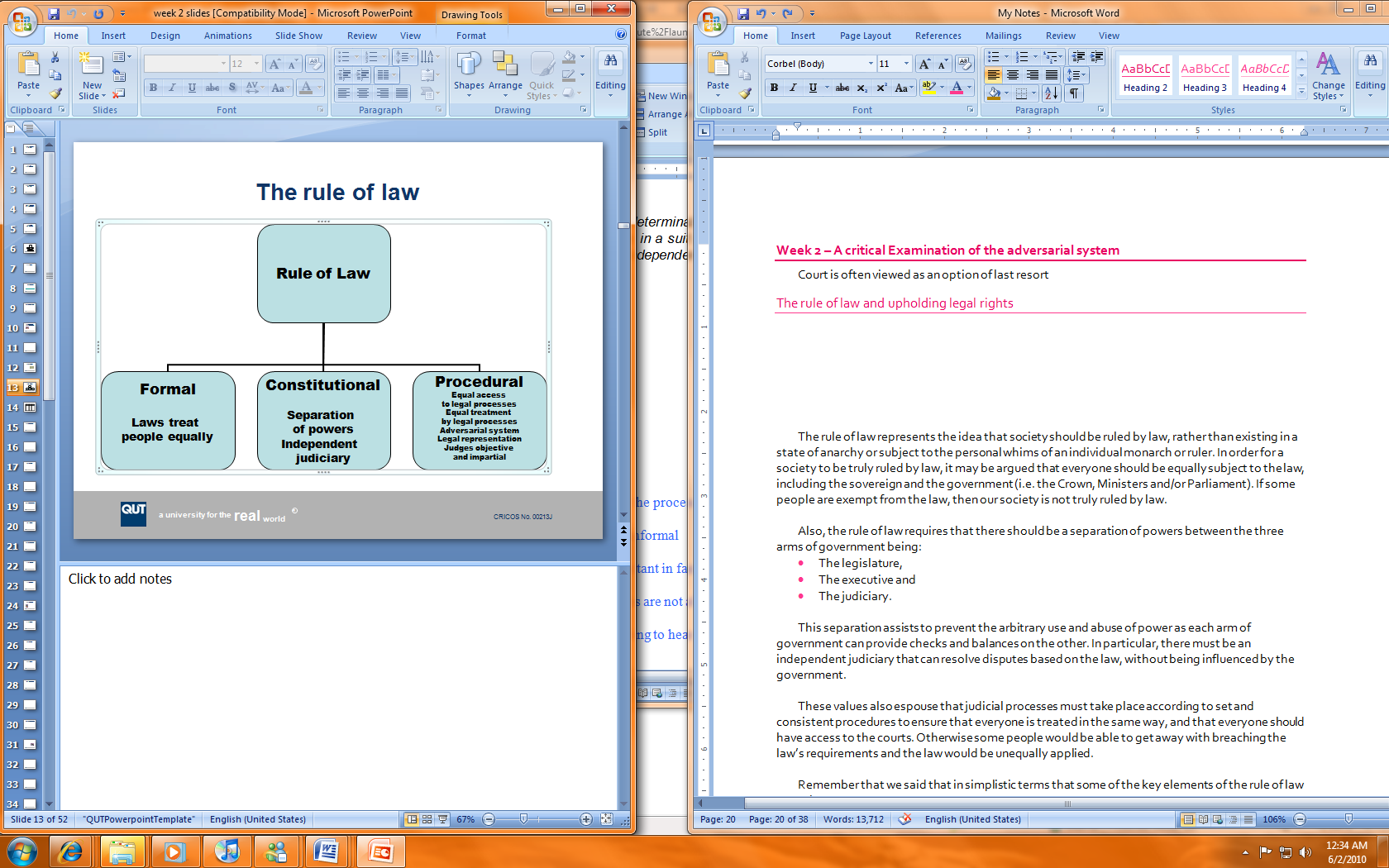
Often there is an aspect of civil law (such as nuisance or trespass) which is involved in defining the dispute.

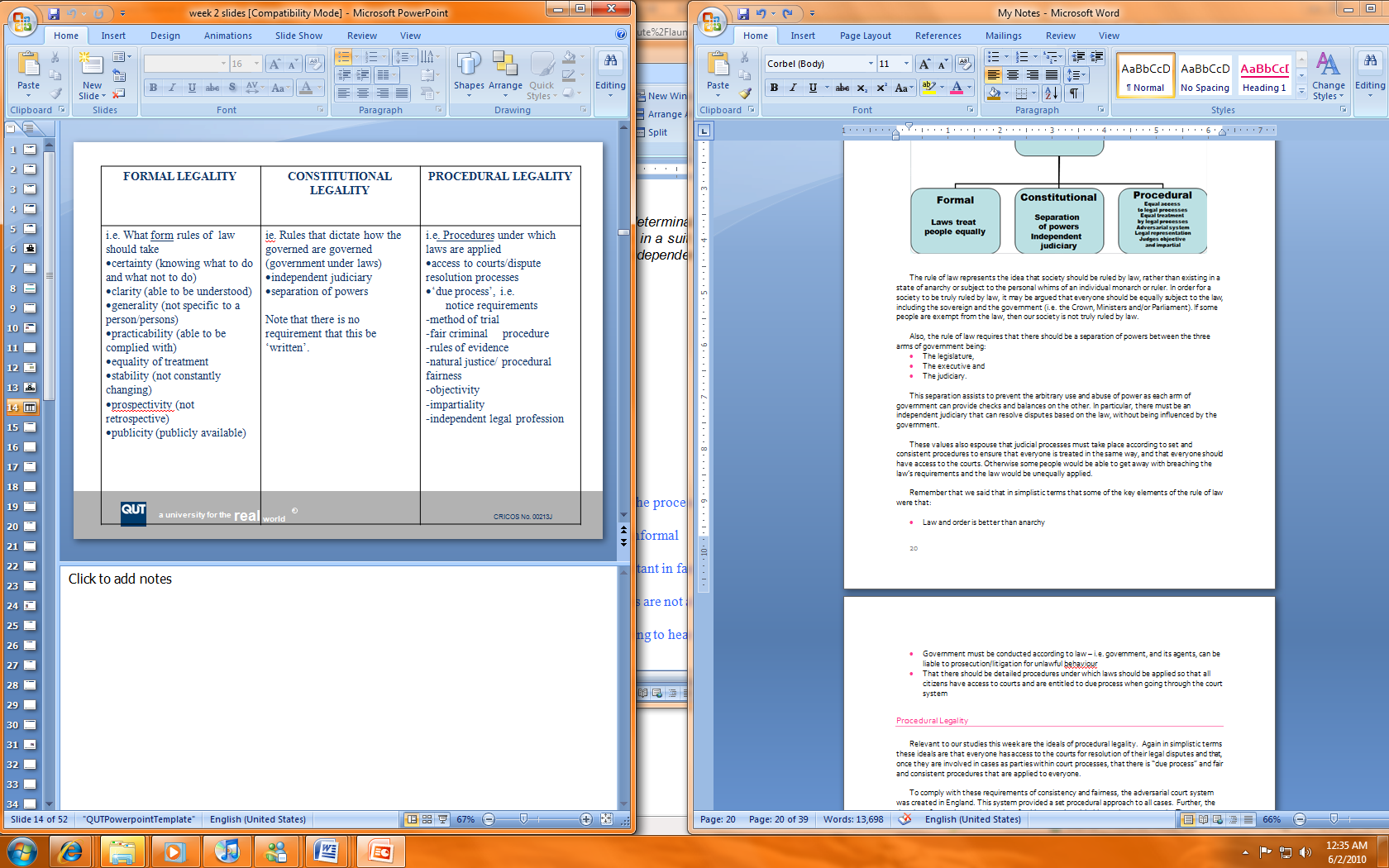
Neighbourhood disputes may have the positive effect of redefining or reinforcing one's perception of the importance of community and one's place in it.

# Week 2 – A critical Examination of the adversarial system

Court is often viewed as an option of last resort

## The rule of law and upholding legal rights





The rule of law represents the idea that society should be ruled by law, rather than existing in a state of anarchy or subject to the personal whims of an individual monarch or ruler. In order for a society to be truly ruled by law, it may be argued that everyone should be equally subject to the law, including the sovereign and the government (i.e. the Crown, Ministers and/or Parliament). If some people are exempt from the law, then our society is not truly ruled by law.

Also, the rule of law requires that there should be a separation of powers between the three arms of government being:

* The legislature,
* The executive and
* The judiciary.

This separation assists to prevent the arbitrary use and abuse of power as each arm of government can provide checks and balances on the other. In particular, there must be an independent judiciary that can resolve disputes based on the law, without being influenced by the government.

These values also espouse that judicial processes must take place according to set and consistent procedures to ensure that everyone is treated in the same way, and that everyone should have access to the courts. Otherwise some people would be able to get away with breaching the law’s requirements and the law would be unequally applied.

Remember that we said that in simplistic terms that some of the key elements of the rule of law were that:

* Law and order is better than anarchy
* Government must be conducted according to law – i.e. government, and its agents, can be liable to prosecution/litigation for unlawful behaviour
* That there should be detailed procedures under which laws should be applied so that all citizens have access to courts and are entitled to due process when going through the court system

### What are our international obligations?

* ICCPR – International Covenant on Civil and Political Rights
  + **Article 14**
    - *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law*.

### Procedural Legality

Relevant to our studies this week are the ideals of procedural legality. Again in simplistic terms these ideals are that everyone has access to the courts for resolution of their legal disputes and that, once they are involved in cases as parties within court processes, that there is “due process” and fair and consistent procedures that are applied to everyone.

To comply with these requirements of consistency and fairness, the adversarial court system was created in England. This system provided a set procedural approach to all cases. Further, the doctrine of precedent and the rules of evidence assist with this consistent approach. The adversarial court system is the legal system that Australia adopted from England.

### Liberalism

If you think back to what you have learnt in the past about liberalism we can reflect upon how the philosophy of liberalism is upheld in our adversarial system. Liberalism focuses on concepts such as individualism, protection of individual rights and concepts of justice and equality. In particular, the philosophy of liberalism is concerned with “the need for the law to preserve the liberty of the individual from the encroachment of others.”[[1]](#footnote-1)

**Elements of liberalism**

* Liberty
* Negative liberty
  + Freedom from
  + State not seen to be under an obligation to give positive assistance to the individual to help them realize their aims, but is obliged to refrain from interfering in the individual’s own attempts to do so and it should protect the individual from interference with others
* Positive liberty/autonomy
  + Freedom to
* Individualism
* Equality
* Justice
* Rights
* Utilitarianism
* Rationality
  + This is a big one – there is a requirement that the parties come to the process with a rational approach
  + It is an interesting point to think whether that requirement in the informal processes is fair
  + in a mediation there is a requirement for rationality – this is important in family law – where parties are required to make a "genuine effort"
  + So this means that there is a place for litigation – where the parties are not able to argue rationally together
  + There are many case listed – and the courts are not short of anything to hear

## What are the historical origins of our adversarial system?

Consider the Magna Carta, Bill of Rights and Australian Constitution

#### Magna Carta

* 17 Common pleas shall not follow our court, but shall be held in some fixed place
* 39 No freeman shall be imprisoned or exiled without lawful judgement of his peers or by law of the land
* 45 We will appoint as justices, constables and sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well

#### Bill of Rights

* 10 That excessive bail ought not to be required, nor excessive fines imposed ; nor cruel and unusual punishments inflicted
* 11 Requirement for jurors

#### Australian Constitution

* Gives power to commonwealth and states over various areas
* Divides up state and federal courts and what they can do
* Chapter 3 Provides for appointment of judges

## What is litigation ?

* One way of resolving legal disputes
* Involves taking dispute to court
* Applicant/Plaintiff makes application
* Respondent/Defendant responds
* Note that all of these parties have different roles and it is important to know the different between them
* Formal:
* Procedural steps
* Rules of evidence
* Discovery process
* Filing / serving documents
* Important to note that:
  + There are many ‘court events’ along the way
    - Eg. Mentions, interim hearing etc
* Final court event: trial/hearing in court
* Judge makes decision: court order

## What is the adversarial system

‘A specific type of proceeding taking place in a court which deals with a dispute between at least two parties…The dispute is ‘party controlled’, that is, the parties define the dispute, define the issues that are to be determined and each has the opportunity to present his or her side of the argument.’

Law Council - Managing Justice: A review of the federal civil justice system (ALRC89) 1999

**Critical analysis of this statement:**

* Is it really like this? Do the parties have control, do they get what they want, do they get to outline their issues/arguments and to define it themselves?
* Note that the adversarial system is a contest

### Definition from within the study guide

The essence of the adversarial system is that the parties are adversaries and that they each seek to present their case to the best of their ability in an attempt for the dispute to be resolved in their favour by the judge. The adversarial system has been described as “the trial as a contest between parties”.[[2]](#footnote-2)

You recall that when we use the term **“litigation”** we are referring to the **process of proceeding through court** from the making **an application** in a court to the **final judgment** following a trial. Litigation generally refers to civil matters. In criminal matters the dispute is between the State (the Crown) and an individual (the accused). In a criminal case the accused is prosecuted by the Crown. However, in both civil and criminal cases “adjudication” is the decision-making process employed by the judge.

### What are the characteristics of the adversarial system

The adversarial system can be described by through the following constituents:

1. Consistency
2. Role of parties
3. Role of lawyers
4. Role of judge

#### Consistency

As we said above, a key factor of our court system is that everyone that comes before the court should be treated consistently and that there should not be special treatment for some people. The doctrine of precedent (stare decisis) was created for this purpose so that cases with similar facts are decided in the same way. This encourages predictability, but can limit innovations and you may recall what you learnt in the first year foundational subjects in relation to judicial activism and arguments for and against judges developing the common law, rather than parliament.

The other way that parties can be treated consistently is that courts have set procedural rules, and each court has its own court rules which set out the steps that parties have to go through to progress their case. Further, we have the rules of evidence which set guidelines as to what information can be presented to the court and in what form.

#### Role of Parties

A key element of the adversarial system is party control over the case, that is, that the parties have almost complete control over the running of their case. It is this factor that sets this system apart from the inquisitorial system which we will discuss below in which the judge has control over the running of the case. In our civil adversarial system one party initiates the proceedings and generally both parties:

* Decide the issues in dispute;
* Control the information to be put before the judge;
* Put forward the arguments to be considered; and decide what witnesses that will be called.[[3]](#footnote-3)
* To institute proceedings;
* What and how much evidence to gather and present to the court;
* Which arguments to present;

This is of course subject to the relevant law in the area of the dispute which will also determine the issues in dispute and the procedural rules of the relevant court which determine how the overall case will progress.

#### Note:

* Parties are subject to:
* Law which determines:
  + Issues in dispute
  + Defenses available
  + Type of evidence that will be led
* Rules of evidence
* Court procedural rules

The parties are said to be in control but they are subject to these kinds of things – so here you can see some cracks starting to form in the notion that the adversarial system is this liberalist, individual oriented system.

Access to justice is also a major issue – if people cannot get access to the justice then it makes it difficult for them to exercise that legal control

**There are lots of limitations around their control**

##### Arguments in favor of party control

* Liberalism
  + Reflects role of state
  + Individual control and maintenance of rights
  + Zone of privacy around private domain
* More cost-effective for State
* Maintains judges role as “independent” and “objective”
* Most cost effective for the state – there is not any document that looks at the cost difference between the two systems but it would be interesting to see a comparison between the two courts.

##### Arguments against party control

* Only information presented is what parties want presented
* Becomes “contest” between advocates
* Combative nature of adversarial proceedings escalates conflict
* Would be advantages in earlier involvement of judge
* Expensive for parties
* There is room for manipulation and story construction in terms of the information that is presented to the court
* The interesting thing though is that it does escalate conflict but at the end of the day there will be an answer
* Just because adversarial systems are criticized for escalating conflict does not mean that alternative measures do not do the same thing

**These sorts of things are going to very important for the exam – it is not just black and white about the different aspects of both litigation and alternative methods**

It's more than litigation is "bad" and mediation is "good"

#### Role of Lawyers

* Only present what information that will advance their client’s case
* Object is to “win” on behalf of client
* Present the evidence
* Prepare court documents
* Subpoena witnesses
* Conduct examination-in-chief and cross-examination
* However their role is subject to:
  + Duty to client
  + Duty to court

The task of the lawyer in the adversarial system is to present to the court the evidence that he or she has decided is important to win his or her client’s case.[[4]](#footnote-4) The lawyer’s role is to act as an advocate on the client’s behalf. However, the lawyer does not just have a duty to the client, they also have a duty to the court and in this regard must act ethically.[[5]](#footnote-5)

#### Examination-in-chief

* Each party tells their side of story
* Subject to distortion/perceptions/human memory

#### Cross-examination

* Outcome of case can turn on “credit”
* Objects are to test the evidence and to test the credit of witness
* Trap witness into inconsistencies
* Prior inconsistent statement
* Prove witness to be a:
* Liar
* Unreliable memory
* Can lead to party resentment

#### Rules of evidence

* Parties can present information relevant to their case
* There are strict rules about:
  + what information can be used
  + how it can be presented
    - Eg. Hearsay

#### Procedural rules

* Dictate how case must proceed through the court
* What documents must be filed in court
* Steps in court
* Court events
  + How court sets down case for final hearing
  + These rules are particular to each court

#### Role of the Judge

* Independent and impartial umpire
* Ensure fair and proper procedures followed
* Decide questions of law
* Decide questions of fact when no jury
* In the main does not question witnesses

Within the adversarial system the judicial officer or judge is, in theory, **a neutral objective person** who determines the dispute. The judge only decides what the parties in the **dispute ask them to decide**. Therefore generally the judge **only has the information provided** to them by the lawyers to base their decision on. Generally if other information would have been relevant or would have assisted one of the clients to win the case, it is **not the role of the judge to direct the lawyers to provide this information at a trial**.

Traditionally judges were not specialised or trained in adjudicatory techniques but were selected from the ranks of advocates (barristers) who had a strong knowledge of legal principles and the rules of evidence. In recent times judges have been selected from the ranks of legal practitioners, including barristers, solicitors and academics and there has been a greater emphasis on judicial training as there is now a National Judicial College (although more judges have continued to have been selected from the ranks of barristers).

#### Lord Denning:

“to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens… in some foreign countries.” “If he (sic) goes beyond this, he drops the mantle of a judge and assumes the role of advocate and the change does not become him well.”

* Jones v National Coal Board [1957] 2 KB 55 at 65.

#### Can the judge “find the truth”?

* Denning said the object “above all is to find the truth”
* *Jones v National Coal Board* [1957] 2 KB 55 at 63.

#### Justice Ipp criticism:

* “The power of a judge to find the truth is limited by the parties’ ability and desire to lay all of the relevant facts before him (sic). That may result in the judge administering the *law* as distinct from *justice*”
* Justice Ipp, ‘Reforms to the Adversarial process in Civil Litigation: Part 1’ (1995) *ALJ* 705 at 713-714.

##### Are judges’ neutral and objective people? Is the idea of judges being able to be impartial in a dispute realistic ?

Good Answer:

* ideal of neutrality and why it’s good
* advantages of the adversarial system
* connect with the notions of liberalism and the exclusion of the state
* judge should be independent and stand back
* what is the importance of judges brining their own emotions, moods etc to the bench

## What is the inquisitorial system?

* Origins: Roman law/*Code Civil* of 19th Century France
* Source of law: civil and criminal codes
* No rigid distinction between the pre-stages of trial and pre-trial stages
* Legal proceedings continuous form of meetings, evidence heard, witnesses introduced and motions made
* Rules regarding courtroom practice minimal and uncomplicated
* Focus on lawyers making *written submissions* rather than oral arguments
* Judge
  + controls the case
  + gathers and presents evidence
  + Asks questions (no cross-examination by lawyers)
  + Role of lawyer supplementary to that of judge

Our adversarial system can be compared with the inquisitorial civil law system found in a number of European countries, and in Japan, for example. These systems place less emphasis on precedent as the source of correct decisions and more emphasis on legal codes and scholarly interpretations. Judges are specifically trained in the skills necessary for judging and take much more control over the conduct of the case. The inquisitorial function of the judge allows them to control the way the case is presented. The judge can determine what evidence is important, call and examine witnesses, and therefore actively seek to find out what actually happened, rather than being limited to accounts of what happened contained in each parties’ court documents.

Despite their differences, both the adversarial and inquisitorial systems emphasise the importance of objective legal standards with which to measure factual situations. They also emphasise the authority of the adjudicator in making a binding decision. In addition, they are both concerned with establishing the impartiality of the third party (the judge) who oversees the proceedings.

### The ideology of the **inquisitorial** system being an “inquest”

#### Contest vs Inquest

* Contest = drawn from historical origins and its common law systems development in England.
* It involves the making of judge made case law
* the modern legal system have the secondary arm of law making (parliament) there is more legislation and that is the dominant element of law and the courts are interpreting Legislation rather than just developing common law as a primary source of law
* so the role of courts now is slightly different to when it started
* Until the 1970's the idea was that the interpretation of the law was something that was to happen in court
* There is also emphasis on the presentation side – on the oral side of the argument
* The expense in the contest sort of the system falls largely on the parties

#### The adversarial system as a contest

* Common law system
* Medieval English society
* Source of law judge-made case law
* Modern common law systems, however, have legislation which makes up primary source of law
* Final hearing/trial distinct and separate end to litigation process
* Courtroom practice subject to rigid and technical rules
* Emphasis on presentation of oral argument by lawyers
* Expense falls largely on parties
* Role of parties
* Party control of case
* Parties present the evidence
* Role of judge
* Judge “neutral & objective”
* You could argue about this all day
* Judge determines outcome

### The operation of a tribunal

* Often mix of adversarial and inquisitorial
* Less formal than court
* Not bound by rules of evidence
* Members lawyers and non-lawyers
* Absence of absence of formal rules of procedure or rules of evidence
* Possible absence of legal representation
* Tribunal can go outside what presented to it to inform itself of any relevant details
* Mental health
* Guardíanship
* Children’s Services

## The evolving nature of the adversarial system

In recent times our adversarial system has been evolving to meet the demands of increased numbers of cases and limited judicial and court resources. There has been an emphasis on what has been termed **“case management” and “managerial judging**”. In effect, **the concept of a judge being completely neutral and of the parties, through their lawyers**, having total control over the presentation of their case, including deciding what evidence will be presented, the witnesses that they will call, the number of witnesses that they will call and the length of the trial are now **often concepts of the past.**

**Due to many factors** including the increasing numbers of disputes and increasing court delays, **judges have become far more interventionist** in the way in which they manage cases in court. The **ultimate control** they now have is often over the **length of a final hearing** and in this regard there are **often procedural rules and directions** made by the judge that will control the length of the final hearing, the **number of witnesses** the parties can call, the judge will even have direction in relation to the **issues in dispute**. If a trial can be kept, for example, to one day rather than three days of court time you can imagine that the court can then get through a greater number of cases over the course of a month or a year.

Consistent with this approach is that judges **are taking a more interventionist role during hearings and preliminary hearings which occur before a final trial**. They may assist the parties to direct themselves to the relevant issues in dispute and to present only evidence and argument strictly relevant to the issues.

### Will we ever have a fully inquisitorial system

* No – civil justice crises such as family law etc push this ideal away
* Supreme court have incorporated the idea of mediation and less adversarial aspects but that does not mean that some cases do not need to be strictly considered within the adversarial system
* Not likely to ever be fully because we like to have expression of arguments – entrenched in society

### Litigants in person

Another factor which is influencing the way in which court procedures are now evolving is the rising numbers of people acting for themselves in court cases. Litigants in person either cannot afford a lawyer to represent them, or do not wish to have a lawyer act on their behalf. The rising number of litigants in person has meant that the role of judges has had to evolve to meet the demands of having one or both litigants in a particular court case without any legal training. In the Family Court there is a specific court case, [*Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001)](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/family_ct/2001/348.html?query=litigant%20in%20person) which sets out in detail what assistance the judge in the Family Court can give a litigant in person as there are so many such litigants appearing in this court.

**See report by John Duer and ? Parker**

* Litigants in person have no expertise so that can impact in a negative way in the sense that it is cumbersome to have them coming through the court
* A means of fixing this would be to increase legal aid and pro-bono services
  + Question then becomes whether we can rely on the goodwill of our profession to solve this problem? Is that really the best answer?

## What are the advantages and disadvantages of litigation?

### Advantages of Litigation

Litigation does also have a number of overt advantages in upholding the values of the rule of law and in terms of providing an avenue for disputes to be resolved by an independent, impartial, legally experienced third person. Some of litigation’s advantages can be argued to be as follows:

* The litigation process is publicly accountable and contains checks and balances against the unbiased exercise of power and decisions are made available to the public which is consistent with rule of law ideals.
* The litigation process has a number of procedural protections (such as the rules of evidence), which do not exist in informal processes. These procedural protections can be argued to better protect parties who are subject to a power imbalance.
* Litigation removes responsibility from the parties themselves for the outcome of a dispute and places it in the hands of the third party who is making the decision - for some parties this is a big relief!
* Litigation could arguably be said to provide a higher order of justice than any other process.
* Courts provide the opportunity for the public enunciation of values. They therefore serve an important public interest role.
* Litigation is a public process. Judges are required to give reasons. There are avenues of appeal if one of the parties thinks the judge got it wrong or decided the matter improperly.
* Court decisions provide predictability and certainty. Decisions arising out of litigated matters provide a ‘shadow of the law’ in which others can bargain/negotiate in an informed way.
* Courts constitute an authority which disputants respect.
* Decisions arising out of litigation are legally binding and therefore enforceable.

### Disadvantages of litigation

However on the other hand litigation can be argued as having a number of, what might be considered significant, disadvantages:

* Litigation is expensive.
* Litigation takes a long time to provide an outcome to a dispute - there are delays caused by excessive court caseloads, lengthy hearings or inefficient procedural rules.[[6]](#footnote-6)
* Clients can have difficulty accessing legal advice and legal representation and the court system can be difficult to negotiate without legal assistance.[[7]](#footnote-7)
* The doctrine of precedent is inherently conservative, and limits innovation in the way the law can be developed through the courts.
* The adversarial model intensifies conflicts as it focuses on differences and negative past behaviour - it discourages compromise, the protection of relationships, and looking to the future.
* While judges have much discretionary power, they are often reluctant to take on an activist role and consider matters omitted by parties.
* The adversarial system resolves cases on the facts and law presented to the court, it doesn’t search for a deeper truth.
* Formal legalism is limited in its ability to adequately explain behaviour or provide substantive justice. Linked to this are the restrictions on what can be considered by the court due to the rules of evidence.
* Often the relevant law and the court procedures contained in court rules (which set out what documents must be filed and court procedure) are not easily understood by most of the community.
* The litigation process inappropriately ‘boxes’ disputes and provides only limited avenues for claims and remedies.
* Although decisions are legally binding and enforceable usually parties have to return to court for further orders to have decisions enforced, often they cannot afford to do so and even if they can afford it they may find that enforcement still does not uphold their legal rights.
* Although judges are referred to as ‘independent’ and ‘impartial’ it can be argued that they come to their cases with their own personal biases and preconceived notions about issues which may influence their decisions.
* The advent of managerial judging means that judges have more personal control over cases and can often exert much influence on the issues that can be pursued and the evidence that can be called.
* As Sexton and Maher point out in *The Legal Mystique* (Sydney: Angus and Robertson, 1982), Australian judges have until recently been remarkably reluctant to recognise socio-economic realities or changing political or moral climates. In addition, judges are often criticised for being chosen from a privileged elite that does not include significant numbers of women, Indigenous peoples, the poor, or people from a variety of non-Anglo-Celtic ethnic groups.
* Court processes are inflexible and court formalities are alienating for the parties.
* Adversarial adjudication has its cultural origins in the legal system of a white Anglo-Celtic “ruling class” and excludes the approaches to conflict resolution of other cultures.

## What type of cases are suitable ONLY for litigation?

* Some matters may have gone on to long
* The conflict might be too deeply entrenched
* If the parties just cannot agree

## Why may a client want to avoid litigation?

* Use the preceding slides regarding the advantages and disadvantages of litigation to identify the types of cases where a client will want to avoid litigation in order to resolve the dispute.
* Cost, time, complexity, public nature of it, relationships are not maintained or protected in the process – the conflict can get exacerbated

## Why may a client want to avoid litigation?

* Fear of going to court and giving evidence
* Legal costs
* Unable to obtain legal aid
* Avoid bad publicity/ loss of reputation
* Public embarrassment
  + Violence and alcohol
  + Fraud/ illegal
* Disclosure of undesirable information eg income tax evasion
* Client wishes to avoid time involved and stress

## What are the challenges of self-representation

* Limited legal aid
* Difficulties with adversarial system
  + Concept of presentation of case
  + Rules of evidence
  + Examination-in-chief and cross-examination
* Why do these come about
* This comes about a lot in the family court
* In criminal matters – case of deatry??? Which said that if you could be considered to not have had a fair trial if you don’t have representation
* Often this can really slow the system down and the other side however has to pay for their lawyers whilst the self represented party presents themselves and gets their head around the various legal issues

## What are some concerns with “alternative” dispute resolution

* “Access to justice”?
* May provide “second class justice” for certain types of disputes?
* Government and commerce monopolise courts?
* Government motivated by economic rationalism?
* Parties must be aware of their legal rights
  + In some settings one or both parties does not have access to legal representation
* Not all cases are suitable due to power imbalances:
  + Parties may not be articulate
  + Not able to defend their own interests
  + Linguistic problems
  + There may be barriers to assertiveness/ an overwhelming power imbalance:
    - parties’ personalities/ relationship
    - cultural background
    - family violence

# Week 3 - Negotiation

## What is negotiation?

* A mutual discussion and arrangement of terms of a transaction or an agreement
* A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and in which they seek as far as possible to preserve their interests, but to adjust their views and positions in the joint effort to achieve agreement
* **Fisher and Ury (1991) suggest**, we are all negotiators, although we don’t all necessarily have the techniques required to negotiate effectively

**In a legal context:**

* Clients negotiating together before approaching lawyers or, sometimes, during the legal process itself
* Lawyers negotiating on behalf of their clients
* Lawyers and clients together at a forum negotiating together towards a settlement
  + Although, the introduction of third parties makes it less like a negotiating

## Advantages and disadvantages of negotiation

* **Advantages** 
  + Parties with their lawyers are in best position to assess proposed solutions
  + Compromise often offers parties at least some of what they want
  + (note: court may not give them any of what they want)
  + Parties might not resolve all issues but may narrow them
* **Disadvantages** 
  + If adequate preparation not carried out a party can agree to a settlement outcome well below what a court may order
  + May not have valuations, adequate medical evidence etc to properly assess case
  + Lawyer may not know the law and be able to bargain effectively
  + A party may agree to an unfair agreement due to inequality of bargaining power/coercion
  + A party may feel that they were pushed too far or coerced into an agreement by their lawyer

## Elements of negotiation:

* A disagreement, conflict or dispute normally exists
* There are two or more parties
* The parties seek to communicate
  + That is they agree to come by themselves and they make an effort to understand the issues in dispute and seek a resolution on some or all of the issues
* The parties attempt to reach an understand of the issues
* The parties attempt to resolve the dispute
* The process is usually empowering for the parties
  + Allows them to fashion a solution that suits their own needs
  + Parties are under no obligation to settle or to compromise on an issue that is important to them
* The parties generally control the process
* The process does normally require an intervention from a third party
  + That is, there is no one charged with the responsibility of facilitating communication between the two parties

## What **knowledge** helps to become a good negotiator?

* Client’s factual case
* The relevant law and how to apply it to the facts
* Court procedure so that correct documents filed and discovery completed
* Dispute resolution eg. negotiation models, structure to most effectively negotiate for client
* Negotiation and professional ethics
* Client, their underlying interests, personality, strengths and weaknesses, bottom line
* Understanding of power imbalances
* Understanding of cultural negotiation differences

## What **interpersonal skills** does a good negotiator have?

* Thorough and thoughtful preparation
* Identifying objectives
* Being realistic about outcomes
* Option generation
* Identifying underlying interests
* Meeting and greeting and establishing a negotiation ‘atmosphere’
* Understanding the other party’s needs and interests
* Picking up any hidden issues/agendas
* Communication skills:
  + Interpersonal skills: eg. open body language and eye contact
  + Listening actively and effectively
  + Expressing yourself clearly and assertively
  + Controlling anger and emotions eg.reframing and summarising

## Negotiation as a skill

Negotiation skills are in use whenever parties have t put their case to an opponent, argue its merits and maybe act by taking the other party to court, mediation etc.

#### The basis of good negotiation skills – the three A’s

**From Spegal, Rogers and Buckley**

* **A**ttitude
  + Be positive
  + Believe that a successful outcome is possible
  + Be prepared to work towards that outcome
  + Be confident
* **A**wareness
  + How sensitive you are to teh messages coming teh other side
  + Be alert to what the person is saying and why they might be saying or not saying those things
  + This is about realising the interests of the other party
* **A**ccountability
  + Accepting responsibility for the outcome
  + Be fully prepared before the negotiation
  + Be flexible and skilled within the negotiation

### Key skills in negotiation include

* Preparing thoroughly and thoughtfully
  + K now what kind of negotiator you are
  + Know the client’s case
  + Know the law (including any relevant court procedures if an agreement needs to later be filed)
  + Know the client – how will they perform and how will they present themselves
  + What are you client’s underlying interests
* Being able to define your own objectives – being clear about what you want
  + Make sure that an agenda is created that covers ALL of your client’s interests
  + Prioritise the agenda so that your clients key interests are at the outset
* Being realistic about what is achievable and understanding the broad consequences (intended and possibly those unintended) of getting what you want
  + Reality test whether your client is actually able to do what they are proposing or accepting as part of the bargaining
    - Take into account significant outside influences that may affect this
      * New partner
      * Family pressures
      * Work pressures
* Being able to identify, express and consider more than one possible option for getting what you want—i.e. being able to generate options.
* Know what your BATNA’s and WATNA’s are
* Know anticipated costs
  + Costs to date
  + Costs if further proceedings are required (trial)
* Being able to identify and express your own interests.
* Being able to listen actively and effectively
* Being able to express yourself clearly and accurately.
* Being able to control anger and frustration – recognise any power imbalances
* Being able to understand and contextualise the other party’s needs and interests.
* Being aware of the possibility of hidden issues (underlying issues)

### Why are negotiation skills important

* Can impact on our clients and mean the difference between
  + Reaching agreement or not reaching agreement
  + Obtaining a fair outcome or an unfair outcome
  + Our client feeling supported or unsupported during the process
  + We as lawyers maintaining ethical conduct or being charged with profession misconduct

### Bridging gaps in negotiation

When settlement negotiations stall the following may assist:

* Each party and their lawyer moves to a separate room to discuss bottom lines and reality test
* When in private session: ask more questions/ assist your client to option generate to try to expand the settlement options
* Assess with client: how much the parties have achieved to date, how far apart are they in dollar values, is it worth the client rejecting current offer and going to court in $ terms?
* Suggest to client different trade-offs and concessions, different ways to ‘package’ settlement offer to make it more attractive
* Be creative in what you offer, appeal to other party’s underlying interests
* Examine BATNA eg. will they get better outcome if go to court?
  + What is involved in going to court?
    - Time, energy, stress, giving evidence and money

### Inequality of bargaining power in negotiations

Inequality in bargaining situations can be caused by:

* Seniority/familiarity with case/ levels of aggression (lawyers)
* Cultural issues
* Gender issues
* Personality issues: levels of assertiveness
* Timing
* Knowledge
* Resources/ Possession
* Acknowledgement that issues can arise of:
  + - Party vulnerability
    - Inequality of bargaining positions
    - Potential injustices in terms of process and outcomes

E.g. different cultures communicate in different ways and therefore negotiate in different ways

## Negotiation as a process

Negotiation is the process furthest from adjudication whilst still maintaining some formal structure

### What are the advantages of negotiation?

A negotiated outcome is not always appropriate or achievable however, the advantages of embarking upon negotiation, as opposed to proceeding directly to litigation, include the following:

* Parties are in the best position to assess the impact of any proposed solution upon them
* Parties “own” the process and can define its terms in any way they choose
  + Compare this to litigation which has a rigid structure
* Parties can create their own solution that reflects mutually agreeable compromises and inclusions
  + In litigation the solution is imposed on the parties with no room to move
* Parties have a chance of getting part of what they want
  + In a court only one party an win
* They save the courts a lot of time any money
  + Approximately 80-90% of civil matters settle before they get to court
    - Civil Justice Research Centre
  + Means that negotiation is always worth a try
* Allows the parties, at the very least, to narrow their dispute prior to the court hearing or further proceedings (mediation, arbitration)
  + This reduces the time, cost, emotion and stress of litigation to the parties

## Theories and models of negotiation

There are four models of negotiation available:

* Adversarial
* Distributive
* Integrative
* Principled
  + Interest-based bargaining

### Adversarial Negotiation

* Seeks to maximise victory
  + Based on the often incorrect assumption that the parties want the same thing
    - Fails to consider the parties interests
* Competitive
* Based on parties legal positions
* Information disclosed tactically to advance case
* Outcomes restricted to legal remedies
* Can result in only one party being a winner and the other party losing entirely
* Normally comes down to how much money one party has

#### A linear process

Based on a linear process where one party’s gain is the other party’s loss

* + Zone of agreement (see page 71 of the text)
  + Each party assesses the other party’s target and resistance points in order to determine whether there is a bargaining range
    - The bargaining range is set by each of the party’s initial offer
  + The problems with this is that it does not work where the issues of each party are varied
    - E.g. an apology in a personal injuries case may reduce the amount that the injured is seeking and this cannot be dealt with in court

#### Unproductive competition

* The competitive nature of this process can affect the quality of solutions to negotiated problems
* Competition may restrict what is shared and this lack of information ay result in the parties coming to an unsatisfactory or inefficient solution

#### The phases of adversarial negotiation

As the entire process is rather structured, adversarial negotiation generally proceeds along these lines:

1. Pre-negotiation strategising or planning to determine target and resistance points
2. Offers and response
3. Information exchange (positions, arguments and objectives are “presented”)
4. Bargaining- where concessions are made and analysed
5. Closure or agreement – where agreements are made and parties allocate final responsibilities for negotiated relations

**Problems with this:**

* The issue with this kind of approach, again, is that it does not always work when the issues are multi-faceted
* This structure places emphasis on an argumentative debate like structure which may force the parties to “lock down” leading to reactive, as opposed to proactive, dynamics and actions
* The use of a lawyer and this structure can force the parties into wishing for a more legal structure and solution to their problems instead of looking at their interests and developing a solution that works
  + Parties, at this stage, are not always as willing to relinquish control over the issues at hand

### Integrative negotiation

* Still rather adversarial in nature but differs through its use of trade offs and concessions
* Where there are two parties with several different issues
  + No longer about one party winning – it is possible that both parties can walk away with ‘more’
* Based on parties making tradeoffs and concessions to lead to a mutually agreeable conclusion
* Different trade-offs may have different values to different parties
  + The parties have assign ‘value’ to different things and then it is that value, and how it is traded, that is integrated into the overall solution
* Effective and assertive use of trade-offs can mean that a party doesn’t go below their bottom line or “lose face”
* **EXAMPLE** – Packaging things up as part of deal
  + I will take the house and allow you to only pay me out for1/2 of the remaining mortgage but settlement has to be within 2 weeks and it won’t be subject to finance
* The problem with this kind of negotiation is that it will not work if the parties do not have anything to ‘trade’
* Principled and integrated negotiation are sometimes interchangeable but it is suggested that while the nature of the transaction may be the same, the method of arriving at resolution is different
  + Note that if there is something that the parties can each trade then there may not be a need for “compromise” on an y issue the subject of the negotiation
* Integrated negotiation is often used when it appears that there is a “zero-sum situation” where it seems that in order for there to be a resolution one party has to effectively “lose “
  + My introducing a means of trading things of different it means that the same outcome can often be reached but with the ‘losing’ party having gained some form

#### Forming a satisfactory agreement

To reach a satisfactory agreement in negotiation it is often necessary for the parties to

* Clarify their interests
  + When there are lots of issues on the agenda and the parties weigh them differently than this allows for integrative problem solving
* Search for common ground
* Create a setting in which the parties can work together to discover differences which can then be exploited to produce joint gains
* The constant reassessment of alternatives to negotiation

### Distributive negotiation

Is about how to distribute what is being bargained for

* Based on the notion that the parties are generally seeking the same goals, items or values
  + Each party in a negotiation are trying to get the same thing and they want to get as much of that thing as possible
  + Dividing a limited resource
* Similar to adversarial approach in that it means that there is a ‘loser’
* E.g. buying a car is a pure distributive model and is also very linear
  + E.g. you have to pay 30k for the car standard, but you offer 25k and it goes backward and forward until an agreement is met
* The bargaining range will be set by the initial offer
* The need for distributive bargaining arises when two parties have a perception that do not coincide and there is an unwillingness by either to abandon the issue or to modify their perception of it
  + Buyers and sellers of commodities
  + People in a divorce
  + People in workplace situations (wages or hours of work)

### Principled negotiation

* Most popular of the negotiation models
* Focus on interests to create mutual solutions
  + Position = *What*  they wanted
  + Interests = *Why* they wanted it
  + **Booth v Bosworth [2001] FCA 143**
    - Lychee farm
    - Flying foxes staling fruit
    - Farmers put up electric fences and the foxes kept getting caught

**Interests**

* Farmer = protect the farm
* Environment people = save the fox – word heritage listed are a

**Positions**

* Will not remove the electric fence because that jeopardises the fruit
* Will not stop making complaints because this is harming the animals and the environment
* Information is shared so that the other side understands point of view

#### The key elements of principled negotiation

* Separating the people from the problem
* Focusing on interests not positions
* Generate options for mutual gain
* Insist on using objective criteria

#### Interests

*What it is that I want and why do I want it?*

* Interests are the needs, desires and fears that really drive a dispute
* Involves determining not only what the client wants but WHY they want it
* By failing to explore the interests underlying the positions, the parties are less likely to find an acceptable solution
* Based on the concept that the other party cannot change the other party’s mind but that the other side can understand that party’s point of view and vice versa

#### Options

* The focus should be on developing creative options to not only solve the problem in dispute but to perhaps reform an organisation or improve the standards currently applied so that a similar dispute does not arise again
* The key to a successful negotiation is realising that there needs to be a variety of options
* “Add items” to the pool of options so that each party is able to walk away with enough to satisfy them
* By developing options you are trying to not pre-determine the situation

**How to create options**

* create a non-judgmental atmosphere - all options should be allowed with little evaluation as to their effectiveness – that will come later
* look for options, not solutions - tell the parties that these may not be the final outcome but it’s about generating possible alternatives
* general multiple options – remember parties can not afford to enter a negotiation with only one solution
  + it is a waste of time and money
  + the more options there are to choose from the more likely the parties are going to walk away happy with what they have achieved
* encourage crazy ideas

### What are some of the limitations of this model?

* Not all scenarios fit this model eg. in some distributive bargaining is more appropriate
* Does not take account of fact that in, some negotiations, one or both parties are not interested in finding a mutually agreeable solution
* In such cases one or both parties may also not be prepared to share relevant information so that a ‘fair’ outcome for both parties can be achieved

### In practice

* A combination of models is used

### Addendum to the principled model

1. What is the difference between an interest and a position?
   1. Look at ***Booth v Bosworth***
      1. Lychee farm
      2. Flying foxes were stealing the fruit
      3. Farmers pt up electric fences and the flying foxes kept getting caught
      4. Resulted in the scenario where the farmer was against the environmentalists

**Positions :**

* **Farmer =** Protect lychee farm
* **Enviro =** save the area – world heritage listed area etc
* **Note:** How this means that each party had a whole heap of different interests

## The stages of negotiation

**A negotiation is often characterised by stages.**

**The following are some suggested ‘common’ stages as described by M Anstey in Negotiating Conflict**

1. **Opening the negotiation**
   1. Sets the tone for the remainder of the process
   2. Once parties state their position they will endeavour to progressively close the gap identified
   3. This stage normally involves the following
      1. The establishment of bargaining boundaries
         1. Parties set their ideal demands and offers
         2. Normally one party attempts to take control here, determining whether the process will go through the agenda one by one or if things will be packaged
      2. Setting the bargaining climate
      3. Arguing, defending, motivating, justifying, clarifying positions, and;
      4. Manipulating expectations of the process
         1. This may involve; using grapevines to obtain information about the otherside, asking probing question to assess values and needs,
2. **Bargaining**

The exchange moves out of the opening phase with its characteristic argument process when the parties begin t signal to each other as to their willingness to move, and start making tentative proposal as to movement or concessions

The primary elements of bargaining include:

* Signalling
  + If parties continue to talk during the argument phase then this is a good sign that they are willing to look for compromise and to avoid breakdown in the exchange
* Proposing
  + Proposals initiate an active search for remedies
  + Often made in a manner that suggests firmness on generalities but flexibility on specifics
* Packaging and bargaining
  + As proposals begin to firm it is suggested that they be bargained as packages rather than individual items
  + Requires a reshaping of variables in a form that more closely approximates the fears and interests of each party
  + Critical skill here is the linking of the right items

1. **Closure and Agreement**

* Put offers down in writing
* Remind the other of consistency in past negotiations
* Make the offer public
  + This is often popular for employers
  + Walkouts are also common in employment situations but are dangerous

## What mediums can we use to negotiate?

* Can occur in person, by phone, via letter, email, messaging, video conferencing/ webcam
* Common forum used by lawyers for negotiation:
  + round table conference
  + shuttle conference outside door of the court
* More sophisticated negotiation process:
  + collaborative law

### The advantages of in-person negotiation

* Parties can see each other’s facial expressions and body language
* Can create more direct communication channels: not have difficulties of misunderstandings that may occur when communicating via letter, email, messaging
* Can assist with overcoming communication problems and reducing conflict
* May be more effective in achieving an outcome that covers all or many underlying interests

### The disadvantages of in-person negotiation

* May be threatening when there are power imbalances
* May be unsafe when violence has been a factor
* Can be used as a tactic by one party to coerce other party to unfair outcome:
  + eg. using intimidation, threatening behaviour etc
* May be too stressful for one party
* May be inconvenient/ too expensive for geographic or other reasons

## Ethical obligations

### Duty to client

* + - Queensland Law Society, *Legal Profession (Solicitors) Rule 2007* (Qld)

12.3 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

### Communications

Queensland Law Society, *Legal Profession (Solicitors) Rule 2007* (Qld)

* A solicitor, in all of the solicitor’s dealings with other legal practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the solicitor’s communications are courteous and that the solicitor avoids offensive or provocative language or conduct.

### Communications with an opponent

Queensland Law Society, *Legal Profession (Solicitors) Rule 2007* (Qld)

* 18.1 A practitioner must not knowingly make a false statement to an opponent in relation to the case (including its compromise)
* 18.2 A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.
* 18.3 A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.

### Duty to opponent

* ***2007 Barristers Rules* (Qld)**
* 52. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
* 53. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.
* 54. A barrister will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.

**Legal Services Commissioner v Mullins [2006] LPT 012**

* Legal Practice tribunal decision
* Professional misconduct occurred during settlement negotiations for compensation for personal injuries claim
* Barrister knowingly misled the insurer by failing to disclose that his client had cancer: relevant to life expectancy issue in assessing amount of compensation

## Bridging the last gap

When settlement negotiations stall the following may assist:

* Each party and their lawyer moves to a separate room to discuss bottom lines and reality test
* When in private session: ask more questions/ assist your client to option generate to try to expand the settlement options
* Assess with client: how much the parties have achieved to date, how far apart are they in dollar values, is it worth the client rejecting current offer and going to court in $ terms?
* Suggest to client different trade-offs and concessions, different ways to ‘package’ settlement offer to make it more attractive
* Be creative in what you offer, appeal to other party’s underlying interests
* Examine BATNA eg. will they get better outcome if go to court?
  + What is involved in going to court?
    - Time, energy, stress, giving evidence and money

## Inequality of bargaining power in negotiations

* Seniority/familiarity with case/ levels of aggression (lawyers)
* Cultural issues
* Gender issues
* Personality issues: levels of assertiveness
* Timing
* Knowledge
* Resources/ Possession
* Acknowledgement that issues can arise of:
  + - Party vulnerability
    - Inequality of bargaining positions
    - Potential injustices in terms of process and outcomes
      * Eg. different cultures communicate in different ways and therefore negotiate in different ways

## 

## Negotiation structures to use in practice

**Suggestion one:**

* Parties introduce themselves
* Establish ground rules
* Opening statements
  + Questioning and discussion
  + Explore underlying interests
* Define issues / set agenda
* Prioritise agenda issues
  + Questioning and discussion
  + Generating options
* Negotiations take place
* Options for settlement
  + Evaluate options taking into account BATNA & WATNA
  + Reality test options
* Write up any agreement

## Some Approaches to Negotiation

### Hard v soft negotiators

The traditional approach to negotiation taken by lawyers has already been described as adversarial. This approach is positional. The two positions of an adversarial approach can be categorised as 'hard' and 'soft'. Hard negotiators emphasise winning, make high demands and few concessions and are not concerned about the prospect of a deadlock. By contrast, a soft negotiator will be more modest about demands, will emphasise the continuing relationship more than winning, will make more concessions and be more concerned about reaching a deadlock. A hard negotiator will usually win over a soft one, providing that the hard negotiator maintains her/his hard-line position or does not stray too far away from it. But if two hard negotiators meet each other, a deadlock is inevitable.

In the alternative, working towards an integrative or co-operative solution retains the firmness of a hard approach but looks to alternative options and avoids being bogged down in positional thinking.

### The influence of power

Other approaches to negotiation emphasise the rarity of negotiation being based on the equality between the parties that is could be argued may be taken for granted by Fisher and Ury. Some of the analyses of power examine negotiation theory (both the interest based and adversarial approaches) as skimming over inevitable power imbalances. If a stronger party (stronger because of resources, skills, status, experience of negotiating, physical threats) refuses to use co-operative bargaining techniques, a weaker party may be left with little option but to attempt some form of hard bargaining themselves or to give in and agree to an outcome that they are not happy with.

## Critical Perspectives on Negotiation

### Gender and negotiation

There have been a number of studies which have focused on gender differences in negotiation processes (see Astor and Chinkin for a summary). Much of the research is based on the work of psychologists such as Gilligan, Chodorow and Dinnerstein, which suggests that women experience the world differently and have different ways of making sense of their lives and experiences than men. The essence of this difference, at least as found in Gilligan's work, is that women tend to define themselves through relationships and to be oriented towards caring and affiliation; while men tend to reason and take decisions in a way that emphasises rationality, rights, justice and logic. Some writers (using Gilligan's work) seem to suggest that co-operative negotiation reflects a more feminist concept of dispute resolution because of its support for dialogue and preservation of relationships. However, other feminist writers have criticised it from an alternative perspective. One argument is that Fisher and Ury's principled negotiation model, by emphasising the removal of personal factors from the problem, is actually another 'male' perspective of conflict management.

# Week 4 – Mediation

## BATNA and WATNA

**General notes from within the lectorial**

Read the Jessica Notini article is required

Best result if you go to court and worst result if you go to court

Options are when the people are looking at what they can offer in a settlement – what types of options

BATNA and WATNA are about alternatives – walk away, getting fired? Etc.

Without prejudice – often used in these types of proceedings

* Should be used to reach an agreement
* Generally means that what is said during the mediation etc can not be then bought up in court proceedings later on – what we are saying is confidential – its for the purpose of negotiations
* There are some exceptions to this – what is said is heard though, so if people say things then you might be able to go away and get independent evidence
* What about “without prejudice, save as to costs”… what does that mean? Maybe to separate the costs agreement
  + Does it mean that the costs agreement is separate…
* Without prejudice means that generally what you are saying is confidential - it is so that people feel that they can speak freely – we have come along, we are in good faith, we are trying to reach agreement, we want to be able to talk freely to be able to reach that agreement
* **Section 131 of the evidence act** – talks about exclusion of evidence of settlement negotiations
  + Look at this section – generally a communication is confidential
  + So in the context of a court case – if there is a court hearing after the adjudication – we cannot adduce in evidence what has been said in the negotiations
  + Look at the exceptions – e.g. if I reveal at the mediation that you are about to commit a criminal offence that might be allowed to come out in evidence
  + Also see the family law act – it has some stuff there, such as if you are in a mediation and someone mentions something about abusing a child that can’t be kept from court proceedings and can’t be kept confidential
  + Sometimes people will just say that it’s confidential and that is not strictly correct –
  + We have to say “as far as the law allows”

## History of mediation

It is clear that forms of consensual third party agreements have existed in a number of different historical and cultural contexts. Mediation was the principal means of resolving disputes in ancient China and it continues to be practised today in the People's Republic of China through what is known as People's Conciliation Committees. Similarly, Japanese law and customs display a strong emphasis towards social consensus and moral persuasion and therefore a tendency to engage in non-litigious means of dispute resolution. Aboriginal society before white colonisation had a complex structure of dispute resolution that emphasised community consensus, co-operation and emotional reconciliation. In parts of Africa there are long-established customs of informal moots or neighbourhood meetings where a respected local notable serves as a mediator to help disputants resolve their problems co-operatively and without the threat of sanctions. The practices of different cultural and religious groups have also often included forms of mediation as alternatives to litigation.

## The “rise of mediation”

There has been a real move over the last few decades in western industrial societies towards instituting more informal modes of settling disputes and mediation has been one of the most favoured options. Beginning in America in the late 1960's, this move centred on disillusionment with existing processes, particularly litigation, and an interest in alternatives.

This period was characterised by high levels of social conflict and discontent in the context of the Vietnam War, civil rights struggles, student politics, a growing consumer awareness, the rise of the feminist movement and the creation of new statutory causes of action.

The increase in litigation, which arose during this period, created concerns amongst the public about the formality, expense, lack of access to justice and slowness of judicial proceedings. Similarly authorities were concerned about the expense of running an overloaded courts system and began instituting government-sponsored mediation in areas of labour relations, family law, racial and community disputes.

In Australia the popularity of mediation began in the mid-late 1970's with the establishment of Community Justice Centres in NSW along the lines of neighbourhood justice centres in the USA. The rationale behind the scheme was to resolve 'backyard disputes' which may lead to aggravation and serious crimes and which use up much of the justice system's resources. Community Justice Centres also, now, help resolve a significant number of family disputes.

Similar developments have also occurred in Victoria, ACT and Queensland. The Queensland Dispute Resolution Centres (formerly known as the Community Justice Program) began operating in July 1990 in the Alternative Dispute Resolution Branch of the Department of Justice and Attorney-General. One of the Centres' stated purposes is to provide 'an accessible, low-cost, and speedy dispute resolution service to the community through dispute resolution processes such as mediation'. They aim to fulfil this by promoting and providing dispute resolution services in the criminal justice system, within Aboriginal and Torres Strait Islander communities and in a variety of settings within the Queensland community, including neighbourhood and family disputes.

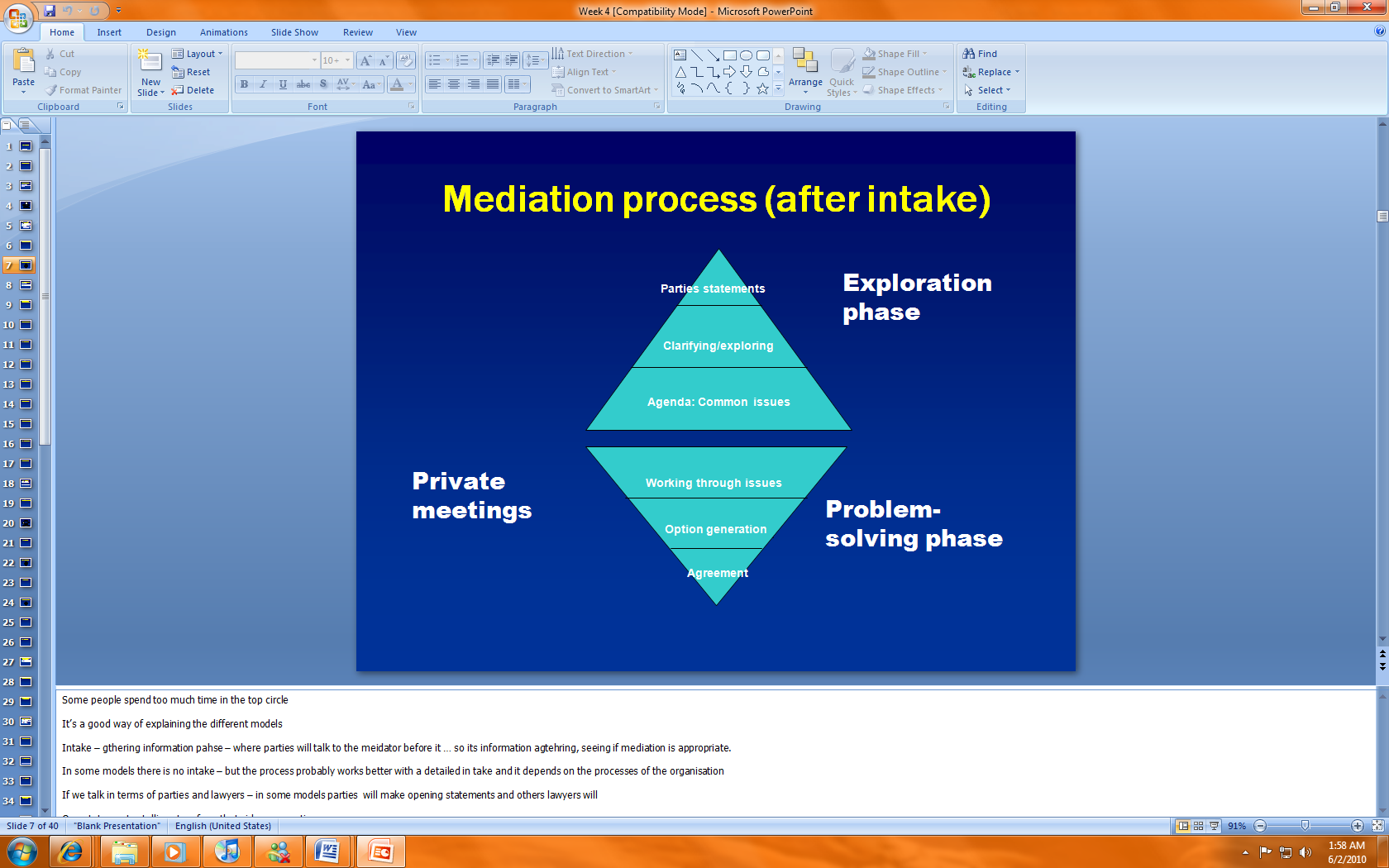
## The mediation process (after intake)

**TOP**

* Some people spend too much time in the top circle
* It’s a good way of explaining the different models
* **Intake –** gathering information phase – where parties will talk to the mediator before it … so its information gathering, seeing if mediation is appropriate.
* In some models there is no intake – but the process probably works better with a detailed intake and it depends on the processes of the organisation
* If we talk in terms of parties and lawyers – in some models parties will make opening statements and others lawyers will
* One statement = telling story from that sides perspectives
* Mediation – talks about what the issues are – and from there an agenda is created
* Issues are then prioritised and then these are dealt with

**BOTTOM**

* + Is more the negotiation phase – sometimes in legal conferences they will do this right at the top –
  + May or may not have private meetings – it is important to have people all in the same room for as long as possible
  + But in mediations people are in separate rooms most of the time or all of the time



## What are some key elements of mediation?

* Independent mediator
* Conflict between the parties which leads to a mediation
* Structure to define the issues
* Defining of issues in a more formal way
* Creating an agenda
* Development of options
* Mediator = control communication and keep people to that structure
* Working through steps
* Promising agenda

**Things mediators need**

* Active listening
* Free framing

## The key stages of the mediation process

### Pre-mediation/intake phase

* Takes place in many mediation processes
* Intake process undertaken by either:
  + Mediator or
  + Administrative officer
  + Eg. legislative requirements to undertake intake in family law
  + Prior meeting/s or telephone conversation/s to:
  + Understand dispute
  + Ensure process suitable
  + Discussion of process and costs
  + Reading and signing re *Agreement to Mediate*
  + Ensure parties come prepared

### Exploration phase

* Preliminaries :
  + welcome and introductions

### Mediator’s opening statement

* Parties’ statements
* Identifying areas of common ground
  + Isolating the issues
* Agenda:
  + Defining the issues
  + Prioritising the issues
* Mediator’s opening statement
* Explain process and role of private meetings
* Explain objectives
* Clarify role of mediator and parties
* Clarify non-adversarial role of lawyers
  + (if present)
* Set some guidelines for conduct
* Explain confidentiality
  + *as far as law allows*
* Time-frame and any time restraints
* If agreement reached option of written agreement

### Parties’ opening statements

* One at a time the parties will talk about:
  + The background to the dispute; and
  + What they want to sort out at the mediation
* Mediator uses questions to elicit their underlying interests
* Goal that each party hears the other party’s perspective of the dispute
* Can assist to resolve communication problems

### Working out an agenda

* Mediator works out with the parties a list of common issues that will form the structure for the meeting
* The are worked out based on interests not positions
* The agenda items should be:
  + mutual
  + neutral
* They can be framed in the form of questions
* Example agenda family dispute

1. What time will the children spend with each parent?

1. What school should the children be attending?
2. How can we balance our different religious values in the way we parent our children?
3. What extra-curricular activities should the children participate in?

5. How can we effectively communicate in the future about our children?

### Problem-solving stage

* Mediator will aim to engage parties in constructive communication
* Option generation
  + Development and exploration of options
  + Evaluation and selection of options
* Bargaining/ Negotiation phase
  + In some models will commence as interest-based
  + Later distributive/integrative may take over particularly towards the end!

### Separate meetings

* Also called “caucus”
* Can occur at any time after agenda has been agreed upon
* Break the tension: time and space
* Useful for advancing aspects of client’s case that will further their interests
* Evaluative mediator:
  + talk to client about prospects if case proceeds to court
  + Pressure to settle! CAUTION
* Opportunity to “reality test” proposals
* Can include “significant others”

### Final phase

* Final decision-making
* Recording the decisions
  + Usually written and signed by parties and their lawyers (if lawyers present)
  + Lawyers should ensure client understands agreement and implications
* Closing statement by mediator
* Termination of mediation

## Boulle’s four models of mediation

* Facilitative
* Settlement
* Evaluative
* Transformative

### Facilitative

* Interest-based, problem-solving mediation
* Process orientated
* The parties provide:
  + the options; and
  + the solution to the dispute
* Mediator:
  + Purely facilitator of communication process
  + Does not suggest options
  + Does not give indications of appropriate settlement options
  + Not required to be an expert in content only an expert in mediation
* Egs. community, family law at Family Relationship Centres, workplace, organisational and environmental

### Settlement

* Compromise mediation
* Object to encourage distributive bargaining
  + Ie. incremental bargaining towards compromise, at central point between parties original positional demands
* Focus on “positions”
* Ascertain parties bottom lines
* Adversarial/distributive and integrative negotiation
* High status mediator: eg. Ex-judge, barrister
* Often lawyers, not parties give opening statements
* Some would argue not “real” mediation
* Eg. commercial, personal injuries, insurance, industrial disputes

### Evaluative

* Advisory/managerial mediation
* Object to reach a settlement based on legal rights within anticipated range of court outcomes
* Mediator an authority figure who evaluates case based on experience of:
  + Law; and
  + Court outcomes
* And offers recommendations of how case would be decided if proceeds to court
* Some would argue not “real” mediation
* Eg. commercial, personal injuries, trade practices, family law, anti-discrimination

### Transformative

* Therapeutic/ reconciliation mediation
* Works best if social scientist mediator or co-mediation
* Focuses on:
  + Empowerment
    - Capacity of parties to communicate and make future decisions effectively
  + Recognition:
    - Assist parties understand each other’s perspectives and be responsive to them
  + Aims to affect changes in the individual and group dynamics
  + Egs. family law, family relationship: eg parent and teenager, community conflict, victim-offender

## What role to lawyers play in mediation?

* Lawyers may or may not be present during the mediation: type of process?
* Lawyer’s functions can be broken down:
  + Before
  + During
  + After

### Role of lawyers before the mediation

* Suitability of mediation
  + Ensure appropriate dispute resolution process
  + Advocate for appropriate structure to suit client
* Process advice: steps in dispute resolution process
* Content advice: legal advice
* Support function: assisting and supporting client towards the process
* Preparing/coaching client
  + Required role client will play
  + Coach client in readiness for this role
  + Assist client prepare opening statement
  + Attend to any information gathering/documents client needs
  + Assess BATNA and WATNA
    - BATNA: What is the best result we can hope to achieve if we don’t settle?
      * Eg. Will we receive a better result if we go to court?
    - WATNA: What is the worst outcome that may occur if we don’t settle?
      * Eg. How much will it cost and how much time will it take to go to court if we can’t resolve at mediation?
* Preparing documents/evidence
* Discussing and signing an *Agreement to Mediate*

#### Duty to inform client of dispute resolution options

Derives from:

* Common law
  + *NSW Couriers Pty Limited v Newman* [2002] NSWSC 1172
* Statutory Obligation
  + *Family Law Act 1975* (Cth)
* Ethical duty
  + Eg. Model Rules of Professional Conduct of Law Council of Australia
* Court Practice Directions
  + Eg. Practice Direction No 22 of 1991, Supreme Court of Queensland

### Lawyers role post mediation

* Lawyer debriefing client
  + Process
  + Content
* Explanation of agreement reached and the legal implications
* Q of making the agreement legally binding
  + How this can happen?
  + What are the legal consequences if the agreement is then breached?
* Dealing with second thoughts/disillusionment???

What if agreement has not been reached?

What are options now?

## Lawyers ethical considerations in mediation

### Law council of Australia

* Model Rules of Professional Conduct
* 12.3 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
* <http://www.lawcouncil.asn.au/policy/1957352449.html>

### ethical duties

* Duty not to participate in mediation for ulterior purpose
* May be an emerging duty not to terminate a mediation unilaterally without consultation with mediator and other party
* Cannot go beyond client’s express instructions in reaching a settlement
* Duty to explain to client the terms of settlement, its effect and significance and consequences of breaching its terms

### QLS standard of conduct

* 8.2 A mediator may report any unethical conduct in a mediation by a solicitor for one of the parties to the President of the Queensland Law Society.
* Similarly the parties to the mediation may complain to the President of the Queensland Law Society in circumstances where they consider the mediator has been in breach of any of the Standards of Conduct.

## CONSENSUALITY

* Participation voluntary
  + A fundamental value of mediation is the fact that it is a consensual process
* No compulsion to reach agreement
* Astor questions: if parties ordered to mediation can their agreement be “consensual”?
  + Is consent to attend is no real then how can the outcome be a consensual one?
* However issues too of large corporations wanting to proceed to court where “litigants” want to mediate to save legal costs
* Venus asks whether going to a court ordered mediation is “participation” or “attendance”

### mandatory mediation

* New acts – such as the Motor Accident Insurance Act and PIPA are requiring parties to attend a compulsory conference within six months of the claimant giving notice to the compulsory third party insurer
  + Note however that in these circumstances, a mediator is not required to attend
* The UCPR now includes provisions for the use of ADR processes in resolving dispute instituted in the Supreme, District or Magistrates Courts
  + **R 319 –** Court may give written notice to the parties that their dispute is to be referred, by order, to mediation
  + **R325 –** provides that the parties must act reasonably and genuinely in the mediation and help the mediator to start and finish the mediation within the time estimated
    - **See page 172 of the text for more information**

#### Benefits of compulsory mediation/compulsory conferences

* Time
* Cost
* Means that parties avoid the trauma of trial
  + will not cross-examined
    - will not be told that they are lying or exaggerating their circumstances

#### barrett v queensland newspapers [1999] qdc 150

* Factors Judge took into account to order all parties to mediation where one party objected (p158 text):

1. Judge could not conclude the mediation would not be successful

2. Trial may take longer than 10 days and would detract from court time available for other litigants

3. Three of four parties supportive of mediation

4. That the second defendant, without admitting liability had agreed to pay the plaintiff’s share for the mediator’s fee and venue costs

5. Appln for mediation order made early and when substantial costs could be saved by all parties

6. There were risks in litigation, even for opposing party

7. Skilled party may be able to assist parties despite difficulties in case

## Neutrality

One aspect of the mediation process that some commentators have critically evaluated is the notion of mediator neutrality and the importance of power in the mediation process. Issues in this context include:

* Mediators have considerable power: how should they deal with this?
* Power imbalances in the process: the danger with party consensus and mediator non-intervention is that the agreement will simply reflect the power imbalance between the parties. Does it matter if an agreement is reached that the parties are happy with but it is not fair or just?
* Gender and mediation: while it is important not to portray women as victims or powerless, it is the case that men are often more likely to hold positions of authority, earn more than women, and exercise the power to use violence as a sanction. These issues do not completely determine who will benefit in mediation, but they should not be forgotten in understanding the dynamics of the mediation process. Another important issue is the effect on women's rights of the way mediation resolves disputes in private when women have fought hard to gain *legal* rights and public recognition of their status.

## Cases which go towards mediation

|  |
| --- |
| **Secombs v Sadler Design [1999] VSC 79 (24 March 1999)**   * Client left mediation before terms of settlement executed   + Client alleged they were signed without his consent * Client alleged lawyer negligent in:   + Failing to communicate terms of settlement to client; and   + Failure to highlight consequences of non-compliance with agreement * Court found negligence in:   + Lawyer failing to communicate terms of settlement on next business day   + And in not having performed to standard of care of ordinary skilled solicitor * Solicitors were negligent in failing to communicate with client on day of mediation, or on next business day and in not having performed to the standard expected of the ordinary skilled solicitor * The could not recover costs from their clients for their appearance at mediation and subsequent appearances in court proceedings   So it’s important because often in a mediation they may go for many, many hours towards the end the client will be getting tired they may have other commitments and they amy decide that they want to leave. Ideally you would keep your client there until it was over and if an agreement was made, read it through with your client there paragraph by paragraph and get them to sign it etc. Then advise them that they are going to to be bound by it and that if they don’t then they will be in breach then they may be up for a costs order. If they do decide to leave you should not let them sign anything – maybe go through it over the phone, paragraph by paragraph |
| **Studer cases**   * Boulle pp240-242 * Predominantly shuttle mediation * Mediator making suggestions for settlement * Client alleged only agreed to settlement due to lawyer pressure * Court decision urges caution re lawyer’s pressuring clients to agreement * Studer sued lawyer acting for him in the mediation * Client alleged pressured into making an offer didn’t feel comfortable with * Handley JA found: Studer could not establish that lawyer (Boettcher) had not properly prepared for the mediation, gave bad or incorrect advice during the process, or overlooked relevant facts, documents or legal arguments and that in bringing considerable pressure to bear upon his client he was acting on the best terms avail and in client’s best interests – so the client was not successful in showing that the lawyer had not acted appropriately * Sheller JA Said in passing it was no part of a mediator’s role to “attempt to impose a settlement on a party” |

# Week 5 - Arbitration

## Describing arbitration

* Similar to litigation re the protection of rights but it is different because it is not caught up in the procedural requirements
* A process where parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination
* The arbitrator may be part of a court annexed scheme or the parties may choose an arbitrator
  + Arbitrators can be chosen or their knowledge in an area
* Arbitration is as close to judicial determination as one can get and is often not classed as ADR

## When will arbitration be binding

The binding nature of a decision in arbitration stems from ether an agreement by the parties to this effect or because the law provides that arbitration in such circumstances will be binding

* Consider Legislation that governs commercial or industrial disputes – arbitration is governed by the legislation and is subject to court review
  + **NOTE:** In private arbitration processes the parties have limited rights of appeal to the courts which in turn have limited powers of review over the exercise of the arbitral function

## Arbitral Power vs Judicial Power

* Arbitrators decide matters of law and resolve rights issues between the parties. They also have the power to create new rights.
* Theoretically, judges only have the power to enforce existing rights.
  + This links to the separation of power that we have as part of our adversarial structure

## Arbitration vs expert appraisal

**The biggest difference is that expert determination is NOT governed by uniform legislation whilst arbitration is governed by the Commercial Arbitration Acts.**

**Definition:** A process whereby the parties agree on an expert in the area of the dispute who, after investigating and hearing from each of the parties, will tender an appraisal. Parties may choose, prior to agreeing on the expert, to be bound by the appraisal, in which case it is sometimes called an **expert determination**

* How do appraisals operate?
  + Where you are going to an expert for an appraisal, so it’s not binding but it can be made binding if you go to court
* How are appraisals different to arbitration?
  + Arbitration is far more formal – but you are submitting to accepting their decision
  + The appraiser has discretion to conduct the appraisal as he or she thinks fit without being fettered by the rules of evidence or preservation of the rules of natural justice
    - Creates a much more inquisitorial approach
* Are appraisals binding?
  + Arbitration is binding whilst an appraisal is not

## Power to legislate about arbitration?

* Commonwealth’s Constitutional power in s.51(xxxv) has been interpreted as restricted to arbitration in relation to employer/employee disputes.
  + Consider workplace relations/industrial relations
* States have introduced Uniform Commercial Arbitration Acts
  + The states have residual powers to legislate about arbitration in other contexts

## Referral to arbitration

* Some courts in Australia have the power to refer to arbitration without the consent of the parties – eg see Supreme Court Act 1995 (Qld) s52.
* Arbitration is used in a variety of contexts – even for example in Family Law, but most commonly in commercial contexts.
* It is fairly common that courts will refer parties to things like mediation, negotiation and arbitration etc if they feel the parties an come to a better solution than being in the court
* Arbitration is allowed in the family law act – but it is rarely used in children’s matters – but is often used for property matters

## Uniform Arbitration Legislation

Relatively uniform Commercial Arbitration Acts have now been introduced in all states and territories, with the Act coming into force in Queensland on 1/12/90. The philosophical basis to this uniform legislation is to recognise and respect party autonomy in choosing a tribunal and procedure suitable for the resolution of the dispute and *reduce* judicial intervention in arbitration.

The legislation in all states aims to provide a non-interventionist environment in which businesses could provide their own mechanisms for the resolution of disputes using individual specialists as arbitrators. Thus the principal objective behind the legislation was to promote arbitration as a legitimate alternative to litigation.

***Commercial Arbitration Act 1990* (Qld)**

* Features:
  + Voluntary,
  + Choice of expert arbitrator with expertise,
  + Private,
  + No formal reporting, no precedential effect,
  + Not bound by formal rules of evidence,
  + Awards are binding, (**s28)**
  + Courts reserve right to determine prelim points of law, **(s39)**
  + Limited grounds for judicial review:

(a) on a point of law if both parties consent or with leave of the Supreme Court

(b) misconduct or improper procurement of award.

* + Misconduct generally mans undue influence, incompetence or if they are unsuited to hear the dispute – this could give rise to a review of their rewards

## Nature of misconduct?

* Undue influence, incompetence, unsuited to hear the dispute.
* ***Stanner v Sperway Constructions P/L* [1990] VR 673**
  + In a renovation dispute the plaintiff sent a copy of the offer to compromise by mistake to the arbitrator.
  + It was argued that the arbitrator should have disqualified himself on the basis of the disclosure of the offer to compromise.
  + Held: arbitrator had discretion to continue and there was no misconduct

## When arbitration becomes mediation

* Section 27 of the Act deals with this situation and states that either prior to or midway through arbitration an arbitrator may cease to prepare for conducting the arbitration and, instead, commence mediating the dispute.
* Arbitrators may proceed to mediation at any point during the proceedings but are still bound by **s 27(3)** which requires arbitrators to be bound by the rules of natural justice unless otherwise agreed upon by the parties
  + **Natural justice** means that parties are to be given the chance to present their own case, to listen to the other side’s allegations against them and to have the opportunity to answer those allegations

**What are some of the complications that arise when this section is invoked? (page 323 of SG)**

* Needs to state clearly and expressly that the settlement is going to be without prejudice
* Should the same person be the arbitrator and the mediator
* Runs the risk that a statement made by the arbitrator maybe taken as a breach of their statutory duty
* What happens if the mediation fails and they have to go back to arbitration?
  + Suggested that they do not go on to participate in the resulting arbitration process
  + Alternatively, the could insist that he or she be relieved of the statutory obligation to comply with rules of natural justice by a express written agreement to that effect
* Your natural justice obligations directly conflict with the requirements (intervention) of being a good mediator
  + For example the need to see parties alone in mediation is not looked upon favorably in mediation

**27 Settlement of disputes otherwise than by arbitration**

(1) Parties to an arbitration agreement—

(a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or

(b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire); whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

(2) Where—

(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under

subsection (1); and

(b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute; no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).

(4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.

(5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).

(6) Nothing in subsection (5) shall be construed as preventing the making of an application to the court for the making of an order under section 48.

## When can the court intervene?

In Australia, the courts have generally not been inclined to adopt a narrow interpretation of their powers under the legislation. Several Australian cases (*Qantas Airways v Joseland and Gillings* (1986) 6 NSWLR 327; and *Abigano v Electricity Commission* CLD No 19008/85, 4 July 1986 unreported) have distinguished the English cases and have held that the discretion to grant appeal must be made taking into account all circumstances of the case including hearing arguments on the matter.

In Queensland there have been some amendments that clarify the situation and require the court to only grant leave to appeal if:

**i)** Deciding the question of law could substantially affect the rights of one or more of the parties; and

**ii)** There is a manifest error of law on the face of the award or strong evidence that the arbitrator made an error and the determination of the question would help the certainty of the law.

**Appealing awards**

Section 38(2) of the Act provides that an appeal shall lie to the Supreme Court on any question of law arising out of an award

* On any question of law = a misinterpretation or misapplication of a principle of law or the application of an inappropriate principle of law to the issue of fact

**Setting aside awards**

Section 42 of the Act provides the court with the power to set aside an award for misconduct

## Unpacking the advantages of arbitration

* Each party has an equal opportunity to present their views.
* Decision-making power lies in the hands of an impartial arbitrator.
* Parties have input/power on process issues.
* Parties can choose the third-party decision-maker (i.e. the arbitrator).
* The process allows for expert evidence to be adduced.
* The process provides a final, enforceable decision.
* The process is relatively objective and avoids the introduction of personal issues that might cloud the issues that are the subject of the dispute (this is particularly relevant in business disputes).
* Because the parties are usually legally represented there is some potential to reduce any imbalance of power between them.
* Achieving an outcome from the process does not depend on the goodwill, trust or co-operation of the parties.
* The process is private.
* Arbitration is arguably cheaper and quicker than courts (although this may not always be the case).

**Additional notes from the lecture:**

Note that the abovementioned points are not always advantages.

In terms of commercial disputes where the parties want a quick resolution to their dispute but want legal protections but they still want a little bit of control then this is a good option – but the argument that it’s cheaper than court is weighed against the fact hat if it does go pear shaped at arbitration then you still have to go to court and that is not necessarily quicker and cheaper

As disputes get more complex – like IT matters or complex in terms of being specific to a certain discipline – then it becomes increasingly something that parties might want in terms of making a determination for them

Yet it does have the protection of parties

## Unpacking the disadvantages of arbitration

* Arbitration has limited applications, that is, it is a process that is relevant to only certain types of disputes - mainly commercial disputes.
* Arbitration can favour the wealthy and disadvantage the poor in that it often involves substantial costs and usually requires the use of advocates.
* The objective and legalistic nature of the process can result in a lack of consideration of the feelings of the parties. This can be a problem in a conflict where there are personal or emotional issues that are relevant.
* Arbitration adopts an adversarial approach (though the arbitrator is able to make certain investigations and take on a more inquisitorial role than a judge).
* Arbitrators have extensive power (sometimes more than judges) but in the private context of arbitration there is limited scope for monitoring of the use of this power and there is always the danger of abuse.

**Additional notes from the lecture**

You can say that the notion of arbitration is being applied to more disputes

Favours the wealthy – access to justice issues but on the other hand you could say that it is a process that suits parties that have the funds to afford it and those people, like businesses, are drawn to it e.g. commercial endeavours.

It is closer to litigation than others – so closer to adversarial style than any thing else in the unit

You need to consider all of this factors (good and bad) when determining whether it is something that you want to consider for your client/situation

## Arbitration and the family law Act

Division 4—Arbitration

10L Definition of *arbitration*

(1) ***Arbitration*** is a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.

(2) Arbitration may be either:

(a) ***section 13E arbitration***—which is arbitration of Part VIII proceedings, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement), carried out as a result of an order made under section 13E; or

(b) ***relevant property or financial arbitration***—which is arbitration (other than section 13E arbitration) of:

(i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB proceedings, Part VIIIB proceedings or section 106A proceedings; or

(ii) any part of such proceedings; or

(iii) any matter arising in such proceedings; or

(iv) a dispute about a matter with respect to which such proceedings could be instituted.

10M Definition of *arbitrator*

An ***arbitrator*** is a person who meets the requirements prescribed in the regulations to be an arbitrator.

10N Arbitrators may charge fees for their services

(1) An arbitrator conducting arbitration may charge the parties to the arbitration fees for conducting it.

(2) The arbitrator must give written information about those fees to the parties before the arbitration starts.

Note: There may be Rules of Court or regulations relating to the costs of arbitration and how they are assessed or taxed (see paragraphs 123(1)(se) and 125(1)(bc)).

10P Immunity of arbitrators

An arbitrator has, in performing his or her functions as an arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge.

Note: Communications with arbitrators are not confidential, and may be admissible in court.

Division 4—Court’s role in relation to arbitration of disputes

13E Court may refer Part VIII proceedings or Part VIIIAB proceedings to arbitration

(1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction in:

(a) Part VIII proceedings; or

(b) Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement);

may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.

(2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

13F Court may make orders to facilitate arbitration of certain disputes

A court that has jurisdiction under this Act may, on application by a party to relevant property or financial arbitration, make orders the court thinks appropriate to facilitate the effective conduct of the arbitration.

13G Family Court and Federal Magistrates Court may determine questions of law referred by arbitrator

(1) An arbitrator of section 13E arbitration or relevant property or financial arbitration may, at any time before making an award in the arbitration, refer a question of law arising in relation to the arbitration for determination by:

(a) a single judge of the Family Court; or

(b) a single judge of the Family Court of a State; or

(c) the Federal Magistrates Court.

(2) The arbitrator may do so:

(a) on his or her own initiative; or

(b) at the request of one or more of the parties to the arbitration if the arbitrator considers it appropriate to do so.

(3) The arbitrator must not make an award in the arbitration before the judge or Federal Magistrates Court has either:

(a) determined the question of law; or

(b) remitted the matter to the arbitrator having found that no question of law arises.

13H Awards made in arbitration may be registered in court

(1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:

(a) in the case of section 13E arbitration—in the court that ordered the arbitration; or

(b) otherwise—in a court that has jurisdiction under this Act.

(2) An award registered under subsection (1) has effect as if it were a decree made by that court.

13J Family Court or Federal Magistrates Court can review registered awards

(1) A party to a registered award made in section 13E arbitration or relevant property or financial arbitration may apply for review of the award, on questions of law, by:

(a) a single judge of the Family Court; or

(b) a single judge of the Family Court of a State; or

(c) the Federal Magistrates Court.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

(2) On a review of an award under this section, the judge or Federal Magistrates Court may:

(a) determine all questions of law arising in relation to the arbitration; and

(b) make such decrees as the judge or Federal Magistrates Court thinks appropriate, including a decree affirming, reversing or varying the award.

13K Family Court and Federal Magistrates Court may set aside registered awards

(1) If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered in:

(a) the Family Court; or

(b) the Federal Magistrates Court; or

(c) a Family Court of a State;

the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement.

(2) The court may only make a decree under subsection (1) if the court is satisfied that:

(a) the award or agreement was obtained by fraud (including non‑disclosure of a material matter); or

(b) the award or agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or

(d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

# Week 5 – Conciliation

## Definition

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| **NADRAC definition:**  Is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner, **identify the issues in dispute, develop options, consider alternatives and endeavor to r each an agreement.**  See how these are almost like key processes!   * The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution but not a determinative role * The conciliator may advice on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement |

In different areas of the law the term “conciliation” is used to describe a variety of dispute resolution processes. It can describe processes in which lawyers may or may not be involved. It can also describe formal court processes and more informal processes outside of courts.

However, conciliation is an important dispute resolution process for future lawyers and justice professionals to understand as in many court processes ‘conciliation’ is a necessary step in the court process. For example in family law cases where the issues include financial issues such as property settlement, a conciliation conference is a step in the court process before a case will be set down for trial. Usually a client will attend the conciliation conference with his or her lawyer (provided that the client is represented by a lawyer) and the conciliator may be an officer of the court with a legal background such as a family court Registrar.

* Used by different people in different ways:
  + Informal discussions between parties and external agency to try to avoid, resolve or manage a dispute; or
  + Like a settlement or evaluative mediation, usually attached to a court or other authority
* We are focusing on conciliation processes attached to courts/tribunals/ legal aid commissions

#### Statutory conciliation programs

Statutory conciliation occurs where the dispute in question ahs resulted in a complaint under a state. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute.

The conciliator is empowered to make suggestions as to the terms of settlement, provide advice on likely settlement terms and may actively encourage the participants to reach an agreement which accords with their own ideas or the requirement of the statute under which the conciliation is attempted.

Each agency will have its own terms as to how it carries out conciliation

* In some schemes it may be voluntary
* The conciliator may act as the conduit who speaks to one party at a time, usually by telephone, and transmits concerns and ideas from one party to the other without the parties actually speaking together

## Differences between mediation and conciliation

**See page 116 of the text**

The differences in the role that the third party facilitator plays in each process in turn affects the dispute resolution process and the appropriate role that lawyers should play.

* There is a compulsion to attend conciliation
* Imposition of the conciliator on the parties
* Lack of neutrality or impartiality in conciliation
* Imposition of the conciliator
* Strong intervention and use of rules and regulations
* Conciliation is more therapeutic
* Conciliation uses expert knowledge (contrast this to the low interventionist role of the mediator)

**Similarities**

* Both mediatory and conciliator are a neutral third party
* The processes of identifying disputed issues, developing options, considering alternatives and endeavoring to reach agreement are identical
* Neither the mediator not the conciliator have a determinative role
* Both may determine and advise on the process used

**Differences**

* Conciliator may have an advisory role on the contents of the dispute the mediator does not
* Conciliator may have an advisory role on the outcome of the dispute, the mediator does not
* The conciliator may make suggestions for terms of settlement, the mediator does not
* The conciliator may give expert advice on likely settlement term, the mediator does not
* The conciliator may actively encourage the participants to reach an agreement, the mediator is not so active in this regard

## When to use conciliation

**See page 118 of the SG**

* Industrial relations and workplace disputes
* Workers’ compensation
* Residential and retail tenancy disputes
  + See pages 124-129 of the text
  + Why was there a shift in Qld from mediation to conciliation
    - Parties needed information about law ie their legal rights: shadow of the law
    - So can make informed decisions
    - Mediation took too long
    - Conciliator can use active strategies to help parties settle:
    - Eg. suggest options
  + Conferences were less likely to settle when they were not in a court setting and when they were not convened by a court officer
* Human rights, equal opportunity and discrimination
* Family law

|  |
| --- |
| **Extract from Queensland Residential Tenancy Authority website**  **Available at: http://www.rta.qld.gov.au/what\_is\_the\_role\_of\_the\_conciliator\_.cfm**  **What is the role of the conciliator?**  The RTA's Dispute Resolution Service is staffed by trained Conciliators. The role of the Conciliator is to assist parties in dispute to resolve issues that they are unable to resolve themselves.  The Conciliator will telephone each party, and then pass relevant information from one party to another, in the aim that the parties may come to an agreement.  This is known as shuttle negotiation.  Alternatively, the Conciliator may decide that a 'face-to-face' meeting between the disputing parties may be the most appropriate way to resolve the dispute.  The Conciliator can:   * Contact and interview disputing parties over the telephone; * Provide information about the Residential Tenancies Act 1994 or the Residential Services (Accommodation) Act 2002. * Assist the parties to exchange relevant information including relevant documents such as receipts. * Facilitate the resolution of disputes by sharing offers and suggesting options. * Provide a Notice to enable an application to the Small Claims Tribunal for a hearing where a dispute remains unresolved.   Conciliators do not:   * Make decisions for disputing parties; * Make judgements about who is right, who is wrong or what the outcome of the dispute should be; * Tell people what to do; * Make rulings; * Force parties to participate in the conciliation process.   As part of the process Conciliators will note relevant issues in the RTA database.  This information is not admissible if the dispute progresses to the Small Claims Tribunal.  For further information about privacy of information, [click here](http://www.rta.qld.gov.au/rta_privacy_plan.cfm). |

## Legal Aid Conferences

* Hybrid
* Mediation/conciliation/early neutral evaluation
* Pre-requisite to grant of legal aid
* Compulsory in nature
* Lawyers attend
* Legal aid chairperson makes recommendations re future legal aid
* Could describe them as an facilitative mediation at the beginning and then an evaluative mediation towards the end
* The chair person has to make an assessment will continue to receive legal aid – so they are not facilitative (i.e. they are not advising on what might happen if they go to court) e.g. the chair person would be saying “look you are not going to get this when you go to court… you should be thinking about a certain other arrangement ... Think about legal aide, after this date you might not get any further legal aid so think about the offers you are making”
* This is often a compulsory process and it has been heavily criticised for being this way
* In Queensland if a person makes an application for legal aid for assistance with a family law dispute they will generally be referred to a conference (unless their case is inappropriate, for example, due to family violence).
* At present legal aid is only available to people of very low socio-economic means who have satisfied an income and assets test and who have also satisfied a ‘merit’ test being that they have prospects of success (a good chance of winning their case) if their matter proceeds to court. Further, in family law which is funded by the Commonwealth government, the case must fall within the Commonwealth funding priorities which determine the guidelines for funding used by legal aid commissions. However at present family law clients funded will receive legal aid for a lawyer and for their attendance with this lawyer at a legal aid conference.
* The applicant is invited to attend a conference at the relevant legal aid office which is organised by an administrative officer. The officer uses an intake process that consists of sending forms out to the legally aided party and the lawyer appointed for his or her by the legal aid officer. The forms are designed to ascertain whether the case is appropriate for a conference. If the administrative officer requires further information once the forms are returned he or she can telephone the client and or the lawyer. The conference is then organised and the other party sent a letter inviting them to attend.
* The process hinges on the cooperation of the other party. If the other party agrees to attend, a chairperson is booked for the conference. The chairperson is obtained from a panel of chairpersons which comprise of legal aid staff, private lawyers and social scientists with expertise in family law and family mediation. The conference is organised as a one-off process. However, in some cases another conference will be organised if some issues, such as child issues, were resolved but there are outstanding issues such as property issues to still be resolved. Funding is provided in Queensland for the conference to take up to four hours and it can be structured as an in-person conference or can be by way of telephone link-up or shuttle. Telephone conferences can assist where one party lives in a rural area. Either telephone or shuttle can assist where there are issues of family violence; however the intake process is carried out and determines that the victim of violence is able to participate in a conference.

## Albotelli’s defining features of conciliation

**See page pg 137**

* Advice – content of dispute
* Advice – outcome of dispute
* Suggestions – terms (content) of settlement
* Expert advice – terms (content) of settlement
* Encourage (actively) – (fact of) agreement

## Core competencies of a conciliator

**See page 144 of the text**

* Analysis
  + Assess the issues
  + Seek out necessary information
* Objective empathy
  + Establish rapport
  + Focus parties on interests
* Inventiveness and problem-solving
* Interpersonal skills
* Strategic direction
* Legislative framework
* Expert knowledge
* Multiple roles
* Personal flexibility
* Self-efficacy: personal power and psychological strength
* Managing expectations

## The role of lawyers in the conciliation process

**Advantages**

* Support role to client
* Can model co-operative non-adversarial negotiation behavior
* Assist parties:
  + provide relevant information (documents etc)
  + to focus on interests
  + with option generation
  + integrative bargaining
  + reality testing
  + with terms of settlement
* Draft the agreement:
  + explain the agreement to client
  + consequences of non-compliance
  + file the agreement in court
* Not all conciliation conferences allow lawyers to be present but – e.g. the legal aid conference does allow for this provided the party can afford to pay their lawyer. Could be the situation where one party has a lawyer and the other doesn’t – depends on funds. Good, in that they can help people understand offers, help people remain assertive, they can also advise on second thoughts and regrets.
* ‘Shadow of the law’
* Advise on what the law is ie. legal rights
* So client can make *informed decision*
* Stop client agreeing to unrealistic settlement
  + maintain assertiveness
  + not let them be warn down by people and process; or
* At least talk them through this and reality test
* Deal with second thoughts/ regrets!!
* Agreements are often made into a court order and that is binding – the order was approved by the register and so we can’t easily go back and change it – getting the court to set an order aside is normally a difficult thing to do.

**Disadvantages**

* Particularly:
  + If not familiar with dispute resolution process
  + If not familiar with the relevant law
* Attempt to interfere with process and structure
  + Cut through opening statements
  + Request shuttle conciliation in separate rooms
* Can model adversarial behaviour
* Can entrench positions (particularly unrealistic position if doesn’t know the law well enough)
* If inexperienced won’t be assertive enough with unrealistic client
* Can give up on the negotiation process
* Can be impatient with time

# Week 6 – communication

## Importance of communication to dispute resolution

* Many disputes have their origin in communication issues: namely either a lack of communication or misunderstandings in communication.
* Effective communication isn’t easy. It is a skill.
* Effective communication requires understanding (yourself and others), empathy, flexibility.

## First step: Understanding yourself and the person you are Communicating with others

### DISC Model

* Directing
* Influencing
* Stabilising
* Conscientious
  + We are all made up of a mixture of these approaches, but some dominate others.

#### A Directing Person

* Extroverted and task oriented
* Driven by results, recognition and challenges.
* Confident.
* Takes the lead.
* Effects change.
* May appear arrogant under pressure.
* May use adversarial approaches.
* Not always good team players.

##### To communicate well with a directing person

* Capture their interest.
* Gain their respect.
* Avoid direct challenges to their control.
* Focus on facts, concrete concepts and a systematic approach.
* Active listening is essential.
* Compliment, recognise.
* Don’t waste their time, waffle or be too hesitant.
* Avoid to much focus on feelings and emotions.
* Use an agenda – they are very logical thinkers

#### An Influencing Person

* Extroverted and people-oriented.
* Like change, new ideas, cooperation.
* Fear disapproval.
* Outgoing, enthusiastic, optimistic.
* Big picture oriented/not so good on the detail.
* May appear disorganised.
* May talk too much and listen too little.
* May speak before they think!

##### To communicate effectively with an influencing person

* Reflect their optimism and enthusiasm.
* Acknowledge the big picture/global perspective.
* Acknowledge feelings and creativity.
* If being critical offer an alternative idea or solution.
* Avoid becoming bogged down in detail too early.

#### A Stabilising Person

* Introverted and people-oriented.
* Reserved but work well in teams.
* Accommodating of others.
* Slow to recover if hurt.
* Prefer steady as opposed to sudden change.
* Need security, fear isolation and standing out.
* Patient, loyal, tactful.
* Might be prone to procrastinate.

##### To communicate effectively with a stabilising person

* Take time to develop a rapport.
* Ask for their ongoing feedback – what do they think?
* Be patient with eg silence – don’t fill the gaps!
* Make them feel valued.
* Minimise risk eg let them take advice or confer with others.
* Lead them with a systematic approach.
* Explain your position clearly.
* Expect them to take adversarial approaches personally.

#### A Conscientious Person

* Introverted and task-oriented.
* Need high standards, to be appreciated, to produce quality work.
* Fear criticism and imperfection.
* Reserved and focussed on immediate task.
* Systematic approach to work.
* Prefer to plan for change.
* Can be very cautious and inflexible.
* Need help to adapt and think creatively – and work outside an adversarial framework.

#### To communicate effectively with a conscientious person

##### Be punctual, organised, prepared, ethical and thorough.

* Follow the agenda.
* Focus on concrete concepts and facts.
* Support ideas and proposals with evidence.
* Emphasise the quality of your argument.
* Deliver what you promise.
* Expect them to take criticism personally.

## Step 2:Communication strategies

* Non-verbal communication
* Active listening
* Paraphrasing
* Empathy: reflective listening
* Focus on interests not positions
* Reframing
* Summarising
* Open and closed Qs
* [**People Skills : How To Assert Yourself, Listen To Others, And Resolve Conflicts / Robert Bolton.**](http://libcat.qut.edu.au/search/aBolton%2C+Robert/abolton+robert/1%2C1%2C5%2CB/frameset&FF=abolton+robert&2%2C%2C5)
* When meeting with something you should:
* Walk in looking organised
* Shake peoples hands and look into their eyes
* Do not talk too fast
* Use your voice to engage the other person
* Be aware of what you are doing and know that what you are doing is being seen and that it is being responded to in some way

### Non-verbal communication

* 84% of communication is non-verbal
* Posture
* Eye contact
* Use of voice
  + Tone
  + Pace
  + Vocal variation
* Body language

### Active listening

* Maintain regular eye contact
* Attending skills
* Show you are listening with nods, mms
* Focus on discovering client’s interests
* Use communication techniques

### Reflective listening

* Summarising – legal and non-legal concerns
* Reframing
* Questions – open/closed

## Attending skills

* A posture of involvement
* Appropriate body motion
* Eye contact
* Non-distracting environment

## Posture of involvement

* Face squarely
* Leaning forward
* Open body language  
  Appropriate distance

## Appropriate body motion

* Body not rigid and unmoving
* Avoid distracting motions and gestures
* Move body in response to speaker

## Eye contact

* Maintain eye contact
* Show interest and empathy

## Non-distracting environment

* Give person undivided attention
* Remove physical barriers?
  + Eg. desk

## Paraphrasing

* Restating back to someone what they have said
* Shows you are listening
* Helps them move to next point

### Paraphrasing eg

* I’m Rachael and I’m lecturing in Dispute Resolution for the third time this year. I have an interest in this area because I research and write about dispute resolution as well.
* So Rachael you said you were lecturing in this unit for the third time and that dispute resolution is an area of research interest for you.

## The power of empathy

* Show empathy
* Acknowledge feelings
* If client cries:
  + Don’t ignore!
  + First acknowledge the upset and hurt
  + May need to give time to re-focus
  + Then direct client back to the issues

## Reflective listening

* Deal with client’s feelings *as well as* the content
* Give them appropriate amount of time to vent their feelings
* Use empathy
* Use an appropriate tone of voice
* Use eye contact and open body language to show you are interested

### Reflective listening example 1

* I’m feeling really upset as the account you sent me was $4000 and I didn’t even get the outcome I wanted from the mediation
* I can see you’re feeling upset about my firm’s account, let’s sit down and talk about it and I can explain how the amount was calculated

### Reflective listening example 2

* Do say:
  + “I can see you’re feeling really upset”
  + “I can see you’re really frustrated”
  + “I can see you’ve had a bad time lately”
* Don’t say:
  + “ I understand how you feel…”

### Reflective listening example 3

* I’m really sorry to hear that has happened, it must have been very difficult to deal with. As your lawyer though I need to get enough information to give you some advice about this situation so let’s now focus on …
* This makes it possible to then appropriately use closed questions to elicit the relevant information

## Positions v interests

### Position

* Statement of what client wants

### Interest

* Underlying concerns/ things that client really wants to achieve

#### Example 1

* Position
* I want my kids half time
* Interest
* I am concerned about how the separation will impact on my relationship with my kids
* I want my kids as much as can be organised around my work commitments

#### Example 2

* Position
* I want to keep the house and the car and I don’t want to pay that \*!! a cent!
* Interests
* I’m wanting to stay in the house with my kids as it gives us some security
* I don’t know if I the bank would give me a loan

## Reframing

Boulle, Laurence, *Mediation : skills and techniques*, Australia: Lexis Nexis Butterworths, pp.115-118 on CMD

* Not just restating what client has said
* Taking what they have said and restating it in such a way that it moves them forward in the negotiation/ mediation/ conciliation
* Reframe statement in am overall more positive way
* Remove emotive language

## Boulle in Mediation, Skills and Techniques at p129 says

* Quoting: Charlton and Dewey, The Mediator’s Handbook
* Reframing is used not only to change the words being used but also the context of the party’s statement
* When done successfully it can lead to a change in perspective or perception on the parties’ part and this altered attitude or view can lead to changed behaviour.

## Different objectives of reframing

* Taking out the sting/detoxifying the statement.
* Shifting from position to interest
* Mutualising the problem
* Shifting from past to future
* Moving from a negative to positive perception

### Take out the sting/detoxify: partnership dispute

* Look the old bugger has to retire, and soon!
* So you would like to restructure the working arrangements of the partners?
* So you would look at the roles and contributions of each partner in the firm?

### Take out the sting/detoxify: contract dispute

* The builder is an idiot! Her appalling work has ruined my carpets!
* So this building job has been a bad experience for you?
* You’d like to talk about the impact of the work on your carpets?

### Shift from position to interest: family dispute

* Statement
* He can only have the kids if he promises not to leave them outside the casino for hours on end! It’s not right!
* Reframe
* So you’re concerned about how the children spend time with their father, you’d like to talk about what’s in the best interests of the children?

### Shift from position to interest: contract dispute

* He has to fix that roof tomorrow and he’d better give me $20 000 for the damage!
* So you are concerned to repair the roof as soon as possible and sort out payment issues?

### Mutualise the problem: family dispute

**Statement**

* She’s turned into a religion freak, I don’t want my kids being brought up in that religion and becoming like her!
  + Reframe
* So you are concerned about the types of religious values that your children will be exposed to?

### Shift from past to future: family dispute

**Statement**

* I’ve made many contact arrangements before and she doesn’t stick to them, she’s always late picking the kids up and I’m not prepared to wait around for her
  + Reframe
* So are you saying that we need to look at how contact arrangements could be organised so that they would work better for you in the future?

### From negative to positive perception: partnership dispute

* He takes forever to make simple decisions, even on small matters.
* What you’re saying is that he likes to think things through before making decisions?

## Summarising

* Summarise key points at appropriate times
* Client’s concerns/interests
* The legal issues
* Non-legal issues
* Your advice
* The action that can be taken

## Fogging

* Agreeing with all or some of the client’s statement

### Example

* It’s not fair, legal aid have refused me aid and I should get help to be able to spend some more time with my children, if I’d murdered someone I’d get legal aid wouldn’t I?
* I can see you’re feeling very frustrated, legal aid does has very tough guidelines that may not seem very fair, let’s talk about what options you do have available to you…

## Broken record

* Repeat same thing over and over until person does what you ask.

## Strategies when experiencing conflict

* Try to remain calm and collected under pressure
* Don’t panic or be rushed/pressured into making ill-considered decisions
* Use appropriate micro-communication skills eg. empathy, sensitivity
* Use appropriate communication and conflict resolution skills

## Effective Communication: The Environment

* The environment is very important to achieving effective communication.
* Macro and micro environment issues affect the way people communicate. How?

## Effective Communication: Nature of the Issues

* Legal dispute contexts vary but many disputes have an emotional content.

## Open and closed questions

* Open question: now tell me about why you are here to get advice today?
* Closed question: Where have the children been living since separation?

## Online dispute resolution

* Most useful when the parties are geographically separated
* Timing
* Reduction in emotional content
* If purely text parties can not even gain the benefit of para-language: Tone, Inflection, Volume, Pitch, emphasis etc.
* Words can be misinterpreted – the written word may come over more harsh or hard hitting.
* It’s harder to gauge initial reactions
* Harder for the mediator to assess credibility
* Computers are “cool” mediums that eliminate the warmth of interpersonal contact
* Harder to reframe questions/statements
* People use different critical evaluation tools to understand things that are said online
* Mediations outcomes are often heavily influenced by the environment that the mediation takes place in – the internet may have an unwanted effect without the parties even realizing.
* Not as secure or confidential

# Week 7 – Understanding Disputes

## The notion of “Without prejudice save as to costs”

* Called, colloquially, a Calderbank offer
  + see English decision of *Calderbank v Calderbank*  [1975] 3 All ER 333.
* "The making of a formal offer to settle the case, coupled with a warning that this offer will be disclosed to the Court in the context of the question of costs." – S Colbran, et al, *Civil  
  Procedure - Commentary and Materials*, 4th ed, 2009 at page 918.
* Allows "a discretionary consideration for the Court in determining the appropriate costs Order"

## What is conflict?

* State of negative feelings such as contempt, anger, fear, distrust
* Product of unmet needs physiological, psychological
* Normal product of human interaction
* Conflict is not a homogenous concept
* Conflict is “when 2 or more parties *perceive* their values or needs as incompatible, whether or not they propose, at present or in the future to take any action on the basis of those values”
* Conflict is an inevitable and persuasive aspect of human life. It arises within individuals and between individuals. It takes place within and between groups, organisations, communities and nations. Conflict occurs at home and at work and in the neighbourhood. It occurs across neighbours’ fences and across national borders.
  + **Gregory Tillett, *Resolving Conflict: A Practical Approach* (2nd ed, 1999) at 1 and 4.**

### When can conflict be a positive thing?

* When it:
  + Raises new ideas?
  + Provokes establishment of different, new or better ways of doing things?
  + When it is dealt with positively to be a catalyst for opportunity, progress, change?

## Differentiating between conflict and a dispute

***Conflict’ and’ Dispute’***

A conflict exists where at least one party perceives that his/her values, principles or needs are incompatible with one or more other parties’ AND wants to satisfy his/her values, principles or needs*.*

A dispute may be a particular manifestation of a conflict.

Disputes exist where at least one party perceives that his/her position, interests or behaviour are incompatible with those of one or more other parties’ AND wants to enforce his/her position or behaviour interests.

* **Spegel, Rogers and Buckley, *Negotiation, Theory and Techniques* (1st ed, 1998) 100**
* It can sometimes be useful to conceive of ‘conflict’ and ‘disputes’ separately
* A dispute can be thought of as a manifestation of a conflict
* In dispute resolution processes– we can’t always fix or resolve or heal the underlying conflict
* Some therapeutic interventions can aim to address the conflict in order to reduce disputes:
  + eg transformative mediation/counseling
* Conflict becomes manifest when one party seeks to resolve the clash of interests or needs by, for example, discussion, fighting, compulsion or seeking resolution in some other way.

## Conflict management vs conflict resolution

* Another point of differentiation is thinking of using non-adversarial skills to help with conflict management as a part of dispute resolution
* ie. in assisting parties to manage their conflict by reducing the number of disputes they may have, we can assist with moving towards a resolution of the base conflict

**Conflict resolution**

The phrase conflict resolution denotes terminating conflict by means that go to the root of the problem. Where conflict itself is resolved any disputes associated with that conflict are also, probably, addressed.

**Conflict management**

Conflict management, on the other hand, points to an outcome that the parties see as a solution even though the underlying conflict continues to exist. It of course follows from our definition of a dispute, that dispute resolution is different to conflict resolution.

Resolution of a particular dispute will not necessarily involve a resolution of the base conflict. It also follows, however, that the process of conflict management may well involve the resolution of a dispute.

## CONFLICT analysis

Preparation in dealing with conflict is extremely important, particularly for legal practitioners preparing for a negotiation, mediation or conciliation. Often the amount of time you can invest in preparation will ensure that settlement is more likely.

**Investigation**

At the outset you should engage in a non-judgemental gathering of as much information as possible about the conflict

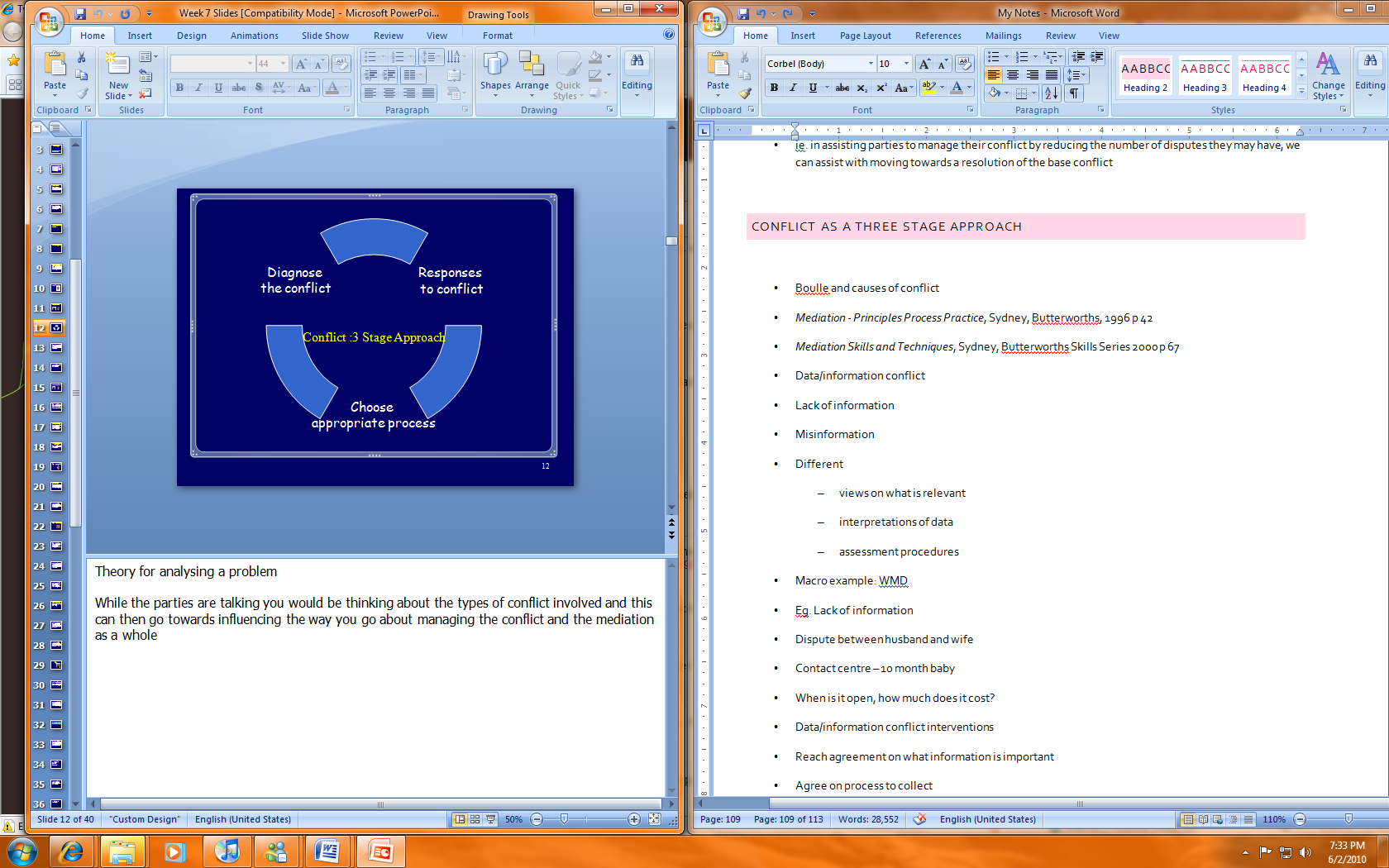
**Identification**

* For each participant identify:
* The problem; what is the conflict/ what are the conflicts?
* Any other participants: who are the people involved, in varying degrees, in the conflict?
* The relevant past: what is the history of the conflict, of the relationship between the parties, the history of each party that may be relevant?
* Pressures and needs: what is motivating the parties in the conflict?
* Projections of fears: what is obstructing the parties in conflict from resolution?

**The Resolution**

* Before beginning the process identify:
* Options for resolution
* Resources necessary for resolution
* At the outset seek agreement on:
* The problem/s
* The process to be used to attempt to resolve the conflict
* **Adapted from Gregory Tillett, *Resolving Conflict: A Practical Approach* (2nd ed, 1999, 23-24).**

## conflict as a three stage approach



* While the parties are talking you would be thinking about the types of conflict involved and this can then go towards influencing the way you go about managing the conflict and the mediation as a whole

## Moore’s sphere of conflict

Interest conflicts are caused by

Perceived or actual competitive:

Substantive (content) interests

Procedural interests

Psychological interests

Data conflicts are caused by

Lack of information

Misinformation

Different views on what is relevant

Different interpretations of data

Different assessment procedures

Structural conflicts are caused by

Destructive patterns of behaviour or interaction

Unequal control, ownership, or distribution of resources

Unequal power and authority

Geographic, physical, or environmental factors that hinder cooperation

Time constraints

Relationship conflicts are caused by

Strong emotions

Misperceptions or stereotypes

Poor communication or miscommunication

Repetitive negative behavior

Value conflicts are caused by

Different criteria for evaluating ideas or behavior

Exclusive intrinsically valuable goals

Different ways of life, ideology, and religion

Possible Data Interventions

Reach agreement on what data are important

Agree on process to collect data

Develop common criteria to assess data

Use third-party experts to gain outside opinion or break deadlocks

Possible Interest-Based Interventions

Focus on interests, not positions

Look for objective criteria

Develop integrative solutions that address needs of all parties

Search for ways to expand options or resources

Develop trade-offs to satisfy interests of different strengths

Possible Relationship Interventions

Control expression of emotions through procedure, ground rules, caucuses, and so forth

Promote expression of emotions by legitimizing feelings and providing a process

Clarify perceptions and build positive perceptions

Improve quality and quantity of communication

Block negative repetitive behavior by changing structure

Encourage positive problem-solving attitudes

Possible Value-Related Interventions

Avoid defining problem in terms of value

Allow parties to agree and to disagree

Create spheres of influence in which one set of values dominates

Search for superordinate goal that all parties share

Possible Structural Interventions

Clearly define and change roles

Replace destructive behavior patterns

Reallocate ownership or control of resources

Establish a fair and mutually acceptable decision-making process

Change negotiation process from positional to interest-based bargaining

Modify means of influence used by parties (less coercion, more persuasion)

Change physical and environmental relationships of parties (closeness and distance)

Modify external pressures on parties

Change time constraints (more or less time)

## conflict diagnosis

|  |  |  |
| --- | --- | --- |
| **Conflict diagnosis** | | |
| **Conflict category** | **Causes of conflict** | **Possible interventions/strategies** |
| Interest  (Goals/objectives) | * Neither party can achieve their differing goals/objectives without assistance from the other | * Focus on interests not positions * Stress implications of non-settlement |
| Data (information) | * Lack of information or conflicting information * Figures, data or documents incorrect/incomplete or differently interpreted | * Agree on what date is important * Organise for party to obtain necessary data * Find, correct, supplement data * Develop objective criteria to evaluate information |
| Relationship | * Strong emotions * Pattern of negative behaviour * The grieving process * Psychological problems | * Acknowledge and validate emotions * Avoid negativity through strict control of process |
| Structural | * Geographic or physical factors that hinder settlement * Unequal access to authority, information, resources, time and other sources of power | * Emphasise different sources of power * Ensure fair decision-making processes |
| Value | * Competing ideologies/world views * Religious and cultural values, basic life assumptions | * Focus on tangible interests * Search for overarching goals * Educate on ‘live and let live’ |

## Data/information conflict

* Lack of information
  + E.g. in a family dispute a husband and wife may not know when a parenting centre is open etc
* Misinformation
* Different
  + views on what is relevant
  + interpretations of data
  + assessment procedures
* Macro example: WMD

### Data/information conflict interventions

* Reach agreement on what information is important
* Agree on process to collect
* Obtain correct information
* Develop common criteria to assess information
* Use third party experts

## Interest/goals/objectives conflicts

* Parties have different goals /objectives
* Can’t achieve them without assistance from each other
* Eg. Interest/goals conflict
* Father wants to maintain a relationship with his children
* Mother does not want children to see their father
  + eg. allegations of physical abuse

### Interests/goals: interventions

* Focus on interests, not positions
* Look for objective criteria
* Develop solutions that address the needs of all
* Search for ways to expand options
* Develop trade-offs to satisfy interests of different strengths
* A way to expand options there is for the mediator to ask lots of questions
* Look at peoples underlying interests
* Separate positions from interests – there will be some underlying interests in common – that the children are kept safe and healthy – get them to talk about that. In that way the mediator an seek to expand options.
* This may lead to the discussion of how care for the child can be safe
* Are there short term solutions vs. long term solutions e.g. if there are abuse issues then they might agree that a supervisor be there for the first 5 months etcs

## Structural conflicts

* Unequal access to authority, information, resources, professional advice, time
  + Remember in some legal disputes one party may be an insurance coy with loads of resources and the other party may be an individual – may not be working and may not be able to afford a lawyer
* Geographic, physical, or environmental factors that hinder cooperation
* Time constraints
  + Eg. Unequal access to legal advice and representation
    - One party legally represented, one party not eg. McLibel case
  + Eg. Geographic factors
    - Parents separated and one moved interstate
  + Other parent wants contact
    - Underlying needs
    - Geographic considerations - cost
    - What options are there?

### Structural : interventions

* Provide equal access to authority, information, resources, professional advice, time
* Ensure fair decision making process
* Interest based bargaining cf positional
* Change geographic, environmental factors

## Relationship conflicts

* Strong emotions
* Misperceptions or stereotypes
* Poor communication
* The grieving process
* Patterns of negative behaviour
  + eg. negative intimacy
* Eg. Patterns of negative behaviour
* Don’t trust former partner to keep to agreement
* Believe they
  + “always break their promises”

### Relationship : interventions

* Allow expression of emotions
* Acknowledge feelings
* May need to control expression of emotions through procedure/ ground rules/ private meetings
* Avoid negativity through control of process
* Create an agenda
* Acknowledge that people are upset – reframing, paraphrasing and resummarising, having a break, letting people talk to each of their lawyers separately

## Value conflicts

* Competing ideologies, world views, religious and cultural values
* Different basic assumptions about life and the universe
* Different parenting styles, ways of life, morals
* Examples
  + Different religions or one person religious and other not
  + Different parenting styles – discipline
  + Diverse lifestyle choices

### Value conflict interventions

* Can each live with the other’s values?
* Search for overarching goals that all parties share
  + ie. what are their interests?

## Diagnosis of the conflict

* Most conflicts have multiple causes
* Identify the central causes of the conflict - this is often done by trial and error - generating theories about the cause/s of conflict and testing them.

## How do interventions work?

* Conflict is often the result of poor communication in either:
  + quality
  + quantity; or
  + form

### Quality of information

* “if the *quality* of the information exchanged can be improved, the right *quantity* of communication can be attained, and if these data are put into the correct *form*, the causes of the dispute will be addressed and the participants will move toward resolution”

C.Moore at p. 28

## Conflict

* Mistaken
  + Real perception of conflict
  + Based on miscommunication or misinformation
* Genuine
  + Incompatible
    - Values
    - Goals
    - Personality disputes
* Contrived
  + One party prolonging the conflict
    - For revenge
    - Cost other party in legal fees
    - Maintain relationship with other “negative intimacy”

## Possible Responses to Conflict?

* **Avoid:** Do no enter into a dispute so you do not engage in the conflict – do not confront the people
* **Accommodate**: do you give in and just let the other person do what they need to
* **Compete:** adversarial negotiation type: when one person is wanting to win and the other person to loose
* **Compromise**: is common, as often people have to compromise – series of confessions and trade offs – can form the basis of integrative negotiation
* **Collaborate:** based on the interest based negotiation method

## Select Appropriate DR Process

* Identify the types of conflict
* Identify client’s response
* Then decide on process

## Ways to Resolve Conflict

* Different types of conflict
* Range of responses to assist
* Identify type of conflict first
* Determine client’s response
* Then choose dispute resolution process
* Advantages to parties coming to own agreement

# Week 8 – Issues for Vulnerable Participants: Power, Culture and Dispute Resolution

## What is negotiating power?

Spegel, Rogers and Buckley say that (1998, 173):

'In terms of negotiating, power is the **ability to influence others**. A distinction must be made between:

* Sources of negotiating power;
* Negotiating power itself; and
* Influence.

If you are unable to identify the sources of power available to you, although the sources may exist and be real, you will limit your ability to influence the other side. For the sources to be translated into negotiating power, they first need to be recognised.

Power is largely based on perception. What the other party thinks about your power is directly relevant to how much you actually have. As a negotiator you need to assess your own negotiating power in the context of the other side’s power.

Fisher distinguishes between:

* The other side being aware of the power you actually do possess; and
* The other side believing you have power you actually do not possess.

He labels the first case ‘real negotiating power’. In the latter case there is only the illusion of power which may be as effective as real power provided the illusion exists.

## Assumptions about power in the dispute resolution process

Professor Boulle has identified a number of assumptions about power that can be made in the context of dispute resolution (particularly informal processes) (2001, 224–225):

* 'There are almost always some power disparities in the resolution of disputes.
* There are many different contexts in which there might be disparities of power between the parties. Some of these are self-evident:
* the large employer and the individual worker;
* the large trade union and the small employer;
* the professionally advised insurer and the self-represented claimant;
* the personally articulate party and the poorly-educated party.
* Other power disparities may not be self-evident, especially to outsiders such as mediators who might never understand the real power dynamics at play between the parties.
* Power is a complex phenomenon and all negotiating parties have some sources of power, although they may sometimes be very slight. Power can derive from many sources, besides the obvious source of money:
* it could come from knowledge and understanding (legal, financial, emotional);
* from the ability to damage or reward;
* from access to authority and the media;
* from rules, standards and principles and their precedent power;
* from the simple morality of the situation
* from reputational needs;
* and from attractive alternatives to negotiating a settlement for one or other party (their Best Alternative To a Negotiated Agreement or BATNA)

## Sources of power

Some sources of power have been mentioned in the quotation from Boulle above. Spegel, Rogers and Buckley categorise sources of power in the following way (1998, 173–180):

### Knowledge power:

**T**his consists of knowledge of the other party, expert knowledge, access to expert knowledge, independent expertise to support your argument such as an expert witness, authority to support your argument such as legislation, precedent, and evidence of industry practice.

### Process power:

This consists of power in relation to the negotiating environment (such as when and where negotiations take place, who attends, who sets the agenda etc), power in relation to coalition building (that is, identifying and coopting allies outside the dispute to support you), power in relation to the planning of concession maneuvers (that is, the ability to work out what you can live without in order to get what you want), power in relation to generating options which will appeal to the other side, and power in relation to having a developed Best Alternative To a Negotiated Agreement (BATNA) that you can walk away from the negotiation feeling comfortable.

### Relationship power:

This consists of confidence and charisma, interpersonal power (that is, an ability to influence others through interpersonal strategies and skills), the power associated with the issue of future interaction (that is, there is power in the likelihood of future dealings), and reputation.

### Structural power:

This source of power is based on structural differences between negotiators such as the social, political and organisational structures within which people operate, how organizations are positioned in relation to other organizations and who controls resources. Where there are inequalities in structures, there is structural power for at least one party.

## Power imbalances

Where the power of the parties is different the possibility of an imbalance of power arises that may mean that the outcome of the dispute is unfair to the weaker party.

Some obvious examples of situations where power imbalances might exist include:

* Cross-cultural disputes
* Juvenile crime
* Environmental disputes
* Consumer disputes
* Workplace disputes
* Corporate disputes where one company has more money/resources than the other
* Insurance/claimant disputes
* Family disputes where there is a history of domestic violence between the parties.

### Situations that may present themselves in practice

* Clients (or opponents) with power resulting from knowledge, wealth, societal standing, education, language.
* Parties (or opponents) who lack power in terms of knowledge, wealth, societal standing, education, language.
* Parties (or opponents) who enjoy some sources of power but not others.

Parties who are seeking your assistance to resolve their dispute are giving you power, and respecting your knowledge and expertise.

## Power imbalances in the context of mediation

The issue of power and concerns about power imbalances are particularly controversial in the context of mediation.

There are two key issues:

1. Whether mediation is appropriate when there is a power imbalance between the parties; and
2. What is the role of mediators in the mediation process in relation to power dynamics and power imbalances.

## Analysing whether mediation is appropriate when there is a power imbalance between the parties

Generally on this issue it is agreed **that if there is a gross imbalance of power between the parties then mediation should not proceed.** This is basically because mediation is a consensus-based dispute resolution option and a power imbalance will significantly and unfairly impact on a party’s ability to agree freely to an outcome that satisfies their own interests.

An obvious area where there is great concern about the use of mediation to resolve family disputes is when there is a history of **domestic violence**. **Physical violence is not needed to create such an imbalance; emotional, financial, sexual and social violence will also create an enormous power differential between the parties**. As domestic violence is an important issue for many lawyers in practice this issue will be considered in some detail.

Some commentators take the view that to deny women access to mediation on the basis of a history of violence is patriarchally patronising and disempowers them as it removes their ability to make choices for themselves. Others, like myself, will argue that in order for a woman to choose the mediation process in such circumstances she must understand fully the issues she faces and their possible impact on the outcome of the mediation. She must also have access to alternatives to mediation if the choice is to be a real one. Others will say that it is never safe to mediate cases that involve a history of domestic violence.

### Think about the following points in relation to the mediation of disputes which involve domestic violence:

* A victim’s fear of having to relive abuse during the mediation.
* A victim’s fear of the possibility of reprisals (i.e. that the violence against them will escalate after the mediation - especially if they disagree with or contradict the perpetrator).
* Importance of adequate intake procedures in 'screening' parties and providing women with enough information to make an informed choice about whether it is appropriate to proceed
* The fact of violence should never be mediable. That is, you can’t negotiate about the issue of the occurrence of violence.
* The cessation of violence must never be conditional on the victim's agreement to do or not do anything.
* Difficult issues must not be avoided in order to reach an agreement. The possibility of no agreement must remain open.
* Note some of the feminist critiques of the values of mediators and the possibility of achieving neutrality.

## The role of mediators when there is a power imbalance

Professor Boulle describes three different approaches to the role and responsibilities of mediators where there is a power imbalance (2001, 225):

* First, 'it is argued that mediators are intended only to conduct the mediation process fairly and impartially, and they should not in their capacity as mediators assume the responsibility of redressing power imbalances which derive from circumstances outside the mediation.'
* Second, 'it is said that mediators do have some responsibilities in relation to certain power imbalances and if they do nothing about them one party may be severely disadvantaged, the agreement may not last, the mediator may be sued, and the reputation of mediation may be adversely affected. For writers such as Tillett (Resolving Conflict, 2nd ed, 1999, 82) one of the most important functions of the mediation process is the 'empowerment' of weaker parties so that stronger parties do not prevail through might alone. However, the extent of this empowerment function is not always clear.'
* Thirdly, an alternative approach is a middle path through the first two. That is, 'that mediators do have some responsibilities over the power issue but that these should revolve mainly around their control over the process of mediation. Mediators are neither the advocates of the less powerful party, nor the champions of the poor and oppressed. The focus here is on practical ways mediators can deal with the power issue through their control of procedure.'

**Additional notes from lecture:**

* Karen Nickel Meadow??? From the states???? – She says that in mediation the remedies are limitless – just depends on the extent of your imagination – and this is empowering – it is possible to satisfy both parties needs… requires patient, a good framework
* We can’t make assumptions that these things will always happen – sticking with mediation – you can’t assume that giving them a chance to speak will address the power imbalance (power and control) if there is an entrenched violence in that relationship then the perpetrator of that violence will still have that power even if they appear calm etc. Could be the use of a word or reference to a certain situation etc. that shows the victim who has the power and they may be coerced into an outcome that they don’t want and is not really safe for them into the future
* There is no real accountability in relation to what happens in the process – there is no transcript of what is said, its confidential – nothing is submissible so there is little redress for a person that gets the wrong end of the stick

## Using power in dispute resolution contexts

Power, which party has it, and who thinks they have it, is certainly important in terms of how disputes are resolved or managed. Understanding the power dynamic in a dispute resolution situation is the first aspect of dealing with it.

'Negotiating power is the ability to persuade. Persuasion is putting power into practice. It is the application of power to influence someone else’s decision. If you have power, it does not necessarily follow that you know how to apply it in order to effectively influence the other party. You must master the art of locating power and applying it to achieve the outcomes you want. Power is useless without the ability to harness it for effective negotiation outcomes.

### Four steps from power to persuasion

There are four steps to lead you from power to persuasion:

1. Identify your negotiation objectives: the interests you want fulfilled.
2. Identify your own and the other side’s sources of power.
3. Improve your own power base.
4. Apply your power by using specific strategies and skills to influence the other side and achieve your objective.'

Let’s focus on the last two steps:

#### How can a person improve their power?

Spegel, Rogers and Buckley (1998, 182) say to: 'Ask yourself: Are there any more sources of power to which I could have access? Over what sources do I have any degree of control? Is there any way I can improve my power based on the resources I have?

Improving your power requires thorough research and preparation. When you think that you cannot improve your power any more, look again. Look in particular to sources of process power such as coalition building and improving your BATNA as these are often underestimated or completely overlooked. Yet these sources of power can provide enormous scope for you to enhance your negotiating power. In terms of improving your BATNA make preliminary inquiries as to the willingness of third parties to deal with you and assess the likelihood of being able to achieve the type of outcome you want with third parties. If you are negotiating the settlement of a dispute, consider the application of other dispute resolution mechanisms such as mediation or adjudication. Assess how much they are likely to cost you and the other side.'

#### How can a person apply power to persuade the other side?

'Putting power into practice means persuading the other side. In other words, your goal is to influence the decision-making process of the other party. As a rule of thumb, it is wise to rely on several sources of negotiating power and not just your strongest. The other side may respond more favourably to a combination of persuasive strategies which do not threaten his/her interests, rather than an assertive display of your most powerful card. In other words, what matters in negotiation is not only the outcome but also how you achieve the outcome. How you choose to persuade the other party may have repercussions not only for the implementation phase of the negotiation, but also for future dealings. The effective application of power hinges on thorough preparation and skilful communication techniques.'

## Culture and disputes

Cultural difference has great relevance for studies of conflict and dispute resolution at both a local and international level. From international commercial negotiations to multi-cultural awareness training for police officers, it has generally been recognised that better understanding of cultural differences can play a major role in preventing and resolving disputes. Cultural factors have significance for the ways in which people communicate. Different negotiating skills, ways of interpreting words and concepts can all affect the outcome of a dispute. Culture is also important in the study of dispute resolution processes. Some dispute resolution processes have been held up as having particular significance for certain cultures or the capacity to protect cultural integrity more appropriately than others.

There are, however, problems with defining culture. In any conflict situation involving culture, there is the possibility of conflicting views about cultural norms.

## Important issues in cross-cultural disputes

* The multicultural nature of Australian society means that large numbers of people do not speak English as a first language. Many migrants either cannot, or have no ordinary need to, speak or understand English fluently. This may lead to an inadequate knowledge of legal and social rights and the ability to enforce them.
* Apart from language, cultural differences in relation to the interpretation of words and approaches to conflict may make the resolution of conflict or disputes uncertain between people of different cultures. Some good examples of this include the less direct and more roundabout way of communication among Indigenous people; or the strong emphasis on politeness and respect necessary for successful negotiations within certain Asian cultures. Such uncertainty will usually end up disadvantaging those who are already marginalised by the legal process.
* Cultural relativism is also a potential issue in cultural disputes. This is where, out of respect to difference and diversity in cultural practice, equal status is ascribed to every perspective and every existing cultural practice. This approach gives cultural groups the space to develop their own practices, however, it may also, problematically, legitimise existing practices which replicate power differentials within a cultural group that discriminate against certain less powerful parts of the group. There is a fine line, then, between imposing the universalising tendencies of liberal 'rights' and respecting the integrity of particular cultural practices. It is important to understand culture not on face value but by critically evaluating the place of particular practices within cultures.
* Another issue in terms of understanding cultural conflict is that of difference in terms of how societies fundamentally approach seeing themselves as a whole. Some cultures are ***homocentric*:** that is, they emphasise the social unit or community as more important than the individual. These societies stress the interdependence of people and structures and aim for social harmony rather than personal gain. **Homocentrism** values reciprocity, obligation, duty, security, tradition, dependence, harmony, obedience, equilibrium and proper action. The form of communication in homocentric cultures is usually high-context (where very little of the message is in the transmitted part of the message, much is in the context).
* In contrast, western culture can be seen as ***egocentric*:** that is, where the self and self-realisation are valued over community. The focus of our society is on individualism, self-creativity, self-expression, self-preservation and personal freedom. Assertiveness and competition are guiding norms. Our society tends to focus on the fight for individual rights and individual justice rather than mutual interests. In addition, much communication is low-context (requiring little in the way of non-verbal context to explain).

## Criminal justice conflicts and Australian Indigenous people

Some of the starkest examples of how cultural differences affect negotiation practices and conflict resolution may be found with the position of Australian Indigenous people. The Australian Law Reform Commission Report No. 31 (on the recognition of Aboriginal customary laws) suggested the use of traditional dispute resolution and punishments where possible for Indigenous people.

The vast over-representation of Indigenous Australians in correctional and detention centres and high arrest rates can be explained by a number of factors including:

* Racism in policing
* Cultural insensitivity in policing
* Misunderstandings over the meanings of words
* Structural disadvantages which encourage and force Indigenous people to break the law
* Lack of knowledge of evidentiary procedures
* Differing definitions of appropriate behaviour between police and Indigenous communities.

### Murri Court

The Murri Court in Queensland can be used when an Indigenous person is being sentenced after being convicted of a criminal offence in the Magistrates Court.

|  |
| --- |
| **What is the Murri Court?**  The Murri Court is a Queensland Magistrates Court which deals with sentencing Indigenous offenders. The Murri Court takes into account cultural issues by providing a forum where Aboriginal and Torres Strait Islanders have an input into the sentencing process. The Murri Court principles tie in with s.9(2)(o) of the *Penalties and Sentences Act 1992* and s.150 of the *Juvenile Justices Act 1992*.    **Who is eligible for the Murri Court?**  The Murri Court handles only Aboriginal and Torres Strait Islanders who plead guilty to an offence and both the prosecution and offender consent to the matter being dealt with in the Murri Court. The offence must be one which falls within the jurisdiction of the Magistrates Courts of Queensland.  In referring matters to the Murri Court the legal representatives will take into account the following:   * The indigenous descent of the person * That the offender pleads guilty to the offence * That the matter can be adequately dealt with summarily in the Magistrate or Children’s Court.   There is a distinct possibility of the person being sentenced to imprisonment, or if they are already in prison, receiving a further custodial sentence.  The court will then determine to adjourn the matter to the Murri Court for sentencing at a later date.    **How does the Murri Court work?**  When an Indigenous person wishes to plead guilty to an offence in a Magistrates Court, the offender is sent to the Murri Court for sentencing at a later date. The Murri Court is presided over by a Queensland Magistrate who is advised by Indigenous Elders or respected persons on cultural issues.  The Magistrate will talk with the offender, his/her legal representative, the offender’s family, an Indigenous Elder, the police prosecutor, a Corrective Services representative and the Community Justice Group if available. A Department of Communities representative may be present where children are involved.  The Magistrate may ask that a case plan be devised for the offender by Corrective Services. In some communities, case plans will generally be worked out in consultation with an Elder, the offender's family and the Community Justice Group representing the local community. Other service providers such as drug, alcohol, psychological and violence treatment agencies may also be included.  The case plan will then be put before the court, where the Magistrate can speak with an Elder to clarify parts of the sentence option and the cultural suitability of the sentence.  Whilst the law that is applicable in the Murri Court is the same as that in a conventional Childrens Court or Magistrates Court, the proceedings are slightly less formal in the Murri Court. For example, in the Brisbane Magistrates Court the Magistrate, Elders, offender and other participants sit at a table close to the defendant rather than on a raised bench, and the participants are generally not required to stand when addressing the Murri Court, as is normally the practice in the Childrens Court or Magistrates Court.  These extracts have been taken Information Sheet, Queensland Government, Murri Court from: <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm> |

## Improving the legal system’s approach to multiculturalism and the law

1. Provide interpreting services for people of NESB
2. Provide education about legal norms which are culturally alien to non-Anglo-Celtic traditions
3. Educate police, courts and legal profession in cross-cultural awareness to eliminate insensitivity, prejudice and lack of awareness
4. Adapt the substance of Australian law to reflect the cultural mosaic of Australian society

# Week 9 – Restorative Justice

## Restorative Justice

An important application of mediation in the criminal justice context is victim-offender mediation. This form of mediation also has particular relevance for legal professionals.

### Background

Criminal conflicts involve us in some of the most important debates about human nature, the 'good society' and the role of the state in establishing an orderly social framework for us all to live in.

Currently, the criminal justice system sees crime is an infringement of legal norms, which are punishable by sanctions from the state. This may in some cases involve the state as the victim (e.g. theft, corruption, treason etc). More often however, the person wronged by an offender is a fellow citizen, who the state protects through intervention on their behalf.

Within this context, two key models exist which interact to provide the rationale behind changes in criminal justice policy.

**The *justice model*** developed from traditional liberal theory, which is still the perspective that underpins the Anglo-American legal tradition. It sees humans as free, rational and responsible agents who have the ability to determine their social circumstances rather than being at the mercy of greater social forces. The role of criminal court adjudication under this model is to decide whether there has been individual culpability by a citizen deemed responsible for a crime. If there has been a deliberate anti-social act, the court must find a fitting punishment which corrects the imbalance of freedoms caused by the infringement. Under this model, the state is seen as a threat to the freedom of the individual and there are a range of legal and procedural formalities in place, designed to ensure the defendant is not at the mercy of the state.

**The alternative model is the *welfare model***, which is intellectually grounded in ideas of communitarianism and socialist conceptions of society. Humans are generally understood as being intimately connected with the community in which they live. Individuals are seen in terms of a social context that both shapes people's needs and is able to satisfy them. In this model, the state actively intervenes and implements social policy in the criminal justice arena. Law has a legitimate role to play in securing the social good. Emphasis is placed more on the needs and interests of the community and the perceived needs and interests of the participants than on individual rights. Decisions of a welfare-oriented court are less a response to the individual culpability of the defendant and more a reaction to their perceived needs as manifested by criminal wrongdoing. Crime is seen as a personal pathology that the order of the court is designed to help cure.

At one time welfare ideals have been prominent and at other times, justice perspectives have taken precedence. The welfare model reflects a concern to involve human science professionals such as psychologists, social workers and therapists in addition to (or instead of) lawyers and police. The emphasis in sentencing is on rehabilitation and curing a supposedly sick individual. The harsh effects of the traditional justice approach were seen to be inappropriate for dealing with the vast majority of offenders. The welfare model fits in with the general rise in state involvement in community life, emphasising the role of the state and courts in promoting 'good' behaviour. By contrast, the justice model emphasises the role of the legal professional in processing offenders. While the individual rights of the offender are important, so too are their responsibilities. The primary concern under the justice model is with punishment and retribution for wrong behaviour rather than the provision of a ‘cure’ for the offender.

Since the 1970's, there has been a steady move back from the welfare model, towards an emphasis on justice with the corresponding focus on individual responsibility, legal rights and punishment. Some of the reasons for this include:

* Frustration at the apparent failure of welfare in providing cures for crime.
* A political change of mood back to a focus on individual responsibility.
* The welfare model was seen to treat offenders both too leniently (because of entrenched sentencing practices) and too harshly (because of the role of discretion).

Concerns exist, however, not only with the welfare model but also with the justice model. This is because:

* Neither model appears to work as a deterrent
* Both models disregard the rights of victims
* Both are insufficiently linked to actual community values or subject to community control
* Both focus on the individual offender as the problem, rather than making a detailed understanding of the act of offending.

In response to these real and perceived inadequacies, there has been a growing interest in a third way of resolving criminal conflicts between victims and offenders which transcends the retribution/rehabilitation dichotomy—the *restorative justice model (also known as reparative justice)*. This model attempts to reconcile victim and offender or at least restore links between the parties as members of the same community.

## Justice model versus the welfare model

### Justice Model:

* Is based traditional liberal legal theory that:
  + still underpins the Washminster systems;
  + sees humans as rational, responsible agents who have the ability to determine their social circumstances and therefore deserve punishment for flouting societal norms with criminal conduct;
  + positions the State as the protector of social order but also as a potential threat to individual freedom;
  + ensures the legal system provides legal protections for accused persons.

### Welfare model:

* + Grounded in communitarianism and socialist conceptions of society.
  + Sees individuals within their social context.
  + Sees the state’s actions in the criminal justice arena as an implementation of social policy.
  + Sees the law’s legitimate role as being to secure the social good.
  + Sees the law, and courts for example, as being ‘here to help’.

## Victim-offender mediation as a manifestation of restorative justice

**\*\*sometimes called conferencing**

The main way in which restorative justice has been introduced to the criminal justice system has been through victim-offender mediation programs.

‘Basically victim-offender mediation involves bringing the offender and victim together in a controlled, structured mediation environment where the process facilitates discussions between them.

* **Offenders** are given an opportunity to explain why they committed the crime - what their life context is, and how they feel sorry for having committed the crime or regret what they have done.
  + Can explain their context and the reasons behind committing the crime.
  + Can apologise and make amends.
  + Can understand the true human impact of their actions – on individuals but also community.
  + Can make-up for what they have done.
* **Victims** are given an opportunity to explain the impact of the crime on them - their response to the crime and to the offender.
  + Aids in getting them to see things differently, take things seriously and to help them see why they shouldn’t reoffend
* Helps victim to manage the impact of the crime committed against them
* Can explain the impact of the crime on them
* Can be angry, sad, disappointed – articulate.
* Can experience community support for the way they feel – ie removing the isolation.
* Can be apologised to.
* Get compensation or reparation.

The end result is hopefully a better understanding between the two parties that restores some sort of balance between them—allowing each to move on from the criminal event. In particular, the hope is that the offender will be deterred from re-offending, having been able to see first hand the direct impact of what they have done on another human being.

### three main models of victim-offender mediation.

1. Mediation instead of charging offenders
   1. Diversion out of the crime environment so that they might get out of the social context that led them to where they are
2. Mediation as part of sentencing or probation
3. Pre-sentence mediation - adjournment model.
   1. So they have admitted that they are guilty – so where all the parties agree it brings the offender etc together and the result of this is that there is then a positive effect – if there is a positive outcome then that may have a mitigating effect on the sentence

#### A pre-sentence model has the following advantages:

a) It is a court-based system, which is open and accountable.

b) It can operate without legislative amendment.

c) It is resource efficient.

d) It doesn't usurp the function of the court in determining the guilt or innocence of the accused.

##### This model usually requires

* Agreement of relevant court.
* Consent of all parties – victim and offender.
* Guilty plea of offender.

## The goals of victim-offender mediation

**According to Mason (1992)**

* Benefits to victims
* Reformative effect on offenders
* Deterrent effect on offenders
* Educative and preventative role in maintaining core community values.

### The benefits to victims include:

* The possibility of compensation
* The involvement of victims in the process and the reassertion of a degree of control
* The opportunity to vent feelings, seek reconciliation and understand the motives of the offender
* Restoration of faith in the criminal justice system.

Mason (1992) provides some criticisms of the use of mediation in the criminal context, particularly from the perspective of victims. He argues that such schemes are more concerned with the rehabilitation of offenders than with victims' rights and are a reflection of a criminal justice system in crisis that requires a cheap alternative.

## Victim-offender mediation in the context of juvenile justice

* Re-integrative shaming – Braithwaite.
* Need for family and community support structures for it to work.
* Separating the act from the individual – sound familiar?
* Criminal trial = degradation ceremony? VS reintegration of RJ?
* Preventing deviant or destructive personality elements in youth from becoming dominant.

For most of this century the welfare model has been used in relation to juvenile offenders as a way of preventing the harsher effects of the justice model on young people. As with the rest of the criminal justice system over the last two decades, however, there has been a move from the welfare model back to a focus on the justice model in relation to juveniles.

In the past, **welfare model-oriented** juvenile justice legislation aimed at protecting vulnerable children through the benign intervention of the courts. By contrast, **justice model-oriented** laws treat children as independent, rational, legal actors who are given the same rights and protections as adults. Given the dissatisfaction with the results of these two models in the adult arena, it is not surprising that there have also been moves to introduce forms of restorative justice in dealing with juvenile offenders.

**One model which has attracted a lot of attention** and which has been trialled in a number of jurisdictions in Australia and New Zealand is based on the theory **of 'reintegrative shaming'** developed by **John Braithwaite.**

Braithwaite's ideas are presented in his 1989 book *Crime, Shame and Reintegration* where he suggests that shame can act as a social regulator which prevents individuals interfering with the rights of others and which can (if utilised appropriately) reintegrate offending individuals to their community.

### The key concepts in Braithwaite's theory are:

* communitarianism:- the interdependency of individuals
* shaming:- expressions of disapproval
* re-integrative shaming: shaming followed by forgiveness and reintegration to the community.

In its application to juvenile offenders Braithwaite's model requires the presence of family structures or other support networks for both the victim and the offender so that it is possible to focus on the criminal act rather than the goodness or badness of the offender**. An essential element of the concept is separating the act from the offender to reinforce the self-respect of (particularly) young offenders**. Braithwaite argues that criminal trials operate as degradation ceremonies and that rather, the emphasis should be on the reintegration of the offender. He also recognises that individuals hold multiple identities and that particularly with young offenders it is important to ensure that deviant and destructive identities and behaviours should not be allowed to become dominant.

### Facing the demons DVD

* + Attitudes of participants.
  + Approaches of facilitator.
  + Social context to the crime.
  + Impact of the process on the participants.
* Involves a crime that happened in the outer suburbs of Sydney the crime was that a pizza hut worker some people came in armed and he was the first person in the store and he got shot – they took the days takings and they got into a car and disappeared – they were all apprehended, only one person shot the victim but they were charged. Terry O'Connell was one of the first cops who really promoted RJ in the criminal sphere he was in wagga so the model that he is famous for is the wagga wagga model and is in the DVD
* Lots of the DVD is interviews with participants – it ends up that the person that actually shot the victim chooses not to come – the key people there are Carl and Andrew – Carl = brother of one of the people that were there and Carl introduced everyone to each other – Andrew drove the get away car
* The victims' mother was there and her life had basically fallen apart
* Friends of the victims from school also attend – as well as the people that were at the pizza hut when it all happened
* Emphasis is on the transformation of the offenders
* Once it’s all done the prisoners are bought into the room – you notice that at the start there is a brief introduction but there is a sense in the DVD that you’re not sure what has been cut out – is this introduction give the parties enough time to settle into the environment
* Look at pg 128 and 129 of the study guide and look at the Brett Mason article – so think through whether you agree with that perspective

# Week 9 – Therapeutic Jursiprudence

New concept – we will not be examined on it fully

* A new way of thinking – a new paradigm.
* Pure theory vs practice related theory.
* Asks legal actors to scrutinise the outcome of their actions and of legal processes.
* Focus is on considering the well-being of participants.
* What is the effect of law and legal processes on clients?
* How is their well-being affected by the system?
* **Therapeutic Jurisprudence**
* Therapeutic jurisprudence is a new way of thinking about the role of the law, of lawyers and of the legal system. The following discussion about therapeutic jurisprudence has been adapted from Kathy Douglas and Rachael Field, “Looking for Answers to Mediation’s Neutrality Dilemma in Therapeutic Jurisprudence” *Murdoch E-Law Journal* November 2006 – see http://www.murdoch.edu.au/elaw.
* **“Therapeutic Jurisprudence**
* Therapeutic jurisprudence offers an alternative paradigm in which to situate and ground mediation practice. For professional mediators it offers a new way forward for conceptualising their practice without value-laden pretences associated, for example, with the myth of neutrality.
* Therapeutic jurisprudence is a relatively recent concept in the development of legal theory. Sometimes described as an approach to practice rather than a theory,[[8]](#footnote-8) therapeutic jurisprudence is considered to be a new way of looking at the law.[[9]](#footnote-9) Therapeutic jurisprudence in the legal context asks legal actors, and traditional legal processes, to submit to a new kind of scrutiny by making the legal outcome of actions, including legal decisions of lawyers, judges and others participating in the legal system, the central focus of consideration.
* In looking not only at the content of a case but also the process, therapeutic jurisprudence concerns itself with effects on the well-being of participants.[[10]](#footnote-10) The theory asks questions about the effect on clients of the law; and of the impact on the emotional life and psychological well-being of those affected by our justice system.[[11]](#footnote-11)
* Originating in the area of mental health law therapeutic jurisprudence attempts to chart the therapeutic impact, or lack of impact, of the legal system. It is an interdisciplinary approach,[[12]](#footnote-12) utilising material from the social sciences.[[13]](#footnote-13) This approach has been most widely adopted in Australia in the criminal justice jurisdiction.[[14]](#footnote-14) However, therapeutic jurisprudence can also be applied in the civil jurisdiction,[[15]](#footnote-15) and potentially to the diverse settings of mediation. Importantly, therapeutic jurisprudence appears to have support from some areas of government in Australia.[[16]](#footnote-16) The potential attraction to policy makers of therapeutic jurisprudence is valuable in terms of the possibilities the theory offers as an alternative legitimising foundation to mediation practice.
* Therapeutic jurisprudence has been connected to the mediation movement in the literature.[[17]](#footnote-17) Synergies have also been identified between therapeutic jurisprudence and second-generation models of mediation practice.[[18]](#footnote-18) There is established support for the assertion that therapeutic jurisprudence has much to offer in terms of conceptualising mediation practice.”

**See the information on TJ and its use in the drug court in the SG**

# Week 9 - Collaborative law

**The summary of Robert Wildau’s article about collaborative law (see reading list above) on mediate.com reads:**   
“To most attorneys including this one, on the first hearing "collaborative law" sounds like a contradiction in terms. Lawyers go to court to find out who's right and who's wrong, so what's to collaborate about? Or if people are truly collaborating, why should they need to resort to law at all?” This summary raises some critical points of comparison between collaborative law and adversarial practice. Currently, the focus of collaborative law is on family matters. But once you start making connections between the idea of *collaborating with* rather than *versing* the other party for the best outcome; and once you link that to other non-adversarial practices such as mediation, then the possibilities for collaborative law open up.

**What is Collaborative Law?**

As a result of separation the finances and lives of separating couples and their children change. Sometimes an entirely amicable arrangement can be reached from the outset. Unfortunately that is not always the case and couples must find a way to resolve their differences. Collaborative law is designed to focus on resolution and minimize conflict. Separating couples and their lawyers agree to make a good faith attempt to reach a mutually acceptable settlement without going to Court. Together they work to co-operatively address everyone's legal, financial and emotional needs.

**The advantages of the collaborative law process**

* You keep control of the divorce process;
* You avoid going to court;
* Children's needs are given priority;
* The solution fits you, not one size fits all;
* You are focused on settlement not focused on preparing for Court .

**The Participation Agreement**

* To start off the process the parties and both collaborative lawyers sign a Participation Agreement which requires the parties to:-
* Exchange complete financial information so that they can make well informed decisions;
* Maintain absolute confidentiality throughout the process enabling one another to express frankly their needs and concerns;
* Reach written Agreement on all issues and concerns without contested Court proceedings;
* Formalize and carry out the agreement reached with the appropriate documentation.

**Is my case suitable for collaborative law?**

* Not all matters are suitable for resolution through collaborative law
* Collaborative law may be an appropriate option for you if you and your spouse:
* Wish to spare your children from the emotional damage litigation can cause.
* Accept personal responsibility in moving forward and reaching agreement.
* Believe it is important to create healthy and more holistic solutions for your family.
* Understand and embrace the necessity to make full and frank disclosure about financial issues.

**Collaborative law will not be the right option for you if:**

* Your primary aim is to seek revenge against your former spouse or partner.
* You are looking for a "soft option"
* You think the procedure will enable you to pressure your spouse or partner to agree to your wishes.
* You want to avoid giving certain financial information to your spouse or partner.

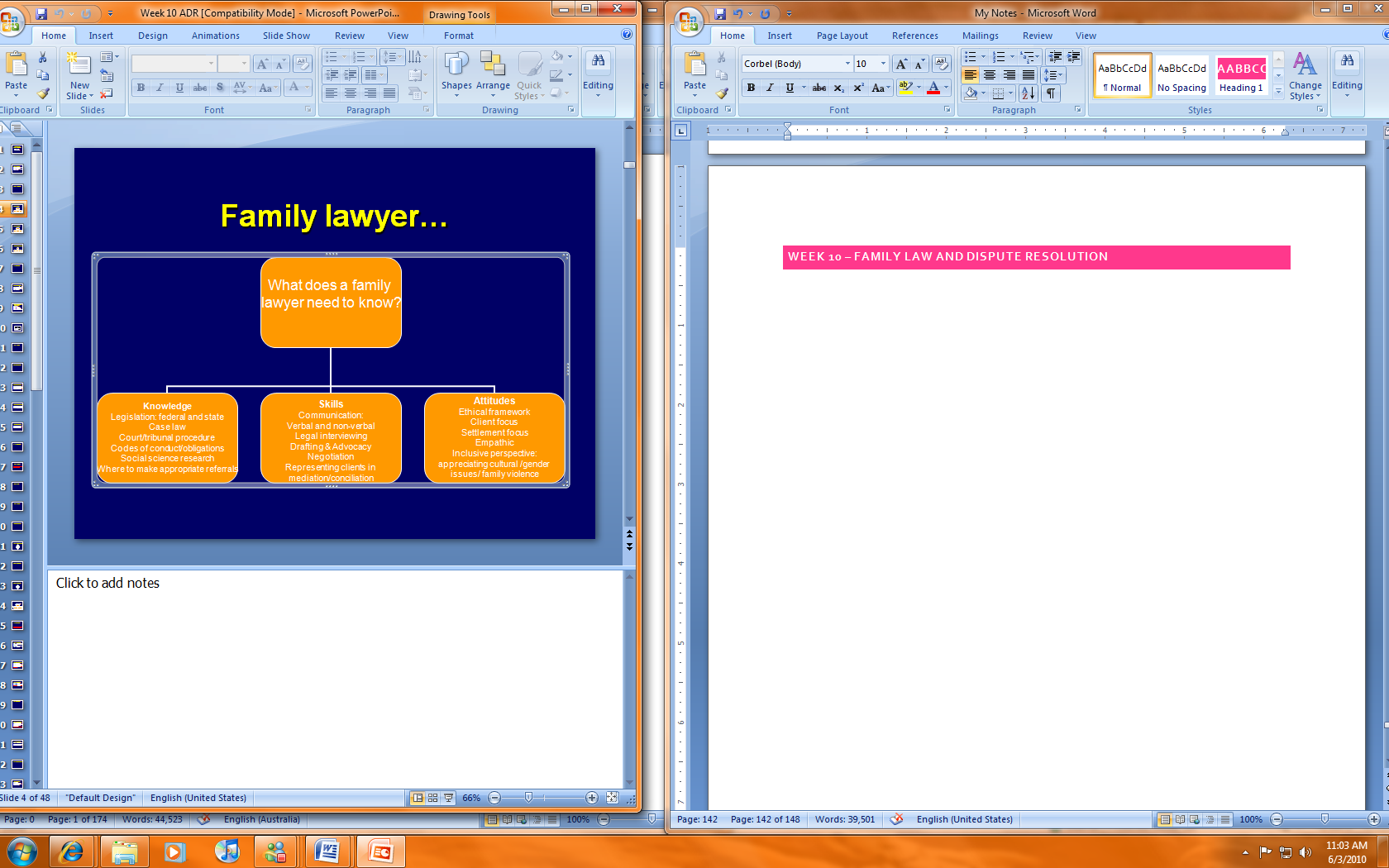
Where there has been a history of domestic violence or any form of abuse, the lawyers will first have to determine whether collaborative law is appropriate. It may be that other professionals are required to be involved to assist and support you through the process and to ensure that your interests are promoted and protected.

**How it works**

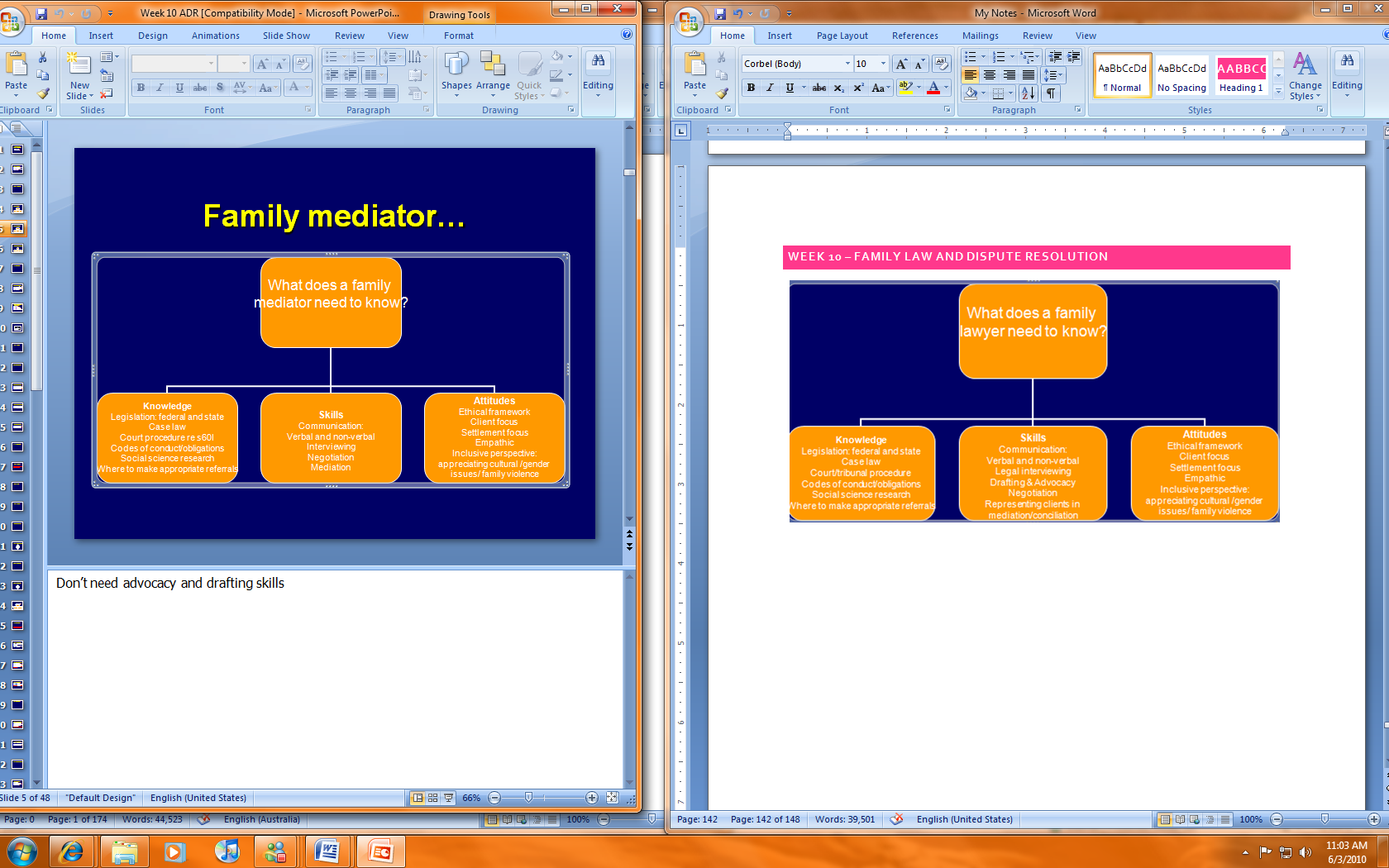
Both parties have an initial meeting with their respective lawyers to obtain advice regarding the Collaborative Law process and to identify the issues that are important to them. The parties and their lawyers then come together in four-way meetings (you, your spouse/partner and each of your lawyers) to reach a settlement. In these four way meetings the parties put their "cards on the table" and all issues are discussed in an open non-confrontational manner. The lawyers support the negotiations by providing the parties with not only the structure to facilitate agreement but also with the benefit of their skills, advice and support. With this assistance, in an atmosphere of openness and honesty, couples can communicate their respective needs and work towards securing their future.

# Week 10 – Family Law and Dispute Resolution

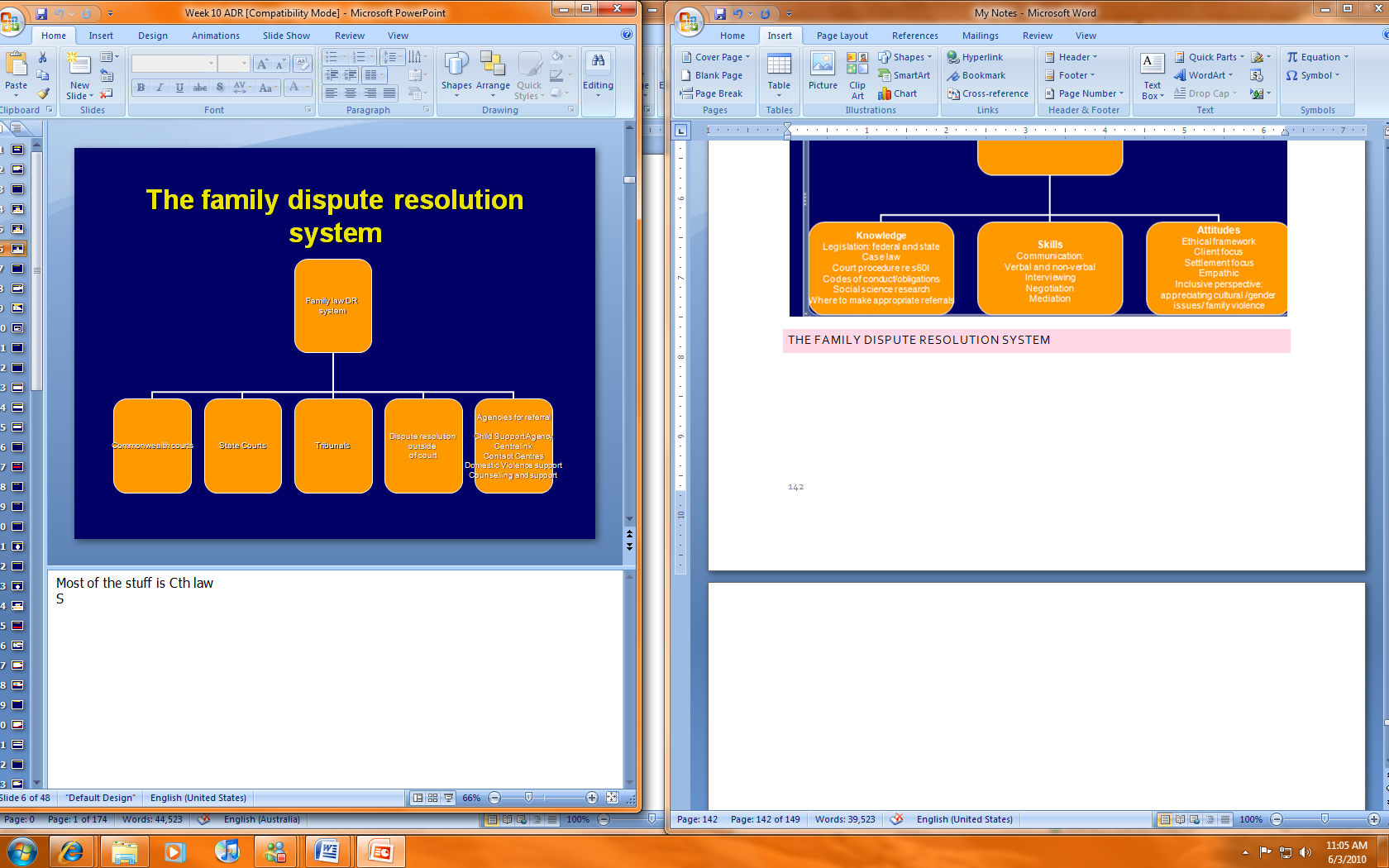
## What does a family lawyer need to know?



## What does a family mediator need to know?



## The family dispute resolution system

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## Family law legislation

### Family Law Act 1975 (Cth), s13A

* + Facilitate access to counselling/ reconciliation/adjust to separation
  + Encourage people to use dispute resolution processes outside of court

### Family Law Rules 2004 (Cth)

* + 1.04 Main purpose of rules ensure each case resolved in a just and timely manner and reasonable cost
  + 1.06 Encourage people to use dispute resolution

### The evolution of family dispute resolution

* 1975 Family Court a “helping court”
  + Assist separating couples to resolve their own issues by offering a variety of dispute resolution options within the confines of one single court
  + Initially, counsellign was offered in children’s disputes and conciliation was offered where a dispute included isues about division of property, prior to a case being set down for a final hearing
* 1995 “primary” dispute resolution
* 2001 – the Federal Magistrates Court was introduced to offer an alternative court system for simpler family law cases (amongst other things)
* 2004 pre-action procedures
* 2006 compulsory dispute resolution in parenting disputes
  + Compulsory mediation falls under s 60I (Subdividion E)

60I Attending family dispute resolution before applying for Part VII order

Object of this section

(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a ***Part VII order***) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

(2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

(3) By force of this subsection, the dispute resolution provisions of the *Family Law Rules 2004* also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary.

(4) Subsection (3) applies to an application for a parenting order if the application is made:

(a) on or after the commencement of this section; and

(b) before 1 July 2007.

(5) Subsections (7) to (12) apply to an application for a Part VII order in relation to a child if:

(a) the application is made on or after 1 July 2007 and before 1 July 2008; and

(b) none of the parties to the proceedings on the application has applied, before 1 July 2007, for a Part VII order in relation to the child.

(6) Subsections (7) to (12) apply to all applications for a Part VII order in relation to a child that are made on or after 1 July 2008.

Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.

Certificate by family dispute resolution practitioner

(8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:

(a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person’s failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;

(d) a certificate to the effect that the person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

Note: When an applicant files one of these certificates under subsection (7), the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117).

Exception

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:

(i) to be made with the consent of all the parties to the proceedings; or

(ii) in response to an application that another party to the proceedings has made for a Part VII order; or

(b) the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(iii) there has been family violence by one of the parties to the proceedings; or

(iv) there is a risk of family violence by one of the parties to the proceedings; or

(c) all the following conditions are satisfied:

(i) the application is made in relation to a particular issue;

(ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;

(iii) the application is made in relation to a contravention of the order by a person;

(iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or

(d) the application is made in circumstances of urgency; or

(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or

(f) other circumstances specified in the regulations are satisfied.

Referral to family dispute resolution when exception applies

(10) If:

(a) a person applies for a Part VII order; and

(b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and

(c) subsection (7) does not apply to the application because of subsection (9);

the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.

(11) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings; is not affected by a failure to comply with subsection (7) in relation to those proceedings.

(12) In this section:

***dispute resolution provisions*** of the *Family Law Rules 2004* means:

(a) Rule 1.05 of those Rules; and

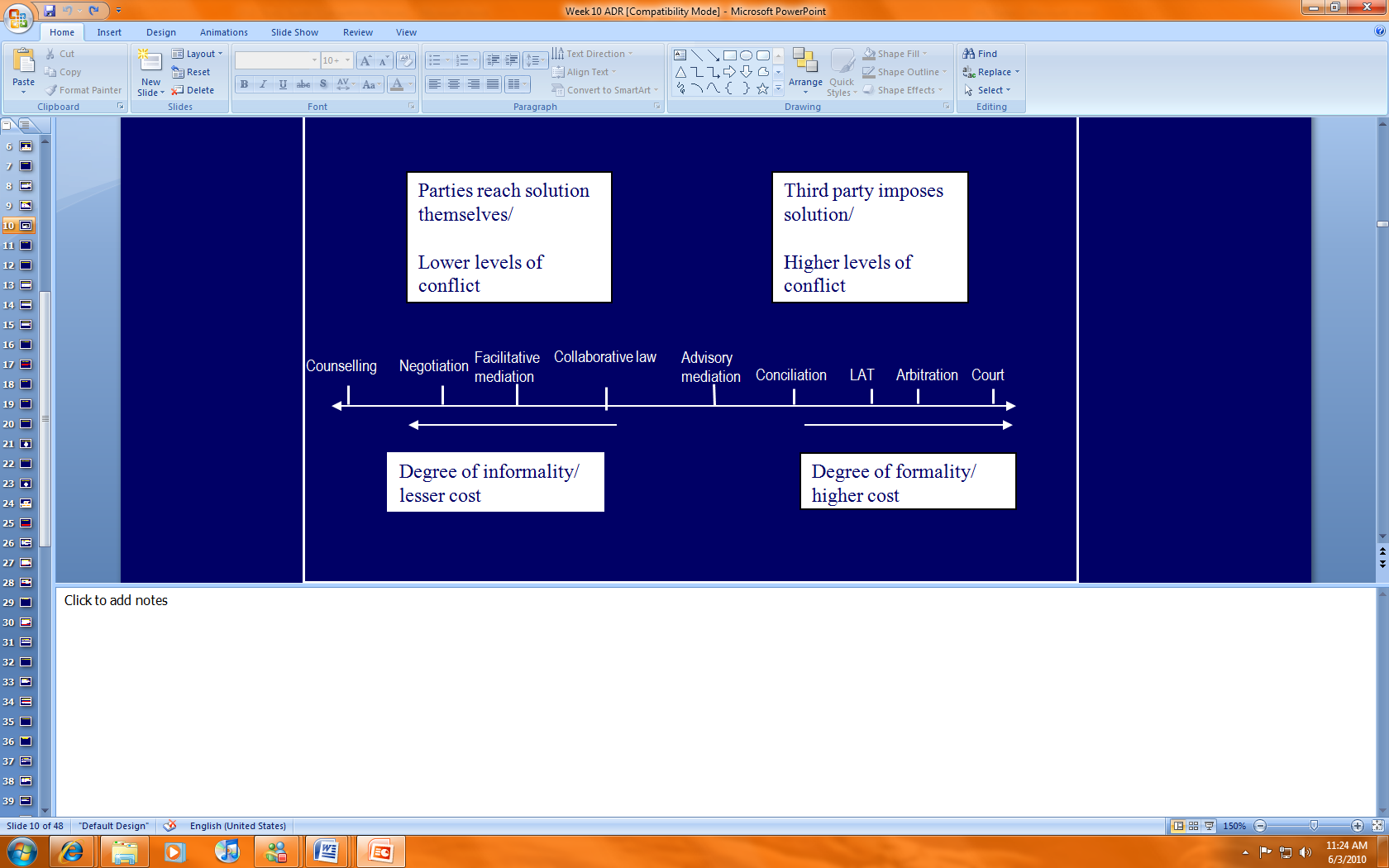
(b) Part 2 of Schedule 1 to those Rules; to the extent to which they deal with dispute resolution.

## Characteristics of family law disputes

May be:

* High levels conflict
* High levels of emotion
* Long history of lack of trust
* Can be negative intimacy
  + Where the two parties are in two different places re getting over it so one party keeps up a relationship (like going to court etc without reasonable appeal) just because they want some form of relationship with the other person
* Involvement of “innocent others”, children affected by escalating conflict

## The spectrum of family dispute resolution



**RE F Litigant in Person (2001) FLC 93-072**

* Where the interests of justice and the circumstances of the case require it, a judge may:
* Draw attention to the law applied by the court in determining the issues before it;
* Questions witnesses;
* Identify applications or submissions which ought to be put before the court;
* Suggest procedural steps that may be taken by a party; and
* Clarify the particulars of the orders sought by the litigant in person, or the basis for such orders.
* Court made a decision about the assistance that the court can give to a person (e.g. self represented)

## Categorising the dispute resolution process

**Court ordered dispute resolution processes**The Family Court has made orders requiring parties to attend dispute resolution processes since the *Family Law Act* was introduced. It originally made orders requiring parties to attend counselling (now called “mediation” and conducted by social scientists) and conciliation. This approach to ordering parties to attend dispute resolution processes has subsequently been taken up by Australian courts in general such as our Queensland civil courts and by the Federal Magistrates Court.

* Available inside and outside court
* Facilitative, advisory and determinative processes
* Represented and unrepresented
* Reportable and unreportable
* Level of party self-determination

### exceptions to the section 60i

The compulsory mediation requirements are waived (**under s60I(9))**when:

* The order applied for is made with the joint consent of all parties to the proceeding
* Where the court is satisfied that there are reasonable grounds to believe that:
  + There has been abuse of the child by one of the parties to the proceedings
  + There would be a risk of abuse of the child if there were to be a delay in applying for the order
  + There has been family violence by one of the parties to the proceedings; or
  + There is a risk of family violence by one of the parties to the proceedings
    - See page 505 of the text book for further

### Dispute resolution processes outside court

* Expert-appraisal
* Legal aid conferences
* Collaborative law
* Counselling
* Negotiation
* Mediation
* Arbitration

### Dispute resolution processes within court

* Case Assessment Conference
* Conciliation Conference
* Less Adversarial Trial (LAT)
* Adversarial hearing

### Primary processes

#### Counselling

* + Usually at community/private facility
  + To reconcile or adjust to separation/parent after separation

#### Negotiation

* + Interest-based: in terms of interests
  + Adversarial: in terms of legal positions

#### Mediation

* + Facilitative
  + Advisory

#### Conciliation:

* + similar to advisory mediation but within a court with court officer as facilitator

#### Court hearing:

* + Adversarial or less adversarial
  + Determinative process

## Forums for family dispute resolution

There are a variety of places in which family dispute resolution can take place. Some of them are:

### Community organisations

Community organisations offer counseling, mediation and a variety of courses and assistance to separated families. They were established by the Federal Government in 2006 to offer mediation, counseling, parenting programs etc.

**What they offer:**

1. Provide information for families
2. Help families use other services
3. Provide assistance for separating families
   * Individual interviews for separating parents to identify issues and options and focus on needs of children
   * Group programs on parenting after separation
   * “Mediation” - joint sessions for parents to help them reach agreement on parenting arrangements

Such organisations include:

* Family Relationship Centres
* Relationships Australia
* Anglicare
* Centracare

**Aims:**

* Move family law disputes away from the courts
* Aim to ensure children grow up in safe environment with love and support of both parents
* First point of call for people separating

### Private services

There are a variety of private mediators and arbitrators who are lawyers and social scientists. The majority offer this service in addition to their daily practice. Some people practice exclusively in mediation, however they are in the minority.

### Family Courts

* The Family Court
* The Federal Magistrates Court

#### Family Court

The Family Court has case consultants who provide a range of dispute resolution services including:

Conciliation counselling involving a variety of intervention strategies depending on the needs of the particular children and their families;

* Child dispute services and joint conciliation conferences with Court Registrars;
* The preparation of Family Assessment Reports for the Court relating to disputes over parenting arrangements for children ;
* Information and education services to the community ;

Mandatory qualifications in psychology or social work are required and counsellors must be eligible for membership of the Australian Psychological Society or the Australian Association of Social Workers. They must also possess at least five years relevant postgraduate experience, of which at least two years must include working with children and their families.

## Confidentiality and admissibility in family disputes

### Confidentiality and Admissibility

Under s10D, parties can attend counselling at the Family Court which will be confidential, except in exceptional circumstances set out in that section.

Such family counselling is not ordered as frequently as it was in the past. The focus in Family Court services is now on providing family consultants to assist parties reach agreement, rather than on therapeutic counselling. These settlement-focused services are not confidential and generally the family consultant makes a report to the court about the outcome (see for example (s11C).

See alsosection 131 *Evidence Act 1995* (Cth).

**131 Exclusion of evidence of settlement negotiations**

(1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or document included a statement to the effect that it was not to be treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or

(h) the communication or document is relevant to determining liability for costs; or

(i) making the communication, or preparing the document, affects a right of a person; or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of paragraph (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed; and

(b) a communication was made or a document was prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was so made or the

document so prepared.

(4) For the purposes of paragraph (2)(k), if:

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or a document was prepared in furtherance of the abuse of power; the court may find that the communication was so made or the document was so prepared.

(5) In this section:

(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and

(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and

(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and

(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and

(e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section:

***power*** means a power conferred by or under an Australian law.

### At the end of each process

If agreement is reached it can be drawn up into a consent order or parenting plan. If agreement is not reached or only partial agreement reached, at a conciliation conference orders can be made by the Registrar about the specific next steps in the case.

### Dispute resolution process inappropriate in some circumstances

Some cases will not be allocated a dispute resolution process where there are family violence factors. The court will assess whether dispute resolution should take place and if so in what circumstances, that is, perhaps it will take place in separate rooms or by telephone link-up.

### Pre-Filing Dispute Resolution

One of the more interesting aspects of family dispute resolution for students of dispute resolution in general is the move in recent times to the requirement that, in general, parties cannot even file an application in court unless they have attempted some form of dispute resolution.

### The Family Law Rules: Financial Cases

Originally the *Family Law Act* encouraged parties into dispute resolution processes after they had filed an application in the Family Court. However in 2004 the *Family Law Rules* 2004 (Cth) shifted the focus towards pre-filing dispute resolution. These reforms derived from the *Civil Procedure Rules 1998* (UK) which were instigated by Lord Woolf who has stated that the reforms changed the concept of “justice” from a quality court decision to a decision arrived at by a dispute resolution process so that ‘justice’ could be more accessible to the general community.[[19]](#footnote-19)

The Australian rules create an obligation on parties to make a “genuine attempt” to resolve their dispute before filing an application in the Family Court. These Rules marked a significant point in time in the history of the family law system when the role of family lawyers as dispute resolution advisors and advocates began to increase and when dispute resolution practitioners took on a greater role in resolving family law disputes.

The pre-action procedures are set out in: *Schedule 1* of the *Family Law Rules 2004* (Cth). Part 1 deals with financial cases (property settlement and maintenance).

### Mandatory Pre-Filing Mediation: Parenting Cases

From 1 July 2007 section 60I of the *Family Law Act* 1975 (Cth) requires that parties in parenting cases participate in mandatory pre-filing dispute resolution and make a “genuine effort” to resolve their dispute.

It is interesting to note that the term, “family dispute resolution” is only defined in terms of its purpose, not its process. It is described as:

A process (other than a judicial process):

(a) in which a family dispute resolution practitioner helps people… to resolve some or all of their disputes with each other; and

(b) in which the practitioner is independent of all of the parties involved in the process.

Section 60I states that parenting applications when filed in family courts are required to be accompanied by dispute resolution certificates. There will be an onus on legal

practitioners to ensure that their clients obtain these certificates, unless they fall within one of the exceptions.

## What are the exceptions to confidentiality in Family Disputes

**See the Family Law Act 1975 (Cth) s 10 D, E , H and J**

### Section 10d

Confidentiality of communications in family counselling

(1) A family counsellor must not disclose a communication made to the counsellor while the counsellor is conducting family counselling, unless the disclosure is required or authorised by this section.

(2) A family counsellor must disclose a communication if the counsellor reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family counsellor may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A family counsellor may disclose a communication if the counsellor reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child’s interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.

(6) Evidence that would be inadmissible because of section 10E is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the counsellor’s evidence is inadmissible in court, even if subsection (2), (3), (4) or (5) allows the counsellor to disclose it in other circumstances.

(7) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.

(8) In this section:

***communication*** includes admission.

### 10E Admissibility of communications in family counselling and in referrals from family counselling

(1) Evidence of anything said, or any admission made, by or in the company of:

(a) a family counsellor conducting family counselling; or

(b) a person (the ***professional***) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2) Subsection (1) does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.

(4) A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

### 10H Confidentiality of communications in family dispute resolution

The idea of this section is to:

* + Protect a child from risk of harm (physical or psychological)
  + To prevent or lessen a serious and imminent threat made to life/health or property
  + Report common or likely common of offence violence/threat or intentional pty damage or threat of damage
  + To assist child rep to represent child properly

(1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.

(2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child’s interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.

(6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 60I(8).

(7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the practitioner’s evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

(8) In this section:

***communication*** includes admission.

### 10J Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

(1) Evidence of anything said, or any admission made, by or in the company of:

(a) a family dispute resolution practitioner conducting family dispute resolution; or

(b) a person (the ***professional***) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

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unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3) Subsection (1) does not apply to information necessary for the practitioner to give a certificate under subsection 60I(8).

(4) A family dispute resolution practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

## Genuine effort

The idea behind the use of this term is that the participation of clients in family dispute resolution is real and not tokenistic – however, a proper definition is not provided.

After conducting a parenting mediation, FDRPs must issue a certificate that parties can then file in court if needing to apply for parenting orders. In working out what certificate to issue, FDRPs must assess whether the parties have made a ‘genuine effort’ to negotiate.

* Genuine effort is actually used I s60I of the Family Law Act but it is yet to be judicially considered
* Genuine effort is also used in the family law rules Rule 12.06 uses the term in relation to conciliation conferences

**Genuine effort has been further defined by decisions in the AAT in that environment it has been held to mean:**

* A real and sincere Endeavour or strenuous attempt
* A level of effort beyond that which is purely superficial or token
* Efforts [which are] … vigorous and determined
* Endeavour or exertion which is sincere and real…and not in the nature of a pretence or sham…substantial activities…a sincere endeavor

**Astor argues** that the definition of genuine effort in the context fo Pt VII of the Family Law Act should include, but not be limited to:

“Genuine effort means:

1. Attending family dispute resolution, and
2. Willingness to consider options put forward by the other party or the family dispute resolution practitioner, and
3. Willingness to consider putting forward options for the resolution of the dispute, and
4. Willingness to focus on the needs and interests of the children, to the best of the parties’ ability “

**See pages 498-501 of the text for more information**

### the types of certificates

The four types of certificates are:

1. Non-attendance because of refusal or failure to attend
2. Non-attendance because family dispute resolution is not appropriate
3. Attendance an tat all attendees made a genuine effort to resolve the issue or issues
4. Attendance and that one of the parties did not make a genuine effort to resolve the issues or issue

### Who can issue certificates

* Must be accredited and registered family dispute resolution practitioner
* Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)
* Lawyer or social scientist
* On register of Attorney-General’s department

## Advisory and facilitative mediation

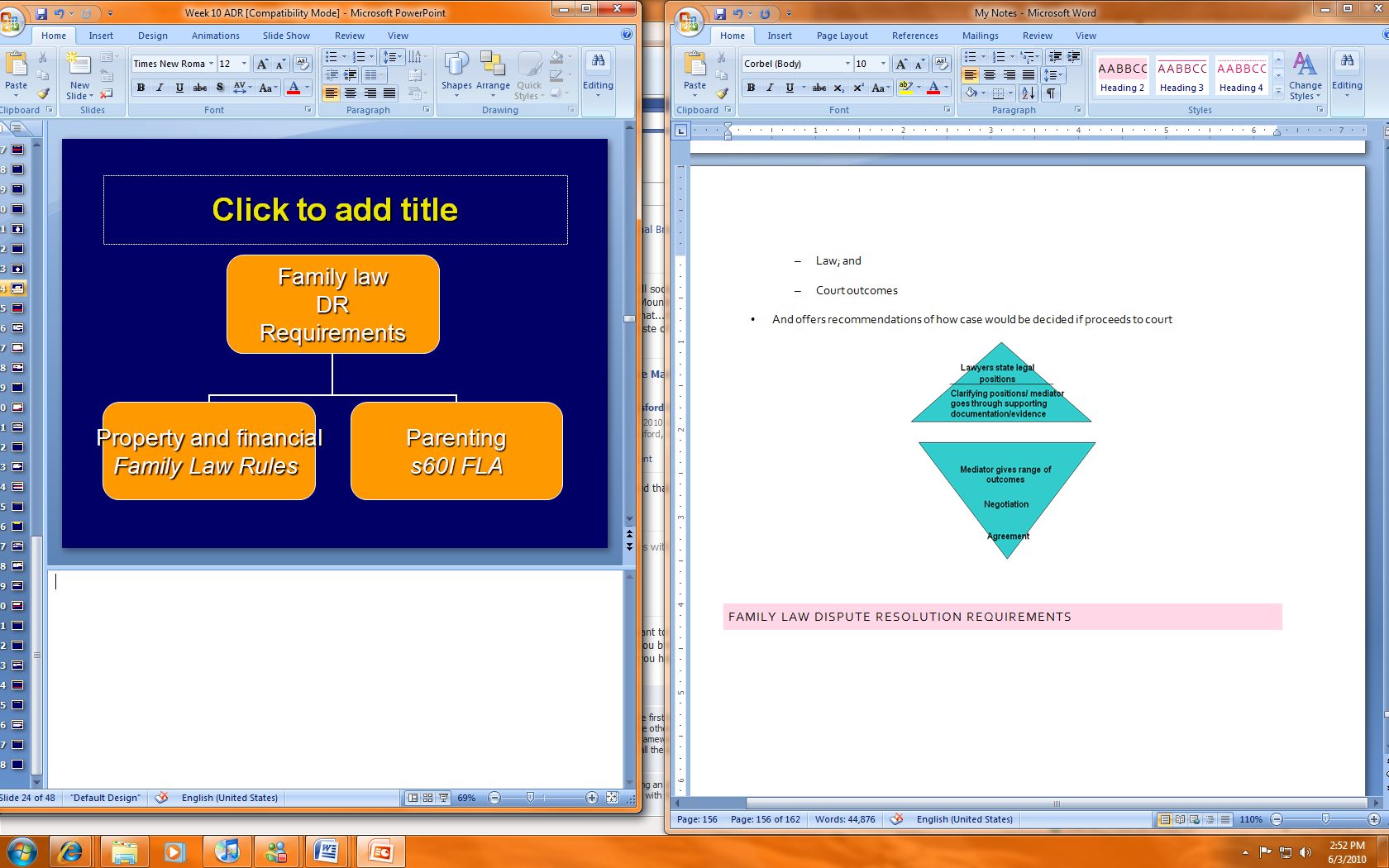
### Facilitative mediation

* Interest-based, problem-solving mediation
* Process orientated
* The parties provide:
  + the options; and
  + the solution to the dispute
* Mediator:
  + Purely facilitator of communication process
  + Does not suggest options
  + Does not give indications of appropriate settlement options
  + Not required to be an expert in content only an expert in mediation
* Egs. At community mediation centres such as Family Relationship Centres, Relationships Australia

### Advisory mediation

* Object to reach a settlement based on legal rights within anticipated range of court outcomes
* Mediator an authority figure (eg. barrister) who evaluates case based on experience of:
  + Law; and
  + Court outcomes
* And offers recommendations of how case would be decided if proceeds to court

## Family law dispute resolution requirements



### Financial issues

* Pre-action procedures
* Family Court
* *Family Law Rules 2004* (Cth): Schedule 1 Part 1
* Attend “dispute resolution”
* Requirement for “genuine effort”
* See Family Court of Australia, Before you file: Pre-action procedures in financial cases – see below.

**Before you file – pre-action procedure for financial cases**

* FAMILY COURT OF AUSTRALIA
* This brochure provides information for people considering applying to the Family Court for financial orders.
* In particular, it provides information about pre-action procedures required before starting a case. For more information, see Rule 1.05 and Schedule 1 of the Family Law Rules 2004.
* Pre-action requirements also apply to parenting disputes. For more information see the separate brochure ‘Before you file - pre-action procedure for parenting cases’.

**What is required?**

* The aim of the pre-action procedures is to explore areas of resolution and, where a dispute cannot be resolved, to narrow the issues that require a court decision. This should control costs and if possible, resolve disputes quickly, ideally without the need to apply to a court.
* The pre-action procedure applies to:
* ■ anyone considering starting a case
* ■ anyone named as a respondent if a case is started, and
* ■ their lawyers (if any).
* The Family Law Rules require prospective parties to genuinely try to resolve their dispute before starting a case. Except for those situations listed under the heading ‘What applications are exempt?’, all prospective parties must:
* 1 Participate in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration.
* 2 If dispute resolution is unsuccessful, write to the other parties, setting out their claim and exploring options for settlement.
* 3 Comply, as far as practicable, with the duty of disclosure (see page 4).
* Anyone who does not comply (unless exempt) risks serious consequences, including costs penalties. See ‘Compliance’ on page 2.
* **What applications are exempt?**
* Pre-action procedure is not required for applications:
* ■ for divorce only, or
* ■ for child support only, or
* ■ where the case includes the Court’s bankruptcy jurisdiction.
* Also, the Court may accept that it is not possible or appropriate for the pre-action procedures to be followed in cases:
* ■ involving urgency
* ■ involving allegations of family violence
* ■ involving allegations of fraud
* ■ where there is a genuinely intractable dispute (for example, where one person refuses to
* negotiate)
* ■ where a person would be unduly prejudiced or adversely affected if another person
* became aware of the intention to start a case (for example, where there is a genuine
* concern that the other person would attempt to defeat the claim if they had this prior
* knowledge)
* ■ where a time limitation is close to expiring
* ■ where there has been a previous application about the same issue or subject in the last 12
* months, and
* ■ where there is a genuine dispute about either the existence of a de facto relationship, or whether a party’s choice to agree to the jurisdiction of the *Family Law Act 1975* in relation to the property or maintenance of a party to a de facto relationship should be set aside.
* **Pre-action procedure objectives**
* ■ To encourage early and full disclosure through the exchange of information and documents about the prospective case.
* ■ To help people resolve their differences quickly and fairly, and to avoid legal action where possible. This will limit costs and hopefully avoid the need to start a court case.
* ■ Where an agreement cannot be reached out of court, to help parties identify the real issues in dispute. This should help reduce the time involved and the cost of the case.
* ■ To encourage parties to seek only those orders that are realistic and reasonable on the evidence.
* **General information and parties’ responsibilities**
* At all stages during the pre-action negotiations and during the case itself, should you ultimately apply to a court, you must keep in mind:
* ■ the importance of identifying issues early and exploring options for settlement
* ■ the need to avoid protracted, unnecessary, hostile and inflammatory exchanges
* ■ the impact of correspondence on the reader, particularly on the other party in the case
* ■ the need to seek only those orders that are realistic and reasonable on the evidence and that are consistent with current law
* ■ the principle of proportionality and the need to control costs; because it is unacceptable for the costs of any case to be disproportionately high compared with the financial value of the subject matter of the dispute, and
* ■ the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute – see page 4 for more on disclosure.
* **Parties must not:**
* ■ use the pre-action procedure for an improper purpose; for example, to harass the other party or to cause unnecessary cost or delay, or
* ■ in correspondence, raise irrelevant issues or issues that might cause the other party to adopt an entrenched, polarised or hostile position.
* The Court expects parties to take a sensible and responsible approach to pre-action procedures. You are not expected to follow the pre-action procedures to your detriment if reasonable attempts to follow them have not achieved a satisfactory result.
* **Compliance**
* If a case is then started, the Court may consider whether the requirements have been met and, if not, what the consequences should be (if any).
* The Court may:
* ■ where there is unreasonable non-compliance, order the non-complying party to pay all or part of the costs of the other party or parties in the case, and/or
* ■ take compliance or non-compliance into account when making orders about how your case will progress through the Court. (See, for example, Family Law Rules 1.10, 11.03 and 19.10.)
* In addition, the Court may ensure that the complying party is in no worse a position than he or she would have been if the other party had complied with the pre-action procedure. Examples of non-compliance with a pre-action procedure include:
* ■ not sending a written notice of proposed application
* ■ not providing sufficient information or documents to the other party
* ■ not following a procedure required by the preaction procedure
* ■ not responding appropriately within the nominated time to the written notice of proposed application, and
* ■ not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirements of this procedure.
* **YOUR OBLIGATIONS AS A PROSPECTIVE PARTY TO A CASE**
* **The pre-action procedure ~ step-by-step**
* **STEP 1 Invite the other parties to participate in dispute resolution**
* A person who is considering filing an application to start a case must:
* 1 Give a copy of this brochure to the other prospective parties to the case.
* 2 Invite the other parties to participate in dispute resolution. For more information about dispute resolution or to find an agency near you:
* ■ go to www.familyrelationships.gov.au, or
* ■ call 1800 050 321.
* **STEP 2 Agree on a dispute resolution service and attend the service**
* Each prospective party must:
* ■ agree on an appropriate dispute resolution service, and
* ■ make a genuine effort to resolve the dispute by participating in dispute resolution.
* If an agreement is reached, you and the other party may enter into a financial agreement or apply to court for consent orders. For more information, or to get a Consent Order Kit, go to www.familylawcourts.gov.au, call 1300 352 000 or visit your nearest family law registry.
* **STEP 3 Written notice of issues and future intentions**
* If:
* ■ no dispute resolution service is available
* ■ a person refuses or fails to participate, or
* ■ agreement is not reached through dispute resolution, then a person considering applying to a court must give the other person/s written notice of the intention to start a court case (called a notice of claim), setting out:
* ~ the issues in dispute
* ~ the orders to be sought if a case is started
* ~ a genuine offer to resolve the issues, and
* ~ a nominated time (at least 14 days after the date of the letter) within which the other person must reply. This brochure must be attached to the notice of claim.
* **STEP 4 Replying to the notice of claim**
* If you receive this notice of claim, you must within the nominated time, reply to it in writing stating whether the offer is accepted.
* Where agreement is reached, you and the other party should consider formalising your agreement by entering a financial agreement or filing an application for consent orders.
* Where you do not accept the offer, you must set out in a letter:
* ■ the issues in dispute
* ■ the orders you will seek if a case is started
* ■ a genuine counter offer to resolve the issues, and
* ■ a nominated time (at least 14 days after the date of the letter) within which the claimant must reply.
* If you do not respond, the initiating party’s obligation to follow the pre-action procedure ends.
* **STEP 5 Taking other action**
* Where an agreement is not reached after reasonable attempts to resolve it by correspondence, other appropriate action may be taken to resolve the dispute, including filing an application in a court.
* Parties to a case have a duty to make timely, full and frank disclosure of all information relevant to the issues in dispute. There may be serious consequences for failing to disclose, including punishment for contempt of court. The Court’s ‘Duty of Disclosure’ provides
* more information.
* In summary, parties should promptly exchange copies of documents in their possession or control relevant to an issue in the dispute before as well as after starting a case. Examples of documents may include:
* ■ a schedule of assets, income and liabilities
* ■ a list of documents in the party’s possession or control that are relevant to the dispute, and
* ■ a copy of any document required by the other party, identified by reference to the list of documents.
* In particular, parties are encouraged to refer to the Financial Statement and Rules 4.15, 12.02, 12.05 and 13.04 as a guide to what information to provide and documents to exchange. Rule 13.12 sets out documents that do not need to be produced. These include documents where there is a claim for privilege from disclosure or documents that have already been disclosed and where there has been no change likely to affect the result of the case.
* The documents that the Court would consider as appropriate to be exchanged include:
* In a maintenance case
* ■ the party’s taxation return and taxation assessment for the most recent financial year
* ■ the party’s bank records for the previous 12 months
* ■ if the party receives wage or salary payments, the party’s three most recent pay slips
* ■ if the party owns or controls a business, the business’s Business Activity Statements for the previous 12 months, and
* ■ any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party.
* **Disclosure and exchange of correspondence**
* In a property settlement case
* ■ the party’s three most recent taxation returns and assessments
* ■ documents about any relevant superannuation interest, including:
* ~ the completed Superannuation Information Form
* ~ for a self-managed superannuation fund, the trust deed and the last three financial statements
* ~ the value of the superannuation interest, including how the value has been calculated and
* any documents working out the value
* ■ for a corporation (business), trust or partnership where the party has a duty of disclosure under Rule 13.04:
* ~ financial statements for each (including balance sheets, profit and loss accounts, depreciation schedules and taxation returns) for the three last financial years
* ■ for the party or a corporation (business), trust or partnership where the party has a duty of disclosure under Rule 13.04:
* ~ any Business Activity Statements for the 12 months ending immediately before the first
* court date
* ■ for any corporation, its most recent annual return, listing directors and shareholders; and the
* corporation’s constitution
* ■ for any trust, the trust deed
* ■ for any partnership, the partnership agreement, including amendments, and
* ■ unless the value is agreed, a market appraisal of any item of property in which a party has an interest
* Where a party is unable to produce a document for inspection, it is reasonable for the party to be required to provide written authority authorising a third party (for example, an accountant) to provide a copy of the document to the other party, where this is practicable.
* Parties should agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies. Parties must not use a document disclosed by another party for any purpose other than to resolve or determine the dispute for which it was disclosed. That is, in seeking the documents through the pre-action procedure, the party receiving them is considered by the Court to have given an undertaking that they will be used for the specific purposes of the case only.
* Where there are disagreements about disclosure, it may be appropriate for an application to be filed with the Court.
* **Expert witnesses**
* As part of the pre-action procedure, you or the other parties may require that information be
* sought from an expert witness. There are strict rules about instructing and obtaining reports from an expert.
* In summary:
* ■ An expert must be instructed in writing and must be fully informed of his or her obligations.
* ■ Where possible parties should seek to retain an expert on an issue only where an expert’s
* evidence is necessary to resolve the dispute.
* ■ Where practicable parties should agree to obtain a report from a single expert instructed by both parties.
* ■ If separate experts‘ reports are obtained, the Court requires the reports to be exchanged.
* **Lawyers’ obligations**
* Lawyers must as early as practicable:
* ■ advise clients of ways of resolving the dispute without starting legal action
* ■ advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty
* ■ subject to it being in the best interests of the client and any child, endeavour to reach an
* agreement rather than start or continue legal action
* ■ notify the client if, in the lawyer’s opinion, it is in the client’s best interests to accept a
* compromise or settlement where, in the lawyer’s opinion, the compromise or settlement is a
* reasonable one
* ■ in cases of unexpected delay, explain the delay to their client and whether or not the client may assist to resolve the delay
* ■ advise clients of the estimated costs of legal action
* ■ advise clients about the factors which may affect the Court in considering costs orders
* ■ actively discourage clients from making ambit claims or seeking orders which the evidence and established principles, including recent case law indicates, is not reasonably achievable, and
* ■ provide clients with documents prepared by the Court about:
* ~ the social and legal effects of separation
* ~ the services provided to families by the Family Law Courts and by government, community and other agencies, and
* ~ the obligations created by an order and the consequences for failing to comply with an
* order.
* The Court recognises that the pre-action procedure cannot override a lawyer’s duty to his or her client. It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice. However a lawyer has a duty, as an officer of the Court, and must not mislead the Court. If a client wishes not to disclose a fact or document which is relevant to the case a lawyer has an obligation to take the appropriate action, that is, cease to act.
* **Legal advice**
* You should get legal advice before deciding what to do. A lawyer can help you understand your legal rights and responsibilities, and explain how the law applies to your case. A lawyer can also help you reach an agreement with the other party without going to court.
* You can get legal advice from a:
* ■ legal aid office
* ■ community legal centre, or
* ■ private law firm.
* Court staff can help you with questions about court forms and the court process, but cannot give you legal advice.

### Duty of disclosure

* Parties to a case have a duty to make timely, full and frank disclosure of all information relevant to the issues in dispute.
* There may be serious consequences for failing to disclose, including punishment for contempt of court.

### Family law rules 2004 (Cth)

* Schedule 1, part 1, 3
* make a genuine effort to resolve the dispute by participating in dispute resolution

1. Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see [rule 13.01).](http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/s13.01.html)

**Duty of disclosure under the rules**

* Schedule 1, Part 1, 4
* (1)         Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see [rule 13.01).](http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/s13.01.html)

## What are the obligations of lawyers under the Family Law AcT

The relevant sections are:

* s12E; and
* s63DA

12E Obligations on legal practitioners

(1) A legal practitioner who is consulted by a person considering instituting proceedings under this Act must give the person documents containing the information prescribed under section 12B (about non‑court based family services and court’s processes and services).

(2) A legal practitioner who is consulted by, or who is representing, a married person who is a party to:

(a) proceedings for a divorce order in relation to the marriage; or

(b) financial or Part VII proceedings in relation to the marriage;

must give the person documents containing the information prescribed under section 12C (about reconciliation).

(3) A legal practitioner representing a party in proceedings under Part VII must give the party documents containing the information prescribed under section 12D (about Part VII proceedings).

Note: Section 63DA also imposes information‑giving obligations on legal practitioners dealing with people involved in Part VII proceedings.

(4) A legal practitioner does not have to comply with subsection (1), (2) or (3) if the practitioner has reasonable grounds to believe that the person has already been given documents containing the prescribed information mentioned in that subsection.

(5) A legal practitioner does not have to comply with subsection (2) if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.

## Less adversarial trial process

* Recent innovation in family law
* Used to be known as the Children’s Cases Program
* The judge controls the hearing process and its inquiry, not the lawyers
* Offers family law clients a problem-solving process within the courtroom where parties have the opportunity to tell their story in their own words
* Likened to a hybrid combination of mediation and then litigation (if a judicial decision has to be made at the end of the process
* Parties give opening statements to the court – similar t opening statements in the mediation process
* A family consultant is available on the first day of the hearing to assist the court and the parties with information, and where appropriate, to assist the parties to explore settlement
* The rules of evidence are not strictly applied and can be used at the discretion of the presiding judge (e.g. hearsay evidence can be admitted)

**Less adversarial trial process:**

* The trial starts when the parties first meet the judge
* It may finish on the first day or further meetings to continue the trial may be scheduled between the judge and all other parties
* The same judge and the same family consultant deals with the matter throughout the trial
* Most of the evidence will come from each of the parents.
* The judge concentrates on getting the best information from everyone about the specific needs of the child(ren)
* The judge will consider the evidence and may discuss it with the parents or witnesses
* Meetings with the judge may be by telephone conferences

**The less adversarial trial in parenting cases (and other cases by consent) – from the family courts website:**

First day of trial before the judge (held in court)

**What further documents do you prepare prior to the first day of trial before the judge?**

At least 28 days before the first day of trial each party must:

File and serve a Parenting Questionnaire

File and serve an Undertaking as to Disclosure.

Parties may also be required to lodge further information about the case at least two days before the trial. The form Case Information may help you to prepare this information. These forms are available from the [Forms section](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Forms+in+alphabetical+order/) of this website.   
  
Where your case is conducted as a less adversarial trial some of the technical rules of evidence will not be applied. However, the judge may decide that rules of evidence should apply to particular issues for special reasons. All the evidence that is given to the judge, both verbally and in writing (in an affidavit), will be admissible and it will be for the judge to decide what weight it might be given. This allows the trial to be less formal and less complicated than court trials usually are. If you need more detail about what rules of evidence are affected you should seek legal advice – see also section 69ZT of the [Family Law Act 1975](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/index.html" \t "_blank).   
  
**The family report**  
In cases involving children, the court may order a family report to assist the judge at the trial.  
  
Before you attend the first day before the judge, you should consider carefully how a family report could help the court to make a decision. You should read Section 62G of the [Family Law Act 1975](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/index.html" \t "_blank).   
  
If a Family Report is ordered, it will be written by a court family consultant or other Court appointed expert, subject to any specific directions from the judge. It will be used as evidence in the trial.  
  
The family consultant (or court appointed expert):

will interview all parties, their children and anyone else who may be involved substantially in the lives of the children, and

may make recommendations about where the children should live, what arrangements there should be about the children spending time with a parent, including how much time, and about other matters concerning parental responsibilities.

You will receive a copy of the family report before the final stage of trial. You will have a right at the final stage of trial to cross-examine the family consultant (or court appointed expert) about the family report. If you wish to do this, you must inform the Manager Child Dispute Services in writing at least 14 days before the family consultant (or Court appointed expert) is to appear in court.  
  
**What happens at the first day of trial?**  
The judge begins to determine the issues in dispute and decides what evidence is required including any expert reports (see family reports above).  
  
You should read the brochure Less Adversarial Trials from the [Publications section](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Publications+in+alphabetical+order/) of the website for more details about what happens at a less adversarial trial.

Continuation of the trial

The judge may conduct one or more continuation of trial hearings. The judge may decide these will not be conducted in court but in chambers and/or by telephone.  
  
The judge may consider expert reports and finish determining the issues in dispute and deciding what evidence is required to decide those issues.  
  
The registrar may deal with aspects of the preparation for the trial including:

* Disclosure
* Subpoenas
* Review compliance with orders
* The parties must obtain expert reports and prepare their evidence as ordered by the court.
* Final stage of trial before the judge (held in court)
* The judge makes a decision about your case (makes orders) and may refer you to a post orders review and referral meeting with a family consultant.

## Collaborative law

Considered to be “negotiation without the mediator present”

* If the negotiations fail, both clients must instruct separate lawyers if they wish to take the dispute to court
* The process is voluntary and the agreement require that parties exchange information and commit to resolving a dispute in a way that respects their shared goals
* Collaborative law at the family law dispute resolution level can be characterised by:
  + Recognition by lawyers in the process that litigation is an option of law resort, and is the most destructive way, emotionally and financially, of resolving disputes
  + The lawyer’s advice to clients as to how to resolve the dispute being directed towards a fair process and just outcomes for BOTH parties
  + Promotion of constructive communications; and
  + A focus on the best interests of children
* The legal position is not the standard against which the parties and their lawyers seek to resolve the dispute

**Why is it effective at a family law level**

* Gives parties what they want
  + Timely
  + Cost-effective and fair resolution of their dispute
* Sits more comfortably with lawyers than mediation because they maintain control of the negotiated settlement – they set the agenda and are responsible for keeping minutes
* **NOTE:** that because it effectively rules out litigation, it may be considered less than satisfactory in circumstances where the parties fail to agree

## Arbitration

* Process of private adjudication where an impartial third party makes a binding decision
* ss13E-K *Family Law Act 1975* (Cth)
* s13E: Both parties must consent
* S13H: award must be registered to be binding

Division 4—Court’s role in relation to arbitration of disputes

13E Court may refer Part VIII proceedings or Part VIIIAB proceedings to arbitration

(1) With the consent of all of the parties to the proceedings, a court exercising jurisdiction in:

(a) Part VIII proceedings; or

(b) Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement);

may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.

(2) If the court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make any additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

13F Court may make orders to facilitate arbitration of certain disputes

A court that has jurisdiction under this Act may, on application by a party to relevant property or financial arbitration, make orders the court thinks appropriate to facilitate the effective conduct of the arbitration.

13G Family Court and Federal Magistrates Court may determine questions of law referred by arbitrator

(1) An arbitrator of section 13E arbitration or relevant property or financial arbitration may, at any time before making an award in the arbitration, refer a question of law arising in relation to the arbitration for determination by:

(a) a single judge of the Family Court; or

(b) a single judge of the Family Court of a State; or

(c) the Federal Magistrates Court.

(2) The arbitrator may do so:

(a) on his or her own initiative; or

(b) at the request of one or more of the parties to the arbitration if the arbitrator considers it appropriate to do so.

(3) The arbitrator must not make an award in the arbitration before the judge or Federal Magistrates Court has either:

(a) determined the question of law; or

(b) remitted the matter to the arbitrator having found that no question of law arises.

13H Awards made in arbitration may be registered in court

(1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:

(a) in the case of section 13E arbitration—in the court that ordered the arbitration; or

(b) otherwise—in a court that has jurisdiction under this Act.

(2) An award registered under subsection (1) has effect as if it were a decree made by that court.

13J Family Court or Federal Magistrates Court can review registered awards

(1) A party to a registered award made in section 13E arbitration or relevant property or financial arbitration may apply for review of the award, on questions of law, by:

(a) a single judge of the Family Court; or

(b) a single judge of the Family Court of a State; or

(c) the Federal Magistrates Court.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

(2) On a review of an award under this section, the judge or Federal Magistrates Court may:

(a) determine all questions of law arising in relation to the arbitration; and

(b) make such decrees as the judge or Federal Magistrates Court thinks appropriate, including a decree affirming, reversing or varying the award.

13K Family Court and Federal Magistrates Court may set aside registered awards

(1) If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered in:

(a) the Family Court; or

(b) the Federal Magistrates Court; or

(c) a Family Court of a State;

the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement.

(2) The court may only make a decree under subsection (1) if the court is satisfied that:

(a) the award or agreement was obtained by fraud (including non‑disclosure of a material matter); or

(b) the award or agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or

(d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted

## advantges of arbitration

* Binding award registered in court
  + Enforceable
* Cost
* Time – long waiting lists in courts
* Private (eg. tax/centrelink issues)
* Choice of arbitrator

# Week 11 – Dispute Resolution Advocacy/Diagnosing Disputes

## Conflict analysis

Tillett discusses the difficulties of determining the nature of a dispute, particularly where there are unmanifest issues or *hidden agendas* driving it. In this regard Moore’s *Circle of Conflict* can be helpful in determining what are the underlying interests driving the dispute.

It is also crucial to remember the power dynamics and the ways in which power impacts upon dispute resolution.

An analysis of a dispute generally involves looking at the following general issues:

• **Defining the problem**: what is the subject matter of the dispute, what are the key issues between the parties?

• **Who are the participants**: who are the parties to the dispute, are there any third parties who are not directly involved but may have an interest in or impact on the outcome, what are the communication skills of the parties, what are their individual needs and interests?

• **The relevant context and past**: what is the factual context—that is, the history of the dispute, the current circumstances? What is the context in terms of the parties and their connection with each other?

• **Possible options for resolution**: what sorts of options are the parties looking at achieving? Do they want a range of remedies and options to be open to them? Do they want an enforceable decision? Would they be able to adhere to a negotiated outcome?

Another way of assessing a dispute in terms of selecting an appropriate dispute resolution process is to consider the following specific factors (Astor and Chinkin, 1991, 188):

* What is the nature of the dispute?
* What time factors apply to the dispute—is there a need for a speedy determination or is there some flexibility about time frames?
* What is the monetary value (if any) of the subject of the dispute?
* What is the factual and legal complexity of the dispute?
* Is there a need for an authoritative ruling with precedential effect?
* What are the objectives of the parties?
* What is the nature of the relationship between the parties, including any power imbalance between them?
* What is the ability of the parties to negotiate without third party assistance?
* What resources are available for the resolution of the dispute?
* How many parties are there to the dispute?
* Do the parties have a continuing relationship?
* Is there a need for privacy?

Astor and Chinkin go on to say:

'the particular combination of these factors in any given case may lead to different conclusions about the most appropriate process and no absolute assumptions should be made about the conclusion to be drawn from any specific factor.'

(1991, 188; see also 2002 edition)

## what to use and when

### mediation

#### Power imbalances

* Power can be a fluid concept and they can change
  + e.g. where one person has legal representation and the other doesn’t
* Where bringing people together means that one person is unsafe – became apparent that when the mother was going to leave that she may be in danger because the ex was going to harm her – may have to use separate rooms, phone link up or video link up

#### How does the role of a lawyer acting for a client in a mediation differ from that in a court process?

* Key thing about being a legal advocate is that you are acting in your clients best interests
* We do use skills that we would use in a court system
* Option generation
* Acting in a settlement manner
* Take a more cooperative approach but think in a wholistic way – think about what they have in common etc and think about option generation – READ the Rundle article – see page 222 of the article where she breaks up the lawyers role into the various sub-categories – look at what she means by using each of those roles and how they work in each of the different types of mediation e.g. in a facilitative mediation the lawyer may be a supportive professional participant

## A Matrix for Assessing the Suitability of Processes for Disputes

|  |  |
| --- | --- |
| **Mediation** | When parties:  a) want to have some type of continuing relationship  b) want control over the dispute resolution process and agreement at end  c) are concerned to minimise costs and delay  d) want the dispute resolved confidentially  e) need a tailor-made resolution which addresses many issues and needs, for example, contact arrangements for children  e) have a genuine desire to resolve the dispute without commencing or continuing litigation |
| **Conciliation** | Where:  a) there is a level of conflict such that the parties require a more directive facilitator  b) where one party is being unrealistic about the outcome they will achieve if the case proceeds to a final court hearing  c) parties are concerned about costs and delay to proceed to final court hearing  d) want the dispute resolved within the court/tribunal or commission process  e) need a tailor-made resolution which addresses many issues  e) one or both parties may have a genuine desire to resolve the dispute without proceeding to final hearing however conflict too high to achieve this by mediation.  f) usually court ordered |
| **Expert appraisal — expert determination (non-binding)** | a) dispute involves issues of fact, quantification or valuation rather than legal liability  b) when parties have a good relationship which they wish to preserve  c) the expert's opinion is likely to assist the parties to reach a settlement. |
| **Expert determination (binding)** | a) dispute involves issues of fact, quantification or valuation rather than legal liability  b) parties want binding decision but wish to avoid disadvantages of arbitration and litigation  c) the parties relationship is such that formal enforcement through the courts will likely not be necessary. |
| **Arbitration** | When parties:  a) wish to reduce delays and formalities associated with court procedures  b) require some degree of privacy (eg. taxation issues)  c) may require adjudicator to have technical expertise  d) wish to limit the hearing to two parties; and/or  e) are located in different countries. |
| **Litigation** | Where:  a) there are circumstances of urgency and one party may lose an entitlement if matter not taken to court  b) case inappropriate for dispute resolution, eg, concerns allegations of fraud or an illegal act, or issue that can only be resolved by court decision  c) one or both parties does not genuinely want to resolve the dispute  d) parties want a public forum  e) parties’ legal representatives are not skilled at non-adversarial justice they make seek litigation as feel comfortable with the process  f) there is an overwhelming power imbalance which is such that a dispute resolution process cannot be successfully utilised  g) may be used inappropriately where one party can afford the litigation process and is using it as “payback” to punish the other party in the dispute |

## Considering suitability for a dispute resolution process

### Civil Disputes

The information under “civil disputes” has been adapted from the *Civil Procedure* Study Guide:

The Uniform Civil Procedure Rules do not state the criteria by which a court will consider referral.

However, in the case of ***Barrett v Queensland Newspapers Pty Ltd*** (Maryborough, No 52 of 1998) the District Court judge, Samios DCJ stated the following to be relevant criteria:

* prospects of success
* length of trial
* willingness to participate in the mediation
* offer to share dispute resolution costs
* role of 3rd party
* stage of action
* risks of litigation
* the success rate of mediation

### When is mediation more appropriate than case appraisal

It is considered that mediation is a more appropriate approach than case appraisal on when there is:

* A history of cooperation
* A limited number of disputants
* Limited Issues
* Moderate to low hostility
* Where an ongoing relationship is desired by the disputants
* There is a desire for settlement
* External pressure for settlement
* Leverage

**Mediation will not be appropriate in circumstances where:**

* Legal precedent is required
* Fraud is alleged
* Illegal activity is alleged
* There is a power imbalance likely to be reflected in resolution

## Family Disputes

Criticisms of the limits of the litigation process have been forcefully made in relation to family disputes. For example:

* Adversarial practice exacerbates conflicts and polarises the parties' positions;
* Litigation fails to adequately take account of underlying issues, including emotional factors;
* Parties do not have real control over proceedings which are fundamentally important to their lives;
* Particularly in disputes involving children, that parents are the best people to made decisions regarding arrangements about the time that each will spend with their children.

The result of this has been the range of dispute resolution options available in family law cases.

There are a wide range of family mediation services in Australia which have developed variations in mediation practice. There are differences in the use of mediation procedures and in attitudes to issues such as mediator neutrality, party control of proceedings, involvement of children and the importance of recognising emotional issues. It is quite common for there to be some form of co-mediation (one man and one woman, or one lawyer and one social scientist) in family disputes and this is the process adopted within the Family Court mediation scheme.

There is still some debate surrounding the need for mediators to have specialist skills in law, social work, counselling or therapy. The argument is that family law is an area where mediators need training in substantive matters of law or in the dynamics of family relationships. Others disagree and argue there is no evidence that having specialist skills in any way benefits the result.

Many mediation services that provide family law mediations emphasise their commitment to community mediation. This commitment involves removing professional involvement and ensuring mediators have knowledge of and are responsive to local issues. By contrast, the *Family Law Regulations* set out the minimum qualifications, training and experience of mediators within the Family Court structure.

Some of the claims for mediation in family disputes as an alternative to litigation focus on the particular characteristics of family disputes which make litigation inappropriate. Such factors include:

i) The high emotional content.

ii) The need for parties to feel in control of proceedings.

iii) The inability of the court system to adequately deal with children.

*The following gives guidance to family lawyers when assessing the suitability of a case for a process such as mediation:*

|  |
| --- |
| **3 Mediation**  ***3.1*** Not all cases are suitable for mediation. All Government funded and approved mediation agencies have a procedure for assessing the suitability of the clients for mediation. For mediation services in your locality refer to details available through Family Law Online at www.familylaw.gov.au.  ***3.2*** Mediation would not be appropriate in the following circumstances:   * at a time when there are child protection issues or a risk of child abduction * where clients do not have the willingness or capacity to mediate or their mental competence is in question * before urgent applications * where a particular issue can only be adjudicated upon by the court, for example, in paternity cases * financial proceedings where either party is bankrupt, or * where bail conditions or a family violence order are in place restricting one party having contact with the other party   ***3.3*** Mediation may also not be appropriate in the following circumstances:   * where domestic violence has occurred or is still occurring. If clients still want to mediate in such cases, the lawyer should discuss the risks and what can be done to make them feel safe during the mediation (for example, separate appointments, shuttle mediation (defined below), and teleconferences. Any intervention or restraining orders need to be examined to establish if separating couples are able to be seen together or whether separate appointments must be arranged * where the position of one party is so much stronger than the other that the difference is likely to be beyond the capacities of mediators to address, or * where reconciliation may be possible and counselling or marital therapy may be more appropriate.   ***3.4*** Mediation usually involves the separating couple meeting with the mediator at the ame time. However, alternatives may be determined at the assessment stage, for example shuttle mediation where separating couples eet separately with the mediator.  ***3.5*** From time to time the dispute between a couple may involve a wider group of family members than just the couple. Family members may include stepparents, randparents, aunts, uncles, children, elders, significant others, and even potential family members. Any of these people may participate in the mediation, provided that his has the agreement of the couple and the mediator.  ***3.6*** Children do not usually attend mediation sessions with their parents, but can participate in a variety of ways. For example, they may be interviewed separately by a person (sometimes the mediator) who is specifically trained to work with children and who may provide the children’s views as input to the mediation.  *Extract from* Family Law Council*, Best practice guidelines for lawyers doing family law work*. |

## Disputes Involving Indigenous People in Indigenous Communities

Over the past decade, there have been attempts to develop alternative forms of dispute resolution within Indigenous communities that are both culturally appropriate and have links to traditional processes.

Considering the use of mediation in Indigenous communities involves a number of important questions and issues:

* Is mediation culturally appropriate and in what form?
* Is mediation appropriate for violent disputes?
* The standard model of mediation emphasises the neutrality or independence of the mediator, but in Indigenous forms of mediation the mediator(s) are likely to be community Elders who know the parties and are aware of the dispute and will exert their authority over the mediation
* These forms of mediation may be closer to “evaluative mediation” or “conciliation” where the Elders are using their authority power to steer the parties towards an appropriate resolution

# Week 12 – Legal Issues and Ethics

## what are some of the duties that lawyers owe to their clients in relation to dr?

### Duty to advise

* Law Council of Australia Model Rules of Professional Conduct and Practice
* Text p43
  + *A practitioner must, where appropriate, inform the client about the reasonably available alternatives to a fully contested adjudication of the case unless the p’er believes that client already has an understanding of these alternatives so as to permit the client to make decisions in best interests about the litigation*

### Mediator confidentiality

* Queensland Law Society Mediation Kit
* A mediator must treat all information revealed in a mediation as confidential except for the following:
* 5.1.1 information that a mediator is required to divulge by statute, court order, or by professional standards of conduct
* 5.1.2 information that in the opinion of the mediator indicates a danger of physical harm to a party to the mediation or a third party
* 5.1.3 information that the parties have agreed may be disclosed by the mediator
* 5.1.4 information that the mediator informs the parties at the outset will not be protected, or
* 5.1.5 information directly relevant to alleged unethical conduct by a solicitor involved in a mediation.
* **REMEMBER:** Secombs v Salder:
  + Do not let your client leave the mediation before the settlement has been finalized
  + You should draw it up with them, read each paragraph to them, explain what a breach will mean , explain consequences of filing and if they breach it once it is filed
  + Can also be handy because if everyone leaves and goes back to their offices then it is difficult to get everyone together again to check things etc and it can make people frustrated and can also take additional time to get a full settlement – people can also go back on their word

### Solicitor confidentiality

Queensland Law Society Solicitor’s Handbook 4.02

Without the client’s knowledge and voluntary consent, a practitioner should not directly or indirectly reveal any matter which has been communicated to the practitioner (whether in writing or otherwise) in the capacity of a practitioner, or use it in any way thereafter detrimental to the client’s interests or lend or reveal the contents of the papers in any brief or instructions to any person except to the extent:

(1) required by law, rule of Court, or Court order, provided that where

there are reasonable grounds for questioning the validity of the authority presented to the practitioner may first take all reasonable steps to test the lawfulness of that authority; or

(2) necessary for replying to or defending any charge or complaint of criminal or unprofessional conduct or professional misconduct brought against the practitioner or partners, associates or employees.

## kinds of Things to think about/ Discussion questions

* What are the key legal issues in non-adversarial practice?
* What are the key ethical issues in non-adversarial practice?
* In what ways does the law, per se, remain significant to non-adversarial practice?
* Can a mediator be sued for negligence?
* Are mediations confidential?
* Why does the ADR movement remain unregulated? Is this a good or a bad thing for clients of ADR processes?
* How are ethics currently dealt with in processes such as mediation?
* How useful are codes of ethical conduct in the ADR context?
* What are the policy arguments in favour of legislating for alternative dispute resolution?
* What is NADRAC’s position on the issue of legislating for alternative dispute resolution?

## Key issues in non-adversarial practice

* Confidentiality and privilege
* Liability and immunity
* Enforceability of settlement contracts
* Enforceability of dispute resolution clauses

### Confidentiality and privilege

* It is generally claimed that dispute resolution processes are confidential.
* This is done to attract parties to the process and is a key ‘alternative’ aspect of processes such as mediation when compared with litigation.
* However, the assertion is not always accurate.
* Astor and Chinkin comment that “all that seems certain is that confidentiality is complex and cannot be absolute.” (2002, 180)
* Note that what people might expect or think is often not what the truth is
* Lots of pamphlets say that mediation is a confidential process- they think it can’t be used in court – allows people to voice their opinion openly
* The idea that everything you say is kept within that environment BUT the reality is that confidentiality is proctected in a number of ways –
* Confidentiality is complex and is not straight forward

#### How can you be sure that a process is confidential?

* Statutory assurances of confidentiality – this is one of the strongest forms of protection of confidentiality. Eg s.131 of the *Evidence Act 1995* (Cth) provides that communications made and documents prepared in an attempt to negotiate a matter are confidential.
* But note in the case of *Silver Fox P/L v Lenards P/L* (no.3) (2004) 214 ALR 621 confidentiality was not upheld in relation to documents prepared in relation to costs because of an exception under that Act.

**Example:** Family law act states that mediation is confidential – they can put that in their pamphlet because they have the statutory backing

Nevertheless – consider the legislation because there could be exceptions – that is what happened in silverfox – exception made the information no longer confidential

* Contractual assurances of confidentiality – eg in agreements to mediate.
  + Comes down to what the clause says and how it is deemed to operate
* Has yet to be fully considered by Australian courts.
* Structure and terms of agreements to mediate can vary significantly.
* The case *789Ten v Westpac Banking Corp* [2004] NSWSC 594 cautions on over-reliance on contractual protections with the court interpreting the contract at issue restrictively, and the result that documents relied on in the mediation were not held to be confidential.
* Protection of confidentiality via common law privilege. The seminal statement of this principle was made in *Field v Commissioner for Railways for NSW* (1955) 99 CLR 285.
* CL privilege allows “parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put into evidence subsequently might impose.”
* However, the courts face a difficult public policy balancing act – ie the assurance of confidentiality on one hand vs ensuring that courts have the best evidence before them.
* The difficulties that arise from these competing issues mean that CL privilege is not a watertight protection of confidentiality.
* WE can now say that the process is confidential to the extent of the law
  + Note that Rachel wrote an article on this area!

## Are mediations confidential

The real answer here is sometimes!

* What about neutrality – well it is still called that because in the 70’s that is probably how it was sold – as something similar to litigation but not as formal
* Judges have to do things in public – it is not recorded (judgments etc) so it may be more open to scrutiny in that light
* There is no one there to have a check on the practice of the mediator – RACHEL THINKS THAT THERE SHOULD ALWAYS BE A LAWYER
* If you are going to encourage people to do it more then you need to be able to assure them that it is safe and secure

## Liability and immunity

* Issue of mediator liability has been considered in relation to:
  + Torts – difficult to establish a standard of care because of different models and approaches to mediation; also may be difficult – especially in facilitative mediation – to establish a causative link between damage suffered and breach of a standard.
  + Fiduciary duties – at law a fiduciary duty can only exist in relation to one person at a time.
  + Statutory immunity – in *Von Schultz* (2000) the mediator was held as having the same immunity from prosecution under s.113 of the *Supreme Court Act 1991* (Qld) as a judge of the court.
  + A mediator has not yet been sued for negligence
  + In the early days mediators had immunity similar to judicial mediation but that has since been removed
  + It is hard to find a mediator negligent because the mediator is a facilitator etc so the reality is that we know that whilst they are generating options etc but the power lies with the parties
  + Fiduciary duties – there are a few articles that have been written on this – you can link it to a mediators role – you can say that they are in a trusting relationship etc. But it can only be one person at a time so that is where it falls down

## Enforceability of settlement contracts

* Settlements arising from dispute resolution processes are usually classified as agreements to compromise the claim by way of settlement – and therefore the law of contract is invoked in terms of enforcing such agreements.
* Usually such agreements are written up as a contract or a deed – but they can be valid if they are oral.

## Enforceability of dispute resolution clauses

* Dispute resolution clauses are now a common feature of contracts in Australia.
* They provide for an approach to resolving disputes informally in the event that a dispute arises.
* Four issues dominate the case law in this area:
  + Such clauses must not oust the jurisdiction of the court (ie dispute resolution is a condition precedent to litigation and cannot be stated as a substitute for access to courts *Scott v Avery* 1856)
  + The clauses must not lack certainty (ie parties must be able to know their rights and liabilities under a contract – therefore difficulties can arise with the range of available options and their implementation)
  + The clauses must not refer to ‘good faith negotiation’ – note conflict on this point between the *Elizabeth Bay* case and the *Aiton* case.
  + The courts have difficulty finding a remedy for breach – because it isn’t possible to know whether a DR process would have produced a settlement it is difficult to work out a head of damages and their amount.

## The ethical issues in non-adversarial practice

* Understanding the differences between ethics, standards and values.
* Neutrality?
* Confidentiality?
* Upholding party self-determination?
* Note mediation is not currently a regulated profession and current ethical standards are aspirational.

## Why does the ADR movement remain unregulated

* ADR movement encompasses a range of diverse processes (refer again to the spectrum).
* The issue of regulation can only be dealt with adequately in relation to discrete processes.
* Many of the more legal processes involving lawyers are considered to be regulated as part of professional legal practice.
* Key process where regulation is increasingly in question is in relation to mediation – which is not yet considered to be a profession in its own right.
* Note that family dispute resolution practitioners are regulated pursuant to Family Law Regulations.

## Is a lack of regulation a good or bad thing for clients of ADR processes

* For clients it can lead to uncertainty about what to do if a practitioner is not competent or breaches an ethical or legal duty.
* For clients of mediation services, for example, currently the only real option is to make a complaint with the service provider.
* This won’t necessarily impact on that practitioner’s right to practice in future with different service providers however.

## Ethics in mediation

* Standards and codes of conduct exist – for example, the Law Council of Australia.
* However, these are aspirational and therefore not enforceable in professional disciplinary proceedings.
* In 2006 the mediation community made steps towards ensuring the competence and standing of mediation with voluntary accreditation processes.
* These processes also include de-accreditation processes.
* There is a model code of conduct that was written in 1994and then frequently updated – the main thing that we have done in Australia is create a voluntary accreditation process system – the problem is that the it really is only voluntary, but this is a good first step

## How useful are codes of ethical conduct in the ADR context

* They are useful as an aspirational measure – and for the development of practitioner artistry through reflective practice.
* They are not so useful for clients who want to enforce the standards – but they could provide a way for establishing a standard of care in torts proceedings (still difficulties with establishing the causative link between damage and breach will remain)

## NADRACS position on the issue of legislating for alternative dispute resolution

* The policy context for NADRAC’s recommendations concerns a legal environment that is promoting the increased use of ADR.
* The key issues examined in NADRAC’s guide concern the legal rights, obligations and protections of the parties who participate in ADR processes, and the powers and obligations of both the bodies who refer parties to ADR and ADR practitioners.
* Therefore their position is that in an environment of increased use of ADR, parties must be protected, and practitioners must be held accountable.
* Legislating for ADR is seen to help protect the quality and standards of the process.

## Common mistakes by lawyer representatives

* Wade, Representing clients effectively in negotiation, mediation and conciliation of family law disputes
* Failure to prepare the ‘right’ information
* Overconfident prediction of court outcomes
* Overemphasis on ‘legal’ issues as compared to ‘commercial’ or personal issues
* Emotional and antagonistic involvement of lawyers
* ‘Entrapment’ - investing too much time and money into the conflict

**Things to ask yourself (avoiding the mistakes)**

1. What *goals* does each client have? This is the reverse of ‘what *risks* does each client have if the conflict continues’?
2. What are the *causes* of this conflict?
3. What *interventions* might be helpful?
4. What *bumps/glitches* are predictable?
5. What *substantive outcomes* are possible/probable?

**Vicker: Seven principles for advising**

* Seven principles for successfully advising a party at mediation:
  + - 1. Be familiar with the process
      2. Be prepared
      3. Be flexible
      4. Be client responsive
      5. Be frank (but diplomatic)
      6. Be patient
      7. Be alert

## Lecture activity – what method where?

Go through them and try and figure out what might be best for each scenario

1. Partners in a partnership dispute – Expert Appraisal working out the method of valuation you’d need an expert – get them to suggest the best way to get a valuer
2. Family law dispute – financial matters – dividing it up but wife is intimidated by husband – mediation – talk about whether it would work, ask if wife could be assertive (due to intimidation), advise that she should do it with a lawyer present – negotiation could also work – talk to client about what she wanted and what would be the best options
3. Child taken out of the country – urgent – may be appropriate for court proceedings s60I – exception for urgency in the family law act – negotiation is an option but there is a risk there so court action may be more appropriate
4. Gavin wants to admit guilt and wants to say sorry – can only work if she wants to participate – may be an abuse of process against her if she doesn’t want it – so possible mediation process there

# Drafting dispute resolution clauses

See pages 405 -420 of the text

* Clauses must not oust jurisdiction of court
* Clauses must be certain
* Clauses must NOT refer to “good faith” participation

## What is good faith

* *Western Australia v Taylor* (1996) 134 FLR 211 at 224-225, otherwise known as the
* Known as the *Njamal* decision
* Failure to take reasonable steps to facilitate and engage in discussions between the parties;
* Failing to respond to reasonable requests for relevant information within a reasonable time;
* Stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
* Unnecessary postponement of meetings;
* Refusing to agree on trivial matters;
* Shifting position just as agreement seems in sight;
* Adopting a rigid non-negotiable position;
* Failure to make counter proposals;
* Failure to do what a reasonable person would do in the circumstances

1. Bottomley and Bronitt, above n 1 at 19 [↑](#footnote-ref-1)
2. S Bottomley and S Bronitt, *Law in Context* 3rd ed, The Federation Press, Sydney, 2006, 116. [↑](#footnote-ref-2)
3. Heilbronn at al, *Introducing the Law*, 6th ed, CCH, 2004 [717] at 279. [↑](#footnote-ref-3)
4. Heilbronn ibid at [724] at 285. [↑](#footnote-ref-4)
5. Bottomley and Bronitt, above n 1 at 122*.* [↑](#footnote-ref-5)
6. Bottomley and Bronitt, above n1 at 122 [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. A Frieberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ (2003) 20 *Law in Context* 6, 9. [↑](#footnote-ref-8)
9. M King and K Auty “Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction” (2005) 30(2) *Alternative Law Journal* 69 at 73. [↑](#footnote-ref-9)
10. Above. [↑](#footnote-ref-10)
11. B Winick and D Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* Durham NS: Carolina Academic Press (2003) at 12. [↑](#footnote-ref-11)
12. Often used to provide a framework for interdisciplinary practice between various professions such as the law and social work: C Hartley and C Petrucci, ‘Justice, Ethics and Interdisciplinary Teaching and Practice: Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and the Law’ (2004) 14 *Washington University Journal of Law and Policy* 133. [↑](#footnote-ref-12)
13. J Popovic, ‘Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary’ (2003) 20 *Law in Context* 121. This has been utilised in the new courts, such as Drug and Koori courts. [↑](#footnote-ref-13)
14. Above. See also M King, ‘Applying Therapeutic Jurisprudence in Regional Areas - The Western Australian Experience,’ (2003) 10(2) *E Law- Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.htmla> (accessed 27 July 2005). [↑](#footnote-ref-14)
15. See for example an analysis of recent USA civil case law and the therapeutic framework D Wexler, ‘Lowering the Volume through Legal Doctrine: A Promising path for Therapeutic Jurisprudence Scholarship’ (2002) 3 *Florida Coastal Law Journal* 123. [↑](#footnote-ref-15)
16. M McMahon and D Wexler, ‘Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand,’ (2003) 20 *Law in Context* 1. [↑](#footnote-ref-16)
17. See for example A Schneider, ‘Therapeutic Jurisprudence/Preventative Law and Alternative Dispute Resolution,’ (1999) 5  *Psychology, Public Policy and Law* 1084 and A Schepard A, and J Bozzomo, ‘Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections On A Survey of Unified Family Courts.’ (2003) 37 *Family Law Quarterly* 333. [↑](#footnote-ref-17)
18. G Paquin G and L Harvey, ‘Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection’ (2002) 3 *Florida Coastal Law Journal* 167. [↑](#footnote-ref-18)
19. Lord Woolf, ‘The Court’s Role in Achieving Environmental Justice’ (2002) 4 *Environmental Law Review* 79 at 79 quoted in Dr Tom Altobelli, ‘Comments: Family Law Rules 2004’ (2004) 18 *Australian Journal of Family Law* at 1-2. [↑](#footnote-ref-19)