

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [10.33 a.m.]: I move:

That this bill be now agreed to in principle.

Community justice centres, which are commonly referred to as CJs, have been providing a valuable dispute resolution service to the community for over 25 years. Community justice centres are wholly funded by the Government and provide free mediation and conflict management services to help people across New South Wales resolve their disputes without having to go to court. The mediation process is one in which trained mediators assist those in dispute to resolve the issues between them. The mediator is impartial, has no advisory or determinative role, but rather facilitates discussions between disputants to help them devise their own solutions. Community justice centre mediators assist with a whole range of disputes, including disputes between neighbours, disputes within families, civil and small claims matters and business disputes.

In 2009-10 New South Wales community justice centres opened files in relation to almost 5,000 disputes, up more than 60 per cent from 3,000 in the previous year. In the same year the centres conducted a total of 1,725 mediations. Over 80 per cent of mediations resulted in an agreement being reached. I am sure honourable members will agree that is an impressive track record. There is no secret to the success of this scheme—people who engage in mediation are more committed to the outcome because they take part in the decision-making process. In 2009, recognising the increasing importance of alternative dispute resolution, the Department of Justice and Attorney General established an Alternative Dispute Resolution [ADR] Directorate. The role of the Alternative Dispute Resolution Directorate is to encourage the greater use of alternative dispute resolution in New South Wales. Community justice centres now come under the umbrella of the Alternative Dispute Resolution Directorate.

The reforms before the House today were developed following an internal review of the Community Justice Centres Act by the Alternative Dispute Resolution Directorate in consultation with community justice centre mediators and parties who use the service. The Community Justice Centres Amendment Bill 2010 introduces amendments that will update and further improve the operation of the Community Justice Centres Act 1983 and provide a better framework for community justice centre mediators to operate under the new national mediator accreditation system. Additionally, the bill also repeals the Community Justices Centres Act 2007. The 2007 amending Act contains a number of un-commenced provisions, some of which have now been incorporated into the bill before the House.

I begin by outlining the proposed amendments relating to the service of community justice centre mediators. Currently, the Community Justice Centre Act provides that community justice centre mediators are accredited by the Minister on the recommendation of the community justice centre director for terms of up to three years. The Minister determines their remuneration. The Community Justice Centres Amendment Act 2007 provided for the repeal of these arrangements and for community justice centre mediators to be made employees under the Public Sector Employment and Management Act 2002. The 2007 amendments were aimed at clarifying the employment relationship of mediators and enabling the appropriate supervision and assessment of mediators to ensure continued delivery of quality service. However, these amendments were never commenced.

In 2010 the role of community justice centres in supervising and managing its mediators is not at issue. With the introduction of the national mediator accreditation system, it is clear that accreditation needs to be supported by a legislative scheme that accords with that system and permits flexibility in appointment, conditions and pay. Accordingly, the bill introduces a new legislative framework for the appointment of community justice centre mediators. This is based generally on that successfully used for youth justice conference convenors under the Young Offenders Act 1997, forum sentencing facilitators under the Criminal Procedure Regulation 2005 and the New South Wales Consumer, Trader and Tenancy Tribunal.

The bill provides for, firstly, the appointment of mediators by the Director General of the Department of Justice and Attorney General on the recommendation of the director of community justice centres; secondly, the appointment of mediators as independent contractors for renewable terms of up to three years; thirdly, the bill provides for the determination of mediators' remuneration and allowances by the director general from time to time on the recommendation of the director of community justice centres; and, fourthly, the removal of mediators from office by the director general or in other circumstances, such as where they are convicted of an offence punishable by 12 months imprisonment or become a mentally incapacitated person. The bill also clarifies the status of mediators and the director and staff of community justice centres under the Public Sector Employment and Management Act 2002.

The proposed new arrangements will result in a transparent and workable system that is more adaptive as developments arise in the alternative dispute resolution area. Community justice centres are currently transitioning their mediators to national accreditation under the national mediator accreditation system. The new legislative arrangements will better support this process and allow community justice centres to accredit their

mediators in line with the national standard and engage them in a manner which is consistent with other equivalent schemes across New South Wales. Other proposed amendments provided for in the bill will enhance the operation of the Community Justice Centres Act and the services provided by community justice centres.

The bill contains a number of amendments aimed at clarifying and modernising the Community Justice Centre Act with regards to court-ordered mediation. The bill amends the Community Justice Centres Act to clarify that community justice centres can now carry out mandatory court-ordered mediations. The bill also amends the Community Justice Centres Act so that, where there are no secrecy, privilege and liability provisions in the legislation under which the court-referred mediation was ordered, the protections and privileges under the Community Justice Centres Act will apply. Further, where there are secrecy, privilege and liability provisions in the referring legislation and those provisions conflict with those in the Community Justice Centres Act, it is proposed that, consistent with the approach taken with the rest of the legislation, the provisions of the Community Justice Centres Act will also prevail.

This approach achieves simplicity. It will mean that community justice centre mediators will generally enjoy the same rights and obligations when carrying out their functions, irrespective of how a dispute has been referred to them. It will also ensure the specific requirements of community justice centre mediators are accommodated; for example, community justice centre mediators need the exception to the secrecy provisions contained in the Community Justice Centres Act in order to enable them to make the requisite mandatory reports to Community Services for child protection purposes.

The Community Justice Centres Act provides that a mediation session is to be conducted in private, but non-parties may be present or participate in a mediation session with the permission of the director. The director's approval is also required in order for a party to be represented at a mediation session by an agent. The bill removes these outdated restrictions on the conduct of mediations. The Community Justice Centres Act already provides that the procedure for commencing and conducting a mediation session is to be determined by the director. Nevertheless, the bill provides that the director or individual mediators will be able to exclude a person from attending, or continuing to attend a mediation, if, in their opinion, the presence of the person may frustrate the purpose or conduct of the mediation session. This will safeguard the proper conduct of mediations.

The Community Justice Centres Act presently provides that a dispute may not be adjudicated or arbitrated upon at a mediation session. The bill removes this restriction. Community justice centre mediators will continue to do what they do best, which is mediation. It is not intended that community justice centre mediators become arbitrators. However, the amendment contained in the bill removes any uncertainty about the ability of community justice centres to provide their conflict management services, including those with a directive element.

For example, since the inception of the service community justice centre mediators have provided dispute resolution and conflict management services relating to disputes in Aboriginal communities in rural areas. These disputes may involve several families and a considerable number of individuals, and are more directive than the conventional mediation process. Removing the prohibition merely confirms the validity of community justice centre mediators to carry out those types of processes, and is for the avoidance of doubt. The Chief Magistrate has advised that he supports the removal of this prohibition, as it will promote alternative dispute resolution services and provide greater certainty to participants in such processes.

At present, the Community Justice Centres Act expressly provides that agreements reached at community justice centre mediations are not enforceable in any court, tribunal or body. The Chief Magistrate has advised that he supports also the removal of this prohibition. The National Alternative Dispute Resolution Advisory Council also supports this view. The restriction is anomalous in contemporary alternative dispute resolution law and policy. One of the principal objectives of mediation is to enable parties to avoid litigation. Enabling parties to reach enforceable agreements at mediation assists in achieving this objective.

The bill therefore amends the Community Justice Centres Act to remove this restriction. Should parties wish to make an enforceable agreement, they will be able to do so at the community justice centre mediation. Statutory protections such as those provided by the Trade Practices Act 1974 and the Fair Trading Acts in relation to misleading and deceptive conduct, and the protections available in cases of unfair contracts will, of course, continue to apply. As a consequence of this amendment, the bill also provides that, where the parties have agreed that an agreement reached at mediation is to be enforceable, evidence can be given before a court or tribunal to enforce such an agreement.

As previously mentioned, community justice centre mediators have a mandatory duty in relation to reporting children at risk of harm. Legislative amendments introduced following the Special Commission of Inquiry into Child Protection Services in New South Wales—the Wood inquiry—raised the threshold for mandatory reports to Community Services. As a result, rather than making a report where there is a reasonable suspicion of a risk of harm, the relevant parts of the care legislation now refer to a risk of significant harm. The bill updates the mandatory reporting obligation for community justice centre mediators consistent with this new standard.

Community justice centre mediations are generally privileged and confidential. The Community Justice Centres

Act provides that evidence of anything said or of any admission made in a community justice centre mediation session is not admissible in any proceedings before any court, tribunal or body. Similarly, a document that has been prepared for the purposes of a mediation session, or produced in the course of a community justice centre mediation session, is not admissible in evidence in any proceedings before any court, tribunal or body. However, these provisions do not apply where the parties to the mediation consent to admission of the evidence or document.

The privilege and secrecy provisions also do not apply where proceedings have been instituted in relation to which a disclosure has been made on the basis that it is necessary to prevent harm to another person or damage to any property. However, there is some doubt over whether evidence or documents from a mediation session would be admissible in care proceedings where a mediator has made a mandatory report to Community Services that a child is at risk. Therefore, the bill amends the Community Justice Centres Act to provide a further specific exception to the privilege and secrecy provisions where a community justice centre mediator has made a report to Community Services as required under the legislation. Finally, the bill makes a number of minor amendments designed to update the legislation and remove certain anachronistic provisions.

As currently framed, the Community Justice Centres Act requires that community justice centres and the principal office of a community justice centre must be established at such premises as the Governor may determine by order. In practice, community justice centre mediations are carried out in a wide variety of locations as needed from time to time, such as in court premises and community facilities. It is impractical to require the director to give approval for each specific location and the bill therefore removes these provisions of the Community Justice Centres Act. While largely technical in nature, the amendments provided for in the bill will help ensure that community justice centres continue to provide high-quality and progressive alternative dispute resolution services to the New South Wales community. I commend the bill to the House.