



**Rotary**



**MEDIATING WITH MONGOLIAN FAMILIES**

**WORKBOOK**

## **Introduction**

In 2017 Dr Katherine Pavlidis Johnson, an Australian mediator/barrister went to Mongolia to visit her brother, Konstantin Pavlidis, who was producing a documentary on the Khamba Lama D. Natsagdorj for which he won an award. Whilst in Mongolia Lama Natsagdorj expressed concern over the breakdown of the family in Mongolia and introduced Dr Johnson to Professor T. Namjil of the International University of Ulaanbaatar who sought assistance from her with resolving family issues in Erdenet, with a group of single fathers. In response to Professor Namjil's request Dr Johnson invited a team of mediation and legal experts to assist her – Mary Walker, Dr Laurence Boulle, Helen Miedzinski and Jennifer Scott. The team included 2 additional report writers, Andrew Wong and Jessica Walker to document the Community Needs Assessment which the team undertook in March 2018. It also included Ian Scott, a Rotarian assessing the possibility of funding parts of the project.

The team met with members of the Judicial Council, the Department of Family, Child and Youth Development, the Mongolian Bar Association, the District Court, Mongolian International and National Arbitration Centre, social workers, NGOs and Rotarians. With the assistance of Enkhtuya Sukhbaatar, (a member of the Rotary Club of Ulaanbaatar), the team prepared an analysis which led to a proposal by Ian Scott for a Rotary Foundation Vocational Training Team (VTT) to meet a need for specialist training in Family mediation and community conflict resolution. After meeting with the Judicial Council delegation to Australia in 2018, Judge Joe Harman, a judge of the Federal Circuit Court in Australia (which manages Family law disputes) accepted an invitation to also join the team. The aim of the project is to strengthen Mongolian institutional capacity in the field of dispute resolution to build a civil society with the family unit at its core.

The Judicial Council and the Department of Family, Child and Youth Development are to be congratulated for recognising the need to strengthen the family unit as the core basis of civil society. The 2018 Community Needs Assessment conducted by the team found that although the Judicial Council had successfully trained over 44 mediators through the Japanese International Cooperation Agency (JICA), there was a marked need for further training in the intake process for family law disputes. This involved an understanding of the impact of loss on the parties in relation to their readiness to make decisions. It was decided that the best program to assist with this need was the Normative Information Session (NIS), which became the basis of the training program. The NIS not only satisfied the need to strengthen the family unit, but also satisfied the need to develop community through conflict resolution methods in order to build a deeper democracy.

1. **Project:** Nation Building Through Mediation: Family Mediation and Community Conflict Resolution in Mongolia
2. **Location:** Ulaanbaatar Mongolia
3. **Sponsor organisations:**
  - a. ADRA

- b. Judicial Council of Mongolia
- c. Mongolian Department of Family, Child and Youth Development
- d. Rotary Club of Ulaanbaatar D3450
- e. Rotary Club of Central Blue Mountains D9685

4. **Project goal:** To help build a civil society with the family unit at its core, the project will focus on training the mediators from the Judicial Council and the social workers and psychologists from the Department of Family, Child and Youth Development as well as approved NGOs in the intake process of the NIS. This training will include skills in identifying the level of readiness of the disputing parties to cope with their specific losses in order to improve their own family relationships. The skills will also include conflict prevention and management at the judicial, government department and community level in Mongolia. In a multi-level approach Court appointed mediators will be provided with further training in the intake process for Family Dispute resolution, and State employed social workers and approved local NGOs will also be provided with conflict management and alternate dispute resolution training. These participants will form a core of skilled people who will train others to intervene, prevent and resolve conflict through a more effective intake process for family law.

5. **Project Outcomes:**

- a. A higher level of skill for court-appointed mediators and government/non-government organisation social workers and psychologists in the intake process for family dispute resolution as well as improved skills overall for alternate dispute resolution, conflict management and conflict resolution.
- b. Improved family law mediation outcomes including better co-parenting of children where parents divorce or separate. This will be achieved through
  - i. an improved understanding of the impact of separation/divorce on all parties,
  - ii. building a collaborative relationship with their partners and
  - iii. working together to support any children.
- c. Improved family dispute resolution where parents:
  - i. develop conflict competency skills,
  - ii. are assisted to reach an agreement,
  - iii. are given the opportunity to improve their parenting skills,
  - iv. strengthen the family unit, and
  - v. reduce family violence.

## **Chapter 1: Introduction to Conflict Resolution**

For a more effective understanding of the intake process, it is important to have a thorough understanding of the basis of conflict itself. The following overview offers the foundational knowledge required to fully appreciate the intake process.

### **Overview**

Conflict is everywhere. It forms a basic, and most natural, part of our lives. Conflict can exist over matters as simple as trying to get a child to clean their bedroom, or it may be as complex as negotiating a corporate merger. Whatever the situation, it is essential to understand the basis of conflict, its nature, causes and the emotions that surround it, in order to successfully resolve conflict to the fullest satisfaction possible. With the tools and objectives that you accomplish in this unit, you will have a greater understanding of why conflict arises, the nature of conflict itself, as well as the perceptions, emotions and assumptions that drive it. Being able to correctly identify and deal with these peripheral issues will be a vital skill for you when mediating disputes with families. You will see that only through a thorough understanding of why humans find themselves constantly at odds will you be able to successfully negotiate and defuse serious situations. You will develop the ability to avoid destructive conflict and recognise instead constructive discussion and negotiation, as well as being able to identify underlying needs and issues that nearly always accompany conflict.

### **Checklist**

Upon completion of this session, participants will be able to:

- Discuss the nature of conflict and the different perspectives which surround its identification;
- Understand the causes of conflict, and the way in which these causes may arise;
- Examine how issues such as communication, emotion, culture and values can influence people's perception of conflict and affect the way in which they react;
- Understand the continuum of human needs, and how it is vital in identifying and dealing with conflict
- Describe situations where conflict is destructive, as opposed to situations where it is actually constructive and appropriate
- Identify and appreciate the continuum of levels of dispute resolution
- Discuss the appropriateness of compromise
- Examine the requirements for long-lasting settlements as identified in the "Satisfaction Triangle"
- Review the causes of conflict
- Describe the four conflict-resolution styles and when to use them

## **The Nature and Causes of Conflict**

### ***The Nature of Conflict***

The following is a summary and extracts from *The Dynamics of Conflict Resolution* by **Bernard Mayer** (note reference in resource guide).

*"Understanding conflict is basic to its resolution. If we seek to end a conflict, we must start by understanding its nature. What makes a successful peacemaker or conflict resolver is not a set of processes, methodologies or tactics; it is a way of thinking, a set of values, and array of analytical and interpersonal skills and a clear focus"*

Conflict is natural, inevitable, necessary and normal. The problem is not the existence of conflict but how we handle it. People and organisations are loathe to admit that they are in the midst of conflict. Many are of the view that to admit there is conflict is to admit failure.

Conflict may be viewed as a feeling, a disagreement, a real or perceived incompatibility of interests, inconsistent world views or a set of behaviours. Its basis derives from expectations not met. If we are to be effective in handling conflict we must start with an understanding of its nature. We need tools that help us separate out the many conflict interactions that make up a conflict, that help us understand the root of conflict and that give us a reasonable handle on the forces that motivate the behaviour of all participants, including ourselves.

Whether we are aware of them or not, we all enter conflict with certain assumptions about its nature. Sometime these assumptions are helpful, at other times they blind or limit our ability to understand what lies behind the conflict and what alternatives exist for dealing with it.

### ***What is Conflict?***

Conflict may be viewed as occurring along cognitive (perception), emotional (feeling) and behavioural (action) dimensions.

In the intake process of the NIS, conflict is based on the disputing parties' differences in their worldview, that is differences in their perceptions around their expectations. In other words, disputes occur when expectations are not met. The only reason for disputing parties to attend mediation is to make sense of their loss. In order to make sense of the loss, the parties have to understand the meaning each attached to their respective losses. In order to live with the loss, the parties have to reconstruct a new meaning around the significance of that loss to their current worldview (see Mediation Quest: Making Sense of Loss).

### **Conflict as a perception**

As a set of perceptions, conflict is a belief or understanding that one's own needs, interests, wants or values are incompatible with someone else's. This dimension has both objective and subjective elements for example, if I wish to develop a parcel of land into a shopping centre, and you want to preserve it as parkland, then there is an objective incompatibility in our wants. An example of a subjective component would be

if I believed that how you raise the children is incompatible with my philosophy of the child rearing (no physical punishment for example).

What if, only one person believes that an incompatibility exists? Are the parties still in conflict? For conflict to exist at least one person needs to believe it exists. If I believe we have incompatible interests and act accordingly then I am engaging you in a conflict process whether you share this perception or not.

#### Conflict as Feeling

Conflict also involves an emotional reaction to a situation or interaction that signals the disagreement of some kind. The emotions that may be felt include fear, sadness, bitterness, anger or hopelessness or a combination of these (see the NIS stages of grieving). If we experience these feelings in relation to another person or situation we feel that we are in conflict – and therefore we are. Often a conflict exists because one person feels in conflict with another, even though those feelings are not reciprocated by or even known to the other person.

#### Conflict as Action

“Conflict also consists of the actions that we take to express our feelings, articulate our perceptions, and get our needs met in a way that has the potential for interfering with someone else’s ability to get his or her needs met. This conflict behaviour may involve direct action, persuasion, or other exercise of power. It may be destructive or conversely it may be conciliatory and constructive”.

By considering conflict along the cognitive, emotional and behavioural dimensions we begin to see that it does not proceed along one simple, linear, path. When individuals or groups are in conflict they are dealing with different and sometimes contradictory dynamics. In these different dimensions, and they behave and react accordingly. This accounts for what often appears to be irrational behaviour in conflict. Mayer provides an example of these dimensions that is common to many workplace environments. “Two employees are assigned to work together on a project and soon find themselves in conflict over whether they are pulling their weight and passing along important information to each other. They engage in a fairly public shouting match, they each complain to their supervisor. The supervisor sits them both down, and they agree on a workload division and certain behavioural standards, to which they then seem to adhere. Has the conflict been resolved? It may have been alleviated along the behavioural dimensions but each goes away from this meeting feeling victimised by the other and unappreciated by the boss. One of the employees decides that these feelings just result from the nature of the job and believes that the immediate conflict is over, but the other continues to see the conflict being acted out every time the other person comes late for a meeting or sends a terse email. Thus progress has been made in the behavioural dimension, the emotional dimension is, if anything, worse, and there are contradictory developments along the cognitive dimension. These employees may have ceased their overt conflictual behaviour, but the tension between them may actually increase.”

#### ***What causes conflict?***

There are many theories that try to explain the origin of conflict. It is seen as arising from basic human instincts caused, for example, by the competition for resources and power, the structure of the societies and institutions, struggle between classes (the haves and have nots). Our focus is throughout this course is focussed on the theory and concepts examined by Dr Katherine Pavlidis Johnson, who explains conflict in terms of loss and loss is nothing else but change. <sup>1</sup>As a result of loss, people go through 7 stages of grieving.

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<sup>1</sup> Mediation Quest. Making Sense of Loss. The Re-Constructive Model: Guidelines for Practitioners.

### Five Basic Sources of Conflict

- Communication
- Emotion
- Values
- Structure
- History

#### **Communication**

Humans are imperfect communicators. Sometimes this imperfection generates conflict. We often fail to appreciate how hard it is for individuals to communicate about complex matters, particularly under emotionally difficult circumstances. Conflict frequently escalates because people act on the assumption that they have communicated accurately when they have not. When they learn that others are acting on the basis of different information and assumptions they often attribute this to bad faith, deviousness or lies and not to the imperfections of communication (see Isolina Ricci's chart in Guideline 5 of the NIS).

Many factors may contribute to communication problems. Culture, gender, age, class and environment significantly affect our ability to communicate effectively. Our interests and priorities also impact on what is important to us. Often we hear and see only part of the communication. People therefore often rely on inaccurate or incomplete perceptions, and tend to form stereotypes and carry in to their communications conclusions drawn from former interactions or experiences or from third parties. They are also inclined to try and solve problems before they understand them. The greater duress a person is under, the harder it is for him or her to communicate (see for eg. marital breakdown). Sometimes communication takes more energy and focus than someone is able or willing to give at a critical point and it is easy to become discouraged. Often the immediate reaction is "What's the point?" Despite these problems people can and do muddle through when they communicate and they can work on improving communication. ( see DISC Model of the NIS).

#### **Emotion**

Emotions are the energy that fuel conflict. If people could always stay perfectly rational and focused on how best to meet their needs and accommodate those of others, and if they could calmly work to establish effective communications, then many conflicts would either never arise or would quickly deescalate. Fortunately, however, emotions can seem to be in control of behaviour. Sometimes they are also the source of power for disputants. They contribute to the energy, strength, courage and perseverance that allow people to participate forcefully in conflict (see readiness levels in the NIS – guideline 6).

Emotions are generated both by particular interactions or circumstances and by previous experiences.

In conflict it is usually necessary to work specifically on the emotional content of the disputants' experience. This may require creating some opportunity to express and release emotion and to experience someone else's understanding and empathy. This doesn't mean people should vent their emotions; rather, they should be given the opportunity to discuss their feelings.

Emotions can fuel conflict, but they are also a key to deescalating it. Many emotions can prevent, moderate or control conflict. Part of our emotional make up is the desire to seek connection, affirmation and acceptance. A genuine expression of sadness, remorse or concern can be a key to addressing conflict effectively. This is where the understanding of the NIS intake process is fundamental to effective communication and ultimate management/resolution of disputes.

The art of dealing with conflict often lies in finding the narrow path between useful expression of emotions and destructive polarisation. This is one reason why it is often helpful to employ the services of a third party such as a mediator or conciliator.

### **Values**

Values are the beliefs we have about what is important, what distinguishes right from wrong and good from evil, and what principles should govern how we lead our lives. This is what the NIS process calls the “parties’ worldview”. When a conflict is defined as an issue of “values”, it usually becomes more charged and intractable. This is because people define themselves, in part, by their core beliefs. When they believe these values are under attack they feel that they are being attacked. It is therefore hard for people to compromise when core beliefs are in question because they feel that they are compromising themselves or their integrity.

Although conflicts are often claimed to be based on fundamental value differences, more often than not disputants do have a choice as to whether the conflict is defined in this way. When individuals feel unsure of themselves, confused about what to do, or under attack, it is particularly tempting to them to define an issue as a matter of right or wrong. This empowers and fortifies them even as it rigidifies their thinking and narrows acceptable options. Often it is easy to carry on a conflict if one can view oneself as honourable, virtuous and fighting for good and the opponents as malicious, evil and dangerous. This stance, comforting though it may be, tends to escalate and perpetuate conflict. Values can often affect the readiness and willingness of the parties to resolve a dispute according to the NIS Guideline 7.

Though values are often a source of conflict and an impediment to its resolution, they can also be a source of commonality and a restraint on conflict escalation. Often disputants can find some level on which they share values, and they often have values about interpersonal relations that support collaborative efforts (eg. parties believing war is not the answer). Recognising when values are in play in conflict is critical to moving the conflict in a constructive direction. When individuals address values directly and express their beliefs affirmatively – that is in terms of what they believe in rather than in terms of what they are against – they can address conflict more constructively. This allows for empathy to develop between the parties, thus enhancing the level of understanding around each other’s experience of loss (see NIS Guidelines 8-9).

### **Structure**

The significance of structure is to understand the relational dynamics involved in the organic process of the dispute. In other words, relational learning is at the heart of empathy and understanding (see Chapter 4 of *Mediation Quest: Making Sense of Loss* “Relational Learning”).

The structure - the external framework in which an interaction takes place or an issue develops is another source of conflict. The elements of a structure may include available resources, decision making procedures, time constraints, communication procedures and physical settings. An example is the litigation process. Litigation is well designed for achieving a decisive outcome when other less adversarial procedures have not worked. However, it is also a structure that exacerbates conflict, makes compromise difficult and casts issues as a win / lose struggle. Other structure elements that can affect conflict include the relationship of the disputants, distribution of resources, access to information, legal parameters organisational structure and political pressures. Sometimes structural realities can be changed however often there needs to be an acceptance of the structural elements and the fact that they are unlikely to be altered.

### **History**

Conflict cannot be understood independently of its historic context. The history of the people who are participants in a conflict, of the systems in which the conflict is occurring and of the issues themselves has a powerful influence on the course of the conflict. History provides the momentum for the development of conflict. Too often we try to understand a conflict in isolation from its historical roots and as a result are baffled by the stubbornness of the players. For example, consider the long history of conflict in the Middle East, Northern Ireland, the former Yugoslavia. Such conflict cannot be solved without an understanding of the complicated systems of interaction that are developed over time and the degree to which the conflict itself has become part of the disputants identify.

It is important to note that the history of a conflict is not just social but also individual. The genetic pool and psychological predispositions an individual brings to their own life experience forms a fundamental element of their worldview; and therefore of their expectations, which if not met can lead to a dispute (see Chapter 5 of Mediation Quest: Making Sense of Loss).

All these different sources of conflict - communication, emotions, values, structure and history interact with each other. People's history affects their values, communication style, emotional reactions and the structure in which they operate. History is constantly being made and therefore affected by these other sources. Therefore, conflict is an organic process constantly moving and changing.

There are three further dynamics that the sphere (wheel) of conflict model does not include as they cut across all the sources and are often best analysed in terms of those sources. They are:

1. Culture,
2. Power; and
3. Information.

### **Culture**

Culture affects conflict because it is embedded in individual's communication styles, history, and way of dealing with emotions, values and structures. These are both individual and societal (see Chapter 5 of Mediation Quest: Making Sense of Loss)

### **Power**

Power is a very illusive concept. One that can confuse our thinking and help us understand an interaction. Some sources of power are structural but other elements are also involved, in

particular, relational learning has a great impact on power (see Chapter 4 of *Mediation Quest: Making Sense of Loss*).

***Information***

Although information is not in itself a source of conflict how information (and knowledge) is handled and communicated can lead to conflict. Therefore, information can be viewed as an issue within both communication and structure (see the DISC Model of the NIS).

***Conflict can be destructive when it leads to loss:***

- one person has to give in too much (win-lose)
- the dispute hurts a relationship
- there is no agreement reached
- there are uncontrolled emotions, anger, and raised voices
- the conflict prevents or stops people from working

***Conflict can be constructive when it resolves the meaning around loss:***

- leads to resolution
- builds a strong relationship with improved communication
- opens people up to new ideas
- leads to win-win resolution
- develops common goals
- clarifies a problem situation and leads to positive change.

### ***Conflict as loss: Winning and losing***

Highly adversarial approaches like war and litigation mean that one party loses and one wins. Almost all the creative effort goes into undermining the other side's case, into reducing their credibility, and into persuading them and the court that one solution is better than the other. The outcome tends to rest on the power of persuasion rather than on the utility of the proposal. In addition, the losers typically carry a level of bitterness in defeat.

Many people see that often the only alternative is compromise. One definition of "compromise" is as follows:

"A settlement of differences by mutual concessions; or an adjustment of conflicting claims, principles, etc., by yielding a part of each" (Macquarie Dictionary)

The central concept of the definition and of the word's common usage is mutual concession. Everyone loses a little and everyone gains a little. The whole process seems fair. While there are many occasions when compromise is appropriate to resolve disputes, it can have the same effect as more adversarial approaches in stifling the search for other options, and may produce outcomes unsatisfactory to all parties.

Compromise is not the approach advocated by most of the models of mediation, probably because of the perceived problem of abandoning certain principles. Instead, an approach is taken which aims to satisfy all parties with the process and the outcome in both a tangible and intangible sense. The advantages of this approach are that better solutions should be discovered, relationships between the parties may be improved, and all parties will strive to make the agreement succeed, as they all gain from it. If compromise is going to be acceptable to parties, it is only going to be so to the extent to which it does not abrogate values that the parties hold as non-negotiable.

### ***Conflict as understood through relational learning: The need to achieve procedural, substantive and psychological satisfaction.***

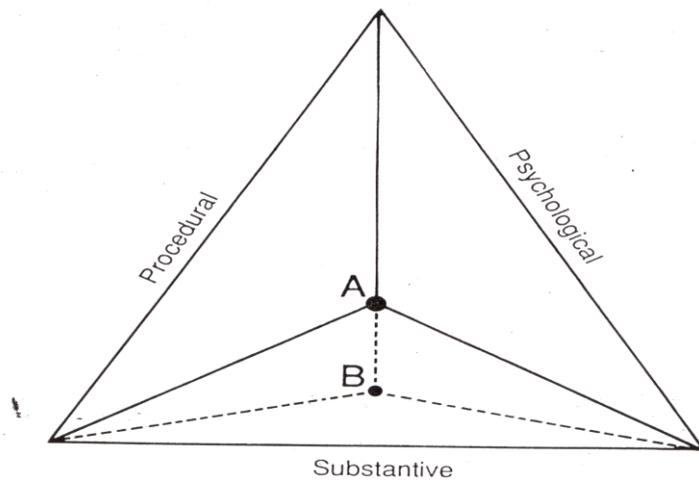
To achieve satisfactory, long-lasting settlements there are three areas of interest that must be satisfied (from Lincoln 1986):

- Substantive interests: i.e. content needs, money, time, goods or resources.
- Procedural interests: i.e. the need from specific types of behaviour or the "way that something is done"
- Relationship or psychological interests: i.e. "the needs that refer to how one feels, how one is treated or conditions for ongoing relationships". This, as with the procedural point above, would also include issues of a philosophical, ethical, cultural and spiritual nature.

It is important to note that fulfilling each of these interests is vital to achieving long-term and durable satisfaction. Settlements that have arisen out of a resolution process designed to address and, in so far as is possible, meet all of these needs, will leave the parties feeling positive about the process and satisfied with the outcome (see Chapter 4 of *Mediation Quest: Making Sense of Loss*).

### Triangle Figure - The "Satisfaction Triangle"

In Lincoln's "satisfaction triangle", each side represents one of these interests. Ideally, any dispute resolution exercise would be designed to satisfy all three interests; that is, to reach point "A". Unfortunately, many professionals involved in dispute resolution aim primarily for substantive satisfactory, point "B". However, procedural and psychological aspects are frequently just as important as, and occasionally more important than, substantive issues.



**Figure 2** The "Satisfaction Triangle"  
(Source: Lincoln 1986)

Psychological satisfaction may refer to the relationships between the parties. It may be that the core of the dispute is a poor relationship, in which case improving this would go a long way towards resolving the problem. Failure to deal with a poor relationship is likely to contribute to failure to find any substantive solution to the dispute (see NIS Guidelines 8-9).

### **Relational Learning: Five major conflict management styles**

They are underpinned by two levels of concern:

- Assertiveness: the degree of concern for their own outcome assertiveness, and,
- Cooperativeness: the degree of concern of the other party's outcome.

These Management Styles are:

- **Competing** style is high on assertiveness and low on cooperativeness.
- **Accommodating** style is low on assertiveness and high on cooperativeness,
- **Collaborating** is high on both assertiveness and cooperativeness,
- **Avoiding** is low on both assertiveness and cooperativeness and
- **Compromising** is moderate on both assertiveness and cooperativeness

(Lewicki, Barry, Saunders, Minton, 2003; Johnson, 2018)

(See also NIS Guidelines, DISC Model)

## Chapter 2: Preparation for Mediation

### Overview

Reconstructive mediation consists of 10 guidelines as a normative benchmark against which participants in mediation can measure their own level of grief to decide whether they are ready, willing and able to move forward from their loss. Underpinning concepts of the Normative Information Session is the belief that the disputing parties can share the benefits of psychological research around coping with grief and loss. By using the NIS, parties can creatively recombine existing ideas around loss. The normative framework of NIS accommodates the stress arising from the legal obligations of parties to assist in their decision-making capacity. It uses the personal constructs or worldview of parties as a fundamental part of their process of relational learning. Understanding each other's worldview enables parties to better understand their combined assumptions and expectations that form those worldviews. With this knowledge, the NIS assists parties, especially those in ongoing relationships, (such as parents) to deconstruct the original meaning attributed to their claim for loss in order to co-create a future through collective relational learning.

### Checklist

Upon completion of this session participants will be able to:

- Understand the normative framework of the NIS
- Be familiar with the Isolini Ricci model of relational learning
- Be familiar with mapping a conflict
- Using the DISC model to assess parties personality traits
- Assess whether parties are ready for mediation
- Prepare parties for mediation by assisting the parties to
- Identify the loss
- Deconstruct the loss
- Reconstruct the loss as an individual, and
- Be prepared for share change

**PLANNING WORKSHEET SUMMARY**

	ME	OTHER PARTY
ISSUES (Why we are meeting)		
OBJECTIVES (What is wanted)		
PERCEIVED NEEDS AND INTERESTS (Feelings)		
POTENTIAL CONCESSIONS (Things I'm willing to give up)		
SETTLEMENT OPTIONS (Possible solutions to the issues)		

**The 7 stages of Grief**

- Shock - initial paralysis at hearing bad news
- Denial - trying to avoid the inevitable
- Anger - initial outpouring of frustrated outpouring of bottled up emotions
- Bargaining - seeking in vain for a way out
- Depression - final realisation of the inevitable
- Testing - seeking realistic solutions
- Acceptance - Finally finding the way forward

See powerpoint presentation by Dr Johnson.

***What parties want to know prior to mediation***

- Why do I need to go?
- Is it compulsory? What happens if I don't go?
- Who will be there?
- What happens there?
- What am I going to get out of it?
- Can I be protected from the other side?
- Is there an appeal from it?
- What information do I have to bring?
- What are the Mediator's qualifications / experience?

***Mediator Intake Questions***

- 1 What am I hoping to achieve through mediation?
- 2 What are my issues and concerns and how do I rank them in terms of importance?
- 3 What might the other side hope to achieve by going to mediation?
- 4 What might be the other side's issues and concerns and how might they rank them?
- 5 What are the possible options for settlement that satisfy my needs and priorities?
- 6 What are the possible options for settlement that satisfy the other side's needs and priorities?
- 7 If I do not settle my dispute at mediation what:
  - could be the best alternative?
  - could be the worst alternative?
- 8 Does the person who will attend the mediation have complete authority to settle?
- 9 Should I be sending more than one person to mediation?
- 10 Am I prepared to completely reappraise my view of the dispute based on what I see, hear and learn at the mediation?

See powerpoint presentation by Dr Johnson.

## Chapter 3: Mediation

### Overview

Mediation is not easy to define, partly due to its flexibility and open interpretation of terms such as 'voluntary' and 'impartiality' – terms that cannot provide certainty and clear boundary lines. The term 'mediation' is used in different senses by different users. You will learn some theory this session and review your communication skills. The bulk of the session will take you through the stages in mediation, in particular the mediator's opening statement and the rules.

### Checklist

Upon completion of this session participants will be able to:

- Understand the concept of mediation and the role of the mediator (especially the intake process)
- Describe the stages in the mediation process as per the NIS Guidelines
- Be aware of the different models of mediation that can all form part of the NIS
- Undertake the first phase in the mediation process, namely the Opening Statement of the mediator as per the NIS Guidelines
- Put theory into practice by role playing opening statements of the mediator and summarising parties' opening statements

**Mediation** is a process of facilitated negotiation in which the parties, together with the assistance of a neutral third person chosen by the parties, work together to isolate disputed issues, develop options and consider alternatives in order to reach a consensual settlement that will meet their needs. (Folberg and Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* at 7).

*"Parties come to mediation to deal with their loss of expectations from the relationship." Johnson ibid.*

Mediators must ensure that everyone's interests are considered, respected and incorporated into a worthwhile agreement. The balance of power between parties affects how conflict is dealt with in the mediation and its effect on the negotiation process. Therefore, mediators need to be sensitive to the power balance and know how the structure and strategies of mediation can address power imbalances. The inequalities are based on negotiation styles, decision making information and lack of information, the mediator can use reflection, clarification, redirection and information finding.

Mediation is an empowering process and sometimes has an ability to address power imbalance. Mediators cannot make assumptions about existing power relationships. Parties need to be reminded that they have demonstrated strength to have come to the table to resolve something and to agree on the ground rules that mediation is based on respect. Mediators model respectful behaviour.

Mediators can foster open exploration of options, this can lead to settlements that go beyond solutions arising from the use of power. Parties are better able to see the other person's point of view when they have had the opportunity to express their feelings.

Mediation recognises people's ability to find their own creative solutions. Mediator's can gently remind parties that they are both responsible for designing the agreement. This gives power to the powerless person.

Mediators must ensure that they treat both parties equally. This in turn will be a model for how the parties should treat each other. As well as the mediation process being confidential and private it is important to create a secure environment to explore the underlying cause of a dispute.

### ***Mediator's Opening Statement***

#### **1. INTRODUCTIONS**

- Introduce self and parties
- Establish order of seating
- Give mediator's background (to establish trust)
- Establish what names to use

#### **2. INTAKE PROCESS AS PER NIS GUIDELINES**

- Go through NIS with the parties Guidelines 1-10
- Voluntary, non-binding, no decision imposed
- Mediator's role – neutral, impartial facilitation, unbiased

Summary of stages to come  
Flexible after initial joint meeting and private caucuses  
Establish any time constraints

**3. ESTABLISH BASIC RULES WITHIN PROCESS**

No interruptions when another talking  
No put downs or attacks on another  
Absolute confidentiality by mediator and parties. If there are limits on confidentiality they must be stated clearly and precisely.  
Role of observers / third parties

**4. COMMITMENT TO BEGIN**

Confirm with parties

**5. ESTABLISH POSITIVE TONE**

Stress mediation success rate  
Ensure mediator controls procedure  
Use conciliatory tone – low key, calm  
Establish eye contact (unless culturally inappropriate)  
If monologue is challenged, keep response as low key as possible  
Call break if necessary / desired

***When the parties talk.... Mediators listen to....***

- Convey respect and interest
- Role model respectful listening
- Convey empathy
- Learn the parties' perspectives
- Discover underlying causes of conflict
- Discover the parties' interests
- Hear the parties' "terms" or "positions"
- Learn the parties' responses to offers
- Discover positives to share
- Discover room for movement
- Discern a softening of attitudes
- Discern a readiness to settle
- To give time to think

Listening like a mediator takes a great deal of energy and concentration. At the end of the mediation you may well be exhausted. You may also feel elated because active, emphatic listening works so well to help the parties let go of their anger and defensiveness and to join together to design creative and collaborative agreements.

***When Mediators talk.... They speak to....***

- Set the parties at ease and earn their trust
- Make sure the mediation process is clear
- Draw out the parties' view of the conflict
- Give evidence that they are listening
- Give evidence that they understand what they hear

- Give evidence that they care.... that they take what they hear seriously
- Help the parties to hear one another
- Manage tensions between the parties
- Find out the nature of the relationship between the parties and their expectations for the future
- See if there are underlying causes for the conflict
- Find out the parties' initial expectations
- Find out the parties' interests
- Find out the "givens" that the parties must work within developing an agreement
- Help the parties invent options for mutual gain
- Test the parties' receptiveness to various options
- Transfer information
- Translate information (reframe statements positively)
- Share positives
- Help the parties see reality
- Stress the consequence of various options
- Build the will to settle
- Keep up the parties' and the mediators' morale
- Show neutrality

Mostly mediators listen. When they speak, they do so purposefully. And, with practice, they accomplish the above goals without cross-examining the parties or putting them on the defensive.

### Mediation Model

STAGE 1 A.	MEDIATOR'S OPENING STATEMENT (NIS Guidelines 1-10; Pre-Mediation Meetings)	RATIONALE –identifying the loss
	<ul style="list-style-type: none"> <li>• Introductions</li> <li>• Features of mediation: voluntary, confidential.</li> <li>• Role of mediators: neutral and impartial facilitator.</li> <li>• Status of agreement.</li> <li>• Process of mediation explained: parties in control of content and outcome.</li> <li>• Authority to settle established.</li> <li>• Parties' endorsement of ground rules.</li> </ul>	<ul style="list-style-type: none"> <li>• To explain mediation and the role of mediators and to set the scene</li> <li>• Acknowledge feelings of anxiety or any high emotions</li> <li>• Creating a climate of safety for resolution.</li> <li>• Enables the mediator to re-establish rapport with parties other's issues.</li> </ul>

	<ul style="list-style-type: none"> <li>Parties' agreement to proceed with the mediation</li> </ul>	
<b>STAGE 1 B.</b>	<b>PARTIES' STATEMENTS AND MEDIATOR'S SUMMARIES (Mediation Session)</b>	<b>RATIONALE: Identifying the loss</b>
	<ul style="list-style-type: none"> <li>Mediator takes notes during each party's statement.</li> <li>Summary of both statements read out at end of second party's statement and checked for inaccuracies. Allows parties time to settle into the room</li> </ul>	<ul style="list-style-type: none"> <li>Each party explaining their own personal constructs around the Loss</li> <li>To help mediators understand the parties' expectations and assumptions and to encourage the parties to listen to each other</li> </ul>
<b>STAGE 1C.</b>	<b>ISSUE IDENTIFICATION AND AGENDA SETTING</b>	<b>RATIONALE</b>
	<ul style="list-style-type: none"> <li>Isolate issues and discussion points.</li> <li>List of issues, expressed in neutral and mutual terms, endorsed by parties.</li> </ul>	<ul style="list-style-type: none"> <li>To set the scene for clarification, exploration and discussion of issues.</li> <li>To give mediator a "road map" for managing the early discussion.</li> </ul>
<b>STAGE 2</b>	<b>CLARIFICATION /EXPLORATION OF ISSUES AND OPTIONS</b>	<b>RATIONALE: Deconstructing the Loss</b>
	<ul style="list-style-type: none"> <li>Parties communicate about the agenda topics.</li> <li>Exchange of feelings about the dispute without pressure for premature resolution</li> </ul>	<ul style="list-style-type: none"> <li><b>Assessing</b> the severity of the <b>grief</b> in relation to the capacity to understand the other's perspective (Child/Parent)</li> <li><b>Engaging Relational Learning</b> – exploring the level of readiness and willingness to understand and/or address each other's worldviews/personal constructs around the losses.</li> <li><b>Engaging Mindfulness</b> to consider options which can enable meaning re-construction through <b>Adult-Adult transactions</b> around the losses</li> </ul>
<b>STAGE 3.</b>	<b>PRIVATE SESSIONS</b>	<b>RATIONALE: Re-Constructing the Loss Individually</b>

	<ul style="list-style-type: none"> <li>• Private and confidential sessions held with each party.</li> <li>• Development of options and mutually satisfying outcomes,</li> <li>• Raise doubts, raise doubts re entrenched positions and rehearse negotiations.</li> <li>• Address any challenging behaviours</li> <li>• Assist parties distinguish between interests and positions and evaluate options bases on interests, (BATNA/WATNA)</li> </ul>	<p>Reality testing from possible to probable options to enable individual meaning re-construction around loss.</p> <ul style="list-style-type: none"> <li>• To enable the 'safe' release of emotions</li> <li>• To reinstate the 'balance' and provide support when power has become unequal</li> <li>• To support parties' efforts to explore blocks and options for resolving</li> </ul>
<b>STAGE 4.</b>	<b>EXPLORATION &amp; NEGOTIATION</b>	<b>RATIONALE: Shared Re-Construction of the losses</b>
	<ul style="list-style-type: none"> <li>• Development of further options facilitated.</li> <li>• Options evaluated and mutually satisfying agreement considered</li> </ul>	<ul style="list-style-type: none"> <li>• Reality test for probable options that enable shared meaning-re-construction around the losses</li> <li>• To help parties move from entrenched positions, encourage creativity for mutual benefit and help them own the final outcome.</li> </ul>
<b>STAGE 5.</b>	<b>DECISIONMAKING</b>	<b>RATIONALE: Loss: an Agent for Organic Social Change: Observer Self</b>
	<ul style="list-style-type: none"> <li>• Terms of agreement reality tested to ensure lasting agreement.</li> <li>• Parties congratulated on reaching total agreement.</li> <li>• Parties assisted to decide on future action if partial or no agreement is reached.</li> <li>• Remind the parties of confidentiality</li> <li>• Ensure the parties are clear about the next steps</li> <li>• Provide appropriate referrals</li> <li>• Manage parties' departures from the mediation rooms to ensure their safety.</li> </ul>	<ul style="list-style-type: none"> <li>• Decision making to live with the losses</li> <li>• Shared meaning re-construction + individual relational learning = the formation of new social relations = social change</li> <li>• To ensure a positive conclusion of the mediation and enhance the parties' sense of achievement.</li> </ul>



### ***Procedures for Generating Settlement Options***

- Work to obtain agreement in principle, and then work on the details.
- In private sessions, assist each party to develop options they can swap in joint sessions and get them to consider these swapped options in the joint sessions.
- Brainstorm options with the parties, either jointly or separately in caucus.
- In private sessions, develop “packages” of options to offer to the other side that, if agreed to, will settle the whole matter and satisfy as many interests of all the parties as possible.
- Break the issues into smaller parts and build up agreements on the smaller parts until a full settlement is achieved.
- Try to find the needs being expressed behind the position so that the options can be expanded.
- Use positional bargaining / offer and counter-offer swapping.
- Write out possible settlement terms and then use that document as the basis for the parties to negotiate to terms that they all find acceptable.
- (On a “what if” basis), suggest options that are common ways to settle similar disputes.
- Take a possible option (or options) that isn’t perfect or fully acceptable to the parties and use that option as a framework for getting them to jointly generate modifications to it until a final agreement is obtained.
- Suggest a temporary, trial solution for an interim agreement and then achieve a final agreement later on.
- Look for options that can be traded.
- Allow time for the parties to express their emotions, if emotions are impeding their ability to look at settlement options, (sometimes called a “controlled burn”)
- Coach parties into giving reasons for refusing an offer before they refuse to encourage the building on offers rather than rejecting them outright.

### ***Breaking Impasses or Deadlocks***

The most important skill in breaking impasses or deadlocks is to avoid the parties “digging into” a negative atmosphere / position. Try to break the deadlock as soon as possible. The longer the deadlock continues the harder it is to break and the harder it is to find “face saving” ways for the parties to move from the positions they have adopted.

The following is a non-exhaustive list of impasse breaking techniques:

- Move onto another issue leaving the deadlocked issue to be dealt with later when people have invested more time and have reached some agreements already.
- Take a break – ensuring you make a time to reconvene. A much used way to do this is to say “let’s break for lunch / a drink / coffee.”
- Remind the other side of their BATNA and their WATNA.
- Try to generate more options that will satisfy their needs and also yours. You can use “what if...” statements so that you are not making an offer but merely raising possibilities.
- Recap all you both have achieved so far, on a whiteboard if possible, because some people “see” arguments more clearly than they “hear” them.
- Acknowledge everybody’s efforts so far and summarise any agreements already reached. That encourages people to continue when they realise they have already made progress.

- Go back to the beginning and recommence the whole negotiation with different strategies with an acknowledgement that what has happened so far has not worked. One negotiator stated that they all reconvened the next morning and pretended the day before had not happened.
- Make a small concession hoping for a reciprocal concession in return. It may be that a small concession by your client will enable the other side to move forward again.
- Find a way either side can move without losing face.
- Expand the issues being negotiated to other contracts or to other claims within this contract, to see if that gives more room to manoeuvre and to create co-operative solutions.
- Each side can telephone their own expert or support person to consult them where there is no such person at the formal session.
- Get the expert witnesses to meet to try to establish common ground between them where the deadlock is caused by their differences.
- Put the dispute in a broader perspective – for example, remind all of the negotiators of their future relationship with your client and that that is more important than this single incident, however big.
- Try to create doubts in the other side's minds, about the validity or viability of the position they are taking (in private session). Find out why they are taking it and try to make them see that there would be other ways to answer their concerns.
- Ask the other side to prepare more details or fresh information. This may give them room to manoeuvre or may pinpoint the differences that are causing the deadlock.
- Ask the other side to consider how they would react if you asked them to agree to what they are asking you to agree to in a similar situation.
- Reminder of the deadlines if there are any.
- Use an external standard of fairness or morality to assist all of you to choose between possible options for resolution of the dispute.
- Be silent – just sit there.
- Acknowledge the deadlock and ask the other side for their suggestions for what you can all do.
- If you are sure you can remain calm, encourage the other side to express their anger, frustration or other emotion so that they can let it go and move on to a more rational discussion level.
- Remind them, if they do not want to agree, the other option is follow other dispute procedures". Try not to make this a threat, but a manoeuvre to give them room to stop opposing settlement.
- List all the issues up on a whiteboard and indicate points of agreement, points of disagreement and possible options for settlement. Often if the problem is placed at a distance from the negotiators, they can all look at it together and start attacking the problem together rather than allowing personalities and person power plays to get in the way.

As a last resort – break off negotiations or other ADR process leaving the way open to resume if the other side feels they can move from the position they have adopted. **Always leave the door open.**

**The Common Problems for Mediators**

A number of different types of problems can occur for mediators in the course of mediation:

PROBLEMS	SUGGESTED STRATEGIES
<b>1. Mediator acts as an advocate or adviser</b>	
<b>c.f. neutral third party e.g.</b>	
<ul style="list-style-type: none"> <li>▪ Mediator takes sides with one party “I really think he / she has a point”.</li> <li>▪ Mediator allows himself / herself to be “seduced” by one of the parties</li> <li>▪ Mediator responds to one party’s attempt to solicit advice e.g. “What do you think I should do? You’ve had a log of experience in this area”.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ask the other party’s opinion instead of giving yours.</li> <li>▪ Politely divert the parties’ attention to the issues.</li> <li>▪ Re-state the mediator’s role as a facilitator not advice giver. If the mediation is at the option generating stage, then mediator can canvass at least 2 and preferable more options: “What about X or Y or Z which some people have found useful. It might or might not work for you”.</li> </ul>
<ul style="list-style-type: none"> <li>▪ Mediator defines the issues rather than letting the parties do so: “The way I see it, the issues are ...”</li> </ul>	<ul style="list-style-type: none"> <li>▪ Summarise their statements and check back with them. “From what you’ve each told me, the issues appear to be X, Y and Z. Am I on the right track?”</li> </ul>
<ul style="list-style-type: none"> <li>▪ Mediator negotiates on the part of one party either in joint or private session.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Encourage and facilitate direct communication between the parties in rehearse negotiation with each in private sessions.</li> </ul>
<ul style="list-style-type: none"> <li>▪ Mediator treats parties differently e.g. at the end of Party 2’s statement, Mediator summarises Party 2’s issues without having done so for Party 1.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Have a check – list handy.</li> </ul>
<b>2. Mediator acts on his / her agenda.</b>	
<ul style="list-style-type: none"> <li>▪ “You’ll get nowhere with that approach” or “I’m glad you admit that”</li> </ul>	<ul style="list-style-type: none"> <li>▪ Encourage a collaborative problem-solving approach in joint session: Can you think of ways in which you can get X and he can get Y” or in private sessions: “How can you help him give you what you need?”</li> </ul>
<b>3. Mediator is focused on a controlled rational approach and avoids dealing with parties’ feelings and emotions at all costs.</b>	
<ul style="list-style-type: none"> <li>▪ “He never delivers the goods on time. I’m absolutely fed up with him. There’s no way I’m going to go on doing business with him”.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Attempt to reframe by giving a future focus in the statement e.g. “So what would help you play your work better is more predictability in arrangements for the delivery of the goods”.</li> </ul>

- Mediator says: “But you said a little earlier that....”
- Avoid arguing with parties and remember that they are entitled to change their mind and are therefore likely to make contradictory statements. Ignore these and avoid the use of “Yes...but” and say: “Yes...and” (Fisher)

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**4. Mediator is overly concerned with premature settlement at the cost of parties exploring and clarifying issues and mutually satisfying outcomes.** “Let’s make a note of that and not forget it when we get to brainstorming options. You might like to tell him more about reaction to....”

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**5. Procedural Problems:**

- Using technical / intimidating language. “Do you understand that?”
- Encourage parties by saying: “Any questions?”
- Allowing parties to come unprepared e.g. uncertainty about authority to settle.
- Check at the outset before the mediation starts.
- Creating an adversarial atmosphere e.g. at the end of Party 1’s statement, Mediator asks Party 2 to respond to that statement.
- Ensure that parties do not respond to each other’s statement and only do so after the agenda has been set.
- Listing an issue based on your summary of parties’ statements, allowing parties to prematurely discuss the merit of that issue in an effort to elicit common ground before listing the next issue, thus encouraging them to remain positional.
- List all the issues first on the white board in general neutral terms, then check back with the parties and get them to select the one they want to explore first.
- Creating imbalance between the parties by canvassing Party 1’s needs in private session, then acting as that Party’s negotiating agent with Party 2 in private session.
- Ensure in private session with Party 2 that his / her needs are being canvassed rather than making offers on Party 1’s behalf.
- Vagueness about the details of the agreement which should be owned by the parties and expressed in their own language not their lawyers unless there is a technical reason why it should be expressed in a particular way, in which case the lawyers can assist in drafting.
- Reduce to writing and get parties to initial the draft agreement and ensure that there are no preconditions to any part of it.

## Chapter 4: Dispute Resolution as an Agent for Social Change: Challenges and Strategies for Nation Building

### Overview

The democratic process has always been associated with governance and, in particular, with the process of elections. The aim of any mediation process is to allow the disputants an opportunity to be heard, that is, to decide how they agree to move forward. The process of moving forward can be likened to the way the parties wish to be governed. It can therefore be argued that the way the parties wish to be governed is a democratic process. Myrna Lewis calls this process of governance “deep democracy”. Katherine Johnson in *Mediation Quest: Making Sense of Loss* argues that the resolution of disputes is in itself a social change agent that manifests the democratic process of how the parties wish to be governed. The following overview demonstrates the challenges that unfold in this process and how to manage them.

Dispute resolution is all about managing conflict. As you will already have seen, conflict is a complex and difficult matter to approach, especially without the right tools or understanding of why conflict occurs as it does. This session aims to build on the knowledge you have already acquired about the principles of communication and dispute resolution, and deal with some of the problem areas which will inevitably come up in any properly conducted resolution process. We will examine some of the more common problems which can and do occur and provide you with effective and successful strategies for avoiding them, if possible, and dealing with them, if not. As mediators, you will already be aware of just how difficult and irrational people can be, especially when placed in difficult circumstances. The ability to remain calm, think quickly and act rationally in the midst of anger and confusion is a vital tool for mediators, and this session also aims to build up your toolkit, so as to speak, of tactics which will enable you to deal with problems as they arise.

### Checklist

Upon completion of this session, participants will be able to:

- Examine the process of reframing questions and statements in order to aid effective communication and dissolve tension during discussions or debates, as well as to help students practice forming non-confrontational and non-judgemental responses to difficult situations
- Understand the nature and causes of impasses; how and why they arise, how they can be destructive to effective dispute resolution, and practical methods of dealing with impasses
- Deal with difficult people, an inevitable task during a dispute resolution. Mediators will be equipped with tactics and techniques to defuse tension, calm stressed or angry people, and turn emotional argument into constructive and rational discussion

- Understand the complex, often emotional, needs and interests which underlie many problem situations, identify these and deal with them
- Examine perceptions and how they contribute to arguments, as well as review techniques for identifying personal perceptions within themselves and others

## Strategies for Effective Dispute Resolution

### Reframing, Impasses and Dealing with Difficult People

**Reframing** is the art of using language to redefine the dispute, the issues or the communication between the parties to enable them to negotiate a solution to it. Reframing applies and both a macro and micro level in mediation and negotiation. The macro level is in framing the dispute for the issue in the dispute. The micro level is in the communication between the parties and their representatives within the mediation or negotiation.

At the macro level reframing can be defined as the art of changing the manner in which a party perceives or conceptualises the dispute. The aim of the mediator is to reframe the dispute into a mutual and neutral one that enables both parties to own it and look for a solution to it.

At the micro level reframing is the removal of the negative or the destructive aspects of the communication and the rewording of it to enable the other party to hear and except it. For example, the communication can be reworded as follows:

1. It is the underlying interests e.g. "my wife is always late home from work" into "It sounds like you are upset by the impact of not knowing when your wife will be home and want to work out a way to get some stability into your home life in the future."
2. Remove the negativity / threats e.g. "He is not going to get the children unless he changes his ways" into "Its sounds like it is difficult for you to allow your children to be with their dad".
3. Reword the communication in the form of a mutual problem e.g. "He did not deliver the goods and I am still apologising to my customers for the mess he got me in." into "What needs to be done to enable you both to satisfy those customers from now on".
4. Reword the demand to make it more general as this usually means that there is less pressure on the other party e.g. "I want her to pay the money immediately" into "What possible ways could the money be paid as soon as possible".
5. Remove the hostility or toxicity from the communication.
6. Turn a "You" message into an "I" message.

### Definitions of Framing and Reframing

**Framing:** The manner in which a conflict situation, issue or interest is conceptualised or defined.

**Reframing:** The process of changing how a person or a party to a conflict conceptualises his or her own, or another's, attitudes, behaviours, issues or interests; or how the structure of a situation is defined.

### Application of Framing and Reframing

Framing or reframing can be used to define or re-define:

- The total conceptualisation of a situation or conflict.
- A specific issue or group of issues in a conflict.

Framing or reframing can also be used to:

- Identify underlying interests that are satisfied by a position.
- Make a transition from positional bargaining to interest-based bargaining by defining the problem according to interests rather than position.

- Soften or harden demands.
- Modify timing or deadlines.
- Decrease or enhance the explicitness of threats.
- Remove emotions from communication.
- Remove value-laden language from communications.

#### Dimensions of a Party's Definition of a Given Situation, Issue or Interest

- Egocentricity: Degree that the situation or issue is defined in terms of only one person's interests or concerns. Another's needs are not recognised or, if so, are not identified verbally.
- Party's insights about underlying concerns: Degree of awareness by one or more parties of the underlying interests or concerns that motivate all the parties. Awareness may be quite specific or general. An understanding of underlying concerns by all parties increases the probability that an acceptable solution can be reached.
- The size of the issue: Degree to which the situation or issue is seen as a small, isolated incident or part of a longer overarching problem. Factors in determining the size of a problem according to Fisher (1964) include:
  - The number of parties on each side.
  - The number and scope of immediate physical issues
  - The level of principles involved (minor / major)
  - The substantive precedent that a settlement might establish.
  - The procedural precedent that a settlement might establish.
- "Purity" of the conflict: Degree to which issues or interests are seen as exclusive, mixed or common. The more "pure" or exclusive the issues or interests are, the more conflicted the relationship.
- Salient alternatives available: How people conceptualise possible substantive outcomes and procedures to meet their needs.
  - Stalemate / impasse.
  - Win / low outcomes resulting from competition and dominance of one side over another.
  - Compromise or agreements to share gains and losses.
  - Accommodation or concessions that are offered in the hope of future positive rewards.
  - Integrative solution that result from problem-solving which focuses on meeting all parties' needs without requiring anyone to sacrifice benefits for another's gains.

#### **General Procedures for Reframing**

Change the person who communicates the message.

Change the syntax or wording of the message.

- Paraphrasing – say it in other words.
- Summarising – digest and condense.

- Ordering – put issues into a logical sequence.
- Grouping – arrange issues according to some common principle or standard.
- Expanding – elaborating on a limited communication. This often involves guessing about unspoken content.
- Fractionating – breaking issues into smaller more manageable sub-issues.
- Generalising – stating issues on broader terms.
- Removing emotions or value-laden language – stating issues in non-judgmental or non-emotional manner.
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#### Change the Meaning of a Statement

- Focus away from positions and define the problem in terms of interests.
- State interests in terms that are more mutually acceptable.
- Broaden or narrow the meanings of a communication by fractionating or generalising the issue or interests.

#### Change the Context of the Situation: Bandler and Grinder (1976)

- Identify the positive value in a perceived negative attitude, behaviour or situation.
- Identify commonalities in the parties' situation.
- Minimise differences between the parties' situations.

#### **General Procedures for Framing or Reframing Issues**

- Decide if the issue or problem involves an individual's attitude or behaviour, the situation or the relationship between the parties.
- Frame issues in terms of the situation or relationship of the parties rather than in terms of an individual's attitude or behaviour.
- Frame issues so that they cannot be answered in a "yes" or "no" manner.
- Frame issues in the form of problem statements. For example:
  - "How can we..."
  - "What can be done to..."
  - "What time frame is acceptable to..."
- Frame issues so that multiple solutions are possible. Do not frame issues so that only one solution is suggested or implied.
- Separate issues or problems from the people involved in the conflict. Depersonalise issues.
- Frame issue so that they are a joint problem.
- Frame issues in terms of future relationships rather than past guilt or innocence.
- Frame issues in such a manner that they are within the parties' "area of freedom" i.e., they have the authority and resources to make a decision and have it implemented.
- Frame issues in a manner that does not threaten one or more parties' sense of self or security.
- Frame issues in an objective and value free manner. Framing should not imply bias toward a particular party.
- Frame issues in specific terms. Vague framing leads to muddled problem-solving and unclear solutions.

- Fractionate broader issues into multiple, more easily handled sub-issues. Carefully frame all sub-issues.
- Frame issues in a manner that encourages freedom of thought, creative problem-solving and innovative options. Do not frame issues so that only one solution is possible.
- Frame issues as briefly and concisely as possible.
- Ask parties to confirm that the framing of the problem is accurate.

#### **General Procedures for Framing and Reframing Positions and / or interests**

- Ask the party presenting a position why the position is important to him or her and what interests the position satisfies. If the party refuses to respond, proceed as follows:
  - When a position is stated, develop a hypothesis about the underlying substantive, procedural, and psychological interests that the position satisfies.
  - State the interests that are satisfied by a position and ask for verification from the party presenting the position that the interests identified are accurate.
  - Ask for more detail on why an interest is important and what impact it has on the individual or party that holds it.
  - Break interests into substantive, procedural and psychological components and explore each part in more depth.
  - Frame the issue or problem in terms of interests. For example, "So we are looking for a solution that meets "X" need for you and "Y" need for you."
  - Consider framing interests in either more specific or more general terms to promote more flexibility in bargaining.

#### **General Procedures for Framing and Reframing Demands, Timing and Threats**

- As a general rule, the more explicit a party is about a demand, a specific time for performance of desired behaviour, or a threat about consequences if the other party does not comply, the more pressure or tension there is in the negotiations.
- If a party wants to increase the explicitness of a substantive demand, he or she may frame the request according to the "asking ladder" (Fisher, 1978, p.142). This sequence of requests and frames of demands increasingly limits the freedom of response of another negotiator.

The sequence of requests are as follows:

1. Demand for action
2. Demand
3. Request for conduct
4. Propose several alternative kinds of conduct
5. Ask for a promise of conduct such as:
  - take affirmative action
  - stop taking action now taken
  - refrain from acting
6. Ask for a promise under some conditions
7. Ask for an offer
8. Ask for an idea or possible solution

9. Offer advice
10. Offer information
11. Ask for advice
12. Ask for information.

- If a party wants to increase the pressure for performance or behaviour, the demand should be framed in terms of a specific time or deadline (e.g. “tomorrow at 2 p.m.). If more bargaining flexibility is desired, the time frame for performance should be framed in more general terms (“within the week” or “within a reasonable time period”).
- Explicit threats or negative consequences that will result if a party fails to comply generally increase tensions and reduce the level of voluntary cooperation. Care should be taken before making any threats.
- If a threat is to be made and if it is to be framed explicitly, the party making the threat should be clear that: (Fisher, 1969)
  - S/he is willing to carry out the threat if called upon by the other party to do so.
  - S/he has the resources to carry out the threat.
  - The threat will not result in an unanticipated negative consequences.
  - The other party believes that the threatening party has the will and resources to carry out the threat.
  - The party receiving the threat has not already calculated the potential damages to him or herself as a result of the threat, and decided that these damages are an acceptable cost to bear to defend his or her interests.
- If a party wants to make the consequences of non-compliance to a demand more uncertain or minimise the negative consequences of a more specific threat, the threat can be framed or reframed in more general terms. This approach provides more bargaining flexibility, decreases polarisation, and still provides some doubt about negative consequences that often motivates parties to settle.

Mediators by their words can help shift people’s perceptions of reality to enable them to consider alternative perspectives and solutions. Pre-empting and reframing are two of the tools that a mediator would use to aide this.

**Pre-Emptying** is a tool used for preventing polarised conflict and for creating an area of cooperation. For example where children are being used as part of a marital fight the mediator would pre-empt by saying “The aim of this mediation is to look at what is in the best interests of your children rather than looking at your own needs and wants and to get even. If you make decisions based on satisfying your children’s needs your children will benefit. Remember your children are always easy pawns in marital battles. Keep them out of the battle and you will help to protect their psychological health”. The mediator here further pre-empts by stating something like the following:

“I am going to assume that each of you love your children equally well, in your own style and both of you wan the best for your children. Is that accurate?”

The mediator would then wait for a reply from each. Further, the mediator may say in this situation:

“I am also going to assume that your children love and need both of you”.

This thereby pre-empts one parent from saying that the children have no need of the other parent or that that other parent is useless.

### ***Communication Blockers***

Mediators and negotiators often use communication blockers when they are supposedly listening to the other side. Communication blockers decrease the flow of information. People often impose their view of the dispute onto the other side and then wonder why they cannot find a solution the other side will agree to!

### **Perceptions in Communicating**

The way we think invariably influences the way we speak and act. Never is this more true than in trying to resolve conflict. People have individual emotional, cultural and personal attributes that will contribute a great deal to how they approach conflict, and how they approach resolving it. It is important to analyse the way we, and other people, think in order to be more aware about how the process of conflict resolution affects people, and how we ourselves think and communicate.

**Activity:** Turning Negatives into Positives

*Reproduced from 50 Activities for Conflict Resolution, by Jonamay Lambert and Selma Myers, Amherst, Mass.: HRD Press 1999.*

**PURPOSE OF THIS EXERCISE:** To practice the art of re-framing negative statements into positive ones.

**INTRODUCTION:** Negative statements put others on the defensive. If you find yourself using negative statements, remember that it is positive statements that contribute to solving a problem.

## WORKSHEET

Listed below are typical statements that could arise during a conflict resolution session. Write in the space next to each negative statement the appropriate positive counterpart statement. (See the first line for an example.)

Negative Statement	Positive Counterpart Statement
You aren't listening to me.	I'd appreciate your full attention for a while.
I've never heard of anything like this.	_____
That's not the way we did it before.	_____
You're wrong!	_____
I don't think you're open to change.	_____
You're not willing to give me what I need.	_____
Don't tell me what to do.	_____
You never give me a chance.	_____
You always get your way, regardless of others.	_____
You got exactly what you wanted and I got nothing.	_____
I don't see it your way.	_____
I'm not going to do that.	_____
That's not acceptable to me.	_____
I'm not going to discuss this further.	_____
You go your way; I'll go mine.	_____
Never!	_____
The meeting can't go on like this.	_____

## **Barriers to resolution**

### ***Causes of Impasses***

- Hidden Agendas
- Unrealistic expectations – which could be based on lawyers advice
- Bad faith
- Different perceptions of facts
- Different values on issues
- “Missing” issues on one side
- Personality clash – both parties and / or lawyers
- Lack of Authority
- Differing expectations of what is achievable
- Cultural differences
- Lawyers not wanting to settle
- Conflict addicted party
- Lawyers egos involved
- Simply using mediation as a delaying tactic
- Under preparedness
- Prior history of negotiations so “been there before – done all this before” attitude

### ***Indicators of Impasses***

- Body language
- Silence – negotiations cease
- Abusing time – playing for time.
- A token offer, particularly late on in the negotiations.
- An early offer – of a global figure.
- A reasonable offer that is withdrawn just as it might be accepted.
- The parties are too far apart.
- The irrelevant issues are concentrated on and continually introduced.
- Lack of preparation by lawyers
- Concentrating on legal solution rather than family focussed solution
- Repetition
- When a party says they have “no issue” to discuss
- When one party has nothing to say.
- Degree of concessions vastly different

### ***How to handle Impasses***

- Have a private session– with each side, or lawyers alone, or parties alone
- Reality testing – costs – weaknesses
- Creative solutions
- “Hypothesise”
- Remind of alternatives

- Test consequences of non-agreement.
- Policy guidelines for bad faith
- Commitment to good faith bargaining in the preliminary conference
- Secret disclosure of bottom line, last resort.
- Generate more options.
- Don't create unrealistic expectations.

### ***Addressing Power Imbalances***

Areas of power imbalance:

- Emotional
- Financial
- Physical
- Verbal
- Cultural
- Knowledge
- Educational

In order to address power imbalance the mediator should:

- Treat parties respectfully;
- Give equal time;
- Provide mutual setting;
- Not interrupt;
- Encourage communication;
- Stick to the subject;
- Separate the people from the problem (provide view points rather than blaming);
- Separate issues from emotions;
- Ensure ownership of the problem and the solution;
- Focus parties towards positive outcomes;
- Be non-judgmental;
- Encourage cooperation.

### ***Perception Pitfalls***

We see with our eyes, hear with our ears but perceive with our brain...

Snap judgments

Making judgment based upon first impressions or by hearsay (third party) information.  
Impressions become frozen and they resist change.

Prejudice

Having preconceived judgment caused by culture, previous experience or learning.

Predisposition

Drawing conclusions based upon seeing what we are motivated to see. We then make up our minds and select evidence to support our viewpoint.

Projection

We attribute to another person our own motives, feelings or faults.

**Preoccupation**

Being too busy with tasks and focused thoughts to notice what is being said or done.

**Expectancy**

We see / hear what we expect to see / hear. It can turn into a self-fulfilling prophecy.

**Selectivity**

Drawing a conclusion from an ambiguous situation based upon our motives, needs, predispositions.

**Stress / fear / anxiety**

We become physically alarmed to deal with a threat. Perception narrows to tunnel vision, focus sharpens, we prepare to act (fight or flight)

***Perception: Filters***

Filters in our mind influencing our perception

- Needs
- Wants/Expectations
- Professional Skills
- Immediate task
- Focus
- Stereotypes
- Anxiety
- Anger
- Culture
- Personality

**Dealing with high conflict situations**

***Separation***

This is used when the level of anger is high, anger is being vented and a person is not listening. The principle is that you remove yourself from the conflict situation.

- “I understand this is a stressful time for the whole family, would you like to have a break?”
- “I think this is a good time to speak with each of you separately”

***Find an Ally***

There may be someone else with the person who could calm them down, translate or give you useful information

- “Is there a family member or support person who is familiar with the situation who I could talk to.”?

### ***Take Responsibility***

When you take responsibility it can have a very positive effect, as the person will perceive you to be an ordinary honest and reasonable person.

- “Perhaps I misunderstood the issue or misread the situation”
- “Perhaps I didn’t quite understand the situation”
- “I am sorry.... can we start again”
- “I’ve got off the track on this one. Can we start at the beginning again. I’m sorry”
- “You are right, I’d like to rephrase that”

### ***Firm Control***

If the person has crossed the line and is being personally offensive you have the right to take firm control. Often the use of careful words said emphatically and firmly will defuse the situation. Be professional about it – not personal.

- “That’s enough sir/madam I am trying to help you”
- I am not comfortable with the way you are speaking to me”
- I can’t help you when you are swearing at me.”
- “I find your remarks personally offensive. Please stop or I cannot help you”
- “That’s enough - please stop swearing now”

### ***Ignore – Don’t Buy In***

Don’t respond to the insult, cynical comment, personal statement, sharp tone of voice, snort, grunt or sigh made to you personally

- Let it go “through to the keeper” but be aware of it.

### ***Broken Record***

This is used when the person is venting. Let them vent for a while. Anger is like an arrow. If the anger cycle is not fed into it will generally subside. After a while, try repeating the same phrase slowly and calmly

- “Can you tell me what the problem is?”
- “I want to understand your perspective”
- “What would you like to change?”

### ***Empathy and Active Listening***

- “I can understand it is a very difficult time for you”
- “It can be very distressing in that situation, you must feel very frustrated...”
- “I am sure that must have been very frustrating”
- “I can hear that you are really upset about that. I really want to help you”
- “Let me clarify what you are telling me is...”
- “The main issue is...”
- “I just want to check I have that right... I’ll repeat what you said...”
- “That’s really important; let me make sure I have it accurate...”

### ***Positive Reinforcement***

Reinforce everything positive or correct that they do.

- “Thank you sir that is very helpful”

**Humour**

Humour can defuse situations. It can prevent them from happening but it must be congruent and natural. It can be read as manipulation, so take care

**Problem Solving**

- “We have a few options...”
- “Lets see how we can do with this”
- “If you give me the information I need we can.... do, resolve, ...”
- “Lets work through this together”

**Distraction**

Basically have some unrelated questions you may ask that will distract them from their line of argument or potential conflict...

- “How old are your children?”
- “Where are you from originally”
- “How are the schools in your area?”
- “How is the weather?”
- “Is anyone hungry/thirsty?”

*Reproduced with permission from Walker Wilson Associate*

**Exercise: How to Deal with Hot Buttons**

PURPOSE OF THE EXERCISE: To understand the meaning and implications of the term “hot button” and how this information fits in with the process of conflict resolution.

INTRODUCTION: We use the term “hot button” to describe what happens when person A does or says something specific that causes an extreme reaction from person B. Person A may not realise that he or she has “pushed the other person’s hot button,” thereby adding fuel to the fire and creating a greater misunderstanding.

**WORKSHEET**

Most of us have at least one “hot button.” When ours are pushed, it is almost impossible to respond in a constructive way, particularly when we are in the middle of a conflict. (Examples of hot buttons: ethnic slurs, stereotypes, name-calling.) List below any words, statements, or behaviours that are hot buttons for you:

1. _____	3. _____
2. _____	4. _____

What strategies have you used to deal with your hot buttons?

1. _____	3. _____
2. _____	4. _____

Other people have hot buttons, too. How might you deal with those hot buttons *you* push in a conflict situation? What skills would be helpful?

1. _____	3. _____
2. _____	4. _____

---

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To help you deal with hot buttons, check your approach and develop skills to deal with them, such as those listed below:

1. *Neutralise the situation by detachment.*  
Mentally detach yourself. Step back from the situation and take a few deep breaths. Give yourself and the other person some space.
2. *Recognise others' feelings.*  
When you realise that a hot button has been pushed, give careful thought to your next move in order to avoid pushing more or adding to the hurt.
3. *Allow things to calm down.*  
Collect more data. Ask questions that will help you get a deeper understanding of the situation.
4. *Look for commonalities and use positive language.*  
Focus on the goals you both have in common. Use "we" language, as in "We both would like to..."

#### **SUMMARY**

Because hot buttons are words or actions that can trigger negative responses, it is vital that they be taken into consideration during a conflict situation. Since they often exacerbate a conflict, all parties must be aware of the impact they make. When a hot button issue comes up, it is important to recognise it for what it is; detach yourself from it, allow the situation to cool off, and move on.

The more sensitive you are to hot buttons (your own and others'), the easier it is to avoid their use and not take things personally. In general, you should always use positive language when resolving conflicts.

*Reproduced from 50 Activities for Conflict Resolution, by Jonamay Lambert and Selma Myers, Amherst, Mass.: HRD Press 19*

## Chapter 5: Mediating with Families

### Overview

This chapter outlines a brief overview of mediating with separated families.

In Australia, we have the National Mediator Accreditation System (NMAS) that defines mediation in the National Practice Standards as:

*“a process that promotes the self-determination of participants and in which participants, with the support of a mediator:-*

- a. Communicate with each other, exchange information and seek understanding*
- b. Identify, clarify and explore interests, issues and underlying needs*
- c. Consider their alternatives*
- d. Generate and evaluate options*
- e. Negotiate with each other; and*
- f. Reach and make their own decisions*

*A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.*

Family dispute resolution in Australia is defined under the Family Law Act 1975:

*“a process (other than a judicial process) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and in which the practitioner is independent of all of the parties involved in the process”*

### Checklist

Upon completion of this session participants will be able to:

- Understand how family mediation is different
- Appreciate the child’s needs and the child’s voice
- Be aware of post separation parenting arrangements
- Understand the importance of effective communication skills and demonstrate familiarity with a variety of techniques designed to improve these skills
- Be able to assist with preparing Parenting plans

## Mediating with Families

There are many approaches to Family Mediation that mediators may adopt. The NIS model adopts all approaches as and when needed. Each model has its own value propositions and phases that mediators follow in conducting a mediation session. Mediators may also use blended approaches to suit the needs of the parties. The following approaches are found:

- \* Facilitative Problem-Solving Approach
- \* Solution-Focused Approach
- \* Transformative Approach
- \* Narrative Approach
- \* Therapeutic Mediation
- \* Evaluative approach

### **Solution-Focused Approach**

In this approach the focus is on the desired outcome; the future with a difference.

The mediator's role is to assist the parties to focus on their hopes and goals and assist them through participation in mediation to realise what they really want for their future and assist them to achieve what they want. This is in contrast to the exploring the past problems and present complaints. For example a question in solution-focus approach is: "*How do you do see your preferred future?*" Instead of "*What brings you here?*" in the facilitative approach. It encourages parents to think positively towards the future where they can create a "*best, better or good enough*" scenarios for parenting arrangements.

Solution-focus approaches may not be suitable for all families in dispute, the parties must have the ability to work together and have a similar mindset in moving towards the future. Where there is a lack of inclination, trust or motivation to speak with one another, and where it is not possible or recommended for future relationships (i.e.: high conflict or family violence involved), the solution focus may not be suitable for the parties.

### **Transformative Approach**

The transformative approach was first articulated by Bush and Folger in 1994 in '*The Promise of Mediation*'. The model defines the mediator's goal as helping the parties to identify opportunities for *empowerment and recognition shifts* as they arise in the parties' conversation, to choose whether and how to act upon these opportunities, and thus to change their interaction from destructive to constructive.

The mediator reflects back both the tone and the content of what the parties have said, without reframing, in mirroring what has been said and allows the parties to listen to, and reflect upon, what they have both said. The mediator uses techniques such as paraphrasing, summarising and open-ended questions to explore parties' expectations without evaluating, controlling or pushing towards outcomes. In transformative mediation the parties' structure both the process and the outcome of mediation, and the mediator follows their lead.

### **Narrative Approach**

The narrative approach to mediation arose from the narrative family therapy model developed by White and Epston in Australia in the mid- 1980s. It was pioneered at Waikato University, in New Zealand, by John Winslade, Gerald Monk and Alison Cotter.

Narrative mediation offers the parties the opportunity to deconstruct the stories of their conflict situation which were originally constructed from within their cultural contexts, such as gender, socio-economic grouping, ethnicity and family environment. Deconstruction allows opportunities for the parties to become more aware and perhaps more interested in others' beliefs. This opens the way for 'unstoried' ways of thinking, for unexpressed and latent knowledge to be allowed to rise. In the narrative approach there are three distinct phases: 'engagement' 'deconstruction of the conflict story' and 'construction of an alternative story' (not necessarily in sequential order) and this can lead to improved communication between the parties.

### **Therapeutic Mediation**

The parties are assisted by the mediator to deal with the underlying causes of the problem with a view of improving their relationship as a basis for resolving the dispute. The mediator's function is to diagnose the causes of a conflict and to work through its psychological and emotional aspects. The mediator works with the parties to identify the roots of the conflict and assist them to deal with these issues and move to resolution of the broader conflict situation.

### **Evaluative Mediation**

Evaluative mediation is a process conducted by experts in the field of the particular dispute. An evaluative mediator guides and advises the parties on the basis of their expertise of the weaknesses of their cases and advising in their view what a Court may likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with assisting the parties to reach an agreement which accords with the legal rights and obligations, industry norms, or other objective social standards. The style of the mediator is interventional, opinionated and settlement focussed. The evaluative mediator structures the process, and directly influences the outcome of mediation.

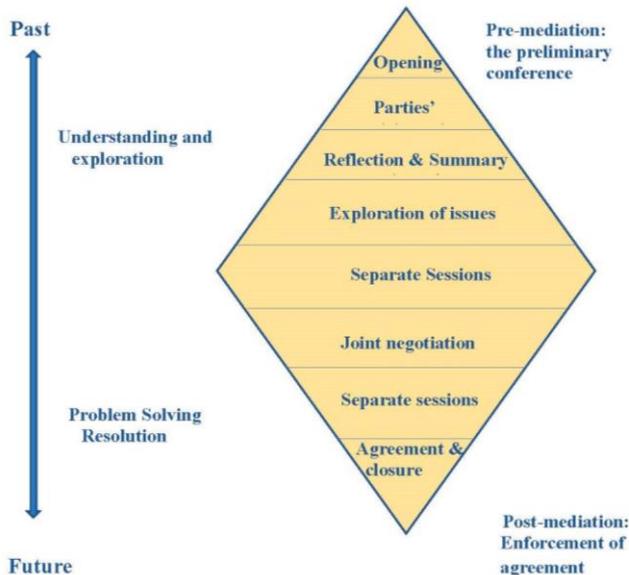
### **Transformative**

#### **FACILITATIVE or PROBLEM-SOLVING APPROACH**

Facilitative models are based on the philosophy of party self-determination and interest-based negotiation. They are commonly used for disputants who need to maintain some form of future relationship, for example family disputes where it is important for parents to find respectful

ways to co-parent their children, or at least have parallel parenting. The mediator's role is to manage the process of mediation, while the participants' responsibility is to work together to overcome their differences and reach an outcome with which they can all live.

The diamond shape which sets out the phases of the process is commonly used in the facilitative approach.



The size of the areas is an indicator of what proportion of time the mediator may spend in the various stages. In family mediations a substantial amount of time is generally spent in the exploration phase of the diamond.

**Explanation**

**The Explanation stage** includes the Mediator's Opening Statement and the Parties' Openings

The Mediator's Opening Statement includes:

- Welcoming parties, introductions, clarifying times for the session, advising of amenities and rapport building
- Explaining the principles of the mediation and the mediator's role ( confidential, impartial , non-advisory )
- Explaining each stage of the mediation and its purpose – party's opening statement, agenda setting, exploration, separate sessions, negotiation and agreement reaching
- Establishing ground rules: both parties to remain respectful throughout the mediation, not interrupting when the other is speaking, using respectful language throughout;
- Obtaining commitment to begin; all parties to sign Participation Agreement.

- Answering parties' questions.

The purpose of the mediator's opening statement:

- Allows parties time to settle into the room
- Enables mediator to re-establish rapport with parties (after first meeting them during earlier intake )
- Acknowledge feelings of anxiety or any high emotions
- Creating a climate of safety for resolution.

The Parties' Opening Statements include: -

- Inviting parties to give their reasons for being at mediation outlining:
  - What brings you to mediation?
  - What would you like to discuss or what issues would you like to resolve?
- Requesting each party not to interrupt while the other is making their opening
- Asking Party 2 not to respond to Party 1 when making their opening .
- The parties being heard and acknowledged by the mediator.
- The mediator asking clarifying questions, if required.

The purpose of the parties' opening statement: -

- Topics are brought into mediation without the mediator breaching confidentiality of pre-mediation sessions
- Allows each party to have their say and to hear what the other party wants to discuss
- Each party can tell their story and be heard and acknowledged

### Clarification

**The Clarification stage** enables mediators to break down the main issues into several manageable proportions. It includes :-

- 'Reading back' of parties' statements
- Identifying common ground between them
- Setting the.

Once both parties have finished their opening statements, the mediator reads back both statements, using techniques such as reported speech and neutralising inflammatory language; the mediator checks back with each party that they have accurately understood what was said.

The principles of 'read back' include

- Taking short notes – do not assume that something is irrelevant
- As much as possible using parties' own words - but if toxic then neutralise the language
- Use of attributions ('you said', 'you went on to say', 'in your words') to ensure there is no doubt that you are reflecting parties' opinion and not facts or the mediator's opinion
- to give the parties an opportunity to clarify their statement, as needed.
- 

After reading back both parties' opening statements the mediator makes a joint summary of what they have said, drawing together what they have in common: for example 'neither parent wants to go to court' or 'both of you have the best interests of the children at heart'. This may assist the parties to move forward in their conversation by acknowledging common ground early in the mediation.

The purpose of common ground is to identify existing areas of commonality and to identify issues for the agenda.

The purpose of the agenda setting is to -

record the list of issues the parties would like to discuss during the mediation.

The principles for agenda setting :-

- Use neutral, mutual and future-focused language;
- Mediators have their own style in setting the agenda by the use of questions: 'how' and 'what' work best, or 'statement' type agendas
- Group related items using headings and subheadings
- The agenda is created by the mediator and prioritised by the parties

### **Exploration**

**Exploration** – the greatest amount of time is expended in the exploration stage. Here parties are encouraged to discuss directly with each other, where appropriate, all the issues and concerns brought by each of them so that they can get a better understanding of each other's perspectives, needs and concerns around each issue. At times, the parties may come up with options, suggestions, or proposals to assist resolve some of their issues.

The exploration stage includes

- Problem definition
- Exploring parties' concerns, feelings and suggestions about each of the items listed on the agenda
- Managing the safety of the room, as needed

During exploration, it is a good time to call 'separate sessions' which are individual confidential meetings with each of the parties separately and the mediator to enable the party to have some time out to reflect on what has been occurring, and as to whether they are achieving to an extent what they had hoped, and to assist the parties with moving forward.

A separate session may be held at any time but are most often held during exploration and negotiation

The principles of separate sessions include;

- Caring, challenging and coaching
- Establishing confidentiality in the session
- Checking with the party to see how they are feeling about the process (care)
- Assisting the parties to distinguish needs from wants, reality-testing options, (challenge)
- Clarify parties' understandings of the others' perspective
- Coaching the party for presenting packages back in joint negotiations.

The purpose of separate sessions include:

- To enable the 'safe' release of emotions
- To reinstate the 'balance' and provide support when power has become unequal
- To support parties' efforts to explore blocks and options for resolving
- Assist parties distinguish between interests and positions and evaluate options based on interests, (BATNA/WATNA) (challenge)
- Address any challenging behaviors
- Uncover any hidden agendas.

## Negotiation

The **Negotiation** stage includes 'problem Solving', the mediator encourages the parties to share proposals they have already prepared and to generate additional options for consideration. The mediator assists the parties to evaluate and reality test options.

The principles for problem-solving:-

- Parties to focus on the future
- Mutualise common interests
- Encourage parties to generate many options
- Encourage parties to evaluate options based on needs and interests
- Separate the people from the problem
- Identify mutual interests
- Insist on objective criteria
- Reality test liveability and workability of options
- Refine options into possible solutions

During negotiations it may be necessary, due to impasse, to call further separate sessions to enable the parties to complete their negotiation..

Mediators should be aware of hidden agendas and bad faith bargaining. Negotiation often feels like it is a second-best option. Typically, at least one party will feel they are losing.

## Agreement

**Agreement** – this stage reinforces the progress made by the parties, the finalising and recording of the agreement and listing of any unresolved issues.

The agreement stage includes :-

- Consensual decision-making
- Mediator's closing statement

The principles of Consensual Decision-Making

- Identify points of agreement for each agenda item
- Clarify the details of each point of agreement and how these agreements are to be implemented
- Record the agreement in neutral language, and the parties to confirm their agreement
- Identify agenda items where agreement was not reached and note future actions required
- Read back the agreement and actions required to check if this is what the parties intended
- Agreements must be SMART (specific, measurable, action-oriented, realistic and time-based)
- Clarify whether the agreements are to be 'good will' agreements or turned into parenting plans or consent orders.
- Discuss review date/s for the agreements

The purpose of Agreement is to capture accurately parties' agreements, to clarify them and to record points of agreement

In Australia if the parties agree on parenting arrangements, they have four methods for recording those arrangements.

- Verbal agreement with nothing in writing
- A written agreement

- A written agreement known as a parenting plan, which is not enforceable by law; and
- Consent orders, which is an agreement in writing, witnessed and filed with the Court. (Usually parties agree to take their written agreement to their lawyers to convert it into Consent Orders).

Please see appendix no. brochure on Parenting Plans produced by the Australian Government. As an example of a Parenting Plan please see appendix no. Information brochure on Parenting Plans produced by Relationships Australia.

When the mediator closes the joint session they can provide referrals and confirm the next steps for the parties.

Principles of closing: -

- Wrap up the joint session
- Check in with the parties to see how they are feeling about the process
- Remind the parties of confidentiality
- Thank the parties for their participation and cooperation
- Ensure the parties are clear about the next steps
- Provide appropriate referrals
- Schedule further joint/individual sessions if appropriate
- Manage parties' departures from the mediation rooms to ensure their safety

The purpose of closing is to terminate the mediation session safely

## **PRE - FAMILY MEDIATION**

Please refer to the NIS with respect to the intake and assessment process.

The intake process is not only essential in determining whether parties are ready to participate or whether family mediation is appropriate for them, but it is also imperative in the risk assessment and safety planning for the parties.

In Australia practitioners are provided with information tools to help assist with the screening of family violence. For an example - Please see appendix no "Domestic Violence Safety Assessment Tool" published by the NSW Australian Government. The Family Law Doors Questionnaire.

## **The Child's Voice**

Mongolia, like Australia is a signatory to the UN Convention on the Rights of the Child.

*Article 9 & Article 12*

*Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.*

*Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.*

### Parents' perspective

It is important to understand the implications of separation, divorce, relationship failure and relationship breakdown, when mediating with families. Emotions run high and deep. Family mediations frequently involve tears and regrets, unforgiveable errors, desires for revenge, spying, following, prying and stalking. While such behaviours are absolutely unacceptable, such behaviours might be normal for some parents with whom you work..

In turning to the emotional impacts of separation and divorce, it is important to understand the normal response to loss. Please refer to Dr Katherine Pavlidis Johnson's NIS.

### What is Loss in Divorce?

A divorce or separation involves the loss of a lover, a mate, a partner and a network. Divorce is the loss of your role as a husband or wife. Divorce makes parents fear they will lose their children; it almost certainly means lost time and experiences with them. Divorce may also feel like the loss of your children's childhood, a shattering of dreams of giving children a loving, carefree and innocent upbringing. Divorce means losing part of your extended family, many friends and other connections and roles in the community. Divorce may involve the loss of your home, of cherished possessions, of savings, and of financial plans. Divorce can create a loss of control, a loss of trust, and a loss of security. And at its core, divorce is the loss of a person's hopes and dreams. (2) 2 Robert E Emery. *Renegotiating family relationships; Divorce, child custody and mediation*, (Guilford Press, 2011) p.40

There is no normal reaction to loss. Loss of anything is an awful part of life, and simply acknowledging the hurt can be a very effective tool in the empathic mediator's tool kit.

Acknowledging the loss can be done by allowing the person you are with the time needed to describe their loss, without conveying in any manner that they are wrong or that they should have 'seen it coming', or that their feelings are in any way overstated.

When we experience a person's death, we experience several stages of grief, including:

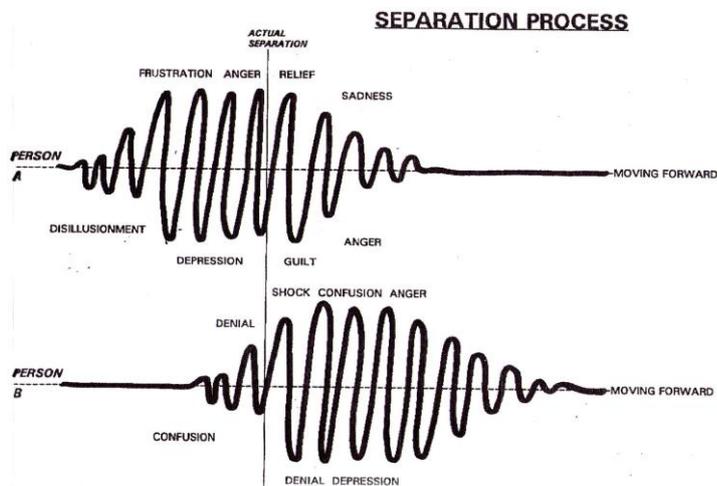
- Shock and denial
- Anger
- Sadness, depression and detachment
- Dialogue and bargaining
- Acceptance

A key feature of grief in death is the absence of the deceased partner, while when the relationship has died, the other partner has not. For a partner who is feeling ambivalent about the death of the relationship, the presence of an ex-partner maintains hope. In particular if the ex-partner sometimes shows care, concern or acknowledgement which engenders in the ambivalent partner the belief that such acts do not support the theory that the relationship has died, it can lead that partner to feel hope that the relationship may still be alive and could get back on track.

The loss of divorce or separation creates a significant and often unacknowledged grief, the impact for some people may last for months or even years.

Please refer to Dr Katherine Pavlidis Johnson 'readiness to move forward'. It is very important to assess that both parties have reached a stage of being able to move forward and participate in the mediation process.

See diagram:



Party "A" is the initiator of ending the relationship and Party "B" is the recipient partner.

The challenge in family mediation is that each party will be travelling through various emotions at different speeds and in a different order. Resolution may come to one party years before the other. Some people may not find resolution, being 'stuck' in their loss and looking for others to blame.

In family mediation you are working with people at their worst, and times at their most vulnerable. It is important to use your tool kit and remain non-judgmental, impartial and empathetic to both parties. You must empathise with Party A's position of just wanting to 'get on with it' and Party B's position of shock, inability to make any decisions, or denial that the relationship had ended.

#### **When loss of relationship combines with high vulnerability**

The reaction of people in separation can be exacerbated by the presence of a range of vulnerabilities from both childhood and adult experiences. These can include

- Extremely poor childhood attachment experiences
- Childhood abuse or neglect
- Exposure to domestic violence as children
- Intimate partner violence
- Drug and alcohol addictions
- Mental illnesses; and
- Other forms of serious child or adulthood traumas

Because of this it is important to acknowledge that while most of your clients are likely to require minimal levels of assistance in order to move forward in an adult way some clients are especially vulnerable and will find the process more difficult.

Your challenge is to work with people who bring forms of disrupted attachment with or without high levels of vulnerability to family mediation processes.

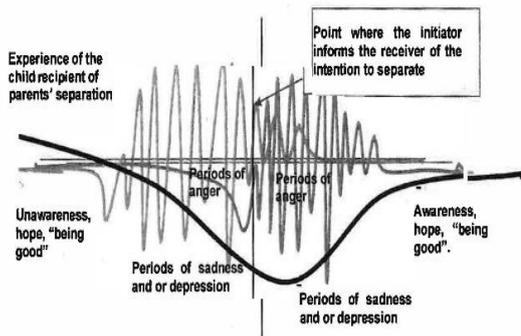
What can appear to be a relatively straightforward process can therefore require more focussed attention than perhaps your first initial intake assessments suggested.

### Children's perspective

'Perhaps the central dilemma in divorce is that children have a third perspective, one that often conflicts with the views of either parent. The children's needs are supposed to be paramount, yet they are frequently forgotten, or manipulated, as a result of their parents' emotional turmoil'

Robert E Emery

The following diagram charts the emotional experience of the child (as depicted by the red line).



The reaction that a child may have to their parents' separation will vary according to

- Individual differences of the child
- The number of children in the family
- The age of the child
- The attitude of the parents towards the other parent
- The availability of the parents to their children and
- The availability of other non-aligned adults who can provide care and support

### Children and child development

When separation occurs, parents who do not hold their ex-partner in disdain can have a working relationship that is respectful and focussed on friendship. These parents work together to form a 'a post separation alliance' - they speak respectfully about the other in front of their children and seek to resolve disagreements without issues becoming personal. Post separation alliance works well as it is the children of these parents who suffer minimal impacts from parental separation.

For many parents, collaborative parenting was not available when the relationship was intact, and after separation it is an aspirational goal. To assist these parents, therapeutic processes help them become more focussed on working collaboratively for the benefit of their children. In the absence of such support, 'parallel parenting' becomes a safe and available process.

Parallel parents work in parallel with each other, operating under clear rules and, by agreement, do not interfere in the day-to-day decisions that each makes when the children are in the other parent's care. They negotiate important decisions as such preferred schools, medical procedures, extracurricular activities, long holidays and religious/cultural upbringing. Parents who embrace parallel parenting tend to require clear agreements concerning their children's living arrangements, including for example, time with each parent, clear change-over

arrangements, time with significant people, communication strategies and emergency communications.

Although parallel parenting does not provide the same positive outcome as collaborative processes, it gives children a much safer post-separation parenting arrangement than conflicted parenting styles.

There are many strategies that mediators may use to help separated parents focus on the needs of their children, and what is in their children's best interest. As a mediator how do you advocate for the well-being of children by actively getting parents to separate their roles as estranged partners, on one hand, and emotionally aware parents of their children, on the other? Part of a mediator's role is to educate parents on effective parenting after separation and on understanding their children's needs, by providing appropriate reading materials or by referring them to or recommending appropriate parent education courses and directing the parents to websites where they can access material. The materials could be fact pamphlets or booklets which provide information on the developmental needs of children or children's responses to their parents' separation.

In Australia there are several services which provide programs and courses to assist separating parents. An example of a parent information seminar is attached at appendix " " being extracts of a booklet from Interrelate (Australia) of Building Connections Seminar. This seminar is designed to help separated families have healthy and strong relationships with their children after separation and continuing. The seminar covers the parents' own well-being, the impact separation and conflict has on children and provides useful tips for parenting. It gives strategies for being a more effective parent and shows ways to communicate with the other parent, set goals for future parenting, and it also educates parents on support services available.

Other materials could include DVDs and videos in which children discuss their feelings about their parents' separation. The aim of parent education is to assist them gain insight into the impact of separation on their children, to allay the parents' concerns, to answer their questions about the possible damaging effects of separation, and also perhaps to help them work through feelings of guilt about the course of action they are taking. Mediators may refer parents to counsellors, family therapy, legal advice, community and other agencies that are relevant to the family's needs.

**What happens to children at different ages when parents separate?** (3) Children and Separation Booklet Family Relationships.gov.au of Australia booklet

#### **Birth – 2 years**

Children in this age group are highly dependent on their parents. If one parent has taken on primary responsibility for care of a child, it is almost certain that a strong physical and emotional dependence will develop between them. Lengthy separation from this parent can be a source of intense emotional distress. A child at this age has a very different concept of time to an adult. For very young children a few hours will often seem to be a very long time and this needs to be considered when making parenting arrangements. In this age group, children are likely to fret for the absent parent with whom they need frequent, short periods of contact to continue their relationship. A high level of conflict between the parents can make visits extremely stressful for a child of this age. For this very young group, it can be helpful if parents stick to a routine and, where possible, provide reminders of the other parent, such as photos. It may also be useful if some special toy or blanket travels with them between households.

#### **2 1/2 – 5 years**

Children in this age group begin to be a little more independent of their parents but separation can be a major crisis for these children and they can react with shock or depression. For

instance, children in this group may show their distress by a change in sleeping and toilet habits or a deterioration in language skills. In this age group also, children differ from adults in how they perceive time. They have less time distortion than do infants, but still experience a short period as a much longer time than it is for an adult. Pre-school children understand the world through very different thought processes than older children. They often fantasise about what they don't understand and are likely to make up things from bits of their own experience. They are also often confused by time and days. A calendar showing when they will be with either parent can be helpful. They are sensitive to criticism about either parent and may perceive this as criticism of themselves.

### **5 – 8 years**

Children at this age group are beginning to be able to talk about their feelings. They often have an intense wish to restore their parents' relationship and say and do things they hope will bring this about. They often want to stay at home to be near the parent with whom they spend most of their time. Similarly, they may feel reluctant to leave the other parent at the end of a visit and may exhibit behavioural problems which are noticed by friends, teachers and parents. Children in this age group can have difficulty expressing their worries and tend to demonstrate them through their behaviour which can be difficult to understand. It may be helpful if both parents, or adult friends or relations, invite children of their age to express their emotions about the separation, particularly of their desire to get their parents back together. You should discourage children from taking responsibility for making contact arrangements.

### **8-12 years**

Children in this age group are able to speak about their feelings. They experience a conflict of loyalty between each parent and, if the conflict between parents is high, they may try to cope by rejecting one parent or trying to keep both happy by saying negative things about one parent to the other. They are also beginning to experience the world outside their family with sporting and other interests and social commitments. When you make parenting arrangements you should take account of the children's interests and activities. This allows them to join in social and sporting activities which are an important part of their development. Where possible, it would be beneficial for children to continue their activities regardless of who is caring for them.

### **12 – 16 years**

In some respects, adolescents are increasingly independent of their parents, even when parents are not separated. They need to be given time and space to work out their own reactions to their parents' separation. If pressured by either parent, adolescents are likely to react with anger and rejection. They particularly need flexibility in arrangements to allow them to participate in normal adolescent social activities and school events.

During the mediation, parents will discuss and explore options as to the living arrangements of their children which may include:-

- Where the children will live
- With whom the children will spend time
- Decisions as to the child's care welfare and development, including education, health and religion
- How and when the parents will communicate with each other regarding the children
- How and when the parents will communicate with the children
- What extracurricular activities the children will participate in

- How the children will spend occasions such as birthdays and other special days
- Other family members such as grandparents spending time with the children.
- Financial support of the children

Child-focused and child – inclusive practice are two frequently-used processes in Australia that can provide valuable insights for parents and assist them in making arrangements which meet the children's needs. While both practices are useful in focussing parents on children's needs, there is a difference between the two., 'Child-focused practice' gives the parents a perspective on the child and their needs during the mediation, while 'child-inclusive practice' (CIP) provides for the child to be interviewed by a trained child consultant who provides feedback to the parents about the child's developmental needs.

#### **Child-Focused Practice – 'Finding the Child's Voice'**

Often this practice is described as 'finding the child's voice' in mediation in the absence of the child. To focus parents on the needs of the children there are a variety of methods used by practitioners in Australia including: -

- Setting goals with the parents
- Bringing the children symbolically into the mediation room, for example starting the exploration stage with child's needs or personality
- Mapping family information
- Facilitating parental discussion on the children's needs: -
  - Providing educational material from social science research on the impact of parental conflict on a child's emotional and physical health. (this may have been provided during the intake but may be referred to again during the exploration)
  - Adding your own items to the agenda, for example an item such as '*management and impact of conflict*'
  - Reminding the parents that each day they are creating memories for their child and asking them to reflect on how the memories created in the current environment may influence the child's future, for example '*How might your children remember this time?*'

Asking the parties to imagine their child sitting in the room and listening to their discussions. Ask the parent, 'what would your child be feeling or thinking?' The above strategies are also implemented as part of the child-inclusive model.

#### **Setting a goal with the parents**

Some mediators when preparing the room for a joint session add a statement to the white board, '*Decisions will be made in the best interests of Jonny and Sara*'.

Other mediators may set a goal together with the parents at the start of mediation that reflects their intentions such as,

*'Working towards agreements that are in the best interests of Jonny and Sara'*

*'Co-parenting so that Jonny and Sara move between our two households easily'*

*'Flexible arrangements for Jonny and Sara so their well-being is considered, when in particular special needs of the children are required'*

The intentions could be written on the white board in the form of a question '*How can we co-parent in the best interests of Jonny and Sara?*'

Commented [LB1]: HM – do we want flexibility here?

Setting the goal up front allows the parents to focus on their children from the start. The mediator can use the goal as a sounding-board throughout the mediation for any proposals made by either parent regarding the children's care, welfare and development. For example the mediator may ask the father, *'Mike, can you explain to Sue how the school you've mentioned would meet the children's different interests and needs?'* Or, *'Sue, can you explain to Mike, why you believe Sara attending dancing is beneficial to her wellbeing?'*

### **Bringing the children symbolically into the mediation room**

***Child's needs/Personality exercise*** – at the commencement of exploration by using a whiteboard, the mediator asks the parents to share information about each child's age, personality, interests, activities or emotional needs, and writes the information on the white board. The mediator may say, *'Tell me about your children so I have an idea about what they are like?'* or *'I haven't met your children - tell me about them?'* This exercise is very useful as it directs the parents to focus on their children rather than themselves.. Often it creates a conversation between parents they have not had for a long time about their children. When talking about their own children parents are usually their biggest fan. It creates communication, and is very powerful tool, when, during the mediation, you continue to refer the parents to each of the child's needs and interests. For example the mediator might ask the parents questions:-

*'describe Jonny to me? What is he like?'*

#### Child's Personality

In response the mediator might hear:

*'Jonny is aged 12 years*

*He is a happy and content little boy*

*He has a caring nature and likes looking after his little sister*

*Jonny enjoys spending time with his grandparents*

*He has a very good group of friends*

*He is an intelligent little boy, having good grades at school*

*'Does Jonny have any interests? Does he play sports?'*

#### Child's interest

*Jonny likes playing chess with his grandfather*

*Jonny plays sport on the weekend each Saturday and trains on Wednesday after school*

*Jonny also is part of the chess club during the week each Thursday after school*

*Jonny enjoys playing on his video games, both parents believe he spends too much time on his gadgets.*

*'How do you think Jonny is coping with the separation? What was Jonny like before the separation? What is he like now?'*

#### Child's emotional needs

Prior to separation Jonny was a very happy little boy

When the parents argue, Jonny goes to his room and plays video games for hours

Lately Jonny has become isolated, he doesn't spend much time with his little sister,

He seems angry all the time, and at school the teachers have noticed a difference in Jonny's behaviour.

He misses seeing his grandfather

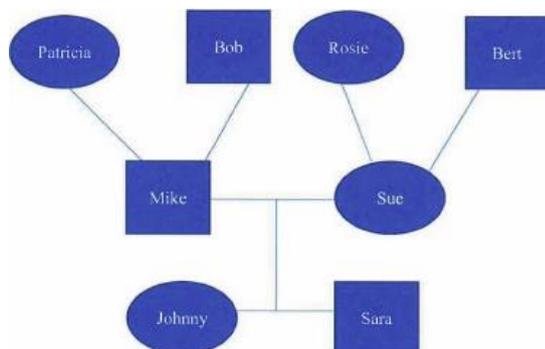
During the exploration the above information brings Jonny into the room. When the parents are discussing arrangements the mediator may ask *'What are the arrangements for Jonny's weekend sport, who will be available to take him?'* *'What happens if Mike is not available, will Sue or another person be available to take him?'* If one parent is positional (the 'fixed pie') the mediator may use the above information to bring the parents back to Jonny on how he enjoys playing his sport on the weekend. The mediator might say, *'You both said Jonny enjoys playing soccer on the weekend, in fact he is a very good player'; 'What impact do you think it would have on Jonny if he is no longer able to play soccer?'; 'If Jonny was in the room what do you think Jonny would be feeling or thinking'.*

A further discussion between the parents could be of Jonny's behavioural issues - they may have a conversation as to whether Jonny is really coping with the separation, and whether he needs some support services to assist him.

### Mapping family information

Many mediators find it useful to draw a genogram that depicts the structure of the family. This is especially useful where there are significant others who play a role in the children's lives, such as grandparents, perhaps new partners, half siblings, cousins, aunts and uncles. Initially, however, it is better to keep the genogram simple - you may always add to it if need be during the mediation.

For example:-



The parents may discuss the various roles of grandparents and other significant persons, if one or both of the parents are not available for some reason to care for the children, then who do they want to care for the children. An example referring back to the example above of 'Jonny playing sport' the mediator may ask *'Mike if you are not available to take Jonny to soccer, and Sue you are working and also not available, who else might there be to take him?'* Such

discussion may extend to the arrangement of taking and collecting the children to and from school, if both parents are working. *'Who may be available to assist? Sue you mentioned that your father, Bert, lives close by to the school and is available to collect Jonny and Sara, Mike what are your thoughts? Would you like to share those thoughts with Sue?'*

### **Facilitating parental discussion on the children's needs**

Having a conversation with the parents and asking them to talk about their children allows the mediator to clarify what the possible impacts might be of their parenting proposals. By doing this the mediator may draw the parent's attention to the changing developmental and social needs of their children over time. Children at various ages have different needs and the discussion may include such things as age-appropriate discipline and extracurricular activities. For example parents may not know what the house rules are in the other parent's household, such as teenage smoking, sexual activity, dress code and curfew, which might also need to be covered. The more consistent the parents are working together the easier for the children to move between the two homes.

Some children may have special needs, whether physical, emotional or psychological, or learning disabilities needing significant support. In such cases parents may discuss the support required, such as emotional and or medical treatments, ensuring both are supportive of and are aware of the child's treatment. For example, *'Mike and Sue may have a discussion about Jonny's behaviour at school. Sue informs Mike that she was contacted by the school counsellor, it is important for Mike to be aware, and if there are ongoing appointments or referrals that Jonny may require'*.

Similarly, if either parent has similar challenges themselves, then a discussion may take place as to the arrangements for the children focusing on what the parent with the challenges would need to assist them best parent the children. For example, *'One parent may not be coping that well, suffering from depression and or anxiety, and they might require some psychological and emotional support; the living arrangements of the children may change for a period to enable the parent to seek help and better cope with the situation'*.

A list of the children's activities and study schedule could also include the parents' schedule (particularly if one parent works on shift) where both parents can see them - this is useful as a visual reminder of the family's commitments and may be considered when discussing living arrangements about the children. The schedule enables the mediator to encourage realistic planning for the future and discuss any possible changes that may arise from time to time, including school holiday periods. The schedule ensures that both parents share the same understanding and provide a visual of the children's activities; it may also be useful to lead into a discussion as to how the parents will pay for activities and who will transport the children back and forth to the activities.

### **Child-Inclusive Practice (CIP)**

In Australia Child Inclusive practice, is a process that actively includes children in the dispute resolution process, via a child consultant. The process aims to assist separating parents to gain insight into their children's welfare. Child consultants are trained persons with experience working with families and children, and a different person from the mediator. The mediation between the parents is informed by the child consultant who, when appropriate, provides the parents with the children's perspective.

There are pros and cons of hearing the child's voice in mediation. Research in Australia has shown that generally there was agreement between parents and counsellors that it is important to hear children's views and for children to feel that they have been heard. Children also wanted their views to be taken seriously as a sign of their parents' respect and care for them.

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(Cashmore and Parkinson n 14, p 16.) On the other hand, research noted that the more weight given to children's views, *'the greater the danger that they will be exposed to pressure from parents and manipulation, and the more they are likely to experience damaging loyalty conflicts'*. (Cashmore and Parkinson, n14, p16) It is very important to screen or assess the suitability for CIP practice with both parents. Generally CIP is not suitable for children under the age of five. The assessment seeks to ascertain whether the parents are capable or agree to respect the child consultant's feedback and that they are committed to making the best arrangements for their child's psychological and physical needs. One of the difficulties in assessing the suitability is establishing *'parental readiness'* to listen and hear, without risk of repercussions to the needs and concerns of the children. Parents need to have an open mind to the child's separation story which may be very different from their own perspectives.

Some of the characteristics that could demonstrate parental readiness have been identified as their ability to: differentiate from the child; value the role of the other parent; problem-solve; self-regulate; have a neutral stance towards the other parent; and put the child's needs before their own needs, as well as having insight, sensitivity and a level of disagreement. (parent Readiness Scale (PRS) in L A Yassenik and J M Graham, "The Continuum of Including Children in ADR processes: ) A child-Centred Continuum Model" (2016) 54(2) Family Court Review 186,pp189-195.

Where there are circumstances where parents do not demonstrate characteristics to an acceptable level, it may indicate that one or both parents have limited ability to hear the children's voice and. in such cases practitioners may consider CIP inappropriate. The practitioner may consider the risk associated with speaking with the children and listening to their concerns, which may inadvertently put the children in the middle of the parental dispute. Further, some parents may not be able to deal appropriately with hearing the child's view in the feedback from the child consultant, which may have negative consequences for the child.

Where there is history of domestic violence, giving a child a voice in the mediation process should be approached with caution, and only after a thorough analysis of any implications for safety is undertaken by a qualified child consultant working with children who are victims of domestic violence.

In Australia there are several ways in which mediators and organisations include a child consultant in family mediation. Notwithstanding the different approaches, they will include the following: -

- Intake session with each parent to assess suitability before mediation
- Parents are provided with information on the child consultation process and purpose, including the confidentiality that will be contracted with the children;
- Parents have agreed to the children being seen by the consultant;
- The first joint session has been held by the mediator with the parents
- The child consultant sees the parents in a separate meeting;
- The child consultant sees the children either jointly or separately, and they decide on what will be taken back to the parents;
- The child consultant and the mediator meet to discuss the outcome of the consultation; and
- The child consultant, with the mediator, brings the agreed feed-back from the consultation to the mediation.

Generally, after the feed-back the mediator continues with mediation without the consultant; in some cases, however, mediators may request the child consultant to remain and assist parties in developing the parenting arrangements for their children in mediation.

When the children are being interviewed by the child consultant, the consultant takes care to make sure that the environment is welcoming and safe. All sessions with the child consultant

are supportive and confidential, the aim of the sessions is for the child consultant to get a feel for what it is like for the children in the family at that point in time. The child consultant spends time with the children together and or individually drawing, playing with various tools such as cards, sand and building blocks or reading with the child depending on the children's' age. The sessions are not therapy, but in some circumstances they can have a therapeutic effect on the child. The child is not asked to make a decision or choose between parents or homes. At the conclusion of the session, the child consultant and child agree as to what information, if any, the child would like passed to the parents.

### **Forms of Conflict**

Not all disputes are the same and because they are different the strategies required for resolution are also different. The mediator as part of their tool kit can identify the kinds of issues that are presenting in the family conflict, and then identify resolution pathways. Please refer to the circle of conflict in chapter written by Jennifer Scott.

Negotiation approaches can differ according to the mindset of the parties. Parties may view their dispute about a 'fixed pie' from which each person seeks to maximise their share. For example, they may enter the negotiation process seeking a particular number of nights per week, making an initial ambit claim for a particular arrangement to give themselves sufficient room to negotiate to a final position. The other parent may enter the negotiation process with a similar strategy but from the other direction. Each parent has concentrated on their own needs and not considered the needs of their children.

### **Communication skills used by Mediators in family mediations in Australia**

In Australia the mediator's attitude is an essential role in the mediation process. Mediation must be conducted in a safe and positive environment, and mediators ensure the parties are being heard and understood in helping them move forward to reach an agreement. The mediator must display the attitudes of impartiality, empathy, tenacity, tolerance for ambiguity; confidentiality; self-confidence; specificity; and memory. Such elements in the mediator's approach is essential in conducting the process.

The micro-skills used by mediators in conducting mediations with families include :-

- LISTENING
- ACKNOWLEDGING
- REFRAMING
- SUMMARISING
- QUESTIONING

#### **LISTENING**

Parties in the mediation need to be heard and understood, and they need to *feel* as though they have been heard and understood.

As a mediator it is important to appreciate the different ways of listening and know each skill can be applied during the course of the mediation process - listening in silence, empathic and passive listening, active and reflective listening.

When the parties are giving their opening statements Australian mediators listen in silence (for much of the time where possible) allowing the parties to express their concerns and tell their story without interruption. During exploration silence plays an important role by the mediator. Silence allows the room to absorb what had just been said for example Sue said, "I really didn't want this to happen" (silence in the room) by the mediator also being silent, the atmosphere of the room makes Sue feel she is being acknowledged, and also at the same time

gives Mike time to reflect as to what Sue had just said ie 'I didn't want this to happen' ". (is Sue expressing an underlying issue? )

Commented [LB3]: MH – don't quite follow this part.

When a party seems stuck the mediator can use their skills in 'passive listening' to encourage the party to continue speaking, by saying 'please go on' or 'what happened next' as well as through 'non verbals as are appropriate in different cultures. In this way the party will still feel that the mediator is listening to what they have to say.

Active listening is being with the party physically and psychologically and making them feel heard - not only listening to what the party is saying but also observing their body language and the tone in what is being said.

During the exploration stage the mediator needs to facilitate discussion between the parties and keep the process moving. During this stage 'reflective listening' is a very important skill, giving feedback and interpreting what the party has said. The mediator, through either summarising or reframing divisive or emotive statements, reflects back to the parties what they have been saying.

Example

*'Mike, you sounded sad when you said that Sue doesn't want the children to spend time with your parents as often as they have done'*

If Mike agrees that this is how he feels, then the mediator could say to Sue:

*'Sue, I'm wondering if you could talk to Mike about your concerns here'*

The above example shows the mediator simply acknowledging the feelings of Mike, rather than acting as a therapist or dealing with the underlying emotions. If the mediator were to ignore the emotional content behind the spoken words, this could lead to difficulty in steering the parties towards an understanding of why each has acted in a particular way, and on to how they will act in the future. Unacknowledged feelings may interfere with the party's ability to move forward towards resolution.

### **Acknowledging**

The parties need to be heard and acknowledged before they are in a position to be able to move from a position or an emotive situation. Mediators need to be able to express empathy, not sympathy to their clients. There is a fine line between empathy and sympathy - if a party feels that the mediator is being sympathetic to them they may think that the mediator is on their side and will assist them in fixing their problems (causing a perception of bias)

Empathy is where mediators use language and non-verbals to indicate to a party that they have heard their concerns. Mediators should indicate that they appreciate it may be a difficult time for the parties, or that the parties may be angry about the issues, and that it is within the mediation process that they may find some resolution. What is important in the mediation is the acknowledging of the feelings, emotions or intentions underpinning the facts. Acknowledgement is a result of reflective listening; the mediator listens to a party and then acknowledges their comments and the underlying emotions.

Example

*'I hear, Sue' you are very angry about how Mike left the children alone at home before you collected them after work.'*

*'Mike, I am picking up that this is a very distressing time for you, as it has been over two weeks since you have seen your children'*

Acknowledging the parties allows them to engage more fully in the mediation process. Acknowledgement is not about working with or dealing with the emotions, but it is important to

acknowledge that the emotions are impinging on the party's ability to negotiate and work towards resolving the issues.

### Reframing

Reframing is about presenting an alternative to a party's current frame of reference, it involves changing the *'the name of the game'*. It involves moving a party from a negative outlook to something that can be discussed within the mediation process. Reframing creates a shift in the parties thinking from positions to interests, changing toxic or emotive statements into objective statements. If a party uses language that may be considered judgmental, biased or positional, which may increase the conflict or tension, the mediator by reframing, introduces different language that focuses them on the issues and diffuse the possible tension.

#### Example

Mike says:- *'My parents have a right to see the children, even though you think they're nuts.'*

To encourage movement, the mediator could reframe the party's statement by either stressing feelings:

*'It sounds like you're really concerned about your parents being able to maintain contact with their grandchildren'*

Or stressing causes:

*'It seems as though the amount of time your parents will have with your children after the divorce is of great concern to you'*

During a reframe if the mediator wishes to check whether the reframe is acceptable, he or she can ask for feedback, eg *'it sounds like you are really concerned about your parents being able to maintain contact with their grandchildren. Is that right?'* In this way the party is invited to comment on whether he or she accepts the proposition the mediator is putting to them, without feeling pressured to do so.

*Definitional* reframing is when an issue that was initially presented in adversarial language is reframed using a mutual interest-based statement.

Sue says: *'All he does is feed the kids junk food. He is a bad father'*. This is reframed to an interest-based statement such as, *'So you would like to discuss consistency in the children's diet'* - this statement is less inflammatory and less adversarial, it refocuses on an interest base for both parties to discuss.

*Metaphorical* reframing involves imaginative speech to touch us at a deeper level than informative or even persuasive language. Mediators can help parties to visualise where they are 'at' psychologically with the use of metaphorical speech in a creative manner which can lead parties to new insights and to depersonalising a conflict. It is important for the mediator to take care when using metaphors as they must have meaning for the parties.

#### Example

Metaphor of a journey – *'You have a long road ahead of you as parents'; 'Lets cross that bridge when we come to it'*

Metaphor of nature – *"challenges in life seem like a river, not knowing when it will end, and difficult to cross. However while the river flows, you will see that there are stepping stones, to help you cross the river safely and move forward with life"*

Meta-questioning is a neurolinguistic programming (NLP) technique allied to reframing. Mediators use meta-questioning to help the parties clarify their thinking and develop behaviours which are more successful. The aim of meta-questioning is to gain a full understanding of a

Commented [LB4]: Not sure if this would work in Mongolia

party's model of reality, which is depicted by the language he or she uses. By using this technique the mediator can challenge what a party says in a way which makes that party examine what might lie behind that statement, giving the party the opportunity to become unstuck from the self-defeating behaviour pattern and perhaps to try a new behaviour.

Example

Mike may say to the mediator, *'Nothing Sue could say would change my mind.'*

The mediator can challenge the limit that Mike has set by saying: *'What could Sue say that would change your mind?' or 'Tell me one thing that would change your mind.'* Or simply reflect one word *'Nothing?'*

Sue may say to the mediator *'It's better we stick to my suggestions for your parents spending time with the children'. Here* the mediator searches for the underlying need by asking, *'What does better mean to you?' or 'How will it be better?' or 'Can you explain who it will be better for?'*

### Summarising and paraphrasing

Summarising and paraphrasing are simple and powerful techniques to enable the mediator to assure parties that they have been heard and understood. It is useful to help the parties to identify or clarify areas of possible agreement as well as disagreement. Summarising is also useful when parties have reached an impasse or when the mediator needs a chance to catch their breath.

Cross-summarising is also useful with mutualising the conversation during exploration.

Example

*'Mike, I hear Sue saying (and correct me if I am wrong Sue) that her primary concern is that your mother is always late at changeovers and this is what Sue sees as the major issue'*

*'Sue, I heard Mike say that if you were prepared to meet at the park, then he could get there early. Did you hear that?'*

*'Round up paraphrasing' or 'progressive summarising'* is also very useful - the mediator summarises and mutualises when the parties in discussion on a particular topic or an agenda item, and during negotiation, moving towards a resolution. This enables the parties to hear an objective interpretation of what they have been saying and how they may be feeling about it. For Example

The mediator summarises what the parties had agreed, and then asks how the agreement will be effected in this scenario - the mediator may say: *'Mike and Sue you have both agreed that Sarah needs to be taken to the dentist for her a check-up. (summarising the agreement) Do you now want to discuss who will take Sarah to the dentist?'* (how is the agreement going to be effected)

Once the decisions has been made, the mediator can use a round-up summary of all the agreements relating to Sarah's dental treatment, before inviting the parties to move onto the next item on the agenda.

### Questioning

In Australia questioning is one of the most important aspects of the mediation process. Mediators should know what questions to use and when. One of the first questions the mediator asks a party is to tell their story. In the opening statements the mediator uses open questions *'What has happened?' 'Why have you come to mediation?' or 'What do you hope to achieve?'*

Commented [LB5]: HM- do not quite understand this question

Questions are used by the mediators to encourage the parties to talk to one another, to shape their story and to manage and control their communication. It is not only the content of the question, it is also how it is being asked that is important - the intonation, facial expression and body language are as important as the words themselves.

There are many styles of questions used in mediation. Closed questions are used to clarify interests and concerns and are also useful to keep the parties on track in their discussions and negotiations.

Mieke Brandon and Linda Fisher in their book, '*Mediating with Families*' provides a comprehensive text on the various styles of questions used in the mediation process and the purpose of questions.

Questions may be open or closed, and allow the mediator to: ( ) Mieke Brandon & Linda Fisher '*Mediating with Families*'

- gather information
- promote and clarify meaning
- generate understanding
- build rapport
- stimulate thinking
- build agreement
- resolve disputes
- change perceptions
- challenge beliefs and assumptions

Mediators also ask questions to

- clarify misunderstanding
- encourage reflection
- compare and contrast alternatives.

### **Examples of using questions**

Open questions

Open-ended questions usually involve asking:

- How.... ?
- Why.... ?
- What....?
- Where..?
- When... ?
- Who... ?

'*How do you feel about Sarah going to the dentist?*' (therapeutic approach encouraging the party to air possible concerns)

'*What are the most important aspects of this for you both?*' (mechanistic approach, asking one party to talk to the other)

'*Please tell Mike why that is important to you?*' (mechanistic)

'*What do you think Sue is proposing?*' (negotiative approach )

Closed questions

Closed questions can be used to clarify interests and concerns and usually require a one word response

*'How often has Sarah gone to the dentist?'* (clarifying events in the past)

*'Do you both agree that Sarah is better off going to a dentist nearby?'* (mechanistic approach)

*'Did the dentist invoice for Sarah come out of your bank account?'* (negotiative approach)

#### Probing questions

Probing questions can be used to get the parties to think of the future or to enable the mediator to dig a little deeper into what has been said:-

*'I'm wondering what made you think or say that?'*

*'What did you think caused the disagreement, and made the situation worse?'*

*'What do you think was the reason?'*

*'Tell me more about your concerns relating to Sara's teeth'*

#### Leading questions

Leading questions are most often used during separate sessions to assist the mediator gain a better understanding of a party's hidden agenda

*'You seemed really nervous when we were discussing the time Sarah's parents were to spend with the children, and I'm wondering what else you might need to talk about in this regard?'*

*'If that is correct, what do you think might make Mike accept your suggestion?'*

#### Relational Questions

Relational questions relate to the parties' past, present and future and may assist them gain an understanding of each other's situation and feelings, and their communication patterns.

Sue: *'You embarrass me in front of the children, you show me no respect. What makes you think I want to have anything to do with you after that treatment?'*

Mediator: *'Sue, are you saying that if things could be different in the way you two communicate with each other, you could see a different way of relating as parents in the future?'*

In the narrative approach the discussions are focused on overcoming the conflict rather than the parties continuing to blame one another over what has happened. When the problem is externalised as 'it' the mediator can explore with the parties how it has impacted on them.

*'What is the conflict doing to you?' 'If kept on, where would it lead?'*

#### Solution-focused questions

Solution-focused questions are used to help the parties to work together to try and reach an agreement that will help them to move forward.

*'What are you hoping this mediation will achieve?' 'How do you see the situation looking after you have reached an agreement and resolved the dispute?'* Hypothetical questions

Hypothetical questions are generally open-ended , non-threatening questions. They have multiple functions such as to encourage open dialogue, perform reality-testing role, encourage a refocus on the future and provide a hypothetical option, pose a hypothetical scenario which may be agreed upon by the parties on the basis of some other condition being linked to a possible solution.

Hypothetical questions are the 'What if....' Or 'If .....was in the room, what do you think they would say about the situation?' 'If Sue were to agree to 50% distribution of the assets what would you think about that proposal?'

Problem-solving questions

Problem-solving question are designed to have the parties working on the problem from the from the start, and are often used when formulating the agenda.

*'How can the change-over be conducted more easily and peacefully managed?' 'How can the children go between the two homes without too much interruption to their activities?'*

All families are different all over the world, regardless of where we live or who we are, when a family separates there will always be grief and loss, our role as mediators is to assist the parties to move forward, and try and reach an amicable resolution which both parties are able to live with.

### **Writing up a formal agreement**

See annexure

## Chapter 6: Ethics and Culture

### Overview

How a mediator and parties involved in a dispute resolution process should behave has been the subject of court cases in both the US and Australia. The difficult questions of ethics such as impartiality, independence and confidentiality, and the issue of compulsory mediation has become a hot topic. Cultural awareness is also essential ingredient to successful mediation. Finally, you will examine the future of ADR in Mongolia

### Checklist

Upon completion of this session participants will be able to:

- Discuss the ethical issues including, neutrality, confidentiality, and conflict of interest.
- Understand and be aware of recent cases that interpret “good faith”
- Examine how different cultures view ADR and adapting processes to acknowledge cultural sensitivities
- Appreciate the acceptance of ADR by mainstream law in Mongolia

## **ETHICS**

The practice of mediation raises many ethical issues about the conduct of mediators that are of critical importance to the parties who use mediation, to the courts and to the public. Like all professionals, mediators can accomplish great good or great harm depending on how they conduct themselves and perform their duties.

Generally the standard of practice for mediation involves six duties. Mediators:

1. Define and describe the process of mediation and its costs before the parties reach an agreement to mediate;
2. Maintain confidentiality of information obtained through mediation unless the parties consent to disclosure;
3. Remain impartial at all times including disclosing any conflicts of interest;
4. Ensure that the participants make decisions based on sufficient information and knowledge;
5. Suspend or terminate mediation whenever continuation of the process would harm one or more of the participants; and
6. Advise each of the participants to obtain legal review prior to reaching any agreement.

### ***Ethics for Participants***

- Do not interrupt when the other person is speaking;
- Show respect in words and gestures;
- Be honest in your words and actions;
- Be willing to listen to the other side as you expect them to listen to you; and
- Negotiate in good faith.

### ***What is Good Faith?***

The former Attorney General, Jeff Shaw QC MLC, (1996 ALLR (CCH) at 50, 124) sets out the principles of negotiation in good faith in a labour relations context.

1. Good faith is an obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. A party will be bargaining in good faith if it has an open mind and a sincere desire to reach an agreement.
2. The duty to bargain in good faith does not require that either party must enter into an agreement.
3. A test as to whether a party is acting in good faith depends on how a reasonable person might be expected to react to the bargaining attitude shown by those participating.
4. In Aiton v. Transfield [1999] NSW C 1996 para.156, Justice Einstein provides “essential core content of an obligation to negotiate or mediate in good faith”:
  - i) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently or precisely defined by the agreement to be certain and hence enforceable)
  - ii) to undertake in subjecting oneself to that process, to have an open mind in the sense of:

- a) unwillingness to consider such options for the solution of the dispute as may be propounded by the opposing party or the mediator, as appropriate.
- b) a willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to those undertakings, the obligation of a party who contracts to negotiate or mediate in good faith do not oblige or require the party:

- a) to act for or on behalf of or in the interests of another party;
- b) to act otherwise or by having regard to self interest.

### **Culture**

Culture, a person's background, experiences and values, is deeply rooted at the heart of any conflict. Culture determines the way in which an individual will approach a situation, how he or she will relate to other disputants, what he or she feels is an acceptable process of resolution, and so on. Assessing a person's cultural perspective is a key part of the intake process. The personal aspects of a conflict will be among the most vital to either fuelling or resolving it; what Peter Condliffe describes as the "intrapersonal" is the most fundamental area of conflict. Condliffe states:

"The intrapersonal ... this means the thoughts and feelings that people experience within themselves in certain situations and which often create inner conflict."<sup>2</sup>

It is a person's cultural background that will greatly influence these thoughts and feelings, and the impact they have on a person's approach to conflict resolution.

John Paul Lederach (1995) examined the relationship of culture to modern assumptions about conflict, and found that:

- conflict emerges through an interactive process based upon a search for and creation of shared meaning
- the interactive process is accomplished through and is rooted in perceptions, interpretations, expressions and intentions which both grow from and go back to common sense knowledge
- meaning occurs as people locate themselves and social "things" in their accumulated knowledge through a process of comparison
- culture is rooted in shared knowledge and schemes created by a set of people for perceiving, expressing, interpreting and responding to social realities around them and therefore understanding the connection of social conflict
- culture is not merely a question of sensitivity or awareness but of digging in the archaeology of accumulated shared knowledge common to a set of people<sup>3</sup>

Therefore, culture is vital in understanding and giving meaning to conflict. Different cultures will have different requirements when it comes to the process of dispute resolution; everything from the sex or dress style of the mediator/s to the mannerisms

<sup>2</sup> Condliffe, P. (2002) *Conflict Management: A Practical Guide*, Sydney: Butterworths

<sup>3</sup> Lederach, J.P. (1995) *Preaching for Peace: Conflict Transformation across Culture*, New York: Syracuse University Press

and body language that they use. Language barriers, value clashes and misunderstandings will be inevitable unless steps are taken to ensure that the disputants and mediator/s are aware of any cultural issues at hand during the mediation process, and as much facilitation as possible is made for easing cultural differences.

## Session 8: Family Mediation in Mongolia

### Overview

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Finally, you will examine the future of ADR in Mongolia

- Mongolian family mediation case studies and challenges
- Acceptance of ADR in law
- A framework for family mediation in Mongolia