Family Law Council

3 June 2011

The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

The Family Law Council provides this letter of advice, of its own motion to express concerns about the possible effect of the recent ruling by Federal Magistrate Riethmuller in the matter of *Rastall and Ball* [2010] FMCA Fam 1290 regarding the application of section 10H and 10J of the Family Law Act (the Act) to family dispute resolution (FDR) intake assessments.

The decision in Rastall v Ball

The parties in this case had been ordered by FM Riethmuller to attend family dispute resolution. His Honour's decision was based on the evidence before the court at the time and neither party objected to attending FDR. The FDR practitioner who conducted the intake and assessment session with the parties considered that FDR was inappropriate in the circumstances and issued a certificate under section 60I(8)(aa) of the Act that 'FDR was not appropriate' having regard to Regulation 25(2) of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. When the matter came before FM Riethmuller again, his Honour questioned the appropriateness of the certificate and whether the intake process formed part of FDR for the purposes of the application of the confidentiality and inadmissibility protections afforded under the Act.

FM Riethmuller ultimately determined that FDR had not commenced as a certificate had been issued on the basis that family dispute resolution was assessed as inappropriate. As a consequence, his Honour ruled that '*evidence of the assessment is not confidential under s.10H of the Act, nor inadmissible under s.10J*' (paragraph 41).

The decision also highlighted some issues in relation to the appropriate exception that would apply when issuing a certificate under s 60I of the Act in the circumstances where the parties had not yet attended any face to face family dispute resolution sessions with each other. In the present case, the certificate that was issued under section 60I(8)(aa) provides that the person did not attend FDR because the practitioner considered that 'it would not be appropriate to conduct the proposed family dispute resolution'. In this case, the practitioner's position was that the parties had in fact begun the FDR process but had not attended the final face to face session. Accordingly, the practitioner admitted that the wrong certificate had been issued. In

this regard, she believed that a certificate should have been issued under section 60I(8)(d) which states that the person 'began attending family dispute resolution with the practitioner and the other party' but that practitioner considers that 'it would not be appropriate to continue the family dispute resolution'. However, the practitioner conceded that the issuing of this kind of certificate would also have been problematic in the circumstances as the parties in this case had not attended any face to face FDR sessions with each other, and so had not attend FDR 'with the other party' as stated on the certificate.

Council's concerns

At its meeting in February 2011, Council was informed that this decision has been widely disseminated within the family dispute resolution sector and that it has led to concern among FDR services and practitioners who are unsure of how to proceed in light of Federal Magistrate Reithmuller's ruling. The FDR sector has tended to adopt the position that FDR is a process which commences at the screening and assessment intake stage. Therefore, the sector has assumed that the confidentiality and inadmissibility provisions of the Act apply to protect any communications or admissions made during the intake process and clients are notified of this protection during the intake session.

Council is concerned that the decision in this case may lead to an increase in the number of successful subpoenas requesting FDR intake session notes and/or requests for FDR staff to give evidence in court. As a consequence, this may impact upon the resource availability of FDR services and inhibit disclosure of information that is needed for the FDR practitioner to assess the appropriateness of the FDR process for the parties. Council also considers that this decision may lead to confusion in the FDR sector about which type of certificate is appropriate to use in this situation.

Council is conscious that the judgment is an unreported decision of a single Federal Magistrate. It is not binding on other judicial officers and to the Council's knowledge, the decision has not been appealed. Despite this, the sector concerns that were raised at Council's February meeting suggest that it nevertheless has significant potential implications for practice within the FDR sector. Further, Council is concerned that, in the absence of clarity about the status of communications made during FDR intake sessions, the ruling may impede effective collaboration between the legal profession and the family dispute resolution sector.

Council notes that the National Dispute Resolution Advisory Council, in its recent report on the integrity of alternative dispute resolution processes, recommended at 6.4.4.1 that the Act should be amended to provide expressly for the inadmissibility of FDR communications made during the intake and assessment process. Council supports this recommendation and considers that the FDR sector requires clarity around this issue.

Yours sincerely

Associate Professor Helen Rhoades
Chairperson