



Chairperson: Associate Prof Helen Rhoades

Members: Ms Nicky Davies  
Mr Clive Price  
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Justice Garry Watts  
Dr Rae Kaspiew  
Mr Jeremy Culshaw

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## Family Law Council

16 December 2010

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

Dear Attorney-General

### ***Proposal to enhance family dispute resolution***

Thank you for meeting with Council on 11 October 2010 to discuss further work priorities for Council and current policy initiatives, including the proposal to enhance family dispute resolution (FDR) outlined in the discussion paper *'Proposal to enhance family dispute resolution'*.

Council supports the principle of providing families with a range of options for resolving family disputes, including enhancing access to services provided in a low-cost, informal and non-adversarial environment. Council does, however, have some concerns about aspects of the present proposal and recommends that at a minimum, a number of safeguards be included to ensure that the proposal is implemented in a way that serves the best interests of children and is just and equitable for the parties. The key points of our discussions are set out below.

#### *Remodelling of FDR to 'facilitative', 'advisory' and 'determinative' FDR*

Council has reservations about the proposal to remodel FDR and incorporate arbitration as a form of FDR. The terms 'facilitative FDR', 'advisory FDR' and 'determinative FDR' may cause confusion for families and practitioners. Reclassifying arbitration as a form of FDR would change the nature and purpose of FDR, and may obscure the binding nature of arbitration and lead families to consent to the process without properly understanding the legal ramifications. Council considers that FDR can be distinguished from arbitration and commercial dispute

resolution on the basis that it helps families to develop skills to resolve family disputes cooperatively into the future.

Council is also concerned that the confidentiality of FDR will be undermined by the proposal that families can seamlessly move between the dispute resolution streams, particularly from facilitative or advisory FDR into determinative FDR. There is a marked difference between giving information through a confidential process that helps families consider options for resolving their disputes and presenting evidence to a decision-maker for a binding determination.

Council submits that the intention to provide families with increased dispute resolution options can be achieved if FDR and arbitration remain distinct processes.

*Extension of the requirement to attend FDR to include property matters*

Council is of the opinion that any extension of the requirement to attend FDR to property and spousal maintenance matters should be subject to a number of protective qualifications, including:

- Exceptions

Council's view is that the current exceptions to FDR for children's matters must also apply to financial matters. These include urgency, consent orders and family violence. An example of urgency in property matters, are circumstances where the financial security of families can be compromised where one party liquidates or otherwise removes assets. Council also agrees that, for financial matters, there is a need for targeted exceptions for circumstances such as bankruptcy, fraud and third parties, as proposed in the discussion paper. In these circumstances, parties should not be required to attend FDR but should be able to apply to the courts to seek property orders.

- A requirement of full disclosure

Council notes that disclosure obligations currently apply to parties to arbitration for family law property and spousal maintenance matters. Disclosure is necessary to address the power imbalances and inequality in parties' capacity to freely negotiate that can result where one party has greater knowledge of the family's finances. Council is concerned that FDR enhancements must not underestimate the importance and difficulty of obtaining financial disclosure, particularly where FDR is compulsory. Council considers that FDR is not suitable where one or more of the parties fail to comply with the disclosure requirements. Council therefore recommends that obligations to provide full and frank disclosure also apply to parties to FDR for property and spousal maintenance matters.

Council notes that FDR intake assessment processes are likely to be a critical part of identifying non-disclosure. However, this process has a limited capacity to ensure

full and frank disclosure occurs prior to FDR. Since March 2004, pre-action procedures, mandated by Schedule 1, Part 1, Paragraph 4 Family Law Rules 2004,

have required full and frank disclosure prior to filing a financial application in the Family Court. Council is also aware of the successful pilot project conducted in the Brisbane FMC, where the parties were required to attempt mediation after the first Court event. Council notes that an important component of the success of the Brisbane project is the making of directions by the Court which require the parties to exchange all necessary information and documents prior to mediation. Council's view is that a system of mandated disclosure is needed as a pre-requisite to negotiation and agreement.

- Appropriately trained FDR practitioners

Council further recommends that practitioners who provide facilitative or advisory FDR for property and spousal maintenance matters be appropriately trained. The issue of training and accreditation for arbitrators is discussed further under the heading *Accreditation* below.

- Independent legal advice

Council's view is that independent legal advice is a necessary pre-requisite to both negotiation and finalisation of settlement agreements of financial disputes in FDR. Parties should be required to seek legal advice before agreeing to the terms of a property settlement. Legal advice will promote agreements that are just and equitable, as the advice will better equip parties to reach informed agreements with an understanding of their legal rights and responsibilities.

#### *Consent to arbitration/ determinative FDR*

Council notes that the present proposal will allow people who commence advisory family dispute resolution of a financial dispute to move to determinative family dispute resolution / arbitration after the process has started. Council has some concerns about this proposal and its potential impact on clients of family dispute resolution services. Council is of the view that clients must be fully informed and properly advised about this option prior to the commencement of the FDR process.

Council is of the view that consent to arbitration must be genuine, that is, it must be free from duress, threat or coercion and conducted only where both parties fully comprehend the binding nature of arbitration. An arbitration award for financial matters has legal ramifications comparable with binding financial agreements. Council also notes the potential for parties to misunderstand the binding nature of arbitration. Accordingly, parties to FDR should not be asked by an FDR practitioner to consent to the practitioner making a determination unless the party has received independent legal advice about the binding nature of arbitration and about their own legal position. In addition to ensuring that consent to arbitration is genuine, legal representation will help ensure that parties are aware of the ramifications of agreeing to arbitration and fully understand the process.

One of the few functioning determinative family law property schemes in Australia, Legal Aid Queensland's property arbitration scheme, is consensual and requires both parties to be legally represented<sup>1</sup>.

#### *Arbitration in children's matters*

Council does not support arbitration in children's matters. Children's matters that cannot be resolved by family dispute resolution, in particular by legally assisted family dispute resolution, require the attention of specialist judicial officers who have the power to obtain independent evidence in relation to children and their families. This evidence is often from professionals who are involved in the lives of the children and families, or are engaged to provide independent expert assessments of the children and families.

Council notes that Family Law Courts have developed a range of processes to ensure that parenting orders are made on sound evidence about the best interests of the child. These processes include Family Reports, the appointment of Independent Children's Lawyers, the Children Responsive Program and focussed evidence gathering from parents and other carers.

Council also notes that with the introduction of the Less Adversarial Trial provisions in the *Family Law Act 1975*, judicial officers of the Family Law Courts have an active role in directing and managing hearings in children's matters.<sup>2</sup>

If arbitration in children's matters were to be further considered significant safeguards would be required to protect the child's best interests. Children's cases involve life changing decisions for children and families that will often have life-long effects for those affected by the decisions.

If arbitration should be extended to children's matters, arbitrators will require access to the same evidence and expertise that is available to the Family Law Courts in their decision-making. Council considers that arbitrations would undermine the more informal, child-focused procedures outlined in Division 12A of the Family Law Act. Procedural fairness must be afforded to all involved.

If arbitration should be extended to children's matters, decisions must be made on proper evidence relating to the needs and in the best interests of the child. Arbitrators must apply the legislative framework set out in the Family Law Act.

#### *Review of arbitration awards*

Council refers to its letter of advice of September 2008 regarding arbitration for family law property and spousal maintenance matters. Council proposed that the Family Law Act be amended to provide parties to arbitration, ordered under

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<sup>1</sup> Family Law Council, 'The Answer From An Oracle: Arbitrating Family Law Property And Financial Matters' (Discussion Paper: May 2007), at 21.

<sup>2</sup> *Family Law Act 1975* (Cth), ss 69ZN and 69ZQ

section 13E of the Family Law Act, options to agree that review may be by way of a rehearing de novo. Council considers that de novo review equips the Family Law Courts to appropriately respond to unjust or inequitable awards or awards otherwise affected by a lack of procedural fairness. Council notes that the letter of advice did not consider arbitration for children's matters. De novo review is consistent with the Family Law Courts' inquisitorial role in children's matters, and Council recommends its adoption not only in financial matters but also children's matters.

#### *Advisory FDR*

Council agrees that there is a role for non-court based dispute resolution processes to provide conciliation or other forms of advice to participants in the process. FDR practitioners already provide families with advice about the issues in dispute and options for resolving disputes. Council notes also the success of court-based conciliation conferences for property matters, in which registrars provide families with advice regarding potential outcomes if the matter were to proceed to trial.

Council appreciates that some families would like the opportunity to put any advice given to them to the Family Law Courts. However, this raises difficult issues about the confidentiality and inadmissibility of statements of advice, and how such statements might be tested in the courts. An amendment overriding the provisions and intent of s 131(1) *Evidence Act 1995* (Cth) would be required.

Council notes that Family Law Courts would be reluctant to give advice statements any weight unless there was sufficient evidence indicating the basis on which the advice was reached, including, but not limited to, the qualifications of the practitioner, the number of sessions attended and information gathered from parents, Family Reports and other single expert reports. Further the practitioner would be required to be available for cross examination. Judicial officers could consider advice provided after an FDR process after they had reached their own conclusions about the matter, when deciding any issue as to costs.

Council notes, however, that cost orders are generally not awarded in children's matters due to the significant financial impact on families already under stress and the genuine (even if unreasonable) position adopted by a parent.

#### *Safety and screening*

Council notes that the physical, emotional and psychological safety of families and practitioners should not be compromised by participation in alternative dispute resolution processes.

FDR programs currently screen families to assess potential safety risks before proceeding to work with families and engage in ongoing monitoring of clients' safety throughout the process. Family Relationship Centres are also required to adopt safety plans, to promote the safety of families and practitioners. Council supports your commitment to develop a uniform screening and risk assessment

framework for use by family law practitioners. To ensure the safety of families in arbitration, Council recommends the risk assessment tool be used by arbitrators prior to conducting arbitration. Council also recommends that arbitrators be required to have appropriate family violence training to support their work with vulnerable families.

Council notes potential safety risks for practitioners who provide determinations or awards and who will not have the benefit of protective security measures in place for the judiciary. Council notes that arbitrators will be placed in a similar position of determining outcomes for families, outcomes that not every party to the proceedings may find agreeable. Council recommends that consideration be given to methods to promote the safety of arbitrators.

### *Accreditation*

Council understands that the accreditation requirements for the new dispute resolution measures are being considered by the Department and that criteria may differ according to the type of FDR conducted and whether the matter involves children or finances.

The current accreditation requirements for arbitration of property and financial matters under the Family Law Act is set out in Part 5 of the Family Law Regulations 1984 (Cth). These prescribe that an arbitrator must be a legal practitioner:

- who is an accredited family law specialist or have practised as a legal practitioner for at least 5 years and at least 25% of the work done by the person in that time was in relation to family law matters; and
- has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators.<sup>3</sup>

These requirements should continue to apply to arbitration of property and spousal maintenance disputes.

As noted, Council does not support arbitration of children's matters. However, if arbitration is extended to children's matters, Council's view is that the accreditation requirements in Part 5 of the Family Law Regulations should also apply to practitioners who arbitrate these disputes. In addition, arbitrators in children's matters should be required to have a detailed understanding of child development and family violence either through the completion of new training requirements or recognition of certain qualifications, such as relevant social science degrees. This would ensure that decisions have regard for the developmental needs of the child whose parenting arrangements are being determined.

### *Further involvement of Council*

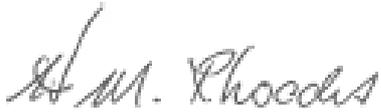
Council notes that the Government is continuing to develop the proposal to enhance FDR to ensure that it best meets the needs of Australian families. Members would be happy to provide further comment on particular aspects of the proposal or the terms of any draft legislation.

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<sup>3</sup> Regulation 67B

I would also be happy to discuss any of the matters raised in this letter at your convenience.

Yours sincerely

A handwritten signature in cursive script that reads "H. M. Rhoades". The signature is written in a dark ink and is positioned above the typed name.

Associate Professor Helen Rhoades  
Chairperson