17 September 2010

NADRAC Secretariat
Attorney-General’s Department
3-5 National Circuit
BARTON ACT 2600

Dear Madam

**Issues Paper - Confidentiality, Admissibility, Practitioner Immunity and Conduct Obligations in ADR Processes**

Thank you for the invitation to make a submission in relation to NADRAC’s reference of 1 December 2009 from the Commonwealth Attorney-General, the Hon Robert McClelland MP, regarding the integrity of Alternative Dispute Resolution processes. In particular, the Family Law Council has been asked to comment on NADRAC’s Issues Paper of July 2010 that addresses ‘Confidentiality, Admissibility, Practitioner Immunity and Conduct Obligations in ADR Processes.’ I am pleased to provide you with the Council’s submission at Attachment A.

This submission is intended to assist NADRAC with its reference, by highlighting issues that the Council have identified as problematic on an operational level both in the legal and relationship community service sectors.

Yours sincerely

[Signature]

Associate Professor Helen Rhoades
Chairperson
ATTACHMENT A

FAMILY LAW COUNCIL

SUBMISSION

This submission considers confidentiality and admissibility in the family law context only.

Confidentiality

1. Is the current level of confidentiality protection concerning family dispute resolution appropriate?

The Council acknowledges that confidentiality is a defining feature of family dispute resolution (FDR). The ostensible confidentiality and privacy of FDR contrast with court and tribunal proceedings which are generally accessible, open and on the public record.

Under the Family Law Act 1975 (the Act), communications made to an FDR practitioner (section 10H) and also to a family counsellor (section 10D) are privileged and confidential. Those provisions prohibit FDR practitioners from disclosing information obtained relating to FDR, except in certain circumstances as specified in those provisions.\(^1\)

The Council observes that there are advantages of FDR being confidential in that it increases the willingness of parties to enter into FDR and engage in open and frank negotiations. This can promote the prospects of formulating an agreement between the parties thus averting the need for any court action.

The Council also observes that the confidentiality (including the inadmissibility) provisions under the Act only apply to FDR practitioners as defined under that Act. FDR practitioners who fall outside the scope of the Act are not covered by those provisions. This raises the issue of consistency. That is, why should FDR practitioners (who are covered by the Act) only be afforded such privileges? To a lay person who is seeking the services of an FDR practitioner, such a distinction would not be apparent. Notably, the same argument applies to family counsellors.

The Council further notes that the FDR confidentiality provisions do not extend to parties/clients who have been involved in an FDR process. The Council understands that parties/clients sign confidentiality agreements to prohibit them from divulging communications arising from FDR.

Overall, the Council considers that the current level of confidentiality protection afforded to FDR practitioners under the Act is appropriate. The Council is of the view that the problem of

\(^1\) While the Issues Paper does not cover the area of family counselling, the Council wishes to highlight that the issues concerning confidentiality and admissibility for FDR also apply to family counsellors as the provisions that apply to them are identical to those that apply to FDR practitioners.
the courts not being able to access information obtained during the FDR process does not lie
with the operation of the confidentiality provisions but more with the functionality of the
inadmissibility provisions under the Act. The Council will expand on this issue later in the
section dealing with inadmissibility.

2. Are the current exceptions to the confidentiality requirement appropriate/adequate?

The Council notes that the current exceptions to the confidentiality requirement for FDR are
specified at sub-sections 10H(2)-(6) of the Act.

Sub-section 10H(2) provides that an FDR practitioner must disclose a communication if the
practitioner reasonably believes the disclosure is necessary for the purpose of complying with
a law of the Commonwealth, a State or a Territory. Sub-section 10H(3) authorises an FDR
practitioner to disclose a communication if consent is given by the person (if 18 or over) who
made the communication or (if the communication was made by a child under 18), a court or
each person with parental responsibility for the child. Sub-section 10H(4) authorises an FDR
practitioner to disclose information to protect a child or person from, for example, risk of
harm (whether physical or psychological). Sub-section 10H(5) provides that an FDR
practitioner may also make disclosures in order to provide information for research relevant to
families, as long as the information provided does not constitute ‘personal information’ as
deefined in section 6 of the Privacy Act 1988 and sub-section 10H(6) provides that an FDR
practitioner may disclose information necessary for the practitioner to give a certificate under
sub-section 60I(8) of the Act.

Subject to the Council’s response at question 4 below, we consider that the current exceptions
to the confidentiality requirement contained in the Act are adequate.

3. Do any changes need to be made to the current confidentiality requirement contained
   in s.10H of the Family Law Act 1975? More specifically – should the
   confidentiality provisions be changed for any reason including to protect children
   and families from physical and psychological harm? If so, how could this be
done?

In light of the Council’s response at question 2 above, we do not consider any changes need to
be made to section 10H of the Act. The Council notes that current paragraphs 10H(4)(a), (b)
and (c) would adequately protect children and families.

4. Should another exception be to address the complaint against the conduct of an FDR
   practitioner? Are there flow-on effects for other administrative legislation (eg
   FOI, Ombudsman and Privacy)?

The Council understands that the Attorney-General’s Department has received legal advice to
the effect that it would appear that section 10H of the Act continues to apply in circumstances
where an independent body is investigating a complaint made by a party against an FDR
practitioner. In particular, the confidentiality obligation attaches to the nature of the proposed
disclosure by the FDR practitioner. If a disclosure relates solely to communications made by,
or conduct of, the FDR practitioner (and does not incorporate the content of a communication
made to the FDR practitioner), no confidentiality obligation attaches. The confidentiality
obligation attaches to ‘a communication made to the practitioner while the practitioner is
conducting FDR.’ In this regard, although the contrary may be argued, an FDR practitioner
would not be able to disclose to an investigatory body communications that had been made to
them during an FDR session, absent the consent of the person who made the communication, or the application of one of the other exceptions specified in sub-sections 10H(2), (4), (5) or (6) of the Act.

The Council is of the view that there should be another exception to the confidentiality requirement in the Act to address the situation where a complaint has been made about the conduct of an FDR practitioner. An FDR practitioner’s role involves a level of trust by the parties and if, for example he/she engages in conduct that concerns fraud, negligence or any other malpractice, the practitioner should be subject to investigation and action in relation to such conduct.

5. **Should the Family Law Act be amended to allow family dispute resolution practitioners to provide additional information to the courts to assist with the courts’ case management/risk assessment in subsequent litigation? If so, how could this be done?**

The Council considers that FDR practitioners should be allowed to provide additional information to the courts to assist with the courts’ case management and risk assessment in subsequent litigation. The Council emphasises that suitable safety measures need to be put in place to ensure that this does not expose victims and their children to further harm.

In particular, it is suggested that a process is needed for ensuring that the court is able to identify when an FDR practitioner has specific information about child abuse or serious family violence in a particular case. One way of doing this would be for the FDR practitioner to enter this information on a Federal court database/portal so that appropriate authorities can access that database/portal to check whether an FDR practitioner has flagged information that could potentially be made available. The Council considers that this would be an effective mechanism through which the courts can receive important information. However, the Council acknowledges that appropriate measures would need to be put in place so that a ‘drag net’ effect is not created because too many less serious cases have been flagged.

It is expected that the costing of the development of such a database/portal would need to be negotiated between the Attorney-General’s Department and the courts.

**Admissibility**

1. **Are the current inadmissibility provisions under the Family Law Act appropriate?**

The Council emphasised in its December 2009 Report on ‘Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues’ (‘the 2009 Report’) the importance of information sharing in order to deal with the disturbing issue of family violence and child abuse.²

In particular, the 2009 Report notes that as allegations of family violence and child abuse are increasingly becoming the core business of the federal family courts, increased communication, co-operation and information sharing between the federal family courts and agencies dealing with family violence and child protection issues is necessary to minimise

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² See Family Law Council’s 2009 Report, pp. 76-86.
situations where the federal family courts are making critical decisions without adequate information.  

Professor Chisholm also highlighted in his report ‘Family Courts Violence Review’ the court’s ability to conduct a risk assessment process and its capacity to protect children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies.

As previously mentioned, the Council considers that the problem of the courts not being able to access important information obtained during the FDR process lies with the inadmissibility provisions contained in the Act rather than the confidentiality provisions. Such evidence may be critical for court processes in order to protect victims (including children) from further harm from family violence and/or child abuse.

The Council notes that there has been anecdotal evidence from FDR service providers that there is an increasing number of subpoenas seeking information about a client’s FDR matter. However, a large proportion of those subpoenas are clearly seeking information that is inadmissible and are used for ‘fishing’ purposes only. The Council acknowledges these concerns that the Act should continue to have an inadmissibility provision to ensure that FDR communications are protected where justified. However, the Council considers that the exceptions to the inadmissibility provision require amendment, details of which are provided at question 2 below.

The Council also notes that when making referrals to other professionals, sub-section 10J(4) of the Act requires FDR practitioners to inform these professionals of the inadmissible status of communications made to them to ensure that they are aware of this fact when receiving a referral. The Council queries whether the inadmissibility provisions would apply to a second professional, if there is a subsequent referral.

2. Are the current exceptions to the inadmissibility requirement adequate? Should the inadmissibility provisions be changed for any reason including to protect children and families from physical and psychological harm? If so, how could this be done?

The Council is of the view that the current exceptions to the inadmissibility requirement are inadequate.

Sub-section 10J(2) of the Act specifies that the inadmissibility requirement does not apply to an admission by an adult that indicates that a child under 18 has been ‘abused’ or ‘is at risk of abuse’ or a disclosure by a child under 18 that indicates that the child has been ‘abused’ or ‘is at risk of abuse.’

The Council considers that the exceptions contained in sub-section 10J(2) allow for narrow interpretation only. In particular, the provision only covers ‘abuse’ and not ‘family violence.’

The Council recognises that there are different categories of family violence. Indeed, in the case of Marriage of JG and BG (1994) 18 Family Law Reports 255 at 261, Chisholm J aptly stated that:

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3 See Family Law Council’s 2009 Report, p.79.
“Violence may take many forms and have a quite different significance in different cases. It might be, for example, a single outburst, out of character, caused by a stressful situation, for which the violent persons feels immediately regretful and apologetic. It might be the result of mental instability or disease...It might represent a deliberate pattern of conduct through which the violent person exercises a position of dominance and power over the other. It might be associated with a particular situation, and be unlikely to be repeated in different situations, or it might be a recurrent pattern of behaviour occurring in many situations...”

In this regard, the Council considers that the exceptions should reflect the different categories of family violence. In this regard, the Council recommends that sub-section 10J(2) could be amended along similar but not identical lines to those exceptions specified in sub-section 10H(4) for confidentiality – in particular, in addition to the current exceptions:

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

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

or

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

(d) preventing or lessening a serious offence relating to the property of a person.

The amended provision would still allow for admissions and disclosures by an adult or a child that fall under the categories specified above unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

3. Should another exception be to address the complaint against the conduct of an FDR practitioner? Are there flow-on effects for other administrative law legislation (eg FOI, Ombudsman and Privacy)?

The Council refers to its response at question 4 above relating to confidentiality. The Council considers that there should be another exception to the confidentiality and inadmissibility requirements in order to investigate and permit evidence of fraud, negligence or other malpractice by FDR practitioners.

Immunity of ADR Practitioners

1. Is the current position with respect to immunity under the Family Law Act appropriate?

Presently, the Council notes that immunity applies only to arbitrators (section 10P) and family consultants (section 11D) under the Act. Such immunity does not apply to FDR practitioners or family counsellors under the Act.

Notably, the former Council and NADRAC wrote a joint letter of advice to the then Attorney-General, the Hon Philip Ruddock MP dated 15 November 2005 concerning whether immunity should continue for FDR practitioners and whether it should also be extended to family counsellors. The advice was given in the context of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. The Councils advised that given the current development of community-based mediation in parenting disputes outside the court system, they considered that there was no justification for maintaining immunity which had its origins in mediation as
an extension of the case management and dispute resolution work of the courts. For these reasons also, there was no justification for extending immunity to family counsellors. The Council maintains this position.

2. Has the removal of practitioner immunity affected family dispute resolution services? Would it do so if an exception were made to the current inadmissibility provision to specifically permit evidence of fraud, negligence or other malpractice by family dispute resolution practitioners?

The Council considers that the removal of immunity from liability for negligence has not affected practitioners in the field of FDR. In accordance with the new accreditation requirements, practitioners are to be covered by professional indemnity insurance before they can be accredited. Therefore the Council does not consider this an issue of significance.

The Council refers to its response at question 4 above relating to confidentiality and question 3 relating to inadmissibility above. The Council considers that there should be another exception made to the current inadmissibility provision to permit evidence of fraud, negligence or other malpractice by FDR practitioners as such practitioners should be punished for such conduct.

3. Should family dispute resolution practitioners be protected from suit for serious misconduct such as fraud or negligence? If so, how can family members in family dispute resolution be adequately protected?

The Council refers to its response at question 2 above. The Council does not consider that FDR practitioners should be protected from suit for serious misconduct such as fraud or negligence.

Conduct obligations

1. Is the current ‘genuine effort’ requirement appropriate and workable?

2. How has the ‘genuine effort’ requirement affected family dispute resolution processes?

3. Are the current exceptions to the ‘genuine effort’ requirement at family dispute resolution appropriate/adequate?

4. Is the current regulation of family dispute resolution practitioners appropriate/adequate without subjecting them to a further conduct obligation?

The Council considers that the current ‘genuine effort’ requirement together with exceptions are appropriate and workable. Therefore, we do not consider that any changes are required in this regard.

The Council also believes that the current regulation of FDR practitioners is appropriately dealt with under the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 and therefore do not need to be subject to further conduct obligations.