National
Alternative
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Council

PRIMARY DISPUTE RESOLUTION IN FAMILY LAW

A Report to the Attorney-General on Part 5 of the Family Law Regulations

NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL

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Report to the Attorney-General on Part 5 of the Family Law Regulations

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THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL

NADRAC is an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

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REFERENCE

The Hon Daryl Williams AM QC MP

Attorney-General
and
Minister for Justice

96084811

8 October 1996

Associate Professor Hilary Astor
Chairperson
National Alternative Dispute Resolution Advisory Council
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Professor Astor

I am writing to seek the Council's early advice on a number of issues that have been raised wit me concerning Part 5 of the Family Law Regulations which commenced on 11 June 1996. Part 5 lays down a regulatory framework for the provision of primary dispute resolution of disputes under the Family Law Act 1975.

The issues that have been raised with me or my Department are:

- The Queensland Law Society Inc raised with the Department whether certain conferencing on behalf of the (Qld)Legal Aid Commission was recognised as practical mediation for the purposes of subregulation 60(3) and the supervision arrangements required by paragraph 60 (1)(c) . These same issue were raised with me by members of the legal profession following an address to a LEADR function in Brisbane on 31 July;

- Professor Wade, of Bond University, sent me a paper he has prepared on the regulations, outlining a number of difficulties with the regulations;

- Letters from Mr Ernest Treagus, Accountant, and the Australian Society of Certified Practising Accountants in relation to the lack of recognition in the regulations of accountants;

- the Attorney-General for the Northern Territory wrote concerning the restrictive nature for that Territory of the tertiary qualifications requirements for the indigenous and ethnic populations; and

- the Queensland Law Society Inc wrote concerning the restrictive nature of the tertiary qualifications requirements for Admission Board qualified lawyers.

I have requested my Department to pass to the Council's secretariat a copy of all of the correspondence and papers.

Further, I have asked that a copy of an advice from the Director of the Queensland Legal Aid Commission that the conferencing function undertaken on behalf of the Commission does not constitute mediation also be passed to the secretariat.

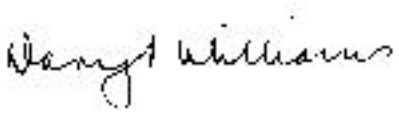
You will note that in his submission Professor Wade requested that I suspend the operation of the regulations pending resolution of a number of concerns he has raised. I have not agreed with that suggestion as I believe that the community is entitled to a range of services and the regulations provide that range.

Nevertheless, I am concerned that there is so much criticism of the provisions and wish to consider whether any amendments should now be made to the regulations rather than waiting for a significant period of operation before evaluating their operation.

I should be grateful if the Council could consider the issues raised and provide advice by early December 1996. I appreciate that this timeframe may impinge on other work that Council is undertaking and that other issues may be delayed. While that is unfortunate, the impact on the community of family law issues is so great that the consideration of the concerns must have priority.

An additional issue that is not raised in the correspondence but that I would be grateful if the Council could include in its consideration is the comprehensiveness of the definition of private mediator in section 4 of the Act. I seek the Council's views on whether it would be desirable to amend the Act to limit the definition of private mediators, so that the regulations apply to those who receive the protections offered by the Act, but would not prevent any other mediation of disputes which could be the subject of family law proceedings.

Yours sincerely



DARYL WILLIAMS

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SUMMARY OF RECOMMENDATIONS

Recommendation 1 Paragraph 3.35

The Family Law Act should be amended to make it clear that only those mediators who require the protections of the Act need to comply with the regulations. To that end the definition of 'family and child mediation' should be amended to make it plain that "family and child mediation" means mediation in accordance with the regulations. The Council regards this as its "central" recommendation and many of the following recommendations are proposed in the light of it.

Recommendation 2 Paragraph 3.56

The need for immunity for mediators in family matters, and the extent of any such immunity, should be considered in the broader context of all of the dispute areas in which mediation is practised. In the interim, the immunity provision should be amended, if necessary, to ensure that consumers of mediation services can pursue actions against mediators for serious misconduct.

Recommendation 3 Paragraph 4.08

The requirement for tertiary qualifications be retained for the present. However, further consideration be given to whether it is possible for the regulations to recognise professionals with specific experience in the area of family law rather than recognising tertiary qualifications in law or social science.

Recommendation 4 Paragraph 4.15

Regulation 60 should be amended to recognise accountants with experience in family law matters.

Recommendation 5 Paragraph 4.17

The regulations should be amended to include legal practitioners admitted to practice as a barrister or solicitor of the High Court or the Supreme Court of a State or Territory.

Recommendation 6 Paragraph 4.39

The regulations should be amended to establish a limited authorisation scheme for Aboriginal and Torres Strait Islander mediators who are providing mediation services to Aboriginal and Torres Strait Islander peoples and who cannot reasonably meet the tertiary qualification requirements.

Recommendation 7 Paragraph 4.40

In the longer term, special measures should be implemented by the Government to assist Aboriginal and Torres Strait Islander peoples to acquire appropriate tertiary qualifications. Aboriginal and Torres Strait Islander peoples should be consulted in this context.

Recommendation 8 Paragraph 4.45

The regulations should be amended to establish a limited authorisation scheme for mediators serving non-English speaking background communities who cannot reasonably meet the tertiary qualification requirements because their English language skills are insufficient to enable them to do so.

Recommendation 9 Paragraph 4.51

The Government should liaise with tertiary institutions with a view to improving access to tertiary courses for people from socially or economically disadvantaged groups and for people with disabilities. Consideration should also be given to the establishment of long-distance programs in mediation /dispute resolution to assist people in rural and remote areas to acquire relevant tertiary qualifications. Programs should be implemented to increase awareness of available tertiary programs.

Recommendation 10 Paragraph 4.56

If the Council's previous recommendation to amend the definition of 'family and child mediation' is adopted a consequential amendment will need to be made to subregulation 60(3) to remove the words "mediation of that kind" and to replace it with a general reference to mediation of family disputes.

Recommendation 11 Paragraph 4.62

Subregulation 60(3) should be amended to enable the 'true grandparents' of mediation (eg. mediators who had obtained the requisite number of hours of mediation by 11 June 1996 and / or meet such other criteria as are considered appropriate) to apply for authorisation by 31 August 1998, thereby obtaining exemption from the requirement to enrol in a course of tertiary study.

Recommendation 12 Paragraph 4.66

Subregulation 60(4) should be removed to exempt mediators who are employed by non-profit mediation organisations who have provided the requisite hours of mediation from the requirement to undertake tertiary study while the mediator continues to be employed by a non-profit organisation.

Recommendation 13 Paragraph 4.67

If the Council's previous recommendation to amend the definition of 'family and child mediation" is adopted a consequential amendment should be made to subparagraph 60(3)(b)(ii) to replace the reference to "family and child mediation" with a more general reference to mediation of family disputes.

Recommendation 14 Paragraph 5.06

Amend paragraph 60(1) (b) to provide that the requisite five days training in mediation must include at least three days of specific training in the theory and practice of mediating family disputes.

Recommendation 15 Paragraph 5.21

That subparagraph 60(c)(i) be amended to ensure that any independent supervisors are experienced in the mediation of family disputes.

Recommendation 16 Paragraph 5.22

That subparagraph 60(c)(ii) be amended to include persons who are eligible for membership of the relevant professional bodies.

Recommendation 17 Paragraph 6.08

The procedural requirements in regulation 62 should be amended as follows:

62(1) to provide that the mediator must conduct the assessment or must be satisfied that the assessment has been appropriately conducted;

62 (2) to provide that the mediator must consider the ability of the parties to negotiate freely or must be satisfied that this has been considered;

62(3) remove (the provision is unnecessary);

62(4) to reflect the fact that the decision as to whether or not the mediation should or should not proceed may be taken by either the mediator or an appropriately trained intake officer.

Recommendation 18 Paragraph 6.28

The requirement to provide information in regulation 63 should be amended as follows:

63(1) to remove the requirement that a written statement must be provided at least one day before the mediation and to require that, before a formal mediation session commences, the participants are to be provided with the information specified in a manner (whether orally or in writing) that is appropriate to the circumstances of the case;

(a) to simply require the mediator to outline the process which the mediator proposes to adopt and to explain the neutral role of the mediator without specifying the information which the mediator is required to convey;

(b)(i) delete "within the meaning of section 61B of the Act";

(b)(iii) to replace with a simple requirement to inform the participants how they may register a parenting plan;

(c) remove (this provision would now be addressed by paragraph (a));

(e) remove;

(g) to add that the mediator also has the right to terminate the mediation at any time;

(h) remove;

(j) to express in plain user friendly language;

(k) to express in plain user friendly language;

(l) remove, instead, a new provision should be added which requires the participants to be informed that the mediation is being conducted in accordance with the requirements of the Family Law Regulations and that the mediator is qualified accordingly;

63(2) remove;

63(3) remove.

CHAPTER 1: BACKGROUND

INTRODUCTION

1.01 For many years now, the Federal Government, like other governments in Australia and overseas, has been concerned about the costs of justice and the fairness, efficiency and accessibility of legal services. Nowhere have these concerns been more evident than in family law – an area of law which affects very large numbers of Australians and confronts them with the potential costs and burdens of litigation. During the course of several parliamentary inquiries into family law and related issues, notably the *Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* in 1991–1992, it became clear that there was some intense dissatisfaction within the Australian community about the operation of the *Family Law Act 1975* .

1.02 In 1995 the Commonwealth Parliament passed the *Family Law Reform Act 1995* which implemented the most far reaching amendments to family law since the *Family Law Act 1975* was first enacted. Those changes came into effect on 11 June 1996. Although the legislation was introduced by the former Labor Government the present Government has made it clear that it supports the changes, particularly the shift in focus from parents' rights to the best interests of the children and from adversarial to non-adversarial dispute resolution mechanisms.

1.03 One of the key objectives of the reforms was to encourage much greater use of alternative dispute resolution processes, such as counselling and mediation, to resolve family disputes. While the Government acknowledges that there will always be a place for litigation in family law matters, it believes that a far greater number of disputes can be resolved by other methods and much earlier than is currently the case. In the Government's view, use of non-adversarial alternatives like conciliation counselling and mediation will enable disputes to be resolved at a greatly reduced cost, with outcomes that are both more acceptable to the parties and more likely to be complied with. The legislative changes seek to encourage people to use alternative process such as counselling, mediation or arbitration before resorting to litigation. Accordingly, the term 'primary dispute resolution' is now used in the *Family Law Act* to describe these processes.

PRIMARY DISPUTE RESOLUTION REGULATIONS

1.04 Section 19P of the *Family Law Act*, as amended, provides that regulations may prescribe requirements to be complied with by community mediators and private mediators in relation to the provision of family and child mediation services. Pursuant to this section, Part 5 of the Family Law Regulations (the regulations) lays down a regulatory framework for the provision of primary dispute resolution by community and private mediators. Part 5 also includes regulations concerning the authorisation of family and child counsellors and the advertising of counselling, mediation and arbitration services in Family Court registries.

1.05 Since the commencement of the new regulations on 11 June last year, considerable concern has been expressed about their impact from a number of different quarters. Any new regulatory framework will provoke concern, particularly in a field such as mediation

which has not previously been regulated. Precisely because this is the first venture by the Federal Government into regulation of mediation it had been envisaged that the operation of the regulations would be reviewed after a suitable period of operation. However, the strength of feeling about the regulations led the Attorney-General to conclude that it would be appropriate to examine the concerns to determine whether any immediate amendments are required.

THE INQUIRY

The letter of reference

1.06 On 8 October 1996 the Attorney-General wrote to the Chairperson to request the Council's early advice on a number of issues concerning the operation of Part 5 of the Family Law Regulations in relation to primary dispute resolution. The matters that the Attorney-General referred to the Council included the following:

- the impact of the regulations and whether the unintended consequences were so serious as to warrant immediate suspension of the regulations as suggested by Professor John Wade of Bond University;

- concerns about whether experience gained in legal aid commission conferencing programs was supervised mediation as required by paragraph 60(1)(c) or family and child mediation for the purposes of subregulation 60(3);

- the lack of recognition of accountants, particularly those that already provide expert advice in relation to family law matters;

- the restrictive nature of the qualification requirements in subregulation 60(1) and the failure to provide for mediators of Aboriginal and Torres Strait Islander background or non-English speaking background who were unable to meet those requirements; and

- the lack of recognition for lawyers who do not hold a degree but were admitted as a result of passing Barristers and Solicitors Admission Board examinations.

1.07 In addition to the above, the Attorney-General's letter asked the Council to consider a related question concerning the breadth of coverage of private mediators by the regulations. The Attorney-General asked whether it would be desirable to amend the definition of 'private mediator' in section 4 of the *Family Law Act* so that the regulations would only apply to those private mediators who wished to receive the protections offered by the Act. The regulations would not then prevent other private mediators from mediating disputes which could be the subject of family law proceedings. However, they would not have the protections afforded by the Act.

1.08 The Attorney-General's Department subsequently provided the Council with a copy of a letter to the Federal Attorney-General from the Queensland Attorney-General and Minister for Justice, the Hon Denver Beanland MLA, dated 15 October 1996 which

expressed concerns about the impact of the training and supervision requirements on solicitor mediators in Queensland.

Breadth of inquiry

1.09 In discussions between the Chairperson and officers of the Attorney-General's Department about the terms of reference it was made clear to the Chairperson that there was no intention on the Attorney-General's part to limit the Council's advice to the specific issues that the Attorney-General had raised. Accordingly, this Report addresses a number of other concerns which have been brought to the Council's attention.

1.10 NADRAC was not asked, nor has it had the necessary time or resources, to conduct a thoroughgoing review of the regulations. However, during the course of the Council's inquiry, it became apparent that there were complex inter-relationships between the provisions of the Family Law Act, the requirements of the regulations and the potential implications for the practice of family mediation. Accordingly, the Council felt that it was necessary to undertake a much deeper inquiry than was, perhaps, initially envisaged. The Council's ability fully to explore all of the issues that it has identified and systematically to consult those involved in the provision of family mediation on those matters has been strictly constrained by both the tight time frame and the limited resources available for this inquiry. Accordingly, the Report raises some matters that will require further consideration. In addition, the Council acknowledges that there may be some further issues that have not yet been brought to the attention of the Attorney-General or the Council.

1.11 The Council also notes that some of the issues that are raised in this Report are the subject of consideration by other bodies. For example, this report refers to the related issues of inadmissibility and confidentiality in mediation, issues which are being addressed by a working party established by the Attorney-General as a consequence of the High Court decision in *Harrington* v *Lowe*[1] .

Priority

1.12 The importance of the issues relating to the Family Law Regulations combined with the short time frame in which to provide a report caused the Council some concern. Council already had a busy schedule of work and Council members have limited time to devote to Council projects as they undertake Council work on a part-time basis, over and above the demands of their own full-time professional positions. The Attorney-General's letter acknowledged that the short time frame may impinge upon other Council work and that other projects may be delayed. Nevertheless, the Attorney-General went on to say that, while this was unfortunate "*the impact on the community of family law issues is so great that the consideration of the concerns [about the regulations] must have priority*".

Time frame

1.13 The Attorney-General requested the Council's advice by early December 1996 (approximately ten weeks from the date of the Attorney-General's letter). There was some

1 *Harrington v Lowe* (1996) FLC 92–668; 136 ALR 42

concern among Council members about this short time frame given the size and importance of the issues, Council's small budget and the considerable expenditure that would be necessary to bring a committee together on a sufficient number of occasions to enable it to carry out this task effectively.

1.14 Following receipt of the Attorney-General's letter on 9 October 1996, the Chairperson quickly convened a committee, the Ad Hoc Family Law Regulations Committee, to consider the issues and report to the Council at its meeting on 5 and 6 December 1996. The Committee held an initial teleconference on 10 October 1996 and subsequently met on 18 October, 14 November and again on 5 December 1996. However, it became clear that the reference raised important issues that were central to the Council's broad functions, as set down in the Council's new Charter which the Attorney-General had developed and transmitted to the Council in a letter dated 18 November 1996. These issues include, the need for minimum standards, the need for minimum training and qualification requirements, the government's role in relation to these matters and methods by which compliance with them may be assured.

1.15 In the light of the highly significant and complex issues raised by the regulations, the Council concluded that it needed more time to consider the issues fully and prepare its advice. Accordingly, the Chairperson wrote to the Attorney-General on 13 December to advise him of the Council's decision. The Chairperson's letter noted that, given the difficulties which would naturally arise as a result of the Christmas / New Year season, the Council would not be in position to provide the Attorney-General with its advice before March 1997. The Attorney-General subsequently acknowledged the Council's letter and agreed that the Council's advice could be provided by March 1997.

AD HOC FAMILY LAW REGULATIONS COMMITTEE

1.16 The members of the Ad Hoc Family Law Regulations Committee who developed the Report for Council were:

Professor Hilary Astor (*Convenor*)
Wendy Faulkes
Susan Gribben
Richard Moss
The Hon. Justice Nahum Mushin
Philip Theobald
Serena Beresford-Wylie (*Director, NADRAC Secretariat*)

THE STRUCTURE OF THE REPORT

1.17 This report addresses the issues arising in relation to primary dispute resolution in family law in the following manner:

- Chapter 2 examines the arguments for and against the regulations in the light, particularly, of Professor Wade's call for their immediate suspension;

- Chapter 3 examines the scope and application of the regulations;

- Chapter 4 examines the tertiary qualification requirements for family and child mediators, including the need, if any, for special treatment of specific classes of mediators such as mediators from Aboriginal and Torres Strait Islander communities, mediators from non-English speaking backgrounds, the "grandparents" of mediation, and mediators who are otherwise disadvantaged by the requirement for tertiary qualifications;

- Chapter 5 examines the training and supervision requirements of the regulations, including the specific issue of whether experience gained in legal aid conferences may constitute supervised mediation for the purposes of the regulations; and

- Chapter 6 deals with the procedural requirements of the regulations and issues relating to mediator neutrality and conflicts of interest.

GENERAL CONCLUSIONS

1.18 A summary of the Council's recommendations is set out at pages ix-xii of this Report. In general NADRAC has taken the view that the regulations serve an important purpose and should not be suspended or repealed. Nevertheless, the Council acknowledges that some of the provisions have created anomalies and that some immediate amendments are warranted to ameliorate these.

CHAPTER 2: THE NEED FOR REGULATION

2.01 The provisions of the new Family Law Regulations which relate to primary dispute resolution have been the subject of considerable criticism since their commencement on 11 June 1996. The Council accepts that any new regulatory framework will provoke some concern, particularly in a field that has not previously been regulated such as alternative dispute resolution (hereafter sometimes referred to as ADR). However, the strength of the criticisms of the regulations, including at least one call for their immediate suspension[2], demonstrates the necessity for an early review of both the need for and operation of the regulations.

2.02 The need for government regulation of ADR services has been the subject of international discussion for some time now. While this debate is still at a relatively early stage it is possible to discern some clear arguments both for and against the proposal.

ARGUMENTS FOR REGULATION

2.03 The arguments for regulation of ADR services primarily relate to the need to protect consumers of ADR services. These arguments have particular significance in an environment in which governments, courts and tribunals are increasingly encouraging, and sometimes compelling, people to use these services before exercising their right to adjudication within the traditional justice system.

Consumer protection

2.04 The mediation process is still at an early stage of development. There is, as yet, no clear, universal acknowledgment about its essential features. Most mediators in family disputes would adopt a process based broadly upon the process defined by Folberg and Taylor:

> *[T]he process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.*[3]

2.05 However, as Professor Laurence Boulle points out in his text entitled, *Mediation: Principles, Process , Practice* [4] this definition has many questionable elements and a number of internal tensions. He notes, for example, that *"There are many instances in which mediation does not systematically isolate the issues in dispute and consider options for its most effective resolution - it merely involves incremental bargaining towards a compromise solution."*

2.06 The privacy and confidentiality of mediation is frequently quoted as one of its primary advantages, particularly as compared to court proceedings. The extent of this

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2 Professor John Wade, draft paper entitled *Family Mediation A Premature Monopoly in Australia?*, 1996.

3 J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, Jossey-Bass, San Francisco, 1984, p 7.

4 Laurence Boulle, *Mediation: Principles, Process, Practice*, Butterworths, Sydney, 1996, p 5

privacy and confidentiality may be "tailored" by the parties, the mediator or the mediation agency or may be imposed by statute. In general, mediation has some or all of the following features:

- the participants meet with the mediator/s behind closed doors;
- third parties are excluded except with the consent of the parties;
- no notes, written records or electronic recordings are kept of the proceedings;
- the participants are asked to agree to keep the proceedings confidential and are informed that the mediator/s will do so;
- the proceedings are conducted on a 'without prejudice' basis so that the parties and the mediator/s are precluded from giving evidence of anything said or done in subsequent court proceedings.

2.07 The extent of privacy and confidentiality adopted in the mediation process creates the risk that the participants may subsequently find it extremely difficult to establish evidence of any abuse of process that may occur.

2.08 The consumers of mediation services have limited knowledge about the process and what they should look for in terms of the qualifications and professional competence of the service providers. A survey conducted by AGB McNair in September 1995 for the Legal Aid and Family Services Division in the Attorney-General's Department found that only 17% of the community had heard of family mediation when the question was unaccompanied by a description of family mediation. The 17% of respondents who said they had heard of family mediation were then asked to describe it. The responses to this question showed that in general the respondents only had a partial understanding of it. When family mediation was described to respondents, the number of people who said they had heard of it increased to 36%. However, AGB McNair concluded that despite this increase, the overall level of awareness of family mediation was still quite low.

2.09 The flexible nature of the mediation process, the privacy and confidentiality in which it is conducted, the fact that it frequently requires the participants to negotiate legal rights and entitlements and the lack of community knowledge about it means that there is a clear risk that consumers of mediation services may be harmed if mediators are not appropriately trained or the quality of the service does not meet certain standards. It is frequently argued that these risks are negligible because the process is a voluntary and consensual one. However, as the New South Wales Law Reform Commission has pointed out:

> *This is the conventional response to calls for controls on mediators. This approach is, however, of limited application across the range of circumstances in which mediation occurs. The claim is relevant when the parties freely and in full knowledge choose mediation and the mediator, and when they may freely choose, without penalty, to discontinue mediation if dissatisfied. It is less applicable to circumstances in which participation is mandatory or less than completely voluntary, to naive parties or to those who have limited access to information or advice. This view relies on assumptions that the parties' level of sophistication are comparable, and sufficient to recognise the incompetent and corrupt, that they have an appropriate level of professional advice, including legal, and a familiarity with mediation acquired most readily by its frequent use or appropriate education. The assumptions may be correct for many consumers. However, the contention ought to be regarded with caution given that empirical studies of informal*

dispute resolution have found that the rhetoric of self-determination and voluntary participation is matched with the realities of capitulation and coercion.[5]

2.10 The Law Reform Commission concluded that the greatest danger to consumers of mediation services is from abuse by "*inept, overbearing or unscrupulous mediators* "[6].

2.11 Disputes involving families and children which could be the subject of proceedings under the Family Law Act are both complex and highly sensitive. Failure to prescribe minimum standards as to qualifications, training, supervised practical experience and continuing education would significantly increase the risk of mediations which:

- escalate the conflict rather than resolving the dispute;
- neglect the needs, wishes and interests of children who may be directly or indirectly concerned;
- neglect the physical safety of the participants and their children; and
- produce outcomes which are unfair or unjust or which are not genuine, workable or lasting.

Obligation upon the State

2.12 The community has an interest in the effective resolution of disputes so as to avoid unnecessary social conflict and maintain social order. This public interest is manifest in the responsibility of the State for the administration of justice. In Australia, the State has traditionally viewed its responsibility for the administration of justice as extending only to the efficient administration of the courts as the fora for judicial determination of disputes. In recent years, however, as community dissatisfaction with conventional court systems has increased, the State (whether constituted by the legislature, the executive government or the courts) has increasingly come to accept that other forms of dispute resolution have a place within the Australian justice system. It is generally acknowledged that alternative methods of resolving disputes, such as conciliation and mediation, can offer a much faster and cheaper and more satisfactory means of resolving disputes than judicial determination in appropriate cases.

2.13 As a consequence, there has been a dramatic growth in recent years of legislation at the Federal, State and Territory levels which not only recognises ADR but allows courts to refer people to alternative dispute resolution with, and sometimes even without, their agreement. Even where there is no legislation, both governments and courts have increasingly accepted, and frequently encouraged, the use of ADR processes such as mediation, quickly, inexpensively and effectively to resolve disputes which might otherwise require a judicial determination of legal rights.

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5 New South Wales Law Reform Commission Report, *Alternative Dispute Resolution: Training and Accreditation of Mediators*, LRC 67, September 1991, p 48

6 New South Wales Law Reform Commission, op cit p 49

2.14 In this environment it may be argued that there is a responsibility upon the State to ensure that the ADR services to which people are referred are of an acceptable standard, that people's rights are protected and that people are not forced to accept poor quality ADR services merely to minimise the administrative costs of court proceedings. The role of the State with respect to court connected dispute resolution was recognised by the New South Wales Law Reform Commission which noted[7]:

> *6.1 The use of consensual dispute resolution processes within the justice system has grown markedly in recent years. Court administrators and judicial officers have adopted less formal and adversarial procedures in order to reduce costs and court congestion, as well as to improve the satisfaction of litigants with the dispute resolution process. Government support for these initiatives is on record, as is that of the legal profession.*
>
> *6.2 The Commission considers that the State, given its general responsibility for the administration of justice, has an obvious responsibility for the quality, integrity and accountability of consensual dispute resolution processes used within courts and tribunals.*

2.15 This view was endorsed by the Access to Justice Advisory Committee established by the former Federal Government. The Committee said[8]:

> *We agree, however, with the NSWLRC that governments have a special responsibility for the quality, integrity and accountability of the ADR processes provided by their courts and tribunals. Indeed, we would go further and suggest that the responsibility extends to all ADR programs funded by government.*

2.16 This position might be advanced still further. It could be argued that, by formally endorsing the role of alternative dispute resolution services within the justice system, the State alters the fundamental character of those services from a private to a public service, thereby requiring a higher level of accountability from those services than would otherwise be necessary.

Professional standards

2.17 Mediators have a professional interest in regulatory standards as a mechanism for advancing their professional reputation and credibility and excluding those whose standards of practice may bring discredit on the profession generally. This interest will be strongest amongst those mediators who already meet high standards of qualification and performance, thereby incurring greater costs than other mediators with whom they are forced to compete. This drive for regulation may be expected to be accentuated in a market for mediation services such as that in Australia at present, in which the community clearly has limited information about the mediation process and the comparative quality of the various mediation services which are on offer.

2.18 Mediation service providers are already actively developing initiatives to develop standards of practice and qualification for mediators. Examples include: the development of tertiary courses in alternative dispute resolution; the development of standards by the Family Services Council for mediators funded under the Family Services Program; the

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7 New South Wales Law Reform Commission, op cit p 71.

8 Access to Justice Advisory Committee, *Access to Justice an Action Plan*, 1994, p294.

development of policies and protocols by a wide variety of mediation organisations to guide practice. Government regulation would guide and support practitioners in this endeavour and provide a measure of national consistency.

ARGUMENTS AGAINST REGULATION

2.19 A number of very well known and experienced ADR professionals in Australia are strongly opposed to any regulation of mediation. The reasons for this include: the fact that there has been little evidence of complaint to date; the infancy of the profession; the contradiction between regulation and ADR philosophy; the benefits of the free market; the danger of creating a professional monopoly; and, the fact that other countries have not yet regulated ADR services on a national basis. After considering the arguments for and against regulation, two law reform bodies, the New South Wales Law Reform Commission in 1991[9] and the Family Law Council in 1992[10] concluded that it was too early for government regulation.

Little evidence of complaint

2.20 The New South Wales Law Reform Commission pointed out that it was difficult to ascertain whether the welfare of mediation clients was actually at risk and, if so, the nature and severity of that risk. The Commission said[11]:

> *The practice is in its infancy and there is little evidence to suggest that the danger or harm to consumers is actual rather than potential. Consumer complaint or dissatisfaction has not gone beyond the level of anecdote: indeed formal evaluations report high user satisfaction levels for ADR procedures.*

2.21 The situation has not changed very much in the years since the Commission produced its report. Anecdotal evidence from mediators and mediation organisations suggests that the level of complaint is still very low (although there has now been at least one court case in which duress in mediation has been alleged[12]). While that remains the case the arguments for regulation must be subject to question.

Infancy of profession

2.22 The practice of alternative dispute resolution is a developing one. Many commentators fear that early regulation of practice may serve to inhibit or misdirect that development. This concern is allied with the fear that the practice of mediation is so new there is insufficient expertise to define appropriate standards.

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9 See footnote 5.

10 Family Law Council, *Family Mediation*, June 1992

11 New South Wales Law Reform Commission, op cit p.48

12 *John William Freeman v New South Wales Rural Assistance Authority* [Supreme Court of New South Wales Administrative Law Division] No 30101 of 1995, 31 January 1996; *State Bank of New South Wales v John William Freeman* [Supreme Court of New South Wales Common Law Division] No 12670 of 1995, 31 January 1996.

The philosophy of alternative dispute resolution

2.23 It is often said that any government regulation of ADR would be contrary to the underlying philosophy and character of the ADR process. Alternative methods of resolving disputes arose as a "grass roots" response to the perceived inflexibility, inaccessibility and consequential inequity of the traditional justice system. The social philosophies which informed the ADR movement were those of self-determination, non-compulsion, conciliation and community responsiveness. While government intervention may advance the objective of conciliation and constitute a community response it clearly does not sit comfortably with the concept of self-determination or non-compulsion.

2.24 *Self-determination* The object of most ADR processes, particularly mediation, is to empower the participants to resolve their own disputes albeit with the assistance of a third person. This approach is clearly very different from the system of compulsory arbitration which applies in our courts of justice. Many ADR practitioners fear that government regulation will usurp responsibility for the dispute resolution process, thereby disempowering the individuals involved.

2.25 *Non-compulsion* It is argued that the underlying philosophy of ADR is one of voluntary participation and that there is no necessity to regulate it as there is no compulsion on people to participate and the outcomes are not legally binding unless the participants take additional steps to make them so. Furthermore, there is support for the view that the agreements reached in ADR are more readily complied with and long lasting because participation in ADR processes is voluntary and the participants feel that they "own" the outcomes. Accordingly, it is feared that regulating ADR services may increase the element of compulsion and therefore reduce the participants feeling of responsibility, thereby reducing the effectiveness of the alternatives procedures.

Economic arguments

2.26 *Free market* In the course of the Council's work on a variety of ADR matters it has become clear that there are a number of ADR practitioners who contend that there is presently a virtually "free market" for some ADR processes, particularly mediation. These practitioners suggest that people may presently make an informed choice about the type of ADR process that they want and the person or organisation they wish to provide it. Consequently, the market is self-regulating. People will not choose practitioners or services that they know to be bad or deficient. On this view, regulation is unnecessary as competition will ensure that service providers meet the demand for range of high quality ADR processes.

2.27 *Monopoly* It is also argued that regulation of skilled services limits the number of service providers thereby creating a professional monopoly, which may be expected to drive up the price of the service that is regulated. This argument has been put in respect of the Family Law Regulations by Professor Wade in his draft pater entitled *Family Mediation A Premature Monopoly in Australia?* He says:

> *These regulations are symptomatic of a recurrent pattern of behaviour in emerging skilled work-groups, sometimes called "professions". That is, a selected group of workers are granted a state monopoly, state funds and certain statutory privileges in exchange for*

assurances of quality of the services provided. Access to the monopoly becomes increasingly difficult as the insiders progressively raise the training standards in order to exclude "outsiders"[13].

THE COUNCIL'S RESPONSE

2.28 One of the objectives of the 1996 reforms to the Family Law Act was *"to encourage people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act"*[14]. Primary dispute resolution is defined as counselling services provided by family and child counsellors, mediation services provided by family and child mediators and arbitration services provided by approved arbitrators[15]. A court exercising jurisdiction in proceedings under the Act and a legal practitioner acting in proceedings under the Act, or advising on the institution of such proceedings, are required to consider whether or not to advise the parties, or prospective parties, about the primary dispute resolution methods that could be used to resolve any matter in dispute[16].

2.29 In view of this strong endorsement for "primary dispute resolution" it is not surprising that the Government perceived that it had some responsibility to protect the people who were directed to counselling, mediation or arbitration. An Attorney-General's Department discussion paper titled '*Community and Private Mediators: Proposed Mediation Regulations*", distributed in October 1995, indicated that the former Government regarded the proposed regulations as "consumer protection provisions"[17].

2.30 While NADRAC is sympathetic to many of the arguments against government regulation of ADR services it does not believe they provide a convincing rationale for dispensing with any government regulation of family mediation. The Council's reasons for this conclusion are outlined below.

Absence of complaint

2.31 Anecdotal evidence from mediation agencies that have a complaints process supports the contention that there are few complaints about mediation. Furthermore, the Council understands that almost all of the complaints which are made reflect the parties' incomplete understanding of the mediation process and the role of the mediator. The Council understands, for example, that many of the complaints that are made relate to the fact that the mediator would not make a decision or give advice.

2.32 However, the Council believes that it is too early in the development of mediation practice to conclude that the absence of complaint means that there are no difficulties. The AGB McNair survey conducted in September 1995 makes it clear that the public has a very limited knowledge of the mediation process. As a result participants in mediation are not likely to be able to make informed judgements about the standard of the service which

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13 Professor John Wade, op cit, p. 1.
14 Section 14(a), *Family Law Act 1975*.
15 See section 14E, *Family Law Act 1975*.
16 Sections 14F & 14G, *Family Law Act 1975*.
17 Attorney-General's Department Discussion Paper *Community and Private Mediators: Proposed Mediation Regulations*, 1995, page 2.

they are offered. Furthermore, participants are unlikely to have the repeated contact with mediation which might allow them to compare and make informed judgements.

2.33 Not only are consumers in a poor position to evaluate mediation services but at present there are no well known avenues for pursuing a complaint about a mediator. There is no professional body and no government authority with the responsibility for maintaining or enforcing professional standards. Accordingly, people most at risk from bad practice may not know where to turn for assistance. In any event those most likely to be harmed are those who are socially, physically or emotionally vulnerable, for example, women who have been or are being subjected to harassment or violence. These people are unlikely to be in a position to pursue a complaint about a mediator in addition to dealing with the difficult issues that they already face. Further, it is possible that the people who are harmed by bad practice are people who are not present at the mediation, for example children. These people may not even know about the mediation let alone have the knowledge or capacity to complain.

2.34 The Council does not wish to imply that there is a significant amount of bad practice in mediation. However, the literature suggests that while most participants are satisfied, others are not[18]. The fact that complaints are rare does not relieve the need to provide an avenue effectively to address the occasional complaints which may arise.

Developing profession

2.35 It is true that mediation is in its infancy in comparison with other professions. Indeed, it is probably incorrect to refer to mediation as a profession at this point. At present there is neither a national professional body nor a nationally agreed set of standards and ethics for practice. While mediators are presently actively engaged in the consideration of these issues it is likely to be some time before agreed standards are developed and a mechanism is instituted for their enforcement. In view of this, the Council does not consider that it is feasible for the Government to wait for mediators to complete the process. The effect of the family law reforms will be to encourage a large number of people, many of whom are at a vulnerable and difficult time of their lives, to use mediation. NADRAC believes that the Government has a responsibility for the protection of those people which should not be deferred.

2.36 Nevertheless, the early stage of development of mediation as a profession is certainly relevant to the nature of the regulations which are promulgated. The Council believes that the Government should be sensitive to the need to encourage the further development of the profession and should employ a light regulatory hand in order to ensure that the development of mediation practice is not inhibited or distorted in any way.

The philosophy of mediation

2.37 NADRAC understands the concerns about the potential for government regulation to usurp people's personal responsibility for resolving their disputes, thereby disempowering them. However, the Council does not believe that this fear represents a

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18 See, for example, G. Davis, *Partisans and Mediators: the Resolution of Divorce Disputes*, Clarendon Press, 1988

convincing argument not to regulate. Instead it emphasises the Council's view that the Government should employ a light hand and impose the minimum requirements necessary to achieve the objective of protecting the consumers of mediation.

2.38 *Voluntary process* The Council is unable to accept the argument that there is no need for regulation of mediation in family disputes because mediation is voluntary. Parties with family disputes are often under considerable personal stress and have no familiarity with formal or informal dispute resolution options. Consequently, when others draw the availability of mediation services to their attention, they may feel pressured to utilise those services, even though there is no legal compulsion to do so and no intention on the part of the referrer to convey the impression that there is an obligation to attend. The delays in proceedings in the Family Court, together with the significant costs involved, may mean that mediation is the only viable option for parties who feel they have an urgent need to resolve a family dispute or who are neither able to afford to litigate nor eligible for legal aid. The Council notes that proposed reductions in the availability of legal aid may accentuate this problem.

Economic arguments

2.39 *Free Market* In the Council's view the argument that the free market for mediation services renders regulation unnecessary is not a sustainable one. Such an argument rests upon the assumptions that the participants in mediation have the experience and information to make an informed free choice amongst a variety of service providers. As the AGB McNair survey (cited earlier) demonstrates, the level of public knowledge about mediation is still very poor. It is unlikely that most of the present 'consumers' of mediation have sufficient knowledge about the process to be in a position to make an 'informed' choice.

2.40 Even if consumers of mediation could make an informed choice of a mediator it is unlikely to be a 'free' one. The free market argument tends to ignore the fact that there is an increasing tendency by parliaments and courts to require, or at least, strongly encourage the parties to court proceedings to attend mediation as a preliminary step. In these circumstances the parties are frequently presented with a list of mediators by the court in which the proceedings were instituted (if the mediation is not undertaken by judicial or court officers). These lists are frequently developed for the court by professional organisations, for example the State/Territory Law Societies and Bar Associations. Accordingly, they are likely to favour particular classes of mediators, frequently lawyer mediators. While the courts accept these lists they do no usually vet the contents of them. Court representatives frequently disclaim any knowledge of or responsibility for the quality of the mediators included on them. In these circumstances the Council finds it impossible to accept that consumers have a 'free' choice or that there is a 'free market' for mediation which constitutes a satisfactory guarantee that mediation standards will be upheld and that there is no need for government regulation.

2.41 *Monopoly* It is acknowledged that professional regulation may have the effect of limiting the number of available practitioners thereby driving up the cost of professional services. It is commonly believed that the regulation of the legal and medical professions has just such an effect. However, the Council does not accept that this is an inevitable

consequence of professional regulation particularly if the "light touch" approach recommended by the Council is adopted.

2.42 The object of any regulatory scheme should be to set the minimum requirements necessary to enable the Government to achieve its policy objectives. In the context of mediation the objective must be to protect members of the Australian community who are diverted from the traditional justice system to mediation. To achieve that objective it is necessary to set some minimum standards of qualification and training to ensure that mediators are competent to provide a service of acceptable quality. This will indubitably mean that a small number of practitioners will fail to meet the standard and will be excluded. The exclusion of those practitioners, while unfortunate, must be regarded as essential if consumers of the service are to be protected. No doubt highly qualified practitioners will have an interest in lobbying the Government to increase the regulatory standards to reduce competition from less qualified practitioners who can provide their services at a correspondingly lower cost. However, the Council believes that it is government's role to resist self-interested pressure of this nature and would not expect that the Government will readily yield to it.

DISTINGUISHING FAMILY AND CHILD MEDIATION

2.43 There is now a wide variety of legislation at the Commonwealth, State and Territory levels which specifically applies to mediation (see Appendix A). The extent to which this legislation affects mediators differs markedly. For example, the *Community Justice Centres Act 1985* (NSW) imposes an extensive regulatory regime upon mediators accredited pursuant to the Act while various State and Territory Commercial Arbitration Acts make only brief references to mediation . It is clear, however, that the Family Law Regulations impose far more stringent requirements upon private mediators in family disputes than is imposed upon private mediators in any other field.

2.44 The question that may be asked is whether there is a real need for such extensive controls over family mediators when mediators are operating with little or no controls in other fields of disputes. NADRAC believes that there is. Family law disputes are complex and personally intrusive. A single dispute may involve financial issues, questions as to the best interests of children, issues of personal safety, psychological welfare and legal rights. An unqualified, incompetent or negligent mediator may do great harm to the participants in these circumstances. No doubt, there are other fields of dispute which involve similarly complex issues. The necessity or desirability to regulate mediators in those is a matter which falls outside the Council's current inquiry.

AN ALTERNATIVE TO REGULATION

2.45 An alternative approach to detailed regulation like that in Part 5 of the Family Law Regulations would be to establish a discretionary authorisation scheme under which mediators could apply for authorisation. The Council understands that a scheme of this type is being developed by Legal Aid and Family Services in the Attorney-General's Department for the authorisation of individual family and child counsellors under the Family Law Act.

2.46 The great advantage of an authorisation scheme is that it appears to offer greater flexibility than government regulation. However, NADRAC notes that decisions made under such an authorisation scheme would be subject to administrative review. Accordingly, the administering agency would be required to develop detailed administrative guidelines governing the manner in which the authorisation decisions are to be made. Consequently, the advantage of flexibility is likely to be limited. At the same time the administration of an authorisation scheme is resource intensive. If there are a large number of potential applicants for authorisation such a scheme could not be regarded as economically justifiable. Consequently, NADRAC does not consider that a national authorisation scheme for family and child mediators is a practicable alternative to the present regulation. However, the Council does consider that limited authorisation schemes should be considered as a means to address any apparent inequities created by the application of uniform regulation (see Chapter 4).

CONCLUSION

2.47 NADRAC believes that a failure to set some minimum standards as to the necessary qualifications, training, supervised practical experience and continuing education for family and child mediators would significantly increase the risk of harm to participants in family mediations as well as to others who may have an interest in mediated outcomes, such as children. Furthermore, the Council accepts that there is a legitimate function for regulations to protect people who choose, or who are forced by law or by social and economic circumstances, to utilise alternative dispute resolution services to resolve their family disputes in place of the more developed and highly regulated processes of determination by a Family Court judge.

2.48 Nevertheless, the Council also considers that it is important to find a proper balance between the need to protect people who may be harmed by substandard mediation services and the need to retain sufficient flexibility to allow mediators to adopt the most suitable mediation process for the disputants and the particular dispute.

CHAPTER 3: SCOPE OF THE REGULATIONS

3.01 The *Family Law Regulations 1996* apply to the mediation of disputes that could be the subject of proceedings under the *Family Law Act* and that involve a parent, adoptive parent, a child or a party to a marriage. The regulations only prescribe requirements to be complied with by private mediators and mediators operating with the authorisation of an approved community mediation organisation. Court mediators are not subject to the same requirements but are subject to different provisions in the Family Law Rules.

3.02 In Chapter 2 the Council addressed the preliminary question of whether there is a need for any regulation of mediation in family disputes. The Council concluded that some regulation was, indeed, desirable. In view of that conclusion the next questions to be addressed must be about the scope, application and form of those regulations. In this Chapter NADRAC addresses these issues.

THE POWER TO MAKE REGULATIONS

3.03 The power to make regulations prescribing requirements to be complied with by community mediators[19] and private mediators[20] is to be found in subsection 19P(1) of the Family Law Act. That subsection provides:

> ***19P(1) [Requirements may be prescribed by regulations]*** *The regulations may prescribe requirements to be complied with by community mediators and private mediators in relation to the family and child mediation services they provide.*

3.04 Family and child mediation is defined in section 4 of the Act, as follows:

> *"family and child mediation" means mediation of any dispute that could be the subject of proceedings (other than prescribed proceedings) under this Act and that involves:*
> *(a) a parent or adoptive parent of a child; or*
> *(b) a child; or*
> *(c) a party to a marriage;*

3.05 Accordingly, regulations made pursuant to section 19P of the Act establish mandatory requirements for <u>any</u> community or private mediators who mediate disputes that could be the subject of proceedings under the Family Law Act and, for constitutional reasons, involve the categories of persons specified.

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19 It is noted that the term "community mediator" was in common use by State and Territory mediation organisations to describe mediators drawn from the community in which they are operating, long before the incorporation of the term in the Family Law Act. The term is used in the Act for a different purpose and is defined as "a person authorised by an approved mediation organisation to offer family and child mediation on behalf of an organisation". Many traditional community mediators feel this is an inappropriate use of the term.

20 The term "private mediator" has been criticised and could be replaced with some other term such as "individual mediator" or "independent mediator". The Council notes that Legal Aid and Family Services, Attorney-General's Department, are using the term "individual counsellor" to refer to counsellors outside the Family Services Program. However, the word "individual" could create some confusion as it could refer to a counsellor/mediator employed by an organisation as well as those working independently of an organisation. From this perspective it may be preferable to use the term "independent mediator".

DIFFERENT STANDARDS FOR COURT MEDIATORS AND FOR FAMILY AND CHILD COUNSELLORS

3.06 The regulations presently only apply to community and private mediators. Court mediators are not subject to the regulations but are covered by a different set of requirements comprised within the Family Law Act, Family Law Rules and internal Court guidelines. The Council understands that Family Court mediators meet, and frequently exceed, the training and qualification requirements in the regulations. The Council also understands that the Family Court's mediation services meet those procedural requirements in the regulations which the Council regards as essential (see discussion at Chapter 6, paragraphs 6.02 – 6.28). However, there is no compulsion upon Family Court mediators to comply in order to obtain the benefits and protections of the Act and no mechanism of public accountability as to whether or not Family Court mediators do in fact comply.

3.07 In the Council's view the regulations set minimum standards with which all mediators under the Family Law Act should comply. While the Council appreciates that the Chief Justice of the Family Court has the power to accredit Court mediators and to manage the Family Court generally, on balance the Council considers that the application of different regulatory requirements creates a perception of inequality, even though there may be none in practice, which may give rise to public confusion and concern amongst mediators.

3.08 The regulatory regime for family and child counsellors also differs to that which applies to family and child mediators. Regulation 57 provides that the Attorney-General may authorise a person to offer family and child counselling if the Attorney-General is satisfied that the person is suitable by reason of the person's training and experience. The Attorney-General's Department is currently developing selection criteria for authorisation of private family and child counsellors and a quality assurance system for all approved LAFS service providers.

3.09 Counselling is a more established area of professional practice than mediation. Training and education for counsellors is better established and recognised than it is for mediators. Importantly, there are professional bodies that are active in accrediting psychologists and social workers who are the majority of professional counsellors. As a result, some variations in government regulation of qualifications and standards for counsellors and mediators may be explicable.

3.10 Nevertheless, the work undertaken by family and child counsellors and family and child mediators has many similarities. Moreover, the same individuals may act variously as counsellors and mediators. It is the Council's view, therefore, that the need for any significant variations in the structure of the regulatory scheme, or the qualifications or standards required under it, should be carefully considered.

ABSENCE OF ENFORCEMENT MECHANISM

3.11 The power to prescribe penalties for breach of the regulations is found in subsections 19P(2) of the regulations. That subsection provides:

19P(2) [Penalties may be prescribed] *The regulations may prescribe penalties not exceeding 10 penalty units in respect of offences against regulations made for the purposes of subsection (1).*

3.12 No penalties for offences against the provisions of Part 5 of the regulations have been prescribed. Furthermore, the immunity provision in section 19M of the Act appears to prevent any private right of action which may arise in tort for the breach of a statutory duty created by the regulations. As a result the regulations are expressed to be mandatory but cannot be enforced by the Government or by a consumer of a mediation service.

3.13 It could be argued that, if the Government promulgates mandatory regulations, it should also provide for their enforcement. However, mediation is a new and emerging area of work and mediators come from many different walks of life and professional backgrounds. There is presently no broad consensus amongst mediators as to the appropriate level or type of qualifications or standards for mediators, and the issue raises complex questions about the nature of the mediation process and maintaining equity. The Council has already noted (at paragraph 2.36 above) the need for the government to be sensitive to the development of the professional practice of mediation and the need to employ a light hand in regulating it.

3.14 In addition, NADRAC notes that a more sophisticated enforcement mechanism that went beyond simple penalties would be expensive to establish and maintain. Before incurring such an expense the need for it should be thoroughly justified. The Council is not convinced that the need is established. Mediators working in the area of family disputes generally have a keen interest in the statutory framework within which they work and a good understanding of the requirements of the regulations. There is presently intense mediator interest in the issue of qualifications of mediators (both in Australia and internationally), and considerable enthusiasm for the development of standards and for improved training and education. In this environment, it may be expected that most mediators will respond positively to the requirements of the regulations. It would, therefore, be difficult to justify the expense of establishing a complex mechanism to enforce the requirements of the regulations.

3.15 The absence of any penalties for failure to comply with the requirements of the regulations, as they presently stand, may lead some people to conclude that compliance with those requirements is voluntary for all practical purposes. However, NADRAC does not accept this view. Although compliance with the regulations is not currently enforced, the regulations are expressed to be mandatory and the requirements which they impose are nonetheless legal requirements. The Council considers that there is a legal and social obligation upon all Australian citizens to comply with the laws of the land. There are already clear indications that this obligation to comply with the requirements of the regulations is being felt by mediators. This is evinced by both the level of concern expressed about the regulations by those who could, in the absence of legal penalty, choose simply to ignore them and by the mounting evidence that mediators and training providers are implementing significant and costly changes to their services in an effort to meet the new requirements .

3.16 As a result, NADRAC does not perceive any need to introduce penalties for mediators who fail to comply with the regulations. Indeed, in the light of the apparent

willingness of most family mediators to comply voluntarily with the regulations in the absence of sanctions, the Council considers that the benefits and protections of the Family Law Act would be a sufficient inducement for mediators to comply. This would be so even if the present doubts of mediators were revised and compliance with the regulations was clearly expressed to be voluntary. The Council addresses this issue more fully below at paragraphs 3.42 - 3.85.

THE AMBIT OF THE REGULATIONS

3.17 A number of concerns have been raised about the ambit of the regulations. Despite the fact that there is no enforcement mechanism the regulations are expressed to be mandatory, Mediators have found the fact that the regulations are compulsory but not enforceable confusing. Some mediators have also expressed concerns as to whether the regulations apply to their own area of practice, questioning whether the disputes they are dealing with and the procedures they follow are "family and child mediation". Some practitioners have pointed out difficulties which will be created if they are required to comply with the regulations.

3.18 Many of the concerns expressed about the regulations appear to relate to the fact that the regulations cover a very broad field catching a wide variety of disputes that could possibly be the subject of proceedings under the Family Law Act. For example, mediators such as Aboriginal elders, community and religious leaders and State and Territory government mediators could be affected by the regulations when mediating disputes that may not, at first glance, appear to concern family law. Examples might include mediation of family quarrels or mediation of disputes arising in the context of State and Territory laws such as domestic violence, succession or child welfare legislation. Many of the mediators who mediate disputes of this nature do not meet the requirements of the regulations and are unlikely ever to do so. Nevertheless, while there is uncertainty about whether any particular dispute might be the subject of proceedings under the Act, these mediators will continue to be concerned about the application of the regulations.

Compliance problems

3.19 Some organisations which offer services which were previously regarded as falling within the broad am bit of family mediation have, since the commencement of the regulations, sought to distinguish their services from 'family and child mediation'.

3.20 For example, the Legal Aid Office (Queensland), like other Legal Aid Commissions around Australia, provides a conferencing program in which many of Queensland's private mediators have trained and undergone initial supervision. Nevertheless, the Legal Aid Office has made a strong submission to the Government to the effect that a legal aid conference is not "family and child mediation".

3.21 The Legal Aid Office argues that the practical and financial consequences of complying with the regulations are too great. It has indicated that if it were forced to comply with the requirements of the regulations:

- many of its conference Chairpersons would not comply with the training and supervision requirements or the grandparent requirement;

- the potentially greater cost of paying the Chairpersons to carry out the preliminary assessment (regulation 62), presently undertaken by staff of the Legal Aid Office, would need to be considered;

- it would have difficulty with the provision in paragraph 63(1)(e) which requires that the parties be informed that mediation is not compulsory in order to commence proceedings in the Family Court;

- there would be cost implications in having the legal aid merit report prepared by another professional (as mediators would breach their duty of confidentiality under regulation 67 by providing recommendations and a merit report); and

- many administrative and computer changes would need to be implemented and associated training conducted.

3.22 Similarly, NADRAC is aware of concerns about the impact of the regulations on State and Territory government mediation organisations such as the NSW Community Justice Centres, the Queensland Community Justice Program and the ACT Conflict Resolution Service. These mediation programs have played a very significant role in the development of ADR in Australia. They already have high quality standards of practice and rigorous accreditation procedures which, in many ways, already exceed the requirements of the regulations.

3.23 Despite this there are many provisions of the regulations which present significant obstacles to compliance by these organisations. For example, these organisations rely on a panel of mediators that is broadly representative of the community and includes Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds, people with disabilities and people from lower socio-economic backgrounds. Despite being highly competent and experienced, many of these mediators do not have tertiary qualifications and could not be expected to meet the qualifications requirements of the regulations. Furthermore, these organisations have well established administrative procedures in place covering all the stages of mediation including intake, follow-up and evaluation. Many of the requirements of the regulations, for example the requirement that the mediator conduct certain intake procedures rather than an intake officer, conflict directly with these established procedures.

CLARIFYING THE AMBIT OF THE REGULATIONS

3.24 As previously noted there is already evidence that most mediators and mediation training organisations working with disputes under the Family Law Act are attempting to comply with the requirements of the regulations. At the same time, there are clearly some mediators working in the wider field of family and child disputes who do not believe that the requirements of the regulations are appropriate to the services which they provide and who are consequently concerned and confused about the broad ambit and apparently

mandatory application of the regulations. In so far as is consistent with the maintenance of appropriate standards, the Council considers that regulation of family mediation should not inhibit the development of mediation or the maintenance of desirable diversity of mediation practice. To this end NADRAC would submit that the ambit of the regulations should be no broader than is absolutely necessary and should be clearly delineated.

3.25 In view of the above, the Council considers that it would be appropriate to allow mediators in family matters to decide whether or not they should comply with the regulations. That decision is likely to be strongly affected by a number of factors. First, the Act offers significant protections to mediators (discussed below) which they prize and which are important to their work. Unless they comply, those protections would not be available to them. Second, mediators who comply with the provisions of the regulations would receive referrals from the Family Court and would be more likely to receive referrals from family lawyers and other agencies.

3.26 While some mediators may opt not to comply with the regulations, the Council does not anticipate that this would be a significant problem. Family mediators are already responding strongly to the regulations. The level of concern about the ambit of the regulations is evidence of the seriousness with which they are regarded. The protections of the Act together with the business advantages of advertising the fact that the mediator or mediation organisation is complying should be sufficient to encourage family mediators operating within Federal jurisdiction to comply. In addition, NADRAC's proposal to simplify the procedural requirements in regulations 62 and 63 (see Chapter 6, paragraphs 6.02 – 6.28) should make compliance easier and encourage more mediators and mediation organisations to comply.

3.27 The Council therefore recommends that the Family Law Act should be amended to make it clear that only those mediators who require the benefits and protections of the Act need to comply with the regulations. In the Council's view this is a central recommendation. Many of the subsequent recommendations in this Report have been proposed in anticipation that this recommendation will be accepted.

Implementing the Council's recommendation

3.28 The Council's recommendation to limit the ambit of the regulations could be implemented in one of two ways, either by amending the definition of 'private mediator' or by amending the definition of 'family and child mediation'.

3.29 *Amending the definition of 'private mediator'* In his letter to the Council of 8 October 1996 the Attorney-General raised the possibility of amending the definition of 'private mediator' to limit the ambit of the regulations. The Attorney-General said:

> *An additional issue that is not raised in the correspondence but that I would be grateful if the Council could include in its consideration is the comprehensiveness of the definition of private mediator in section 4 of the Act. I seek the Council's views on whether it would be desirable to amend the Act to limit the definition of private mediators, so that the regulations apply to those who receive the protections offered by the Act, but would not prevent any other mediation of disputes which could be the subject of family law proceedings.*

3.30 The Attorney-General's letter does not elaborate on how the definition of 'private mediator' could be amended to achieve this result. The definition of 'private mediator' is:

> ***"private mediator"*** *means a person referred to in paragraph (c) of the definition of "family and child mediator".*

3.31 Paragraph (c) of the definition of 'family and child mediator' says:

> *(c) a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation.*

3.32 While, the Council agrees with this general approach it questions whether amending the definition of 'private mediator' is the best way to achieve that objective. Such an amendment would tend to complicate the regulatory structure by introducing further differentiation between the different categories of mediator. There does not seem to be any reason to distinguish between private mediators and community mediators in this respect. If the Government wishes to ensure that community mediators comply with the regulations this could be achieved simply by attaching an appropriate condition to the relevant approval pursuant to section 13C of the Family Law Act.

3.33 *Amending the definition of 'family and child mediator'* An alternative approach would be to amend the definition of 'family and child mediation' to make it plain that 'family and child mediation' means mediation in accordance with the regulations.

3.34 This option has the advantage of providing a clear distinction between mediators who comply with the regulations, that is provide 'family and child mediation', and those who do not. Consequential amendments would be required to many provisions in the Act which refer to 'family and child mediation' if the intention of the relevant provision is merely to make a general reference to the mediation of family disputes, that is, disputes that could be the subject of proceedings under the Family Law Act.

3.35 The Council notes, however, that the Government might wish to retain the term 'family and child mediation' in some provisions of the Act. For example, retention of the amended term in section 13B of the Act would mean that only those organisations who are willing and able to comply with the regulations and are already doing so could be approved as a mediation organisation by the Minister. This may or may not be an appropriate result. Similarly, the regulation making power in section 19P presently provides that the regulations may prescribe requirements to be complied with by community mediators and private mediators when mediating any disputes which could be the subject of family law proceedings. If the term 'family and child mediation', as amended, were retained in that section it would make it clear that the regulations only prescribe requirements to be complied with by mediators who purport to provide mediation services in accordance with the regulations.

Recommendation 1

The Family Law Act should be amended to make it clear that only those mediators who require the protections of the Act need to comply with the regulations. To that end the definition of 'family and child mediation' should be amended to make it plain that "family and child mediation" means mediation in accordance with the regulations. The Council regards this as its' "central" recommendation and many of the following recommendations are proposed in the light of it.

Avoiding potential problems

3.36 Further to the above the Council considers that it is essential to require mediators who intend to claim the benefits and protections of the Act to inform the participants that they are providing 'family and child mediation', under the Family Law Act before the formal mediation session commences, If mediators do not do so it may lead to subsequent protracted arguments in the courts as to whether a mediator was or was not complying with the regulations and, is or is not entitled to the protections of the Act.

3.37 A requirement of this nature could be incorporated in the definition of 'family and child mediation'. The definition would then have three essential components, they are:

- mediation of a dispute that could be the subject of proceedings under the Family Law Act and involving the requisite persons;
- mediation that is stated to be "family and child mediation"; and
- mediation that is conducted in accordance with the Act and regulations.

3.38 Alternatively, a requirement to inform the participants that the mediation is 'family and child mediation' conducted in accordance with the Family Law Regulations could simply be incorporated in the regulations themselves. To this end, the Council has recommended a new paragraph be added to subregulation 63 (see paragraph 6.23).

Legal Aid and State/Territory government mediation

3.39 The Council's recommendation to amend the Family Law Act to make it clear that only those mediators who require the protections of the Act need comply with the regulations should address the concerns of mediation organisations, such as the Legal Aid Office (Queensland) and the State and Territory government mediation organisations, that consider the practical and financial difficulties of complying with the regulations to be too great. These organisations may simply opt not to comply if they feel that the protections and advantages offered by the Act are not required in the context of their operations.

3.40 However, NADRAC notes that a significant proportion of the family disputes dealt with by legal aid commissions and State and Territory government mediation organisations are disputes which are or could be the subject of proceedings under the

Family Law Act. Provided the participants in a mediation session are not misled, NADRAC accepts that these organisations should have the right to choose whether or not to comply with the regulations. Nevertheless, the Council considers that the regulations set very basic qualification and standards requirements and it would be regrettable if large organisations like these do not comply. The proposals which the Council has made for simplifying the procedural requirements of the legislation (paragraphs 6.02 – 6.28) and amending the grandparent clause (paragraphs 4.51 – 4.61) should make it easier for these organisations to meet the regulatory requirements and thereby encourage their compliance .

3.41 The submissions received by the Attorney-General raised an additional concern as to whether or not legal aid conferences are mediation for the purposes of the supervision requirements in Regulation 60. This issue is addressed separately in Chapter 5 at paragraphs 5.26 – 5.30.

INDUCEMENTS TO COMPLY WITH THE REGULATIONS

3.42 The Council believes that the benefits of complying with the regulations are such that most mediators and mediations organisations will choose to comply with them even if the regulations are clearly not mandatory. The following provisions together represent a significant inducement to comply with the regulatory requirements.

Immunity from civil suit

3.43 Section 19 M of the Family Law Act confers statutory immunity from suit upon family and child mediators, that is court mediators, community mediators and private mediators. The section provides:

> ***19M*** *A family and child mediator, an approved arbitrator, or an arbitrator who carries out a private arbitration, has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.*

3.44 The immunity conferred by this section represents a substantial benefit to those who provide 'family and child mediation'. At present the immunity extends to any private mediator who mediates a dispute which could be the subject of proceedings under the Family Law Act and involves a parent, adoptive parent, child or party to a marriage irrespective of whether the mediator complies with the requirements of the regulations.

3.45 *Judicial immunity or absolute privilege.* The immunity conferred by section 19M is that of a Judge of the Family Court. This immunity derives from the long established principle of judicial immunity applying to acts done by a judge in the course of the performance of judicial duties[21]. The principle was enunciated by Lord Denning MR in *Sirros* v *Moore*[22]:

> *Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a*

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21 *Gallo v Dawson* (No 2) 109 ALR 319.

22 *Sirros v Moore* [1975] 1QB 118 at 132.

jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CH in Garnett v Ferrand (1827) 6B & C 611 at 625: 'This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgement, as all who are to administer justice ought to be".

3.46 *Application to others.* It seems that the principle of immunity applies by virtue of common law to all those involved in proceedings before a court. This view was endorsed by a majority of the High Court in *Jamieson v R*[23]. In that case Deane and Dawson JJ said[24]:

The general proposition, enunciated by Lord Mansfield in R v Skinner (1772) 98 ER 529 at 530 that "neither party, witness, counsel, jury or judge, can be put to answer, civilly or criminally, for words spoken in office", must be qualified by a number of well-established exceptions. In particular, in so far as criminal proceedings are concerned, it must be qualified as regards substantive administration of justice offences (such a perjury, contempt of court and, depending upon the circumstances, perverting the course of justice) and offences associated therewith (such as conspiracy and attempt). None the less, and notwithstanding the submissions of the Crown to the contrary, the proposition as so qualified remains valid as a general statement of common law principle.

3.47 As Gaudron J pointed out this general principle is sustained by public policy[25]:

Resort to the courts for the orderly resolution of disputes between citizens, or between citizens and government, would be greatly put at risk if witnesses were to be subject to restraints with respect to their evidence, other than those which serve to protect the integrity of the judicial process.

3.48 The application of the privilege was considered further by the Federal Court in *O'Neill v Mann*[26]. The Court, by majority, concluded that the protection of absolute privilege ought to be limited to judicial and semi-judicial proceedings. Beaumont and Ryan JJ said:[27]:

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23 (1993) 177 CLR 574.
24 Op cit, at 582.
25 *Jamieson v R* Op cit, at 595.
26 *O'Neil v Mann* (1994) 126 ALR 364.
27 Op cit, at 382.

As has been seen, the rationale for the absolute immunity is the overriding need to encourage citizens to resort to the courts to resolve their disputes. This policy is also fulfilled when the State, instead of permitting access to the courts in certain matters, eg military or professional discipline, allows for an alternative method of dispute resolution by a special tribunal. In that context, the tribunal is, in truth, a substitute for a court and thus it is only appropriate that the tribunal should enjoy the same immunity as a court.

3.49 Accordingly, privilege extends at common law to statements made before tribunals recognised and constituted by law for the determination of disputes as to rights and liabilities of parties and which by their incidents resemble judicial proceedings. However, whether that privilege is absolute or qualified will depend upon whether clear grounds of public policy require complete freedom of suit in order to allow effective performance of judicial, legislative or official functions.

3.50 *Statutory immunity.* Legislation has conferred similar immunities upon statutory office-holders who conduct quasi-judicial inquiries and exercise investigatory functions[28] and upon witnesses before quasi-judicial inquiries[29]. The extension of statutory immunity to arbitration[30], particularly compulsory arbitration, is consistent with this trend.

3.51 *Immunity for family and child mediators.* As previously noted, section 19M of the Family Law Act extends to mediators the same protection and immunity as a Judge of the Family Court. This provision is not unusual. There is now a great deal of legislation at Commonwealth, State and Territory level which confers immunity on mediators. It is not clear why governments have felt it necessary to extend such immunity to mediators as it appears to be a significant departure from the common law position that immunity should only extend to judicial and quasi-judicial proceedings. Mediators are neutral facilitators who do not have decision-making or investigative powers.

3.52 NADRAC notes that there are both arguments in favour of, and arguments against, retaining the present immunity in respect of family and child mediators. These arguments may be expressed as follows:

Arguments in favour of immunity

- Many other statutes give immunity, including the Federal Court legislation. The Family Law Act would be exceptional if it did not.
- There is concern that, if mediators were not immune, discontented parties may use mediation to bring the matter before the court again.
- Some lawyer mediators do give advice of a limited nature and desire immunity because of this.
- Family disputes are highly emotionally charged and participants may be susceptible to misinterpret the words and actions of the mediator;

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28 See, for example, *Royal Commissions Act 1902*, subsection 7(1).
29 See, for example, *Royal Commissions Act 1902*, subsection 7(2).
30 In addition to section 19M, Family Law Act see section 53, Federal Court of Australia Act 1976.

- Suing the mediator is a complex and expensive way to deal with mediator misconduct.

- The rationale for encouraging mediation is to reduce the number of cases coming before the courts: to enable participants in mediation to sue the mediator for negligence or minor misconduct might reduce the effectiveness of this strategy (particularly if large numbers of these cases come before the courts).

Arguments against immunity

- The role of a mediator is very different to that of a judge and the arguments for giving judges, tribunal members, and arbitrators immunity do not apply to mediators. Whatever model of mediation operates, the mediator is not a decision maker whose freedom to make decisions according to law and good conscience needs protection;

- Lawyers, whether barristers or solicitors, are only entitled to common law immunity for work which is related to judicial and semi-judicial proceedings. It seems inconsistent then (without some compelling arguments about the nature of mediation) to protect them when they give advice of a minor nature in mediation;

- Counsellors do not have immunity. The work of counsellors may be very similar to that of mediators. Indeed counsellors may perform counselling roles and mediation roles and there may be great similarities between the two activities in family cases. However, those individuals are given immunity when they are mediating, but not when they are counselling;

- Many professional groups, including lawyers and counsellors, deal with people who are in distress and who may misinterpret what is said if great care is not taken. It is part of the professional skills of those people to ensure, so far as possible, that the participants understand what transpires in mediation. If the parties are not in a fit state to understand, even with skilled help from a mediator, it is questionable whether they should be in mediation. Mediation is a process which requires the participants to negotiate difficult issues on their own behalf and mediators should attend with care to issues of capacity. Lack of care or skill in these matters should not be obscured by the provision of immunity;

- From informal canvassing of practitioners, Council is in some doubt about the extent to which mediators value immunity.

3.53 There are important issues of consumer protection involved. Where a mediator has been negligent, engaged in misconduct or significantly departed from their function as a mediator it is appropriate that the participants should have redress. It is unlikely that there would be a large number of actions against mediators if the statutory immunity were removed. The Community Justice Centre in New South Wales reports that in the 16 years since its establishment, including over 18,500 mediation sessions and 45,000 files, there has

not been one threat of action against a mediator. However, the small number of cases may reflect the fact that the Community Justice Centres Act (NSW) includes a statutory immunity provision.

3.54 *Good faith* The Council notes that other immunity provisions confer immunity only where the person covered by the immunity has acted in good faith and/or in the capacity in relation to which the immunity is conferred. The Council is attracted to these limitations upon the extent of any immunity. However, further research would be needed to establish the parameters of these provisions and to identify the precise nature of the protection they offered to mediators and to the participants in mediation.

3.55 *Conclusion* The Council has not been asked to advise the Attorney-General on the issue of whether or not family and child mediators should be granted immunity under the Family Law Act. The only relevance of the immunity issue to the present discussion relates to the fact that it confers a benefit upon mediators and may consequently provide an inducement to them to comply with the regulations. As noted above, however, the value which mediators place upon immunity and, consequently, the usefulness of the provision as an inducement to comply with the regulations, is unclear.

3.56 A consideration of the need to grant immunity to mediators raises a number of important issues. These issues stretch beyond the area of family mediation and NADRAC recommends that the need for immunity, and the extent of any immunity, should be considered in greater depth across all the fields in which mediation is practised. In the interim, the Council takes the Act as it finds it and expresses no concluded view on the matter. The Council does, however, have some broad concern about the potential for the immunity provision to prevent actions against mediators for serious misconduct (see discussion below in relation to the inadmissibility provision in section 19N of the Act). To the extent that the immunity provision prevents such actions the Council proposes that it should be amended accordingly.

Recommendation 2

The need for immunity for mediators in family matters, and the extent of any such immunity, should be considered in the broader context of all of the dispute areas in which mediation is practised. In the interim, the immunity provision should be amended, if necessary, to ensure that consumers of mediation services can pursue actions against mediators for serious misconduct.

Inadmissibility

3.57 Section 19N of the Family Law Act provides that evidence of anything said or any admission made at a mediation session is inadmissible in a court or other legal proceedings. Subsection 19N(1) provides that the section applies to, inter alia, a court mediator or, subject to the regulations, a community mediator or a private mediator. Subsection 19N(2) says:

19N(2) [When evidence not admissible] Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

3.58 At common law the 'without prejudice' privilege applies to information disclosed during the course of mediation[31]. This privilege provides that any communication made with a view to settling either part or the whole of a dispute cannot be put into evidence without the consent of both parties[32]. The 'without prejudice' privilege has been replaced by section 131 of the *Evidence Act 1995* for the purpose of most proceedings brought in Federal courts and, with the agreement of the ACT Government, the courts of the ACT. Section 131 is similar in many respects to the 'without prejudice' privilege.

3.59 The Evidence Act is, however, subject to other Commonwealth and ACT legislation including section 19N of the *Family Law Act 1975* . Section 19N provides mediators with a blanket protection from being called to give evidence of anything said, or any admission made, during a mediation even if all the participants to the mediation consent to the admission of that evidence. It seems that this provision may prevent evidence being given of any improper conduct, for example duress, which occurred at, or in association with, a mediation.

3.60 Proceedings against mediators for negligence or misconduct are relatively rare. However, the issue was raised before the Supreme Court of New South Wales in *State Bank of New South Wales v John William Freeman* [33]. The case was an action by the State Bank, as mortgagee, for possession of the Freemans' farming properties. During the course of proceedings the Freemans filed a notice of motion which sought an order that "satisfactory mediation" within the meaning of the *Farm Debt Mediation Act 1994* had not taken place. The Freemans submitted, inter alia, that the mediator had acted in a manner that was outside the scope of his function as defined in the Act. In particular, the Freemans alleged that the mediator had placed the Freemans under 'sustained and unconscionable duress' during the mediation.

3.61 The Court concluded that the Farm Debt Mediation Act conferred no right of appeal or other right of review in respect of the Farm Debt Authority's decision to issue or not to issue a certificate that satisfactory mediation had taken place. During the course of the judgment, Badgery-Parker J addressed the question of the application of section 15 of the *Farm Debt Mediation Act 1994* which is a similar provision to that in section 19N of the Family Law Act. Badgery-Parker J concluded:

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31 Legal professional privilege may also have limited application to mediation. Furthermore, English cases recognise a 'marital privilege' which renders inadmissible communications between spouses made with a view to reconciling their differences (see *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] 2 WLR 721, *Theodoropoulas v Theodoropoulas* [1963] 2 All ER 772 and *McTaggart v McTaggart* [1948] 2 All ER 754. It is uncertain whether this 'marital privilege' will ever be recognised under Australian law.

32 *Field v Commissioner for Railways* (NSW) (1957) 99 CLR 285; *Lukies v Ripley* (No 2) (1994) 35 NSWLR 283.

33 Supreme Court of New South Wales, Common Law Division, No. 12670 of 1995, 31 January 1996.

What is clear, is that s 15 would prevent a court from embarking in any practical way upon an examination of what took place in the course of a mediation session; and if that be precluded, any attempt to review the Authority's decision that it was satisfied that a satisfactory mediation had taken place would be hamstrung to the point of impossibility.

3.62 There is a view that the inadmissibility provision in section 19N is too wide and may protect the mediator at the expense of the participants in the mediation. Accordingly, it has been suggested that section 19N should be repealed. The Family Law Act would then be subject to section 131 of the Evidence Act which would enable evidence of what was said or admitted in the mediation to be adduced with the consent of the parties. NADRAC has two concerns about this approach. First, as the privilege in section 131 of the Evidence Act is subject to waiver by the participants in the mediation it is uncertain whether it would, of itself, provide an effective incentive for mediators to comply with the regulations. Secondly, the statutory privilege in section 131 of the Evidence Act may be abused in circumstances where there is a power imbalance between the parties, by enabling a stronger party to intimidate a weaker party to give consent.

3.63 There does not seem to be any consistency in national legislation on the issue of whether parties may consent to the admission of the evidence. While some provisions contain a complete prohibition, similar to that in section 19N[34] other statutory provisions specifically enable the parties to consent to the admission of the evidence[35].

3.64 NADRAC endorses the argument that the principal purpose of the confidentiality clause should be to protect the participants in mediation rather than the mediator. As Professor Laurence Boulle has noted[36]:

A significant form of accountability for mediators is the possibility that legal proceedings might be brought against them. In Australia there are no known cases in which a mediator has been successfully sued. This may be attributed partly to the existence of statutory immunities for some mediators, and partly to the fact that the flexible and confidential nature of mediation reduces the risk of liability for mediators.

3.65 *Mediators value inadmissibility*However, the Council is aware that the protection against being called to give evidence which section 19N provides is highly valued by mediators. Mediators consider the prohibition on calling evidence to be essential to the integrity of the mediation process for the following reasons:

- the participants need to feel free to be honest and open and to negotiate freely if disputes are to be resolved successfully. If the participants fear that what they say will later be used as evidence in a court it will constrain their ability to do so;

- if the mediator could subsequently be called to give evidence the informality of the process might be compromised by the mediators concern to avoid being required to give evidence of what was said in the mediation;

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34 See, for example, section 15 of the *Farm Debt Mediation Act 1984* (NSW).

35 See for example, section 28 of the *Community Justice Centres Act 1983* (NSW) and section 5.3 of the *Dispute Resolution Centres Act 1990* (Qld).

36 Laurence Boulle, *Mediation Principles Process Practice*, 1996, p 247.

- the possibility that the mediator might be brought before a court to give evidence of what happened would affect the participants trust in the mediator; and

- the participants may be encouraged to continue the marital fight in court and to draw the mediator (and others) into it.

3.66 Furthermore, the possibility that mediators might be required to give evidence of what was said in mediation would have a number of significant practical effects for mediators and mediation organisations. New record keeping practices and training would be required in addition to the need to make time available to enable mediators to prepare for and to attend court hearings. These new requirements could be expected to be increase the costs of providing mediation services.

3.67 In view of these arguments, NADRAC believes that the section has special value as an incentive for mediators to comply with the requirements of the regulations.

3.68 *Mediator misconduct* As previously noted, however, NADRAC accepts the view that the principal purpose of the confidentiality/inadmissibility provision should be to protect the participants in mediation rather than the mediator. Accordingly, the Council does not consider it to be appropriate for the provision to be used to protect mediators from the consequences of serious misconduct. Examples of serious misconduct in relation to which evidence should be admissible include bias, sexual harassment and duress.

3.69 *Intake* The Council considers that section 19N should apply to intake procedures and not just the formal mediation session. In this context it is noted that other legislative provisions relating to privilege specifically include "steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session"[37]. The experience of the Community Justice Centres in NSW is that allegations are most likely to be made at the intake stage and it is at that stage that participants often threaten to find out what the other party has said.

3.70 *Documents.* Section 19N of the Family Law Act does not specifically cover documents produced for the purposes of the mediation. This can be contrasted with section 131 of the Evidence Act and other statutory provisions[38]. Consideration should be given to whether it would be appropriate to extend the section to cover documents. Relevant case law should be taken into account in this context[39].

3.71 *Conclusion* NADRAC understands that the Attorney-General has established a Working Party to consider the issues of inadmissibility and confidentiality. Without wishing to pre-empt the outcome of that inquiry, the Council suggests that there would seem to be some value in retaining the inadmissibility provision in section 19N as an

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37 Section 28, *Community Justice Centres Act 1983* (NSW), section 15, *Farm Debt Mediation Act 1994* (NSW).

38 cf section 15, of the *Farm Debt Mediation Act 1984* (NSW).

39 See for example, *AWA Ltd v George Richard Daniels (T/A Deloitte Haskins & Sells)*, Supreme Court of NSW, No 50271 of 1991, 18 March 1992; *AWA Ltd v George Richard Daniels (T/A Deloitte Haskins & Sells)* Supreme Court of New South Wales, No 50271, 12 May 1992; *State Bank of New South Wales v John William Freeman*, op cit.

incentive for mediators to comply with the regulations. However, the Council recognises the concerns about possible misbehaviour and / or unprofessional conduct on the part of the mediator. Accordingly, the Council suggests that the provision should be qualified by the incorporation of a relatively simple exception with respect to proceedings against the mediator for serious misconduct. The Council would also submit that the Working Party consider extending the protection of the provision to the intake process and to documents produced for the purposes of the mediation.

3.72 If the Working Party's decision is to replace the broad protection for mediators in section 19N with a consensual privilege such as that in section 131 of the Evidence Act the Council believes that it may be necessary to reconsider the application of the regulations, particularly their enforceability.

Confidentiality and disclosure

3.73 Section 19K of the Family Law Act provides that court and community mediators must make an oath or affirmation of secrecy before starting to perform the functions of a mediator. Regulation 66 prescribes the form of such an oath or affirmation. The oath states that the person will not disclose any communication or admission made to them in their capacity as a family and child mediator unless they reasonably believe it to be necessary to do so:

- to protect a child;
- to prevent or lessen a serious and imminent threat to:
  (i) the life or health of a person; or
  (ii) the property of a person;
- to report the commission, or prevent the likely commission, of an offence involving:
  (i) violence or threat of violence to a person; or
  (ii) intentional damage to property of a person or a threat of damage to property;
- to enable the mediator to discharge properly their functions as a family and child mediator; or
- to assist a separate representative for a child to represent the child properly.

3.74 Regulation 67 purports to prohibit private mediators from disclosing any communication or admission made to them in their capacity as a family and child mediator unless the mediator reasonably considers that it is necessary to disclose the information for the same reasons as set out in regulation 66 (above). The Council notes, however, that regulation 67 was inserted in the regulations after the commencement of the

Evidence Act 1995 [40] and is not supported by any legislative provision similar to section 19K. Accordingly, there may be some doubt as to how effective this regulation will be in securing the confidentiality of any information, not protected by the inadmissibility provision in section 19N, which is required in court proceedings to which the Evidence Act applies (that is, in the Family Court of Australia and the courts of the Australian Capital Territory).

3.75 There is no provision in the Act or regulations which expressly requires confidentiality to be maintained by the participants to the mediation. Accordingly if such confidentiality were desired it would need to be addressed by a separate provision in a mediation agreement. It is noted, however, that complete confidentiality will not always be possible. Participants to a mediation will frequently have people who must be told about the outcome, such as lawyers, accountants and relatives and in discussing the issues with these 'stakeholders' it may not be possible for the participants to avoid revealing information about things that were said in the mediation.

3.76 While the regulations permit family and child mediators to disclose information in the circumstances specified, it should be remembered that this disclosure does not affect the inadmissibility provision in section 19N. Accordingly, while mediators may disclose a matter they are prevented from giving evidence of it in court proceedings. Accordingly, those to whom such a disclosure is made would be required to seek the necessary evidence to pursue court proceedings elsewhere. The Council recognises the potential inconsistency in this approach but considers that it is necessary in order to satisfy the competing public policy objectives of protecting vulnerable clients and preventing crime on the one hand and maintaining the integrity of the mediation process on the other.

3.77 The statutory duty of confidentiality imposed upon mediators, together with the ability to disclose where necessary, clarifies the mediator's role and assists mediators in the performance of their functions. NADRAC considers that these provisions are an advantage to family and child mediators and that they will encourage mediators to comply with the provisions of the regulations even if they are not required by legislation to do so.

Ability to advertise in Family Court registries

3.78 The Family Law Act and Family Law Regulations provide that family and child mediators may advertise in Family Court registries in certain circumstances. Section 19Q (2) of the Act provides:

> **19Q(2) [Mediation services may be advertised]** Subject to the regulations (if any), a family and child mediator, or an approved mediation organisation, may advertise, at a Registry of the Family Court, the mediation services the mediator or organisation provides.

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40 Subsection 8(2) of the Evidence Act states that the Act does not affect the operation of regulations in force on the commencement of section 8 of the Act (that is, 8 April 1995). Regulation 67 commenced on 11 June 1996.

3.79 The regulations provide that a family and child mediator or an approved mediation organisation may advertise details of:

- professional qualifications as they relate to the functions of the mediator/s;
- the experience of the mediator or organisation in family and child mediation, including the number of disputes mediated;
- the fees (including any hourly rate) charged for mediation[41].

3.80 However, the regulations go on to prohibit advertisement of:

- details of professional qualifications which do not relate to mediation;
- details of the number or percentage of disputes which have been mediated to a successful or unsuccessful resolution;
- comparisons between the mediation services offered and those offered by other mediators or organisations; and
- a testimonial or other endorsement by any person as to the quality of the mediation services offered[42].

3.81 A Registrar of the Family Court is entitled to determine, in writing:

- the form in with the family and child mediator or approved mediation organisation may advertise at the Registry; and
- the location of the advertising at the Registry[43].

3.82 The development of mediation as an alternative to litigation in the Family Court has largely been pursued by the Government, the Courts and family law professionals in response to community concerns about the cost and adversarial nature of traditional proceedings in the Family Court. Community knowledge about the availability and benefits of mediation services is still limited[44]. Accordingly, there is still limited consumer demand for mediation services.

3.83 In these circumstances the ability to advertise in the Family Court has the potential to significantly increase the available work for family and child mediators. As a result NADRAC considers that these provisions represent a significant inducement for mediators and mediation organisations to comply with the provisions of the regulations.

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41 Regulations 71 and 72.
42 See above.
43 Regulation 68.
44 See AGB McNair research, September 1995 (previously cited).

Referrals from the Family Court, family lawyers and others

3.84 In addition to the direct benefits which family and child mediators receive from advertising in Family Court registries, it is likely that they will receive additional mediation work simply because they conduct mediations in compliance with the requirements of the regulations.

3.85 Courts exercising jurisdiction in family law proceedings and legal practitioners acting in family law proceedings or advising on the institution of such proceedings are required to consider whether or not to advise about the dispute resolution methods that could be used to resolve any matter in dispute (sections 14F and 14G, *Family Law Act 1975*). It can be expected that the Family Court will, and that family lawyers and other family professionals will be more likely to, refer cases to mediators who comply with the requirements of the regulations in preference to those who do not. NADRAC considers that this effect will also provide a significant inducement for mediators and mediation organisations to comply with the regulations even though it may not be mandatory to do so.

CHAPTER 4: QUALIFICATIONS FOR FAMILY AND CHILD MEDIATORS

4.01 NADRAC is aware of a number of concerns which have been expressed about the tertiary qualification requirements imposed by the regulations. These concerns relate to the following issues:

- the need for tertiary qualifications;
- the recognition of tertiary qualifications (such as those in law or social science) which do not directly relate to the practice of mediation;
- the limitation of the recognition of tertiary qualifications to dispute resolution, law and social science (particularly, the failure to recognise qualifications in accountancy);
- the failure to recognise lawyers qualified by barristers' and solicitors' admissions boards;
- the potentially racially discriminatory impact of the tertiary qualifications requirement for particular groups such as Aboriginal and Torres Strait Islanders and people from non-English speaking backgrounds; and
- the difficulties for people from disadvantaged socio-economic backgrounds and people in remote areas.

REQUIREMENTS OF THE REGULATIONS

4.02 Regulation 60 requires that all new family and child mediators must have an appropriate degree, diploma or other qualification by a university, college of advanced education or other tertiary institution of an equivalent standard, in:

- law
- a social science (for example, psychology or social work);
- mediation; or
- dispute resolution.

THE NEED FOR TERTIARY QUALIFICATIONS

4.03 The Council is aware that there is concern among many mediators about the requirement in the regulations for mediators to have tertiary qualifications. This issue was a troubling one for the Council. On the one hand the Council acknowledges that many of the advances in the practice of mediation, including family mediation, have been wrought by people who have no tertiary qualifications (see the discussion about the 'grandparents' of mediation later in this Chapter at paragraphs 4.51 - 4.61). Furthermore, many people

who have no tertiary qualifications are presently competently mediating in family disputes, whether in State/Territory government mediation organisations, churches, Aboriginal and Torres Strait Islander communities, ethnic communities or elsewhere. On the other hand, the Council was concerned about the sensitive nature of family disputes and the considerable potential for inadequately educated people to do significant harm to the vulnerable people who may be affected by the outcome, including children.

4.04 Ultimately, the Council formed the view that the requirement of tertiary qualifications should remain. In coming to this conclusion the Council was influenced both by the need to maintain high standards and by the absence of viable alternative methods of ensuring relevant knowledge of the complex legal and social issues surrounding disputes arising under the Family Law Act. In reaching this conclusion, however, the Council must acknowledge that some of its members hold very strong views to the contrary. Those members were persuaded to concede to the majority view only by virtue of the fact that the Council's recommendations will enable particular categories of mediators such as "grandparent", Aboriginal and Torres Strait Islander and non-English speaking mediators to mediate under the regulations (see discussion below, commencing at paragraph 4.18) and also will enable other non-tertiary qualified mediators to continue to provide family mediation services albeit without the benefits and protections of the Act.

RELATIONSHIP OF TERTIARY QUALIFICATION REQUIREMENTS TO MEDIATION

4.05 During the course of its inquiry the Council became aware that there were concerns about the recognition of tertiary qualifications requirements that are unrelated to the practice of mediation. It has been argued that tertiary qualifications, particularly qualifications in law and social science, are not necessarily a guarantee of knowledge of family law issues or of the ability to undertake family mediation.

4.06 However, the regulations provide that family and child mediators must have more than prescribed tertiary qualifications. They must also have training and supervised practice in family mediation. Furthermore, family lawyers, family psychologists and social workers were amongst the first mediators to practice in the area of family mediation. Many people in these professions have considerable knowledge about the framework of the Family Law Act and the complex psychological and social consequences of family disputes. While the Council strongly supports the development of tertiary courses in mediation and dispute resolution, it also believes it is appropriate for the regulations to recognise people in other professions who have relevant work experience with families.

4.07 However, the recognition of tertiary qualifications in law and social science is clearly an imprecise mechanism for ensuring experience in family matters. If it were possible for the regulations to recognise professionals with specific experience in the area of family law then the Council would prefer that course. The Council recommends that this issue be considered further. In this context the Committee understands that the Attorney-General's Department is currently considering qualification requirements for arbitrators and family and child counsellors which may address the issue of experience in the family law area. These proposals could be examined to assess whether they may provide some guidance with respect to family and child mediators.

4.08 In any event, NADRAC anticipates that the majority of family mediators will, in practice, continue to be drawn from the ranks of those professionals with substantial experience in family law matters. It seems unlikely that large numbers of lawyers or social scientists who have practiced in other areas would seek to mediate, particularly *as private practitioners* , in the complicated, highly emotional and demanding area of family law.

Recommendation 3

The requirement for tertiary qualifications be retained for the present. However, further consideration be given to whether it is possible for the regulations to recognise professionals with specific experience in the area of family law rather than recognising tertiary qualifications in law or social science.

FAILURE TO RECOGNISE OTHER TERTIARY QUALIFICATIONS

4.09 In letters to the Attorney-General's Department dated 5 August 1996 and 8 August 1996 respectively, Mr Ernest Treagus and the Australian Society of Certified Practising Accountants (CPAs), raised concerns about the restrictive and discriminatory nature of the qualifications requirements. Mr Treagus said:

> *As my professional qualifications are in the field of accountancy these regulations effectively stop me from practising in family law mediation, and I am interested in understanding the rationale behind the structure of the regulations under Division 2 - Family and Child Mediators, especially as they discriminate against anyone not academically qualified in either law or social sciences.*
>
> *I wish also to highlight that you are excluding critical financial knowledge and skills which are essential to full and proper conduct of family law mediation, whilst requiring a full understanding of the implications of relevant laws and social science issues are required.*

4.10 The Australian Society of CPAs pointed out that:

> *Members of this Society already provide expert evidence to the Family Court of Australia on a daily basis and are well versed in the requirements of the Court pertinent to the settlement of disputes relating to property and finances between parties.*
>
> *...*
>
> *A Certified Practising Accountant is required to (sic) by the Society's Code of Conduct to exercise complete independence in his or her dealings, which is the basis of the mediation service envisaged under the regulations.*
>
> *...*
>
> *What the Society suggests is that its members have an important existing role within the Family Law Act jurisdiction. To exclude these individuals from a role which has and can continue to benefit both the individuals coming before the Court and the system itself in time and cost saving seems counter to the stated intention of the Attorney-General to cut down complications and cost to the community.*

4.11 NADRAC acknowledges that limiting the tertiary qualification requirement to dispute resolution, law and social science may appear to be overly restrictive. However, the Council would contend that this is not, in fact, the case. As previously pointed out family disputes raise a number of complex and sensitive issues that are inextricably linked to the operation of the Family Law Act. Family lawyers, family psychologists, social workers and welfare officers have a central role in respect to the resolution of family disputes in the Family Court and are well aware of the issues raised. The Council believes that people with this experience are appropriately qualified to undertake family mediation with additional training in family mediation.

4.12 Qualifications in law and social science do provide a broad understanding of many concepts, institutions, issues and skills relevant to the resolution of family disputes. The Council recognises that these qualifications do not necessarily provide expertise with respect to disputes under the Family Law Act and has recommended that consideration be given to a requirement of relevant experience. Nevertheless, it is appropriate to recognise the qualifications of those professionals who have played a key role in the development of family mediation and who presently do much of this work.

4.13 For these reasons, NADRAC would not support extending the tertiary qualification requirement to other professional groups who have no similar experience in the resolution of family disputes under the Family Law Act, such as for example, engineers or teachers.

Accountants

4.14 The Council believes, however, that there is force in the arguments put on behalf of accountants. Family disputes can involve complex financial matters, and accountants are another professional group who are presently involved in doing this work. The experience which some accountants have in resolving family disputes would appear to give them a particular claim for inclusion in the regulations. Accordingly, NADRAC recommends that Regulation 60 be amended to include appropriate accountancy qualifications.

4.15 However, as for the other professional groups whose qualifications are recognised, a professional qualification in accountancy does not necessarily provide particular knowledge of the Family Law Act and family disputes and consideration should be given to a requirement of relevant experience.

Recommendation 4

Regulation 60 should be amended to recognise accountants with experience in family law matters.

BARRISTERS AND SOLICITORS ADMISSIONS BOARDS QUALIFICATIONS

4.16 Many lawyers have qualified to practice under examinations offered by the various barristers and solicitors admissions boards. Legal practitioners who have been admitted as a result of passing examinations set by the various boards do not meet the qualifications requirements of the regulations. This issue was raised with the Attorney-General's Department by the Queensland Law Society in a letter dated 4 September 1996 and again in a letter from Rhonda Sheedy & Associates in a letter dated 29 October 1996.

4.17 The Council considers the exclusion of legal practitioners who have qualified in this way to be an oversight. Some of Australia's most respected practitioners have qualified in this way. It is usual for regulatory schemes covering lawyers to refer to admission to practice rather than a tertiary qualification in law. Accordingly, it recommends that the Regulations should be amended to recognise all legal practitioners who are admitted to practice as a barrister or solicitor of the High Court or the Supreme Court of a State or Territory.

Recommendation 5

The regulations should be amended to include legal practitioners admitted to practice as a barrister or solicitor of the High Court or the Supreme Court of a State or Territory.

IMPACT OF THE TERTIARY QUALIFICATIONS REQUIREMENTS

Ensuring standards

4.18 Legislating to ensure standards of professional practice in the area of family mediation is challenging. Usually professional standards are protected by giving responsibility to a professional organisation which sets appropriate standards and methods of qualification. However, in the area of mediation there is, as yet, no professional body which could fulfil this function. Family mediators come from a number of already recognised areas of professional practice, such as law, psychology and social work. There are also some mediators who have long experience of mediation who do not have professional qualifications.

4.19 Another possible way of ensuring standards would be to accredit organisations which provide training and education for mediators. However, mediation courses are very diverse. The nature and standard of training provided is variable, depending upon the needs of the training organisations and intending mediators. Many courses would have little content specifically directed to mediation of family disputes under the regulations.

4.20 The option which has been chosen in the regulations is the option of ensuring standards by requiring a qualification of a known level of excellence – tertiary

qualifications. In addition, training in family mediation and supervised practice is required. The difficulty which has been generated by the choice of this option is that there are some groups who are less likely to be able to qualify as mediators under the regulations because they may find it more difficult to acquire a tertiary qualification.

4.21 The tertiary qualification requirements have been identified as a significant obstacle for Aboriginal and Torres Strait Islanders and people from non-English speaking backgrounds. In his letter to the Attorney-General of 28 August 1996, the Hon Denis G. Burke, Attorney-General for the Northern Territory said:

> *I am concerned that the proposal under regulation 60(1), that mediators will have to hold tertiary qualification in either law of (sic) social science, is too restrictive and does not cater for the special needs of the Northern Territory.*
>
> *A significant proportion of the Territory's population is either Aboriginal or from a non-english speaking background. Aboriginal and Torres Strait Islanders and people born overseas represent 42 percent of the Territory population compared to a national average of 24 percent. Approximately 20 percent of the Territory's population were born overseas. Of this percentage, half come from non-english speaking backgrounds.*
>
> *Given this cultural diversity it is desirable that persons with appropriate cultural background and/or language qualifications be able to mediate in family law disputes. In particular, when dealing with the Territory's Aboriginal community there is a need for such mediators. It is doubtful that individuals, with the relevant pre-requisites, would currently possess the proposed tertiary qualifications.*

4.22 NADRAC is concerned that the tertiary qualification requirements in regulation 60 may have an indirectly discriminatory effect upon Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds, mediators from socially or economically disadvantaged groups including those working for community mediation organisations and mediators in remote areas. In broad social policy terms, indirect discrimination occurs when a requirement or condition is imposed upon a physically or socially identifiable group (particularly a group protected by anti-discrimination legislation) and the requirement or condition has a detrimental effect upon that group imposing, for example, significantly greater cost or hardship upon it.

4.23 In addition, NADRAC is aware that there are concerns among community mediation organisations, particularly those recognised or provided by State and Territory governments, about the impact of the tertiary qualification requirements on their ability to provide family and child mediation services. The Council understands that some of the most experienced family mediators working for these organisations do not have the required tertiary qualifications. Further, it is understood that a number of those mediators have indicated that they will not be enrolling in an appropriate course of study by 31 August 1998 as required by subregulation 60 (3). The reasons for this are varied. The decision may reflect the cost of the available courses, the limited time the mediators have available, the socio-economic background of the mediator, the age of the mediator or even a general (probably unfounded) fear of failure in an academic environment.

ABORIGINAL AND TORRES STRAIT ISLANDER MEDIATORS

4.24 Aboriginal and Torres Strait Islander people are clearly a physically and socially identifiable group. Indeed, they are also protected by Federal anti-discrimination legislation, namely the *Racial Discrimination Act 1975*. That legislation contains a specific prohibition on indirect discrimination which nullifies or impairs the exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life[45]. In addition the Act makes specific provision[46] as to equality of rights under any federal law. Other provisions of the Act may also be relevant.

4.25 It could be argued that the requirement to have a tertiary qualification to qualify as a family and child mediator indirectly discriminates against Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people are less likely to have tertiary qualifications because of the social and educational disadvantage they suffer. They are, therefore, less likely to qualify under the regulations. The regulations therefore appear to impose a requirement or condition which has a disparate impact upon Aboriginal and Torres Strait Islander people. The question remains however, whether the requirement of tertiary qualifications is nevertheless reasonable.

4.26 There are some circumstances where it would be difficult to argue that a requirement of tertiary qualifications is unreasonable. Where a tertiary course is the only requirement for professional practice in the field (for example as tertiary qualification in medicine is required for practice as a doctor) an argument that such qualifications are unreasonably discriminatory would be difficult to pursue. However, there is no such direct relationship between the tertiary qualifications required under the regulations and the practice of family and child mediation. The Council has expressed, above, some reservations about the limitations of the requirement of tertiary qualifications. However, the difficulties created by the regulations for Aboriginal and Torres Strait Islander mediators should not be over estimated.

4.27 It is probable that the framework of the Family Law Act will not be relevant for many Aboriginal and Torres Strait Islander mediators. They may do most of their work with indigenous peoples whose values about marriage, relationships, kinship, and the resolution of family disputes is not necessarily informed by the values embodied in the Family Law Act. Such mediators may not desire the protections of the Act so far as immunity and confidentiality are concerned. The clients of Aboriginal mediators may well find the idea of pursuing their mediator in the courts for malpractice not to be within their frame of reference. Issues of confidentiality may also be quite different for Aboriginal groups, where group or community decision making about family matters may be culturally appropriate[47].

4.28 Nevertheless there will be some Aboriginal people who are engaged in family disputes where the framework of the Family Law Act is relevant. There may be disputes between indigenous people, or between indigenous and non-indigenous disputants, where proceedings in relation to custody and access have been commenced in the Court,

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45 Section 9, *Racial Discrimination Act 1975*.

46 Section 10, *Racial Discrimination Act 1975*.

47 See, Larissa Behrendt, *Aboriginal Dispute Resolution*, Federation Press, Sydney, 1995.

or where the parties are negotiating within the framework of the Act. Mediation by an Aboriginal mediator or including an Aboriginal co-mediator may be highly desirable in such circumstances and qualified mediators should be available.

4.29 There are a number of possible approaches to this issue.

No change

4.30 The Act and regulations presently make no special provision for indigenous mediators. The first possible approach would be to maintain this position. However, this would mean that all Aboriginal mediators who have no tertiary qualifications (and do not meet the practice requirements of the grandparent clause) who mediate family disputes that "could be the subject of proceedings" under the Family Law Act are technically breaching the law. While the lack of an enforcement mechanism means that no action may be taken against such mediators it is nevertheless a significant disadvantage for them.

4.31 It will assist Aboriginal and Torres Strait Islander mediators if, as Council has recommended, it is made clear that only those mediators who require the protections of the Act need to comply with the regulations. Nevertheless Aboriginal mediators who desire the protections of the Act but who cannot comply with the regulations because they do not have the necessary tertiary qualifications will continue to be disadvantaged. It is not clear how many Aboriginal mediators might fall into this category. To gauge the extent of the problem it would be necessary to consult Aboriginal and Torres Strait Islander mediators. Such a consultation is beyond the resources presently available to the Council for the purposes of this inquiry.

Exemption

4.32 An alternative option would be to include a special exemption for Aboriginal and Torres Strait Islander mediators in relation to the tertiary qualification requirement. However, 5 days training plus a period of supervised practice is a very low standard to require for family and child mediation under the Act. Mediators who provide services to Aboriginal communities should be of a high standard. Being a member of an appropriate racial group and/or having the necessary language skills may be necessary or important for the mediation of some disputes but it is not a sufficient qualification to mediate the difficult issues which often arise in mediation of family disputes. Strong skills in mediation are also important. The tasks of Aboriginal mediators are often complicated by difficult issues of the relationship of Aboriginal culture and values and non-Aboriginal culture and values. The need for skilled and experienced mediators is readily apparent. If the requirement of tertiary qualifications is removed, the question of an appropriate substitute is raised.

Authorisation

4.33 A further alternative would be to alleviate the discriminatory impact of the tertiary qualifications requirement by instituting a discretionary procedure for the authorisation of Aboriginal and Torres Strait Islander mediators. A significant drawback of such a proposal is that it could have the effect of lowering the quality of the mediation

services provided to Aboriginal and Torres Strait Islander communities relative to the services provided to the rest of the Australian community. In the Council's view that result should be avoided as far as possible.

4.34 Furthermore, authorisation schemes which require discretionary judgements in relation to individual cases can be very costly to administer. Accordingly, they are only justifiable in circumstances where there are a limited number of people who are eligible to apply for authorisation under them.

4.35 For these reasons, any authorisation scheme would need to be strictly limited to Aboriginal and Torres Strait Islander peoples who are providing mediation services to Aboriginal and Torres Strait Islander peoples and who cannot reasonably meet the tertiary qualification requirements. Decisions under the scheme would no doubt be subject to administrative review. Accordingly, acceptable guidelines for such decisions would need to be established. Relevant criteria might include the remoteness of the Aboriginal and Torres Strait Islander communities being served; the lack of accessible tertiary courses; and the other qualifications and experience of the mediator.

Special measures

4.36 Finally, special measures could be implemented to assist Aboriginal and Torres Strait Islander peoples to meet the requirements of the regulations. Special funding could be made available to Aboriginal and Torres Strait Islander people to assist them with the costs of tertiary study including, in appropriate cases, the cost of travelling from their traditional lands to urban centres to undertake a course of full-time study. Funding could also be made available to tertiary institutions to assist them to develop:

- courses which are readily accessible by Aboriginal and Torres Strait Islander peoples (for example, by providing some or all of the course by long distance education methods);
- curricula which are appropriate to the needs and practice of indigenous mediators and support the development of appropriate models of mediation;
- admission criteria which will encourage enrolment by indigenous peoples; and
- supports necessary to enable indigenous mediators successfully to qualify.

Conclusion

4.37 The difficulties identified by Aboriginal people in the formal justice system are well known. The Family Court has made significant moves in working with Aboriginal and Torres Strait Islander peoples. Nevertheless, it is still the case that few indigenous people litigate under the Act. In such circumstances the use of mediation may be a particularly appealing method of resolving disputes.

4.38 In view of the importance of maintaining high standards of mediation the Council is reluctant to recommend any special exemptions for indigenous mediators.

Nevertheless, the Council recognises that indigenous mediators are disadvantaged under the present regulatory regime. Even if the Act and the regulations are amended to make it clear that only those mediators who require the protections of the Act need comply with the regulations, indigenous mediators who do seek the protections of the Act will continue to be disadvantaged (unless they are mediating under comparable State / Territory government legislation).

4.39 The Council believes that there are only a small number of Aboriginal and Torres Strait Islander mediators who cannot meet the tertiary qualification requirement in the regulations. Consequently, an authorisation scheme to meet the needs of these mediators should be economically feasible. Accordingly, NADRAC recommends the establishment of a limited authorisation scheme for Aboriginal and Torres Strait Islander mediators who are providing mediation services to Aboriginal and Torres Strait Islander communities and who cannot reasonably meet the tertiary qualification requirements.

Recommendation 6

The regulations should be amended to establish a limited authorisation scheme for Aboriginal and Torres Strait Islander mediators who are providing mediation services to Aboriginal and Torres Strait Islander peoples and who cannot reasonably meet the tertiary qualification requirements.

4.40 In addition, the Council recommends that special measures be implemented in the longer term to enable Aboriginal and Torres Strait Islander mediators to acquire appropriate tertiary qualifications. Council notes the need for consultation with Aboriginal and Torres Strait Islander peoples in this context.

Recommendation 7

In the longer term, special measures should be implemented by the Government to assist Aboriginal and Torres Strait Islander peoples to acquire appropriate tertiary qualifications. Aboriginal and Torres Strait Islander peoples should be consulted in this context.

4.41 Further to the above, the Council notes that there is a need to develop appropriate models of mediation which are culturally relevant, and are consistent with the high standard of mediation available to the general community.

MEDIATORS FROM NON-ENGLISH SPEAKING BACKGROUNDS

4.42 The issues which arise for mediators from non-English speaking backgrounds are similar to those for Aboriginal and Torres Strait Islanders. People from non-English speaking backgrounds are clearly a socially disadvantaged group and are protected by the Racial Discrimination Act. The lack of facility with the English language which many people from non-English speaking backgrounds suffer, as well as the challenges of

adjusting to a new life and culture, means that it is more likely that these mediators will not have recognised tertiary qualifications and will not qualify under the regulations.

4.43 The Council's recommendation to amend the regulations to make it clear that only mediators who require the protections of the Act need comply with them will enable mediators from non-English speaking backgrounds who do not have and are unlikely to obtain a tertiary qualification to continue legally to mediate a broad range of family disputes. However, as is the case for Aboriginal and Torres Strait Islander mediators, it will mean that they do not receive the benefits and protections of the Act (unless conferred by other legislation) and will continue to be disadvantaged.

4.44 The Council's impression, however, is that unlike Aboriginal and Torres Strait Islander mediators, most mediators from non-English speaking backgrounds work in metropolitan areas. The foreign language skills of mediators from non-English speaking backgrounds are highly valued by community mediation organisations. Mediators working with these organisations may receive protections under State legislation. Accordingly, most mediators from non-English speaking backgrounds are unlikely to be adversely affected by the regulations. However, there are a small number of mediators working independently with ethnic communities whose English language skills are such that they could not reasonably be expected to obtain tertiary qualifications. The regulations have a discriminatory effect in respect of these people and the ethnic communities they serve which must be addressed.

4.45 NADRAC recommends that a limited authorisation scheme, similar to that for Aboriginal and Torres Strait Islander mediators, should be established for mediators serving non-English speaking background communities who cannot reasonably meet the tertiary qualification requirements because their English language skills are insufficient to enable them to do so. Again, the small number of mediators likely to be covered by such a scheme should mean that it is not too costly to administer. For the present the Council does not consider that it is necessary for the Government to institute any special measures with respect to mediators from non-English speaking backgrounds. However, the Council suggests that a "watching brief" be kept upon this issue.

Recommendation 8

The regulations should be amended to establish a limited authorisation scheme for mediators serving non-English speaking background communities who cannot reasonably meet the tertiary qualification requirements because their English language skills are insufficient to enable them to do so.

MEDIATORS WHO ARE SOCIALLY OR ECONOMICALLY DISADVANTAGED

4.46 Mediators may not obtain tertiary qualifications for a variety of reasons which do not reflect upon their competence. Social and economic disadvantage can create an insuperable obstacle to gaining such qualifications. It is now well known that children from families with tertiary qualified parents and children from economically advantaged backgrounds are the most likely to go on to study at a tertiary institution. Similarly older

people may not have had the same opportunities to undertake tertiary study in their earlier years as are available today and their age may now be a significant deterrent to undertaking such tertiary studies.

4.47 However, like mediators from non-English speaking backgrounds, most mediators from socially or economically disadvantaged backgrounds work for community mediation organisations in metropolitan areas. Community mediation organisations seek to provide a panel of mediators which is broadly representative of the community and includes mediators from a diverse range of backgrounds, many of whom do not have tertiary qualifications. As noted above, many of these mediation organisations receive similar benefits and protections under State and Territory legislation to those provided by the Family Law Act.

4.48 While recognising the difficulties of members of such groups, the Council does not believe it is appropriate to address the issues by diminishing the legislative standards for family and child mediators. Rather, the Council believes that these issues should be addressed by the provision of appropriate tertiary courses to provide for the needs of disadvantaged groups. Alternative dispute resolution has great potential to provide for the needs of such groups. Consideration should be given to the provision of funding for the development of such courses.

DISABLED MEDIATORS

4.49 Council notes that people with disabilities may also have difficulties meeting the tertiary qualifications requirements. Despite the significant improvements in facilities for the disabled in recent years, it is still more difficult for them to obtain tertiary qualifications. These issues should be addressed by improving access to tertiary courses for people with disabilities.

MEDIATORS FROM REMOTE AREAS

4.50 The Council is aware that similar concerns apply to people in remote areas (eg. central Australia, western Queensland and north-west Western Australia), because of the physical difficulties of attending a tertiary institution and, possibly, because there is an outback "culture" which places a lower value upon gaining tertiary qualifications. Again, the difficulties of mediators in these areas will be addressed in part if the Act is amended to make it clear that only those mediators who want the protections of the Act need to comply with the regulations. However, it will mean that mediators in remote areas who have not obtained tertiary qualifications will not be entitled to the benefits and protections of the Family Law Act.

4.51 Accordingly NADRAC proposes that the Government liaise with tertiary institutions with a view to the establishment of long-distance programs in mediation /dispute resolution to assist people in both rural and remote areas to acquire relevant tertiary qualifications. Community education programs should be implemented to ensure that people in rural and remote areas are made aware of available tertiary programs.

Recommendation 9

The Government should liaise with tertiary institutions with a view to improving access to tertiary courses for people from socially or economically disadvantaged groups and for people with disabilities. Consideration should also be given to the establishment of long-distance programs in mediation /dispute resolution to assist people in rural and remote areas to acquire relevant tertiary qualifications. Programs should be implemented to increase awareness of available tertiary programs.

GRANDPARENT CLAUSE

4.52 The regulations contain specific provisions to provide for experienced mediators who are presently working as family mediators but who do not meet the tertiary qualifications requirements in subregulation 60(1). Subregulations 60(3) and 60(4) (the "grandparent clause") provide:

> **60(3) [Appropriate experience]** Subject to regulation 61, a person may provide family and child mediation if the person has provided mediation of that kind for a total of at least 150 hours since 11 June 1991, of which at least 50 hours has been provided since 11 June 1994, and:
>
> a) the person:
> i) enrols in a course of study of a kind described in subregulation (2) before the end of 31 August 1998; and
> ii) is not excluded from completing the course by reason of the person failing to pass any of its requirements; and
> iii) completes the academic requirements of the course at, or before, the end of 7 academic years of the relevant institution; or
>
> b) the person provides the mediation through a non-profit organisation:
> i) that is funded wholly or partly by the Commonwealth, or by a State or Territory; and
> ii) a substantial part of the functions of which is the provision of family and child mediation services.
>
> **60(4) [Non-profit organisation mediation]** A person described in paragraph (3)(b) must not provide family and child mediation after 31 August 1998, unless the person is otherwise eligible to provide the mediation under this regulation.

4.53 NADRAC supports the inclusion of a clause which recognises those highly experienced mediators who are the 'grandparents' of the mediation movement. At the same time the Council would wish to ensure that the primary objective of the regulations, the protection of consumers, is not significantly compromised.

4.54 However, the Council has some concerns about the structure and operation of the provision. The Council is concerned that the provision does not adequately protect either the "true grandparents" of mediation in Australia or the highly trained and experienced

mediators operating within the stringent standards set by a number of non-profit mediation organisations. In addition, following its earlier recommendation to amend the definition of "family and child mediation" the Council considers that it would be desirable to make some consequential amendments to subregulation 60(3).

Nature of appropriate experience

4.55 As indicated above, subregulation 60(3) requires a person who wishes to provide 'family and child mediation' to have provided a specified number of hours of "mediation of that kind".

4.56 The reference to "mediation of that kind" will create a problem of circularity if the Government adopts NADRAC's previous recommendation to amend the definition of family and child mediation to make it clear that, to constitute family and child mediation, the mediation must be conducted in accordance with the regulations. Accordingly, the Council recommends that the reference to "mediation of that kind" should be replaced with a more general reference to mediation of family disputes, that is, mediation of disputes that could be the subject of proceedings under the Family Law Act.

Recommendation 10

If the Council's previous recommendation to amend the definition of 'family and child mediation' is adopted a consequential amendment will need to be made to subregulation 60(3) to remove the words "mediation of that kind" and to replace it with a general reference to mediation of family disputes.

Protecting the 'grandparents' of mediation

4.57 The origins of family mediation in Australia today are diverse. Present day practice has certainly been influenced by the skills of lawyers and behavioural scientists. However, Australian family mediation also has strong antecedents in community movements which emphasise the ability of ordinary people to resolve disputes for themselves. Some of the 'grandparents' of family mediation therefore do not necessarily have professional qualifications in law or a behavioural science. These 'grandparents' are some of the most experienced mediators we have. They may have played a role in shaping the direction of Australian practice by being the architects of present day training programs, mediation policies, protocols and practices.

4.58 Many of the 'grandparents' of family mediation have a tertiary qualification which will qualify them under the regulations. However, it has come to the attention of the Council that there are some who do not. Furthermore, they are at a stage in their lives and careers where some would be unwilling to embark on tertiary study. It would seem regrettable if regulations which have a function of protecting consumers by fostering standards of excellence were to exclude such people from qualifying under the regulations.

4.59 Further, family mediation is still in its infancy, compared to many other areas of professional practice. Courses at tertiary level which specialise in dispute resolution have

not existed for very long. Tertiary qualifications, including tertiary qualifications in dispute resolution, would certainly not have been part of the expectations or career plans of the grandparents of family mediation. Indeed, those in tertiary teaching might expect to harness the experience of some of the 'grandparents' assisting in the teaching of skills and practice elements of tertiary courses, rather than seeing them in their classrooms as students.

4.60 In their present form subregulations 60(3) and (4) (the grandparent clause) will prevent these mediators from mediating after 31 August 1998 unless they have enrolled in, or completed, a required course of tertiary study by that date. The Council believes that the grandparent clause should exempt these mediators from the requirement to undertake tertiary qualifications.

4.61 The Council believes that the simplest way to recognise the 'true grandparents' of mediation would be to institute a limited authorisation process under subregulation 60(3) (possibly as a new paragraph 60(3)(c)) similar to that which the Council has already recommended for Aboriginal and Torres Strait Islander and non-English speaking people.

4.62 The Council recognises that there are resource implications consequent upon the establishment of an authorisation process but notes that these are unlikely to be significant as there are very few family mediators who may be regarded as the 'true grandparents' of mediation. After carefully considering this issue over an extended period the Council was not able to devise any satisfactory alternative proposal. A criterion for recognition of these mediators might be that they had obtained the requisite number of hours of mediation by 11 June 1996. However, other appropriate criteria might be added to this or imposed as an alternative. This issue will require further consideration.

Recommendation 11

Subregulation 60(3) should be amended to enable the 'true grandparents' of mediation (eg. mediators who had obtained the requisite number of hours of mediation by 11 June 1996 and / or meet such other criteria as are considered appropriate) to apply for authorisation by 31 August 1998, thereby obtaining exemption from the requirement to enrol in a course of tertiary study.

Mediators employed by non-profit organisations

4.63 Paragraph 60(3) (b) makes special provision for mediators who are employed by non-profit organisations. The paragraph qualifies persons who have provided the requisite hours of mediation and provide mediation through a non-profit organisation that is funded by the Commonwealth or by a State or Territory and a substantial part of the functions of which is the provision of family and child mediation.

4.64 *Exemption of employed mediators* Non-profit mediation organisations, whether government or non-government, frequently apply very high standards in the provision of mediation services. The mediators they employ are usually highly trained irrespective of whether or not they hold tertiary qualifications. NADRAC supports the objective of recognising mediators employed by these non-profit organisations who have obtained

appropriate experience in the mediation of family disputes (that is, mediators who have provided the number of hours of mediation required by subregulation 60(3)).

4.65 However, subregulation 60(4) appears to override paragraph 60(3)(b) by prohibiting a person who works for a non-profit organisation and has the requisite experience from providing family and child mediation after 31 August 1998 unless they have enrolled in or completed a required course of tertiary study by that date. It seems likely that the intention behind this provision was to ensure that all new mediators who wish to qualify under the regulations after 31 August 1998 obtain appropriate qualifications and that employment in a non-profit mediation organisation should not become a means of "back door entry".

4.66 NADRAC accepts that exemptions from the requirement to undertake tertiary studies should be strictly limited. Nevertheless, the Council considers that it is appropriate to exempt experienced family mediators who are employed by non-profit mediation organisations from the requirement to undertake tertiary study while those mediators continue to be employed by a non-profit organisation. Accordingly, the Council recommends that subregulation 60(4) should be removed.

Recommendation 12

Subregulation 60(4) should be removed to exempt mediators who are employed by non-profit mediation organisations who have provided the requisite hours of mediation from the requirement to undertake tertiary study while the mediator continues to be employed by a non-profit organisation.

4.67 *Consequential amendment* If the Government adopts NADRAC's earlier recommendation and amends the definition of family and child mediation to make it clear that, to constitute family and child mediation, the mediation must be conducted in accordance with the regulations, it would be desirable to make a consequential amendment to the reference to "family and child mediation" in subparagraph 60(3)(b)(ii). In that event, the Council suggests that the reference to "family and child mediation" should be replaced with a more general reference to mediation of family disputes, that is, mediation of disputes that could be the subject of proceedings under the Family Law Act. The provision would then extend to mediators employed by non-profit organisations, a substantial part of the functions of which is to mediate disputes irrespective of whether the organisation conducts its mediations in accordance with the regulations.

Recommendation 13

If the Council's previous recommendation to amend the definition of 'family and child mediation" is adopted a consequential amendment should be made to subparagraph 60(3)(b)(ii) to replace the reference to "family and child mediation" with a more general reference to mediation of family disputes.

CHAPTER 5: TRAINING AND SUPERVISION REQUIREMENTS

5.01 A number of concerns have been expressed about the requirements for mediation training and supervised mediation in regulations 60 and 61. These include:

- the need for specialised training;
- the cost of meeting the training requirement;
- the meaning of "supervision";
- the need for supervised mediation of family disputes;
- the impact of the training and supervision requirement on mediators who do not presently meet the requirements (or the requirements of the grandparent clause); and
- whether experience in legal aid conferences can be counted as supervised mediation for the purposes of the regulations.

REQUIREMENTS OF THE REGULATIONS

Training

5.02 Regulation 60 requires all new family and child mediators to have at least 5 days training in mediation (including one training course of at least 3 days duration). In addition, Regulation 61 provides that all family and child mediators must undertake at least 12 hours training in family and child mediation each year.

Supervision

5.03 Regulation 60 requires that all new family and child mediators must not only have a qualification in law, social science, mediation, or dispute resolution together with 5 days training in mediation, they must also have engaged in at least 10 hours of supervised mediation in the 12 months immediately following completion of their mediation training.

WHAT SORT OF TRAINING?

5.04 The regulations require mediators to undertake 5 days training in "mediation" before they may qualify under the regulations. During the course of the Council's inquiry into the regulations, Council members had the opportunity informally to consult their professional colleagues about the issues under consideration. As a result the Council concluded that there was strong concern about the requirement for training being only a general requirement for training in "mediation" rather than specified training in the mediation of family issues.

5.05 The Council shares this concern for the reasons outlined above in relation to the sensitivity and complexity of family disputes. There are a number of available training courses which relate specifically to mediation of family disputes. At the same time, however, the Council acknowledges that there are many competent and experienced family mediators, a number with extensive knowledge of family law and family dynamics, who have already undertaken considerable generic training in the mediation process. The Council would anticipate that any five day training course which purports to specialise in "family mediation" would include a significant component of training in general process issues. In the Council's view it would be inappropriate to require experienced family mediators to undertake a further 5 days of training in general process issues.

5.06 The Council would wish to ensure that all mediators in family disputes have some specialised training in family issues without requiring experienced family mediators to undertake a full five days of further training. Accordingly, the Council considers that paragraph 60(1) (b) of the regulations should be amended to provide that the requisite five days training in mediation must include at least three days of specific training in the theory and practice of mediating family disputes.

Recommendation 14

Amend paragraph 60(1) (b) to provide that the requisite five days training in mediation must include at least three days of specific training in the theory and practice of mediating family disputes.

THE COST OF TRAINING

5.07 In a letter to the Federal Attorney-General dated 15 October 1996, the Queensland Attorney-General and Minister for Justice, the Hon Denver Beanland MLA, expressed concern about the costs of the required mediation training, saying:

> *It is important to consider the cost of the initial and ongoing training to private mediators. In most instances the ongoing costs of complying with the Regulations are more than they can expect to earn from providing the service. In difficult financial times many solicitors will make an economic decision that they cannot afford to meet the requirements of the Regulations and will therefore not be available to promote this service. This will deny clients access to a range of service providers or, as it (sic) most likely in regional areas, access to any service providers at all."*

5.08 NADRAC understands this concern. However, the Council believes that the present training and continuing education requirements in the regulations are far from onerous when the need for consumer protection is borne in mind. Further, the Council notes that solicitors may already undertake at least some continuing legal education each year. For example, lawyers in NSW are required to undertake 10 hours of continuing legal education each year and mediation training would be accepted for that purpose.

5.09 In any event, NADRAC considers that 12 hours of continuing training in the mediation of family disputes is essential to ensure that mediators can deal appropriately with the complex and sensitive issues which arise in family mediations and do not compromise the mediation process.

5.10 Initial training courses in family mediation are offered by a number of different organisations. Some examples are:

Organisation	**Duration of training**	**Cost**
AIFLAM/ Bond University	3 days	$1100
AIFLAM/ Bond University	5 days	$1800
Bond University	5 days	$2150
Relationships Australia (Qld)	100 hours	$2500
Relationships Australia (Vic)	18 hours (approx)	$595
Relationships Australia (NSW)	22 hours (approx)	$1250

5.11 A variety of intermediate and advanced family mediation training courses (or continuing education) are offered by different organisations. Some examples are:

Organisation	**Duration of training**	**Cost**
AIFLAM/Bond University	3 days	$1100
Relationships Australia (Qld)	28 hours	$700
Relationships Australia (Vic)	23 hours (approx)	$695
Relationships Australia (NSW)	3 days	$450
Relationships Australia (NSW)	2 days	$560
Relationships Australia (NSW)	6 hours (approx)	$70
Relationships Australia (NSW)	3 hours (approx)	$35

5.12 In addition to the short training courses set out above, NADRAC notes that the University of South Australia offers a Graduate Certificate in Mediation (Family) over one year on a part-time basis and La Trobe University offers a Graduate Diploma in Conflict Resolution (Family Law Mediation) over one year on a full-time basis or two years on a part-time basis. The fees for these courses are significantly greater (approximately $3,000 and $6,000 respectively). Several other universities offer general degrees in dispute resolution which include some specialised study in family mediation. The cost of those courses may be expected to be comparable to the courses offered by the University of South Australia and La Trobe University.

5.13 Training providers report that, in response to the Family Law Regulations, there is now significant demand from private mediators who have less than 5 days training to undertake the extra training necessary to enable them to qualify under the regulations. The cost of the training does not necessarily seem to be having a deterrent effect, at least on metropolitan solicitors. The Council considers this to be evidence that the Family Law Regulations are working to increase the skills of private mediators.

THE NEED FOR FURTHER TRAINING

5.14 The Queensland Attorney-General raised the onerous nature of the requirement in regulation 61 for solicitors to undertake ongoing mediation training.

5.15 Regulation 61 provides:

> 5.16 A person who is eligible under regulation 60 to provide family and child mediation:
>
> a) must undertake at least 12 hours education or training in family and child mediation each calender year; and
>
> b) must not provide mediation services if a period longer than a year has elapsed since last undertaking training.

5.16 The Council does not believe that the requirement in regulation 61 to undertake at least 12 hours of further education or training in family and child mediation each year needs to be amended. The Council believes that there should now be sufficient individuals and organisations with experience of the regulations to provide training courses that meet this requirement.

WHAT CONSTITUTES "SUPERVISION"

5.17 There has been considerable concern about what constitutes "supervised mediation" for the purposes of paragraph 60(1)(c) of the regulations.

5.18 The Council does not consider this to be an issue. Supervision is not defined by the regulations (perhaps intentionally), and should, in the Council's view, be interpreted broadly. The Council does not consider that the supervisor would necessarily need to be present at the mediation. In this context, it is important to have regard to the purpose of supervision which is to be sure that an experienced mediator assists novice mediators to develop their skills. In this context supervision could include co-mediation with an experienced mediator and/or any appropriate combination of the following:

- feedback on written records / notes / report;
- feedback on video recordings;
- the distance supervision package developed by the Queensland Law Society;
- the debriefing process following co-mediation;
- subsequent oral consultation with supervising mediator;
- consideration of statistical data (eg outcomes, mediation times); and
- consideration of any client feedback.

SUPERVISION REQUIREMENTS

5.19 As previously noted, paragraph 60(1)(c) of the regulations requires new family and child mediators to have engaged in at least 10 hours of supervised mediation in the 12 months immediately following their training.

5.20 Subregulation 60(5) provides that "supervised mediation" means mediation that is supervised by:

a) an experienced court mediator or community mediator; or

b) a person who is the regular provider of a training course of a kind described in paragraph (1)(b); or

c) a person who is:

i) an experienced dispute mediator; and

ii) a practising member of:

A) the Law Society of a State or Territory; or
B) the Bar Association of a State or Territory; or
C) the Australian Psychological Society Limited; or
D) the Australian Association of Social Workers Limited.

5.21 The Council believes that supervisors of family and child mediators should have specific knowledge or experience in the resolution of family disputes. Court mediators and community mediators will meet this requirement by reasons of their employment in any organisation, a substantial function of which, is to resolve family disputes. Furthermore, if the Council's recommendation with respect to paragraph 60(1)(b) (above) is accepted then paragraph 60(5)(b) would extend only to providers of training courses in the mediation of family disputes. However, the Council considers that subparagraph 60(c)(i) should be amended to ensure that all independent supervisors are not simply 'experienced dispute mediators' but have experience in the mediation of family disputes.

Recommendation 15

That subparagraph 60(c)(i) be amended to ensure that any independent supervisors are experienced in the mediation of family disputes.

5.22 The Council notes that the requirements for practice as a lawyer, psychologist or social worker are changing and that it may be possible to practice without necessarily being a member of the relevant professional body. Accordingly, the Council suggests that subparagraph 60(c)(ii) should be amended to include persons eligible for membership of the specified bodies.

Recommendation 16

That subparagraph 60(c)(ii) be amended to include persons who are eligible for membership of the relevant professional bodies.

IMPACT OF TRAINING AND SUPERVISION REQUIREMENT

5.23 In his letter to the Federal Attorney-General of 15 October 1996, the Hon Denver Beanland MLA also expressed concern about the detrimental impact of the training requirement on solicitor mediators in Queensland. Mr Beanland said:

> *Although many solicitors have some mediation training, for the most part they do not have sufficient training or supervision to meet the requirements of the Regulations. This means that as of 11 June 1996 these solicitors are not able to continue a valuable service that has been growing in popularity since 1990. It will take most solicitors at least 12 months to comply with the Regulations. If they are forced to deny clients this service during this period the growth of mediation and its acceptance will suffer a severe setback.*

5.24 The Council's recommendation to amend the Act to make it clear that only those mediators who wish to obtain the benefits and protection of the Family Law Regulations need comply with them should address this problem. Mediators who do not meet the requirement of the legislation will be able to continue to mediate in family disputes.

5.25 However, until such time as these mediators meet the requirements of the regulations they will not have the right to refer to themselves as family and child mediators under the Act, will not receive the protections of the Act and will not be able to advertise in Family Court registries. NADRAC considers that this is entirely appropriate. As noted earlier in this Report, family disputes are frequently complex and highly sensitive. A person with some mediation training who has not been specifically trained to recognise and deal with the issues arising in family disputes may do considerable harm to the participants in the mediation or to third parties who are affected by the outcome of the mediation, including the participants' children.

LEGAL AID CONFERENCES AND SUPERVISION

5.26 In July 1996 the Queensland Law Society Inc expressed concern to the Attorney-General's Department about whether the experience which many lawyer mediators in Queensland had obtained in legal aid conferences would be recognised as supervised mediation for the purposes of paragraph 60(1)(c) of the regulations or as practical mediation for the purposes of the grandparent clause. These concerns were subsequently raised with the Attorney-General directly by members of the profession at a function in Brisbane organised by the Queensland Chapter of LEADR.

5.27 The Family Law Act provides no assistance in resolving this question as it contains no general definition of "mediation". The issue of whether legal aid conferences should be conducted in accordance with he Act and the regulations (ie whether they should be

regarded as "family and child mediation") is a different one which is discussed above in Chapter 3, at paragraphs 3.39 – 3.41.

The view of the Legal Aid Office (Queensland)

5.28 In its letter to the Attorney-General's Department the Legal Aid Office (Queensland) distinguished its conferencing process from " family and child mediation" on the basis that:

- attendance is compulsory;
- the process is not based upon a facilitative mediation model but is far more evaluative and 'legal rights' focused;
- the Chairperson is required to provide a report to the Legal Aid Office which may be relied upon by when assessing eligibility for legal aid.

Resolving the concerns

5.29 NADRAC is not and does not wish to be seen as an arbitrator upon whether or not various models of dispute resolution constitute 'mediation'. This issue is ultimately one for the courts to decide when and if the issue is raised for their consideration.

5.30 The Council will shortly be producing an issues paper on definitions which sets out some broad definitions for a wide range of dispute resolution processes including mediation. In the Council's view the legal aid conferencing process adopted by the Legal Aid Office (Queensland) contains sufficient elements of mediation for the Council to consider it "mediation" within the context of its proposed definition. Accordingly, NADRAC considers that experience gained in legal aid conferences which involve family disputes could be appropriately recognised for the purposes of both supervision and the grandparent clause.

CHAPTER 6: OTHER ISSUES

6.01 There are a number of miscellaneous issues which remain to be dealt with. These include:

- the onerous and impracticable nature of some of the procedural requirements in the regulations;
- concerns about mediator neutrality and conflict of interest; and
- questions about the role of legal practitioners in mediations under the regulations.

PROCEDURAL REQUIREMENTS OF THE REGULATIONS

6.02 Several members of Council who are directly concerned in the provision of family mediation expressed considerable concern about the impact of some of the procedural requirements in regulations 62 and 63 upon the efficient provision of their mediation services. This view was supported by comments which other members of Council received from family mediation practitioners. Council believes that many of the procedural requirements are felt to be overly onerous, impractical and inconsistent with the existing administrative procedures adopted by several of the larger family mediation organisations, whilst not providing benefits to consumers.

6.03 In view of this the Council considers that the following changes should be made to regulations 62 and 63.

Regulation 62 assessment

6.04 *Responsibility for undertaking assessment* Subregulation 62(1) requires a mediator to whom a dispute has been referred to conduct an assessment of the parties to the dispute to determine whether mediation is appropriate.

6.05 This procedure is inconsistent with the practice in most of the major mediation organisations operating in the field of family mediation. In many organisations the initial assessment is undertaken by trained intake officers rather than mediators. Assessment of suitability for mediation by trained persons is extremely important. The Council accepts that it is appropriate to require that either the mediator will undertake such an assessment or will satisfy herself or himself that such an assessment has been appropriately carried out. NADRAC recommends that subregulation 62(1) be amended accordingly.

6.06 *Ability to negotiate freely* Subregulation 62(2) provides that, in determining whether mediation is appropriate, the mediator must consider whether the ability of any party to negotiate freely in the dispute is affected by certain specified matters. Again, this provision is inconsistent with the practice in many of the major family mediation organisations. The Council proposes that this subregulation should be amended to make

it clear that either the mediator must consider the ability of the parties to negotiate freely or must be satisfied that this issue has been considered by an appropriately trained intake officer.

6.07 *Suitability for mediation* Subregulation 62(3) provides that the mediator may provide mediation if, after considering the matters in subregulation (2), the mediator decides the mediation is appropriate. Subregulation (4) provides that the mediator must not provide mediation if, after considering the relevant matters, the mediator decides that mediation is inappropriate. Subregulation (3) appears to be redundant in the light of the prohibition in subregulation (4) which implies that mediation is permissible in other circumstances. Accordingly, the Council suggests that subregulation (3) be removed.

6.08 Subregulation (4) (and subregulation (3) if retained) should reflect the fact that the decision as to whether or not the mediation should proceed may be taken by either the mediator or a trained intake officer.

Recommendation 17

The procedural requirements in regulation 62 should be amended as follows:

62(1) to provide that the mediator must conduct the assessment or must be satisfied that the assessment has been appropriately conducted;

62 (2) to provide that the mediator must consider the ability of the parties to negotiate freely or must be satisfied that this has been considered;

62(3) remove (the provision is unnecessary);

62(4) to reflect the fact that the decision as to whether or not the mediation should or should not proceed may be taken by either the mediator or an appropriately trained intake officer.

Regulation 63 Provision of information

6.09 The Council supports a provision which ensures that certain information is provided to the participants before the formal mediation session commences. Nevertheless, NADRAC considers that the provisions in regulation 63 are far too detailed and create unnecessary administrative difficulties for mediators, particularly for the larger mediation organisations.

6.10 *Subregulation 63(1)* Subregulation (1) requires a written statement containing specified information to be provided to the participants at least 1 day before the mediation commences. This provision may act to delay mediations that would be better dealt with urgently. Furthermore, it may tend to confuse the participants to the mediation by requiring that they be provided with a great deal of unnecessary and possibly irrelevant legal and technical information at a time when they are emotionally stressed and have a limited capacity to comprehend that information. In addition, anecdotal evidence suggests that many mediators are confused about the onus which the provision appears to

place on them to provide the participants with legal advice about the operation of the Family Law Act.

6.11 In view of these factors, NADRAC considers that the subregulation should be amended to remove the requirement that a written statement must be provided at least one day before the mediation. Instead, the provision should require that, before the formal mediation session commences, the participants are to be provided with the information specified. The information should be required to be provided in a manner (whether orally or in writing) that is appropriate to the circumstances of the particular case. The Council notes that the expression " mediation exercise" is unusual and that the term "mediation session" is more widely recognised.

6.12 *Paragraph 63(1)(a)* Paragraph (a) requires the participants to be informed that the mediation will follow a particular model. This provision is too restrictive. While, the Council believes that most family mediators would, in general, use the facilitative model outlined, many mediators would vary this model from time to time in accordance with the characteristics of the particular case. Furthermore, the Council believes that it is best to leave the mediator or mediation organisation to describe the process which they intend to adopt in the manner which they consider to be most appropriate. Accordingly, the Council recommends that the paragraph should be amended to require the mediator to simply outline the process the mediator proposes to adopt and indicate that the mediator's role is a neutral one.

6.13 *Paragraph 63(1)(b)* Paragraph (b) provides that if the dispute involves a child the participants must be informed:

(i) that each parent has parental responsibility for the child, within the meaning of section 61B of the Act; and

(ii) that the best interests of the child are the paramount consideration in any decision that affects him or her; and

(iii) the requirements under Division 4 of Part VII of the Act to register a parenting plan in respect of the child.

6.14 While NADRAC considers that this information is important and should be provided the Council believes that many mediators who are not lawyers are concerned that this paragraph appears to require them to give legal advice. Accordingly, the Council recommends that subparagraph (i) should be amended by deleting the words "within the meaning of section 61B of the Act" and subparagraph (iii) should be replaced with a simple requirement to inform the participants how they may register a parenting plan.

6.15 *Paragraph 63 (1)(c)* This paragraph requires the participants to be informed that the mediators role is to facilitate discussion and not to advise them or provide them with legal advice. NADRAC believes that this provision is too detailed and that the objective is satisfactorily dealt with by the suggested amendment to paragraph (a).

6.16 *Paragraph 63 (1)(d)* Paragraph (d) requires that the participants be informed that mediation may not be appropriate for all disputes, particularly if the dispute involves violence. This paragraph is an important one which requires no amendment.

6.17 *Paragraph 63 (1)(e)* Paragraph (e) requires the participants to be informed that mediation is not compulsory in order to commence proceedings in the Family Court. While this information is technically correct it may tend to create confusion in the mind of the participants. Many Legal Aid Commissions now run mediation conferences as a necessary prerequisite to the grant of legal aid. Furthermore, both the Family Court and family lawyers are now encouraging parties to attempt mediation as a preliminary step to the commencement of legal proceedings. Informing the participants that mediation is not compulsory after they have decided to use it is unlikely to be useful and may simply cause the participants to be confused about whether they are doing the right thing. In the Council's view it would be preferable to remove this provision.

6.18 *Paragraph 63 (1)(f)* Paragraph (f) requires the participants to be informed that they have the right to obtain legal advice at any stage in the mediation process. This is an important provision. Parties must be made aware that they can stop the proceedings at any point if they feel the need to obtain expert advice. The Council endorses this provision.

6.19 *Paragraph 63 (1)(g)* Paragraph (e) requires that the participants be informed that they have a right to terminate the mediation at any time. NADRAC considers this to be appropriate. However, the Council believes the participants should be informed that the mediator may also terminate the proceedings at any time. Mediators may choose to do so because, among other things, they believe that one of the participant is bargaining in bad faith, because they believe the participants' proposed agreement is illegal or unconscionable or simply for urgent personal reasons. The Council recommends that this paragraph should be amended accordingly.

6.20 *Paragraph 63 (1)(h)* Paragraph (h) requires the participants to be informed that the mediator is immune from civil liability. NADRAC considers that this provision is unnecessary and potentially confusing particularly in view of the Council's earlier recommendation (Recommendation 2, paragraphs 3.43 – 3.56) that the immunity provision should not extend to serious misconduct on the part of the mediator.

6.21 *Paragraph 63 (1)(j)* This paragraph requires the participants to be informed that, under section 19N, evidence of anything said in the mediation is inadmissible in later legal proceedings. While the Council would agree that this information is important it would suggest that the paragraph could be expressed more simply in plain user friendly language. As already noted many mediators are not lawyers and find legal language difficult to comprehend. It would be better if the regulations did not appear to require such mediators to give legal advice on the interpretation and meaning of particular sections of the Act. If the inadmissibility provision is to be subject to an exception regarding serious misconduct on the part of the mediator, as previously suggested by Council (see paragraphs 3.57 – 3.72), this should also be drawn to the participants attention.

6.22 *Paragraph 63 (1)(k)* Paragraph (k) requires the participants to be informed of the mediator's confidentiality and disclosure obligations and goes on to refer to details of the specific legislative provisions which apply to community mediators or private mediators. The Council's comments with respect to paragraph (k) are the same as for paragraph (j). The paragraph could be more simply expressed in plain user friendly language. For

example, it might be sufficient to say "details of the mediator's confidentiality and disclosure obligations".

6.23 *Paragraph 63 (1)(l)* This paragraph requires the participants to be informed of the qualifications of the mediator to be a family and child mediator. The Council considers that details of the mediator's qualifications are unnecessary at this stage of the mediation process. Accordingly, the Council recommends that the present paragraph (l) should be removed. Instead, the Council believes a new paragraph should be added to subregulation 63 which requires the participants to be informed that the mediation is "family and child mediation" under the Family Law Act and is to be conducted in accordance with the requirements of the Family Law Regulations and that the mediator is qualified accordingly. A provision of this nature would help to avoid some subsequent litigation as to whether or not the mediation was "family and child mediation" within the meaning of the Family Law Act. This issue is discussed in greater depth at Chapter 3, paragraphs 3.36 - 3.38.

6.24 *Paragraph 63 (1)(m)* Paragraph (m) requires the participants to be informed of the fees which are to be charged. This is an important provision and the Council endorses it.

6.25 *Subregulation 63(2)* Subregulation (2) requires the participants to certify that they have received the written statement before the mediation commences. The Council notes that such a certificate of receipt is no guarantee that the information has been read or understood. Participants in family mediation are frequently in a highly emotional state and may be unwilling to read a written statement, no matter how early it is provided to them, or to be capable of fully understanding it if they do. As Professor Wade has pointed out, the certificate "*has the benefit of certainty and clear proof, but also has the disadvantage that many clients as first time users of mediation services will sign without reading the document, and/or will not understand the cognitive list of propositions*"[48]. Furthermore, the apparent "legality" of such a certificate contrasts with the "informal" nature of mediation and may discourage some people from using the mediation service.

6.26 The Council has proposed that the Family Law Act should be amended to make it plain that only those mediators who require the protections of the Act need to comply with the regulations. If this proposal is adopted then, whenever a mediator relies upon the protections of the Act, evidence will be admissible as to whether the mediation was conducted in accordance with the regulations. A signed document to the effect that a participant had received the required information could be misleading in this context.

6.27 Consequently, NADRAC does not consider that this provision serves a useful purpose and recommends that it should be removed.

6.28 *Subregulation 63(3)* Subregulation (3) provides that a mediator must not commence mediation until subregulations (1) and (2) are complied with. This provision appears to be redundant. The Council recommends that it be removed.

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48 Professor John Wade, op cit, p 6.

Recommendation 18

The requirement to provide information in regulation 63 should be amended as follows:

63(1) **to remove the requirement that a written statement must be provided at least one day before the mediation and to require that, before a formal mediation session commences, the participants are to be provided with the information specified in a manner (whether orally or in writing) that is appropriate to the circumstances of the case;**

(a) **to simply require the mediator to outline the process which the mediator proposes to adopt and to explain the neutral role of the mediator without specifying the information which the mediator is required to convey;**

(b)(i) **delete "within the meaning of section 61B of the Act";**

(b)(iii) **to replace with a simple requirement to inform the participants how they may register a parenting plan;**

(c) **remove (this provision would now be addressed by paragraph (a));**

(e) **remove;**

(g) **to add that the mediator also has the right to terminate the mediation at any time;**

(h) **remove;**

(j) **to express in plain user friendly language;**

(k) **to express in plain user friendly language;**

Recommendation 18 continued...

(l) **remove, instead, a new provision should be added which requires the participants to be informed that the mediation is being conducted in accordance with the requirements of the Family Law Regulations and that the mediator is qualified accordingly;**

63(2) remove;

63(3) remove.

MEDIATOR NEUTRALITY AND POTENTIAL CONFLICTS OF INTEREST

6.29 Professor Wade has raised a further concern about the impact of the provision in subregulation 65(1)[49]. Subregulation 65(1) provides:

> **65(1)** [**Avoiding conflict of interest**] If, in relation to a person who is a party to a dispute that is the subject of mediation, or any other party to that dispute, a community mediator or private mediator:
>
> (a) has acted previously in a professional capacity (otherwise than as a family and child mediator, a family and child counsellor or an approved arbitrator); or
>
> (b) has had a previous commercial dealing; or
>
> (c) is a personal acquaintance;
>
> the mediator may provide family and child mediation services to the person only if;
>
> (d) each party to the mediation agrees; and
>
> (e) the previous professional dealing (if any) does not relate to any issue in the dispute; and
>
> (f) the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the mediator in the provision of his or her mediation services.

6.30 Professor Wade considers that the provision goes too far to protect the perception of neutrality in prohibiting the changing of roles from "professional" adviser to mediator. He says:

> *Arguably the interest is sufficiently protected by both parties signing acknowledgments that:*
>
> *1. The mediator has previously acted in the capacity of adviser and yet they both still want him / her to now act as a mediator;*
>
> *2. If the dispute is not settled during mediation, neither will be able to employ the mediator again in the capacity as an adviser in relation to the same issues.*

6.31 Professor Wade goes on to point out:

> *This solution allows access to a larger pool of trusted mediators (particularly in country areas). Otherwise, the pool of trusted mediators may be dramatically reduced if members of the family have interviewed several lawyers and counsellors as professional advisers before eventually deciding to go to mediation.*
>
> *This solution also accords with the ethical codes of a considerable number of mediation organisations.*
>
> *It is not clear whether reg. 65 applies where one family member has been interviewed by an employee of an organisation (eg, UNIFAM, Centacare, Relationships Australia or a law firm) where the individual employee is acting as a lawyer or counsellor, but then the family*

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49 Professor John Wade, op cit, p 19.

later wants to use another member of the same organisation as a mediator. Are individuals or whole organisations disqualified by reg. 65(1)(3)?

6.32 The Council considers that there are two considerations which must be balanced here. The first is the one raised by Professor Wade as to the need of people in rural and remote areas to have ready access to a well qualified mediator, particularly when such mediators may be in short supply. The second is the very troubling issue of potential power imbalance which may arise where the mediator has previously acted in a professional capacity for one of the parties.

6.33 This concern is clearly exemplified by the following example. A couple wish to mediate a dispute concerning the distribution of marital property. That property substantially comprises a family farm which has been inherited by one of the spouses from their family who owned the farm for a number of generations. The only mediator in the local town is the trusted solicitor who has previously advised and/or represented the married couple. The firm in which that solicitor is a partner has traditionally represented the family of the spouse who inherited the farm. In these circumstances there must clearly be some apprehension of bias on the part of the solicitor mediator no matter how well intentioned or trusted the person is. Yet, a scenario such as this could not be considered to be particularly unusual in rural Australia.

6.34 These difficulties may also arise in some of the smaller ethnic groups in the cities, where a person fluent in the language (either mediator or interpreter) is highly likely to be from the same family as one or all of the persons in dispute. Experience in Sydney suggests this problem is acute amongst communities drawn from the smaller Pacific Island nations and also the Catalan, Assyrian and some African communities. The language barrier can be a particular problem in this case because it may prevent the mediator or participants to the mediation identifying partiality or bias.

6.35 It is the Council's view that the interests of the participants in mediation must be protected particularly in circumstances where it may not be possible to obtain subsequent relief if neutrality is breached. The immunity and inadmissibility provisions will clearly make it very difficult, if not impossible, to obtain such redress even if the provisions are amended to allow actions against the mediator for serious misconduct.

6.36 Furthermore, the Council does not consider that the difficulty of travelling to find a suitable mediator should be over emphasised. In most areas of rural Australia an alternative mediator could be found within no more than a few hours drive.

LEGAL REPRESENTATION OF PARTIES IN FAMILY AND CHILD MEDIATION

6.37 There is an impression among members of Council that there is an increasing tendency for only one of the participants in family mediations to be legally represented in the mediation. This may reflect the fact that one of the participants is entitled to legal aid while the other is not. The Council considers that this is a vexed issue which raises the question of imbalances of bargaining power, particularly in family mediation, together with questions about the availability of legal aid funding for family mediation. The issue has not been raised with the Council by the Attorney-General or by other members of the profession. Accordingly, NADRAC does not wish to pursue it for the purposes of this

Report. However, the Council considers that the issue is one which should be reviewed at a later stage.

APPENDIX A

MEDIATION LEGISLATION

A wide variety of Australian statutes refer to 'mediation'. The following list enumerates a number of these but there may be other statutes that could be included.

Commonwealth

Family Law Act 1975
Family Law Regulations
Family Law Rules
Federal Court of Australia Act 1976
Federal Court Rules
Native Title Act 1993

Australian Capital Territory

Commercial Arbitration Act 1986

New South Wales

Commercial Arbitration Act 1984
Community Justice Centres Act 1983
Compensation Court Act 1984
District Court Act 1973 No 9
Industrial Relations Act 1991
Land and Environment Court Act 1979
Local Courts (Civil Claims) Act 1970
Supreme Court Act 1970
District Court Act 1973
Farm Debt Mediation Act 1994
Industrial Relations Act 1991
Industrial Court Rules (Transitional) Regulation 1992
Land and Environment Court Act 1979
Legal Profession Act 1987
Legal Profession Regulation 1994
Local Court (Civil Claims) Act 1970
Retail Leases Act 1994
Supreme Court Act 1970

Northern Territory

Local Court Act 1989

Queensland

Commercial Arbitration Act 1990

Supreme Court of Queensland Act 1991
Rules of the Supreme Court 1900
Dispute Resolution Centres Act 1990

South Australia

Commercial Arbitration Act 1986
District Court Act 1991
District Court Rules 1992
Magistrates Courts Act 1991
Supreme Court Rules 1987

Tasmania

Commercial Arbitration Act 1986

Victoria

Commercial Arbitration Act 1984
County Court Act 1958
County Court Miscellaneous Rules 1989
County Court (Building Cases) Rules 1989
County Court Rules of Procedure in Civil Proceedings 1989
Supreme Court Act 1986
Supreme Court General Rules of Procedure in Civil Proceedings 1986

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