**To the Commissioner in Charge: The Honourable Justice Derrington SC**

**Response to the Australian Law Reform Commission Discussion Paper 86: Review of the Family Law System**

By Donna Cooper

13 November 2018

**Dispute Resolution**

**Proposal 5.4**

I agree with the proposal that the guidance as to assessment of suitability for FDR currently set out in regulation 25 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) [FDRP Regulations] should be moved to the Family Law Act 1975(Cth) [FLA].

However I do not agree that all that should be required for property and financial matters is the lodgement of a “genuine steps statement” as set out in proposal 5-4. I would submit that there should be a similar provision to section 60I in Part VIII of the FLA and that a property application should not be filed unless accompanied by a FDR certificate or unless the applicant sets out their reasons for an exemption from this requirement. The reasons for the exemption could be those set out in Proposal 5.3.

If the need for a FDR certificate was introduced this would mean that a far greater number of parties would attempt FDR before filing an application in court, as has been the experience in the parenting area since the introduction of section 60I. This would result in a significant reduction in the number of cases being filed in family courts.

**Proposal 5.4 and Questions 10-2, 10.5**

I would submit that people conducting family dispute resolution in parenting and property matters should ideally be accredited FDRPs. It is common that parties want to mediate in relation to both parenting and property issues in one FDR session and also that parenting issues will often overlap with financial issues, particularly parenting issues and child support.

Further, FDRPs receive a significant amount of specialised training to deal with couples in conflict. They cover areas such as the causes of conflict and the dynamics of conflict. They also cover areas such as the various types of power and how to deal with power imbalances.

FDRPs are currently required to complete the equivalent of the core units of the Graduate Diploma of Family Dispute Resolution which[[1]](#footnote-1)include the following modules:

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| CHCDFV008 Manage responses to domestic and family violence in family work  CHCDSP003 Support the safety of vulnerable parties in dispute resolution |

If a key goal of the current review is to increase protections for victims of violence, vulnerable parties and those from different cultural backgrounds, development in these types is included in the training that FDRPs complete. The training required for FDRPS is vastly more extensive than the training required for for nationally accredited mediators under the NMAS system.

A further concern is at present there is no actual requirement under the FLA or FDRP Regulations, or any proposal in the current Discussion Paper, for people mediating family law property disputes to have any mediation or dispute resolution training, they do not even have to be nationally accredited mediators under the National Mediation Accreditation Scheme (NMAS). At the very least people mediating family law property and financial disputes should be required to be nationally accredited mediators. The lack of any mediator training requirements for what probably is now probably a small minority of people conducting property and financial mediations is a real concern, particularly in relation to the quality of mediators who may be mediating disputes with separating couples, particularly where there may be issues of family violence.

NMAS mediators are required to complete basic training in power and in conducting intake and screening for suitability for mediation where there are issues of violence. FDRPs complete far more detailed and comprehensive training in these areas.

**Proposal 5.5**

The circumstances for the issuing of certificates in both property and parenting matters needs to be broader to cover the different scenarios that FDR providers are encountering. I would agree that the requirement to assess “genuine effort” has been difficult for FDR providers. Also family law practitioners have reported that the type of certificate issued is not often relevant once the case reaches the family courts.

For FDR providers the process would be more streamlined if the requirement for “genuine effort” is deleted and the range of certificates that can issue is broadened to cover some of the common scenarios that occur in practice, such as parties responding but stating that they do not wish to participate or responding and stating that they do wish to participate in FDR but want to do so with a different service provider, this is particularly the case when a party cannot afford a private mediator and wants to approach a community provider.

Some parties are quite distressed that a “refusal” certificate may be issued if they cannot afford the private provide and consequently want to approach a more affordable service provider so the option of a specific certificate to this effect would assist to alleviate unwanted stress for some parties who are already stressed from the separation of their family.

I would suggest the following categories would cover the scenarios FDR providers currently encounter.

1. The matter was assessed as not suitable for FDR
2. The person to whom the certificate had issued had attempted to initiate a FDR process but the other party has not responded
3. The person to whom the certificate had issued had attempted to initiate a FDR process but the other party has responded and advised that they will not participate in a FDR process
4. The person to whom the certificate had issued had attempted to initiate a FDR process but the other party has responded and advised that they will not participate in a FDR process at the Service which issued the invitation as they indicated they wanted to use a different Service
5. The parties had commenced FDR and the process had been terminated
6. The matter had commenced and concluded with full resolution of the issues
7. The matter had commenced and concluded with partial resolution of the issues

**Amendments Required to Sections 10H and J and 10D and 10E FLA**

Sections 10H and 10J of the Family Law Act should be amended so that Intake, the preliminary interviews and screening processes that occur prior to the actual mediation session is confidential. Further that section 10J and 10E of the FLA is specifically amended so that if a party makes a threat to harm another adult in a FDR or counselling session that this threat is admissible in any future court proceedings in any jurisdiction.

**3. Simpler and Clearer Legislation**

**Proposals 3.3-3.7:**

I agree with proposal 3.1 that the FLA should be redrafted to be simpler and clearer.

I agree that the presumption in s61DA should be deleted and that section 65DAA should be deleted as it is not appropriate for the court to have to consider certain time arrangements. However the amendments need to take into account psychological and emotional abuse.

The proposed amendments that appear to delete the primary considerations in section 60CC(2) and are currently suggested to be drafted in terms of “safety” do not go far enough as they don’t appear to take into account psychological and emotional abuse, particularly exposure to family violence or to very high conflict between parents.

I would suggest also that there be further additions to the new set of best interest factors, for example that sections 60CA and 60CC be redrafted as follows:

**Section 60CA:**

The court must regard the child’s best interests as the paramount consideration.

**Section 60CC**

In determining what arrangements will be in the child’s best interests the court must consider the following best interest factors:

Whether particular arrangements are safe for the child and the child’s parents or carers, including safety from physical and psychological harm and from being subjected or exposed to abuse, neglect or family violence. That this best interest factor is the overriding consideration taking priority above all of the further best interests factors listed below.

The benefit to the child of having a meaningful relationship with both parents or carers and any other person who has had a significant involvement with the child.

Any relevant views or perspectives expressed by the child;

The developmental, physical, psychological, emotional, educational and health needs of the child and the capacity of each proposed parent or carer to provide for these needs;

The capacity of each proposed parent or carer to cooperate and communicate with the other carer to ensure a safe, secure and positive environment for the child;

The capacity of each proposed parent or carer to ensure appropriate and safe transitions between parents or carers during changeovers;

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The benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, siblings and step-siblings, where it is safe to do so;

The attitude to the responsibilities of parenthood of parents and carers, including providing financially for the child where they have the financial means;

If the child is of Aboriginal, Torres Strait Islander or other cultural background, the child’s right to appreciate and learn about the culture; and

Anything else that is relevant to the particular circumstances of the child.

1. Industry Skills Council Graduate Diploma of Family Dispute Resolution CHC8115. See Attachment A to this submission. [↑](#footnote-ref-1)