

**The Mediation Standards Board (MSB) has made responses to the sections that address dispute resolution and the qualifications and training required in the family law system. The recommendations from the MSB focus on the purpose and requirement of NMAS for practitioners in family law system. The MSB agrees with the continued importance of dispute resolution as a way for separating parties to resolve both children and property issues.**

## **5. Dispute Resolution**

- Expanding the availability of FDR
- FDR in property and financial matters
- Supporting further development of FDR and LADR models

**Proposal 5–1** The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

**Proposal 5–2** The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

**Proposal 5–3** The *Family Law Act 1975* (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters. There should be a limited range of exceptions to this requirement, including:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);
- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter;
- and

**Proposal 5–4** The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless

the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

**Proposal 5–5** The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;
- the parties had commenced family dispute resolution and the process had been terminated; or
- the matter had commenced and concluded with partial resolution of the issues in dispute.

**Question 5–1** Should the requirement in the *Family Law Act 1975* (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

**Proposal 5–6** The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:

- earnings, including those paid or assigned to another party;
- vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;
- income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- superannuation interests; and
- liabilities and contingent liabilities.

**Proposal 5–7** The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:

- impose a consequence, including punishment for contempt of court;
- take the party's non-disclosure into account when determining how costs are to be apportioned;
- stay or dismiss all or part of the party's case; or

- take the party's non-disclosure into account when determining how the financial pool is to be divided.

**Question 5–2** Should the provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

**Proposal 5–8** The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:

- they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:
  1. (a) impose a consequence, including punishment for contempt of court;
  2. (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
  3. (c) stay or dismiss all or part of the party's case; and
  4. (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

**Question 5–3** Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

**Proposal 5–9** The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. This should include:

- examining the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres;
- the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such

as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and

- amendments to existing funding agreements and practice agreements to support this work.

**Proposal 5–10** The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.

These Guidelines should include:

- guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;
- effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk;
- the respective roles and responsibilities of the professionals involved;
- the application of child-inclusive practice;
- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;
- practices relating to referrals from and to the family courts; and
- information sharing and collaboration with other services involved with the family.

**Response:** MSB agrees with 5.9 and 5.10 and recommends that NMAS training should be the basis for any specialised family dispute resolution practice and processes. NMAS Accreditation ensures that practitioners have the process, skills and attitude required for dispute resolution. The complexities of FDR can be built upon the NMAS accreditation.

**Proposal 5–11** These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

## 10. A Skilled and Supported Workforce

- A workforce capability plan for the family law system
- FDR practitioners and property matters
- Legal practitioners and family violence training
- Children's Contact Services 249 Judicial appointments
- Reports in children's matters
- Professional wellbeing

**Proposal 10–1** The Australian Government should work with relevant non- government organisations and key professional bodies to develop a workforce capability plan for the family law system.

**Response:** MSB agrees.

**Proposal 10–2** The workforce capability plan for the family law system should identify:

- the different professional groups working in the family law system;
- the core competencies that particular professional groups need; and
- the training and accreditation needed for different professional groups.

**Response:** MSB agrees.

**Proposal 10–3** The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- an understanding of family violence;
- an understanding of child abuse, including child sexual abuse and neglect;
- an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;
- an ability to identify and respond to risk, including the risk of suicide;
- an understanding of the impact on children of exposure to ongoing conflict;
- cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;
- disability awareness; and
- an understanding of the family violence and child protection systems and their intersections with the family law system.

**Question 10–1** Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

**Response:** MSB recommends that dispute resolution process and skills competencies should be at the basis of any competencies for the family law system. Mediation accreditation under NMAS would ensure these competencies form the basis for professionals engaged in the family law system.

**Proposal 10–4** The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training— including cross-disciplinary training—and accreditation of family law system professionals.

**Proposal 10–5** In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.

**Question 10–2** What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

**Response:** MSB recommends that NMAS Accreditation be at the basis of FDRP training and that NMAS be considered as base training and qualifications for any one practicing FDR.

**Proposal 10–6** State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.

**Proposal 10–7** The *Family Law Act 1975* (Cth) should provide for the accreditation of Children’s Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.

**Question 10–3** Should people who work at Children’s Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

**Proposal 10–8** All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person’s knowledge, experience and aptitude in relation to family violence.

**Question 10–4** What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

**Response:** MSB recommends consideration be given to NMAS Accreditation as a criteria to the appointment of federal judicial officers.

**Question 10–5** What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

**Proposal 10–9** The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

**Proposal 10–10** The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.

**Proposal 10–11** When requesting the preparation of a report under s 62G of the *Family Law Act 1975* (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

**Proposal 10–12** In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter.

**Proposal 10–13** The *Family Law Act 1975* (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person's parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations about how that person's disability may, or may not, affect their parenting.

**Proposal 10–14** The *Family Law Act 1975* (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

**Question 10–6** Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

**Proposal 10–15** The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.