National Alternative Dispute Resolution Advisory Council

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the provisions of the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

1. The National Alternative Dispute Advisory Council (NADRAC) appreciates the opportunity to comment on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) and generally supports the provisions of the Bill.

2. NADRAC has the following comments on specific issues.

Terminology

3. Item 101 (schedule 4) of the Bill renames Part 4 of *the Federal Magistrates Act 1999* 'Primary dispute resolution for proceedings other than proceedings under the Family Law Act 1975'. Item 102 inserts proposed s 20A which will provide that the Part applies to proceedings other than those under the *Family Law Act 1975*. Given the decision to replace the term 'primary dispute resolution' in the Family Law Act, it would be more appropriate to use the term 'alternative dispute resolution' in the Federal Magistrates Act.

Compulsory dispute resolution

4. Although there is a phasing in period for compulsory dispute resolution that will match the establishment of the Family Relationship Centres (FRCs), there are nonetheless concerns there will be a lack of sufficiently qualified persons to fill the roles of family dispute resolution (FDR) practitioners. A shortage of practitioners could lead to delays, frustration and over-working of existing services.

Certificates

5. Item 9 (schedule 1) of the Bill will add a requirement for an applicant to file with his/her application for a Part VII court order a certificate from an FDR practitioner that the applicant has attended family dispute resolution with the other party (s 60I(7)(a)). This may cause difficulties for the applicant if the practitioner delays in providing the certificate, which could create further and potentially more damaging delay. NADRAC suggests that FDR practitioners be subject to an obligation to issue a certificate as soon as practicable and at least within 14 days after

the applicant has attended FDR in accordance with proposed s 60I(7)(a). An alternative to including this obligation in the Bill would be to specify it by regulation under proposed s 10R (item 32, schedule 4).

6. Where the applicant has not attended FDR because the other party refused or failed to attend, the applicant must file a certificate from an FDR practitioner to that effect before the court can hear his or her application (item 9, schedule 1, s 60I(7)(b)). This paragraph should be expanded to include circumstances where the other party refuses or fails to attend FDR, fails to respond to an invitation to attend FDR or cannot be located.

Certificates in cases of family violence

7. Item 9 of the Bill also requires applicants to file with their application, where dispute resolution is not compulsory because there are reasonable grounds to believe that there has been child abuse or family violence, a certificate from a family counsellor or FDR practitioner that the applicant has been given information about 'the issue or issues that the order would deal with' (proposed s 60J(1)). The Explanatory Statement (ES) notes that the intention of this provision is to ensure parties involved in situations of family violence are informed of the services and options that are available to them. However, it is not clear from proposed s 60J(1) what information should be conveyed and what the certificate is to contain. NADRAC suggests that the phrase 'the issue or issues that the order would deal with' be replaced with a more accurate description of the information to be provided.

8. There may also be appropriate sources for this information other than family counsellors and FDR practitioners, for example, court registries, lawyers, duty lawyers and relevant service providers. NADRAC suggests that the category of people able to provide a certificate be expanded to be as wide as possible without compromising the quality of the information given.

Other exceptions to compulsory FDR

9. Item 9 (schedule 1, s 60I(8)(c)) permits an application to be filed without a certificate where there has been contravention of a parenting order by a person who has exhibited serious disregard for his or her obligations under the order. However, this provision only applies where the court order was made within the six months before the application is made. While a time limit is necessary, a six months period is too short and NADRAC suggests that a period of 12 months would be more appropriate. It is noted that the court must consider ordering the parties to FDR when an exception to the requirement to attend compulsory FDR and file a certificate applies (proposed s 60I(9)). The court may also order the parties to attend FDR at any stage in the proceedings (proposed s 13C, item 32, schedule 4).

10. Consideration may also need to be given to the rules that apply when a child representative wishes to make an application, for example, whether an additional exception is needed in these circumstances.

Parenting plans

11. While it is accepted that parenting plans can and do work well, especially where the parties do not want formal orders, there may be difficulties in using them as proposed by the Bill. One potential concern arises from the operation of proposed s 64D (item 19, schedule 1) which will generally make a parenting order in relation to a child subject to a parenting plan subsequently entered into by the child's parents. The effect is that it assumes a discharge or variation of an order of a court without court record. This provides flexibility for the parties to agree on new parenting arrangements without going to court. However, it may raise questions about the enforcement of such orders when external factors are involved. This is despite the requirement in proposed s 64D(b) that a third party to whom the parenting order applies must agree to the subsequent plan. One particular example where there may be difficulties is where a party on a watch list attempts to remove a child from Australia on the basis of a subsequently agreed parenting plan and is unable to do so despite that agreement. There is also a danger that parenting plans will become highly elaborate and an increased cause of litigation.

12. Under the Bill, parenting plans will be given increased legal status, including by operation of proposed s 64D discussed above and s 65DAB which requires the court to have regard to the terms of the most recent parenting plan when making a relevant parenting order. However, non-lawyers may potentially be heavily involved in the parenting plan process. Proposed s 63DA sets out the substantial obligations of advisers in relation to parenting plans, including informing parents that they could consider entering into a parenting plan (s 63DA(1)), informing parents about the matters that may be dealt with in a parenting plan and the desirability of particular provisions (s 63DA(2)(b) and (d)) and informing them about the application of proposed ss 64D and 65DAB (s 63DA(2) (c) and (f)). Under the Bill, advisers are defined to be legal practitioners, family counsellors, FDR practitioners or family and child specialists (s 63DA(3)). The ES states that the intention of this provision is to inform parties of their opportunity to make parenting plans and the effects of entering into such plans. However, despite this intention, and regardless of whether advisers are legally qualified or otherwise, the mandatory tasks of advisers under this section appear to encompass advisers providing legal advice. It should be made clear that non-legally qualified persons will not be required to provide legal advice under the proposed section.

Compulsory FDR under parenting orders

13. Under proposed s 64B(4A) (item 16, schedule 1) a parenting order may require the parties to consult with an FDR practitioner to resolve a dispute about the terms and operation of the order or to reach agreement about changes to the order. However, it is important that there be exceptions to this requirement in appropriate circumstances, for example, in cases of urgency.

Joint parental responsibility

14. Proposed s 65DAC(3)(b) (item 23, schedule 1) states that a parenting order providing for joint parental responsibility is taken to require parents to consult with each other about deciding on major long-term issues, and that the parties must make a genuine effort to come to a joint decision about such issues. This provision would be difficult to enforce and there would be particular difficulties proving 'genuine effort'.

15. However, parents need to consult with each other about major long-term issues to endeavour to come to a mutual understanding about such issues. Reaching joint decisions about what is a workable parenting arrangement may not necessarily be based on parental agreement, on all or some issues, but rather on concessions made by one or both parents in the best interests of the child.

Relationship with other relatives

16. Proposed amendments to s 68F(2) (items 31 and 32, schedule 1) will add an explicit reference to the relationship between a child and his/her grandparents and other relatives to the factors the court must consider in determining the best interests of the child. The Bill also refers to grandparents and other relatives when describing the possible contents of parenting plans and parenting orders (items 13 and 16, schedule 1). The definition of relatives is very wide and extends to uncles and aunts, nephews and nieces and cousins. It is questionable whether this consideration of other relations when determining the best interests of the child is necessary. It has the potential to involve the child in an extensive array of conflict, including between two united parents and the family member of one or the other parent, and to further divide a child's time between parties other than the parents. It is suggested that where the parents are in agreement, there should be a compelling reason before a court would make an order inconsistent with that agreement.

Parties not physically present

17. Under proposed s 60KE(1)(h) the court must deal with matters, where appropriate, without requiring the physical presence of the parties in court where this would give effect to the principles for conducting child-related proceedings in proposed s 60KB (item 4, schedule 3). The ES envisages that the parties may not need to be present at court where the use of technology such as video link removes the need for their physical presence or where the court can make decisions on the papers. It would be important to ensure that the application of this provision did not inhibit, in appropriate cases, the parties meeting and, possibly with the assistance of lawyers, endeavouring to resolve the dispute.

Confidentiality obligations of family counsellors

18. Proposed s 10C(3) (item 32, schedule 4) sets out the exceptions to a family counsellor's duty of confidentiality. Under proposed s 10C(3)(d), counsellors may disclose information if they reasonably believe that it is necessary to enable them to properly discharge their functions. An equivalent exception is proposed for FDR practitioners under s 10K(d). These exceptions appear to be very broad and discretionary.

Advisory dispute resolution

19. Proposed s 10H(2) (item 32, schedule 4) defines 'advisory dispute resolution' to mean FDR where the FDR practitioner provides advice on possible outcomes of the dispute, the application of the law or an area of professional expertise besides the law. 'FDR practitioner' is defined in proposed s 10J. These two sections appear to contemplate the possibility of a non-legally qualified person giving advice on the application of the law in the context of an advisory dispute resolution session as long as he/she can be classified as an FDR practitioner. Again, it should be made clear that non-legally qualified persons would not be giving legal advice under the proposed provision.