

LEGAL AID NSW

Responses to the Consultation paper on the proposed new FDR Regulations

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Questions for response:

Changes to the accreditation criteria

Professional Indemnity Insurance

Q1. Do you have any views on the proposed change?
Response This appears to be an additional unnecessary barrier for FDR practitioners (FDRPs). It may also create challenges for FDRPs between positions as their accreditation would be cancelled or suspended for short periods of time which may also create an additional financial burden.
Q2. Does the requirement that insurance must be in place at the time of applying for accreditation present issues?
Response This additional requirement may present an issue for some applicants. In particular, those entering the profession or for individuals that seek to work as an FDRP following retirement. This additional requirement may add a further financial burden.

Fit and proper person

Q3. Does setting an outline for a 'fit and proper person' to provide FDR services, as opposed to the current simpler requirement to be 'suitable to perform the functions of an FDR practitioner', provide a clearer framework towards establishing a person's suitability to conduct themselves as an FDR practitioner?

Response

The terminology of a "fit and proper person" appears to be more suitable and reflective of the requirements to hold a legal practicing certificate. As FDRPs are working within a legal framework, this change in terminology is appropriate if it is objectively understood.

The 4 considerations outlined in the paper are:

1. any previous disciplinary action in a person's capacity as an FDR practitioner
2. any history of complaints that had been substantiated in a person's capacity as an FDR practitioner.
3. any disqualifications in relation to a professional practice other than FDR, and
4. any other matter the Secretary considers relevant.

Further information and details are needed, in particular around consideration 2 and 4. Regarding consideration 2, there is no definition of what a substantiated complaint means. Complaints in this area can be extremely complex and multifaceted. In addition, we are often dealing with complainants that are vexatious. At Legal Aid NSW, we have had experience where complaints have been used to bully and target FDRPs.

A clear definition of what factors are considered to substantiate a complaint is required.

Q4. Are the considerations being proposed reasonable and fair?

Response

In principle yes, however further guidelines and clarity are required in consultation with the industry.

Q5. Are there any other considerations that would be appropriate to include in a fit and proper person requirement?

Response

It may be appropriate to include a reference to a criminal conviction.

Clarifying the definition of an 'appropriate qualification'

Q6. Does the clarification of the relevance of the subject matter assist with transparency when determining the appropriateness of a qualification towards meeting part of the accreditation criteria?

Response

Yes, the proposed amendments do provide clarification.

Q7. Are there any other subjects that could be considered in the definition of an 'appropriate qualification'?

Response

Some additional points for consideration regarding an 'appropriate qualification'

- There is no consideration in the paper regarding the barriers faced by Aboriginal and Torres Strait Islanders in undertaking the course. Pathways and support for Aboriginal applicants needs further exploration as more Aboriginal FDRPs are needed to support Aboriginal clients and participants and create a more culturally inclusive mediation experience for clients.

- The Graduate Diploma of Family Dispute Resolution can be prohibitively expensive, with the cost creating a barrier for new potential FDRPs.
- The legal content in the diploma is very basic for family lawyers, particularly those who have worked in the area of family law for more than two years. Feedback provided to Legal Aid NSW by family lawyers undertaking the course was that only the Practicum component of the Diploma was of real value. Consideration should be given to providing exemptions to those family lawyers practicing in family law around the legal component of the course.

Excluding 'double-dipping' in qualifications

Q8. Does the proposal to specify that 'double dipping' with certified courses is not able to be accepted towards meeting the accreditation criteria, present any issues or concerns

Response

There are no concerns with this proposal.

Acknowledging the change from NMAS to AMDRAS

Q9. Does the recognition of the change from NMAS to AMDRAS in the proposed new Regulations present any issues or concerns? If so, please clarify.

Response

There is no clarity regarding what "meet the necessary changes as specified in the new AMDRAS" means for applicants. Further clarification around this is required to provide a more detailed response about whether this change will impact upon existing FDRPs.

Additional requirements to gain accreditation if using the NMAS/AMDRAS pathway

Q10. Does the proposal to require new applicants for FDR accreditation, to hold NMAS/AMDRAS for at least the preceding two years before applying for accreditation, address the perceived imbalance between NMAS/AMDRAS and an appropriate qualification such as a degree (or higher)?

Response

Yes, this proposal is supported.

Q11. Is this proposed inclusion a reasonable step to ensure mediators have sufficient skills in mediation to operate effectively in a family law environment?

Response

Yes, this proposal is supported.

Q12. Would this inclusion create a barrier that would deter people from becoming FDR practitioners using this pathway?

Response

No, it does not appear this would create a barrier.

Removal of the accreditation path relying on 3 specified units of competency

Q13. Does the removal of the three-unit pathway to meet part of the accreditation criteria present concerns or issues?

Response

Legal Aid NSW has no concerns regarding the removal of the three-unit pathway.

Q14. Is the increased requirement to undertake further study for a person returning to the FDR sector, if having only completed the three units of competency, considered a reasonable step to having the appropriate knowledge and skills to provide FDR services, or is the burden too high?

Response

This is considered a reasonable requirement.

Complaints mechanisms

Q15. How will the proposed change to complaints management for FDR services impact FDR services?

Response

Legal Aid NSW would strongly argue that this proposed change to complaints management would not have a positive impact on the way complaints are managed, in particular for those FDR practitioners working for legal aid commissions.

Legal Aid NSW is currently responsible for managing internal complaints made by participants to a mediation. The process is robust, comprehensive, transparent and timely. The process is done within the framework of the Legal Aid NSW complaints management policies and can be escalated by participants that are not satisfied with the outcome.

Every complaint is investigated by a registered and experienced FDRP, actioned within 48 hours and depending on the outcome, coaching, mentoring and further supervision can be provided to the FDRP. Participants are directly communicated with and receive a thorough response. Complaints are also used to inform training and practice development for the panel and are an invaluable learning mechanism. The Family Dispute Resolution unit at Legal Aid NSW deals with on average approximately 20 formal complaints per year. Since commencement of the Regulations only two matters have been referred to external bodies, supporting the robustness of our complaints management system.

Legal Aid NSW provides legally assisted mediations and offers several mediation models including in care and protection. Mediations can also involve social work support, the attendance of Non-Government Organisations, Department of Communities and Justice etc. There is concern that professional associations do not have the adequate experience or knowledge of this work type to appropriately investigate these complaints.

Additionally, there is no clarity regarding how confidentiality of the documents and reports be managed for the purpose of complaint investigation.

Overall, there is no evidence presented in the paper that the proposal will strengthen the management of complaints against FDR practitioners.

If this proposal is approved, Legal Aid NSW would recommend that legal aid commissions are able to be certified as complaints management bodies and a clear direction is provided about how certified complaints management bodies will manage complaints.

Q16. Will a consistent approach to complaint management be achieved by having professional associations manage all complaints about FDR services in the first instance?

Response

Legal Aid NSW would argue that the proposal could not create a consistent approach to complaints management. The proposal recommends that professional associations manage complaints of their members. Each professional association would have their own oversight, policies and processes. In addition, these agencies have an interest in maintaining membership, which may impact the manner in which complaints are managed.

A way in which to create consistency would be the establishment of a single oversight body for FDR services that is responsible for all complaints management processes.

Q17. For practitioners who do not already have an established membership with a professional association will this affect your ability to provide FDR?

Response

Yes, this may have a direct impact on practitioners' ability to provide FDRP services. FDRPs would be required to secure membership and pay the required fees, which may be prohibitive. This would have a particularly negative effect for those FDR practitioners who are employed exclusively by legal aid commissions and rely on their complaints mechanisms.

Certification of courses or units as being equal to the Graduate Diploma of Family Dispute Resolution

Q18. Does the inclusion of a more formal certification process of courses equivalent to that of the Graduate Diploma of Family Dispute Resolution, including the provision for the department to revoke the certification, present any issues or concerns

Response

This proposal appears appropriate.

Certification of the complaint management body

Q19. Does the proposed approach to formalise an agreement between a complaint management body and the department present any issues or concerns?

Response

The paper does not provide clarity regarding the requirements of the accreditation standards for associations to become approved complaints management providers. There is also no clarity regarding who will have oversight to ensure the standards are being maintained.

Providing clarity about the factors to consider in managing complaints in this area is supported to assist with consistency.

Q20. Do the issues being proposed for inclusion in the certification present any?

Response

The issues being proposed for inclusion are:

1. when investigating the complaint, consider if the practitioner has contravened a requirement of the Family Law Act or the FDR Regulations
2. receive complaints for at least 12 months after an FDR service has been provided, which will take into consideration the life-span of a s60I certificate and the nature of families with complex needs
3. notify the department if the complaint is substantiated

4. if required, arrange supervisory, coaching or mentoring services to support the practitioner's improvement in service delivery, and
5. advise the department when the body ceases to manage complaints for all, or individual, practitioners.

Proposals 1 and 2 and supported.

Regarding proposal 3, there is no clarity regarding what factors are considered when making a determination that a complaint is substantiated. Further information regarding this is required, particularly if substantiated complaints are considered when making decisions about removing accreditation.

Regarding proposal 4, who will be responsible for providing those additional services and support to the FDR practitioner? For FDR practitioners employed by Legal Aid NSW, this support is provided to those practitioners on our panel when required. The support aligns with our processes and models.

There is no information provided regarding how professional organisations would provide feedback on the complaint or the outcome to organisations such as Legal Aid NSW at the conclusion of any investigation.

Mandating the use of the FDR Register

Q21. Does the proposal to require practitioners to continue to engage with the FDR Register in order to manage their accreditation details pose any concerns?

Response

This proposal appears appropriate.

Including all practitioners' names on the public-facing FDR Register

Q22. Does the proposed requirement to having all FDR practitioner's names appearing publicly, pose any concerns?

Response

Yes, the requirement for all FDR practitioners to have their names appearing publicly does create a concern.

Several providers are working with matters that involve high levels of family violence, mental health, drug and alcohol abuse etc. The option for those practitioners to elect not to publish their name publicly is an important safety mechanism. Feedback has been provided that remaining in the profession would need to be considered due to safety concerns if this protection was not maintained. Additionally, section 60I certificates do not require practitioners to provide their full name. This again can be used to protect the safety of an FDR practitioner. This proposal appears to be inconsistent with this.

Participants and services currently accessing Legal Aid NSW FDR services are not able to elect the individual FDRP that is assigned to them. The assignment of the FDRP is made by Legal Aid and can include considerations regarding culture, language, location, gender etc.

For organisations such as Legal Aid NSW, we recommend that consideration be given to allow the organisation to register. Individuals working solely for that organisation can elect to register but would not be required.

Q23. How would the use of a pseudonym operate in the workplace?

Response

It is unclear how this would operate realistically within a workplace environment. This proposal also appears to contradict the argument about the need for a public register.

Additionally, the paper does not provide clarity regarding what “exceptional circumstances” would be considered to allow someone to use a pseudonym.

Offence to make false representations about being an FDR practitioner when not accredited

Q24. Is the proposed penalty for falsely representing as an FDR practitioner adequate?

Response

The proposed penalty appears adequate.

Q25. Is this an appropriate deterrent from falsely representing a person as an FDR practitioner?

Response

Yes, this proposal appears appropriate.

Suspension of accreditation

Q26. Does the proposal to limit the suspension of accreditation to two years pose any concerns?

Response

Yes, the new proposal to suspend accreditation after a period of two years is likely to create several additional barriers for FDRP in continuing to work in the profession.

A period of two years is not a significant timeframe. People may require that amount of time when having children, going overseas, or dealing with significant illness.

We propose that further consideration be given to extending this timeframe to allow more flexibility for those that need to take time away from the profession. An example for consideration would be the legal profession. In NSW practitioners are required to be supervised (for a period of two years) if they do not renew their practising certificate for a period of 5 years. This does not remove them from the profession but ensures that on their return they are provided guidance and mentoring when engaging in their work.

The lack of appeals process is a concern and does not allow for any extenuating circumstances to be considered. We would ask this proposal is reconsidered.

Q27. Does the proposal to cancel a person’s accreditation at the end of two years, which would require the person to meet the new accreditation criteria if they wanted to return to FDR, present any concerns or issues?

Response

Yes, this requirement appears to be overly burdensome and may create barriers for those that leave or take a break from the profession for a variety of reasons in coming back.

Practitioners that have experience working as FDRPs would retain that experience, even if they were to take a break from the profession. In these circumstances where a break is taken, consideration of a period of supervised practice may be more suitable and conducive to allowing practitioners back into

the profession.

The cost of the training could also be a significant barrier to FDRPs returning to the profession.

Including the assessment of suitability in 'FDR'

Q28. Does the proposal to include communications made to an FDR practitioner during the assessment process confidential and not admissible in court present any issues or concerns

Response

Legal Aid NSW supports the proposal to extend the confidentiality and admissibility provisions to pre mediation communications.

The concern with this proposal is that it limits the provisions to suitability assessments undertaken by registered FDRPs only. In organisations such as Legal Aid NSW, mediation organisers (intake officers) are used to arrange and schedule mediations. The role also includes collection of documents, and a preliminary initial review of the information received. This work is all undertaken under the supervision of their team leader and the team FDRP who is registered. Once suitability is determined, a FDRP is appointed to undertake the mediation. This FDRP also reviews the documents and makes the final determination regarding suitability.

The determination of suitability is a robust and carefully managed aspect of the work undertaken by Legal Aid NSW, however as outlined an initial component of that work is undertaken by the Mediation Organiser.

The proposed changes would provide ambiguity and uncertainty regarding which aspects of the work are covered by confidentiality.

We propose that consideration be given to extend the provisions of confidentiality and inadmissibility to cover situations where mediation organisers or intake officers conduct work regarding suitability but do so supervised and supported by a practicing FDRP.

Q29. Would this change impact current business practices?

Response

As outlined in the response to question 28, the current proposal would present significant challenges to Legal Aid NSW and other organisations that use mediation organisers or intake officers in the suitability assessment process. It would create ambiguity about which aspects of the work are covered and which are not as FDRPs supervise the work undertaken by the mediation/intake officer at Legal Aid NSW.

In practice, Legal Aid NSW receives more than 9,000 referrals for mediation and undertakes approximately 3,000 mediations per year. Due to this large volume of work, we cannot operate without the use of mediation/intake officers.

Q30. What complexity will arise if the assessment is made by two different people – one accredited and the other not?

Response

As outlined in the response to questions 28 and 29, the proposed changes would provide uncertainty and ambiguity in situations where you have multiple people working to assess suitability of a matter. In organisations such as Legal Aid NSW, this is common practice due to the significantly large volume of work.

It is proposed that consideration be given to extending this proposed provision to include all pre-mediation work undertaken under the supervision of a registered FDRP. That would cover situations

where multiple people are involved in organising a mediation as long as the work undertaken is done so under the supervision of a registered FDRP.

Determining if FDR is appropriate – ‘any other matter’

Q31. Based on experience in the field, what issues should be considered for inclusion towards ‘any other matters’ that ensures the broadest possible collection of issues are included in the proposed new Regulations?

Response

Further examples of ‘any other matters’ we have encountered include:

- Where one party has a genuine fear of the other and refuses to attend on that basis
- Coercive control
- Withholding children
- Deliberate and malicious delay of mediation process
- Matters where it would be almost impossible for an agreement to be reached
- Where it appears that the alleged circumstances require further resources such as can be provided by the FCFCOA.

The terminology ‘any other matter’ provides the ability for FDR practitioners to consider the vast, nuanced and at times novel matters that are presented. An explanatory note which outlines the types of matters for consideration but retains the broad definition would provide guidance to practitioners and assist in consistency and flexibility.

Q32. How would the exclusion of an ‘any other matter’ clause effect the assessment for suitability?

Response

We propose that the broad terminology of ‘any other matter’ remains in the legislation. Whilst additional clarification around what this means would be of assistance to FDRPs as outlined in response 31, the situations and matter types that are referred vary significantly and present nuances that may not be covered if a broad category is not maintained.

Record keeping

Q33. Does this proposed change to record keeping cause any issues or concerns?

Response

The proposed change regarding specification of the length of time records must be kept is supported. This provides clarity to the industry regarding their obligations around this issue.

Q34. Is 24 months a suitable timeframe?

Response

Due to the large number of mediations that FDRPs usually undertake and the fact that section 60I certificates are in effect for 12 months, it may be more appropriate for the minimum timeframe to be 12 months from the date of the mediation. In our experience at Legal Aid NSW, most complaints made against FDRPs also occur within a short time frame after the mediation is held, not after 12 months.

Wording of the 60I certificate

Q35. Please provide suggested text for the wording of the categories in the s60I certificate.

Response

The current wording of the categories is sufficiently broad and covers the majority of situations appropriately.

However, in the experience of Legal Aid NSW, the issue with the current categories is that no explanation has been provided regarding the circumstances of when each category should be used. Some clarity around this would assist in consistency by the sector in its use of the certificate.

For example, in circumstances where a party refuses to attend as there is a genuine fear of the other party, some providers issue a section 60I(a) due to the refusal whilst other provide a section 60I(b) certificate as they determine the matter as unsuitable.

In addition, there is no current process available to retract the issuing of an incorrect certificate. We would ask that consideration be given to the inclusion of this in the amended Regulations.

General

Q36. Any other issues you would like to raise?

Response

Legal Aid NSW has also contributed to the response provided by National Legal Aid and supports the submission of National Legal Aid.

Other issues for consideration in the review include:

- A greater focus on Aboriginal and Torres Strait Islander families. The review provides an opportunity to create a platform where more culturally appropriate and safe mediation services could be provided to Aboriginal and Torres Strait Islander clients accessing the family law system. In line with the recent changes under section 60CC (3) of the Family Law Act, consideration around the requirements of the FDR practitioner to raise cultural matters during the mediation. At this stage the review is silent on this matter. Further consultation with Aboriginal service providers may be of assistance.
- The review does not discuss the importance of the children's voice in a mediation. This is an extremely important aspect of family law mediations relating to children's issues and we would support further work in this area.

Legal Aid NSW would welcome the opportunity to discuss any feedback provided and consult on any further aspects of the review.