

## **Should the Government have a role in regulating primary dispute resolution (PDR)?**

### ***Analysis***

The majority (92%) of respondents indicated that the Government should have a role in regulating PDR; however, the extent to which Government should regulate PDR practice varied. A “light regulatory approach” was preferred, with emphasis placed on striking a balance between fostering quality of service and maintaining a flexible approach to practice. Many respondents considered that it is the Government’s responsibility to ensure that PDR services address the child’s best interests and are consistent, accessible and of a high quality. An overly regulated approach would stymie flexibility and diversity of PDR practice, reduce the practitioner’s ability to respond to individual client need, increase costs to clients and ultimately reduce access, as practitioners would find compliance too onerous.

### ***Summary***

<p>Most respondents supported some Government involvement, with the preferred approach being a light regulatory role that maintains flexible service delivery in PDR practice.</p>
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## **Is the proposed Quality Framework supported?**

### ***Analysis***

Over three-quarters (79%) of the respondents indicated support for the proposed Quality Framework with almost a third (32%) of these offering *full* support. In the submissions offering *some* support, several issues were raised. These included the need for the Quality Framework to reflect the best interests of the child, recognise diversity in PDR practices and not be too onerous in time or money. The need to establish a process to handle feedback and complaints was also raised. Some submissions expressed more specific concerns, with one respondent offering support only on the condition that the Quality Framework fully addresses certain issues (eg. children’s needs, violence and safety issues, power imbalances, the ability of people to access PDR processes/ get legal advice). A number of respondents supported the use of the Family Relationships Service Program (FRSP) approval requirements as a basis for the Quality Framework but noted that modifications would need to be made to accommodate non-funded organisations and individual practitioners. One respondent supported the Quality Framework provided ‘approval’ under the *Family Law Act 1975* (CTH) (the ‘Act’) was limited to organisations with individuals being authorised in turn by the ‘approved’ organisations. Only one respondent declined to support the Quality Framework on the basis that it opposed further regulation of the legal profession by way of quality assurance. They felt that their area was already sufficiently regulated.

### **Summary**

A majority of respondents supported the establishment of a Quality Framework, however, conditions with respect to its development were given.

### **Should the Government regulate extensively for standards in the practice of PDR or should it leave the regulation to practitioners?**

#### **Analysis**

There was general agreement (58%) that there should be some level of Government regulation with regard to the practice of PDR, although 25% of respondents did not directly address this issue. Few respondents felt that the Government should regulate extensively or conversely, that self-regulation should prevail. Whilst many respondents felt that some matters concerning practice should be regulated, most felt that the detail (ie developing the content of standards) should be left to the practitioners. Most comments regarding regulation were made on the proviso that practice remains flexible and diverse. The multi-disciplinary nature of PDR practitioners, and the lack of a central authorising body to oversee PDR practice, ruled out self-regulation and necessitated an appropriate complaints mechanism. The proposal to use professional associations to act as authorising bodies without a central body overseeing such a process was seen as problematic – it would result in a fragmented approach to PDR practice because each professional association has its own priorities and standards against which members are assessed.

### **Summary**

Despite support for Government regulation of practice, most respondents stated that the details as to what should be included in the Quality Framework should be left to practitioners. The establishment of an overarching professional body to oversee the accreditation process was preferred to approving professional associations to act as authorising bodies.

### **The current role of the Government is to approve organisations. How useful are the benefits associated with approval and authorisation under the *Family Law Act 1975*?**

#### **Analysis**

Over half (54%) of the respondents regarded the approval benefits as useful. Among the benefits listed as critical to PDR processes were the Act's provisions pertaining to privilege, immunity and confidentiality, although further clarification of the Act's

provisions<sup>1</sup> was called for. Reservations were also raised that the Act's protection may not be sufficient to encourage compliance as service providers may be covered under other Statutes. Other 'approval' benefits mentioned were the ability of approved organisations to receive referrals from Courts exercising Family Law jurisdiction, the marketing and 'badging' advantages for individuals and organisations, the assurance of quality for purchasers of PDR services and the increase in client confidence in PDR services. Some respondents were of the view that approval should be separated from funding so that the benefits are extended to all approved PDR service providers, and not just those receiving Government funding. The voluntary nature of the Quality Framework was also raised as problematic as there may be individuals or service providers who do not need, or wish, to seek approval. Similarly, questions were raised as to whether clients are actually aware of the benefits of using approved organisations.

A significant proportion of the submissions (38%) did not address the issue and this group was composed of both funded and non-funded organisations. Of the respondents that challenged the benefits of approval one was an advisory body and the other was a service provider that does not receive FRSP funding. Their concerns were couched in terms very similar to those mentioned above relating to the insufficiency of Act's protection and the tying of funding to approval.

### **Summary**

The approval benefits were recognised as useful by a majority of respondents but it was recommended that the nexus between funding and approval be removed. Concerns were also expressed as to whether the practitioners or clients properly understood the benefits to approval, and the need for an information strategy to inform them of these benefits was suggested.

### **How should the recommendations outlined in NADRAC's report, "A Framework for ADR Standards" be applied to the delivery of PDR services**

#### **Analysis**

Of the 58% of respondents that addressed this issue, almost all supported NADRAC's recommendations, particularly recommendations 2, 3, 5, 16, 20 and 21.<sup>2</sup> Most respondents supported the development of a code of practice,<sup>3</sup> along with an

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<sup>1</sup> *Family Law Act 1975* (CTH), s4 (1) definitions re: family & child activity. s 13 A, B& H, s 19M-N, Reg 63.

<sup>2</sup> One respondent stated that NADRAC's recommendations are problematic in that they are dependent on the good will and interest of the sector in developing its own standards – the sector is too fragmented and there is not enough interest.

<sup>3</sup> NADRAC *A Framework for ADR Standards*, recommendation 2, that all ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers and associations.

appropriate complaint<sup>4</sup> regime. A code of practice should address process, inform participation, access and fairness and service quality. An independent external body should monitor complaints and compliance.<sup>5</sup> Some respondents were concerned that resources devoted to development of and compliance with standards should be commensurate with risks and benefits achieved.<sup>6</sup> Some support was also voiced for a consistent and comparable system for ADR data collection.<sup>7</sup> It was noted that NADRAC's recommendation 6, which supports self-regulation, was contrary to the proposals outlined in the paper. Only one respondent supported the accreditation of practitioners on a sector by sector basis.<sup>8</sup> There was some support for enabling those who engage PDR practitioners to establish the knowledge, skills and ethics required. It was agreed that tertiary qualifications should not be a universal requirement.<sup>9</sup>

### *Summary*

A majority of respondents supported NADRAC recommendations, with most supporting the development of a code of conduct, complaints regime and an independent external body to monitor complaints and compliance. Some support for the recognition of prior learning, skills and experience was also given

**Several options for regulation have been considered. Are there other options that should be considered?**

### *Analysis*

A majority (83%) of respondents did not address this question or identify any other options. While most of these respondents were silent as to the reason why no response was supplied, satisfaction was expressly voiced by at least one respondent that the options outlined were sufficiently comprehensive. Only four submissions presented other options for consideration. One submission suggested that the preferred model of regulation outlined in the consultation paper should be modified to compel compliance. Another suggested that the Australian Family Mediation Association (AFMA) be established as the central body within the proposed

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<sup>4</sup> NADRAC, *A Framework for ADR Standards*, recommendation 3, that all ADR service providers have in place an appropriate and effective system for managing complaints.

<sup>5</sup> NADRAC, *A Framework for ADR Standards*, recommendation 4, that ADR organisations examine the feasibility and appropriateness of establishing an ADR Industry Ombudsman or similar body, in order to provide a second tier complaints system.

<sup>6</sup> NADRAC, *A Framework for ADR Standards*, recommendation 20, that the resources devoted to the development of and compliance with standards be commensurate with the risks to be addressed and the benefits to be achieved.

<sup>7</sup> NADRAC, *A Framework for ADR Standards*, recommendation 21, that the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and comparability in ADR data collection.

<sup>8</sup> NADRAC, *A Framework for ADR Standards*, recommendation 12, that the need for and nature of accreditation of ADR practitioners, organisations and programs be determined on a sector by sector basis.

<sup>9</sup> NADRAC, *A Framework for ADR Standards*, recommendation 16, that those engaging ADR practitioners clearly establish the knowledge, skills and ethics required through the processes described in the Report, and that tertiary qualifications not be a universal requirement for ADR practitioners.

regulation model. Another respondent suggested that a combination of individual and organisation accreditation should be developed. This respondent expressly stated that the individual accreditation system would need to be Government based and that the system of accreditation for service providers would require registration to both a national PDR Board/Council and also to professional registration board/s that provide PDR services of a particular type. The final respondent addressed the area of lawyer-mediators only and suggested that the Law Council of Australia should be invited to accept the NSW Law Society guidelines as the national standard.

### *Summary*

Given the proportion of respondents that directly addressed this issue was small, it can be implied that the options outlined were sufficiently comprehensive so as not to warrant further comment. However, those that did respond reiterated the need for an independent body and an accreditation system.

### **Are there other advantages and disadvantages concerning the options for regulation not already identified in the paper?**

#### *Analysis*

Half of the respondents did not address this issue. Of those that did, there were only three issues in common. Firstly, the proposal to develop a Quality Framework based on organisational standards (as per the FRSP Approval requirements) was seen as problematic because this approach does not necessarily guarantee good service delivery. Too much emphasis is placed on documentation rather than practice standards. Secondly, using different professional bodies to authorise individuals would fragment the overall service and result in inconsistency, as each professional association would have different standards and approaches to PDR. And without an overarching body to administer the authorisation process, unscrupulous practitioners could move freely from one association to the other. Furthermore, relying solely on membership of a professional association does not necessarily equate with good practice/expertise in PDR. Finally, some respondents expressed concern regarding confidentiality provisions and how these work against protecting the best interests of the child. Other advantages raised by respondents included bringing regulations in line with practice and providing clients with an assurance of quality whilst at the same time clarifying admissibility provisions for practitioners. Disadvantages outlined by respondents included the limits of a system which assures procedural rather than substantive fairness, the lack of a 2<sup>nd</sup> tier complaints system, conflict between fostering good standards and demands placed on private practitioners, and legal issues concerning the appropriate delegation of powers.

## *Summary*

As only half the respondents addressed this question it may be implied that the rest deemed the options sufficiently comprehensive so as not to warrant any further comments. Of those who did respond, the issue of organisational versus practice standards was discussed with the former approach being labelled problematic. The preference for an overarching, accrediting body instead of multiple, professional associations was also reiterated.

### **The proposed Quality Framework requires that standards be met that enables a wider range of practitioners to practice. Is the proposed Quality Framework too burdensome for the benefits it delivers?**

#### *Analysis*

Only one respondent suggested that the proposed Quality Framework was too burdensome<sup>10</sup>. Three respondents expressly stated that the benefits of regulation outweighed the burdens and almost half (45%) did not address this question. There is no obvious reason why this many chose not to address this question, given a majority of these (73%) had given at least some support in their submissions for the establishment of a Quality Framework. The remaining respondents (38%) stated that it depended on the Quality Framework, and raised a number of concerns relating to this issue. The common theme in many of these submissions was that the ‘burdensome’ nature of the Quality Framework would depend on the costs (in time and money) of the approval requirements/accreditation process especially in relation to the auditing of private practitioners. There was general concern that PDR must remain affordable, and compliance requirements should not drive up the costs to private practitioners and thereby the consumers. Similarly it was also noted that professional associations may not be willing, or have the expertise, to undertake the responsibilities of meeting the approval requirements and that this may ultimately undermine the Quality Framework.

#### *Summary*

Just over half of the respondents addressed this issue with some adopting an idealistic approach that quality should be guaranteed at all costs. Other respondents adopted a more practical approach whereby the ‘burdensome’ nature of the Quality Framework would depend on issues such as the costs to the consumer and current practitioner interest in meeting approval requirements.

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<sup>10</sup> One respondent was of the view that practitioners, for whom Family Law is only part of their caseload, would not absorb the increased costs brought on by further regulation.

## **Several elements of the new Quality Framework have been described. What should the new Quality Framework include?**

### *Analysis*

Of the 75% of respondents that addressed this issue, the majority (77%) supported the inclusion, to some extent, of FRSP recommendations in the Quality Framework. 38% of respondents also supported the inclusion of the NADRAC recommendations. 22% considered that the Quality Framework should also include other recommendations, such as the guidelines developed by the Law Society of New South Wales, the professional standards proposed by the Psychotherapy and Counselling Federation of Australia, and the National Institute for Dispute Resolution's 1995 Test Design Project.<sup>11</sup> Support for a code of practice was reiterated, as was the need for recognition of knowledge and skills, through performance-based assessment.<sup>12</sup> There was general agreement that standards for practitioners should address: entry, supervision, ongoing training, appraisal and accreditation. From the client perspective, safety, appropriate avenues for redress and addressing the best interests of the child must also be included. Standards covering processes for assessing clients' suitability for PDR and the uniform collection of data were also seen as important. The Quality Framework should attempt to resolve definitional issues around PDR and may ultimately assist with jurisdictional issues concerning domestic violence, child protection and the family law system.

### *Summary*

A majority of the respondents supported the inclusion of the FRSP/NADRAC recommendations in the quality framework. Some of the respondents also promoted their own or other guidelines for inclusion, however, it is possible that these guidelines also contain many of the requirements already specified (eg. the best interests of the child).

## **Are all or any of the FRSP Approval Requirements appropriate as basic standards? Comments on the discussion in Appendix A are sought.**

### *Analysis*

A majority (63%) of the respondents regarded the FRSP Approval requirements as an appropriate starting point for developing basic standards. However they also recognised that some of the requirements may be inappropriate, or alternatively may need modifying, in their application to non-funded organisations and private practitioners. In particular requirements 3-4,6-7 were discussed. Some respondents judged requirement 3 (Information & Analysis) as having specific application to

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<sup>11</sup> However, the respondent stated that whilst the use of a performance-based assessment process for the selection, training and evaluation of mediators is preferable, it is too resource intensive. The respondent also referred to Family Mediation Canada's "Practice, Certification and Training Standards" as a useful reference for drafting regulatory criteria.

<sup>12</sup> Supported by two respondents, one respondent indicated approval with particular reference to the needs of Indigenous communities

funded organisations only. However other submissions suggested that the reporting and data collection requirements should be encouraged from all PDR services, as such information is vital to the policy development of PDR. Requirement 4 (People) also attracted a number of comments with some respondents expressing the view that supervision and staff appraisal requirements may not be appropriate for individual practitioners, or even applicable to a Quality Framework generally. Others simply stated that supervision requirements should not be too onerous, the staff appraisal requirements should be clarified and the entry requirements should not be unduly restrictive. A number of the submissions supported the inclusion of Law as an appropriate qualification. Mixed support was also offered for requirement 5 (Client focus) with some respondents emphasising the importance of setting safety standards as part of the accreditation process and others stating that client safety was not directly relevant to professional associations. One respondent did, however, state that that the client focus standards should not be included as part of the approval requirements. Similarly, some respondents regarded requirements 6 (Process, Products and Services) and requirement 7 (Organisational performance) as inappropriate for non-funded practitioners and organisations.

The importance of addressing the needs of Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds, children's interests and family violence was also raised, as was the need to include a Code of Ethics. Additional standards relating to the termination of PDR processes, client feedback, complaint handling procedures, advertising, promotion and procedural fairness were also suggested. Only two respondents (8%) found the FRSP approval requirements to be generally inappropriate with one respondent regarding them as too prescriptive and onerous for small providers and individual practitioners. In particular they regarded requirement 4 (People) as burdensome, and that the proposed level of supervision was excessive even for larger organisations. The other respondent stated that the competency standards in Appendix A were unclear, the qualifications requirements were inadequate, that generic accreditation would be inappropriate, and that the FRSP requirements needed extensive discussion and clarification.

### ***Summary***

A majority of the respondents found the FRSP approval requirements to be appropriate as basic standards for funded organisations. However, they found that some of the requirements were inappropriate, or may need modifying, in their application to non-funded organisations and private individuals. Additional standards were also recommended.

## **How would such standards apply to individual practitioners and/or professional associations to whom individual practitioners belong?**

### *Analysis*

Of the 71% of respondents that addressed this issue, various suggestions were made as to which standards should or should not apply to private practitioners and professional associations. There was general agreement that the FRSP Approval requirements would have to be modified; however, one respondent felt that the FRSP Approval Requirements were too onerous. With regard to private practitioners, standards concerning planning, service design and staff appraisal were considered irrelevant. Whilst standards concerning client safety, client confidentiality, and client feedback/complaints were considered essential. One respondent considered that obligations of practitioners (such as conflict of interest, confidentiality and disclosure) should remain in the *Family Law Regulations 1984* (the 'Regulations'). There was some agreement that data should be collected from all authorised PDR practitioners. One respondent reiterated the use of an independent external body to administer the authorisation process, whilst another suggested a "brokerage system" for the authorisation of private practitioners.

### *Summary*

The paper did not address in detail what should be contained in the Regulations and most of the respondents were silent on this matter except for one which expressed the view that the obligations of practitioners (eg. Confidentiality) should remain in the Regulations. Most of the respondents concurred with the modifications outlined in the proposal in relation to the FRSP approval requirements.

## **Who should administer the Quality Framework?**

### *Analysis*

Responses to this question were evenly distributed between the three options,<sup>13</sup> however, the overall impression was that most of the respondents supported some degree of Government involvement (at least in the short to medium term), and most respondents supported the establishment of a national representative body. Those that specifically selected the Government option nominated the Attorney-General's Department expressly, with a few respondents noting that the Department of Family and Community Services should continue to administer the FRSP. Some support was explicitly given for the administration model outlined in the consultation paper. However, one respondent was totally opposed to the longer term plan to develop a self-sustaining framework through industry subscription. Of those respondents that supported another body, most suggested the establishment of a national, expert body comprising of a range of interested stakeholders. Some supported the notion that this

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<sup>13</sup>(1) Government (2) Other Body (3) Not Addressed.

body should be independent whilst others advocated Government involvement and funding. The AFMA was nominated in a number of submissions as one such body that could be appropriately developed. This was on the proviso that it received funding.

### ***Summary***

A majority of the respondents supported some degree of Government involvement. They also supported the establishment of a national representative body comprising interested stakeholders.

### **Who should be responsible for developing and maintaining the quality framework and undertaking the quality endorsement process?**

#### ***Analysis***

One-third of respondents indicated that the Government should have some responsibility for developing and maintaining the Quality Framework and undertaking the endorsement process; whilst 38% indicated that another body should undertake such activities. The remaining respondents (29%) did not address the issue. Of those that preferred some Government involvement, most (62%) considered that the Government should have sole responsibility whilst the remainder suggested that the Government should share its responsibility with an independent body. Of those that indicated a preference for an independent body (with no Government involvement), several nominated AFMA as appropriate.

### ***Summary***

Some respondents supported the establishment of an independent body with several of these nominating AFMA as the appropriate, responsible body. Other respondents supported the sharing of responsibility between the Government and an independent body, whilst others supported sole Government responsibility.

### **Who should pay for it?**

#### ***Analysis***

Half of the respondents specifically addressed this question with 83% of these recommending the Government pay for some or the entire Quality Framework. The support for Government contribution came from both funded and non-funded organisations with some proposing full funding by the Government and others proposing only partial funding. Those organisations that recommended partial funding by the Government also supported the payment of fees by applicants seeking approval. Only two respondents expressly approved 'user-pays', with one respondent offering total support and the other proposing seed funding from the Government with a view to becoming self-sustaining through membership fees. This respondent also supported the offering of training and professional development on a 'user pays'

basis. Although half of the respondents were silent on who should pay for the Quality Framework some did explicitly state that they did not support the passing of costs onto clients.

### *Summary*

Half the respondents addressed this issue with a majority of these supporting Government funding of some sort. It is important to bear in mind, when developing the quality framework, that the market is not supportive of costs being passed onto the consumer.

## **How should the quality framework be accessed and publicised**

### *Analysis*

Half of the respondents addressed this issue, with all agreeing that the Government should fund promotional activities. The majority of respondents were also of the view that promotional activities should be overseen or developed by Government. Avenues for promotion included the Internet, broad media coverage and pamphlets/brochures. Information should be available at key referral sites such as the Family Court, Federal Magistrates Services and community-based organisations. There was general support for a community-education campaign or communication strategy aimed at informing both potential clients of the service, as well as practitioners. Material must be culturally sensitive and appropriate. Only one respondent considered that promotional activities should be the responsibility of individual organisations. Those respondents that support the establishment of an independent body to administer and develop the framework also considered that such a body should be responsible for the promotion of the quality framework.

### *Summary*

Half of the respondents addressed this question. All of the respondents that addressed this issue recognised the need for Government-funded promotional activities.

## **What issues should be considered with respect to a ‘user pays’ approach?**

### *Analysis*

A majority (54%) of the respondents addressed the issue of ‘user pays’ with many of these accenting the importance of keeping the cost of PDR services low. Some respondents were of the view that the ‘user pays’ approach was not appropriate in the PDR field as there is the potential for the cost of compliance to be passed onto the clients, thus denying the most vulnerable, disadvantaged clients the benefits of a Quality Framework. The potential impact of compliance costs reducing the pool of available services was also raised, as was the fact that the current funding cutbacks in the Family Court budget have already begun to affect access to PDR services. Other respondents took a more flexible approach by recognising the overall benefit to the

community of establishing a Quality Framework, while also acknowledging the difficulties in making such a service viable. Several suggestions were made to combat this issue including one proposal to increase Government funding and another suggestion that any fees that are imposed should appropriately reflect the size and income of the organisation. One respondent also made the suggestion that, as PDR reduces the likelihood of re-litigation; the money that once went to the Family Court should now be diverted to PDR services.

Only one respondent specifically addressed regional distribution. They raised the importance of taking into account the individual geographic needs of remote and regional areas, as many of these organisations and individuals would find any increase in costs prohibitive. Another respondent also broached the topic of Family Court-ordered PDR services. The respondent questioned the suitability of adopting a ‘user pays’ approach to this service and the implications that would flow from this<sup>14</sup>.

### ***Summary***

Concerns were raised as to whether ‘user-pays’ is appropriate for PDR services. The client group is not wealthy and for many of the practitioners, their work in PDR only forms a small part of their workload. Therefore, whilst quality assurance is needed, it must not be too burdensome. ‘User-pays’, especially if too onerous, runs the risk of defeating the very idea of promoting PDR as a viable alternative to the Family Court system, and may ultimately result in an increase in filing through the courts.

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<sup>14</sup>Eg. The submission discussed a ‘user pays’ approach and whether it would be ethical to demand a fee from people who are ordered by the Court to attend PDR. Furthermore it also raised the question - If a person refused to pay such a fee would this refusal constitute a failure to comply with a Court order?