



**Australian Government**  
**Attorney-General's Department**

**Civil Justice Division**

**FAMILY RELATIONSHIP PRACTITIONERS**  
**IN THE**  
**NEW FAMILY LAW SYSTEM**

**JULY 2007**

***Introduction***

The following paper has been prepared by the Family Pathways Branch in the Attorney-General's Department to provide family relationship practitioners (eg counsellors, dispute resolution practitioners and others involved in the provision of services to families that assist them to improve their relationships) with general information on their roles and responsibility in the family law system.

A range of other information material about the family law system is also available to assist practitioners and the general public. This information can be obtained by visiting Family Relationship Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au) or by calling the Family Relationships Advice Line on 1800 050 321.

This material is provided to practitioners for general information only and should not be relied upon for the purpose of a particular matter.

## ***Table of Contents***

1. *Changes in terminology*
2. *Information provision obligations*
  - 2.1 *Obligations on family counsellors and family dispute resolution practitioners*
    - 2.1.1 *Provide information on services that assist reconciliation*
    - 2.1.2 *Provide information about parenting plans*
    - 2.1.3 *Provide information in cases involving family violence or child abuse*
  - 2.2 *Obligations on family dispute resolution practitioners*
    - 2.2.1 *Provide information on family dispute resolution*
3. *Confidentiality and inadmissibility of communications*
  - 3.1 *Confidentiality*
  - 3.2 *Admissibility*
4. *Obligations of family dispute resolution practitioners*
  - 4.1 *Inclusion on the Family Dispute Resolution Register*
  - 4.2 *Provide family dispute resolution certificates*
  - 4.3 *Assessment of family dispute resolution suitability*
  - 4.4 *Practice obligations*
5. *Registration and Accreditation of family dispute resolution practitioners*
  - 5.1 *Family Dispute Resolution Register*
  - 5.2 *Accreditation of Family Dispute Resolution Practitioners*

1. *Changes in terminology*

Extensive changes were made to the counselling and dispute resolution provisions of the *Family Law Act 1975* (Family Law Act) in 2006. These changes included the introduction or amendment of a range of defined terms to improve general understanding of some key

concepts in family law and assist in focusing separating parents on the best interests of their children.

### *Equal Shared Parental Responsibility*

When courts make a parenting order they are required to presume that, except in cases where there are issues of family violence or child abuse, it is in the best interests of the child for the parents to have equal shared parental responsibility for the child.

This does not mean that the child should spend equal time with each parent. Rather, it means that both parents have an equal role in making decisions about important long term issues that affect their children, such as schooling and health care.

### *Equal Time*

If a court makes a parenting order that provides that a child's parents have equal shared parental responsibility, the court is required, under section 65DAA of the Family Law Act, to consider whether the child should spend equal time with both parents (if this is reasonably practicable and it is in the best interests of the child).

The factors that the court can take into account in determining what is reasonably practicable are set out at sub-section 65DAA(5) of the Family Law Act and include issues such as how far apart the parents live from each other, the parent's current and future capacity to implement an equal time arrangement and their ability to resolve difficulties that might arise.

If a court decides not to order that the child spend equal time with both parents, the court must consider whether the child spending substantial and significant time with each of the parents is in the child's best interests and is reasonably practicable.

### *Substantial and significant time*

Substantial and significant time is defined by at subsection 65DAA(3) of the Family Law Act to include day-to-day routine activities and not just weekends and holidays. It includes days that fall on weekends or holidays and on weekdays. It also includes time that a child spends with a parent that allows the child or the parent to be involved in occasions or events that are of significance to the child or the parent.

### *Family Counselling*

'Family counselling' is defined as a process in which a family counsellor helps one or more people to deal with personal or interpersonal issues relating to marriage, separation or divorce, including issues relating to the care of children. To address concerns about whether 'family and child counselling' encompassed counselling of a child (as opposed to counselling of others in relation to a child), the new definition of 'family counselling' explicitly includes counselling of children.

The professionals who provide family counselling are termed 'family counsellors'.

## *Family Dispute Resolution*

‘Family dispute resolution’ is defined as a process in which a family dispute resolution practitioner, who is independent of all the parties involved in the process, helps people affected, or likely to be affected, by separation or divorce to resolve issues in dispute.

The professionals who provide family dispute resolution are termed ‘family dispute resolution practitioners’.

### *2. Information provision obligations*

#### *2.1 Obligations on family counsellors and family dispute resolution practitioners*

##### *2.1.1 Provide information on services that assist reconciliation*

Part IIIA of the Family Law Act sets out the obligations of specified individuals to inform people about non-court based family services and other important matters relating to family relationships.

Section 12G of the Act requires family counsellors, family dispute resolution practitioners and arbitrators who deal with a married person who is considering instituting proceedings for a divorce, or considering going to court in relation to proceedings about their children or their finances under the Family Law Act, to give that person (and, in appropriate cases, that person’s spouse) documents containing certain ‘prescribed information’ about services available to help with a reconciliation between the parties to a marriage.

The ‘prescribed information’, set out at regulation 8A of the *Family Law Regulations 1984* (the Regulations) must include information on the family counselling and family dispute resolution services that may assist with a reconciliation of the parties to a marriage. This information can be easily obtained by searching Family Relationships Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au) or by contacting the Family Relationships Advice Line on 1800 050 321.

This prescribed information does not have to be provided if the practitioner has reasonable grounds to believe that the person has already been given these documents (for example, the person may have received the documents from a legal practitioner or from a family law court), or if the practitioner considers that there is no reasonable possibility of a reconciliation between the parties to the marriage.

##### *2.1.2 Provide information about parenting plans*

###### *What is a parenting plan?*

A parenting plan is an agreement that sets out parenting arrangements for children. A parenting plan covers the day to day responsibilities of each parent, the practical considerations of a child’s daily life, as well as how parents will agree and consult on important, long-term issues, such as which schools children will attend.

A parenting plan, in itself, is not a legally enforceable agreement, and is different from a parenting order, which is made by a court. Parties to a parenting plan can ask the court to make 'consent orders' in the terms of that plan. The court will only make a consent order if it is satisfied that the terms of the plan are in the best interests of the child. Once made, consent orders are legally binding – they have the same effect as any other order made by a court.

Similarly, prior to 14 January 2004 it was possible to 'register' a parenting plan with the court. A registered parenting plan also has the same legal effect as a court order.

If parents proceed to court at any time, the court will be required to consider the terms of the most recent parenting plan when making a parenting order in relation to the child, if it is in best interest of the child to do so. In order to be recognised by the court, a parenting plan must be in writing, dated and signed by both parents. It must be made free from any threat, duress or coercion.

In addition, when considering the best interests of the child, the court will also consider the extent to which both parents have complied with their obligations in relation to the child, which may include the terms of a parenting plan.

#### *Provision of information on parenting plans*

Section 63DA of the Act sets out the obligations of advisers (that is, legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) when giving advice to people in relation to parenting plans.

There are two different types of information that must be provided under this section, depending on whether an adviser is advising people generally about arrangements for children after separation or providing specific advice in connection with the making of a parenting plan.

Subsection 63DA(1) places an obligation on advisers assisting or advising people about parental responsibility following the breakdown of a relationship to inform the people they are advising:

- that they could consider entering into a parenting plan, and
- about the services that are available to provide assistance to develop a plan.

Subsection 63DA(2) provides that when advising people about the making of a parenting plan, an adviser must inform the people:

- that where it is in the best interests of the child and reasonably practicable, they could consider as an option an arrangement where they **equally share the time** spent with the child.
- that if an equal time arrangement is not appropriate, they could consider whether an arrangement where the child spends **substantial and significant time** with each person would be in the best interests of the child and reasonably practicable.

As set out above, 'substantial and significant time' is defined at subsection 63DA(3). It ensures that the focus is not just on the amount of time that each parent spends with the

child but also on the type of time that is spent. The definition encourages people to ensure that there is a mix of holidays, weekends and other days and that both parents are able to participate in the child's daily routine and in events that are significant to the child (like sporting events, birthdays and concerts). It also ensures that the child is able to participate in events significant to the parent such as Mothers' or Fathers' day, extended family weddings or christenings and birthdays.

- The note at the end of subsection 63DA(2) makes clear that an adviser must only inform people that they could consider the options of the child spending equal time or substantial and significant time with each person. It does not require the adviser to provide advice as to whether such arrangements are practicable or in the best interests of the child. However, the adviser may provide such advice if that is appropriate.
- that decisions made in developing parenting plans should be made in the best interests of the child.
- of the matters that may be dealt with in a parenting plan (these are set out at subsection 63C(2)).
- that a parenting order made by a family law court after 1 July 2006 may be subject to a parenting plan that is subsequently made by both parents. This is due to the operation of new subsection 64D.<sup>1</sup> Advisers must also inform their clients that the court is required (by section 65DAB) to consider the terms of the most recent parenting plan about a child when making a parenting order about that child, if it is in the best interests of the child to do so.
- that it is desirable to include in a parenting plan provisions that deal with the form of consultations between the parties to the plan, the process for resolving disputes about the terms or operation of the plan, and the process to be used for changing the plan.

The intention of these paragraphs is to help people avoid having to take parenting matters to court by ensuring that when making a plan, they consider how they will consult with one another, resolve disputes and make changes to the plan as their child grows older and their needs change.

- about the programs that are available to help people who experience difficulties in complying with parenting plans.

The information relating to parenting plans that advisers are required to provide under this section can be provided in written form such as brochures. The Attorney-General's Department has prepared a brochure that can be used to meet this information provision requirement. It is available from [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au).

---

<sup>1</sup> Section 64D provides that if a parenting order is made on or after 1 July 2006 setting out parenting arrangements, the parents can agree to change those arrangements by a parenting plan (unless the court order says that the order is not to be changed in this way). This makes it easier for parents to agree on parenting changes, knowing they will not be required to go back to court to change the parenting order each time.

### *2.1.3 Provide information in cases involving family violence or child abuse*

As set out at Part 4.2, below, section 60I of the Family Law Act imposes a general requirement on people to attempt to resolve their disputes about children's matters (that is, matters that are dealt with under Part VII of the Family Law Act) before commencing a court process. The Family Law Act provides a number of exceptions to this requirement to ensure that people are not required to attend family dispute resolution in circumstances where it may not be appropriate, such as:

- where people are applying for a consent order
- where an application has been made for procedural or interim orders while the main proceedings are happening
- where there has been, or there is a risk of, family violence or child abuse
- in cases of contravention within 12 months of a court order. The court must be satisfied that a person has shown serious disregard for his or her obligations under that order
- where the matter is urgent. This may cover an application to give immediate protection to a child, or for the urgent location and recovery of a child, including cases of child abduction
- where a party is unable to participate effectively in dispute resolution. This covers circumstances such as incapacity or physical remoteness.

Section 60J of the Family Law Act aims to ensure that people who are not required to attend family dispute resolution due to child abuse or family violence can obtain information about the services and options that are available to them.

This information is to be obtained from family counsellors and family dispute resolution practitioners.

An applicant for an order concerning children will be required to indicate, in writing, whether they have, or have not, received the information.

People are not required to obtain this information where there is a risk of child abuse or family violence if the matter is delayed getting to court.

Information on relevant services can be obtained by searching Family Relationships Online at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au) or by contacting the Family Relationship Advice Line on 1800 050 321.

## *2.2 Obligations on family dispute resolution practitioners*

### *2.2.1 Provide information on family dispute resolution*

Regulation 63 of the Regulations requires family dispute resolution practitioners to ensure that consumers receive information to enable them to understand the important elements of family dispute resolution. This information must be provided prior to commencing family dispute resolution and must include the following information:

- that it is not the role of the family dispute resolution practitioner to give people legal advice (unless the family dispute resolution practitioner is also a legal practitioner)
- the family dispute resolution practitioner’s confidentiality and disclosure obligations under section 10H of the Family Law Act (as detailed at Part 3.1, below)
- the generally inadmissible status of communications made in family dispute resolution (as detailed below)
- the qualifications of the family dispute resolution practitioner to be a family dispute resolution practitioner
- the fees (including any hourly rate) charged by the family dispute resolution practitioner in respect of the family dispute resolution
- that family dispute resolution must be attended, if required under section 60I of the Act, before applying for an order under Part VII of the Act (as explained above)
- that, if a person wants to apply to the court for an order under Part VII of the Act, the family dispute resolution practitioner may provide a certificate under subsection 60I (8) of the Family Law Act, including a certificate to the effect that the person:
  - did not attend family dispute resolution due to the refusal, or the failure, of the other party or parties to the proceedings to attend, or
  - attended family dispute resolution with the other party or parties to the proceedings but that the person, the other party, or another of the parties, did not make a genuine effort to resolve the issue or issues
- if a certificate under subsection 60I(8) of the Family Law Act is filed, the court may take it into account in considering whether to make an order under section 13C of the Act, referring the parties to family dispute resolution or to award costs against a party under section 117 of the Act
- information about the complaints mechanism that a person who wants to complain about the family dispute resolution services may use.

### 3. *Confidentiality and inadmissibility of communications*

#### 3.1 *Confidentiality*

Sections 10D and 10H of the Family Law Act set out the circumstances in which communications made in family counselling and family dispute resolution, respectively, must or may be disclosed.

Family counsellors and family dispute resolution practitioners must not disclose a communication made in family counselling or family dispute resolution unless the disclosure is required or authorised under the Family Law Act.

A family counsellor or family dispute resolution practitioner *must* disclose a communication made in family counselling or family dispute resolution if he or she reasonably believes that the disclosure is necessary for the purpose for the purpose of

complying with a law of the Commonwealth, a State or a Territory (eg to comply with legislation requiring mandatory disclosure of suspected child abuse).

A family counsellor or family dispute resolution practitioner **may** disclose a communication made in family counselling or family dispute resolution if he or she reasonably believes that the disclosure is necessary for the purpose of:

- protecting a child from the risk of physical or psychological harm
- preventing or lessening a serious and imminent threat to the life or health of a person
- reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person
- preventing or lessening a serious and imminent threat to the property of a person
- reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property
- assisting an independent children's lawyer to properly represent a child's interests.

In addition, a family counsellor or family dispute resolution practitioner may disclose a communication with the consent of the party who made the disclosure, where that person is an adult, or, where the disclosure was made by a child who is under 18, if parents consent to the disclosure. If agreement cannot be reached the matter may be referred to the court for decision.

A family counsellor or family dispute resolution practitioner may also make disclosures in order to provide information for research relevant to families, as long as the information provided does not constitute 'personal information' as defined in section 6 of the *Privacy Act 1988*. 'Personal information' is information or an opinion from which an individual's identity is apparent, or can reasonably be ascertained.

The Family Law Act clarifies that the provision of a certificate by a family counsellor under paragraph 16(2A)(a) of the *Marriage Act 1961* is not prevented by the confidentiality requirement. Section 16 of the Marriage Act deals with the ability of judges to consent to the marriage of a minor in circumstances where consent has been refused by the minor's parents. Paragraph 16(2A)(a) provides that the judge must not consider the minor's request for consent unless there is a signed certificate from a family counsellor stating that the minor has received counselling in relation to the proposed marriage.

The Family Law Act also clarifies that the provision of a certificate by a family dispute resolution practitioner under new subsection 60I(8) is not prevented by the confidentiality requirement. These certificates relate to the conduct of compulsory dispute resolution procedures that are being phased in from 1 July 2007 (see Part 1.2.1 of this paper).

Information that is inadmissible as evidence due to the effect of sections 10E or 10J (explained below) does not become admissible merely because its disclosure is required or authorised sections 10D or 10H.

### 3.2 *Admissibility*

Sections 10E and 10J of the Family Law Act provide that a communication made in family counselling or family dispute resolution is not admissible in any court or proceedings, in any jurisdiction.

Additionally, a communication made when a professional consultation is being carried out on referral from a family counsellor or family dispute resolution practitioner is also inadmissible in any court or proceedings, in any jurisdiction.

In order to ensure that professionals to whom family counsellors or family dispute resolution practitioners make referrals are aware of the inadmissible status of communications made to them, family counsellors and family dispute resolution practitioners are required to inform relevant professionals of this fact when making a referral.

An admission or disclosure that indicates that a child under 18 has been abused or is at risk of abuse may be admitted as evidence, unless there is sufficient evidence of the admission or disclosure available to the court from other sources.

## 4. *Obligations of family dispute resolution practitioners*

### 4.1 *Provide family dispute resolution certificates*

Section 60I of the Act imposes a general requirement on people to attempt to resolve their disputes about children's matters (that is, matters that are dealt with under Part VII of the Act) before commencing a court process.

From 1 July 2007, a court will not be able to hear an application for an order concerning a child in a new case (that is, a case where there has not been a previous application to the court in relation to the child) unless the person applying to the court files a certificate from a registered family dispute resolution practitioner or the matter falls within certain exceptions (including cases involving family violence or child abuse). It is expected that the requirement will apply to all applications for orders concerning children (other than those that fall within the exceptions) from 1 July 2008.

The Family Law Act specifies four types of certificates that may be provided by a family dispute resolution practitioner. These certificates may provide that either:

- the person did not attend family dispute resolution due to the refusal or failure of the other party or parties to attend the process
- the person attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, at which they discussed and made a genuine effort to resolve the issue or issues to which the court application relates
- the person attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues, or

- that the family dispute resolution practitioner considers, having regard to the matters set out at subregulation 62(2) of the *Family Law Regulations 1984* (the Regulations), that it would not be appropriate to conduct the proposed family dispute resolution.

Subregulation 62(2) requires the family dispute resolution practitioner to be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by:

- a history of violence (if any) among the parties
- the likely safety of the parties
- the equality of bargaining power among the parties
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the parties
- any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

Subregulation 62A(3) provides that a family dispute resolution practitioner may not issue a certificate to a person under subsection 60I(8) of the Act after 12 months has elapsed since the date of the last attendance (or attempted attendance, as per paragraphs 60I(8)(a) and (aa)) of that person at family dispute resolution, conducted by the family dispute resolution practitioner, in relation to the issue or issues that are the subject of the person's intended application to the court.

To ensure that people are properly informed of the potential consequences of not attending family dispute resolution, subregulation 62A(4) provides that a family dispute resolution practitioner must not provide a certificate pursuant to paragraph 60I(8)(a) of the Act unless the party or parties who have failed to attend the process have been contacted at least twice, with at least one of these contacts being made in writing, and have been provided with a reasonable choice of days and times for attendance at family dispute resolution.

In these contacts, the party or parties must be informed that if they do not attend family dispute resolution, a certificate may be provided by the family dispute resolution practitioner under paragraph 60I(8)(a) and that this certificate may be taken into account by a court when determining whether to make an order referring parties to family dispute resolution under section 13C or awarding costs against a party under section 117 of the Act.

In order to issue a certificate retrospectively, up to a period of 12 months, the family dispute resolution practitioner must be registered at the time the certificate is issued.

It is possible that, in the period between the family dispute resolution (or attempted family dispute resolution) and the request for a certificate, the practitioner who conducted the family dispute resolution may become incapable of providing the certificate (for example, due to death, loss of registration, inability to be contacted etc). Subregulation 62A(5) allows an organisation for which a family dispute resolution practitioner provides services, to issue a certificate on the practitioner's behalf if he or she is unable to issue the certificate. However, if the issues in dispute have changed since the original family dispute resolution

took place, the people involved should be encouraged to attend family dispute resolution again, and organisations should avoid issuing certificates in such circumstances.

#### *4.2 Assessment of family dispute resolution suitability*

Regulation 62 of the Regulations requires an assessment of the parties to the dispute to be undertaken, to determine whether family dispute resolution is appropriate, prior to a family dispute resolution practitioner providing family dispute resolution.

The family dispute resolution practitioner must be satisfied that this assessment has considered whether the ability of any party to negotiate freely in the dispute is affected by:

- a history of violence (if any) among the parties
- the likely safety of the parties
- the equality of bargaining power among the parties
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the parties, or
- any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

If, after considering these matters, the family dispute resolution practitioner is not satisfied that family dispute resolution is appropriate, the family dispute resolution practitioner must not provide family dispute resolution.

#### *4.3 Practice obligations*

Regulation 64 sets out the obligations of a family dispute resolution practitioner when providing family dispute resolution services under the Act. When providing family dispute resolution services a practitioner must:

- ensure that, as far as possible, the family dispute resolution process is suited to the need of the parties involved (eg by ensuring the suitability of the family dispute resolution venue, the layout of the family dispute resolution room and the times at which family dispute resolution is held)
- ensure that family dispute resolution is only provided in accordance with all the regulatory requirements (such as the requirement to assess whether family dispute resolution is appropriate prior to conducting the family dispute resolution)
- ensure that any record of the family dispute resolution is stored securely
- terminate the family dispute resolution if required to do so by a party, or if the practitioner is no longer satisfied that family dispute resolution is appropriate
- not provide legal advice to any of the parties unless the practitioner is also a legal practitioner, or the advice is about procedural matters
- not use any information acquired from a family dispute resolution for personal gain or to the detriment of any person.

#### *4.4 Avoidance of conflicts of interest*

Regulation 65 provides that if a family dispute resolution practitioner:

- has previously acted in a professional capacity for one or more of the parties to a dispute (other than as a family dispute resolution practitioner, a family counsellor or arbitrator)
- has had a previous commercial dealing with one or more of the parties to a dispute, or
- is a personal acquaintance of one or more of the parties to a dispute

the practitioner may only provide family dispute resolution services if:

- each party to the family dispute resolution agrees
- the previous professional dealing (if any) does not relate to any issue in the dispute, and
- the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the family dispute resolution practitioner in the provision of family dispute resolution services.

### *5. Registration and Accreditation of family dispute resolution practitioners*

#### *5.1 Family Dispute Resolution Register*

From 1 July 2007, all individuals, except people who are authorised to provide family dispute resolution by the Family Court of Australia, the Federal Magistrates Court or the Family Court of Western Australia, must be included on the Family Dispute Resolution Register in order to be a family dispute resolution practitioner as defined in the Family Law Act and issue family dispute resolution certificates under section 60I of the Act. For more information on the Family Dispute Resolution Register see [www.ag.gov.au/fdrproviders](http://www.ag.gov.au/fdrproviders)

#### *5.2 Accreditation of family dispute resolution practitioners*

Section 10A of the Family Law Act allows the development of Accreditation Rules for family dispute resolution practitioners (among other professionals). The purpose of accreditation is to ensure the provision of high quality family dispute resolution services, and to recognise the professionalism of the sector.

Interim Accreditation Rules for family dispute resolution practitioners have been prescribed in the Regulations pursuant to section 10A of the Family Law Act. Final Accreditation Rules are being developed by the Attorney-General's Department and are expected to be prescribed in the Regulations before the end of 2007. For more information see [www.ag.gov.au/fdrproviders](http://www.ag.gov.au/fdrproviders)

From 1 July 2009, all individuals (except those authorised by a court or by an organisation designated by the Attorney-General under the Act beyond the transition period) will need to meet the requirements of the final Accreditation Rules as set out in the Regulations in order to be family dispute resolution practitioners under the Act and to issue valid family dispute resolution certificates.