



Australian Government
Attorney-General's Department

Access to Justice Division

FREQUENTLY ASKED QUESTIONS FAMILY DISPUTE RESOLUTION PRACTITIONER OBLIGATIONS

Confidentiality and Admissibility

- What confidentiality obligations are imposed on practitioners under the *Family Law Act 1975*?
- What should practitioners know about admissibility of communications under the Family Law Act?
- Do the confidentiality and admissibility provisions under the Family Law Act apply to those practitioners who have not met the Accreditation Standards?
- Can communications/notes of a practitioner be subpoenaed?

Other Obligations of practitioners when providing family dispute resolution

- What do practitioners need to consider when assessing suitability for family dispute resolution?
- What information do practitioners need to provide?
- What are the general obligations imposed on practitioners?
- What are the conflict of interest obligations imposed on practitioners?

Confidentiality and Admissibility

What confidentiality obligations are imposed on practitioners under the *Family Law Act 1975*?

(Family Law Act – Section 10H)

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

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

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

In addition, a family dispute resolution practitioner **may** disclose a communication, with the consent of the person 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 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.

What should practitioners know about admissibility of communications under the Family Law Act?

(Family Law Act – Section 10J)

Communications made in family dispute resolution are 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 dispute resolution practitioner, is also inadmissible in any court or proceedings in any jurisdiction.

In order to ensure that professionals to whom family dispute resolution practitioners make referrals are aware of the inadmissible status of communications made to them, family dispute resolution practitioners are required to inform relevant professionals of this 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.

Do the confidentiality and admissibility provisions under the Family Law Act apply to those practitioners who have not met the Accreditation Standards?

The confidentiality (section 10H) and admissibility (section 10J) provisions under the Family Law Act only apply where family dispute resolution is being conducted by a practitioner as defined in section 10G(1) of the Act. Therefore, people who meet the Accreditation Standards and can therefore issue certificates, will attract the confidentiality and admissibility provisions.

Family dispute resolution conducted by a person who cannot issue certificates will not attract the confidentiality provisions. Where a practitioner is training to become a practitioner, it would be prudent for them to sign a confidentiality agreement.

In terms of admissibility, according to the Family Law Act, 'evidence of anything said, or any admission made, by or in the company of, a family dispute resolution practitioner is not admissible.' Therefore, provided an accredited practitioner is conducting or supervising the process, the admissibility provisions will apply.

Can communications/notes of a practitioner be subpoenaed?

A subpoena is an order requiring the giving of evidence, or the production of documents to a court or tribunal. Whilst notes can be the subject of a subpoena, the admissibility provisions in the Family Law Act provide a basis for raising an objection to producing documents. If an objection to a subpoena is raised, the court may inspect the documents to determine whether they should be provided to the party who issued the subpoena.

Do the confidentiality obligations apply where an investigation is being conducted as a result of a complaint being made against a practitioner?

The confidentiality obligation attaches to the nature of the proposed disclosure by the practitioner. If a disclosure relates solely to communications made by, or conduct of, the practitioner (and does not incorporate the content of a communication made to the practitioner), no confidentiality obligation attaches. In accordance with section 10H of the Family Law Act, the confidentiality obligation attaches to a 'communication made *to the practitioner* while the practitioner is conducting family dispute resolution'. Therefore consent is required of the party to whom the communication relates.

Other Obligations of practitioners when providing family dispute resolution

What do practitioners need to consider when assessing suitability for family dispute resolution?

An assessment of the people involved in the dispute must 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 a person to negotiate freely in the dispute is affected by:

- a history of violence (if any) among the people involved in the dispute
- the likely safety of the people involved
- the equality of bargaining power the risk that a child may suffer abuse
- the emotional, psychological and physical health of the people involved, 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.

Where family dispute resolution begins but part way through the practitioner decides it is no longer appropriate to continue because of the above matters, the practitioner may stop providing family dispute resolution. A certificate can then be issued stating the person attended family dispute resolution but part way through the practitioner decided it was not appropriate to continue.

What information do practitioners need to provide?

The Family Law Act and *the Family Law (Family Dispute Resolution Practitioners) Regulations 2008* require family dispute resolution practitioners to provide information in the following circumstances.

Provide information on family dispute resolution

Family dispute resolution practitioners must ensure that people 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 (Family Law Act s10H)
- the generally inadmissible status of communications made in family dispute resolution (Family Law Act s10J)
- the qualifications the practitioner has in order to be a family dispute resolution practitioner
- the fees (including any hourly rate) charged by the family dispute resolution practitioner in respect of the service
- that family dispute resolution must be attended before applying for an order in relation to a child, unless an exception applies
- that if a person wants to apply to the court for an order in relation to a child they will need to obtain a certificate from the family dispute resolution practitioner before applying, unless an exception applies
- that a court may take into account the certificate when deciding whether to make an order referring the people to family dispute resolution or to award costs against a person
- information about the complaints mechanism that a person can use should they wish to complain about the family dispute resolution service.

Provide information on services that assist reconciliation

(Family Law Act – Section 12G)

Family dispute resolution practitioners must give a married person who is considering a divorce, or considering going to court about their children or their finances, information about family counselling and family dispute resolution services available to help with reconciliation.

Information does not need to be given if the family dispute resolution practitioner believes they already have the relevant documents or they believe there is no reasonable possibility of reconciliation.

[Family Relationships Online](#) or the Family Relationship Advice Line (1800 050 321) can provide information about family counselling services.

Provide information in cases involving family violence or child abuse

(Family Law Act – Section 60J)

A person does not need to attend family dispute resolution before making an application to the court about a child in a number of circumstances including where there has been family violence, child abuse or a risk of family violence or child abuse.

Where these circumstances exist the court must be satisfied that the person making the application has received information from a family counsellor or a family dispute resolution practitioner about services and options (including alternatives to court action) available.

Practitioners who are asked to provide this information can find relevant resources on [Family Relationships Online](#) or by contacting the Family Relationship Advice Line on 1800 050 321.

Provide information about parenting plans

What is a parenting plan?

(Family Law Act – Sections 63DA(1)-(3) and 63C(2))

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.**

If parents go 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 a child, if it is in the best interests 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 a 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

The type of information a practitioner is obliged to provide will depend if they are advising people generally about arrangements for children after separation or providing specific advice in connection with the making of a parenting plan.

If the practitioner is advising generally about parental responsibility following the breakdown of a relationship, they should advise that:

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

When advising people about the making of a parenting plan, practitioners must inform people:

a) that where it is in the best interests of a child, and reasonably practicable, they could consider as an option an arrangement where they **equally share the time** spent with the child (*note: a court will only consider equal shared time or substantial and significant time if there is equal shared parental responsibility. A court will not presume there is equal shared parental responsibility where there is family violence or child abuse*)

b) 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.

'Substantial and significant time' is defined in the Family Law Act. People considering this should ensure 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.

Practitioners 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.

c) that decisions made in developing parenting plans should be made in the best interests of the child

d) of the matters that may be dealt with in a parenting plan

e) that the terms of the parenting plan may alter a previously made court order about the child (in exceptional circumstances the court may order that this can not occur).

f) that it is desirable to include in a parenting plan information about how people will consult and resolve disputes about the plan and the process to be used for changing the plan.

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

The information relating to parenting plans that practitioners are required to provide can be provided in written form such as brochures. You can download information from Family Relationships Online which can be used to meet the information provision requirements.

What are the general obligations imposed on practitioners?

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 people 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 person, or if the practitioner is no longer satisfied that family dispute resolution is appropriate
- not provide legal advice to any of the people 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.

What are the conflict of interest obligations imposed on practitioners?

A family dispute resolution practitioner will have a conflict of interest if the practitioner:

- has previously acted in a professional capacity for one or more of the people involved in the 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 people involved in the dispute, or
- is a personal acquaintance of one or more of the people involved in the dispute

In these situations the practitioner may only provide family dispute resolution services if:

- each person involved in the family dispute resolution process 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.