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15 January 2020

Government Centre for Dispute Resolution
Ministry of Business, Innovation & Employment
Wellington

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Model Standards for the Dispute Resolution System – consultation

1. The New Zealand Law Society welcomes the opportunity to comment on the draft Model Standards for the Dispute Resolution System (model standards) set out in MBIE's November 2019 consultation paper.

2. The model standards are intended to support more consistent and coordinated best practice dispute resolution across government, at both the systemic level and for the many out-of-court dispute resolution processes provided in contexts such as employment, housing, family, human rights, education and consumer protection.[1] The intention is that "… *all New Zealanders are empowered to resolve disputes earlier, and can easily access appropriate support to help them do so*."[2]

General comments

3. The Government Centre for Dispute Resolution's development of model standards to provide more detailed guidance to the best practice principles is a useful way to more clearly articulate expectations to both dispute resolution providers and to consumers. The Law Society welcomes measures to facilitate New Zealand's dispute resolution system meeting best practice and ensuring the system (and the service provided through the many dispute resolution schemes) is consistently of a high standard, accessible and well-resourced. A dispute resolution system that provides for the effective, efficient and early resolution of disputes out-of-court contributes to better access to justice.

4. The Law Society supports the draft model standards. This is subject to the proviso that in some areas the standards need to more fully reflect the complexity and diversity of the schemes covered. As well as applying to a wide range of disputes, from family matters to tax, the standards will apply to different dispute resolution methods and practices; principles and practices that work well in mediation, for example, may not be appropriate in other contexts. It is important the standards do not force dispute resolution systems and participants into a 'one size must fit all' model.

5. It is clear from the consultation paper that considerable thought has been given to the need to recognise complexity and diversity across the system, and to balance that with the need for consistency (and simplicity) across the system.[3] However, in our view Standard 5

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1 Consultation paper, at pp6 – 8. The model standards will apply to dispute resolution schemes that are delivered or funded by government or that exist within a regulatory/statutory framework.

2 Consultation paper, at paragraph 4, p6.

3 Ibid, at pp10 – 11.

("Confidential, as far as the law allows") in particular needs further development to better reflect the diverse range of types of alternative dispute resolution.

6. The Law Society also endorses the recognition of the need for adequate resourcing of the dispute resolution system (reflected in Standard 8 ("Properly resourced to carry out the service"). As the consultation paper notes, this underpins many of the other proposed standards: "In order to be accessible, responsive and timely, schemes will need to have the appropriate funding, skills and capabilities".[4] The excerpt from the Morris Report in the consultation paper states that adequate resourcing – i.e. adequate funding, capability and competence – is "a known problem".

7. In particular, the Morris Report references the Independent Panel report on the significant difficulties experienced with the Family Dispute Resolution (FDR) system, and says that if FDR "had been properly resourced at its inception we may have avoided many of the current problems".[5] The Law Society agrees, and has set out below detailed responses to the consultation questions in relation to the FDR system. Comments are also provided on standard 8 in relation to employment mediation services, endorsing the statement in the Morris Report that there "have also been capacity concerns around recent restructuring of employment mediators."

Structure of this submission

8. In addition to the general comments above, this submission:

   A. comments briefly on each of the proposed Standards; and

   B. provides a detailed response to the consultation questions, in relation to Family Dispute Resolution (FDR). This part of the Law Society's submission has been prepared by its Family Law Section, from the perspective of family lawyers who provide mediation services including FDR mediators who are appointed to mediate in respect of parenting and guardian disputes prior to or during Care of Children Act proceedings.

A. General comments on the individual Standards

Standard 1: Consistent with the Treaty of Waitangi principles

9. The Law Society agrees that the dispute resolution system should be consistent with Te Tiriti o Waitangi principles. As the consultation paper acknowledges, dispute resolution services provided by/through government must be designed and delivered in a way that is effective for and responsive to the needs of Māori.[6]

10. As discussed in Section B, this may require dispute resolution providers to undertake additional training. The capacity of government agencies and service providers to meet Standard 1 is likely to develop over time (and will require adequate resourcing).

Standard 2: Accessible to all potential users particularly those from marginalised communities

11. The Law Society supports this standard: dispute resolution should be both affordable and accessible to those who need it.

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4 Ibid, at p22.

5 Ibid.

6 Consultation paper, at p14.

12. Cost is a barrier to accessing justice in New Zealand. Any accessibility standard must recognise the need to minimise cost to users. Removing lawyers from dispute resolution processes (such as in the Disputes Tribunal) provides for speed and simplicity and reduces upfront costs, but safeguards are required:

    a. A system operating without lawyers or other advocates needs to provide easily accessible information about the process and the relevant law, so that users can advocate for themselves.

    b. Access to justice must deal with any inequality of arms between the parties. Some disputes will involve parties with a significant power disparity, such as where the government is advised by and represented by lawyers. For example, the consultation paper includes the Inland Revenue Department's Disputes Review Unit; an individual representing themselves in a dispute with the Inland Revenue Department will need to be given comprehensive and accessible information in order to mitigate the power imbalance.

13. In some cases – as illustrated by the Family Dispute Resolution system (discussed in Section B) – removing lawyers from the process is neither cost-effective nor efficient from the perspective of users and the justice system.

Standard 3: Impartial, and Standard 4: Independent

14. The Law Society agrees that it is a fundamental requirement that dispute resolution be both impartial and independent. Retaining impartiality and independence as separate standards is necessary, to recognise the fact that at times the government has a dual role as both the provider of dispute resolution services and as a party in particular disputes.

Standard 5: Confidential, in so far as the law allows

15. Standard 5 illustrates the tension that arises when a single standard is applied to diverse dispute resolution mechanisms. In our view, standard 5 needs further development to better reflect the diverse range of types of alternative dispute resolution.

16. Confidentiality underpins the provision of mediation, where it is a useful tool. This is usually agreed by mediating parties by contract. In addition, the without prejudice privilege is codified, including for mediations, by section 57 of the Evidence Act 2006, which also provides a framework for exceptions to the privilege – giving rise to the "insofar as the law allows" qualification to the standard.[7] There are other circumstances which may give rise exceptions to confidentiality, particularly where personal safety is at issue.

17. The principle of confidentiality in mediation (whether or not considered through the without prejudice privilege prism) does not translate across to other dispute resolution services, where outcomes are reported. Some of the dispute resolution providers identified in appendix 2 of the consultation paper do not operate confidentially. By way of one example, decisions of the Intellectual Property Office Commissioner are available online and give the names of the parties involved.[8] Other dispute resolution providers, for example, the Health and Disability Commissioner, publish decisions that are anonymised.[9]

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7 See, eg, *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 and *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326.

8 <www.iponz.govt.nz>

9 <www.hdc.org.nz>

18. Confidentiality is not always a good in itself. It can operate as a tool to mask "repeat offenders" or systemic dysfunction.[10] Furthermore, making decisions available assists in the development of a body of case law in New Zealand and conforms with the principle of open justice, that "justice should be seen to be done".

19. We suggest that a relatively minor amendment to the subtext to standard 5[11] would provide clearer guidance:

> Standard 5: Confidential, in so far as the law allows
>
> Many dispute resolution processes (such as mediation) are confidential. Where confidentiality applies, any exceptions are clearly communicated to all parties and participants in the process. Confidentiality relates to both the process and the outcomes.

20. If the commentary provided in the consultation paper is retained in the final Model Standards (which we would recommend), it should also be amended for clarity. Namely, the statement that "… confidentiality is a central tenet of best practice dispute resolution" should read "… confidentiality is a central tenet of many – although not all – dispute resolution processes, such as mediation".

<u>Standard 6: Timely</u>

21. The Law Society supports this standard. It is essential that parties have timely access to dispute resolution, to avoid disputes escalating or becoming entrenched. As noted in the paper, "justice delayed is justice denied" and unreasonable delays will be fatal to any dispute resolution regime.

22. However, the paper rightly notes that "what is a reasonable time limit to facilitate speedy resolution will vary and depend on the context, particularly the nature of the disputes" and that properly resolving complex and multi-faceted disputes such as family or human rights disputes will take longer than high volume-low complexity disputes.[12] For this reason, it will be important to include commentary providing context for the standard, that what is "timely" will depend on the nature of the dispute (the aim being to avoid delays that are unreasonable or unacceptable in the circumstances).

23. In this regard, we note recent research into delays in New Zealand's civil high court system found that while delays are a key obstacle in accessing justice, the reasons for delays and their impact on participants in the justice system are varied.[13] The study also found that before reforms could be implemented, further data collection and analysis is required.[14] In relation to implementation of the model standards, innovations to reduce delay should be supported by evidence-based research.

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10 See for example the concern raised about the use of Non-Disclosure Agreements and confidentiality provisions in relation to sexual harassment allegations: Report of the New Zealand Law Society Working Group, December 2018, at p62.

11 The current wording is "Dispute resolution processes are confidential. Any exceptions to the presumption of confidentiality are clearly communicated to all parties and participants in dispute resolution processes. Confidentiality relates to both the process and the outcomes."

12 Consultation paper, at p20.

13 See the executive summary to Toy-Cronin, B., Irvine, B., Stewart, K., & Henaghan, M. (2017): The Wheels of Justice: Understanding the Pace of Civil High Court Cases (Project Report).

14 Ibid, p. ii

24. It is also worth mentioning that in any dispute resolution system there will always be outliers to any timeframe aspirations. Too much of a focus on time can have downstream consequences, as the commentary recognises – "adhering to timeliness requirements should not, however, compromise the quality of decisions".[15]

Standard 7: Prioritise prevention of disputes and early intervention

25. The Law Society agrees that early intervention to avoid disputes escalating or becoming entrenched is appropriate. However, in our view the focus in standard 7 on prioritising *prevention* of disputes is unnecessary and the standard should be reworded as "Prioritise early intervention". The Law Society agrees with the commentary that dispute resolution providers should seek to identify the causes of disputes and trends over time, to assist in systemic improvements that might prevent future disputes developing – and, as noted in the commentary, this will be addressed through standard 9 which encourages better collection of information and insights about disputes.[16] There is no added value in including dispute prevention in standard 7. In our view, the discussion in the paper does not shed any light on how dispute resolution service providers can proactively prevent disputes, beyond the general monitoring/systemic improvements already mentioned.

Standard 8: Properly resourced to carry out the service

26. The Law Society agrees that proper resourcing is essential. As the commentary notes, this standard underpins many of the other standards.[17] Dispute resolution service providers' ability to comply with the other standards (including the required skills, capabilities and cultural competency) will be directly impacted by its resourcing.

27. This standard is commented on in detail in Section B, in relation to the FDR service.

28. The proper resourcing of employment mediations is also a current issue, as noted in the Morris Report excerpt. The Law Society agrees, and notes that concerns have consistently been expressed by its national Employment Law Committee and employment lawyers across New Zealand about the need for proper resourcing of Employment Mediation Services. The concerns about the current provision of employment dispute resolution services are set out in Appendix 1. In order to be accessible, responsive and timely, the employment mediation scheme must be appropriately funded so that mediators have the required availability, skill and capability.

Standard 9: Accountable through monitoring and data stewardship

29. The Law Society agrees that government-funded dispute resolution should be accountable through monitoring and data stewardship. Data should be used to measure service effectiveness and to inform changes to make services more effective and efficient.

30. The commentary states that data collection can "[identify] whether the scheme is doing the right thing and in the right way".[18] We note that identifying "the right thing" for different stakeholders is not measurable by quantitative data, and that qualitative research will be needed.

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15 Consultation paper, at p20.
16 Ibid, at p21.
17 Ibid, at p22.
18 Consultation paper, at p23.

31. In addition, as acknowledged in the consultation paper,[19] data collection (and particularly qualitative data about user experience) from dispute resolution schemes that are subject to confidentiality restrictions must be collected and used in ways that protect the privacy and confidentiality of users.

B. Family Dispute Resolution – responses to consultation questions

32. In this section of our submission, responses to the consultation questions are provided by the Law Society's Family Law Section, from the perspective of family lawyers who provide mediation services, including FDR mediators who are appointed to mediate in respect of parenting and guardian disputes prior to or during Care of Children Act proceedings.

33. In 2018, the Minister of Justice appointed an Independent Panel (panel) to evaluate the 2014 changes to the family justice system. The responses below draw on the extensive submissions made by the Family Law Section in response to the panel's two consultation papers in 2018 – 2019.

Standard 1: Consistent with the Treaty of Waitangi principles

Do you support this proposed standard? Why or why not?

34. The Law Society supports the standard that Family Dispute Resolution (FDR) mediation practice should be consistent with te Tiriti o Waitangi principles. This may require some mediators to undertake additional training to meet this standard as well as the cultural competence requirements of standard 2 (discussed below).

35. We note there is likely to be additional cost for dispute resolution providers, including FDR mediators, in upskilling and developing systems to meet the proposed standards. This may make it uneconomical for FDR mediators to continue to provide mediation services unless there is a sufficient volume of mediations to justify the additional cost in upskilling. In its submission to the panel, the Law Society raised a concern about the low uptake of FDR making it unsustainable for some practitioners to continue their work as mediators.[20] Additional costs for FDR mediators to meet the proposed standards would exacerbate this concern.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

36. The current FDR process is modelled on a Pākehā nuclear family framework rather than recognising te tamaiti as part of a wider family group who may need to be part of the FDR mediation in order for it to proceed in a culturally appropriate way.

37. There is no 'one size fits all' when it comes to mediating with Māori, and many Māori parties may be more comfortable with models of family mediation that are responsive to cultural considerations. Providing mediation in a way that is consistent with Te Tiriti principles implies the right for Māori to mediate in a self-determining way. Significant work would need to be undertaken in partnership with Māori to design a mediation model that is more culturally appropriate.

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19 Ibid, at p19.

20 New Zealand Law Society (Family Law Section) submission to the independent panel, 12 November 2018, at paragraph 52.

38. Under the current FDR model, there is a lack of mediators with sufficient and ongoing training in cultural competency, te reo and tikanga, and there is often insufficient time available under the current FDR framework to include wider family where this is required by participants.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

39. The Law Society supports the following ideals as part of this standard:

- greater whānau participation in appropriate cases;
- availability of skilled mediators that can demonstrate knowledge of tikanga, te reo and Te Aō Māori;
- availability of venues that are culturally appropriate; and
- availability of iwi-based mediation or other dispute resolution processes that are culturally appropriate, designed in partnership with Māori and accessible for Māori.

40. Māori will need to be appropriately consulted regarding suitable measures or indicators that demonstrate compliance with te Tiriti principles.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

41. We are not aware of any good examples that are already tracking well against this standard. However, the Law Society is aware that most FDR suppliers are working hard to build cultural competence amongst mediators they contract with.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

42. Government currently partners with hapū, iwi and Māori organisations to deliver services in other areas outside of family law. Consideration should be given to the current partnership models the government already uses, to establish a partnership model to deliver services in respect of family mediation.

43. Until a true partnership model is able to be developed, the current FDR model needs to be adequately resourced to improve its capability to deliver culturally appropriate mediations.

<u>Standard 2: Access to all potential users particularly those from marginalised communities</u>

Do you support this proposed standard? Why or why not?

44. The Law Society supports this standard and believes mediation should be both affordable and accessible to those who may require it.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

45. There are a number of barriers to accessing FDR under the current model:

- **Fees:** the fee makes mediation inaccessible for some participants and is an impediment to participation.[21] While those living in marginalised communities may meet the income threshold for fully government-funded mediation, the fee for FDR impacts on those who

[21] 12 November 2018 submission, at paragraph 63.

may be slightly above the income threshold for fully funded FDR but who nevertheless have insufficient resources to meet this cost. The fee also impacts on a mediation where one party is fully-funded while the other party is not, which sets an unlevel playing field from the outset.

- **Awareness:** there is a lack of public knowledge and visibility of the existence and availability of FDR, particularly in marginalised communities. Even if there is knowledge of the service, there is difficulty in accessing it due to the multiple FDR suppliers and a lack of a central hub to access family dispute resolution. The Law Society has previously proposed that all family justice services, including FDR mediation, come under the 'umbrella' of the Family Court, to promote greater visibility of FDR.[22]
- **Removal of lawyers:** the 2014 changes to the family justice system saw the removal of lawyers to represent parties in parenting and guardianship disputes with the exception of matters filed without notice (urgent matters that involve risk and/or safety) and the removal of legal aid. This has limited public access to family legal advice and representation. The Law Society considers that parties in family disputes should be allowed to have legal representation in all stages of proceedings, including pre-proceedings. Pre-proceeding legal advice, prior to March 2014, enabled more opportunity for settlement of issues. Parties were able to obtain legal advice and be legally represented in negotiations with the other party's lawyer. This often led to the settlement of issues without the need for an application to the Family Court.
- **Language barriers:** an additional barrier to meeting this standard is the current lack of interpreters for participants who do not speak English and the lack of information about FDR mediation that is available in languages other than English on the Ministry of Justice website.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

46. In terms of accessibility to FDR mediation, particularly for those from marginalised communities, the following characteristics should be part of this standard:

- information that is readily available to diverse ethnic groups in those languages;
- "easy to read" brochures and/or information for those with low literacy;
- mediators fluent/competent in te reo, sign language or other languages or translation services that are readily available;
- a free FDR mediation service; and
- an established central hub to easily access family dispute resolution services.

47. In terms of suitable measures in relation to this standard, the Ministry of Justice should regularly review the uptake of FDR mediation and how that is accessed to identify areas where accessibility may need to be improved. In addition, FDR suppliers should regularly report to the Ministry on measures they have in their processes to meet this standard.

[22] Ibid, at paragraph 55.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

48. As noted above, there are multiple suppliers that contract with the Ministry to supply FDR mediation services. Some of those suppliers, as part of their service:

- support people with disabilities by providing appropriate information about access to mediators;
- readily fund interpretation/translation services when required;
- provide information about FDR in a variety of languages; and
- fund travel and accommodation costs for mediators in order to ensure that there is access to FDR for parties who are outside main centres.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

49. In the Law Society's view, the following capabilities and resources are required to make FDR mediation more accessible:

- removing the fee for parties to attend mediation;
- re-establishing access to free legal advice before and during a mediation where a person is financially eligible;
- publicising the facilities each FDR supplier offers to cater for various ethnicities and those with disabilities who may need to access mediation services;
- financially supporting suppliers and individual mediators to enable them to meet this standard, for example, through ongoing specialist training; and
- establishing a central hub to access family dispute resolution services.

<u>Standard 3: Impartial</u>

Do you support this proposed standard? Why or why not?

50. Yes, it is essential that the mediator is impartial as between the parties. In the FDR context, FDR mediators have a legislative obligation to ensure the mediation focuses on the welfare and best interests of the child, and this is explained to the parties at the outset.[23] (In family disputes, the child is not a party to proceedings but is the subject of the dispute and this is reflected in the legislative requirement for the FDR mediation outcome to be in the welfare and best interests of the child.)

What barriers or challenges do you see to the dispute resolution system meeting the standard?

51. The legislative requirement for FDR mediators to ensure the parties focus on the welfare and best interests of the child is an appropriate requirement in family mediations and should be retained. It does not affect FDR mediators' obligation to be impartial as between the parties themselves and is an appropriate statutory overlay.

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[23] See section 4 and 11(2)(c) of the Family Dispute Resolution Act 2013, sections 4 and 11(2)(c).

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

52. The current FDR operating model of impartiality is appropriate. FDR mediators work with parties to explain their role in the process and the legislative requirements to ensure the mediation is focussed on the welfare and best interests of the child. This enables parties to have a good understanding of the process and also the focus of the mediation at the outset.

53. To support this standard, high quality training in mediation practice is available through the NZLS CLE Limited and other education providers and the Law Society has a robust complaints process available to parties who may feel an individual mediator has not been impartial. The three Alternative Dispute Resolution Organisations (of which the Law Society is one) approved under section 6 of the Family Dispute Resolution Act 2013, are required to have an established code of conduct and an established complaints and disciplinary process in place.[24]

54. In terms of suitable measures or indicators to show this standard is being attained, we make the following suggestions:

- FDR suppliers should regularly audit individual mediators so that any identified concerns about impartiality are resolved via the appropriate complaints mechanism;
- mediators should regularly undertake continuing professional development and professional supervision (which many already do); and
- FDR suppliers should report regularly to the Ministry on how they are meeting this standard.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

55. The Law Society is aware that some suppliers' documentation helps participants understand the requirement of impartiality and the requirement for FDR mediators to help the parties focus on making a decision based on the welfare and best interests of the child.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

56. In order to further develop this standard, easy to read information should be available to parties to ensure that they are fully aware of the mediator's role in FDR mediation.

<u>Standard 4: Independent</u>

Do you support this proposed standard? Why or why not?

57. Yes. The framework for FDR mediation involves the Ministry of Justice contracting with multiple FDR suppliers who then in turn contract with individual FDR mediators. In the Law Society's view, this framework is distinct enough to avoid any perceived conflict of interest.

[24] See regulation 4(b)(i) to (iii) of the Family Dispute Resolution Regulations 2013.

Standard 5: Confidential, in so far as the law allows

Do you support this proposed standard? Why or why not?

58. The Law Society supports the standard of confidentiality in FDR mediations, in so far as the law allows. There are explicit limits on confidentiality when a risk is disclosed to the physical safety of any adults or children which arise from the mediation. This limit should be identified in the Agreement to Mediate signed by the mediator and participants prior to the mediation.

59. The agreed outcomes of FDR mediations are not confidential. This should also be made clear in the Agreement to Mediate. Parties need to be able to produce their agreed outcomes to the court, Inland Revenue, Work and Income NZ and to the children's schools.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

60. The only barrier or challenge to meeting this standard is in ensuring that participants understand the limits on confidentiality where safety issues arise for adults or children. FDR mediators already explain the process of FDR mediation to parties at the outset, including the limits on confidentiality.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

61. There are clear Agreements to Mediate which set out the limits on confidentiality and FDR suppliers should report regularly to the Ministry on how they are meeting this standard.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

62. The Fairway Resolution "Agreement to Mediate" is a good example of a clear agreement which explains the principle of confidentiality and the limitations on that principle.

Standard 6: Timely

Do you support this proposed standard? Why or why not?

63. The Law Society supports this proposed standard. It is essential that parties have timely access to mediation services to resolve disputes over care and guardianship arrangements for their children.

64. However, as discussed earlier, "timely" does not necessarily mean "fast". Timeframes need to be flexible to enable an outcome that is in the welfare and best interests of the child who is the subject of the dispute.

65. Separating parents typically experience significant stress and a range of intense emotions, including anger, jealousy and shame. Such emotions can hinder the parties' effective communication and prevent them from engaging effectively with services to resolve care arrangements for the child in a rational and child-focussed way. It is therefore important that parents have an opportunity to obtain counselling assistance to manage their emotions so that they are ready to negotiate a settlement or to make decisions about how to progress issues. The Law Society recommended to the panel that a limited number of free, focussed counselling sessions should be available to parents before they attend FDR.[25] This would

[25] Submission 12 November 2018, at paragraphs 31 – 40.

enhance the level of engagement in FDR and the opportunity for settlement of disputes. It is also essential that parties have legal advice in relation to their dispute before they attend FDR so they can come to an informed agreement. The Law Society notes that this would also create the need for longer time-frames for resolution.

66. There may also be particular cases where the welfare and best interests of the child will require successive mediation meetings to be held over a period of time. For instance, the staged reintroduction of a parent's contact with the child may be necessary to allow the child to develop a relationship with a parent, or for the parent with day-to-day care to develop trust in the other parent. Alternatively, time may be needed for a parent's attendance at a parenting programme or other programmes, such as counselling. It is important in such cases that the mediation occurs at the appropriate pace, which will depend on the individual circumstances of the parties. Flexibility is therefore important. Pressure on parties to resolve parenting disputes quickly will not necessarily result in the best or most sustainable outcomes for the children.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

67. The greatest challenge for FDR in meeting this standard lies in the availability of suitably qualified providers. In the past, lack of work flow and low remuneration have led to a number of experienced and qualified family mediators deciding to discontinue providing this service as there is not the volume of work to sustain the cost of maintaining their accreditation status and professional supervision requirements. The Law Society highlighted this issue in its submission to the panel.[26]

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

68. A "good" FDR process would ensure:

- the FDR supplier promptly contacts the parties following a request for mediation;
- a prompt initial assessment of all referrals, including agreement with the parties about timeframes for steps in the process;
- the agreed timeframes are complied with by the FDR supplier and mediator;
- free counselling is available if required to assist parties to be emotionally ready to mediate (noting that the pre-mediation counselling that is currently available relates only to preparation for the mediation process);
- parties have access to legal advice prior to the mediation (and representation at the mediation if they choose) to ensure they are aware of their legal rights before they reach agreement;
- the mediation process progresses at a pace that is consistent with the welfare and best interests of the child in the particular case; and
- there is sufficient flexibility in the process to ensure attendance at counselling, parenting programmes and more than one mediation session if that is required in the particular circumstance of a case.

[26] Submission 12 November 2018, at paragraph 52.

69. FDR suppliers should report regularly to the Ministry of Justice on how they are meeting this standard.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

70. Fairway allows for successive mediation meetings over a period of up to 12 months to allow time for interim and then final parenting agreements to be reached. This is however constrained by the current time limit of 12 hours for an FDR mediation, unless the matter proceeds to court and a judge directs the parties to attend FDR – parties can then access an additional 12 hours of FDR within a 12-month period.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

71. FDR suppliers need to have good processes and sufficient staffing to ensure that unwanted delay does not occur. It is also vital that there are enough FDR mediators available to accept referrals for mediation and that those providers also have good processes and time management skills to ensure timely management of the mediation.

Standard 7: Prioritise prevention of disputes and early intervention

Do you support this proposed standard? Why or why not?

72. The Law Society supports this standard. The resolution of parenting disputes at an early stage minimises the risk of escalation of conflict and consequential harm to children.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

73. In the Law Society's view, the main barriers to meeting this standard are problems with people accessing FDR mediation and the resourcing of FDR, particularly in relation to the hours allocated for FDR mediations.

74. In order to intervene early and prevent ongoing disputes, it is essential that parents are able to access FDR when they need it. In its submissions to the panel, the Law Society noted the extremely low uptake of FDR and the high proportion of exemptions granted.[27] This indicates a significant barrier for parties in accessing FDR, in turn preventing opportunities for early intervention. Our earlier comments about accessibility (standard 2) apply equally to standard 7: the current level of resourcing for FDR constitutes a barrier to meeting this standard. The current timeframe allocated for FDR is 12 hours within a 12-month period which in our view is insufficient. Our submission to the panel suggested an increased time allocation of 17 hours should be available for each case.[28] That increased allocation would allow more scope for the mediator to work with the parties on strategies to prevent future disputes, to resolve any underlying issues and to also allow for the voice of the child to inform the mediation.

75. Counselling should be available to assist parties in addressing underlying issues which might otherwise hamper their ability to resolve issues at FDR mediation in a child-focussed way. Such counselling would also assist parties to improve their future communicate with one another to avoid triggering future disputes.

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27 Submission 12 November 2018, at paragraphs 53 – 54.

28 New Zealand Law Society (Family Law Section) submission to the independent panel, 1 March 2019, at paragraphs 113 – 115.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

76. In its submissions to the panel, the Law Society made the following suggestions to improve the uptake of FDR:[29]

- FDR, along with other pre-proceeding services should be brought under the 'umbrella' of the Family Court with dedicated court staff to manage pre-proceeding processes;
- parents should have limited and targeted access to free counselling prior to FDR;
- FDR is free and voluntary;
- there is one supplier to provide FDR on a nationwide basis;
- the voice of the child is obtained through a lawyer for child who is on the Ministry's list;
- legal aid is available for legal advice prior to FDR and for lawyers to attend FDR where parties request legal representation; and
- there is an easy way established to obtain consent orders in respect of mediation agreements where no filing fee is necessary.

77. Adoption of these recommendations and the recommendation for increased resourcing for FDR mediations referred to under standard 8 below would significantly improve the ability of FDR mediators to meet this standard.

78. FDR suppliers should report regularly to the Ministry of Justice on how they are meeting this standard.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

79. No.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

80. We refer to our comments above under this standard.

Standard 8: Properly resourced to carry out the service

Do you support this proposed standard? Why or why not?

81. The Law Society agrees that proper resourcing of both FDR suppliers and providers to carry out FDR mediation is essential.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

82. The Law Society's view is that FDR mediation is currently under-resourced in terms of remuneration paid to FDR mediators and in terms of the 12 hours allocated for an FDR mediation.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

83. The following characteristics would achieve this standard:

[29] Submission 12 November 2018, at paragraphs 55 – 82.

- FDR is free for all participants;
- there is a wide range of providers who are suitably trained and skilled to ensure cultural competency;
- participants have access to legal representation (that is free when they cannot afford it) both prior to and at mediation;
- participants have access to free and focussed counselling;
- the child's voice is available in FDR mediation through appropriately qualified and experienced professionals. In particular, there would be a transparent process for appointment to a list of approved professionals to undertake this role;[30] and
- the ability to direct funded counselling and make a referral (similar to section 46G of the Care of Children Act 2004) would go some way to preventing further unresolved disputes which may otherwise result in an application made to the Family Court.

84. FDR suppliers should report regularly to the Ministry of Justice on how they are meeting this standard.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

85. No.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

86. In the Law Society's view, additional resourcing (additional hours per mediation than the current 12 hours available) is required for FDR mediation to allow for:

- compliance with Treaty obligations (refer to standard 1 above);
- legal advice and representation at the FDR mediation if parties choose;
- counselling services for parties; and
- separate and additional funding for the child's voice to inform the mediation.

<u>Standard 9: Accountable through monitoring and data stewardship</u>

Do you support this proposed standard? Why or why not?

87. The Law Society agrees that government-funded dispute resolution should be accountable through monitoring and data stewardship. This data should be used to measure effectiveness of the service and inform what improvements could be made to make the service more effective and efficient.

What barriers or challenges do you see to the dispute resolution system meeting the standard?

88. Aside from the information provided from the panel's evaluation of the 2014 family justice system, we are unaware whether the Ministry of Justice carries out any monitoring of the data it collects on FDR mediations.

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30 Submission 1 March 2019, at paragraph 102.

What would "good" look like in relation to this standard? Do you have any suggestions of suitable measures or indicators?

89. The Ministry of Justice should collect meaningful data on the FDR system in terms of the services provided by the various FDR suppliers, accessibility of the service by parties and any issues parties raise in terms of their experience with the process. Data on the effectiveness of the service in resolving disputes (thereby reducing applications to the Family Court) would also be beneficial.

Are you aware of any good examples or schemes, or practices within schemes, that are already tracking well against this standard?

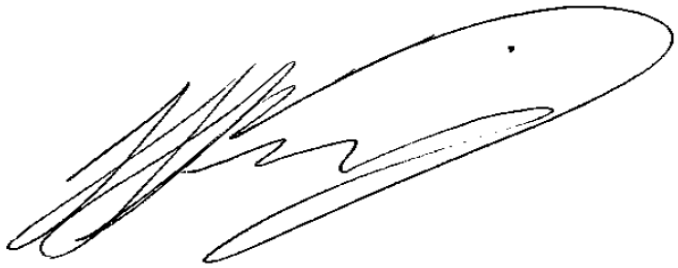
90. No.

What capability and resources do you think the dispute resolution system needs to develop in order to meet this standard?

91. We refer to our comments above under this standard.

We hope you find these comments from the Law Society's Family Law Section, Civil Litigation & Tribunals Committee and Employment Law Committee helpful in finalising the draft standards. If you have any questions or would like to discuss the comments, please contact the Law Society's Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz) in the first instance.

Yours faithfully



Herman Visagie
NZLS Vice President

Appendix A: Employment mediations – resourcing concerns

Appendix A: Employment mediation services –

Current concerns about resourcing (Model Standard 8)

Further to the discussion about Model Standard 8/Adequate resourcing (at paragraph 26):

Employment mediation

92. Commentary in the consultation paper acknowledges other standards in the model standards are underpinned by dispute resolution services being properly resourced.[31] The Law Society agrees. In order to be accessible, responsive and timely, the employment dispute resolution scheme must have appropriate funding, if mediators and the service are to have the required skill, availability and capability.

93. The Employment Relations Act 2000 recognises that the employment institutions are specialist in nature and prompt problem resolution requires expert problem-solving support.[32] This is particularly so when the Act expressly empowers a mediator to perform significant functions requiring specialist employment law expertise, such as:

    A. Upon request, making recommendations to the parties to resolve the dispute;[33]

    B. Upon agreement, making a binding decision for the parties akin to an Employment Relations Authority member;[34] and

    C. Assessing minimum entitlements (requiring a comprehensive understanding of key pieces of legislation including the Minimum Wage Act 1983, Holidays Act 2003 and Wages Protection Act 1983).

Concerns

94. Concerns about resourcing have been reported in recent years to the New Zealand Law Society by employment lawyers across both the North and South Islands, including:

    A. Across centres, there are consistent reports regarding problems of availability of mediators and dates for mediation, particularly for urgent and regional matters. Practitioners have reported:

        i. Reduced capability in regional centres, particularly in areas where mediators circuit on a regular basis, causing delays of up to 6 to 8 weeks;

        ii. Having to travel from Tauranga to Hamilton to get mediations at short notice;

        iii. That some practitioners are unaware that mediators travel on circuits to Whakatane and Rotorua and that this may explain the low number of mediations requested in these centres;

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31 Paragraph 3, Page 22, Consultation Document.

32 For example, Section 143(c) of the Act expressly recognises that, "*… if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships*."

33 Section 147A.

34 Section 150.

iv. The contracting model not being utilised at key peak times, including MBIE staff informing representatives a mediator is unavailable because the set budget had been exhausted at a key peak time; and

v. Short notice cancellation by a representative resulting in rescheduling to a date months later (for an urgent reinstatement claim).

B. Inconsistent mediator experience and performance. Practitioners have reported:

i. A mix of experience and skill across contracted and employed staff. One or more mediators have been reported as having little employment law experience, failing to follow accepted mediation process (particularly when dealing with difficult lawyers or advocates), and consequently being unable to engage substantively in the discussion about reality testing or the strength and weaknesses of a particular case (a critical skill when attempting to get parties to compromise and crucial to resolving complex disputes).

ii. Concern about inexperienced mediators and recent law graduates employed by MBIE being unable to effectively conduct the mediation process; and

iii. MBIE mediators being good at transactional mediations but lacking real expertise in dealing with relationship difficulties and breakdowns where people still work together.

C. Concern about format changes foreshadowed by MBIE. Mediations are inherently personal. Mediators are required to quickly gain rapport with people from wide ranging backgrounds in often heated disputes. Rapport is best gained in person over time; more difficult when done remotely and in a rush. Reports of more telephone mediations planned and shorter mediations, are considered likely to impact on the ability of mediators to build rapport and will risk the effective "in person" benefits of mediation.

95. The concerns outlined above illustrate that the quality of employment mediations will suffer if appropriate resourcing is not allocated to ensure:

A. **Mediator resourcing & availability**: Ensuring the appropriate availability of mediators including regionally and for urgent and early intervention matters. This is key to ensuring everyone can access mediation when they need it.

B. **The right operating model**: Using the right format is key to ensuring adequate mediator resourcing and supports training and retaining mediator talent. This also favours face to face mediators and sufficient time allocation.

C. **Specialist skill sets**: To be successful and ensure consistently high-quality mediator performance and confidence in mediation, the Employment Relations Mediation Service must be recognised as requiring a specialist skill set. The consultation paper acknowledges the diversity in the New Zealand context across the 55 different schemes – this is an example of why a different approach may be required for employment mediations.[35] Specialist skills in the Family Dispute Resolution model are recognised and this equally applies to specialist employment mediation skills.

[35] Paragraph 3, Page 10, Consultation Document. Referred to as the "*diversity principle*" being balanced with the "*consistency principle*.

Mediator resourcing

96. Early intervention and urgent mediations involving several parties need to be able to access mediation services locally and swiftly. There needs to be the appropriate number of mediators, locations and slots allocated, including in regions.

97. Rushed mediations rarely resolve. Mediators often spend well in excess of the scheduled time, (including calls and emails after the mediation itself) to ensure parties reach resolution. It is therefore vital that not only there be slots available at short notice, that mediations have the appropriate amount of time allocated to them.

The right operating model

98. The goal must be to provide a specialised service that is efficient, effective and sustainable. The Law Society's national Employment Law Committee supports an operating model that will mean that both employed and contracted mediators will be held to the same standard of quality. However, an operating model must support long-term mediator training and retention in order to be effective. Contract mediators could be a temporary solution to what is a long-term problem – providing an expert, specialised and sustainable dispute resolution service to businesses, unions and individuals. The operating model currently uses a mixed model of contractors and employed mediators, with mixed results.

99. Using model standards to hold all mediators to account will go some way to ensure consistently high-quality mediators, but we question whether the Employment Mediation Services' current operating model supports that. The challenge will be to retain quality. Contractor mediation work will not provide the same employee career structure. The contractor model does risk experienced mediators becoming less engaged over time if stymied by a limited fee and their own business overheads. Are talented and experienced mediators leaving MBIE to get work privately?

Specialist skill sets

100. The risk of having a mediator with limited employment law knowledge is that problems are at best unresolved or at worst inappropriately resolved. It would be difficult to measure such injustice given the confidentiality attaching to the mediation process. The cost of problems remaining unresolved would be passed onto businesses forced to litigate further. Individuals who cannot afford the cost beyond mediation, simply would not obtain resolution. If matters progressed to the authority or court, our justice system and businesses would be burdened with additional cost.

101. The key to the success of the employment jurisdiction being able to settle matters appropriately is safeguarding that mediators are well trained, professional and specialists in employment law.