



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC:JWsh230421

23 April 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: nathan.mcdonald@lawcouncil.asn.au

Dear Mr Tidball,

Regulation 67B of the *Family Law Regulations 1984*

Thank you for the opportunity to contribute to this consultation on a possible amendment to the *Family Law Regulations 1984* to clarify the degree of knowledge and experience required of family law arbitrators under reg 67B.

We support the objective of clarifying the minimum requirements for qualification as an arbitrator under reg 67B(b)(i).

We understand that fewer family law matters are referred to arbitration than to other forms of alternative dispute resolution such as mediation. We support measures aimed at strengthening the arbitration system and encouraging practitioners to refer appropriate matters to arbitration. We agree that clarifying the minimum requirements for accreditation as a 'family law specialist' by State and Territory legal professional bodies under reg 67B(b)(i) will assist in achieving this objective.

Raising the standard of expertise required of an arbitrator

The intention of the proposal would seem to ensure a high standard of expertise in those qualifying as family law arbitrators. We support this objective. Concerns may be raised that raising the standard overall may risk discouraging practitioners from seeking to qualify as arbitrators or may make it more difficult to qualify, which could in turn lead to a shortage of arbitrators. However, in our view, raising the standard of expertise required will strengthen the arbitration system overall and engender greater confidence in it, both amongst the legal profession and parties in family law proceedings.

Recent family law experience

We note that Options 1 and 2 in the proposal include the element of *recent* family law experience. We support introducing this as a requirement. In our view it is vitally important for family law arbitrators to have strong technical skills in family law based on recent experience. Unlike arbitral awards in general civil matters, family law arbitral awards must be registered by the court. The arbitrator must therefore have a strong current knowledge of the application of the key considerations to be applied by the court. Also, given the high proportion of

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unrepresented litigants in family law matters, the arbitrator must be able to take an active role in identifying and narrowing the issues.

We note that under the current arrangements, those who qualify by satisfying the requirement under reg 67B(b)(i) – being an accredited specialist – will by definition have recent family law experience. In New South Wales, renewal of an accredited specialist practising certificate requires certifying to having maintained substantial involvement in the area(s) of accreditation not less than 25% of normal full-time practice over the previous year. The same rules apply in Victoria and Queensland, and we understand similar rules apply in the other participating states.

Retaining Specialist Accreditation as a pathway

We do not support Option 2 and the removal of specialist accreditation as one of the possible pathways to qualifying as an arbitrator. Specialist accreditation schemes have been developed in New South Wales, Victoria, Queensland, South Australia and Western Australia. The family law specialist accreditation scheme in each jurisdiction provides an objective and fixed process for indicating whether a candidate has an appropriately high standard of specialist expertise to qualify.

Entry prerequisites

Strict prerequisites apply to entry into the NSW Law Society Family Law Accreditation Scheme. The candidate must:

- hold a current solicitor's practising certificate;
- be a current solicitor member of the Law Society of NSW or full solicitor member of an equivalent body in an Australian state or territory;
- have been engaged in the practice of law on a full-time basis for at least five years;
- in each of the three years immediately preceding their application, have been engaged in family law;
- in the three years preceding the application, have practised in the area for not less than 25% of full-time practice.

We understand that similar prerequisites apply in the other participating states.

Assessment criteria

After qualifying for entry into the NSW scheme, candidates undergo assessment against criteria which include:

- ability to identify and analyse relevant issues;
- understanding and application of family law principles, procedural rules and practices;
- ability to communicate clearly, effectively and appropriately with parties and others;
- ability to prepare legal documents in accordance with the relevant rules and principles; and
- adherence to ethical and professional best practice.

The assessment criteria were developed collaboratively by Law Society of NSW, the Law Institute of Victoria and the Queensland Law Society and are applied in those states as well as in Western Australia. Candidates who successfully gain accreditation in one participating state can apply for mutual recognition in another.

Assessment standards

The assessment standard for Specialist Accreditation in NSW is high and accreditation is not easy to obtain.

In recent years less than a third of NSW candidates have successfully attained accreditation as the table below illustrates:

Family Law	2017	2018	2019	2020
Number of candidates	79	54	64	82
Pass	26	11	16	25
Fail	53	43	48	57
Pass rate (%)	33%	20%	25%	30%

In short, including Specialist Accreditation as a possible pathway to qualifying as a family law arbitrator is an excellent way of setting, and measuring against, the high standard of expertise required.

'Accredited specialist in family law'

We support the proposal to clarify the wording in reg 67B(b)(i), and suggest including the words 'accredited specialist in family law'. In our experience, there is often confusion in the legal profession between the terms 'specialist practitioner' and 'accredited specialist'. Including the words 'accredited specialist' would reduce this confusion.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Juliana Warner
President