

# Family Dispute Resolution

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*This paper was settled jointly by the members of ADRAC.*

## Overview

Family Dispute Resolution (FDR) is a process by which separating people can reach agreements regarding issues that arise due to the separation. It is generally a faster and more affordable alternative than litigation.<sup>1</sup> Furthermore, because most parents will need to cooperate in the future around parenting decisions and responsibilities, the FDR process is designed to promote joint decision-making and constructive conflict resolution. The *Family Law Act 1975* (Cth) (FLA) was amended in 2006 to introduce the FDR scheme and FDR is now a mandatory step where the dispute involves the parenting responsibilities.<sup>2</sup> This means parties must make a 'genuine effort'<sup>3</sup> to resolve their dispute by using FDR before making an application to the court for a parenting order. There are some exceptions to this rule, including where a child has, allegedly, been abused by one of the parties, where there is a risk of abuse occurring if the order is delayed, or 'there is a risk of family violence by one of the parties to the proceedings'.<sup>4</sup>

## What is involved?

### A facilitative framework

The form of FDR is not mandated by the FLA.

In the FLA FDR is defined as something other than a judicial process where an independent person helps people likely to be affected by a separation or divorce to resolve some or all of their disputes.<sup>5</sup>

FDR is usually conducted within a facilitative framework which means that the purpose is to create the opportunity for each participant to speak, to be heard and to identify and explore child focused mutually satisfactory perspectives before reaching pragmatic child focused agreements.<sup>6</sup>

## **Confidentiality**

A significant feature of FDR is the confidentiality of the process. The FDR practitioner (FDRP) cannot disclose the content of the parties' discussion without their consent except in certain circumstances – most notably to report child abuse<sup>7</sup> (discussed further below).

Anything said by or to the FDRP during FDR is not admissible in court unless it involves the disclosure of abuse or risk of abuse of a child under 18.<sup>8</sup>

## **Outcomes**

The outcome of FDR is not legally binding.<sup>9</sup> However, if the parties would like their agreement to be enforceable, they may apply to the court for consent orders.<sup>10</sup>

## **The Role and Qualifications of Family Dispute Resolution Practitioners?**

### **Family Dispute Resolution practitioners**

FDR is administered by accredited FDRPs. An FDRP is an independent (and trained, see below) third party who assists the participants to reach agreement through mediation. They do not provide legal advice or render a decision. Rather, it is up to the parties to take responsibility for the content and the outcome of the process.

The FDRP must remain independent when providing information.

### **Accreditation**

Since July 2009, FDRPs must be accredited under the Accreditation Rules prescribed in the Regulations.<sup>11</sup> Requirements that practitioners must meet before

they can become accredited include educational qualifications<sup>12</sup> and compliance with the relevant working with children rules.<sup>13</sup>

The Attorney-General's Department maintains [a database of registered FDR providers](#).

### **Certificate of participation in FDR**

If the parties in FDR wish at a later date to approach the court regarding the matters they discussed in FDR, they need to provide a certificate to the court supplied by their (registered) FDRP. A FDRP is able to issue one of five certificates: 1) the parties made a genuine effort in the FDR process; 2) it would be inappropriate to conduct FDR; 3) it would be inappropriate to continue FDR; 4) one or more parties did not attend; or 5) one or more parties did not make a genuine effort to resolve the dispute.<sup>14</sup>

### **Issues in Family Dispute Resolution**

#### **What can be the implications of mandating FDR?**

As mentioned above, FDR is a mandatory step in disputes involving the parenting arrangements. The family courts do not look favourably upon a party that refuses to participate in good faith – or at all – in FDR, unless an exception applies. This means that initially the parties are not necessarily voluntary participants in the process of FDR, although of course many are likely to be willing participants regardless. FDR is only compulsory for those who wish to subsequently utilise the court processes to resolve their parenting disputes. There is, however no obligation to reach agreement in FDR. The obligation, as mentioned above, is to make a 'genuine effort' as perceived by the FDRP.

FDR was made mandatory in 2006 as part of a raft of reforms to the Family Law Act and family law system at that time. Coinciding with this reform the Government introduced a network of free FDR services throughout Australia in the form of Family Relationship Centres and the accreditation requirements of FDRPs described above.

The Government of the time argued for a 'cultural change' in family law, shifting dispute resolution of parenting matters away from legal and court process towards ADR processes.

The government agrees a new approach to the family law system is needed – one that ...helps parents agree on what is best for their children rather than fighting in the courtroom.<sup>15</sup>

Recent large scale research carried out by the Australian Institute of Family Studies (AIFS) has examined the changing patterns of dispute resolution in family law. Prior to 2006 around 3% of separating parents utilised FDR, 11% used lawyer based negotiation and 8% used the courts. In 2014 it was found that 10% used FDR, 6% used lawyers and only 3% used courts.<sup>16</sup>

Clearly the pattern of resolving parenting disputes has changed and it is reasonable to assume the introduction of mandatory FDR and availability of low cost FDR services has contributed to this change.

However, some controversy still exists as to whether the mandating of FDR is desirable or appropriate. It is argued that, notwithstanding the identified exceptions, some parents will be disadvantaged by participating in the FDR process. Victims of family violence in particular may feel compelled to undertake FDR when it may be more appropriate they seek the assistance of an advocate, lawyer and the courts to resolve their parenting matters. In some instances, it is argued, that the FDR process may be unsafe and/or the resulting outcomes unsafe or unfair for certain clients. Polak argues that the lack of voluntary participation in FDR can lead to an imbalance in power between the parties, meaning that less powerful parties may fall under the influence of more powerful parties.<sup>17</sup>

### **What does confidentiality contribute to Family Dispute Resolution?**

The traditional view is that the confidentiality of the process allows parties to be open and frank in resolving their dispute.<sup>18</sup>

There is a longstanding and continuing debate regarding the confidentiality of FDR processes. Currently a FDRP must not disclose communications made in FDR unless required to or allowed to under conditions stipulated in the Family Law Act. In practice FDRPs must disclose when they suspect child abuse and may disclose if they have reasonable belief that a number of other circumstances apply including, but not limited to: psychological or physical harm, neglect and threat to person or property.

It has been argued that FDRPs should be able and willing to disclose communications in FDR in order to protect family violence affected clients caught up in the family law system. The courts in particular might benefit from information provided and assessments made in FDR for clients who subsequently enter the court processes. Others argue that such information would be no different to that available from clients in affidavits, and any erosion of confidentiality of FDR confidentiality would inhibit disclosure in FDR.

Confidentiality of FDR processes is a very live issue within the sector at the present time and remains hotly contested.

### **What does impartiality of Family Dispute Resolution Practitioners contribute to FDR?**

Traditional definitions of mediation processes describe the mediator as an impartial or neutral facilitator. These terms are not used to describe FDR in the Family Law Act. The FDRP is described as someone who is 'independent of all of the parties involved in the process'. No mention is made of impartiality or neutrality of the FDRP with respect to the process or outcome.

The Family Law Regulations place a number of significant process and outcome obligations on FDRPs when carrying out FDR. These obligations include, where appropriate, information about parenting plans, the consideration of equal shared time, or substantial and significant time with children and that decisions made in developing parenting plans should be made in the best interests of children.

Cooper and Field consider that the reporting requirements placed on FDRPs, the requirement to breach confidentiality in certain statutorily mandated circumstances, and – most significantly – the duty to issue a certificate of genuine effort, all impact upon a practitioner’s ability to act impartially towards both parties.<sup>19</sup> The requirement of a FDRP to make an ongoing assessment of whether each party is making a genuine effort throughout the process, could be seen as a coercive tool. Because the certificate can have such an impact upon the later court process, this is considered to give FDRPs a substantive (even quasi-determinative) role.<sup>20</sup>

FDRPs may provide advice about procedural matters, but not legal advice to a client ‘unless the practitioner is also a legal practitioner’. Thus a legally qualified FDRP is permitted to provide legal advice when providing FDR.

NADRAC has previously defined mediation as a purely facilitative process and conciliation as a mixture of facilitative and advisory processes. If this definition is accepted, it is arguable that FDR is more closely aligned to conciliation than mediation. However, it is also likely that some FDRPs would argue that they remain facilitative most if not all of the time.

### **How effective is FDR?**

Effectiveness in all ADR processes is an ill-defined concept - in FDR even more so. Although it is beyond the scope of this paper to explore the issue in any depth, it is important to recognise that effectiveness in FDR is complex, multifaceted and at times contradictory. A simplistic approach would focus on outcomes, in particular the resolution of presenting parenting issues and formulation of an agreed parenting plan. However, scratching just below the surface, it is necessary to consider how an outcome reflects the interests of children, keeps children safe from harm, protects relationships with parents, grandparents and between siblings and, in more contemporary frameworks, considers and reflects children’s views and wishes. Furthermore, outcomes need to also consider current and future safety of adults, including how substantive outcomes keep adults safe from harm in the future.

FDRPs need to assess risk and suitability of FDR. An effective outcome might be to identify safety issues and explicitly deny FDR service (and refer clients on to more

appropriate services). In some situations, clients requesting FDR may be assessed as unable to look after their own or their children's self-interests – perhaps due to depression or an unwillingness to accept the ending of a relationship. In such situations screening out of FDR or ceasing service during FDR might be the most appropriate outcome. Effectiveness in such situations is a function of the quality of the assessment and referral process, not the dispute resolution process.

Notwithstanding these complexities, research over many years into the outcomes and process of ADR in family law have generally demonstrated positive results. It is arguable that the 2006 family law reforms and the consequent impact upon the practice of FDR required a re-examination of effectiveness. Clients are now more likely to feel compelled to attend FDR, thus drawing into the service a new cohort of separating parents who might not have otherwise selected to undertake FDR. Simultaneously, FDRPs may have shifted their model of ADR from a purely facilitative process towards a more advisory or conciliatory one.

AIFS has undertaken a number of large studies examining the impact of the 2006 reforms on the experiences of separating parents engaging with the broader family law system.<sup>21</sup> In multiple samples across a number of years it was found that around 40% of parents who attended FDR reached parenting agreements. Between 20% and 40% were issued with certificates. Although it is not clear which certificates were being issued, associated analysis found those issued with certificates were more likely to be concurrently experiencing family violence. This would suggest that a large proportion of these clients were being issued with inappropriate certificates and thus were being screened out of FDR.

The same research found that the majority of separated parents who utilised FDR services to resolve their parenting matters report a positive experience of the process.

At the post-separation level, over 70% of FRC and FDR clients said that the service treated everyone fairly (i.e. practitioners did not take sides) and over half said that the services provided them with the help they needed. This can be considered to be a quite high level of satisfaction, given that these situations

often involve strong emotions and high levels of conflict, and usually lack easy solutions.<sup>22</sup>

More recently, in order to evaluate the impact of the 2012 reforms of the Family Law Act (which focussed mainly on family violence) the AIFS sampled two large cohorts of separated parents – in 2012 (N=6119) and 2014 (N=6079).<sup>23</sup> In the 2014 sample, of those who had sorted out their parenting issues via FDR, 83% reported they had the opportunity to put their side forward in the process, compared to 70% of those who used lawyers to negotiate a settlement and 55% of those who used the court. Comparatively high percentages of these FDR clients also reported that the process had worked for them (74%) and that the needs of their children were adequately considered (87%).

### **What are the considerations regarding the appropriateness of FDR when there is family violence?**

Family violence is prevalent amongst the separating population. Kaspiew et al. (2015)<sup>24</sup> found that just over 25% of separating parents experience physical violence and an additional 39% emotional abuse prior to separation. The incidence of family violence in FDR clients is even higher with a similar amount reporting physical abuse but over 70% reporting emotional abuse.<sup>25</sup> Settlement rates are lower for family violence affected clients. Kaspiew et al. (2015) found that 37% of family violence affected cases reached a parenting agreement in FDR compared to 53% of cases with no background of family violence.

Clearly many family violence affected clients are presenting to FDR, many are being judged as appropriate and many are achieving parenting agreements (albeit at a lower rate than those with no history of violence). Many are also happy with the way their family violence issues were dealt with by the FDRP and furthermore this satisfaction rate is identical to those that used lawyers to sort out their parenting issues and higher than those who used court processes.<sup>26</sup>

However, there remains disagreement within the sector as to the appropriateness of FDR for cases affected by family violence. The FLA identifies the presence of family violence as an exception to the requirement to attempt FDR and FDRPs are required

to identify family violence cases they judge as inappropriate for FDR and issue the relevant certificate.

It is argued that victims of family violence who are unlikely to be able to participate effectively in the FDR process, will be subjected to further abuse and trauma during the FDR process and will end up with parenting arrangements that will be unsafe for themselves and the children. It is similarly argued that perpetrators are unsuited to participate in a facilitated dispute resolution process and are unlikely to comply with outcomes that result.

Proponents of FDR argue that many family violence affected clients can be provided with a safe and affective FDR process. They point to adaptations to the process that can accommodate the special needs of family violence affected clients. Examples include shuttle FDR (where the clients are kept in separate rooms), lawyer assisted processes, specialist support workers for victims, and various FDR process controls.

The decision as to what level and type of family violence renders a case unsuitable for even a modified FDR process remains ill-defined and controversial.

1. Federal Circuit Court of Australia, [‘Reaching an agreement without going to court’](#).
2. *Family Law Act 1975* (Cth), s 60I(7).
3. *Family Law Act 1975* (Cth), s 60I(1).
4. *Family Law Act 1975* (Cth), s 60I(1).
5. *Family Law Act 1975* (Cth), s 10F.
6. M Brandon, ‘Preserving a facilitative process in family dispute resolution’ (2009) 20 ADRJ 172.
7. *Family Law Act 1975* (Cth), s 10H.
8. *Family Law Act 1975* (Cth), s 10J.
9. Relationships Australia, [‘Family Dispute Resolution Process’](#).
10. Federal Circuit Court of Australia, ‘Reaching an agreement without going to court’, above n 1.
11. *Family Law Act 1975* (Cth), s 10A(1)(b). See the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).
12. *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), reg 4.
13. *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), reg 5.
14. *Family Law Act 1975* (Cth), s 60I(8). A template certificate is found in Schedule 1 of the *Family Law (Family Dispute*

*Resolution Practitioners) Regulations 2008* (Cth). D Cooper and R Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent" Practitioner' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 158, 163.

15. Australian Government (2005a). Attorney-General, The Hon Philip Ruddock, Media Release, 10 May 2005.

16. Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. et al. (2015), *Experiences of Separated Parents Study* (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies.

17. Ibid.

18. Altobelli, T and Bryant, D, 'Has confidentiality in family dispute resolution reached its use by date?'. Paper delivered at *Seen and Heard: Children and the Courts* (Conference held in Canberra, 7-8 February 2015), 204.

19. Cooper and Field, above n 14, 171-172.

20. Ibid.

21. Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J. (2014). Post-separation parenting, property and relationship dynamics after five years. Canberra: Attorney-General's Department.

22. Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team. (2009). Evaluation of the 2006 family law reforms. Melbourne: Australian Institute of Family Studies.

23. Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., & De Maio, J. (2015). *Evaluation of the 2012 family violence amendments: Synthesis report* (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies.

24. Ibid.

25. Kaspiew, R., & Qu, L. (2014, 7 October). Honouring the role and meeting the challenges. Paper presented at the Inaugural National ICL Training Conference, Sydney.

26. Kaspiew et al. (2015). However it is important to note that the research does not measure severity of family violence issues. It is likely that cases attending court are experiencing more severe family violence which may in turn affect their satisfaction levels.