



Family Files

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and mediator

Family Court reforms: Family Dispute Resolution update

Family Dispute Resolution (FDR) is imminently nigh, with the *Family Dispute Resolution Act* (Act) being passed on 24 September 2013. With it, the *Brave New World* of Family Court Reform will be here.

The Government has introduced its mandatory “user-pays” pre-court alternative dispute resolution, family dispute resolution, in parenting or guardianship matters, and made it discretionary for judges to refer parties to FDR after proceedings have commenced (once only) – section 46F.

A lot is unknown about FDR, and what will be expected of those providing the service – as individual FDR providers, those professional bodies who accredit (ADROs), those who are bulk-funder providers.

This article aims to provide an update on the landscape of the new Act, and tips on what to watch out for, for those contemplating becoming FDR providers.

What is FDR?

Mediation – LEADR, at their September 2013 kongres FDR Update, publically shared (with MOJ’s permission) “competencies currently agreed by the relevant working party”. “The set of criteria FDR practitioners will need to demonstrate to become FDR accredited... include mediation skills and other skills/knowledge that is associated with practice in the family area.”

When does FDR ‘go live?’

March 2014 is picked by the Family Law Section as the likely implementation date for the majority of reforms.

Family dispute resolution forms, and the key FDR provider role/obligations linked to these, may come into force later (October 2014). These are the key ‘gate-keeping’ forms that determine access to court (for those otherwise barred except by compliance with mandatory FDR).

However, given the bulk of the Family Court reforms (including self-represented litigants (SRL)) appear to be scheduled for introduction in March 2014, mandatory pre-court FDR would seem likely to be introduced at the same time as a package.

Who does what in FDR?

The family

Pre-court: Mandatory attendance:

The parties to a parenting or guardianship dispute must attend an FDR prior to filing any court applications. They are barred from making applications to court except in limited circumstances.

The parties will attend the mediation with or without lawyers, depending on their means, whether they are State-subsidised (it is understood that the State does not provide funding for attendance of lawyers).

After commencement of proceedings: ‘once-only’ FDR:

Parties can be directed to attend at FDR after proceedings have been commenced, if a judge thinks there is a ‘reasonable prospect’ of reaching an agreement. Parties’ consent is only needed if they have attended an FDR in the last 12 months. The parties will attend the mediation with or without lawyers, depending on their means.

The child

There will be no State-funded lawyer, or other representative, to represent the views of the child at FDR – unless the regulations State otherwise when they are promulgated.

The FDR provider

The FDR provider is a mediator, who is required to be specifically trained and accredited to an approved dispute resolution organisation. They will have to comply with explicit training, codes of conduct, discipline, CPD, and supervision.

The FDR provider is obligated to determine if it is appropriate to start FDR.

If it is, the FDR provider will identify the matters in issue between the parties, facilitate discussion on the guardianship and parenting issues, and assist the parties to reach an agreement on the resolution of those matters that best serves the welfare and best interests of all children involved in the dispute.

The FDR provider remains a “gate-keeper” to Court, and access to justice due to obligations with the FDR form, and who he or she provides it to and how.

FDR form - FDR provider mandatory obligations:

- › Must provide family dispute resolution form that states that family dispute resolution is inappropriate to start or continue family dispute resolution for a family dispute because—
 - at least one of the parties to the family dispute is unable to participate effectively in family dispute resolution,
 - at least one of the parties to the family dispute, or a child of one of the parties, has been subject to domestic violence by one of the other parties to the dispute,
 - a situation exists that gives the FDR provider reasonable grounds for deciding that family dispute resolution is inappropriate for the parties to the family dispute;
- › Must give every other party to the family dispute a form that states that family dispute resolution was not possible because one party refused to attend or to continue to attend family dispute resolution:
- › Must give every party to the family dispute a form that states that family dispute resolution was unable to be resolved within a reasonable time, stating:
 - the matters on which the parties reached, and did not reach, resolution while the FDR provider was dealing with the dispute; and
 - if proceedings are commenced, or have been commenced, whether, in the opinion of the provider,
 - a settlement conference would be likely to facilitate settlement of the matters on which the parties did not reach resolution; and
 - at least one of the parties would need legal representation at a settlement conference in order to participate effectively in that hearing
- › Must give every party to the family dispute, a form that states all of the matters on which resolution has been reached and the agreement reached, where resolution has been reached on all matters.

It is troubling to require the mediator to provide an opinion on settlement conference where the parties are not legally represented in FDR itself (and may not have had the benefit of legal advice), and the FDR provider may not be legally trained or have any Family Court legal expertise/experience. It makes the quality of that opinion concerning.

The FDR practitioner can refer parties to three hours preparatory counselling for FDR to parenting through separation, and for legal advice for State-paid legal counsel where appropriate.

It is stressed that the form cannot be given outside these circumstances outlined. The form remains a barrier to access for justice for parents and guardians.

Approved Dispute Resolution Organisations

ADROs have the following statutory role.

Appointment of individual FDR providers “if that person is qualified and competent to provide services intended to resolve family disputes... apply(ing) the qualification and competency requirements”

LEADR has publically shared (with MOJ’s permission) the competencies by which ADROs will assess the skill and knowledge of the FDR applicant measured against a prescribed set of competencies. These are the competencies of the working party:

1. Apply and communicate laws, rules and functions of the Family Justice System.
2. Comply with professional and ethical principles and practices.
3. Assess and manage parties for risk factors before and during mediation
4. Address the diversity of parties to the mediation
5. Determine and facilitate an appropriate process to assist parties to reach agreements that are in the best interests and welfare of children.
6. Use appropriate skills to assist parties to participate in an effective mediation process
7. Assist parties to the mediation to develop skills and strategies for managing future disagreements.

All FDR providers must belong to a professional body which has a code of ethics, code of conduct/complaints procedure, and the ability to monitor on-going professional development obligations of FDR practitioners, and regular supervision requirements.

The quality of the ADROs is crucial to quality control of the FDR providers.

Bulk-funded FDR Suppliers

MOJ is seeking to have more than one provider of FDR bulk-funded services. It is understood that the provider of bulk-funded FDR services will employ or contract FDR providers of mediation and preparatory counselling services, and administer the bulk funding of State-subsidised FDR and preparatory counselling. This appears to be a contractual and administrative role, administering the bulk funded payments and contractual/employee relationships.

There is currently only one bulk funder of FDR services announced by MOJ so far – DRSL – Dispute Resolution Services Ltd.

DRSL was a division of ACC, and became an independent crown owned company in 2011. "A large proportion" of its dispute resolution focus is ACC claim reviews, with telecommunications disputes, financial dispute resolution, and disputes for the Real Estate Agents Authority making up the balance of its work.

DRSL will provide (employ or contract) FDR services. The Family Law Section of NZLS advised on 4 October 2013 that DRSL intends to source its FDR providers of mediation services from the NZLS Panel of Mediators, family Specialists, and AMINZ panels.

The Legal Services Agency would appear to be a useful adjunct to bulk providers. It has the infrastructure to deal with contracts/bulk funds for FDR, and given that many of the FDR providers will be former counsel-led mediators, it may well have existing contractual relationship to work from making for a seamless transition, if the government is under pressure due to timeframes.

Given that many (if not most) counsel-led mediators have mediation facilities, and simply require a contract and an organisation with a bulk fund financial infrastructure to administer the payment of fee, this may be a simple low cost arrangement.

The private FDR provider?

These are individual accredited FDR providers. They mediate and do what the State-subsidised FDR provider does, but with the ability to do so with (hopefully) a fee paid.

Costs and fees

Client cost

The fee was stated as being \$897.00 GST inclusive. Currently the quantum is unknown (to be confirmed in regulations when they are promulgated).

It is known that FDR is 'user-pays', and that both parents are jointly responsible for payment. Payment is a private fee paying arrangement if the parent does not qualify for a State subsidy.

The State will not pay for a lawyer to attend the FDR mediation with a parent/guardian if they qualify for a State subsidy. The State will provide four hours of "legal support prior to court".

If this four hours in a capped maximum, covering one party and one lawyer advising prior to FDR mediation and filing applications to court afterwards (if unsuccessful), this four hours won't allow those who qualify for a State subsidy

to 'have it all'. The numbers 'don't stack up' for attendance at FDR mediation

The State will not pay for a lawyer to represent the views and best interests of the children of that relationship.

The quantum of a provider fee is unknown, to be confirmed in regulations when they are promulgated.

Public access to FDR providers

There will need to be advertising, hopefully funded by the State, through the following (non-exclusive list of) venues:

- › MOJ website;
- › The courts;
- › Citizen Advice Bureau;
- › Lawyers;
- › Doctors, counsellors, and psychologists;
- › Community Law Officers;
- › Community centres;
- › ADROs will likely have a panel of FDR practitioners available on the ADROs' website.
- › Word of mouth.

Being an FDR provider: things to consider

You don't have to do State and private FDRs, however, you may wish to do both. If you elect to do State FDR, here are some things to consider when you are reading the fine print of the contracts:

- You need to have a contract with a bulk provider. Watch out for:
 - › Screening for FDR parties risk – what if your FDR bulk provider mandates they do the screening (eg via a call centre)?
 - This is particularly important, if access to the Family Court's CMS (or a variant) is to be allowed for FDR providers to screen out DVA/CYF/MHA and other matters which should not be part of FDR?
 - Access to this data base in some form is essential for FDR providers, but access out of the individual providers hands would minimise the ability to undertake their statutory mandated risk screening role.
 - › Are you obliged to do the work allocated to you by your FDR bulk provider, or can you say no?
 - › Referral source of State-eligible funded work if you are contracted to one bulk funder:
 - Is your bulk funded FDR supplier obliged to process payments of all State-eligible mediations, even when they are not referred by them?
 - If not, then who pays for that State-eligible mediation?
 - › What if you have your own facilities to mediate, and your bulk provider has too?
 - Are you obliged to use their facilities and absorb their costs (ie reduce your fees)?
 - What if the bulk provider's facilities don't meet your expectations or needs (in comparison with your own or what you have used previously)?
 - › FDR bulk provider promotion of mediators:
 - How will your bulk funder promote itself and its mediators to the public?
 - Who will pay for this?
 - › Bulk providers and work allocation:
 - Who decides the work allocation?
 - Are you in competition with your bulk provider?
 - Do they have their own employees?
 - Are those employees FDR family mediation experts?
 - Fee:
 - How much of the fee will you get?
 - How much will go on 'administration charges' by the bulk funder?
 - › FDR referrals to counselling by FDR practitioner – will you or the FDR bulk funder do this?
 - › Can you make a recommendation for other professional supports in terms of your FDR process, or is this freedom removed from you by your bulk funder?
 - › Will the quantum of fee you receive as a contractor mean that you don't retain the freedom to determine the supports that you bring into the mediation?
 - The ability to bring a child's voice in.
 - Other supports, eg lawyer for parties, psychologists. ●