

**Submissions to the Independent Panel
on the 2014 family justice reforms
Post the first report**



**ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC**
Te Mana Kaiwhakataū, Takawaenga o Aotearoa

EXECUTIVE SUMMARY

We refer to our initial submission and that made in tandem with Resolution Institute on the issue of mandatory mediation. This submission builds on both those submissions.

We have only responded to issues that we have expertise in and that we feel need our further response.

There is much to commend the Panel's consultation document. It is particularly pleasing to see the approach of the Panel is to form a korowai – a joined-up approach to family justice that is accessible and responsive to different needs. This has been sadly missing in the past.

Other matters that would herald considerable improvement include clear statements about the value of families making decisions without going to court and encouraging greater use of Family Dispute Resolution and other non-adversarial approaches.

We have long advocated a reintroduction of counselling, a true public awareness campaign, an increase in court referrals to FDR and increased access to legal advice. These are important steps in themselves, but as we have often said, FDR does not occur in a vacuum and many of these steps will improve outcomes in FDR.

It is implicit in the report that it is good for families, good for children, for disputes to be settled away from the Court, that those families that can, albeit with support, settle their dispute. We whole-heartedly agree.

The issue for the review then is how to achieve the aspiration of more care of children disputes being resolved without going to court, and in particular how to increase the uptake of FDR.

We are concerned that the Panel is considering making FDR voluntary. If the needs of children were put at the centre of the reforms, we respectfully doubt this would be the conclusion. Children want and need their parents to settle their dispute at the earliest opportunity, without the necessity of an adversarial Court approach. They do not need extra burdens to the family with court costs, the uncertainty whilst waiting for a Court decision, family stress and the added animosity that Court action most often brings with it.

A mandatory approach does mean compulsion, but it does not mean compulsion to settle. We believe our children deserve to have the State tell their parents unequivocally that they have the responsibility to sort out their disputes and to try and do it away from Court, together. They need to know that the State will support this approach.

We have already given the Panel evidence of mediation schemes, including family mediation schemes, that are mandatory overseas. They work. Why? Because doing the reasonable thing – talking and trying to find a pathway, is not what people necessarily do when in dispute, let alone when in an emotional family dispute.

A voluntary scheme will in our opinion cause the unintended consequences of:

- Greater adverse impacts on children.
- More cases in the Court.
- Higher court costs.
- More gaming of the system of one party refusing mediation, leaving, often the most vulnerable party, with no place to go, but Court.

It is for these reasons that the AMINZ view is that mediation should be a required step (for most people) before going to court, and that the whole system should be geared to supporting this.

If a decision is made to make mediation a choice for families, it is even more important that the system supports families to choose to resolve their disputes in a non-adversarial way out of court. We advise ways in which this can be done, but underline it is no replacement for a mandatory scheme.

RECOMMENDATIONS - SUMMARY

We submit:

Focus on Children

- There needs to be a child-centric approach in the family justice system.
- Age - appropriate information available for children would be helpful.
- A research-based analysis of how to safely bring the child's voice into a mediation is very useful. It needs diversity.
- There needs to be extra funding per child available for ensuring the voice of the child in every FDR.

FDR – Mandatory or Voluntary

- Mandatory FDR is the best mechanism to ensure high rates of cases settle early and do not go into the Court system.
- A child-centric approach to the family justice system points to the State requiring parents, in most cases, to try and settle their disputes.
- If the Panel is intent on a voluntary scheme, we will see lower rates of cases in FDR, but we suggest to ameliorate this in part:
 - Mediation being free for the parties.
 - Costs awards against a party who did not agree to mediate and had no good cause.
 - Any application made to Court where FDR has not been undertaken, is automatically referred to FDR, unless there are good reasons for no referral.
 - A process in the Rules for Courts to refer to FDR for appropriate cases that have not attempted it.
 - Lawyers obligated to promote FDR and to certify that they have given this advice.
 - On-going marketing of mediation in educational, information programmes as the go-to mechanism for families to solve their disputes.

Rebuttable Presumption: Question 15:

There must be a rebuttable presumption for FDR, whether there is a mandatory scheme or not.

Obligation to Promote: Question 16:

All family justice professionals should promote FDR and conciliation processes generally. This should be an obligation on lawyers that they need to certify they have undertaken.

Funding for FDR: Question 40:

- We prefer FDR to be free to both parties as a signal of the support the State has for FDR.
- The thresh-hold for those gaining free FDR should be raised if a thresh-hold is to remain to make FDR more accessible.
- If FDR is not to be mandatory, then FDR must be free to both parties to enhance the likelihood of take-up by both parties.
- There should be separate funding for each child to ensure their voice can be incorporated into the mediation in a meaningful way.

Sustainability of the FDR workforce

- The rate for FDR should be increased.
- There should be separate funding for each child to ensure their voice can be incorporated into the mediation in a meaningful way.
- The rate for FDR should be increased.

AMINZ SUBMITS:

1. General

- 1.1 We want to particularly support the independent panel on the following recommendations:
 - 1.1.1 Comprehensive and cohesive services that are joined-up and form a korowai.
 - 1.1.2 A truly child-centric approach.
 - 1.1.3 Excellent information that is available at numerous ports.
 - 1.1.4 A family justice service that can respond to the diversity that represents New Zealand families.
 - 1.1.5 A higher level of participation in FDR.
 - 1.1.6 Parties having a right to a lawyer with legal aid funding.
 - 1.1.7 New roles for family justice service coordinators.

2. Focus on Children

- 2.1 We support the recommendation that children be at the centre of the Family Justice Service. We think this is a fundamental issue and noted Chris Dellabarca's comments at a meeting last month when he asked what we would establish in family justice, if children were really the focus. We agree with that approach. Let's think about what it would look like if children were actually the focus.
- 2.2 We like the idea of child-friendly information for children. It could be useful. But it is not a substitute for a speedy and effective resolution of a family dispute.
- 2.3 We whole-heartedly agree there needs to be a review of practices of child participation in mediation with a view to having some agreed principles. Within those principles there would be the need for diversity of practice. Flexibility is often needed to deal with the diversity in New Zealand families. But there should be at least some "bottom-lines".
- 2.4 Currently there is no extra funding for the 12 hours allocated, for ensuring the child's voice in the FDR process. This means that the existing funding must be stretched to cover all children in the family, no matter how many.
- 2.5 The risks in the current system are discouraging a safe and effective process for each child, discouraging child participation and mediator burn-out for those who do the job properly, but are not fully compensated.
- 2.6 The process needs to be meaningful for each child in the family. This can be time-consuming.
- 2.7 If children's voices are to be meaningfully included in FDR, there will need to be extra funding per child of the family.

We submit:

- There needs to be a child-centric approach in the family justice system.

- Age - appropriate information available for children would be helpful.
- A research-based analysis of how to safely bring the child's voice into a mediation is very useful. It needs diversity.
- There needs to be extra funding per child available for ensuring the voice of the child in every FDR.

3. FDR – Mandatory or Voluntary

- 3.1 The Panel wishes to promote self-resolution. We agree. It also notes that to date FDR could only be described as compulsory in name only. We agree. A truly compulsory family mediation scheme has not been undertaken in New Zealand.
- 3.2 The question is how to best support the expectation that parents will resolve their own disputes.
- 3.3 We believe that the settings will be absolutely critical to whether families will self-resolve as much as possible.
- 3.4 The information on family mediation schemes internationally is that voluntary schemes mean lower rates of take-up of family mediation and therefore lower rates of self-resolution. That is why the family mediation schemes in Australia, Norway and the UK are mandatory. We have provided ample evidence of this in the Supplementary Report provided by AMINZ and Resolution Institute.
- 3.5 It is known that people in dispute will not always act reasonably. For *both* parties to agree to mediation does require a level of reasonableness of *both* parties.
- 3.6 If a scheme is voluntary evidence of other voluntary schemes shows that it is highly likely that in a number of cases that one party will opt for mediation and the other will simply refuse. That will leave the only option as the Court. This will mean that more cases will flow into the Court than is necessary.
- 3.7 We fear that the more financially vulnerable party, often a woman, will be forced into the court system and be significantly disadvantaged as a consequence.
- 3.8 If we focus on what children want, we know that generally children do not want their parents to be in dispute. Children want them to solve their disputes at the earliest time and they do not want to be involved in the dispute.
- 3.9 What we know from the cases that get into mediation, is that a large number resolve there. And with the changes proposed for counselling, Parenting Through Separation and legal advice, mediation will be better supported. If required, FDR is likely to be more successful.
- 3.10 A child-centric family justice system would seem to dictate *requiring parties* to try to resolve their dispute at the earliest time because if we do not, a high number of appropriate cases will not go into FDR.

- 3.11 Mandatory does equate to compulsion to settle, and the Panel is right that parties do not necessarily like compulsion. Neither do children like their parents to be in dispute. Compulsion is a temporary expedient for the benefit of children.
- 3.12 If the Panel is intent on a voluntary scheme of FDR, it will need to consider how to meet its goal of higher levels of FDR. We suggest the following as necessary:
- 3.12.1 Mediation being free for the parties.
 - 3.12.2 Costs awards against a party who did not agree to mediate and had no good cause.
 - 3.12.3 Any application made to Court where FDR has not been undertaken, is automatically referred to FDR, unless there are good reasons for no referral.
 - 3.12.4 A process in the Rules for Courts to refer to FDR for appropriate cases that have not attempted it.
 - 3.12.5 Lawyers obligated to promote FDR and to certify that they have given this advice.
 - 3.12.6 On-going marketing of mediation in educational, information programmes as the go-to mechanism for families to solve their disputes.
 - 3.12.7 A rebuttable presumption for mediation. This is required for a mandatory scheme, but needed even more so in a voluntary setting to help ensure that the settings are right to refer to FDR for judges, registrars, coordinators, lawyers, parents and all those working in the family justice system.

We do not submit on the wording for rebuttable presumption. We leave this to statutory drafters, but note that the prior statutory requirement for FDR was not strong enough to ensure that all appropriate cases went into FDR.

- 3.13 We believe these measures will enhance the rates of mediation, but they certainly will not equate to the levels of mediation of a mandatory scheme, the unintended consequences being:
- 3.13.1 Unresolved disputes adversely affecting children.
 - 3.13.2 More cases in the court than necessary.
 - 3.13.3 Extra and unnecessary financial burdens on the family justice system.
 - 3.13.4 A way in which an unreasonable party that does not want the issue solved can "hold out" against the other party.

We submit:

- Mandatory FDR is the best mechanism to ensure high rates of cases settle early and do not go into the Court system.
- A child-centric approach to the family justice system points to the State requiring parents, in most cases, to try and settle their disputes.

- If the Panel is intent on a voluntary scheme, we will see lower rates of cases in FDR, but we suggest to ameliorate this in part:
 - Mediation being free for the parties.
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Question 15:

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Question 16:

All family justice professionals should promote FDR and conciliation processes generally. This should be an obligation on lawyers that they need to certify they have undertaken.

4. Funding for FDR

- 4.1 The funding for FDR for parties has been problematic in the past, the settings for funding so low that many people who need the funding cannot get it and a barrier to both parties participating in FDR when one party gets funding and the other does not.
- 4.2 Our preference is that FDR is simply free. This would signal that the State supports FDR. It would bring simplicity to the scheme and ensure FDR Providers did not need to sort out funding eligibility at all. A trial of this seems a sensible approach.
- 4.3 If the Panel opts for a non-mandatory FDR scheme, a free FDR service is necessary to ensure that people actually consider this option as viable.
- 4.4 If this “free option” is not accepted, then make FDR free for both parties if one party is eligible for funding.
- 4.5 If eligibility criteria remain, the criteria needs to be raised so that more people can access FDR.

Question 40:

- We prefer FDR to be free to both parties as a signal of the support the State has for FDR.
- The thresh-hold for those gaining free FDR should be raised if a thresh-hold is to remain to make FDR more accessible.
- If FDR is not to be mandatory, then FDR must be free to both parties to enhance the likelihood of take-up by both parties.

5. Confidentiality in FDR

- 5.1 We note that the report states that confidentiality is an issue to be considered and so we wish to deal with it.
- 5.2 A mainstay of mediation is confidentiality. It is a fundamental part of what enables parties to speak freely in an effort to solve their issues.
- 5.3 Any diminution of the principle of confidentiality except as it relates to the making of complaints about mediator conduct should not be countenanced.

6. Sustainability of the FDR workforce

- 6.1 The past 5 years has seen FDR providers come and go as a number simply could not make the work pay.
- 6.2 Many FDR providers could not afford the CPD that was necessary to keep credentialed. The Suppliers therefore had to go "Cap in hand" to the Ministry to help obtain funding for continuing professional development.
- 6.3 Whilst FDR providers are required to ensure the Voice of the Child is taken into account, there is no extra funding per child to make this occur. Many FDR Providers report that they simply do the work for free. We fear some do a lesser job that is required to stay within the 12 hours funded, We refer to previous submissions.
- 6.4 The rate of pay for FDR Providers is low.
- 6.5 An ancillary issue is regarding Maori mediators. There are far too few and the cost of training needed to upskill is a barrier.
- 6.6 There should be separate funding for each child to ensure their voice can be incorporated into the mediation in a meaningful way.
- 6.7 The rate for FDR should be increased.

6.8 There should be funding to the ADROs for Maori to upskill as FDR Providers.

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