



Family Justice System Review

Submission from Resolution Institute

Submitted by:
Catherine Cooper
General Manager New Zealand
1 March 2019

About Resolution Institute

Resolution Institute is a professional association and membership organisation of mediators, arbitrators, adjudicators, restorative justice facilitators and other dispute resolution professionals. Resolution Institute was created as a result of the integration of LEADR with LEADR NZ in 2013, and then with the Institute of Arbitrators and Mediators Australia (IAMA) in 2014. Resolution Institute is a not-for-profit organisation with around 4,000 members across Australia, New Zealand and the Asia Pacific region. Resolution Institute members work in a wide range of industry sectors and have diverse backgrounds and experience.

Resolution Institute has been training mediators in Australia and New Zealand for close to 30 years and has a well-recognised accreditation scheme for mediators. Resolution Institute mediation qualifications are also internationally recognised. Resolution Institute is a Recognised Mediator Accreditation Body (RMAB) for accreditation under the National Mediator Accreditation System (NMAS) in Australia, and is also a Qualifying Assessment Programme (QAP) for International Mediation Institute (IMI) accreditation.

In New Zealand, Resolution Institute is an Approved Dispute Resolution Organisation (ADRO) under the Family Dispute Resolution (FDR) Regulations 2013, and has responsibility for training and accreditation of FDR Providers. Resolution Institute is also contracted by the Ministry of Justice for training and accreditation of Restorative Justice facilitators.

Resolution Institute offices are in Wellington (New Zealand) and Sydney (Australia).

Resolution Institute promotes the use of a range of alternative dispute resolution approaches, including mediation. When high quality and appropriate for the purpose, alternative dispute resolution can be quicker and more cost effective than court, can reduce or repair harm to relationships, and may result in more enduring resolution.

About this response

Resolution Institute appreciates the Panel's ongoing efforts to engage with and hear from FDR mediators. We have encouraged members to respond directly to the Panel as well as consulting with members, AMINZ, FDR suppliers and others to inform our response.

This response builds on our earlier submissions to the Panel. We have focused this response on particular areas of member interest and expertise, rather than seeking to respond to all the Panel's proposals and questions.

Summary

It is really positive to see the Panel consultation document include clear statements about the value of making decisions about care of children without going to court and encouraging greater use of Family Dispute Resolution and other non-adversarial approaches.

The Panel's proposals also address a number of the concerns or suggestions made by FDR mediators, with proposals to re-introduce counselling, run public awareness campaigns, increase court referrals to FDR and increase access to legal advice all meeting needs FDR mediators have seen in the families they work with.

We believe a key question for the review is how to achieve the aspiration of more care of children disputes being resolved without going to court, and in particular how to increase uptake of FDR.

While the consultation document proposes a ‘rebuttable’ presumption for FDR, we are concerned that the Panel is also considering making participation in FDR voluntary. We believe that this is incompatible with increasing uptake of FDR and will result in a decline, rather than an increase, in FDR and out of court and non-adversarial resolution of care of children disputes. Given the significant impacts of conflict on children, slower and more adversarial approaches will generally not be in the best interests of children or families.

Resolution Institute’s view is that mediation should remain 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.

Strengthening family justice services

Resolution Institute supports:

- The emphasis on non-adversarial and out of court approaches
- The concept of an integrated Family Justice Service
- People being able to access services through many different points
- Courts referring parties who have not taken part in Parenting Through Separation or Family Dispute Resolution back to these services except in urgent cases

Focus on children

Resolution Institute supports:

- Children having access to quality child-friendly information
- Children being able to take part in a meaningful way and that their voices are heard
- Further research on children’s participation in New Zealand

Resolution Institute recommends:

That additional funding be available to ensure quality processes for children’s participation or including children’s voices in FDR. Currently there is no funding provided to support children’s participation in FDR. As a result when a child consultant is involved with a child it is currently funded from the 12 hours allocated for mediation.

Involving children and hearing their voices in a meaningful and child appropriate way can be a time consuming process, especially when there is more than one child. Utilising mediation funding for child participation risks discouraging the use of child participation processes, compromising mediation, or use of constrained child participation processes that are not meaningful or safe for children.

That flexibility be retained in the ways that children can participate or that their voices be heard.

The current system allows FDR mediators to determine the most appropriate approaches for child participation, depending on a range of factors including age of the children, other professionals involved with the children and family, the expertise of the mediator and the wishes of parents. Mediators report that the best way to involve children can vary and that flexibility in approach, rather than a one size fits all model is important. Further research in this area would be very beneficial for informing the decisions mediators make. Further training for mediators on the research, as well as child development, children’s needs and how to best engage children at different ages and stages would also be beneficial.

Te Ao Māori in the Family Court

Resolution Institute supports:

- Introducing culturally appropriate training for family justice professionals including court staff, lawyer for child and the Family Court Bench. **Resolution Institute recommends that FDR mediators be included in cultural appropriate training.**

Resolution Institute recommends:

Initiatives to increase the number of Māori FDR mediators.

There is a shortage of Māori mediators. This is in contrast to restorative justice, where around a third of the people training as restorative justice facilitators are Māori.

Unlike restorative justice training which is fully funded by the Ministry of Justice, training and gaining accreditation as an FDR mediator is not funded in any way. So this is a significant investment which could easily be a barrier to more Māori entering family mediation work.

Resolution Institute would like to see the Ministry of Justice contribute to the cost of training and accreditation of FDR mediators and the development of a pathway for new mediators to gain skill and experience in this important area.

6.	How could the Ministry of Justice or the Government partner with hapū, iwi or Māori organisations to deliver services?
-----------	---

The Ministry of Justice already contracts Iwi and Māori organisations to deliver restorative justice services. This could provide information on how such an approach could work in FDR and other out of court services. It is also interesting to note that while mediation and restorative justice are fundamentally different, the skills required are similar and as a result a number of Resolution Institute members work in both restorative justice and mediation. This could mean that there are Māori organisations that could be interested in FDR, that already have restorative justice facilitators with relevant skills who could train in mediation. As noted above cost barriers to training and accreditation would need to be addressed.

Quality, accessible information

Resolution Institute supports:

- An information strategy to provide a wide variety of resources that meet all needs
- A public awareness campaign to improve New Zealanders' understanding of Family Justice Services.

Resolution Institute recommends:

That the public awareness campaign promotes out of court resolution and focuses on education about how out of court approaches like mediation can help. Such a campaign would emphasise that most people can resolve their care of children arrangements without going to court and that services like mediation can help.

That the public awareness campaign includes an ongoing programme so that information is available when it is relevant to people.

Counselling and therapeutic intervention

Resolution Institute supports:

- The re-introduction of funded post-separation counselling available at all stages, particularly counselling that can be accessed prior to involvement with the court.

Resolution Institute notes that counselling fulfils a different function than Preparation for Mediation. Preparation for Mediation is targeted specifically at assisting people to participate in the mediation process rather than addressing personal emotions. Mediators report that Preparation for Mediation is a valuable process that should be retained and be available, along with the ability to refer parents with significant emotional issues to counselling.

11.	Are Parenting Through Separation/Family Dispute Resolution suppliers, Family Justice Service Coordinators and Judges best placed to refer people to counselling? Are there any other service providers who should be able to refer to counselling or should people be able to refer themselves?
------------	--

Resolution Institute supports access to counselling prior to involvement with the court to increase the ability of families to resolve parenting arrangements early and without the adversarial approach of court. FDR mediators or Supplier organisations working with the parties are well placed to identify where there may be issues which will impact on the likelihood of reaching agreement on care arrangements for children. Issues could be identified either at initial contact and assessment, or later during the mediation process, or after the mediation process to support parties coping with implementing agreements.

Family Dispute Resolution

Resolution Institute supports:

- Promoting a higher level of participation in FDR
- That when an application has been made to the court but FDR has not been undertaken, that there is an automatic referral to FDR unless good reasons are given not to
- Continuation of ‘preparation for mediation’
- A clear process in the rules for the court to make direct referrals

Resolution Institute recommends:

That remuneration of FDR mediators is increased to address workforce issues. The success and benefits of FDR are highly reliant on the skills and expertise of mediators in assisting the parties to reach resolution. FDR is a high emotion, high conflict area of mediation practice where the best outcomes are achieved by highly skilled and experienced practitioners who are able to provide a strong mediation process and also increase the parties’ ability to resolve their own disputes.

FDR is a poorly remunerated area of mediation practice where mediators are not funded for administration work or travel time and are responsible for all their own costs related to doing the work (training, accreditation, ongoing professional learning and professional supervision). A number of highly experienced mediators are no longer doing FDR as they cannot justify the financial cost of the work or the lost opportunity for better remunerated work. Yet it is really important that FDR continues to retain highly experienced and skilled mediators. There is a risk that at current remuneration rates, FDR will increasingly be seen as ‘entry-level’ mediation work.

That there is separate funding provision for child participation to ensure that a quality process can be implemented for children. FDR mediators tend to view 12 hours as sufficient for assessment, preparation for mediation and mediation in most cases (although some would like more hours to allow greater flexibility and time for complex cases, or so that families can come back to review arrangements after a period of time). However, the additional expectation of involving children and seeking their views within the 12 hours is of significant concern to many FDR mediators. If children are to be involved in the FDR process (and it is clear they should be able to be), then this must be done well and not at the expense of the mediation process.

15.	Do you agree with the idea of a rebuttable presumption? If so, how might it be worded to make sure that parties take part in Family Dispute Resolution unless there are compelling reasons not to?
------------	---

Resolution Institute recommends:

That FDR mediation continues to be a required step prior to applying to the Family Court, except in circumstances where it is not appropriate (mandatory mediation or a rebuttable presumption).

In the consultation document the Panel notes that it is in the best interests of children for their care to be decided without the inherently adversarial process of court, and also specifies greater use of FDR as a focus of the new family justice service. Resolution Institute fully supports this. We think that emphasising reducing conflict is the best way to meet the needs of children, and that this can

only be achieved if there is a clear and strong expectation that parents participate in mediation, prior to accessing court. We suggest that the expectations need to be strengthened because as the Panel notes *“given the current participation and exemption rates, FDR could be considered as compulsory in name only”*. There needs to be strong signals to families that they should try and resolve their own agreements over care of their children, and that except in exceptional circumstances they will need to participate in FDR prior to going to court.

The Panel has been discussing removing compulsion to participate in FDR and making FDR mediation voluntary. In our view making FDR voluntary will result in significant reduction in participation in FDR – from the current already low levels. This will add to the overload and delays in the court system, exposing more families to (and continuing to normalise) an adversarial process. In prolonging and increasing conflict, this will (in the majority of cases) not be in the best interest of children.

Information on mediation schemes that are voluntary is that they are not well-utilised. Alternative dispute resolution or mediation is not yet sufficiently normalised for people to see it as the default or preferred approach to resolving disputes. As a result mandatory mediation schemes – schemes that require participation in mediation prior to accessing court – are common in New Zealand and in the family area internationally. Mandatory mediation requires parties to participate in the process (unless there are good reasons not to) but it does not require parties to reach agreement – all agreements reached at mediation are the choice of parties. Mediators are skilled at working with the parties to foster participation and take them through a process that provides an environment for reaching agreement.

Research and experience shows that requiring people to participate in mediation works. *“Studies demonstrate that where parties are compelled to mediate, there are still comparatively high rates of settlement and the parties benefit from the process. It has also been shown that, if given the choice, disputants will normally choose to opt out of mediation however there are high rates of settlement for both voluntary and mandatory mediation when it is engaged in early on in the process”*.¹ In the family area specifically, experience has been that making mediation mandatory increases participation and reduces court applications. For example the Australian Law Reform Commission paper ‘Review of the Family Law System Discussion Paper October 2018 notes that in Australia *“Patterns of service use have changed significantly since the introduction of stronger legislative support for family dispute resolution (FDR) in children’s matters in 2006. Court filings in children matters dropped by 25% and the use of FDR increased significantly.”*²

A significant study into the impact of the European Union Mediation Directive in 2014 found that *“A thorough comparative analysis of the legal frameworks of the 28 Member States, combined with an assessment of the current effects of the Mediation Directive in terms of its produced results throughout the EU, shows that only a certain degree of compulsion to mediation can generate a significant number of mediations.”*³ The study also notes that *“evidence shows that elements of mandatory mediation can have a positive effect on voluntary mediation as well”*.

Ideally, the benefits of mediation as a non-adversarial approach to resolving disputes would be well understood and people would see this as a normal way to reach agreement on care of children. However, mediation is not yet ‘normalised’ in our society that still sees the law and court as the way

¹ Melissa Hanks, Perspectives on Mandatory Mediation, UNSW Law Journal Volume 35(3), 2012.

² Australian Law Reform Commission, Review of the Family Law System Discussion Paper, October 2018, p.101

³ European Parliament Directorate General for Internal Policies, ‘Rebooting’ the Mediation Directive: Assessing the limited impacts of its implementation and proposing measures to increase the number of mediations in the EU’, 2014, p.7.

to resolve disputes. And the very conflict that people who are unable to resolve care of children disputes are in, makes voluntarily agreeing to mediation difficult. As the current exemption rates show, often one party simply does not want to engage in mediation, sometimes because they simply do not want to change current arrangements. Many parents who are unable to reach agreement on care of their children will also be unable to reach agreement to participate in mediation. In a voluntary scheme this will mean these cases head to court, where many could have been resolved quickly and effectively at FDR.

Resolution Institute views it as critical that FDR continues to be a required step prior to apply to the family court. Given FDR is currently mandatory (in name at least), the challenge to improving participation in the new Family Justice Service is how to reduce the number of people that by-pass mediation either as ‘without notice’ applications or when one party refuses to participate. We don’t know that there is a single solution to this, and believe that without a single solution the answer lies in the whole system supporting that FDR is the usual way to resolve care of children disputes. We think that combining a range of measures will improve participation.

Issue to be resolved	Potential causes	Solutions we recommend
Inappropriate ‘without notice’ applications to court	<ul style="list-style-type: none"> • Desire for legal advice/representation • Lawyers advising ‘without notice’ path • Courts allowing inappropriate ‘without notice’ applications by not referring back to FDR 	<ul style="list-style-type: none"> • Expand access to legal advice out of court • Engage lawyers in supporting FDR • Tighten obligation for lawyers to advise participation in FDR • Clear rules for the courts to refer cases not ‘without notice’ that have not attempted FDR to FDR
Limited awareness of FDR mediation	<ul style="list-style-type: none"> • Assumption that lawyers and courts are the ‘normal’ way to resolve family disputes • Lack of familiarity with mediation • Not knowing where to go 	<ul style="list-style-type: none"> • Ongoing publicity/education/information programme • Improved Family Justice Service website and information call centre • FJS Co-ordinator tasked with providing information and facilitating access to out of court services
One party not wanting to participate	<ul style="list-style-type: none"> • Not wanting to change current arrangements or experience further conflict • Cost of FDR 	<ul style="list-style-type: none"> • Remove FDR fees so cost isn’t a disincentive • Sanctions for a party who refuses to participate in FDR without reason, if the case goes to court

The message of self-resolution if possible, albeit with assistance, needs to be clear and reinforced by all parts of the family justice system. The key intention is to shift the presumption that the starting point for resolving care of children disputes is court.

If a decision is made to reduce the obligation to participate in FDR prior to attending court (mediation is made voluntary) then the need to get two parties in conflict to agree will almost certainly see participation in FDR decline. It will be even more critical to foster participation through education, and by encouraging and supporting families to resolve their disputes out of court through participation in FDR. We think this would require:

- A free FDR service so there is no cost barrier/deterrent

- A very comprehensive and ongoing publicity/education/information programme
- Strong support from the whole family justice service for FDR and universal commitment to encouraging participation in FDR
- Cost implications (sanctions) if parties choose not to participate in FDR and choose to go to court without good reason

16.	Do we need stronger obligations on family justice professionals to promote FDR and conciliatory processes generally?
------------	---

It is clear that all parts of the system must reinforce that most people can resolve parenting arrangements themselves with support of FDR. In looking to strengthen the family justice system it will be important to engage the support of all family justice professionals to promote FDR and other out of court services and to position these as the 'normal' way to resolve parenting disputes.

This will be best achieved through educating and gaining buy-in from all parts of the system, however the obligations may also need to be clear and reinforced. As noted above, this will be even more important if FDR becomes voluntary.

17.	What could a streamlined process for court referrals to FDR look like?
------------	---

Multiple FDR suppliers provides choice in the type of service and the type of organisation people wish to work with and also reduces service risk and encourages service quality. We note that the current multiple supplier model provides an approach that would also allow for addition of new suppliers to meet specific needs, such as Māori organisations. The multiple supplier model also seems however, to have been something of a deterrent for court referrals to FDR.

Resolution Institute supports continuation of the current model of multiple Suppliers. We think that a referral process for the court should in the first instance provide parties with information on their options and choices, and then if the parties don't wish (or can't) make a choice, then have a fair process for allocation of referrals.

We note that ACC is currently running a tender process to appoint multiple suppliers to provide dispute resolution services (moving away from a single supplier model) and that they intend as part of this process to implement a case allocation tool. We believe that parties should have the choice of supplier in the first instance, and if they prefer not to choose a supplier, that an allocation process or tool should be used.

Resolution Institute members also note that often the choice that parties want to make is the choice of the mediator rather than the supplier. They might know a mediator they want to work with through speaking to friends, their lawyer or a counsellor. In these cases it would be simplest for the court to refer parties to the mediator directly so that the mediator can confirm who their supplier is and how to contact them.

We note that a concern that is raised about court referrals to FDR is the inability of the court to track progress of cases once referred to FDR. If this is important to the confidence of the judiciary to refer to FDR, then we'd recommend that RMS be adapted to meet this need.

Legal advice and representation

18.	Is there a place for more accessible provision of funded legal advice for resolution of parenting disputes outside of court proceedings? What would the key elements of this service be and how could it be achieved?
------------	--

An important factor for the success of any mediation is parties coming to mediation with the information that they need to be able to make decisions. In the case of parents participating in FDR this includes having the legal information that they need to make decisions about the care of their children, and understanding the legal options if they are not able to reach agreement at mediation.

Mediators would like to see more access to legal advice outside of court proceedings. Mediators view this as a higher priority than ability to have legal representation during mediation. Whether it is beneficial to have lawyers attend mediation depends on the case and the legal issues involved. Skilled lawyers with a strong understanding of mediation and their role in mediation can support the process without introducing an adversarial approach. Equally a primary purpose of mediation is encouraging parties to talk to each other and setting a foundation for ongoing communication, which can mean there are advantages to parties attending without legal representation.

Better availability of legal advice/service at all stages might also increase the confidence lawyers have in the Family Justice Service and in particular in FDR, hopefully increasing the degree to which the whole system promotes use of FDR.

Mediators report that a major issue with FLAS is the actual availability and accessibility of the service. Many FLAS providers listed on the Ministry of Justice website are not available when contacted.

A “new” role – Family Justice Service Coordinator

28.	What do you think of our proposal to create a new role; the Family Justice Services Coordinator (FJSC)?
------------	--

Resolution Institute supports the role of the Family Justice Service Coordinator as it is described by the Panel. This role should be focused on providing information, referring people to out of court services as a first step and triaging applications to the court, including any applications that should be referred back to FDR.

It is really important, even with this role providing a valuable source of information on how to access Family Justice Services, that it doesn't become a single point of entry to services. We support the Panel's proposal that there should continue to be multiple entry points to the Family Justice Service and be 'no wrong door'. A key message for parents is that most people can reach decisions on care of children themselves and that FDR can support them to do this. In other words, only some people will need to go to court, so it is vital that court isn't positioned as 'the place' to go to get information or access services. Parents should still be able to access information on services on the internet, by phone, direct with FDR mediators and Suppliers, and via lawyers.

Family Justice Service Coordinators will need clear and fair information, processes and systems for referring people to services.

Lawyer for Child

34.	Do you see a role for an additional advocate with child development expertise to work together with the lawyer for the child, to support the child to express their views and make sure they're communicated to the judge?
------------	---

Resolution Institute agrees that there is a role for an additional advocate with child development expertise to work together with the lawyer for the child, to support the child to express their views. FDR mediators who work with child consultants to include the voice of the child/children in mediation note the valuable skills and expertise that therapeutically trained people with child development expertise can bring.

In terms of engaging children and communicating their views during FDR, it is important that FDR mediators can determine the most appropriate person to work with the child/children, depending on the needs of the child/children. FDR mediators note that in some cases they would like to be able to use a lawyer for the child and the skillsets that they have to work with the child. This is particularly where there are legal issues or they see that the parties may end up in court at a later stage and using a lawyer for the child may mean the child can work with the same lawyer for child later on.

Where a child consultant with child development expertise has been involved with the child through FDR we would recommend that the child consultant continue to be the primary contact working with the child, in consultation with the lawyer for child, during court processes.

Recent research⁴ conducted by the South Australian Commissioner for Children and Young People noted “What was loud and clear was the children we consulted wanted to engage more in the entire Family Law process so that they had a say in their own lives.” They list the attributes that children and young people said they need in an advocate:

- Guide children through the Family Law process and be there to answer any questions they might have
- Give information to children about the rights and services that could help them
- Be someone children can talk to confidentially about their feelings and wishes
- Communicate directly what children want to mediators, lawyers and/or the court in the mediation process
- Provide recommendations to the court
- Help guide the court/mediators if children want to be witnesses

⁴ Commissioner for Children and Young People South Australia, ‘What children and young people think should happen when families separate’, 208

Costs

Resolution Institute supports:

- Parenting Through Separation remaining free
- Counselling being funded by the Government

40.	Should FDR be fully funded by the Government for everybody, or should FDR be free for both parties where one party is eligible for Government funding? Should the eligibility threshold be raised?
------------	---

Resolution Institute recommends:

That FDR be a free service, consistent with the free mediation service available to employers and employees in dispute.

We believe making FDR free would:

- Remove financial barriers to participation in FDR
- Remove up-front administration and therefore time delays
- Reduce administration costs
- Reduce perceived inequity when one party qualifies for funded FDR and the other does not

Any legal fees aside, it is currently cheaper to apply to the Family Court than to participate in FDR.

While making FDR free for both parties where one party is eligible for funding would address perceived inequity between parties, this is likely to make the system more complex and difficult to understand. On a practical level it will be difficult for FDR mediators and Suppliers to communicate with parties why they do, or do not, qualify for funding without breaching confidentiality around the other party's eligibility for funding.

Conclusions

Much research has found that parental conflict, rather than separation, is the main impact on children's wellbeing. The Panel's aspiration to increase use of non-adversarial out of court approaches and increase the use of FDR is a really positive way to address this. A key question for the review then, is how to achieve more care of children disputes being resolved without going to court, and in particular how to increase uptake of FDR.

While the consultation document proposes a 'rebuttable' presumption for FDR, the Panel also appears to be considering making participation in FDR voluntary. We believe that this is incompatible with increasing uptake of FDR and will result in a decline, rather than an increase, in FDR and out of court and non-adversarial resolution of care of children disputes. Given the significant impacts of conflict on children, slower and more adversarial approaches will generally not be in the best interests of children or families.

Resolution Institute's view is that mediation should remain a required step for most people before going to court and that the whole system should be geared to supporting this:

- FDR should be free
- Lawyers need to support FDR and encourage clients to participate

- Judges should refer appropriate cases that have not attempted FDR back to FDR
- An ongoing promotion campaign should inform families about resolving parenting disputes and FDR
- FDR fees should be removed so cost isn't a disincentive
- Introducing cost implications when people choose to go to court without good reason

If a decision is made to make mediation a choice for families, rather than an expectation, then these steps become even more critical to avoid the usual trend of reduced participation when mediation schemes become voluntary.