FDR: Just five sections of a renamed Act

Nigel Dunlop discusses the proposed Family Dispute Resolution scheme

The statutory underpinning of one of the cornerstones of the profound changes proposed to family dispute resolution in New Zealand is intended to be contained in just five sections of a renamed Act.

This parsimony and careful appellation speaks to some of the policy considerations underlying the proposed Family Dispute Resolution scheme (FDR): personal responsibility, choice, flexibility, child centred, minimal state and judicial intervention, and cost saving.

The purpose of this article is not to debate policy, but to raise a number of issues apparent from the Family Court Proceedings Reform Bill, which serves to establish the FDR.

The Bill was introduced on 27 November 2012 and given its first reading on 4 December. Submissions are due by 13 February 2013. The Justice and Electoral Committee are due to report by 4 June. FDR is scheduled to commence on 1 October 2013.

The FDR process

The Bill provides that the *Family Courts Act* 1980 be renamed the Family Disputes (Resolution Methods) Act 1980, which, according to the explanatory note, is in order to "change the focus of parties to family disputes and those who work with them" by indicating that "Family Courts are only [one] method for resolving family disputes" and "family dispute resolution is the other method and it comes first".

Essentially, the scheme envisages that subject to specified exceptions, anyone wishing to apply to the Family Court for the resolution of a dispute between guardians or a parenting dispute must produce a *family dispute resolution form* in order to have the application accepted. Where agreement is reached in FDR, a form is not issued, but that is not of consequence either because the parties do not, as a result of their agreement, wish to apply to the Family Court, or because they will be seeking a consent order, that being one of the stated exceptions to the requirement that a form accompany an application.

The forms are to be issued by *family dispute resolution providers*. These providers are persons or organisations approved by the Secretary for Justice.

The point to be made here is that the providers are gatekeepers to the Family Court. The Bill as currently drafted does not provide judges with the power to review the correctness of a provider withholding a form and, hence, for the time being at least, preventing a party from applying to the Court.

Providers may issue the all important forms if *they* decide that:

- a party is "unable to participate effectively" in FDR;
- a party "has suffered or is suffering domestic violence" inflicted by another party;
- FDR is "inappropriate for the parties";
- FDR "was not possible because [one] party refused to attend or to continue to attend";
- the dispute "is unable to be resolved within a reasonable time".

The above criteria are broad but undefined. Inevitably, therefore, as the scheme is currently drawn, their interpretation will involve differences of interpretation by different providers. One need only ponder the meaning of the criteria in the context of heated and messy disputes to come to that realisation.

This is particularly the case given that the FDR process itself is not defined. The declared reason is that FDR is a user-pays scheme. Only where the means of the parties fall below legal aid limits will the state pay. As the explanatory note reiterates, for parties whose income is over the civil legal aid threshold, the FDR will be provided under a private contract, which therefore "makes it inappropriate for the Bill to dictate all the details" about the FDR process. The explanatory note goes on to state: "The contract between the Secretary for Justice and the approved family dispute resolution providers will deal with the services that the Ministry is paying for and can contain as much or as little prescription about family dispute resolution as the contracting parties agree on."

Consistent with the above, the regulation-making powers envisaged by the Bill do not include any power to prescribe the FDR process. However, the regulations can prescribe the criteria that the Secretary for Justice must apply when deciding to grant, suspend, or cancel the approval of a provider. These criteria may perhaps indirectly lay out expectations as to the process to be conducted by providers.

The explanatory note to the Bill mentions that those seeking to resolve their disputes on a self-funded basis need not engage the services of an approved dispute resolution provider, and hence are at liberty to determine the process to be applied by the professional they engage. This option has always existed and will continue to do so regardless of legislative change now or in the future. However, the significance of the Bill is that those seeking to engage and pay for the services of a dispute resolution professional are likely to want to choose the services of an approved family dispute resolution provider because only those

providers may issue the form which allows access to the Family Court, should the initial dispute resolution process not proceed or prove unsuccessful.

A time to listen

Assuming, therefore, that the first phase of family dispute resolution is likely in the great majority of cases to be conducted by or under the auspices of approved FDR providers, the knowledge, skill, and experience of the people involved will be vital to achieve, in the words of the explanatory note, "a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective".

Not only should the individuals providing the services have requisite knowledge, skills, and experience, but they will need dedication and commitment as well. That is because FDR will be really difficult, challenging, and, at times, unpleasant work. FDR is to be undertaken soon after disputes arise. To borrow medical parlance, the parties will be in the acute phase of their dispute. Emotions will be running high. Such emotions will typically include a potent combination of fear, anxiety, confusion, hurt, anger, sadness, and despair.

By contrast, mediation under the current Early Intervention Programme scheme is comparatively straightforward. Under that scheme, delay has allowed emotions to lessen. Counselling has probably occurred. Specialist reports have issued. Events have been laid out in affidavits. Issues have been clarified and distilled in memoranda. Lawyer for the Child has done superb work. The lawyers for the parties have been reality checking their clients and holding them in check. The mediator has the enormous benefit of these three lawyers being present at the mediation conference.

In many, if not most, cases under the FDR, the person providing the services will be alone in a room with two parties in crisis, without the advantages just outlined. The proposal in the Bill that parties attend a parenting information programme is a good one, but it may nonetheless be difficult for parties to achieve a child focus when they are still subjected to the emotions already mentioned. It is not proposed that legal aid will fund legal advice and representation for parties before or during FDR. Those parties who can afford it may well obtain legal assistance. Arguably, however, it is the parties who most need legal assistance who will least be able to afford it. Especially will that be the case given that, unless legally aided, parties will be required to pay for FDR.

Therefore, the point needs reiterating. Those persons who will conduct FDR will need to be highly knowledgeable, skilled, experienced, dedicated, and committed in order for the scheme to succeed.

If I was one of those responsible for devising, reviewing, or implementing this scheme, I would be listening really carefully to what dispute resolution experts have to say about process, qualifications, and credentialing. The two professional bodies in New Zealand in the best position to lend such advice are AMINZ and LEADR. They are the undoubted experts in this area.

The New Zealand Law Society should be listened to as well, but lawyers need to understand that FDR will primarily be a non-legal process. Lawyers are the pre-eminent experts in litigation, but not in dispute resolution more generally, especially that which occurs before litigation has commenced. EIP mediation occurs in the shadow of the Court. FDR dispute resolution is avowedly beyond the shadow of the Court.

Other professional bodies should be listened to as well. Counsellors, psychologists, therapists, and others can all make useful contributions to what is required for the scheme to succeed based on their insights and skills.

However, FDR is not a process of litigation, counselling, or therapy, important as each is in relevant settings. It is a process of dispute resolution.

There is just one process dedicated to the non-directive resolution of disputes, and that is mediation. Therefore, those undertaking FDR work need first and foremost to be skilled and experienced mediators. This is why the advice of AMINZ and LEADR and other mediation experts is so important to FDR achieving its stated goals.

Considerations of space preclude a detailed analysis and critique of FDR in this article. It is hopefully apparent from the foregoing, however, that, in my view, the key to FDR succeeding is for policymakers to base their decisions on the premise that the process should be one of robust and skilful mediation in conformity with international standards, and to take and accept advice accordingly.

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