FAMILY LAW, DISPUTE RESOLUTION

Taking a hard look at Family Dispute Resolution – what's wrong and how it might be put right

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The Family Dispute Resolution (FDR) scheme which began on 31 March 2014 is now subject to governmental review. It is timely therefore to assess the impact of the scheme and identify what changes are called for.

In this article, I will focus on a few areas of concern which have been apparent to me as mediator, and indicate how improvement can be made.

EIP comparison

It is useful to compare FDR with mediation under the Early Intervention Programme (EIP), which immediately preceded it. EIP mediation involved lawyers who were also approved mediators being appointed by the Family Court as "lawyer to assist", with the brief to mediate. I will contrast the two systems under a number of heads.

Uptake

It was comparatively rare under EIP for parties to decline to attend mediation. That was because the parties were reluctant to defy the Court's direction to undertake mediation. They took mediation seriously due to the imprimatur of the Court. In contrast, many prospective parties to FDR mediation simply decline to participate. They do not view suppliers as having authority. This is a downside of the policy separation of the Court from FDR. FDR would benefit from the stamp of officialdom.

I recommend that when FDR is applied for, the intended parties receive a letter from the Ministry of Justice briefly outlining the scheme, underscoring its importance, and encouraging participation (subject to mediator approval of suitability).

Another reason for the low uptake of FDR is the Court's limited use of its power under section 46F of the *Care of Children Act 2004* to direct parties to FDR (as I discussed in the Spring 2017 issue of the *Family Advocate*).

I recommend a law change such that, absent special reason, parties before the Court who have not attended FDR must be directed to attend. The suitability of the case for mediation will then be assessed by the mediator in the usual way.

Involvement of lawyers

Most EIP mediation included the involvement of the lawyers for the parties and a lawyer for the children. This was beneficial to the process for a host of reasons, too many to list. Lawyer participation is now comparatively rare, mainly due to the unavailability of legal aid, fewer and later appointments of lawyer for the children, and the more general estrangement of lawyers and the Court from the process.

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I recommend that legal aid be extended to cover FDR and that, absent good reason, the lawyer for the children (if appointed) should always be authorised and expected to attend FDR mediation.

Timeliness and simplicity

EIP mediation would typically be commenced and completed comparatively quickly, following the Court's direction. FDR mediation is a slower process. Primarily, the delay results from the complexity and bureaucratic overlay of the scheme. This in turn relates to funding issues and the involvement of suppliers. Under EIP, the case was sent directly by the Court to the mediator, and no question arose as to whether a party was entitled to funding because the process was free for all. Under FDR, parties most often deal with suppliers, and then with mediators, and the issue of whether funding is available has to be carefully addressed. The Ministry imposes complex obligations on suppliers, many of which are then passed on to mediators. In short, FDR involves a great deal of paperwork, which was never the case with EIP.

I recommend that FDR be free of charge to all parties. This would serve to significantly simplify and streamline the scheme, and increase its uptake and perceived fairness. Economists will have their views, but I can't help thinking that a simpler, free of charge system would, in global net terms, be fiscally advantageous, especially if it achieves a reduction in the workload of the Court.

Remuneration

Under EIP, mediators were paid at "lawyer to assist" rates, for all time spent. By contrast, FDR mediators are (in the greater part) paid only for their face-to-face contact with parties. Rates vary, but many FDR mediators are nominally paid around $130 per hour, exclusive of GST. Effectively, therefore, mediator remuneration is appreciably less than $100 per hour, especially when unremunerated travel and administration time are taken into account. From this meagre remuneration, mediators may be required to meet the cost of motor vehicle expenses, venue costs, annual accreditation, professional supervision, and continuing professional education. This level of remuneration is a disincentive for the most qualified and experienced mediators to undertake FDR, and is bad for mediator morale and commitment.

I recommend that mediators are paid commensurate with their actual time input, and the importance and difficulty of the work.

Funding fairness and non-supplier mediation

As already mentioned, under EIP, mediators were appointed directly by the Court. Under FDR, mediators may be appointed directly by the parties, but this rarely happens. Most often, suppliers appoint the mediators. This is primarily because parties who directly appoint a mediator are required to meet the full cost of the mediation themselves. By contrast, the cost of mediation through suppliers is capped at $897. Suppliers can afford to provide mediation at this rate because, even where the parties are not entitled to funding, the supplier receives a top-up payment from the Government. Thus all FDR mediation through a supplier is subsidised, whereas mediation for which parties contract directly with a mediator is completely unsubsidised. It is not a level playing field. FDR would be enhanced if there was more non-supplier mediation than is currently occurring.

I recommend that where parties appoint a mediator directly, the process is subsidised by the Government and, as a quid pro quo, the mediator's fee is capped. Should FDR mediation become a free service, then directly-appointed mediators should be able to provide that service.

The health and standing of the mediation profession

It is desirable that New Zealand have a vibrant, diverse, skilled and experienced mediation profession. Aspects of FDR are inimical to this. In practice, mediators have had no choice but to effectively become part of a supplier organisation. They have been prevented from offering their services to all suppliers. This infringes mediation autonomy. For this and other reasons mentioned above, FDR can be dispiriting to mediators.

All of the recommendations I have made above would serve to improve on this situation. I recommend that the review of FDR take account of the need to protect and promote the health of the mediation profession.