



# **Family Justice System Review**

## Submission from Resolution Institute

Submitted by:  
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## 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 as such 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 of a high quality and appropriate for the purpose, alternative dispute resolution can be quicker and more cost effective, can reduce or repair harm to relationships, and may result in more enduring resolution.

## About this response

Resolution Institute appreciates the efforts the Panel has made to speak to FDR Providers around the country and we appreciate the opportunity to make this submission.

At the end of October 2018 Resolution Institute holds FDR Provider accreditation for 67 FDR Providers (mediators). In addition to this a number of other members have an interest in family mediation and may hold an accreditation through another ADRO.

To prepare this response Resolution Institute has consulted with members in a variety of ways:

- A working group of FDR Providers has met (online) on a number of occasions to discuss the 2014 reforms and consider options
- Discussion sessions have been held with FDR Providers in a range of forums and a number of discussions have also taken place with individual FDR Providers
- A survey of FDR Providers was conducted to gain wide input

Resolution Institute has also consulted with the other ADROs, particularly AMINZ and the four Supplier organisations contracted by the Ministry of Justice to deliver FDR.

Resolution Institute's submissions is therefore an accumulation of feedback and views from a wide range of FDR Providers and others involved in FDR.

Resolution Institute's submission focuses on Family Dispute Resolution (mediation) and related components of the Family Justice System, because that is the area of experience and expertise of our mediator members.

## Resolution Institute FDR Providers

Resolution Institute FDR Providers are all trained, accredited and experienced mediators.

By way of background, our survey indicates that:

- Resolution Institute FDR Providers work for each of the four Supplier organisations. Some FDR Providers work for more than one Supplier
- Very few FDR Providers do more than eight FDR mediations per month. Around three quarters of FDR Providers complete four or less mediations per month
- Most FDR Providers have been involved in FDR work for more than three years.

Resolution Institute's data on FDR Providers indicates that:

- Only a very small number of people become newly accredited for FDR each year
- The number of people maintaining FDR Provider accreditation is declining
- Around a third of FDR Providers are legally trained and another third have a therapeutic (social worker, counsellor or psychologist) background.
- FDR Providers are disproportionately female and cultural groups such as Māori and Pasifika are under-represented

## FDR mediation works for care of children disputes

While there is great potential to improve the family justice system through examining the 2014 reforms, FDR mediation itself has proved successful for those that have participated in it.

Mediation is a process that empowers parties to reach their own agreements. There are clear benefits in assisting parents to reach their own agreements for care of their children, rather than having arrangements imposed. Agreements reached in this way are likely to be more enduring than those imposed in an adversarial process. Beyond this, mediation is a process which fosters communication between the parties enabling parents to gain valuable skills, strategies and tools for ongoing communication and negotiating future agreements. As a result mediation is particularly well suited to helping people reach agreements on parenting, where the need to communicate and reach agreement will inevitably reoccur. Mediation is also a flexible approach that can be tailored to the needs of parents and the children.

Ministry of Justice data shows a fairly consistent rate of 83% of cases reaching agreement on some or all matters through FDR. Even where all matters are not resolved at FDR, the process can increase parties' understanding of the conflict and each other's perspectives. Ministry of Justice research has also shown that FDR provides a faster path to resolution than court and is more enduring. This data is supported by numerous stories from FDR Providers, Suppliers and parents themselves about the impact that FDR has been able to make in a wide variety of cases.

The biggest challenge for FDR within the family justice system seems to be low participation – significantly lower than the level of FDR forecast prior to the implementation of the 2014 reforms. Ministry of Justice data shows, for example, that 1,561 mediations were completed in the year to 30 June 2017. Ministry of Justice data also shows that there are actually almost as many cases exempted from FDR, as mediations completed.

Ministry of Justice research explored the reasons that cases were exempted and concluded that the majority of exemptions (83%) were because one of the parties would not participate. The research, using Supplier data, was unable to dig further into exactly why parties did not want to participate in FDR.

Concerns raised by FDR Providers suggest some contributing factors:

- Lack of publicity/promotion of FDR as an approach for reaching parenting agreements after separation
- Parties receiving advice that they would be better off in the Family Court and being advised to refuse to do FDR
- Significantly increased numbers of cases ending up on the 'without notice' track on legal advice
- Disinclination of the judiciary (in some courts) to refer cases that should have been to FDR, back to FDR

It seems that in the eyes of the general public and the legal community, the Family Court is still the main way to resolve parenting disputes. For the potential of FDR to be realised it needs to be seen as the main way to resolve parenting disputes and consequently the Family Court seen as the next step for those disputes unable to be resolved through FDR.

## Recommendations for FDR to improve the FJS

### FDR as an expectation

It seems clear that separation between 'in-court' and 'out-of-court' solutions has resulted in cases that would have been suitable to mediate, ending up in the Family Court, leading to workload pressures in the Family Court and higher costs for Government. FDR is underutilised because there remains a perception that the Family Court is the best way to resolve parenting disputes.

FDR needs to be firmly established as the main way for separating parents to be assisted to resolve parenting arrangements. It is important that advice from lawyers to clients and decisions about without notice application are consistent with this, and that the message is also reinforced by the Family Court.

*Resolution Institute recommends that there be a clear expectation, supported by all in the family justice system that mediation be attempted (suitability for mediation assessed by an FDR Provider) prior to application to court, except where there are special circumstances.*

The Law Commission recommends a similar approach for relationship property disputes in the recently released *Review of the Property (Relationships) Act 1976: Preferred Approach*, proposing that:

- voluntary out of court dispute resolution be given statutory endorsement
- the Act include a requirement to make a genuine effort to resolve relationship property matters out of court

It should be noted that Resolution Institute does not suggest that all cases will be suitable to mediate. Whether FDR is initiated by a party or referred by the Court, mediators are required to assess whether or not a case is suitable to mediate. Some cases will not be suitable to mediate for a wide range of reasons, and will be most appropriately managed by the Court. Assessment of

suitability to mediate is the expertise of mediators. FDR Providers note that this is not a one-size-fits all decision but must be made based on comprehensive assessment with the parties. They point out for example, that in some circumstances it may be appropriate to mediate where there has been family violence – depending on the specific circumstances of the family and the expertise of the mediator.

It seems that separation between ‘in-court’ and ‘out-of-court’ processes has resulted in a general lack of support for FDR by some lawyers and courts, possibly because of lack of understanding and trust in the process. Addressing the concerns of lawyers and the judiciary will be key. In this submission Resolution Institute has identified some recommendations aimed at supporting this.

Key to establishing FDR as an expectation will be judges reinforcing this expectation by referring cases that should have been to FDR, back to FDR. The degree to which this happens currently seems to vary from court to court. FDR Providers report that in many courts, referral back to FDR is very limited or non-existent. In some courts judges instead choose to undertake judicial settlement conferences, or direct the Lawyer for the Child to facilitate a round table meeting. Resolution Institute notes that neither approach is a substitute for mediation by a trained and qualified mediator. Neither approach reinforces that FDR is the appropriate first step in resolving parenting disputes.

Resolution Institute notes that over more recent years, FDR Suppliers have worked with the courts to support referral of cases back to FDR. FDR Providers report that in some courts this referral of cases back to FDR seems to be working well. Variability in the willingness of courts to refer cases back to FDR suggests that some mandating of this process is required.

*Resolution Institute recommends that judges be required to consider whether a direction should be made to FDR in all cases where FDR has not been completed, and that parties should be directed to attend FDR unless there is a compelling reason why this should not occur.*

## FDR funding

FDR Providers feel strongly that cost should not be a barrier to families’ participation in FDR, and most report that they have had clients for whom it has been a barrier.

Ministry of Justice research is inconclusive, finding cost to be only the third most common reason for non-participation in FDR, after not wanting to do FDR or being uncontactable. The research did not however explore whether cost was a contributing factor (or indeed the underlying reason) for not wanting to participate in FDR or not responding to contact.

FDR providers report that fees are an issue in several ways:

- The administration around fees plus the time that it takes to address fees and complete paperwork, is a deterrent for families, as well as costly for Suppliers/FDR Providers.
- The fees are challenging and a barrier to participation for people just over the funding threshold (this issue is raised in the Law Commission’s recent report *Review of the Property (Relationships) Act 1976: Preferred Approach* with respect to Legal Aid thresholds.
- Fees create a perception of inequity where one party qualifies for funding and the other does not. This perception can impact on the second party’s likelihood of participating in FDR, and also on their perception of the fairness of the mediation if they do participate.

If participation in FDR is to be an expectation and genuinely mandatory prior to accessing the court, then it follows that funding eligibility must not be a barrier. It seems incongruous and questionable in terms of access to justice, that Government funds a free employment mediation service for employers and employees in dispute, but does not fully fund mediation for families in dispute over care of children.

Further, in a system intended to encourage families to agree parenting arrangements themselves, with the support of FDR, for those not eligible for funding it is currently less expensive to go to court than to FDR (excluding any costs for legal advice). The cost of filing an application under the Care of Children Act is \$220 compared to \$448.50 per person for FDR. This cost discrepancy does not support the use of FDR.

*Resolution Institute recommends that FDR become a free service.*

Announcing a free FDR service seems likely to address multiple issues with the current system including:

- Removal of financial barriers to participation
- Removal of up-front administration and time delays currently resulting from the need to determine funding eligibility
- Reduced administration costs
- Reduced disparity or perceived inequity between parties where one qualifies for funded FDR and the other does not
- Reduced administration would go some way to addressing the administration costs in the system for Suppliers/Providers (Some Suppliers manage administration around subsidies, for other Suppliers this administration is managed by the FDR Providers) and therefore could partially address FDR Provider fees.

Removal of FDR fees would be a significant change that would also provide the Government with a platform or the opportunity to publicise FDR, increasing awareness of the service as a way to resolve parenting disputes.

The recent change to the 12 hours flexible model of FDR is well supported by FDR Providers. FDR providers report that this enables them to develop an approach and mix of services tailored for the parties they are working with. This customised case management provided by FDR Providers is important.

*Resolution Institute recommends that the 12 hours flexible model of FDR be retained.*

## Promotion of FDR

One of the implementation activities planned for the 2014 reforms of the family justice system was marketing of the new services. The intended campaign was never carried out and instead Suppliers were left to market their individual services.

If the understanding of the general public remains that 'when you separate the first thing you do is contact a lawyer', and lawyers continue to advocate for court resolution, then little will change in the way New Zealanders resolve parenting disputes. A fundamental shift in perception about how to resolve parenting disputes is required.

Resolution Institute recommends that Government invest in a significant communication campaign to educate the public about resolving disputes on separation, emphasising the assistance available, including FDR, to assist parents to agree their own arrangements for care of their children. Parents should be encouraged to seek help early and be made aware of how to access information about the services available. Other comprehensive campaigns including TV, radio and social media have achieved significant change and awareness. For example the 'It's not ok' and 'It's ok to ask for help' family violence campaigns.

*Resolution Institute recommends a communication campaign that promotes services available to assist people to resolve their own parenting disputes outside of court, including fostering awareness of FDR and how to access it, and that funding should be allocated for this annually.*

The Ministry of Justice website has good information and provides a useful central point for access information – once people know to go there. So promotion of the website as a source of information is key and missing.

Website information could also be improved by:

- Expand the information videos showing people what to expect in mediation. For example the NSW farm debt mediation videos show Resolution Institute mediator Nina Harding explaining the mediation process in some depth. <https://www.raa.nsw.gov.au/fdm/nsw-farm-debt-mediation-videos>
- Having more information to assist with choice in FDR. For example the differences between the Suppliers
- Including information on private mediation. See the section on FDR Provider funding and remuneration

The Law Commission's recent report *Review of the Property (Relationships) Act 1976: Preferred Approach* similarly identified the importance of access to information and support, to improve access to dispute resolution.

## Focusing on children

FDR Providers are very committed to ensuring that FDR mediation is focused on the best interests of children. There are a range of ways that FDR Providers ensure that the interests and views of children are taken into account in FDR.

In addition to ensuring that FDR focuses on the child's interests and views many FDR Providers report that providing a specific voice for children in mediation is helpful in improving parents' decision making. Allowing children to participate in decision making about their lives is an obligation of New Zealand's commitment to the United Nations Convention on the Rights of the Child.

Ministry of Justice guidelines introduced in 2018 require that all Suppliers have a process in place to ensure that children's voices are represented at mediation, and Suppliers and FDR Providers are increasingly seeing direct input from children as an important part of FDR. While on some occasions children participate in mediation or meet with the mediator, the most common approach seems to be the use of a Child Consultant to seek and relay the views of children. A Child Consultant is usually a social worker, counsellor, mediator or other professional.

The implications of this additional process for the 12 hours model were not explored and it seems to have been simply assumed that a process for including the child's voice could be included within the

12 hours. FDR Providers tend to be comfortable that 12 hours sufficiently covers 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 Providers. If children are to be involved in the FDR process (and it is clear they should be able to be), then it needs to be done well and not at the expense of the mediation process.

Engaging children and gaining their views is not just a matter of a short meeting with a single child. There must be a meaningful and safe process that allows the views of each child in the family to be considered. This can be achieved in many different ways and is likely to involve:

- Additional discussion with both parents about getting the views of their child/children, how this could happen, and gaining consent from both parents to proceed
- Making appropriate arrangements for a meeting with the child/children
- A meeting with the child/children to gain their views
- Feedback to parents about the child/children's views
- Feedback to the child/children

Each of these steps is important and must be well managed. For example, the way that the information about the child/children's view is relayed to parents is critical to ongoing relationships and the success of FDR.

*Resolution Institute recommends that a minimum of an additional six funding hours be available for including the voice of children in FDR mediation, on top of the 12 hours available for assessment, preparation for mediation, and mediation.*

An question that has been raised is the role of a Lawyer for the Child in FDR mediation. A number of FDR Providers believe it would be useful to have provision for a Lawyer for the Child to be appointed and involved in FDR mediation (without the case going to Court first). FDR Providers suggest that in some cases a Lawyer for the Child will be the most useful person in the role of Child Consultant, but they also point out that the common Child Consultant approach usually works well and that Child Consultants with counselling or social work bring different skills, such as expertise in working with traumatised children or with children who have experienced family violence. The role of Child Consultant in FDR would not always be best served by a Lawyer for Child. Through assessment meetings with both parents, FDR Providers are well placed to identify the most appropriate ways of including the child's voice in mediation, and the most appropriate person to meet with a child if this is appropriate.

*Resolution Institute recommends that mediators are able to request a Lawyer for the Child be appointed as a Child Consultant for the purposes of FDR if they believe there are significant legal issues to be considered, or that there is a likelihood the case will end up in the Family Court.*

A potential issue arises however if a Child Consultant meets with a child and the case ends up going to the Family Court where a Lawyer for the Child is appointed. For many children it will not be ideal to then have to meet with another professional. Protocols, including addressing confidentiality issues could be developed to address this.

*Resolution Institute recommends that if a Lawyer for the Child is appointed after a Child Consultant has already met with the child, then protocols should be developed for the Lawyer for the Child to work with the Child Consultant in order that the child does not need to meet separately with a new person.*



## Suppliers

One of the more contentious issues in FDR seems to be the role of Suppliers and whether having multiple Suppliers adds to confusion about accessing FDR. Resolution Institute does not believe that having multiple Suppliers is the major reason for under-participation in FDR. The level of exemptions and number people going straight to court on without notice application are not the result of multiple Suppliers creating confusion.

FDR Providers tend to think that a single point of entry would simplify things for families but they see effective triaging of cases as more important. There must be a simple way for parents to access FDR services and have their needs explored and their case managed.

When asked to consider whether there should be a single access point to FDR the majority of FDR Providers are uncomfortable with the idea that either the Family Court, MBIE or a single supplier should become a single point of entry to FDR services.

There are clear advantages in having multiple Suppliers. From the service user's perspective it allows choice in the type of service and the type of organisation they wish to access services from (and we expect choice in most services we use). Each Supplier has a different philosophy and service approach. From an FDR Provider perspective multiple suppliers means a choice of Supplier to work with. FDR Providers can choose the Supplier organisation whose model fits the way they prefer to work. That choice is valued by both parents and FDR Providers, is demonstrated by the spread of cases between the Suppliers and the fact that FDR Providers choose to work with different Suppliers.

While Resolution Institute does not advocate for a highly competitive model, we do think there would be risks in a single supplier approach, potentially in continuity of service and also in quality of service provision. Having multiple services encourages Providers to focus on service, quality and innovation.

In Resolution Institute's experience, all the Supplier organisations are committed to FDR and providing FDR services that have a positive impact on families and children. Since 2014 Suppliers have developed expertise in delivering FDR services and it would be a step back to lose this expertise. Suppliers have also demonstrated an ability to collaborate for the greater good of FDR services.

Resolution Institute supports maintaining the current Supplier arrangements, but believes solutions must be found to make access to services and choice of Suppliers simple, with effective triaging of cases. Choice must not be a barrier for people accessing FDR and it is likely that some people will not want to or be able to make a choice on Supplier. The complexity of choice of Suppliers also cannot be a reason for courts not to refer cases back to FDR.

Mediation is about identifying options and solutions that meet the interests of all parties. That is the challenge for the Supplier organisations and stakeholders – to come up with solutions that enable simple access to FDR services, while meeting the interests of Suppliers and maintaining the advantages of choice. Resolution Institute is optimistic that solutions for streamlined access can be found.

*Resolution Institute recommends that the current Supplier arrangements be maintained and that processes be developed to implement simple access to services and streamline referral to FDR by the courts.*

Resolution Institute believes that the answers to simple access will lie in creation of an entry point or Supplier 'hub'. The Ministry of Justice website provides an initial access point for information about services. The website was also originally intended to be supported by a 0800 advice line to help separating parent connect with the services they need. While this 0800 service still seems to exist it is not promoted and even on the Ministry of Justice's own website it is very hard to find. Other options for creating simple access for people could include:

- A virtual hub run by the three suppliers that provides a first point of contact and where people do not want to make a choice of supplier refers cases on a pre-determined basis.
- An FDR Court Co-ordinator role in each court, similar to that used in Restorative Justice, which assists with referrals from the court to FDR. The role could provide information about the Suppliers, act as a first point of contact and where parties don't want to make a choice of supplier refer cases to suppliers on a pre-determined basis.
- Funded advisor roles in community organisations such as CABs, and Community Law Centres such as is suggested in the *Review of the Property (Relationships) Act 1976: Preferred Approach* paper.

In considering the benefits of choice, it is important that this also extends beyond choice of Supplier organisation, to choice of FDR Provider. Where parties have a preference for a particular mediator and are able to agree on this, they should be able to work with their preferred mediator. If a party contacts an FDR Provider, they should be able to access services from the provider even though currently they need to be referred to a Supplier organisation to access funded services.

Taking this a step further, FDR Providers would like to be able to offer clients the funding subsidy when they access mediation privately. Private mediation has always existed for care of children disputes and early estimates from the 2014 reforms were that 40% of mediation would continue to be privately organised and funded. The later introduction of a fixed fee and a subsidy for FDR mediation seems to have diminished this market. Privately engaged mediation should be subsidised to the same extent as FDR accessed through a Supplier. This could be managed in a similar way to the funding of legal aid or FLAS with individual lawyers.

## FDR Providers

FDR mediation is a highly skilled area of mediation and it is vital that highly skilled mediators are attracted to and retained in this work. FDR Providers must have specific mediation training and experience, as well as experience in working with families. It is important that all family mediation is conducted by accredited FDR Providers with appropriate training and experience. We note that neither judicial settlement conferences, nor round table meetings with a Lawyer for the Child, are a substitute for FDR conducted by a trained and accredited FDR mediator.

One of the advantages of FDR is the broad skillset of FDR Providers. Whereas only lawyer mediators were appointed in the previous Early Intervention Process, the introduction of non-lawyer mediators has resulted in a pool of mediators which includes therapeutic skillsets such as social work, counselling and psychology. This provides increased capacity to work with cases where there are issues such as family violence or emotional trauma. It also means more choice for clients to find an FDR Provider to suit their needs, and a greater ability for Suppliers to refer parties to an FDR Provider suited to their situation.

Resolution Institute's experience is that the mix of skills in the pool of FDR Providers increases the capability of all. In training courses, professional or peer supervision groups, FDR Providers are able

to learn from the expertise of others. Collegial networks mean that FDR Providers can seek advice from others with different expertise. For example, lawyers can draw on the knowledge of psychologists or counsellors when working with families with complex emotional issues or experiences of family violence. Social workers can draw on the expertise of lawyers in understanding legal issues.

## FDR Provider remuneration and funding

Resolution Institute is concerned that current mediator remuneration is insufficient for the expertise required, and the amount of work involved in FDR mediation. Low mediator fees have resulted in some of the most experienced family mediators ceasing to provide FDR, or limiting the number of cases they take on.

FDR Providers are generally contracted by Supplier organisations (although some Suppliers also employ FDR Providers). While Suppliers contract FDR Providers, Supplier contracts with the Ministry of Justice set fees paid to FDR Providers. Current rates are lower level than that paid to mediators in the former EIP scheme.

Contract FDR Providers are paid an hourly rate based on a maximum of 12 contact hours with FDR clients. FDR Providers are not paid for administration time, travel time or other non-contact time spent on FDR cases, making the effective hourly rate for FDR Providers extremely low.

*Resolution Institute recommends increasing fees paid to FDR Providers to reflect the skill and expertise required, and the non-contact time involved in addition to FDR contact hours.*

Compliance costs for FDR Providers to retain FDR accreditation are (rightly given the importance of the work) high. FDR Providers must participate in regular professional supervision, complete professional development and maintain membership of an ADRO. ADROs receive no funding to support this activity on the basis that FDR Providers are expected to fund this. Given the low rates of FDR provider remuneration and the fact that the majority of FDR providers do only a few mediations per month, it is hard for FDR Providers to justify or afford covering the costs of maintaining accreditation.

A particularly important area that can be neglected when funds are tight is professional development. Professional development is vital for continued improvement of services provided to families. Since the 2014 reforms, the Ministry of Justice has twice provided ADROs with funding to deliver professional development to FDR Providers. This has only been one-off funding when funds are available, and does not allow for a regular, planned programme of professional development. It should be noted that even when funding allows for professional development to be delivered at a low cost or no cost, there is a significant personal commitment from FDR Providers to professional development, in terms of their time and lost income.

*Resolution Institute recommends establishment of ongoing professional development funding for FDR Providers.*

Resolution Institute also notes that the pool of FDR Providers is insufficiently diverse. FDR must be able to meet the differing needs of families and is far from a 'one-size-fits all'. It is particularly important that FDR can meet the needs of Māori and other cultural groups such as and Pasifika. Whilst all FDR Providers must be culturally aware, in particular of Māori values and concepts, some families will want the choice, for instance to work with a Māori mediator. The fact that FDR Provider training and accreditation is self-funded by those wishing to do FDR mediation is likely to be a barrier

to more Māori and Pasifika working in this area. This is in contrast to restorative justice where training and accreditation is funded by the Ministry of Justice and around half of restorative justice trainees are Māori. Resolution Institute offers several mediation training scholarships each year, often targeting increased diversity in mediation. Resolution Institute would like to be able to offer more subsidised training and accreditation specifically targeted at increasing the number of Māori and Pasifika FDR Providers.

*Resolution Institute recommends establishment of funding for training and accreditation of Māori and Pasifika FDR Providers.*

## Access to other services

If the aim is to support families to reach their own parenting agreements without the cost and time of the court, then it makes sense to resource access to services that will assist this.

One of the strongest recommendations made by FDR Providers is to re-introduce counselling for separating families. The 2014 reforms removed the previous access to six hours of funded counselling for each partner, in theory replacing it with three hours shared between the parties, of Preparation for Mediation. Preparation for mediation, as the name suggests is targeted at preparing parties to participate effectively in mediation. It usually covers what to expect in mediation, and can also include some communication skills to assist in the mediation. It is not counselling to assist parties to work through uncertainties about their separation, or deal with the emotional and psychological stress resulting from separation. FDR Providers suggest that there is still a need for this counselling as distinct from preparation for mediation, and that early, effective counselling, prior to mediation will assist families to deal with separation better, prevent issues becoming entrenched, increase the success of FDR and improve outcomes for children.

The need for counselling to respond to emotional and psychological stress from separation is an area also identified by the Law Commission in the *Review of the Property (Relationships) Act 1976: Preferred Approach* paper.

*Resolution Institute recommends re-introduction of funded counselling for separating families.*

A number of FDR Providers also raise concerns about the availability and provision of the Family Legal Advice Service (FLAS). Concerns fall into two areas:

- The sufficiency of FLAS in terms of whether it allows for enough legal advice for parties to be able to effectively participate in FDR
- The availability of FLAS and whether parties can actually access it. While there are a large number of FLAS providers listed on the Ministry website, FDR Providers report that clients often have difficulty actually finding someone able to provide the service. This seems to vary around the country.

The Law Commission report on the Property (Relationship) Act also identified issues with the availability of lawyers willing to do property relationship work funded by legal aid.

Better provision of legal advice prior to FDR may go some way in addressing the concerns that lawyers have about FDR, and may therefore reduce some of the 'divide' between FDR and the Family Court. Resolution Institute hopes that if lawyers gain confidence in the outcomes of FDR, that the number of without notice applications and the number of clients advised to elect not to participate in FDR will decrease.

*Resolution Institute recommends expansion of the FLAS service to improve pre-mediation legal advice.*

Some FDR providers also advocate for legal aid to be extended to fund lawyers to participate in FDR. Resolution Institute notes that, in the majority of cases, FDR Providers do not see lawyers participating in FDR mediations as necessary or advantageous, but recommends considering extending Legal Aid to FDR to allow parties the choice to be legally represented if they feel it is warranted.

Resolution Institute notes that funding aside there is no prohibition to lawyers (or other people supporting the parties) participating in FDR if parties agree to their participation. Usually it will be appropriate for both parties to be legally represented if one party is.

The Law Commission has also identified the need to review sufficiency of legal advice for property relationship matters being resolved out of court, recommending a review of existing provision and funding in the *Review of the Property (Relationships) Act 1976: Preferred Approach* paper.

## Other areas

### Enforcement of agreements

The majority of FDR Providers do not consider enforcement of mediated agreements to be a problem in FDR. Where agreements are developed and owned by the parties, enforcement is less likely to be an issue. If circumstances change, the 12 hour model of FDR usually allows for parents to come back to re-visit the agreement with the mediator. Given that the needs of children change over time, it seems logical that re-visiting agreements rather than enforcing them is the best approach.

Resolution Institute notes that where parties want agreement to be enforceable they can apply to the Family Court to have their mediated agreement turned into a Court Order. Perhaps there is a need for this to be clearer to parents. Some FDR Providers have raised a concern that courts are reluctant to turn a mediated agreement into a Court Order without re-visiting the agreement. This seems to vary between the courts.

### Relationship property

Under current Ministry of Justice guidelines, FDR Providers can include matters of relationship property during mediation where these issues remain secondary to care of children issues. Resolution Institute notes that this is appropriate only where FDR Providers have the knowledge and experience to deal with relationship property issues and where they are linked with the care of children issues that are the purpose of FDR. FDR Providers point out that that there is risk in arrangements for care of children becoming a 'bargaining chip' in relationship property negotiation. Equally though, their experience is that often relationship property arrangements are relevant to care of children arrangements, and that uncertainty on relationship property can interfere with finalisation of care of children arrangements.

It is clearly in the best interests of children to have property matters resolved quickly and in a way that minimises conflict between parents. Where separating parents have care of children and relationship property disputes to resolve, it seems that a co-ordinated service would be beneficial.

The relationship and communication benefits of mediation could be lost through an antagonistic legal battle over property.

Equally for people going through the stress of separation, two disconnected processes could add to the stress. A co-ordinated service would mean a mediator working with the family on either property relationship or care of children matters could determine the most appropriate approach for mediating the other matters. In some cases, depending on the expertise of the mediator and the needs of parties, it may be suitable for the same mediator to mediate both areas, in other cases a co-ordinated handover to another mediator will be most appropriate. At a minimum there should be consistency in the approach for all family disputes.

*Resolution Institute recommends that mediation of property relationship disputes be encouraged, and that a means tested mediation service, linked to but separate from FDR be available.*

Resolution Institute also supports arbitration as an option for property relationship disputes, particularly where they are unable to be resolved in mediation or the case is unsuitable to mediate.

The Law Commission supports use of mediation in the *Review of the Property (Relationships) Act 1976: Preferred Approach*, proposing that:

- Voluntary out of court dispute resolution be given statutory endorsement
- A requirement to make a genuine effort to resolve PRA matters out of court be included in the Act
- Government consider extending a voluntary, modified FDR service or other form of state funded dispute resolution service to property relationship matters

## Summary

The aspiration of effective, efficient and self-determined resolution of the majority of parenting arrangements is possible through FDR. Resolution Institute believes there is scope for changes that will improve the experiences and outcomes for families, reduce the time taken for parenting arrangements and result in overall savings for Government.

Resolution Institute urges the Panel to support retaining FDR as an effective approach to family dispute resolution, and also to support retaining the things about FDR that work well, including:

- The strength of a diverse pool of mediators from legal, therapeutic and other backgrounds
- The model of 12 hours that can be used flexibly by mediators to meet the needs of parties
- FDR's placement outside of the court system, which supports early and less formal resolution

To be effective, FDR must be positioned as a central and early component of the family justice system. It must be expected, mandated, and commonly understood that most parents in dispute over the care of children will participate in FDR. That a path straight to court is only for the most complex cases or where there are particular reasons that FDR is not appropriate. And that court can be the next step where the parties themselves have not been able to fully resolve arrangements in mediation.

To create this environment, Resolution Institute recommends the following refinements to the family justice system:

- Make FDR a free service to improve access and reduce administrative burden and costs
- Launch a publicity campaign to increase awareness of FDR including how to access FDR

- Mandate a clear expectation that mediation be attempted prior to application to the court, except in special circumstances
- Require judges to consider a direction to FDR in all cases where FDR has not been completed
- Fund additional hours for including the voice of children in mediation, so that this process can be well managed for children and parents
- Retain the current multiple Supplier arrangements but require that process be implemented to simplify access to services and referral to FDR by the courts
- Re-introduce funded counselling services to support the well-being of separating families
- Expand provision of FLAS to ensure that separating parents have the advice they need to reach agreement on parenting arrangements and address concerns of lawyers and the judiciary
- Increase FDR Provider fees to reflect actual time involved in cases and retain the expertise of FDR Providers
- Provide professional development funding to continue developing the expertise of FDR Providers, and funding to support training and accreditation of more Māori and Pasifika FDR Providers.

Resolution Institute is excited about the opportunity the review presents to further the FDR approach which achieves positive outcomes for families, and to refine the family justice system so that FDR works better for more people.

Best wishes to the Panel completing this challenging and important work.