

# Advent of Compulsory Family Dispute Resolution: Implications for Practitioners

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A new phase of the federal government's family law reform package has recently begun, with the advent of compulsory family dispute resolution from July 1 2007. The commencement of this phase poses a range of challenges, with family dispute resolution (FDR) practitioners now assuming a greater role as the 'gateway' to the reformed family law system. This article outlines what is required of FDR practitioners (FDRPs) by the *Family Law Act 1975 (FLA)* when they are assuming this role, which represents a direct interface with the legal system.

## The gateway role

In most cases, parties who wish to commence legal proceedings in the Federal Magistrates Court (FMC) or the Family Court of Australia (FCA) are now only permitted to do so if they also file a certificate from a registered FDRP with their application (*FLA* s60I). These certificates show they have complied with the requirement to attempt to resolve their dispute through family dispute resolution.

Exceptions to the requirement to obtain a certificate include cases where the court is satisfied there are reasonable grounds to believe that family violence or child abuse has occurred, or that there is a risk they may occur (s60I(9)(b)). Further exceptions include applications for orders made by consent (s60I(9)(a)(i)), situations where an urgent determination is needed (s60I(9)(d)), and circumstances where a party is unable to participate effectively, including for reasons of physical remoteness or a lack of capacity (s60I(9)(e)).

### 1. What is FDR?

Under the *FLA*, FDR is defined as a process (other than a judicial process) conducted by an independent family dispute resolution practitioner, in which the practitioner "helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other" (s10F).

### 2. What is a registered FDRP?

The federal government has established the Family Dispute Resolution Register [[fdregister.familyrelationships.gov.au/Search.aspx](http://fdregister.familyrelationships.gov.au/Search.aspx)] as a system of registration for FDRPs to be recognised for the purpose of providing FDR services, including issuing certificates under s60I (*Family Law Regulations 1984*, Part IVB). Both individuals and organisations may be included in the register, with organisations requiring ministerial approval and individuals being required to comply with a range of training and other specifications.

### 3. What is the purpose of the certificates?

A key aspect of the new family system is the requirement for people who are involved in disputes over parenting arrangements after separation to attempt to resolve their dispute without going to court. In most cases, they are only able to file an application in court if they can show that they have attempted to resolve their dispute through other means. FDRPs are able to issue certificates to show that one or both of the parties involved in the dispute has attempted to address their disagreement without court action.

Issuing a certificate has significant consequences besides allowing parties to lodge their application in court. Depending on the circumstances of the case, the certificate may be taken into account by the court in deciding whether to order the parties to attend further family dispute resolution (*FLA* s13C) or to order that one party pay some or all of the other party's court costs (*FLA* s117).

### 4. In what circumstances may a certificate be issued?

There are four sets of circumstances that may lead to an FDRP practitioner issuing a certificate.

- a) The person did not attend FDR because the other party refused or failed to attend. The *Family Law Regulations 1984* give specific guidance as to when such a certificate should be issued (R62A(4)). They require that the FDRP should have attempted to contact the relevant party at least twice, including once in writing. In addition, they must have given the party a reasonable choice of days and times for attendance, and informed the party of the consequences of their failure to attend.

- b) The party did not attend because the FDRP thought it would not be appropriate. Issues related to the assessment of suitability are governed by Regulation 62 of the Family Court Regulations 1984. Under this regulation, the following issues are relevant to assessments in terms of suitability:
- A history of family violence;
  - The likely safety of the parties;
  - Equality of bargaining power;
  - The risk that a child may suffer abuse;
  - Emotional, psychological and physical health of the parties; and
  - Any other matter that the FDRP thinks is relevant.

If the FDRP considers these issues and forms the view that FDR is not appropriate, then they must not provide FDR.

- c) FDR was attended and all parties made a genuine effort to resolve the dispute, but the issues in dispute remain unresolved.
- d) The party attended FDRP and either they or the other party/parties did not make a genuine effort to resolve the dispute.

(i) The meaning of 'genuine effort'

The Attorney-General's Department (AGD) provides the following guidance about the meaning of 'genuine effort' (AGD 2007), which so far has not been defined in case-law or statute. It indicates that this is a matter on which the FDRP should form their own opinion, having regard to these factors:

- It should be given its ordinary meaning;
- It is not equivalent to 'good faith';
- It should be a real attempt to resolve the issues, not a superficial, token or false effort;
- It does not require people to agree;
- It does not require a minimum number of FDR sessions; and
- It does not require FDR practitioners to 'tick off' objective indicators and subjective matters may be considered.

## 5. Family violence and child abuse

As the considerations relevant to an assessment of appropriateness under Regulation 62 indicate, situations in which there is alleged history of violence or concerns about risks to the safety of children raise particular concerns in the FDRP context. This is recognised in the new legislative scheme, which makes cases in which there are 'reasonable grounds' to believe either or both of these issues are occurring an exception to the requirement for compulsory dispute resolution (*FLA* s 60I(9)).

However, the legislation does not make it compulsory for such cases NOT to be dealt with in FDRP. Indeed, it allows the court to make orders for such parties to attend FDR (s60I(10)). The Attorney-General's Department has formulated a Screening and Assessment Framework (AGD 2006) to be applied in FDRP settings for the purpose of screening FDR clients for family violence issues. The *FLA* requires that such parties indicate in writing to the court that they have received information about alternatives to court proceedings for resolving their disputes, unless doing so would put a child at risk of abuse, or where there is a risk that a party might engage in family violence (s60J).

The Screening and Assessment Framework provides extensive guidelines to be applied in the FDR context to identify cases in which there may be a history of family violence or child abuse, and where there may be the presence of future risk, including a risk of child abduction. In addition to the definition of family violence in the *FLA* (s4), the Screening and Assessment Guidelines refer to the Partnerships Against Domestic Violence (1997) definition, which is:

"...an abuse of power perpetrated mainly (but not only) by men against women both in a relationship and after separation. It occurs when one partner attempts to physically or psychologically dominate or control the other. Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation." (AGD 2006, p. 27)

The Guidelines provide detailed information about methods of assisting clients to disclose information that may be relevant to the existence of such a history or indicative of risk. They also include sample intake forms, detailed indicators of risk, and examples of questions that can be used to facilitate disclosures of factors that may be relevant to risk. They also caution that whilst some of the most severe indicators – such as those related to a risk of homicide – may suggest that some factors are more concerning than others, "there is no such thing as no risk in the context of domestic and family violence and risk assessment should not be used to marginalise or minimise the concerns of clients believed to be at lower risk" (AGD 2006, p. 28).

## References

Australian Government, Attorney-General's Department. (2006). Screening and Assessment in the Family Relationship Centres and the Family Relationship Advice Line, Practice Framework and Guidelines, 14 August 2006.

Australian Government Attorney-General's Department. (2007). Changes to the Law – Family Dispute Resolution. Available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~Module+A+-+Compulsory+family+dispute+resolution+information+-+11+May+07.pdf/\\$file/Module+A+-+Compulsory+family+dispute+resolution+information+-+11+May+07.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~Module+A+-+Compulsory+family+dispute+resolution+information+-+11+May+07.pdf/$file/Module+A+-+Compulsory+family+dispute+resolution+information+-+11+May+07.pdf), accessed 23 July 2007.

*Family Law Act 1975.*

*Family Law Regulations 1984.*

Partnerships Against Domestic Violence (1997). Statement of Principles agreed at the 1997 National Domestic Violence Summit. Available at: [http://www.coag.gov.au/meetings/071197/national\\_domestic\\_violence\\_summit.htm#context](http://www.coag.gov.au/meetings/071197/national_domestic_violence_summit.htm#context)

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