# Family Dispute Resolution Practitioner obligations to clients

This Fact Sheet outlines the obligations of family dispute resolution (FDR) practitioners under the *Family Law Act 1975* (the Family Law Act) and the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (the Regulations). It includes information about:

1. confidentiality and inadmissibility – includes cases on intake and assessment, and subpoenas
2. intake and assessment
3. information for clients
4. reporting of child abuse obligations
5. general obligations
6. conflict of interest

Information about a practitioner's ongoing obligations relating to accreditation can be found on the Fact Sheet named: *FDR Practitioner Obligations – accreditation* available on the Information for FDR practitioners' web page.

## 1. Confidentiality and inadmissibility

The confidentiality and inadmissibility provisions under the Family Law Act only apply where FDR is being conducted by a practitioner as defined in section 10G(1) of that Act. Therefore, people who meet the Accreditation Standards and can therefore issue section 60I certificates will attract the confidentiality and inadmissibility provisions.

FDR conducted by an unaccredited person will not attract the confidentiality provisions. Those people cannot issue section 60I certificates either. Where a person is training to become an FDR practitioner, it would be prudent for them to sign a confidentiality agreement.

In terms of inadmissibility, according to the Family Law Act, 'evidence of anything said, or any admission made, by or in the company of, an FDR practitioner is not admissible.' Therefore, provided an accredited FDR practitioner is conducting or supervising the process, the inadmissibility provisions will apply.

### Confidentiality (*Family Law Act 1975* – Section 10H)

Family dispute resolution (FDR) practitioners must not disclose a communication made in FDR unless the disclosure is required or authorised under the Family Law Act.

An FDR practitioner ***must*** disclose a communication made in FDR if he or she reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory (eg to comply with legislation requiring mandatory disclosure of suspected child abuse).

An FDR practitioner ***may*** disclose a communication made in FDR if he or she reasonably believes that the disclosure is necessary for the purpose of:

a) protecting a child from the risk of physical or psychological harm

b) preventing or lessening a serious and imminent threat to the life or health of a person

c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person

d) preventing or lessening a serious and imminent threat to the property of a person

e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property

f) assisting an independent children's lawyer to properly represent a child's interests.

In addition, an FDR practitioner ***may*** disclose a communication, with the consent of the person who made the disclosure where that person is an adult, or, where the disclosure was made by a child who is under 18, if parents consent to the disclosure. If agreement cannot be reached, the matter may be referred to the court for decision.

An FDR practitioner ***may*** also make disclosures in order to provide information for research relevant to families, as long as the information provided does not constitute 'personal information' as defined in section 6 of the *Privacy Act 1988*. 'Personal information' is information, or an opinion, from which an individual's identity is apparent, or can reasonably be ascertained.

## Inadmissibility (*Family Law Act 1975* – Section 10J)

Communications made in FDR are not admissible in any court or proceedings, in any jurisdiction. Additionally, a communication made when a professional consultation is being carried out, on referral from an FDR practitioner, is also inadmissible in any court or proceedings in any jurisdiction.

In order to ensure that professionals to whom FDR practitioners make referrals are aware of the inadmissible status of communications made to them, FDR practitioners are required to inform relevant professionals of this when making a referral.

An admission or disclosure that indicates that a child under 18 has been abused, or is at risk of abuse, may be admitted as evidence unless there is sufficient evidence of the admission or disclosure available to the court from other sources.

## Intake and assessment

FDR practitioners should be aware of the ruling by (the then) Federal Magistrate Riethmuller in the matter of *Rastall and Ball* [2010] FMCA Fam 1290 in relation to FDR intake and assessment sessions. The Magistrate considered that 'FDR' under the Family Law Act had not commenced in a case where the intake and assessment process had occurred. As a consequence, he ruled that "evidence of the assessment is not confidential under s.10H, nor inadmissible under s.10J" of the Family Law Act.

The decision also raised some issues in relation to the appropriate exception that would apply when issuing a certificate under section 60I of the Family Law Act in circumstances where mediation sessions had not been conducted as yet. The judgment is an unreported decision of a single Federal Magistrate and therefore not binding on other judicial officers.

## Subpoenas

A subpoena is an order requiring the giving of evidence, or the production of documents to a court or tribunal. Whilst notes can be the subject of a subpoena, the admissibility provisions in the Family Law Act provide a basis for raising an objection to producing documents. If an objection to a subpoena is raised, the court may inspect the documents to determine whether they should be provided to the party who issued the subpoena.

FDR practitioners should be aware of the Full Federal Court decision of UnitingCare – Unifam Counselling & Mediation & Harkiss & Anor [2011] FamCAFC 159. In this matter, a subpoena was issued requesting that Unifam produce all records in relation to the parties, including any reports or allegations, counselling notes, referrals and file notes. Unifam objected to the subpoena. Whilst the subpoena was upheld in the first instance, on appeal Justice Coleman held that the subpoena should be discharged and set aside on the following grounds:

(i) Subsection 10D(3) did not empower Federal Magistrate Altobelli to order Unifam to produce the documents under the terms of the subpoena in this case. [That provision provides that a family counsellor may disclose a communication if consent is given.]. Coleman J considered that subsection 10D(3) provides for disclosures which are '*authorised*' rather than '*required*' and if the legislative intention had been to require disclosure by a family counsellor in the circumstances described in subsection 10D(3), '*must*' would have appeared instead of '*may*'. Therefore, the family counsellor was not obliged to disclose communications even if consent is given by the clients.

(ii) Had the subpoena been expressed in the terms of paragraphs 10E(2)(a) and (b) (admission or disclosure that a child had been abused or is at risk of abuse) and Unifam held any documents falling within those provisions, they would have been produced.

# 2. Intake and assessment

Under the Regulations, an assessment of the people involved in the dispute ***must*** be undertaken, to determine whether FDR is appropriate, prior to an FDR practitioner providing FDR.

Therefore, an FDR practitioner ***must*** be satisfied that this assessment has considered whether the ability of a person to negotiate freely in the dispute is affected by the following factors as outlined in the Regulations:

- a history of violence (if any) among the people involved in the dispute
- the likely safety of the people involved
- the equality of bargaining power the risk that a child may suffer abuse
- the emotional, psychological and physical health of the people involved, or
- any other matter that the FDR practitioner considers relevant to the proposed FDR.

If, after considering these matters, the FDR practitioner is not satisfied that FDR is appropriate, the FDR practitioner must not provide FDR.

Where FDR begins but part way through the practitioner decides it is no longer appropriate to continue because of the above matters, the practitioner may stop providing FDR. A certificate can then be issued stating the person attended FDR but part way through the practitioner decided it was not appropriate to continue.

# 3. Information for clients

The Family Law Act and the Regulations require FDR practitioners to provide information in the following circumstances:

## Provide information on FDR

***(Family Law (Family Dispute Resolution Practitioners) Regulations 2008* – Regulation 28*)***

FDR practitioners must ensure that people receive information to enable them to understand the important elements of FDR. This information ***must*** be provided prior to commencing FDR and ***must*** include the following information:

- that it is not the role of the FDR practitioner to give people legal advice (unless the FDR practitioner is also a legal practitioner)
- the FDR practitioner's confidentiality and disclosure obligations
- the generally inadmissible status of communications made in FDR
- the qualifications the practitioner has in order to be an FDR practitioner
- the fees (including any hourly rate) charged by the FDR practitioner in respect of the service
- that FDR must be attended before applying for an order in relation to a child, unless an exception applies
- that if a person wants to apply to the court for an order in relation to a child they will need to obtain a certificate from the FDR practitioner before applying, unless an exception applies
- that a court may take into account the certificate when deciding whether to make an order referring the people to FDR or to award costs against a person
- information about the complaints mechanism that a person can use should they wish to complain about the FDR service.

## Provide information on services that assist reconciliation

***(Family Law Act 1975 – Section 12G)***

FDR practitioners must give a married person who is considering a divorce, or considering going to court about their children or their finances, information about family counselling and FDR services available to help with reconciliation.

Information does not need to be given if the FDR practitioner believes they already have the relevant documents or they believe there is no reasonable possibility of reconciliation.

Family Relationships Online or the Family Relationship Advice Line (1800 050 321) can provide information about family counselling services.

## Provide information in cases involving family violence or child abuse

***(Family Law Act 1975 – Section 60J)***

A person does not need to attend FDR before making an application to the court about a child in a number of circumstances including where there has been family violence, child abuse or a risk of family violence or child abuse.

Where these circumstances exist the court must be satisfied that the person making the application has received information from a family counsellor or an FDR practitioner about services and options (including alternatives to court action) available.

Practitioners who are asked to provide this information can find relevant resources on Family Relationships Online or by contacting the Family Relationship Advice Line on 1800 050 321.

## Provide information about parenting plans

***(Family Law Act 1975 – Sections 63DA(1)-(3) and 63C(2))***

FDR practitioners ***must*** provide information about parenting plans. A parenting plan is an agreement that sets out parenting arrangements for children. A parenting plan covers the day-to-day responsibilities of each parent, the practical considerations of a child's daily life, as well as how parents will agree and consult on important, long-term issues, such as which schools children will attend.

A parenting plan, in itself, is not a legally enforceable agreement, and is different from a parenting order, which is made by a court. Parties to a parenting plan can ask the court to make 'consent orders' in the terms of that plan. The court will only make a consent order if it is satisfied that the terms of the plan are in the best interests of the child. Once made, consent orders are legally binding — they have the same effect as any other order made by a court.

If parents go to court at any time, the court will be required to consider the terms of the most recent parenting plan when making a parenting order in relation to a child, if it is in the best interests of the child to do so. In order to be recognised by the court, a parenting plan must be in writing, dated and signed by both parents. It must be made free from any threat, duress or coercion.

In addition, when considering the best interests of a child, the court will also consider the extent to which both parents have complied with their obligations in relation to the child, which may include the terms of a parenting plan.

### *Parenting plan information*

The type of information a practitioner is obliged to provide will depend if they are advising people generally about arrangements for children after separation or providing specific advice in connection with the making of a parenting plan.

If the practitioner is advising generally about parental responsibility following the breakdown of a relationship, they should advise that:

a) they could consider entering into a parenting plan, and

b) about services that are available to provide assistance to develop a plan.

When advising people about the making of a parenting plan, practitioners ***must*** inform people:

a) that where it is in the best interests of a child, and reasonably practicable, they could consider as an option an arrangement where they **equally share the time** spent with the child (note: a court will only consider equal shared time or substantial and significant time if there is equal shared parental responsibility. A court will not presume there is equal shared parental responsibility where there is family violence or child abuse)

b) that if an equal time arrangement is not appropriate, they could consider whether an arrangement where the child spends **substantial and significant** time with each person would be in the best interests of the child and reasonably practicable.

'**Substantial and significant time'** is defined in the Family Law Act. People considering this should ensure that the focus is not just on the amount of time that each parent spends with the child but also on the type of time that is spent. The definition encourages people to ensure that there is a mix of holidays, weekends and other days and that both parents are able to participate in the child's daily routine and in events that are significant to the child (like sporting events, birthdays and concerts). It also ensures that the child is able to participate in events significant to the parent such as Mothers' or Fathers' day, extended family weddings or christenings and birthdays.

Practitioners must only inform people that they could consider the options of the child spending equal time, or substantial and significant time, with each person. It does not require the adviser to provide advice as to whether such arrangements are practicable or in the best interests of the child. However, the adviser may provide such advice if that is appropriate.

c) that decisions made in developing parenting plans should be made in the best interests of the child

d) about the matters that may be dealt with in a parenting plan

e) that the terms of the parenting plan may alter a previously made court order about the child (in exceptional circumstances the court may order that this cannot occur)

f) that it is desirable to include in a parenting plan information about how people will consult and resolve disputes about the plan and the process to be used for changing the plan, and

g) about the programs that are available to help people who experience difficulties in complying with parenting plans.

The information relating to parenting plans that practitioners are required to provide can be provided in written form such as brochures. You can download information from Family Relationships Online which can be used to meet the information provision requirements.

You can also visit the Family Court of Australia's website for information.

If an FDR practitioner draws up a parenting plan there is no legal requirement for that practitioner to record their name or registration number on the parenting plan.

## 4. Reporting of child abuse obligations imposed on practitioners

Under the Family Law Act, a practitioner:

- ***must*** make a notification report to a prescribed child welfare authority where the practitioner has reasonable grounds for suspecting that a child either has been abused or is at risk of abuse (s67ZA(2))

- may make a voluntary notification report to a prescribed child welfare authority where the practitioner has reasonable grounds for suspecting that a child either has been ill treated or is at risk of ill treatment or has been exposed or subjected to behaviour which psychologically harms the child (67ZA(3) of the Act

- need not notify a prescribed welfare authority of his or her suspicion that a child has been abused, or at risk of being abused, if the practitioner knows that the authority has previously been notified about the abuse or risk under s67ZA(2) or s67ZA(3), but the practitioner may notify the authority of his or her suspicion (s67ZA(4).

## 5. General obligations imposed on practitioners

Under the Regulations, when providing FDR services a practitioner ***must***:

- ensure that, as far as possible, the FDR assessment and process is suited to the needs of the people involved; this includes ensuring the suitability of the FDR venue, the setting and layout of the room and the times at which FDR is held. Due to the potential for highly sensitive and / or personal matters to arise, practitioners need to consider how they will assure the confidentiality, privacy and safety of themselves and the client in choosing a suitable venue.
- ensure that FDR is only provided in accordance with all the regulatory requirements
- ensure that any records of FDR sessions are stored securely
- terminate FDR if required to do so by a person, or if the practitioner is no longer satisfied that FDR is appropriate
- not provide legal advice to any of the people unless the practitioner is also a legal practitioner, or the advice is about procedural matters
- not use any information acquired from FDR for personal gain or to the detriment of any person.

## 6. Conflict of interest obligations imposed on practitioners

Under the Regulations, an FDR practitioner will have a conflict of interest if the practitioner:

- has previously acted in a professional capacity for one or more of the people involved in the dispute (other than as an FDR practitioner, a family counsellor or arbitrator)
- has had a previous commercial dealing with one or more of the people involved in the dispute, or
- is a personal acquaintance of one or more of the people involved in the dispute.

  In these situations the practitioner may only provide FDR services if:

  - each person involved in the FDR process agrees
  - the previous professional dealing (if any) does not relate to any issue in the dispute, and
  - the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the FDR practitioner in the provision of FDR services.