

## Submissions in response to the January 2019 consultation document

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1. These submissions are limited to FDR
2. A difficulty encountered when considering FDR is that its subject matter and the circumstances in which it occurs are highly variable.
3. For example, FDR with two collaborating parents who simply wish to improve their communication and decision-making about their children, has a quite different character and purpose to court directed FDR during bitter proceedings. The former is in the nature of facilitated discussion. The latter is in the nature of a settlement conference. Nominally they involve the same process, but in substance are entirely different.
4. For this reason I submit that a “one size fits all” approach should be avoided.
5. Amongst other things, a rigid and doctrinaire approach concerning the voice of the child should be avoided.
6. There is a danger that if FDR is too closely aligned to the Family Court, it will lose its character as a relatively informal and flexible process driven by the parties.
7. Although I very much welcome the proposal that there be a rebuttable presumption that the court should direct parties to FDR where they

have not already undertaken it, I would not want FDR to be reduced to an instrument of the court.

8. There is a danger that this could occur if lawyer for the child acquired a formalised, mandatory, central role in presenting the voice of the child in FDR to the exclusion of others.
9. There is also a danger that FDR would become an instrument of the court if it was to impose unreasonably tight timeframes and reporting obligations on the process.
10. There is no simple answer here. In cases of urgency, or where the immediate safety and welfare of children is at stake, then it is entirely appropriate that the court impose firm deadlines and reporting obligations. But otherwise, FDR should be allowed to follow its own course. Especially is that so where it would have been reasonable for the parties to have undertaken FDR before proceedings were filed.
11. The consultation document raises the question of whether stronger obligations on family justice professionals are needed to promote FDR and conciliation. Speaking of FDR only, I see it to be the role of the state to *promote* FDR and the role of professionals to *advise* about the availability of FDR. Certainly, FDR providers should not be expected to *market* the services of suppliers.
12. The ideal is that FDR be fully funded for all, because removal of funding considerations would greatly simplify the scheme, and allow suppliers and providers to focus on mediation rather than administration.
13. If fees continue, there is something to be said for the court having the power to waive fees for court directed FDR, in order to ensure timely FDR and a sense of fairness, especially where FDR is in effect mandatory.
14. The consultation document refers to *raising* the threshold for government funding. This would mean fewer people eligible for

funding. Was it intended to say that the threshold to achieve government funding should be *lowered*?

15. There is superficial appeal to the idea that if one party is eligible for funding then the other party (or parties) should be as well. A downside is that a party above the threshold may not know whether they will have to pay because they will often not know whether the other party (or parties) will be eligible for funding. This could cause confusion or uncertainty on the part of parties or prospective parties. Also, the administrative burden of funding issues on suppliers and providers will continue unchanged (or arguably be more complicated) and yet the revenue gathered will be reduced.



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Nigel Dunlop

10.02.19  
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Date