FDR, confidentiality and diversity: Impacting FDR for different cultures and vulnerable clients

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Abstract

Is uncertainty about the confidential status of information given in assessment of suitability for Family Dispute Resolution impacting client willingness to access and/or fully utilise the benefits of mediation? Rastall and Ball and Ors [2010] FMCAfam 1290 (22 November 2010) provisions of the Family Law Act provide confidentiality and inadmissibility only to joint sessions of Family Dispute Resolution (FDR). Intake and assessment processes are therefore no longer considered to be inadmissible or confidential.

For clients of a diverse range of backgrounds and circumstances, we suggest that an impact is being felt. Some people are self-selecting away from a process which previously had confidentiality as one of its noted benefits. If there is a loss of access, what is the accompanying benefit of disclosure to the justice system. FMC has dealt with several subpoenas from 2011 onwards and has found that client confidentiality has been protected in these cases. Are clients in vulnerable situations and of non-mainstream backgrounds missing out with no accompanying benefit to the Courts?

Rastall and Ball and Ors [2010] FMCAfam 1290 (22 November 2010) necessitated a change in the way in which confidentiality is explained to clients at an initial stage. For clients of a background where authority has been abused in their view, for example immigrants and asylum seekers, the idea that information they give can be accessed by Courts and lawyers for evidential purposes can result in greater guardedness and withdrawal from mediation. In training FDRPs and in practice we have come across concerns about disenfranchisement of the already disenfranchised.

Concerns about the impact of Rastall and Ball were raised within the FDR community including by the Family Law Council and noted in Elizabeth’s 2012 article “Viewpoint; Concerns about the limits of Confidentiality in FDR” Journal of Family Studies (2012) 17: 213–219

The issue of confidentiality in the FDR process has also been addressed by those who feel there is no cause for concern. Federal Magistrate Dr Tom Altobelli spoke memorably at the previous National Mediation Conference about the vital nature of information for the litigation process and the small amount of concern expressed by clients already within the Court system about any lack of confidentiality in Family Reports and FDR.

This presentation forms an assessment of the impact in practice from that point in experience of FDR assessment, training and litigation from the FDRPs perspective with a
particular focus on the diverse needs of clients within a culture of great diversity. The speakers all practice FDR within a growth corridor of Melbourne with greatly diverse populations and challenges.

In reality, what has the impact been in requests for information from FDRPs and counsellors. FMC has dealt with subpoenas for information in several different circumstances. Outcomes have been protective of the confidentiality of clients. Our experience with clients and support agencies however is that clients are now less likely to feel comfortable about disclosure. There is a possibility that clients are losing access to FDR without an achievement of the benefit to the Courts of access to the information. The call made in 2012 for “amendment of the Family Law Act and relevant regulations to ensure inadmissibility of evidence ……..from commencement of intake to termination of FDR” remains critical.