

# THE FAMILY DISPUTE RESOLUTION OF PARENTING MATTERS IN AUSTRALIA: AN ANALYSIS OF THE NOTION OF AN ‘INDEPENDENT’ PRACTITIONER

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## I INTRODUCTION

This article considers the contemporary nature of family dispute resolution in parenting matters in Australia. Our particular focus is on exploring a fundamental principle of family dispute resolution; namely, the purported ‘independence’ of family dispute resolution practitioners (FDRPs).<sup>1</sup> Our analysis questions the reality of the notion of an ‘independent’ FDRP, particularly in the context of the current provisions of the *Family Law Act 1975* (Cth) (*Act*). These provisions effectively make attendance at family dispute resolution a compulsory pre-filing requirement in family law parenting disputes, and place a number of active obligations on FDRPs that might be said to conflict with the idea of ‘independence’.<sup>2</sup> For example, the current law obliges FRDPs in some circumstances to actively raise the issue of equal time shared parenting with parties.<sup>3</sup> FRDPs are also required to assess whether parties are making a ‘genuine effort’ in the

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<sup>1</sup> For the definition of ‘family dispute resolution practitioner’ see *Family Law Act 1975* (Cth) ss 10F and 10G.

<sup>2</sup> Attendance is compulsory unless there is urgency or exceptional circumstances as set out in the *Family Law Act 1975* (Cth) s 60I(9).

<sup>3</sup> *Family Law Act 1975* (Cth) s 63DA(2). This obligation arises if an FDRP is giving ‘advice’ to parties in relation to making a parenting plan. An equal shared time arrangement must be considered if it is ‘reasonably practicable’ and in the best interests of the children. If it is not considered to be appropriate the FDRP must then raise the option of the children spending substantial and significant time with each parent.

process.<sup>4</sup> We argue that in the modern practice of family dispute resolution, practitioners invariably take an active role – and that this also conflicts with the idea of an ‘independent’ practitioner. FDRPs do this by assisting parties to develop a realistic agenda, by contributing to ideas in the option generation phase, by reality testing impractical proposals and, often, by giving the benefit of their own experience to the parties as either family lawyers or social scientists when discussing the legal and practical merits of proposed agreements.

The discussion in this article encompasses the centrality of family dispute resolution in parenting disputes in Australia and the legal and ethical obligations of FDRPs. We focus on mediation as the key form of family dispute resolution. We then unpack the expectations that accompany traditional notions of practitioner ‘independence’ by examining the mediation literature in relation to ‘neutrality’, a term that has often been used interchangeably with ‘impartiality’ and ‘independence’. These expectations in relation to the roles of mediators are first, that they will uphold procedural fairness and second, that they will act impartially, both in relation to the parties and the content and outcome of the mediation. We contend that, in reality, the legislative and policy obligations of FDRPs mean that only a relatively narrow and limited notion of practitioner ‘independence’ can accurately be held out to parties participating in family dispute resolution. Such limitations must be acknowledged if the process is to be accurately represented, and if its practice is to be efficacious.

## II THE CENTRALITY OF FAMILY DISPUTE RESOLUTION IN AUSTRALIA’S FAMILY LAW SYSTEM

Separating couples involved in parenting disputes are now strongly encouraged to reach their own agreements about arrangements for their children. Effectively, parties are required by the legislation to participate in ‘family dispute resolution’ before they can seek the assistance of family courts, unless their case is urgent or falls within certain exceptions.<sup>5</sup> The federal government’s philosophy behind this approach was to encourage ‘people to take responsibility for resolving disputes themselves, in a non adversarial manner’.<sup>6</sup>

The term ‘family dispute resolution’ is only loosely defined in the *Act*. It is described as a process ‘other than a judicial process’<sup>7</sup> in which ‘the practitioner is independent of all of the parties’.<sup>8</sup> The FDRP’s role is stated as being to assist the parties ‘to resolve some or all of their disputes with each other’.<sup>9</sup> In practice, mediation is the key process used by parties required to participate in ‘family dispute resolution’ as arbitration is not considered appropriate in most family law matters.<sup>10</sup>

<sup>4</sup> *Family Law Act 1975* (Cth) ss 60I(1) and (8). For a discussion of how ‘genuine effort’ may be interpreted see D Cooper and M Brandon, ‘How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes?’ (2007) 21(3) *Australian Journal of Family Law* 288, 298; and T Altobelli, ‘A Generational Change in Family Dispute Resolution in Australia’ (2006) 17 *Australasian Dispute Resolution Journal* 140, 148-9.

<sup>5</sup> *Family Law Act 1975* (Cth) s 60I.

<sup>6</sup> Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) Schedule 1.

<sup>7</sup> *Family Law Act 1975* (Cth) s 10F.

<sup>8</sup> *Family Law Act 1975* (Cth) s 10F (b).

<sup>9</sup> *Family Law Act 1975* (Cth) s 10F(a).

<sup>10</sup> *Family Law Act 1975* (Cth) s 10L which confines arbitration to cases involving financial issues.

In addition to the parties being required to attend dispute resolution, they must also obtain a certificate from the FDRP to evidence their attendance. This certificate is issued at the conclusion of the mediation,<sup>11</sup> and must be filed with any later parenting application made to a Family Court.<sup>12</sup> FDRPs can issue one of four types of certificates, depending on the circumstances that present. One certificate states that one or both parties made a ‘genuine effort’ to negotiate, another that one or both parties did not in fact make a ‘genuine effort’. An additional type of certificate attests to the fact that one party attempted to organise mediation and the other party either refused or failed to attend.<sup>13</sup> Finally, a certificate can be issued where the FDRP considers that family dispute resolution was inappropriate in the circumstances.<sup>14</sup>

To be able to issue certificates, mediators must be registered FDRPs,<sup>15</sup> and have sufficient family law mediation experience and training to be accepted on to the dispute resolution register of the Commonwealth Attorney-General’s Department.<sup>16</sup> In practice, FDRPs will generally be specialist family mediators, operating outside the parameters of the court, although regulated to a significant degree by the statutory framework.<sup>17</sup> They will often also be accredited under the recently established voluntary national mediation accreditation scheme, and as such will be subject to the *Australian National Mediation Standards* (‘*Practice Standards*’).<sup>18</sup> Many FDRPs practice in Family Relationships Centres and other community mediation organisations, funded by the federal government, but separate to the functioning of courts.<sup>19</sup> Other providers of family dispute resolution include Legal Aid Commissions around Australia and independently accredited practitioners who consist of family lawyers and social

<sup>11</sup> The exceptions are set out in the *Family Law Act 1975* (Cth) s 60I(9).

<sup>12</sup> *Family Law Act 1975* (Cth) s 60I(7).

<sup>13</sup> *Family Law Act 1975* (Cth) s 60I(8)(a).

<sup>14</sup> In assessing whether the case is suitable for mediation the practitioner must have regard to whether both parties can ‘negotiate freely’ or whether there are any factors present which will mean that a party is unable to negotiate freely, including family violence, safety issues, inequality of bargaining power and the physical or psychological health of a party, see *Family Law Act 1975* (Cth) s 60I(8)(aa); and *Family Law Regulations 1984* (Cth) reg 62.

<sup>15</sup> The FDRP must be on the Dispute Resolution Register of the Commonwealth Attorney-General’s Department. The requirements for a person to qualify for registration are set out in the *Family Law Regulations 1984* (Cth) reg 58. All FDRPs in Family Relationship Centres are registered practitioners. If a party is considering using other types of community or private FDRPs, it is prudent to check their registration status. Registration status can be checked at Family Relationships Online, *Family Dispute Resolution Register* <<http://fdrregister.familyrelationships.gov.au/Search.aspx>> at 2 July 2008.

<sup>16</sup> *Family Law Regulations 1984* (Cth) pt 4A div 2, ‘Accreditation of persons as family dispute resolution practitioners’ and pt B, div 2, ‘Registration of family dispute resolution practitioners’. See Commonwealth Attorney-General’s Department, *For Family Dispute Resolution Practitioners, Accreditation and Registration* <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_ResearchandEvaluation\\_ForFamilyDisputeResolutionPractitioners](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForFamilyDisputeResolutionPractitioners)> at 2 July 2008.

<sup>17</sup> For example, there are more than 40 references to ‘family dispute resolution practitioner’ in the *Family Law Act 1975* (Cth) and more than 100 references in the *Family Law Regulations 1984* (Cth).

<sup>18</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *Australian National Mediator Standards, Practice Standards* (2007) (‘*Practice Standards*’) <[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR\\_NationalMediatorAccreditationSystem\\_NationalMediatorAccreditationSystem](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem)> at 2 July 2008.

<sup>19</sup> See L Maloney and B Smyth, ‘Family Relationship Centres in Australia’ (2004) 69 *Family Matters* 64. See also Commonwealth Attorney-General’s Department, *Family Relationship Centres* <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_FamilyRelationshipServicesOverviewofPrograms](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_FamilyRelationshipServicesOverviewofPrograms)> at 2 July 2008.

scientists. Lawyer and social scientist mediators are also subject to the professional codes of conduct of their professions.<sup>20</sup>

### III THE LEGAL AND ETHICAL OBLIGATIONS OF FDRPs

The term ‘independent’ in its application to the role and practice of FDRPs in Australia, has not been explicitly defined in the *Act*. The only guidance as to its meaning is the reference in the *Act* to the practitioner being required to be ‘independent of all the parties involved in the process’.<sup>21</sup> The term is also yet to be judicially considered. However, an examination of the legal and ethical obligations of FDRPs can inform our analysis as to the true meaning of the term ‘independent’ in the context of family dispute resolution.<sup>22</sup> These obligations are primarily contained in the *Act* and the *Family Law Regulations 1984* (Cth). Also relevant to this discussion are the recently drafted National Alternative Dispute Resolution Advisory Council (NADRAC), *Australian National Mediator Standards* (‘*Practice Standards*’).<sup>23</sup>

The overriding legal obligation of practitioners in family dispute resolution processes is to ensure that, during the discussions and when considering parenting arrangements, the best interests of children are promoted.<sup>24</sup> For lawyer FDRPs, the *Best Practice Guidelines for Lawyers Doing Family Law Work* reinforce this obligation making clear that ‘all practitioners or conciliators who deal with parenting matters are required by the *Family Law Act* to promote an outcome which is in the best interests of the child.’<sup>25</sup> Another overarching legal obligation is that FDRPs encourage parents to share parental responsibility for their children, that is, have joint input into important long-term decisions.<sup>26</sup>

FDRPs are subject to a range of further legal and ethical obligations which arise before, during and after the mediation. Prior to mediations taking place, they are required to

<sup>20</sup> For example, family lawyers are subject to the Family Law Council and Family Law Section of Law Council, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004) paras 1.3, 12 <<http://www.familylawsection.org.au/pages/content.asp?plid=23>> at 2 July 2008.

<sup>21</sup> *Family Law Act 1975* (Cth) s 10F(b). The definition in s 10G of Family Dispute Resolution Practitioner only sets out the groups of people eligible to be FDRPs, it does not provide any specific guidance in relation to their role appropriate role.

<sup>22</sup> The legal and ethical obligations are set out under the *Family Law Act 1975* (Cth); *Family Law Regulations 1984* (Cth); and *Practice Standards*, NADRAC, above n 18.

<sup>23</sup> NADRAC, above n 18.

<sup>24</sup> *Family Law Act 1975* (Cth) s 63DA(2). This mirrors the obligations of judicial officers when considering parenting applications as the overriding consideration for the court is that the best interests of the children are paramount, *Family Law Act 1975* (Cth) s 60CA. Best interests are determined by the court examining the lists of factors set out in *Family Law Act 1975* (Cth) s 60CC. For lawyer FDRPs this is reinforced in the Family Law Section Law Council of Australia and Family Law Council Australian Government, *Best Practice Guidelines for Lawyers Doing Family Law Work*, above n 20.

<sup>25</sup> Family Law Section Law Council of Australia and Family Law Council Australian Government, above n 20, paras 6.1, 17.

<sup>26</sup> *Family Law Act 1975* (Cth) ss 61B and 61C. This also derives from the rebuttable presumption in the Act of shared parental responsibility: *Family Law Act 1975* (Cth) s 61DA. Shared parental responsibility involves parents having joint input into decisions in relation to a child, see s 61B. For an explanation of the approach of the court see Z Rathus, ‘How Judicial Officers are Applying the New Part V11 of the Family Law Act: A Guide to Application and Interpretation (2008) 20(2) *Australian Family Lawyer* 5. See also B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 264–77.

screen parties and their cases to ensure they are suitable for mediation.<sup>27</sup> In practice, many FDRPs undertake detailed intake processes, often engaging parties in separate meetings prior to the mediation.<sup>28</sup> In the course of these intake processes they are also required to supply parents with certain types of information concerning mediation,<sup>29</sup> including details of the mediator's role, their qualifications, any fees that will be charged, and information that they are not permitted to provide legal advice to parties, 'unless they are legal practitioners or the advice is about procedural matters'.<sup>30</sup> Practitioners must also advise parties of the limits to the confidentiality and admissibility of certain types of information disclosed during the course of discussions.<sup>31</sup> For example, FDRPs cannot keep information confidential that may assist to protect children from physical or psychological abuse.<sup>32</sup> Practitioners are also, in certain circumstances, required to provide parties with information to assist them to assess the possibility of reconciliation.<sup>33</sup>

FDRPs are also subject to a cluster of what may be termed 'ethical' obligations when engaged in family dispute resolutions. They are specifically directed to avoid conflicts of interest and cannot facilitate mediations in which they have had personal or professional dealings with parties, unless both parties agree or the previous dealing is 'not of a kind that could reasonably be expected to influence the ... practitioner in the provision of his or her family dispute resolution services'.<sup>34</sup> Further, practitioners cannot use any information obtained from mediations 'for personal gain' or 'to the detriment of any person'.<sup>35</sup>

In certain contexts, practitioners are also required to raise specific parenting issues with parties. When discussing with parties how parental decision-making will occur after separation, FDRPs are obliged to ask the parties to consider whether any agreement reached should be committed to writing in the form of a formal 'parenting plan'.<sup>36</sup> They are also required to provide the parents with information as to where they can obtain assistance to further develop such a plan.<sup>37</sup> Again, practitioners must inform clients that all decisions made in the course of developing their parenting plans should be in the best interests of their children.<sup>38</sup>

<sup>27</sup> *Family Law Regulations 1984* (Cth) reg 62.

<sup>28</sup> D Cooper and M Brandon, 'Non-Adversarial Advocates and Gatekeepers: Lawyers, FDR Practitioners and Co-operative Post-Separation Parenting' (2008) 19 *Australasian Dispute Resolution Journal* 104, 107.

<sup>29</sup> If a parent is considering making a parenting application in a family court the FDRP is obliged to provide the parties with information about reconciliation, *Family Law Act 1975* (Cth) s 12G.

<sup>30</sup> *Family Law Regulations 1984* (Cth) regs 64(d), 63(1)(a), (b) and (c).

<sup>31</sup> *Family Law Act 1975* (Cth) ss 10H and 10J. See also NADRAC, above n 18, para 6.9.

<sup>32</sup> *Family Law Act 1975* (Cth) s 10H(4)(a).

<sup>33</sup> Where parties are considering filing court proceedings: *Family Law Act 1975* (Cth) s 12G. This is unless the parties have already been supplied with such information or the FDRP considers 'that there is no reasonable possibility' that the parties will reconcile.

<sup>34</sup> *Family Law Regulations 1984* (Cth) reg 65. This is echoed in the *Practice Standards* which require mediators to disclose any potential grounds for bias or conflicts of interest, NADRAC, above n 18, para 5(2) 8.

<sup>35</sup> *Family Law Regulations 1984* (Cth) reg 64(e). Again, also contained in the *Practice Standards*, NADRAC, above n 18, para 5(4) 8.

<sup>36</sup> *Family Law Act 1975* (Cth) s 63DA(1).

<sup>37</sup> *Family Law Act 1975* (Cth) s 63DA(1).

<sup>38</sup> *Family Law Act 1975* (Cth) s 63DA(2)(a)(ii).

Practitioners are also expected to inform parties of the types of issues that can be included in parenting plans, such as how parental time with children will be allocated and how parties will communicate and make long-term decisions about their children.<sup>39</sup> In certain circumstances, FDRPs are also required to raise with parties the suitability of certain types of parenting arrangements. If giving ‘advice’ to parties in connection with the making of a parenting plan, they are required to raise whether equal time shared parenting arrangements will be ‘reasonably practicable’ and in the children’s best interests.<sup>40</sup> If such arrangements are not considered appropriate, practitioners are further obliged to turn the discussion to whether ‘substantial and significant time’ arrangements would be appropriate.<sup>41</sup> Required considerations when assessing ‘reasonable practicability’ include looking at how far apart parents live from each other, and their current capacity to communicate and implement such arrangements.<sup>42</sup>

The obligations of FDRPs then continue beyond the actual mediation session. As mentioned above, they are also required to make determinations as to whether parents have made a ‘genuine effort’ in the negotiations.<sup>43</sup> As discussed, these decisions are then documented in the form of certificates that must be filed with any court applications.<sup>44</sup> Such determinations can have significant implications. For example, if one party is judged not to have made a ‘genuine effort’ the parties may be ordered back to dispute resolution, or a costs order may be made against the recalcitrant party.<sup>45</sup>

Finally, further legal and ethical obligations are set out in the *Practice Standards*. The most relevant to our analysis of the ‘independence’ of FDRPs are first, that mediators will ‘conduct the mediation in a procedurally fair manner’,<sup>46</sup> and second, that the ‘mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice’.<sup>47</sup> These are discussed in more detail below in the context of arriving at a clearer understanding of practitioner ‘independence’.

The above discussion of the obligations of FDRPs under the current statutory framework offers some explanation as to the extent of their role in the context of family dispute resolution. According to the *Act*, this role is to be exercised under the umbrella of principled ‘independence’. Therefore, an analysis of the meaning of the concept of ‘independence’ in this context can provide further clarity about the role and obligations of FDRPs. Such clarity is important if potential parties to family dispute resolution processes are to be accurately advised about the process, and especially about the extent and limitations of the role of FDRPs. Another consideration is that, as discussed above, many different people serve as FDRPs around Australia, in a variety of organisational

<sup>39</sup> *Family Law Act 1975* (Cth) s 63DA(2)(d) referring practitioners to raise the issues set out in s 63C(2).

<sup>40</sup> *Family Law Act 1975* (Cth) s 63DA(2)(a).

<sup>41</sup> *Family Law Act 1975* (Cth) ss 63DA(2)(b) and 63DA(3).

<sup>42</sup> *Family Law Act 1975* (Cth) ss 65DAA(5). These elements reflect some of the requirements of successful shared parenting arrangements revealed by recent Australian research conducted by the Australian Institute of Family Studies: B Smyth, C Caruana and A Ferro, *Parent-Child Contact and Post-Separation Parenting Arrangements, Report No 9* (2004) Australian Institute of Family Studies ‘Chapter 3 Fifty-fifty Care’ <<http://www.aifs.gov.au/institute/pubs/resreport9/main.html>> at 2 July 2008.

<sup>43</sup> *Family Law Act 1975* (Cth) s 60I(8).

<sup>44</sup> *Family Law Act 1975* (Cth) s 60I(7).

<sup>45</sup> *Family Law Act 1975* (Cth) s 60I(8).

<sup>46</sup> NADRAC, above n 18, para 9.12.

<sup>47</sup> *Ibid* para 5.8.

contexts. They include not only mediators working within community operations such as Relationships Australia, but private lawyers and social scientists. Within this broad range of service providers will exist a variety of approaches to the provision of family dispute resolution, which creates worrying potential for inconsistencies in vital aspects of service provision. The development of a common understanding as to the meaning of FDRP ‘independence’, and the extent to which practitioners can actually achieve it, is therefore critical to achieving a level of consistency in the practice of Australian family dispute resolution.

#### IV TYPES OF FAMILY DISPUTE RESOLUTION PROCESSES FACILITATED BY FDRPs

It is significant to a deeper analysis of the ‘independence’ of FDRPs to examine the types of dispute resolution processes that they facilitate. If we assume that, in practice, ‘family dispute resolution’ generally means ‘mediation’, it is useful to examine the different models of mediation that FDRPs currently facilitate. Again, no particular mediation model has been mandated by the legislation.

Boulle has defined mediation in terms of four different models; namely, facilitative, transformative, evaluative and settlement mediation processes.<sup>48</sup> These models have then been further re-grouped into two categories: ‘advisory’ and ‘facilitative’ mediation processes.<sup>49</sup>

A reference to ‘advisory’ mediations is to processes in which mediators are not independent of the content of the dispute. In practice, mediators in advisory processes give information and advice as to the range of likely court outcomes if cases proceed to court, termed the ‘boundaries of resolution’ and they will generally encourage parties to settle within these ranges.<sup>50</sup> This is specifically provided for in the regulations which permit lawyer FDRPs to ‘advise’ parties when acting as FDRPs.<sup>51</sup> This mediation model is referred to in the *Practice Standards* as a ‘blended process model’.<sup>52</sup> Lawyer practitioners may give advice on the range of parenting arrangements that family courts will consider promote the best interests of children, based on their past advocacy experience. Social science practitioners, although not permitted to give legal advice, often provide guidance on parenting arrangements that will be developmentally appropriate for children.<sup>53</sup>

<sup>48</sup> L Boulle, *Mediation: Principles, Process and Practice* (LexisNexis Butterworths, 2005) 43-7. Boulle, at page 43, states that the main objective of settlement mediation is ‘to encourage incremental bargaining towards compromise, at a ‘central’ point between the parties’ original positional demands’ and that the practitioner does not have to have expertise in mediation skills in the traditional sense.

<sup>49</sup> Cooper and Brandon, above n 4. See also the further descriptions contained in the *Practice Standards*, NADRAC, above n 18, and the reference to a ‘blended process model’ which refers to advisory processes, para 7.6.

<sup>50</sup> See NADRAC, *Dispute Resolution Term* <[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_DisputeResolutionTerms](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_DisputeResolutionTerms)> at 2 July 2008.

<sup>51</sup> *Family Law Act 1975* (Cth) s 63DA; and *Family Law Regulations 1984* (Cth) regs 63(1)(a) and 64(d)(i). Social science FDRPs are permitted by the regulations to give procedural advice.

<sup>52</sup> NADRAC, above n 18, para 2(7) 6. The references are to ‘advisory mediation’ and ‘evaluative mediation’.

<sup>53</sup> See R Emery, *Child Custody Alternatives Schedules (Children of All Ages) – by Parents’ Divorce Style*, Divorce Resolutions, Colorado Center for Divorce Mediation <[www.coloradodivorcemediation.com/family/schedules.asp](http://www.coloradodivorcemediation.com/family/schedules.asp)> at 2 July 2008; J Kelly, ‘Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce’ (2005) 19(2)

Whilst some FDRPs will facilitate advisory processes, it is important to note that much of the practice of family dispute resolution (for example, in the Family Relationships Centres and through community service providers) will in fact focus on the facilitative mediation model. It is for this reason that the further discussions in this article as to the notion of the ‘independent practitioner’ will focus on FDRPs in the context of facilitative mediation processes.

The facilitative model is one which has traditionally involved the mediator seeking to uphold the philosophy of party self-determination.<sup>54</sup> That is, in assisting parties to communicate and negotiate together to reach their own agreement, without offering any views about appropriate options and settlement outcomes.<sup>55</sup> As Boulle has commented, ‘the process has a problem-solving focus’ with the role of practitioners being centered on their expertise in facilitating the mediation process, leaving the ultimate solutions to the parties themselves to develop.<sup>56</sup> In facilitative mediations, the parties are encouraged to participate to negotiate in terms of their interests and concerns, not their legal positions.<sup>57</sup>

The philosophy of party self-determination can be further broken down in terms of family dispute resolution. It can be seen as empowering the parties to: 1) actively and directly participate in the communication and negotiation processes; 2) choose and control the substantive norms that will guide their decision-making; 3) create the options for settlement; and 4) control the final decision regarding whether or not to settle and the terms of settlement.<sup>58</sup>

In our ensuing discussions we will question whether, under the current Australian legislative framework, FDRPs in facilitative mediation processes can realistically seek to uphold the philosophy of party self-determination. To inform this analysis we now examine in more detail the role of family dispute resolution practitioners, and what the ‘independence’ of their role might mean in Australia today.

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<[http://www.aaml.org/files/public/Kelly - Beneficial Parenting Plan Models for Children.htm](http://www.aaml.org/files/public/Kelly_-_Beneficial_Parenting_Plan_Models_for_Children.htm)>

at 2 July 2008; J Kelly, *Child Custody Parenting Plan Options (for Children of School Age)*, Divorce Resolutions: Colorado Center for Divorce Mediation

<[http://www.coloradodivorcemediation.com/family/parent\\_plans.asp](http://www.coloradodivorcemediation.com/family/parent_plans.asp)> at 2 July 2008; JD Sanders, ‘Age Appropriate Parenting Plans: Using Child Developmental Information’ (2007) 21(3) *American Journal of Family Law* 67; and D Britton, ‘Developmental Needs of Children and Contact Regimes’ (Paper presented at the Queensland Family Law Practitioners’ Association Residential Conference, Novotel Twin Waters Resort, 30 September 2005).

<sup>54</sup> Ethical codes for practitioners describe party self-determination as ‘the fundamental principle of mediation,’ regardless of the context within which the mediation is occurring.’ NA Welsh, ‘The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (2001) 6 *Harvard Negotiation Law Review* 1, 3.

<sup>55</sup> Boulle, above n 48, 44–5, describes the object of the facilitative mediation model as being ‘to avoid positions and negotiate in terms of parties’ underlying needs and interests instead of their strict legal entitlements.’

<sup>56</sup> Ibid 46.

<sup>57</sup> See Chapter 13, ‘Negotiation in Family Law Matters’ in T Altobelli, *Family Law: Theory meets Practice* (Butterworths, 1999) 188. See also N Spiegel, B Rogers and N Buckley, *Negotiation: Theory and Techniques* (Butterworths, 1998) 64.

<sup>58</sup> Welsh, above n 54, 3. See also descriptions of advisory mediation processes and participant self-determination in the *Practice Standards*, NADRAC, above n 18, para 6.5.



V EXPLORING FDRP 'INDEPENDENCE' (WITH PARTICULAR REFERENCE TO THE FACILITATIVE MEDIATION LITERATURE ON 'NEUTRALITY' AND THE *PRACTICE STANDARDS*)

The earlier discussion in relation to the regulatory framework makes clear that concepts such as 'independence' and 'impartiality' have all been linked to the role of family mediators. If we examine the mediation literature we can discern that, historically, these terms derived from notions of mediator 'neutrality'. The expectation that mediators are neutral facilitators of the process has dominated the mediation literature for many years, and was a feature of many early definitions of mediation.<sup>59</sup>

When mediation was first introduced as an alternative to litigation it was considered by many to be essential that mediators adopted a neutral stance so that mediation could be perceived as a legitimate alternative to litigation. Thus the 'neutral' role of the mediator mirrored, to some extent, the neutral and objective role traditionally ascribed to judicial decision-makers.<sup>60</sup> Mediator neutrality is still considered central to the philosophy of party self-determination; as the mediator must maintain a neutral stance to ensure that the parties themselves control the content and the outcome of their dispute. Many commentators continue to reinforce the importance of mediator neutrality,<sup>61</sup> with Astor recently asserting that 'neutrality is even more important to the legitimacy of mediation than it is to the legitimacy of adjudication'.<sup>62</sup>

Although there has been a theoretical reliance on the notion of mediator 'neutrality' in the facilitative mediation literature it has not been a term with a clear or precise meaning.<sup>63</sup> Despite this relative level of uncertainty, two primary meanings of mediator 'neutrality' can be distilled from the literature that are helpful in conceptualising a clearer notion of what it means to be an 'independent' dispute resolution practitioner.<sup>64</sup> First, that neutrality relates to the concept of the mediator maintaining *procedural fairness* in the family dispute resolution process. And second, that neutrality actually means *impartiality*, both in terms of the mediator's *relationship with the parties*, and in

<sup>59</sup> H Astor, 'Practitioner Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221; Boule, above n 48, 18; and C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey Bass, 1986). However, of note is the fact that Sir Laurence Street's three fundamental principles of mediation do not include a reference to neutrality on the part of the practitioner: L Street, 'The Language of Alternative Dispute Resolution' (1992) 3 *Australian Dispute Resolution Journal* 144, 146. This is also reflected, for example, in ME Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Practitioners' (2000) 14(1) *Notre Dame Journal of Law, Ethics and Public Policy* 479; and KK Kovach and LP Love, 'Making Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71.

<sup>60</sup> BL Heisterkamp, 'Taking the Footing of a Neutral Practitioner' (2006) 23(3) *Conflict Resolution Quarterly* 301, referring to WA Donohue, 'Communicative Competence in Practitioners' in K Kressel and DG Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (1989) 322-43.

<sup>61</sup> Boule, above n 48, 18-19. See S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law and Politics* 69; and C Harrington and S Engle Merry, 'Ideological Production: The Making of Community Mediation' (1998) 22 *Law and Society Review* 709.

<sup>62</sup> Astor, above n 59, 221.

<sup>63</sup> A Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215, 216. See also, for example, H Astor, 'Rethinking Neutrality: A Theory to Inform Practice- Part 1' (2000) *Australasian Dispute Resolution Journal* 73, 79; and K Gibson, L Thompson and MH Bazerman, 'Shortcomings of Neutrality in Mediation: Solutions Based on Rationality' (1996) 12(1) *Negotiation Journal* 69, 69.

<sup>64</sup> For a useful general discussion of practitioner neutrality see Boule, above n 48, 30-6.

his or her distance from, or lack of personal interest in, the *outcome* of the family dispute resolution.

The recently drafted, *Practice Standards* echo this two-pronged approach. In terms of the obligations of practitioners, they highlight both notions of procedural fairness,<sup>65</sup> and impartial and ethical practice.<sup>66</sup> We argue that it is these notions that are at the core of the true meaning of mediator ‘independence’. Below, we assess these concepts in more detail and determine whether they can be held out to be realistic expectations of Australian FDRPs. First, we examine the notion of procedural fairness.

#### A *Practitioner ‘Independence’: Procedural Fairness*

In the mediation literature on ‘neutrality’, the concept of procedural fairness is understood to mean that the mediator is committed to providing a balanced and appropriate dispute resolution process, or in other words, a fair process.<sup>67</sup> The *Practice Standards* express an expectation that ‘a mediator will conduct the mediation process in a procedurally fair manner.’<sup>68</sup> The *Practice Standards* also highlight the specific obligations of mediators in relation to power imbalances and provide that ‘mediators shall have completed training that assists them to recognise power imbalance, and issues relating to control and intimidation, and take appropriate steps to manage the mediation process accordingly.’<sup>69</sup> The following paragraphs discuss procedural fairness in mediation, and the ‘independent’ role of the practitioner, in terms of both treating the parties fairly, and balancing the negotiations.

##### 1 *Procedural Fairness: Treating the Parties Fairly*

The first element of procedural fairness involves the practitioner managing the process to ensure that each party perceives that they are being treated fairly. Somewhat simplistically this can be achieved by spending equal time focused on each party, and allowing each party equal time to speak and be heard. Such efforts to display an overt commitment to a fair approach are also required if the mediator undertakes private meetings with the parties.<sup>70</sup>

Although equal treatment of the parties may sound relatively straightforward, in practice a fair and equal process is not always easy to achieve. In the context of family dispute resolution, a high level of experience is required to be able to maintain a substantively fair and equal approach to the treatment of the parties. One reason is that, in family matters, the parties are experiencing an emotional and difficult time that may impact significantly on their capacity to positively engage with the process. Some parties are able to come to the family dispute resolution table as rational negotiators who can accept the process ground-rules of respect and cooperative behaviour. Others are extremely volatile and difficult to manage. Difficult parties can upset the balance of the

<sup>65</sup> NADRAC, above n 18, para 9.12.

<sup>66</sup> Ibid para 5.8.

<sup>67</sup> J Rifkin, J Millen and S Cobb, ‘Toward a New Discourse for Mediation: A Critique of Neutrality’ (1991) 9(2) *Mediation Quarterly* 151, 152.

<sup>68</sup> NADRAC, above n 18, para 9 and *Procedural Fairness* para 12.

<sup>69</sup> Ibid para 4.8.

<sup>70</sup> ML Merrill, ‘Mediation’ in AL Greenspan (ed), *Handbook of Alternative Dispute Resolution* (1990) 44; LM Cooks and CL Hale, ‘The Construction of Ethics in Mediation’ (1994) 12(1) *Mediation Quarterly* 55, 63. L Boule, *Mediation: Skills and Techniques* (Butterworths, 2001) 115–42.

mediation process, and the fair treatment of each party, by demanding more time of the practitioner and by remaining entrenched in their initial positions. As this aspect of procedural fairness requires a high level of practitioner expertise, there is real potential for problems to arise in the current Australian context. One of the reasons for this is that, currently, levels of practitioner experience may not necessarily be high because, for example, many Family Relationships Centres have only recently opened their doors,<sup>71</sup> and recruitment pools of practitioners with the requisite skills and training are low.<sup>72</sup>

It is clear, however, that in practice (and with experience) it is possible for family dispute resolution practitioners to work to uphold this first element of procedural fairness. And our assessment is that it is a realistic expectation of FDRP ‘independence’, particularly when considered in the context of the next sub-element of procedural fairness, namely the practitioner’s role in balancing the negotiations.

## 2 *Procedural Fairness: Balancing the Negotiations*

The *Practice Standards* state that ‘the mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiation tactics can be employed by participants.’<sup>73</sup> This element of procedural fairness works in conjunction with treating the parties fairly, as there will be some instances in which practitioners will have to provide one party with more time to speak, or with greater support, to balance the power differentials in the mediation. Further, the practitioner may have to use techniques such as reminding the parties of the ground rules, reframing, summarising, and the appropriate use of questioning to ensure that both parties are able to contribute equally during the process.<sup>74</sup> Taylor has commented that ‘if the mediator is unbalancing the process or if the practitioner is not allowing information to flow, the mediator is acting as a biased, partial, or non-neutral facilitator.’<sup>75</sup> Upholding this aspect of practitioner ‘independence’ therefore also requires the practitioner’s skilled use of verbal communication in the family dispute resolution environment, for example, the choice of balanced and ostensibly non-judgmental vocabulary and phrasing.<sup>76</sup>

Another way in which the mediator can ensure that the process is balanced is by ensuring that parties are provided with the opportunity to obtain further information and legal advice.<sup>77</sup> They can also ensure that parties have the benefit of interpreters or support persons, when needed.

<sup>71</sup> The first roll-out of FRCs occurred on 1 July 2006, the second occurred on 1 July 2007. See Family Relationships Online, *Family Relationship Centres* <<http://www.familyrelationships.gov.au/www/agd/familyreloonline.nsf/Page/RWPFFDAE1FF77800FB5CA25721800038A30>> at 2 July 2008.

<sup>72</sup> Private communications with Family Relationship Centre manager (30 August 2007). Note on file with authors.

<sup>73</sup> NADRAC, above n 18, para 9(4) 12.

<sup>74</sup> Boulle, above n 70, 115–42.

<sup>75</sup> Taylor, above n 63, 228.

<sup>76</sup> Merrill, above n 70, 44.

<sup>77</sup> NADRAC, above n 18, paras 9(5), 9(6) and 12. For Field’s alternative perspective on the issue of balancing negotiations – particularly from the perspective of victims of violence see R Field, ‘Using the Feminist Critique of Mediation to Explore “The Good, The Bad and The Ugly” Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45, 49–53 and accompanying references; see also R Field and J Crowe, ‘The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis’ (2007) 27 *Australian Feminist Law Journal* 97.

We conclude that FDRPs can certainly be expected to use their skills to assist in treating the parties fairly, and to promote (as far as possible) balanced negotiations in family dispute resolution processes. Procedural fairness is therefore an important aspect of the reality of ‘independent’ practice on the part of FRDPs. It can also be said that it is of primary importance in family dispute resolution, where issues of power imbalance can often be significant. We contend, however, that the regulatory obligations imposed on FDRPs (to be discussed in more detail below), mean that whilst independent practice can ensure fair process to some extent, this does not necessarily translate to upholding the deeper principle of mediation, namely the philosophy of party self-determination.

### B *Practitioner ‘Independence’: Impartiality*

In the section above we began the process of constructing an understanding of what it means to be an ‘independent’ practitioner in the family dispute resolution context by considering issues central to the notion of procedural fairness. We now turn to thinking of an ‘independent’ practitioner’s practice in terms of ‘impartiality’.

In relation to historical understandings of practitioner ‘neutrality’, it was asserted that it was the notion of impartiality that had ‘garnered the greatest level of agreement and support.’<sup>78</sup> Some commentators simply asserted in the mediation context that ‘neutrality’ meant ‘being impartial’;<sup>79</sup> whilst others have said that ‘neutrality, by its very nature, must include impartiality.’<sup>80</sup> In the earlier discussion, when we considered the legal and ethical obligations governing FDRPs, it was clear that ‘impartiality’ is a central expectation. It is therefore important to ascertain whether FDRPs can in fact act ‘impartially’ in practice.

Impartiality itself is multi-faceted and in the mediation literature three particular foci can be identified; first, that mediators will avoid any conflicts of interest, second, that they will treat the parties impartially, and third, that they will take an impartial stance with regard to the outcomes reached in the mediation.<sup>81</sup> The *Practice Standards* contain a whole section on impartiality and ethical practice which can inform our discussion.<sup>82</sup> The next sections of this article discuss ‘impartiality’ in greater detail as a way of constructing a clearer notion of what it means to be an ‘independent’ FDRP in the current Australian family law system.

#### 1 *Impartiality: The Avoidance of Conflicts of Interest*

As we have said, the first element of impartiality involves the avoidance of conflicts of interest. This has always been a fundamental ethical element of mediation practice,<sup>83</sup> which involves the disclosure of personal interests or biases to the parties prior to the mediation and ensuring that the mediator is not in any way connected with either the parties or their interests. The *Practice Standards* set out that mediators ‘must conduct a

<sup>78</sup> Cooks and Hale, above n 70, 63.

<sup>79</sup> H Gadlin and EW Pino, ‘Neutrality: A Guide for the Organisation Ombudsperson’ (1997) 13 *Negotiation Journal* 17, 18.

<sup>80</sup> M Feer, ‘Toward a New Discourse for Mediation: A Critique of Neutrality – Commentary’ (1992) 10(2) *Mediation Quarterly* 173, 174.

<sup>81</sup> Family Law Council, *Family Mediation* (Australian Government Publishing Service, 1992) 7. See also Cooks and Hale, above n 70, 63.

<sup>82</sup> NADRAC, above n 18, para 5.12.

<sup>83</sup> Taylor, above n 63, 228.

dispute resolution process in an impartial manner and adhere to ethical standards of practice'.<sup>84</sup> 'Impartial' is defined as 'freedom from favouritism or bias either in word or action'.<sup>85</sup> The *Practice Standards* also require that the mediator discloses any potential grounds for bias or conflicts of interest.<sup>86</sup>

If we turn to whether FDRPs can achieve this element of impartiality in their family dispute resolution practice we see that it is an explicit obligation set out in the *Family Law Regulations 1984* (Cth). The Regulations clearly state that FDRPs cannot previously have acted for either of the parties, have been involved in commercial dealings with them or be personally acquainted with the parties.<sup>87</sup> It is realistic to expect that FDRPs are able uphold this element of impartiality without too much difficulty, and therefore can be said to satisfy an element of 'independence' in their practice.

## 2 *Impartiality: In Relation to the Parties*

As the avoidance of conflicts of interest is a clear obligation of FDRPs, we now turn to the second element of being impartial; namely, impartiality in relation to the parties. This is the one clear expectation in section 10F of the *Act* which provides that the FDRP must be 'independent of all the parties involved in the process.' This can be said to involve the practitioner standing back from the parties as individuals with different (often overtly conflicting) needs, interests and perspectives, and treating them 'without favouritism or bias'.<sup>88</sup> It also requires the practitioner, to some extent, to treat the parties impartially, regardless of their personality traits and degrees of 'likeability'. For example, during the course of the mediation a party may be accommodating or difficult, polite or rude, extroverted or introverted, engaged or disengaged, reasonable or unreasonable. In order not to favour the more 'likeable' party, or disfavour the less 'likeable' party, practitioners are essentially required to leave their human selves at the door of the mediation room, and to practise and 'interact in the absence of feelings, values, or agendas in themselves.'<sup>89</sup> We question whether this is an appropriate or realistic expectation of practitioners, and argue that it brings into question the integrity of a practitioner's 'independence'.

Certainly, we acknowledge that a lack of bias on the part of the mediator has been identified as a characteristic which is 'essential to mediation'.<sup>90</sup> This is in part because, in replicating judicial impartiality, an absence of mediator bias allows mediation, as an informal and relatively unregulated and unaccountable process, to nevertheless assume legitimacy as an appropriate alternative to litigation. Unbiased conduct has therefore been considered by many to be essential if mediators and the mediation process are to be accepted by the parties as a legitimate alternative to court decisions. Any demonstration of bias on the part of a mediator, or a party's perception of practitioner bias, may critically undermine perceptions of the mediator's 'independence' and

<sup>84</sup> NADRAC, above n 18 s 5, *Impartial and Ethical Practice* and s 8.

<sup>85</sup> *Ibid* para 5(1) 8.

<sup>86</sup> *Ibid* para 5(2) 8.

<sup>87</sup> *Family Law Regulations 1984* (Cth) reg 65. This is unless both parties consent to the FDRP undertaking the mediation or the dealing not being considered to impinge on their ability to facilitate the family dispute resolution process.

<sup>88</sup> NADRAC, above n 18, para 5(1) 8.

<sup>89</sup> Rifkin, Millen and Cobb, above n 67, 152.

<sup>90</sup> TF Marshall, 'The Power of Mediation' (1990) 8(2) *Mediation Quarterly* 115, 120.

possibly lead, for example, to a party disengaging from the process, threatening to leave the mediation, or actually terminating the session.

In relation to the context of family dispute resolution, we argue that, realistically, it is almost impossible for FDRPs to practise completely without bias. This is not only because lacking any bias imposes an inhuman requirement on practitioners, but also because realistically, a practitioner must be able to 'assist the disputants in expressing their 'side' of the case.'<sup>91</sup> There are links here with the element of procedural fairness outlined above, relating to the practitioner assisting with balancing the negotiations. It may not be possible for a practitioner to operate effectively unless 'biased' techniques, such as the practice of 'equidistance', are used. 'Equidistance' refers to the practice where the mediator may, particularly (but not only) in private meetings appear to empathise with one party's plight and express support for some aspects of his or her case, to gain the confidence of that party and in doing so, progress the negotiations.<sup>92</sup>

So can FDRPs realistically achieve impartiality in relation to the parties in practice? We contend that, in addition to the human limitations on achieving this aspect of impartiality, the legislative reporting requirements significantly compromise the true possibility of practitioner 'independence' in terms of treating the parties impartially and without bias. For example, if a party has been ordered to attend family dispute resolution and then fails to attend, the FDRP is obliged to report this failure to the court.<sup>93</sup> This requirement places the practitioner in a position of bias against the recalcitrant party, a stance that may impact on the way that party is perceived in later court proceedings, or is dealt with in court orders.<sup>94</sup> It is our view that an unbiased, or truly impartial, practitioner could not act against a party in such a way.

Further, although generally what is said in family dispute resolution is confidential, there are a number of situations in which this commitment will be overridden by higher level reporting obligations. For example, a practitioner must report a need to protect a child from the risk of harm.<sup>95</sup> These exceptions to the general confidentiality of family dispute resolution are very broad and, in our view, compromise the extent to which FDRPs can act impartially in relation to both parties.

Another factor that compromises an FDRP's ability to be impartial is perhaps the most critical. This issue relates to the requirement that, at the conclusion of the process, practitioners now have to make an assessment, as we noted above, as to whether the parties have made a 'genuine effort' to resolve the issues in dispute and they must then issue the relevant certificate. The requirement to make this judgment gives rise to the possibility of partial treatment of the parties, and evidences the practitioner's legislatively imposed obligation towards the Court, that overrides a commitment to treating the parties impartially.

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<sup>91</sup> Rifkin, Millen and Cobb, above n 67, 152-3.

<sup>92</sup> For a more detailed discussion of this concept see, for example, Rifkin, Miller and Cobb, above n 67.

<sup>93</sup> *Family Law Act 1975* (Cth) s 13D.

<sup>94</sup> *Family Law Act 1975* (Cth) s 60I(8). A party that failed to attend may be made subject to a costs order.

<sup>95</sup> *Family Law Act 1975* (Cth) s 10H. Further disclosures made to a practitioner that involve an admission by an adult that indicate a child under 18 has been abused or is at risk of abuse or a disclosure by a child under 18 that indicate that the child has been abused or is at risk of abuse will be admissible in a court, unless in the opinion of the court there is sufficient evidence of the admission of disclosure available from other sources, see *Family Law Act 1975* (Cth) s 10J.

The obligation imposed on practitioners to issue such certificates clearly compromises their impartiality and, could lead to perceptions of, or real, bias. This is because, even though the certificate is issued at the conclusion of the family dispute resolution, consideration of the 'genuine effort' requirement is one that will carry through the course of the process. For example, a practitioner may be tempted to encourage one party to compromise more than the other by reminding them of the assessment of 'genuine effort'. Or a practitioner may feel compelled to advise a party that is presenting as 'unreasonable' that he or she will end up with a certificate which reflects a lack of 'genuine effort'. It is therefore clear that there is potential for the certificate to be used by the practitioner to coerce a party into making what the practitioner perceives to be a more 'reasonable' offer to the other side, and/or to accept a more conservative settlement.

In a sense, then, the practitioner becomes not only a facilitator of the dispute, but also an arbitrator of the issues relating to the certificate. In effect, we contend that the determination of 'genuine effort' by the practitioner may be viewed as turning the process into a combination of mediation and then arbitration (in other contexts this is a process that would be termed 'med-arb').<sup>96</sup> Such a determinative role, and the potential for contextual influences to undermine any impartiality in the execution of that role, most certainly compromises the practitioner's 'independence'.

Further, in making a decision about the content of the certificate, the practitioner also influences future family court proceedings. That is, if one party is deemed not to have made a 'genuine effort', the court can order them to attend a further family dispute resolution, or make a costs order against him or her.<sup>97</sup> It is possible, then, that a practitioner's determination as to 'genuine effort' will result in one party being ordered to pay the other party's legal costs. In this regard the practitioner is not independent, but rather, potentially, a partial decision-maker working under an overarching obligation to the Court.

It is significant and notable that the term 'genuine effort to resolve the issue or issues' is not one that is defined in the legislation. How does a practitioner determine whether a parent has made a genuine attempt at resolving the issues? Is the 'genuine effort' requirement satisfied if parents attend family dispute resolution and follow through with the process, but at the end of say, three hours, could not reach agreement? Or does it involve, as it seems to imply, a degree of subjectivity in that the practitioner must determine whether a parent was 'reasonable' in the proposals they made during the process, and in their willingness to compromise or generate alternative viable options? At this stage there are no answers other than conjecture.<sup>98</sup> However, it is our contention that impartiality in relation to the parties is not an element of 'independence' that can be realistically achieved by FDRPs.

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<sup>96</sup> Boulle, above n 48.

<sup>97</sup> *Family Law Act 1975* (Cth) s 60I(8) contains a note to the effect that the contents of the practitioner's certificate can be taken into account in determining whether to make a costs order against a party under s 117.

<sup>98</sup> For a discussion of how 'genuine effort' may be interpreted by the courts see Cooper and Brandon, above n 4; and Altobelli, above n 4.

3 *Impartiality: In Relation to the Content and Outcome of the Dispute*

The third aspect of impartiality to be considered here relates to a FDRP's impartiality in relation to the outcome of the dispute. That is, an impartial practitioner (and therefore an 'independent' practitioner) might be said to be one who is disinterested (or has no interest) in the outcome of the dispute. In other words, the practitioner has 'no personal stake' in the outcome.<sup>99</sup> An example of this can be found in the *Practice Standards* which state that mediators, 'will not use information about participants obtained in mediation for personal gain or advantage.'<sup>100</sup> Further, impartiality towards the outcome has generally been portrayed in the mediation literature as crucial to the mediator's ability 'to gain acceptance and credibility as a third party, and hence to gain entry to the dispute at all.'<sup>101</sup>

We acknowledge that the concept of mediator impartiality in terms of the outcome of a dispute has been fundamental to the notion of party self-determination in facilitative, problem-solving models of mediation. However, for FDRPs in practice there are many impediments to being able to achieve this aspect of impartiality. These impediments arise from the increasingly active roles that practitioners are required to play in family dispute resolution processes, and from the statutory obligations imposed upon them. For example, practitioners are obliged to direct parents during discussions to consider the best interests of their children and to accept that both parents should generally be involved in long-term decision-making about their children.<sup>102</sup> Therefore, when a practitioner is faced with a choice between 'impartial' conduct, or the promotion of options and outcomes that promote the best interests of the children, then the higher ethical priority is to play a directive role in upholding the best interests of children.<sup>103</sup>

Practitioners also have obligations, in certain circumstances, to raise with parties whether equal time or substantial and significant time arrangements will be reasonably practical and in the children's best interests.<sup>104</sup> These obligations alone call into question whether practitioners can purport to be 'impartial' and as such, 'independent', as they have legislative obligations to contribute to the content of the mediation, in terms of both option generation and the framing of settlement proposals. In effect, FDRPs are required to implement the government's policy agenda behind the legislation, namely the encouragement of shared parenting arrangements.<sup>105</sup>

It is interesting to reflect on this last obligation in relation to client perceptions of 'independence' and 'impartiality'. If a father comes into the family dispute resolution asking for equal shared time with his children, and the mother is proposing every second weekend, what will happen to the mother's perception of the practitioner once the FDRP raises the issue of 'equal time'? It could be argued that the mother's perception of the practitioner's impartiality or independence will be permanently tainted.

<sup>99</sup> Gadlin and Pino, above n 79, 18.

<sup>100</sup> NADRAC, above n 18, para 5(4) 8.

<sup>101</sup> Marshall, above n 90, 120.

<sup>102</sup> *Family Law Act 1975* (Cth) s 63DA.

<sup>103</sup> *Family Law Act 1975* (Cth) s 63DA(2)(a)(ii).

<sup>104</sup> *Family Law Act 1975* (Cth) s 63DA(1).

<sup>105</sup> See, for example, House Standing Committee on Family and Community Affairs, Parliament of Australia, House of Representatives, *Every Picture Tells A Story: Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) <<http://www.aph.gov.au/house/committee/fca/childcustody/report.htm>> at 2 July 2008.



Another statutory obligation requires practitioners to supply separating couples that have been married with information about reconciliation in certain circumstances.<sup>106</sup> This obligation creates a situation in which a practitioner's impartiality in relation to the outcome may again be lost, in the pursuit of another item on the government's policy agenda; namely, the promotion of a certain view of family values that dictates that married parties can work things out if they try hard enough. In other words, there is a partiality to a certain outcome evident here, namely the reconciliation of the parties.

In summary, it is clear that, whilst practitioner impartiality has traditionally been the mainstay of facilitative mediation, there are now a number of legislatively imposed obligations that compromise a facilitative FDRP's ability to satisfy any real potential of being 'impartial' or 'independent'. They also compromise a FDRP's ability to truly participate as a 'facilitative' practitioner and uphold the philosophy of party self-determination as he or she will have legislative obligations to advise and encourage parties towards certain predestined outcomes.

## VI CONCLUSION

In this article we have considered the scope of the operation of FDRPs within the Australian family law system, and critically analysed whether their role can be considered to be an 'independent' one having regard to the current legislative and regulatory framework within which they operate, and the realities of practice. We have acknowledged that the legislation provides a wide scope for FDRPs in terms of the processes that they are permitted to facilitate under the umbrella of 'family dispute resolution'. It also provides parties with a wide range of choice in terms of the processes that they can opt to participate in, including facilitative and advisory mediation processes conducted by practitioners working in a variety of settings.

To create a shared understanding of the role of FDRPs in family dispute resolution we have considered whether they can be considered to be truly 'independent' in the traditional sense of this term, which in the mediation literature has been used interchangeably with the terms 'neutral' and 'impartial'. From this analysis we arrived at a series of expectations in relation to 'independence' framed under the broad headings of 'procedural fairness' and 'impartiality'.

We contend that FDRPs, even though subject to many statutory obligations, can still be expected to fulfil certain elements of what may be termed 'traditional notions' of mediator 'independence' (procedural fairness and impartiality). We can expect FDRPs to ensure that they have no conflict of interest with the parties. We can also expect that they will strive to achieve fair treatment of the parties and that they will assist parties, where needed, by using various strategies and skills to balance the negotiations, particularly where there are power differentials.

However, we argue that there are several other elements of 'independence' which are not realistic expectations of FDRPs. Certainly the notion of practitioners being 'independent' (at least in relation to being impartial towards the parties and the outcome of their dispute) is clearly inconsistent with the current general and reporting obligations of FDRPs. Such statutory requirements include ethical obligations to ensure that parties

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<sup>106</sup> *Family Law Act 1975* (Cth) s 12G.

consider parenting arrangements that will be in the best interests of their children and developmentally appropriate. They also include obligations, in some circumstances, to ensure that parties consider the appropriateness of equal time shared parenting requirements, and make a 'genuine effort' to participate in the negotiations. Importantly, the compromised nature of FDRPs' 'independence' has a flow on impact in terms of the integrity of the philosophy of party self-determination in family dispute resolution.

Our conclusion is that, in the practice of family dispute resolution in Australia today, only certain elements of practitioner 'independence' are realistically achievable for accredited FDRPs.<sup>107</sup> It is therefore important for practitioners, when describing their role to parties, to refrain from using terms such as 'neutral' and 'impartial'. To accurately describe their role FDRPs could state that they are independent of the parties in that they have no conflict of interest, and that they will endeavour to ensure that both parties are treated fairly in the process. Such a description to parties of the practitioner's role will more accurately describe the true nature of their 'independence' in the current Australian family law system.

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<sup>107</sup> We would agree with Boule when he says that 'in the reality of mediation practice only some of the dimensions of practitioner neutrality are in evidence.' Boule, above n 48, 34.