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# UNDERSTANDING THE USE OF PRACTITIONER DISCRETION IN SCREENING ADR SERVICES FOR SUITABILITY: RESULTS OF A PILOT STUDY

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## Abstract

Processes categorised under the banner of “ADR”, particularly mediation and conciliation, are increasingly relied upon by parties in dispute, both inside and outside of the formal justice system. Given that an ADR process may not always be appropriate for a given dispute, legislation often affords ADR practitioners discretion as to whether to offer (or continue offering) an ADR process. However, there is limited contemporary empirical evidence exploring how practitioners are making such decisions in practice. To build on existing empirical research, I conducted a pilot study of ADR practitioners in the form of a survey (n = 12) in the lead up to and during the National Mediation Conference 2021. The pilot study had several limitations, resulting on a majority of respondents (n=10) being Family Dispute Resolution Practitioners (‘FDRPs’). As such, the results of the pilot study have been limited to a discussion in the context of family law only. The pilot study asked practitioners a series of multiple-choice questions, with the opportunity to provide free-text responses, and asked the practitioners demographic and characteristic questions, before asking practitioners to identify factors which influence when and how ADR is offered or ceased to be offered to parties in a dispute. The results of the pilot study supports existing evidence that FDRPs can have very different approaches to how they use their discretion to offer dispute resolution, in the context of their requirements to assess suitability for dispute resolution under the *Family Law Act 1975* (Cth) and associated regulations. I discuss the possible impacts of this potential inconsistency in practitioner discretion on parties and the legal system more generally and make suggestions for further research.

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## I INTRODUCTION

ADR<sup>1</sup> processes, in particular mediation and conciliation (which are the focus of this study), are now commonplace methods of dispute resolution through varying legal and quasi-legal processes such as: complaints mechanisms with ombudsmen and other statutory complaints bodies; where such processes are required or encouraged as a pre-litigation step before filing a dispute in court (as is the case in family law); or where directed by a court or tribunal.<sup>2</sup> Throughout these processes, a third party (in family law, known as a Family Dispute Resolution Practitioner or FDRP) is required to assist the parties to work together to find a mutually agreeable outcome. In the family law context, the proliferation of ADR (known as Family Dispute Resolution or FDR) as a dispute resolution mechanism can be largely credited to its benefits, which include being cost-effective, having high satisfaction rates, and allowing parties to have determination over the outcome.<sup>3</sup> FDR is usually conducted through a facilitative mediation model, where the FDRP takes a non-interventionalist approach to resolution.<sup>4</sup>

However, FDR can lead to harms if used in circumstances that are not appropriate, such as where there are unmanageable power imbalances between parties or where there is a history of violence between the parties.<sup>5</sup> The factors which may make FDR (and non-determinative ADR processes more generally, such as mediation and conciliation) inappropriate are unsettled and underdiscussed in the literature.<sup>6</sup> I discuss the possible factors that may make FDR inappropriate and/or harmful, and review the literature further in Part II.

Given that FDR may have harms if not used appropriately, it is important that FDRPs use their discretion to not offer FDR when it is not appropriate to do so. Most statutory ADR schemes allow practitioners to refuse to offer mediation or conciliations, though the schemes vary in how prescriptive they are.

Family law has a very detailed regulatory framework for assessing the suitability of a dispute for FDR, with the *Family Law (Family Dispute Resolution*

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<sup>1</sup> 'Alternative Dispute Resolution' or 'Appropriate Dispute Resolution'. While referring to 'ADR', this article has a particular focus on mediation and conciliation.

<sup>2</sup> See Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16 *International Journal of Law in Context* 108.

<sup>3</sup> Victorian Law Reform Commission, *Civil Justice Review Report*, (Research Report No 14, March 2008) 214.

<sup>4</sup> Donna Cooper and Rachael Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Role of the Independent Practitioner' (2008) 8(1) *Queensland University of Technology Law Review* 158, 159.

<sup>5</sup> See Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2-3) *Common Law World Review* 214, 216-17; Gay R Clarke and Iyla T Davies, 'ADR — Arguments for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7(1) *Queensland University of Technology Law Journal* 81, 87.

<sup>6</sup> Kathy Mack, 'Court Referral to ADR: Criteria and Research' (Research Report, Australian Institute of Judicial Administration and National Dispute Resolution Advisory Council, 2003) 55.

*Practitioner) Regulations 2008* ('2008 Regulations') detailing what factors must be considered before commencing FDR.<sup>7</sup> The framework for FDRP decision making in the family law context is outlined in Part III.

But how do FDRPs understand what disputes are 'appropriate' for FDR? What factors are they considering in choosing whether to offer a mediation or conciliation process, or an amended dispute resolution process such as facilitating dispute resolution through separate sessions. Existing empirical studies on how ADR practitioners understand and apply powers to deem a dispute resolution process unsuitable or inappropriate is underdeveloped.<sup>8</sup> However, the existing studies suggest that practitioners, particularly FDRPs, do not take a consistent approach to determining whether FDR is appropriate, relying on differing factors to make their determinations and applying different thresholds for when FDR is not appropriate.<sup>9</sup> I discuss the existing empirical research further in Part IV.

I conducted a pilot study (n = 12) for the purpose of exploring what factors ADR practitioners are using when making such determinations and whether these approaches are consistent. While the study did not set out to focus on FDRPs, due to limitations of the study a significant majority of respondents (n=10) were FDRPs. As such, I have framed my results and analysis through the context of family law, as the respondent pool is too small to draw conclusions regarding the practices of other ADR practitioners.

The study aimed to gather insights into what factors FDRPs were weighing in making such decisions and how paramount such considerations were to practitioners in assessing a dispute. As a pilot study, I intend that these preliminary results are used to inform further empirical research. I discuss the role of the pilot study further in Part III.

The pilot study was conducted during the National Mediator Conference in 2021, which was held entirely online due to the outbreak of COVID-19. I asked participants to complete a series of multiple-choice questions, with capacity for free text responses, to assess their decision-making process in offering ADR. I discuss my methodology and the limitations of the pilot study further in Part V.

The pilot study results support the conclusions of existing empirical studies that FDR practitioners take inconsistent approaches to determining when FDR is inappropriate. In particular, I found that there is a divergence amongst practitioners in how often they chose to decline to offer, or cease offering, FDR services. There is also inconsistency amongst FDRPs about which factors of a dispute they considered in making this determination. The results of the pilot study and discussion are discussed further in Part V.

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<sup>7</sup> *Family Law (Family Dispute Resolution Practitioner) Regulations 2008* (Cth) reg 25(2).

<sup>8</sup> Bruce Smyth et al, 'Certifying Mediation: A Study of Section 60I Certificates' (Working Paper No 2/2017, Centre for Social Research and Methods, Australian National University, November 2017) 8.

<sup>9</sup> See Joshua Taylor, 'A Critical Analysis of Practitioners Issuing 'Not Appropriate for Family Dispute Resolution' Certificates under the *Family Law Act 1975* (Cth)' (2020) 41(1) *Adelaide Law Review* 149.

In Part VI, I discuss the implications of the pilot study (particularly in the context of its limitations), and make suggestions for how further research into ADR practitioner decision making may build on my pilot study and address its limitations.

## II THE REQUIREMENT FOR ADR PRACTITIONER DISCRETION IN SCREENING FOR ADR SUITABILITY

While ADR is celebrated as an important tool in dispute resolution, there have long been concerns that ADR processes may negatively impact parties if not used appropriately. Laurence Boulle and Nadja Alexander refer to this as the 'diagnostic' question of the dispute.<sup>10</sup> Kathy Mack refers to two distinct possible diagnostic questions: 'screening' inappropriate disputes out of ADR processes, and 'matching' or 'fitting the forum to the fuss' by matching a dispute to the most appropriate dispute resolution process (or litigation) and involves attempting to match the dispute to the most appropriate dispute resolution process.<sup>11</sup>

In the family law context, there is a significant body of research which highlights the potential risks to parties participating in ADR processes, particularly in cases where domestic violence is present.<sup>12</sup> These concerns include that the existence of power imbalances between parties will lead to one party railroading the process and achieving an unjust or coerced outcome. It also leads to the possibility that a perpetrator may use the process to continue to exert violence, control or influence over the more vulnerable party.<sup>13</sup>

John Wade suggests that some disputes require litigation rather than an ADR process, and suggests a range of factors which may indicate this, such as: where parties express that they 'won't give in without a fight'; a history of routine default judgements; where parties want to preserve a tough reputation or not be held responsible for a certain action; or where the dispute is high in conflict but low in resources.<sup>14</sup>

Lawrence Susskind, William Tilleman and Parra-Herrera further state that dispute resolution may not be appropriate where there are an unmanageable number of parties, access to dispute resolution is difficult for some parties but not others, or where implementation may be blocked by third parties. They

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<sup>10</sup> Laurence Boulle and Nadja Alexander, *Mediation: Skills and Techniques* (LexisNexis, 3<sup>rd</sup> ed, 2019) 71; Laurence Boulle, 'Diagnostic Factors in Mandatory ADR Referrals' (2001) 4 *ADR Bulletin* 31.

<sup>11</sup> Mack (n 6) 9.

<sup>12</sup> See Sarah Dobinson and Rebecca Gray, 'A Review of the Literature on Family Dispute Resolution and Family Violence: Identifying Best Practice and Research Objectives for the Next 10 Years' (2016) 30(3) *Australian Journal of Family Law* 180; Hilary Astor, 'Violence and Family Mediation: Policy' (1994) 8(1) *Australian Journal of Family Law* 3.

<sup>13</sup> Rachael 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, 74.

<sup>14</sup> John Wade, 'Don't Waste My Time on Negotiation or Mediation; This Case Needs a Judge: When is Litigation the Right Solution?' [2001] *ALTA Law Research Series* 7, 7-8.

also argue that where there is a significant public interest in the outcome, or where a public mandate is useful, ADR may not be appropriate.<sup>15</sup>

Linda Kochanski says that a practitioner has to be satisfied that the issues in dispute are suitable for resolution in the ADR process, including by assessing if the ADR process is the most effective way of resolving the parties' presenting issues.<sup>16</sup> Linda Fisher and Brandon outline a number of factors for practitioners to consider in whether a FDR session should be conducted. These include 'emotional readiness to mediate', 'sufficient trust in each other to mediate', and whether they have 'the necessary negotiation skills and motivation'.<sup>17</sup> They also support a list originally developed by National Alternative Dispute Resolution Advisory Council (as it was then) which adds factors such as 'a clear statement by one party that he or she will not participate in dispute resolution, and "wants their day in court"'; 'bad faith bargaining, or a clear likelihood of this'; 'overriding public interest'; 'a matter which is primarily a dispute of fact'; 'parties who have major, non-negotiable values differences'; 'a lack of commitment by the parties to resolve the dispute'; 'cultural factors and considerations'; and 'the likelihood that the costs of dispute resolution outweigh its benefits'.<sup>18</sup> They further add that many practitioners also consider whether there is a history of broken agreements and 'whether the timing of the mediation [due to emotional capacity/correct professional advice] is appropriate'.<sup>19</sup>

Bret Walker SC and Andrew Bell argue that at a principled level, parties have a *right* to pursue a litigated resolution if that is what they want.<sup>20</sup> Pragmatically, as Tania Sourdin notes, by forcing parties to go through a mediation session which is highly likely to keep the issue unresolved, parties are having to wait longer to seek a judicial determination, which could serve the effect of making the situation worse.<sup>21</sup> ADR can also be a difficult and confronting process for participants, and arguably should be avoided where unlikely to be effective. As such, where an ADR process may not be suitable or appropriate, having parties engage in an ADR process has the potential to negatively affect the parties. Further, as Tom Altobelli notes, where ADR processes are inconsistently governed, it has the possible impact of lessening the public's trust in ADR and creating a perception that the dispute resolution system is arbitrary and unjust.<sup>22</sup> As such, there are many complex, intersecting

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<sup>15</sup> Lawrence Susskind, William A Tilleman and Nicolás Parra-Herrera, *Judicial Dispute Resolution: New Roles for Judges in Ensuring Justice* (Cambridge University Press, 1<sup>st</sup> ed, 2024) 95.

<sup>16</sup> Linda Kochanski, 'The Importance of an Intake' 1 *Family Law Review* 164, 164.

<sup>17</sup> Linda Fisher and Mieke Brandon, *Mediating with Families* (Lawbook Co, 4<sup>th</sup> Ed, 2018) 252.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Bret Walker and Andrew S Bell, 'Justice According to Compulsory Mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)' (2000) 4 *NSW Bar Association News* 7, 8.

<sup>21</sup> Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35 *University of New South Wales Law Journal* 889, 892 - 896.

<sup>22</sup> Tom Altobelli, 'A Generational Change in Family Dispute Resolution in Australia' (2006) 17 *Australasian Dispute Resolution Journal* 140, 141.

and multi-faceted factors which may impact on an assessment as to whether an ADR process is appropriate.

FDRPs have several other tools available to them to manage power imbalances. Mieke Brandon and Rachael Field note that practitioners have significant power in an ADR setting, including informational power (by being the expert in the process and sometimes also the subject matter of the dispute), and referent power by building rapport and connections with participants.<sup>23</sup> Focussing on the facilitative mediation context, they suggest the practitioners can take a range of approaches to mitigating power imbalances in a way that enables them to remain impartial, including the use of language used; establishment and enforcement of clear ground rules; process interventions such as private sessions and co-mediation models; framing the discussion points; assisting parties to listen and be heard and manage communication flow; the use of reality testing, and others.<sup>24</sup> They note that practitioners are guided by process guidelines, standards, and code of ethical practice, as well as their own professional and personal ethical norms and values in using these strategies.<sup>25</sup>

Beyond power imbalances, commentators have suggested a multitude of other factors which make an ADR process inappropriate. Boulle and Alexander accept that there are 'no settled list of factors which make mediation unsuitable', but may include situations of power imbalance, one or more parties are unsuited to the dispute resolution process, external party interests may be affected (i.e. creditors), or policy or social reasons such as where there are allegations of terrorism or a dispute over a point of law.<sup>26</sup> They also argue that mediation should not be offered where '...past experience suggests that they will not respond to information...'.<sup>27</sup> They argue that this 'no treatment option' serves to prevent wasteful or destructive mediation sessions, allow time to pass until they are in a better position to mediate, and motivating parties to rely on their own resources.<sup>28</sup>

Many of these factors suggest an overarching criterion that ADR should not be offered where it is likely to result in an unfair process (due to inability of parties to equally advocate for their own best interests) or where ADR is unlikely to be effective or resolve the dispute.

The factors which may make ADR processes unsuitable in the literature are broadly reflected in the current National Mediator Accreditation Practice Standards ('NMAS'). The NMAS requires mediators as part of its approval standards to have knowledge of the nature of conflict, including the dynamics

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<sup>23</sup> Mieke Brandon and Rachael Field, 'An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process' (2020) 3 *Arbitrator and Mediator* 33, 39.

<sup>24</sup> *Ibid* 46-47.

<sup>25</sup> *Ibid* 48.

<sup>26</sup> Boulle and Alexander (n 10) 30.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

of power and violence,<sup>29</sup> and the skills to manage high emotion, power imbalances, impasses and violence,<sup>30</sup> and states that ADR practitioners must ‘...be alert to changing balances of power in mediation and manage mediation accordingly’ and where necessary, take steps, which may include:

- (a) agreeing guidelines to encourage appropriate conduct;
- (b) activating appropriate security protocols;
- (c) using separate sessions, communication technology or other protective arrangements;
- (d) having a participant’s friend, representative or professional advisor attend mediation meetings;
- (e) providing participants with information about other services or resources; and
- (f) suspending or terminating the mediation with appropriate steps to protect the safety of participants.<sup>31</sup>

While these standards are set to be updated in late 2024, it does not appear that these changes are likely to significantly impact on these suitability requirements.<sup>32</sup>

The question of whether it is appropriate to require parties to engage in ADR has also been grappled with in a judicial context. In the recent UK case of *James Churchill v Merthyr Tydfil County Borough Council*<sup>33</sup> (‘Churchill’) the Court of Appeal in England and Wales was asked to assess when it was appropriate for a party to be compelled to engage in ADR. The Bar Counsel of England and Wales suggested the following factors may be relevant to such a determination:

- The form of ADR being considered
- Whether one or both parties are represented
- Whether ADR is likely to be effective or appropriate without representation
- Whether the parties had been informed of their legal rights in the event the matter did not settle
- The urgency of the case
- Whether delay to pursue ADR would vitiate a claim or give rise to or exacerbate any limitation issue
- The costs of ADR, both in absolute terms, and relative to the parties’ resources and the value of the claim

<sup>29</sup> Mediator Standards Board, ‘National Mediator Accreditation System’, *Documents* (Web Page) <<https://msb.org.au/resources/documents>>.

<sup>30</sup> Ibid 11.

<sup>31</sup> Ibid 11.

<sup>32</sup> Mediators Standards Board, ‘Australia’s Mediator Accreditation System Set to Evolve in 2024’, *The MSB Collection* (Web Page, 21 February 2024) <<https://msb.org.au/publications/article/australias-mediator-accreditation-system-set-evolve-2024>>.

<sup>33</sup> [2023] EWCA Civ 1416.

- Prospects of settlement
- Any power imbalance concerns
- The reasons given by a party for not wanting to mediate (including any recent attempted ADR that was unsuccessful)
- The reasonableness and proportionality of any sanction to a party in court if they decline ADR.<sup>34</sup>

Ultimately, the Court of Appeal stated that each of these factors and more may be relevant to the courts exercise of its discretion to refer parties to ADR, and there should not be fixed principles as to what will be relevant in deciding whether ADR should be offered.<sup>35</sup>

Similar considerations have arisen in the Australian judicial context. In the 1999 case *Barrett v Queensland Newspapers Pty Ltd*,<sup>36</sup> Samios DCJ noted that the court had a wide discretion to refer parties to mediation, and suggested that the parties' views as to the likelihood of settlement should not be given much weight, noting that '...why do so many disputes resolve on the doorstep of the court? A solution to the dispute must have been found and why could that solution not be found earlier?'<sup>37</sup> His Honour went to conclude that mediation was appropriate, taking into account that the majority of parties wished to participate and that with a suitable mediator, resolution was quite possible, notwithstanding the disposition of the parties.<sup>38</sup> That the courts have a wide discretion to refer matters to mediation, and that opposition by parties to participation should not be given much weight, have been reinforced in subsequent case law.<sup>39</sup>

In *Spina v Shimeld*, DCJ Fanton refused an application that a matter be referred to mediation.<sup>40</sup> Her Honour provided a summary of factors which may be relevant to whether a matter was suitable for mediation, which included whether the mediation was likely to be successful, the timing of the referral, the state of the pleadings (and if amendments would be required before trial), the nature of the issues in dispute and length of any trial, and 'whether the costs and effort that may be put towards a mediation process, might not, in the circumstances, be equally directed towards a determination of some essential issues'.<sup>41</sup> In determining against a mediation, her Honour considered that the medical evidence before the parties was dated and that without updated reports, the parties would be unlikely to assess quantum and therefore would be unlikely to resolve the dispute.<sup>42</sup>

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<sup>34</sup> Ibid [61].

<sup>35</sup> Ibid [65].

<sup>36</sup> [1999] QDC 150.

<sup>37</sup> Ibid [19].

<sup>38</sup> Ibid [20].

<sup>39</sup> See *Higgins v Higgins* [2002] NSWSC 45; *Indoport Pty Ltd & Anor v National Australia Bank Limited & Ors* [2001] NSWSC 427; *Facer v WorkCover Queensland & Anor* [2005] QDC 025; *Simic v LTH Investments (Qld) Pty Ltd* [2013] QDC 240.

<sup>40</sup> [2017] QDC 303.

<sup>41</sup> Ibid [13].

<sup>42</sup> Ibid [22]-[27].

In the legislative context, parties are sometimes required to commence ADR prior to commencing litigation. In these contexts, ADR practitioners are generally still afforded the discretion in the legislation to not commence or continue with an ADR process, but usually with little legislative guidance. The family law context is an exception to this; FDRPs are expressly required by legislation to consider if any factors are present which may impact on the parties ability to negotiate freely and *must not* offer FDR where it is not appropriate to do so.<sup>43</sup> I discuss this framework in detail in the next section.

Ultimately, as Mack notes, while there are widely identified features of what may make an ADR process inappropriate, there is little research to justify them, and the research which exists is inconclusive or contradictory.<sup>44</sup> The literature and case law provide a range of suggested factors which may be relevant, but gives little guidance to support ADR practitioners in assessing the suitability for ADR of a given dispute in practice.

### III THE FAMILY LAW CONTEXT

In Australia, before a party can apply to court for a judicial determination, they must first engage in FDR unless an exemption is sought. To give effect to this requirement, under the *Family Law Act 1975* (Cth) ('FL Act') parties commencing an application in court must file with their application either a certificate from a FDRP attesting to their compliance or non-compliance with the requirement or an affidavit setting out the grounds on which the exemption for the requirement is sought.<sup>45</sup>

FDRPs are required to screen parties prior to offering FDR under s 60I(8)(aa) of the FL Act, which states that an FDRP may issue a certificate stating that FDR is not appropriate in the circumstances, which may then be filed with the federal circuit court with an application for judicial determination of the dispute.<sup>46</sup> A FDRP may also issue a certificate if the FDR session has commenced, and the FDRP considers that it would not be appropriate to continue.<sup>47</sup> To issue such a certification, the FDRP must be satisfied that an assessment has been conducted of the parties to the dispute, and that FDR is not appropriate.<sup>48</sup> FDRPs must 'have regard' to regulation 25 of the 2008 Regulations, which states:

(2) In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

(a) a history of family violence (if any) among the parties;

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<sup>43</sup> 2008 Regulations reg 25(1).

<sup>44</sup> Mack (n 6) 9.

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

<sup>46</sup> *Ibid* s 60I(8)(aa).

<sup>47</sup> *Ibid* s 60I(8)(d).

<sup>48</sup> 2008 Regulations regs 25(1)–(2).

- (b) the likely safety of the parties
- (c) the equality of bargaining power among the parties;
- (d) the risk that a child may suffer abuse;
- (e) the emotional, psychological and physical health of the parties;
- (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

FDRPs are afforded a broad discretion in determining how this requirement is met through the 'catch-all provision' in reg 25(2)(f) of the 2008 Regulations. As is seen in the next section, while the empirical evidence is limited, FDRPs appear to be exercising this broad discretion inconsistently.

#### IV CURRENT EMPIRICAL RESEARCH ON ADR PRACTITIONER DECISION-MAKING

There is little empirical research which evidences how ADR practitioners are currently making decisions regarding the appropriateness of ADR processes.

In the Australian family law context, a qualitative study by Smyth et al in 2017 interviewed 27 FDRPs from the relationship service Interrelate, and asked interviewees about their decision-making in determining that FDR sessions were not appropriate ('the Certifying Mediation study'). Smyth et al found that despite the guidance in the 2008 Regulations,

[s]ome factors outside the legislative instruments appear to be affecting decisions. The factors include, in particular, best interests of the children (variously perceived by FDRPs), organisational policy, fear of complaints, and perceptions about what will lie ahead for clients if a certificate (or particular category of certificate) is issued, particularly when the FDRP perceives that the client does not have the financial resources to go to court.<sup>49</sup>

The Certifying Mediation study also found inconsistencies in how the factors listed in the 2008 Regulations are applied by ADR practitioners in their assessments. For example, some FDRPs expressed that they were 'all for giving [FDR] a go' so long as the parties are confident in being able to have a discussion, while for others 'the presence of some of the factors set out in 2008 Regulations result in an automatic determination that FDR is not appropriate'.<sup>50</sup> This supported earlier findings by the Australian Law Reform Commission, in the context of assessing the impact of violence between parties during the FDR process, that FDRPs were sometimes inconsistent and arbitrary in their assessments.<sup>51</sup>

It is worth noting that, like my pilot study, there was limitations to the Certifying Mediation study. The most relevant limitation for the purpose of the above findings was the study was limited to the experience of FDRPs at

<sup>49</sup> Smyth et al (n 8) 25.

<sup>50</sup> Ibid.

<sup>51</sup> Australian Law Reform Commission, *Family Violence — A National Legal Response* (Research Report No 114, October 2010) 997.

one service provider.<sup>52</sup> FDRPs operating in different contexts may report different considerations in their decision making. My pilot study did not limit itself to one service provider; however my study did not capture data on which service providers the participants were from (or where they are located). This is worth addressing in future studies.

Outside of family law, the empirical research becomes very scarce. Under the *Equal Opportunity Act 2010* (Vic) ('EO Act'), members of the public alleging discrimination against certain public bodies may apply to the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') for it to provide dispute resolution services to resolve the complaint. Under section 116 of the EO Act, dispute resolution may be declined to be offered or continued in certain circumstances, including where the 'the matter involves subject matter that would be more appropriately dealt with by a court or tribunal'<sup>53</sup> and 'having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution'.<sup>54</sup> In interviews with five conciliators from VEOHRC, researcher Dominique Allen found that conciliators would often tailor the process to suit the dispute and the participants requests, including by resolving the dispute via a 'shuttle' process (where the parties never meet together) or by directly negotiating with the parties, rather than by having a formal ADR process such as conciliation.<sup>55</sup> In my experience as a former conciliator at VEOHRC (from November 2018 to March 2020) I found that section 116 of the EO Act was used sparingly, and generally in circumstances where the complaint had been lodged at another tribunal. Otherwise, where the complaint was within the scope of the VEOHRC, some form of dispute resolution was always attempted. I note however that Allen's study did not address directly address the use of discretion under section 116 of the EO Act.

Similarly, the recently published report on conciliation by the Australian Dispute Resolution Advisory Council found that there were diverse views from conciliators about how the operation of the conciliators role, though the report itself does not discuss conciliators use of discretion in refusing to offer or cease offering ADR.<sup>56</sup> This by itself may suggest that legislative frameworks which use a conciliation model (often the preferred legislative dispute resolution process)<sup>57</sup> do not contemplate the appropriateness of offering an ADR process, instead focussing on conciliators taking steps to ensure fairness in the process.<sup>58</sup>

There is also little empirical research internationally. In an empirical study of ten civil law mediators who perform mediations in a voluntary setting (that

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<sup>52</sup> Smyth et al (n 8) 7.

<sup>53</sup> EO Act s 116(c).

<sup>54</sup> EO Act s 116(e).

<sup>55</sup> Dominique Allen, 'Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria' (Research Report, Monash University, August 2019).

<sup>56</sup> Australian Dispute Resolution Advisory Council, 'Conciliation: Connecting the Dots' (Research Report No 1, November 2021).

<sup>57</sup> Ibid 4.

<sup>58</sup> Ibid 22-23.

is to say, participants were not required by law to attend), researchers James Wall and Kenneth Kressel noted that mediators have to consider whether to accept a case and that their own goals (being settlement and satisfied clients) were paramount considerations their decision making,<sup>59</sup> though the study did not directly review decisions by mediators to accept a dispute. A study from the Massachusetts Institute of Technology found that mediators of public disputes in Boston responded in vastly different ways to concerns of power imbalances, including by having different views as to when intervention was appropriate and how to intervene.<sup>60</sup>

Regardless, while the empirical research is limited, there are some consistent themes which emerge. These may be summarised as:

- There is little to no cohesive framework for assessing when a given ADR process is unsuitable for a given dispute;
- In most disputes outside of family law, ADR practitioners do not appear to actively consider if the dispute is suitable for ADR before commencing the process;
- Within family law, even with legislative guidance FDRPs appear to have divergent views as to when ADR is unsuitable.

These hypotheses were tested in my pilot study (largely in the context of FDR), with the outcomes of my study largely supporting the above conclusions.

## V PILOT STUDY

### A *Background*

A pilot study is a small-scale test of the methods and procedures to be used on a larger scale.<sup>61</sup> Pilot studies can have multiple purposes, including to test the feasibility of a particular research method and to identify best practices for the larger scale study.<sup>62</sup> Pilot studies can collect useful empirical data, though it is usually not the primary objective.

My pilot study had two primary aims:

1. Test the study's research methodology and instruments with a view to finessing and further developing a more comprehensive research tool to investigate how ADR practitioners use their discretion to either offer, or amend, dispute resolution processes in their practice; and

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<sup>59</sup> James Wall and Kenneth Kressel, 'Mediator Thinking in Civil Cases' [2017] 34 *Conflict Resolution Quarterly* 331, 331.

<sup>60</sup> Alexis Gensberg, 'Mediating Inequality: Mediator's Perspectives on Power Imbalances in Public Disputes' (Masters Thesis Submission to the Massachusetts Institute of Technology, Massachusetts Institute of Technology, 2003).

<sup>61</sup> Miquel Porta, *A Dictionary of Epidemiology* (6th ed) (2014) Oxford university Press.

<sup>62</sup> Malmqvist et al, 'Conducting the Pilot Study: A Neglected Part of the Research Process? Methodological Findings Supporting the Importance of Piloting in Qualitative Research Studies' (2019) *International Journal of Qualitative Methods*.

2. Collect preliminary data and test the feasibility and suitability of my hypotheses, to enable a further larger scale study to be conducted with the benefit of refinement of my hypothesis’.

## B Methodology

The methodological paradigm of the pilot study was qualitative research. This approach was appropriate as the goal of the pilot study was to understand the experiences of ADR practitioners and to identify features and patterns in individual decision making.<sup>63</sup> Given the relative lack of empirical information available, the pilot study aimed to provide further research to understand how ADR practitioners are behaving in practice.

The research method adopted was interpretive phenomenology (‘IPA’). Phenomenology is a discipline that investigates people’s experiences to understand the meanings within them. In the tradition of Heidegger, IPA seeks to understand how others understand their world through understanding and analysing the contextual foundations of their experiences.<sup>64</sup> Phenomenology does not seek to test hypothesis, but rather to provide an open-ended exploration of subjective human experience.<sup>65</sup> IPA seeks to gather insights and provide interpretations of the themes that emerge from the phenomenological investigation through understanding the participant’s ‘lived experience’, coupled with a subjective and reflective process of interpretation, in which the analyst explicitly enters into the research process.<sup>66</sup>

To investigate the lived experience of ADR practitioners and their experiences in assessing the suitability of disputes to ADR processes, ADR practitioners were asked to anonymously complete a survey which reflected on their experiences. Overall, ten questions were asked of the participants, which could be placed in three categories:

- Questions which identified key features of their practice. These questions were: the ADR practitioner’s years of experience; the types of disputes they primarily practiced in; and the ADR framework they primarily used;
- Questions which queried if ADR practitioners ever refuse to offer, or continue offering ADR processes, where they believe it to not be appropriate;

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<sup>63</sup> Burke Johnson and Larry Christensen, *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (SAGE Publications, 3<sup>rd</sup> ed, 2008) 34.

<sup>64</sup> See Johanna Spiers and Jonathan A Smith, ‘Interpretative Phenomenological Analysis’ in Paul Atkinson et al (eds) *Qualitative Analysis* (SAGE Publications, 2019).

<sup>65</sup> Michael Larkin, Simon Watts and Elizabeth Clifton, ‘Giving Voice and Making Sense in Interpretative Phenomenological Analysis’ (2006) 3(2) *Qualitative Research in Psychology* 102, 105.

<sup>66</sup> Katie Reid, Paul Flowers and Michael Larkin, ‘Exploring Lived Experience’ (2005) 18(1) *The Psychologist* 20, 20.

- Questions which investigated the rationales for such decisions being made. These questions included asking participants to identify factors which they have considered in not offering, or continuing to offer, ADR processes, and asking whether participants had ever continued to offer a process when they otherwise considered it unsuitable because of an overarching factor, such as the parties have no other dispute resolution option available to them.

The questions were multiple-choice, but with the option to provide free text responses so as to ensure that pre-coded responses were not unduly limiting or affecting participant answers.

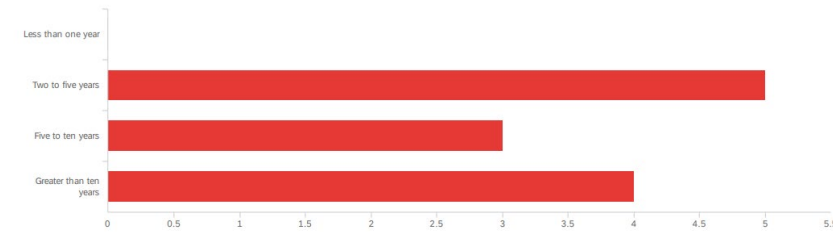
C     *Results*

1     *Demographic of Survey Participants*

Overall, twelve (12) practitioners participated in the survey. Of these, ten (10) identified as FDRPs and two (2) stated that they practiced in another legislative framework. As such, the results are more indicative of phenomenon in FDR than any other ADR framework. As such, I use the terminology of FDR in assessing the results and frame the analysis of my results through the FDR framework. I have included the non-FDRPs in my results and explain how the survey results of these practitioners affect the survey outcomes.

All practitioners reported that they were reasonably experienced, with a majority having over five (5) years’ experience and all having over two (2) years’ experience as practitioners (see Table 1 below). This indicates that the FDRPs are more likely to be reflecting general trends, rather than applying factors in making their determinations which are irrelevant due to a lack of experience in the profession.

**Table 1**  
**Survey Participant Level of Experience in FDR/ADR**



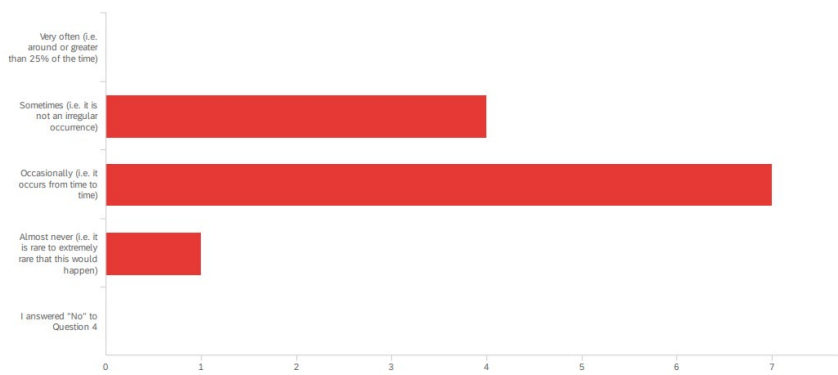
All practitioners bar one stated that they primary practiced a ‘facilitative mediation’ ADR model (the other stated that they practiced ‘FDR’, which likely encompasses a high degree of facilitative mediation). This is important as the facilitative mediation/conciliation model prioritises a process that maximises

the self-determination of the participants, which requires that the processes be nondirective as to content.<sup>67</sup> As such, FDR practitioners who operate under the facilitative model may feel as though the participants are required to have a greater capacity to engage in the process, which may in turn affect how often they screen disputes out of FDR.

2     *How Often is ADR refused?*

Overall, the results of the pilot study broadly show that FDRPs have a wide degree of variance in how they determine to refuse FDR. All participants stated that they had refused to offer or continue with an ADR process due to the nature of the dispute, though they differed on how often they did so (see Table 2 below).

**Table 2**  
**How Often Practitioners Refuse to Offer or Continue With ADR Processes**



Of the FDRP’s, all stated that they either ‘sometimes’ or ‘occasionally’ refused to offer FDR. One ADR practitioner not practicing in family law stated that they ‘almost never’ did so. Further research is required as to whether thresholds for offering ADR services differ between FDRPs and other ADR professionals.

3     *Factors which Affected Determination to Not Offer ADR*

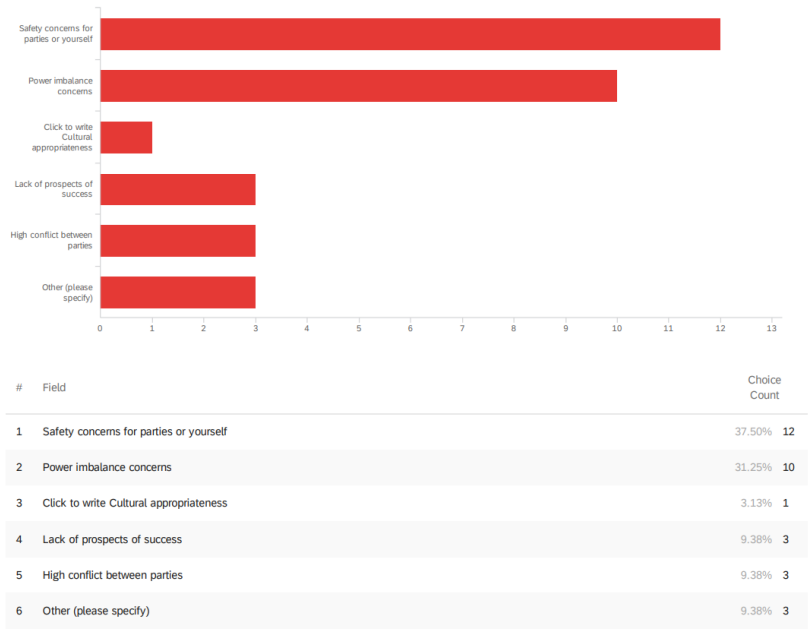
Participants reported a wide variety of factors which affected their decision to not offer FDR/ADR processes (Table 3). Perhaps expectedly, all participants stated that safety concerns were a key factor in determining whether FDR/ADR should be refused. However, participants then gave mixed feedback as what other factors warranted consideration in determining to not move ahead with an FDR/ADR process.

Interestingly, the two participants who did not practice in family law did not list power imbalances as a factor in determining whether to offer ADR. The sample size is too small to draw any proper conclusions, though it does

<sup>67</sup> Mediator Standards Board (n 29) 9.

give some indication that it is worth exploring in greater detail whether power imbalance concerns are a paramount consideration in contexts other than family law. Given the intensely personal nature of family relationships and high propensity of domestic violence, as reflected in the comparatively more detailed literature informing when FDR should be offered than ADR in other contexts, it is plausible that FDRPs may be much more conscious of power imbalances and other factors which may make ADR not appropriate than practitioners in other fields. However, given that power imbalances can manifest in any dispute, the potential lack of consideration of power imbalances in ADR processes outside of family law warrants further investigation.

**Table 3**  
**Factors Which Influenced when Practitioners Did Not Offer ADR**



Beyond safety concerns and power imbalance concerns, participants gave a variety of responses regarding what factors were relevant in determining whether to offer FDR/ADR. Three participants cited high conflict and a lack of prospects of success as relevant considerations in determining whether to offer FDR/ ADR. In the ‘Other’ category, participants listed: psychological or cognitive capacity of the parties to negotiate; the positional nature of the parties; safety of any children involved; and mental health, drug or alcohol concerns.

These results indicate that a wide variety of factors are considered by at least some practitioners in determining whether to offer FDR/ADR. In the FDR

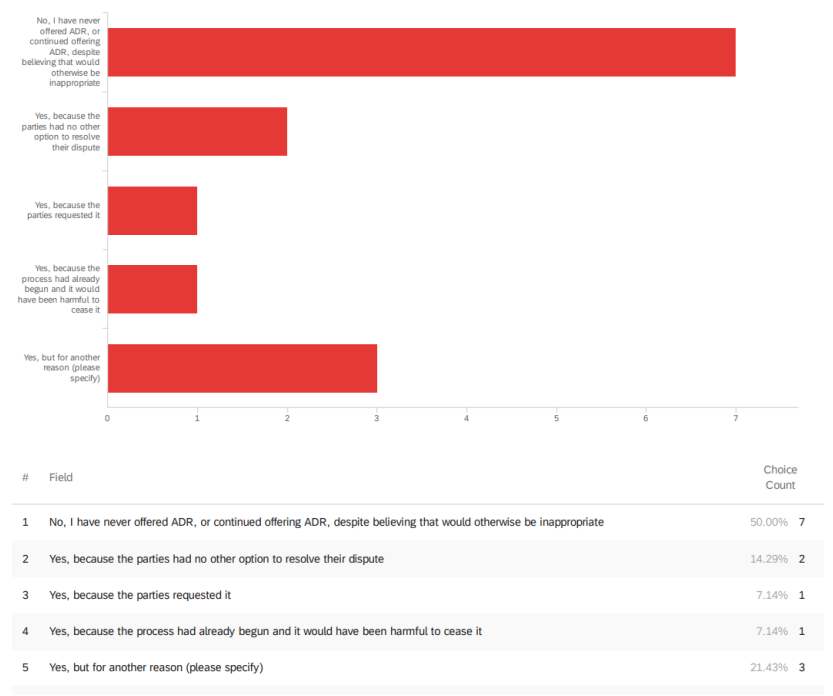
context, while some of the considerations given by the survey participants relate to the ability of parties to negotiate freely, other factors do not. As such, it appears that some FDRP's are acting outside of their statutory authority in determining to not offer FDR. Similar considerations are reflected in determining whether to cease offering ADR services once they have commenced. In addition to the reasons outlined in Question 6, six (6) participants also stated that they have ceased ADR in circumstances where parties show a lack of willingness to participate in ADR.

This again supports the observations of the Certifying Mediation study. More generally, these results suggest that FDRPs are acting inconsistently in how they determine not to offer FDR, including in the factors given consideration in making this determination.

This conclusion is further enforced by the results of Question 9 of the survey, which asked practitioners whether they had ever continued offering ADR/FDR in circumstances where they otherwise would have considered it not appropriate. While seven (7) participants stated that they had never done so, two participants stated that they had continued with FDR when they otherwise would not have on the grounds that the parties would have been unable to otherwise resolve their dispute, while one participant stated that they continued the process as it had already begun and they felt it would have been more harmful to stop, while another continued the process at the parties request.

First, the responses to these questions indicate that at least some practitioners are making decisions to allow FDR processes to commence or continue when they otherwise would not do so for one of the reasons listed in Question 6 or 7. Put another way, for FDRPs at least, where parties show a willingness to engage in FDR or where the practitioner felt that they had nowhere else to go (i.e., perhaps they were unlikely to be able to commence legal proceedings), these were key factors which led to FDR being offered or continued.

**Table 4**  
**Factors Which Influence if and when ADR Practitioners Continue with an ADR Process in Circumstances where They Would Otherwise Not Continue the Process.**



Once again, these results align with the results of the Certifying Mediation study, which found that practitioners were sometimes driven to offer ADR services where they otherwise would not have, especially where practitioners perceived that ‘...the client does not have the financial resources to go to court.’<sup>68</sup>

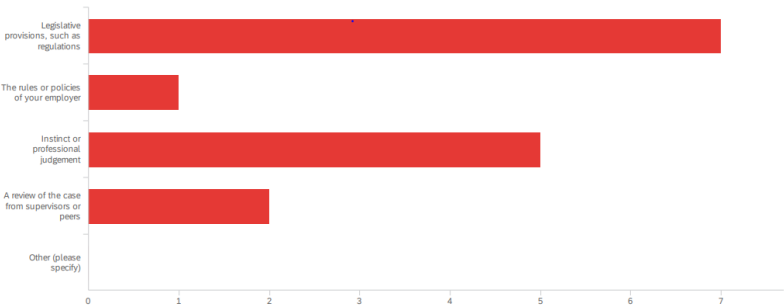
The survey did establish possible reasons for these disparities, which should be drawn out further in the full-scale study. Question 8 of the survey asked participants to identify their *primary* consideration in how they make their decisions to not offer or cease offering ADR. Seven (7) participants, all FDRPs, stated that legislative guidelines were their primary consideration. This makes sense in the context where the family law legislative framework offers reasonably detailed guidelines as to how FDRPs to are determine whether or not to offer FDR. However, it does raise the possibility that FDRPs are interpreting the legislation inconsistently. Five participants found that ‘instinct’ or ‘professional judgement’ was the primary consideration, one stated the rules or practices of their employer, and two participants primary consideration was a review of the cases from supervisors (See Table 5 below).

<sup>68</sup> Smyth et al (n 9) [xii].

Using one’s professional judgement, the individual practices of an organisation, or reviews from supervisors, are all subject to the rationales of individual practitioners (or at least individual organisations) and therefore are plainly open to different interpretations and understandings developing from practitioner to practitioner.

**Table 5**  
**ADR Practitioner Primary Considerations in How They Make Their Decisions to Not Offer or Cease Offering ADR.**

Q8 - What is your primary consideration in deciding whether to not commence offering, or cease offering, ADR?



4 Limitations of the Pilot Study

There are several clear limitations to the results of the pilot study. First and most obviously, the sample size and make up of the pilot study is a limitation on the effectiveness of the results, with 12 participants offering a fairly limited sample size. However, it is not an inconsistent sample size with the other empirical studies outlined in Part II. When it comes to practices outside of family law, the sample size becomes very limited (n=2), which is insufficient to draw any conclusions from the research with respect to these fields.

Low participation rates of practicing mediators and other ADR professionals in empirical studies is a well recognised barrier to empirical research in this space, for reasons which have been hypothesised to include issues of perceived respect for the profession of dispute resolution, and trust in researchers and the goals of their studies.<sup>69</sup> My study was conducted during the National Mediator Conference, which was designed to overcome some of these participation challenges by conducting the study with the approval, and in the framework of, a trusted conference and where participants were less likely to be distracted by other work commitments. However, with the

<sup>69</sup> Lola Akin Ojelabi and Alysoun Boyle, “Playing Devil’s Advocate”: Reality Testing in the Context of Mediation in Australia’ (Report to the Mediator Standards Board, Australia, December 2022) 23.

conference being held entirely online, this approach was likely less effective than it might otherwise have been.

By making the conference online, I was limited in my capacity to engage with ADR practitioners and encourage greater participation. I was restricted to online communication with practitioners during my presentation, which was in the context of family law. As such, my engagement became limited to largely family law practitioners; this is reflected in the demographics of the final participants. It is also possible that there may have been a cross-over of participants between my pilot study and the Certifying Mediation study, which could affect the extent to which my study supports the outcomes of the Certifying Mediation study.

Secondly, the use of a survey as a research tool limits the extent that participants are able to provide insights into their decision-making and so limits the extent of the phenomenological investigation.<sup>70</sup> While free form text boxes were available, these were not used to any great effect by the participants and may have been limited by the numerous pre-coded responses available. As such, further research in this area would benefit from semi-structured interview questions, which enable a deeper exploration of the experiences of the participants.

Thirdly, the survey questions may have had limitations in question design. Question design is crucial as the fixed design means the researcher cannot evolve questions during data collection, or probe or clarify questions.<sup>71</sup> Question 8, which asked participants if participants continued offering ADR when they otherwise would deem it not appropriate, was responded to by one participant as 'this question does not make sense'. As such, there is some evidence that participants may not have accurately understood what this question was asking and should be re-drafted in the further study. An interview data collection method may also assist to clarify the questions for the participants.

## VI DISCUSSION AND FUTURE RESEARCH

Overall, several themes emerge from the results of the pilot study. The results support the existing limited empirical research that suggests that within family law, even with legislative guidance, FDRPs appear to have divergent views as to when ADR is unsuitable, with a range of factors being considered by practitioners, including some outside of the legislative framework. In particular, the results support the results found in the Certifying Mediation study regarding the variance how FDRP's determination whether a dispute is suitable for FDR, including that some FDRP's may be using factors not listed in the 2008 Regulations in making their determinations.

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<sup>70</sup> See Virginia Braun et al, 'The Online Survey as a Qualitative Research Tool' (2021) 24(6) *International Journal of Social Research Methodology* 641, 642, which argues that while surveys traditionally are perceived as having this limitation, this doesn't necessarily have to be so where designed with sufficient free-form text responses.

<sup>71</sup> Ibid 647.

The pilot study has also given some initial insights into more 'hidden' factors FDRPs may be considering in making their decisions, including considerations as to whether the dispute is likely to resolve, the capacity of the parties to seek redress through litigation, and the desire of the parties. The results also show that FDRPs tend to actively consider the legislative guidance when making their decisions, however they are also influenced by other factors such as organisational policy and peer review. There are some other factors which may be playing a subtle role but was difficult to pick up in a multiple-choice study, particularly because the answers aren't flattering to the FDRP. Specifically, some FDRPs may be inclined to deem disputes not appropriate where there are difficult personalities involved and the prospect of conducting the ADR process may seem overwhelming or unenticing for the FDRP. FDRPs may seek to keep settlement rates high, particularly as this is a measured metric in their organisation, and so may be more inclined to screen out disputes which seem unlikely to resolve. These more self-interested reasons for screening out disputes may be present in the results of my pilot study, and subsequent research would benefit from finding ways to address these or account for these more directly.

It is perhaps surprising that most participants stated that they only 'occasionally' refused to offer FDR, given the results of the Certifying Mediation study which found that approximately 25% of all certificates issued in the family law framework are 'Not Appropriate for FDR' certificates.<sup>72</sup> This could be explained by the relevantly small and congruent sample sizes of both studies. Further, the Certifying Mediation study only interviewed practitioners from one organisation, while this pilot study only had limited participants. As such, the organisational practices affecting the FDRPs in the Certifying Mediation study may have had a significant effect on those results. Clearly, further research is required to ascertain more broadly the prevalence of how often FDR (and ADR processes more generally) are refused. It would be particularly beneficial for a wider sample of FDRPs to be interviewed specifically on how they assess disputes for suitability.

The results also provide initial insights into which factors may be paramount considerations for FDRPs in determining whether to screen parties out of ADR disputes. Particularly, FDRPs appear willing to keep a process going which may otherwise be screened out in circumstances where the parties express that the FDR process is their only option for resolving the dispute. The Certifying Mediation study found that FDRPs may sometimes continue with an ADR process where they feel that there is nowhere else for the parties to turn, and this was supported by this pilot study. Further, the pilot study found that FDRPs may also be taking into account the views of the parties and their perceived best interests of the children in making such decisions. These results show just how individualistic decision making of ADR practitioners may be. It would be beneficial for further research to investigate what is influencing ADR practitioners in making such decisions.

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<sup>72</sup> Smyth et al (n 9) 25.

Overall, the results suggest that the decision-making process of FDRP's are complicated, and involve weighing a significant number of considerations. To further investigate how such decisions are being made, the insights of the pilot study should be developed in a more comprehensive investigation which involves a data collection method that allows for a deeper exploration, such as interview processes.

Outside of family law, the limited results with respect to non-family law ADR practitioners also warrant further investigation. The limited empirical research and the results of this pilot study suggest that outside of family law, considerations with respect to 'screening' parties out of inappropriate ADR processes may not be a paramount consideration, and with little guidance to support ADR practitioners, there may be quite divergent views across practitioners and forums.

In conclusion, the pilot study has found that there are divergent approaches in how ADR practitioners approach screening disputes that are not appropriate or suitable out of ADR processes. Future projects would benefit from updating the survey questions to account for aspects that were not accounted for in my pilot study, such as geography and self-interested reasons for screening disputes. At times, there were limitations in the research questions which will benefit from review. Finally, notwithstanding the potential limitations of structured interviews, the ability to interview and delve deeper into survey responses to understand the rationales behind the answers may lead to a deeper understanding how assessments are conducted.