

The Mediation of Disputes Involving Violence against Women

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The following is an excerpt from the paper Professor Astor delivered at the DVIRC Annual Family Law Forum.

I first came to write about the mediation of disputes involving violence because of a personal history of involvement with issues of violence against women. In the late 1970s and the early 80s, I was involved in establishing a refuge for battered women in West London. I came to Australia in 1985 and took an academic job at Sydney University. I was teaching and writing in family law and discrimination law and, because of working in those two areas, became very much interested in alternative methods of resolving disputes. But my intellectual and my personal involvement with issues of violence made me only too aware of the likely problems of mediating family disputes that involve violence, and so I wrote what I think was probably the first article that raised these issues in the Australian context. I remember very well the reaction to it and the initial resistance from mediators to the idea that disputes involving violence were unsuited to mediation.

Despite that resistance, discussion about the problems of mediating disputes involving violence against women continued and our understanding of the issues, as well as our policies and practices developed apace. Support for that work came from, for example, the National Committee on Violence against Women, which funded me to write a *Position Paper on Mediation*. The Federal Attorney General's Department further supported the development of policy, practice and training in the area and of course, mediators discussed and debated and developed policy and practice.

However, just at the point when many mediation agencies thought they were doing well in identifying violence and handling it appropriately, the Keys Young Report was published. This was a research evaluation of family mediation practice on the issue of violence, funded by the Attorney General's Department, published in 1996. It shocked many mediators with its revelation that some mediation agencies that thought they were identifying violence and handling it well were not, in fact, doing well at all. For example, women were prepared to reveal violence in a telephone interview to the Keys Young researchers when that violence had not been detected by the mediation agency they had just attended. However, as a result of this research there was further policy development. The result is that today many mediation agencies have careful, detailed policies on violence. Those policies are supported by training and education on violence for intake staff and for mediators.

There will always be room for further improvement but nevertheless I want to pay tribute to all of those mediators, domestic violence professionals and academics who have worked in this area since those early days. The dispute resolution sector, I think, is marked by its energy and its creativity. It has the originality and flexibility of a comparatively new area of endeavour and the richness of ideas that comes from multiple disciplines. Mediators have kept up a dialogue and been open to learning difficult lessons about the impact of violence in their work and have made important changes. Those who work in the area of family violence also deserve tribute for persisting in raising the issues, for providing training and also for keeping up the dialogue about mediation and violence.

However this is an area that does not stand still. The most immediate challenge we now face is the impact of the changes to family law and family dispute resolution created by the *Shared Parental Responsibility Act 2006*. These reforms responded to concerns about family violence, but more substantially to the

agenda of the fathers' rights movement. The point at which these two contradictory impulses come together is in family dispute resolution.

Where there is a dispute about children which the parties wish to litigate, they must go to family dispute resolution (FDR) and there make a 'genuine effort' to resolve their dispute. There are a few exceptions to the requirement to go to FDR. The most important, for our purposes, is where the parties have an agreement and there are consent orders, or where there are reasonable grounds to believe there has been abuse of the child, family violence, or a risk of either. FDR practitioners must make an assessment about the suitability of dispute resolution in cases of violence, but they have also been given some new jobs. First they must issue certificates about whether or not the parties in FDR have made a 'genuine effort' to resolve their disputes. Second, they are obliged to inform the parties about arrangements involving the child spending equal time or substantial time with each parent. It is clear that the Government's intent is that FDR practitioners will be the agents through which equal time arrangements for the care of children will be brought into effect.

Some obvious examples of issues which arise from these changes are: what is a genuine effort by someone who is the target of violence? Will the victims of unidentified (or even identified) violence be assessed as making a genuine effort in mediation if they refuse to consider an apparently reasonable parenting arrangement because they believe it will provide opportunities for control or for violence? How will FDR practitioners deal with demands, supported by the legislation, by controlling and violent men for equal or substantial time with their children? The Act, at Section 63DA, says that FDR practitioners must inform the parties that if a child spending equal time with them is reasonably practical and in the best interests of the child the parties should consider an option of equal time, and there are mirror provisions for substantial and significant time. Where will FDR practitioners place weight in interpreting this section? Will they place greater weight with equal time or will they focus on practicality and the welfare of the children?

Research by Helen Rhoades and Ann Sanson and myself, with the help of others, supports the view that there are several things about the practice of FDR practitioners that may support an interpretation of the legislation in ways that effectively protect the interests of vulnerable people in mediation. These protective influences are mediator neutrality and the reliance of FDR practitioners on behavioural science research to inform their understandings of the best interests of children.

Let me look, first of all, at mediator neutrality. I would argue strongly that despite the fact that shared parenting legislation gives dispute resolution practitioners the tasks of assessing for violence and for genuine effort, FDR practitioners cannot and should not abandon their neutrality. The discussion paper *Behind Closed Doors* which is launched today raises the question: is neutrality no longer as important as it was? I argue that it has actually become even more important since these amendments. The research with Helen and Ann shows that FDR practitioners have a strong attachment to neutrality. That research is not about neutrality, but about what makes for good relationships between family lawyers and FDR practitioners. Consequently the FDR practitioners we interviewed were not asked direct questions about neutrality. But neutrality was one of the descriptors that they raised repeatedly as a defining characteristic of their role. What those mediators meant by neutrality was not being aligned with one side or the other, and not imposing their own judgements on the parties. Interestingly the neutral space claimed by mediators was also a space occupied by the children. Our FDR practitioners were clear that their role was to direct the parties' attention to the welfare of the children.

Whilst I do not have time to explore all of the implications of this view of neutrality, one of the things I think it means is that FDR practitioners should have violence in the forefront of their minds when making decisions about genuine effort and when talking about equal time with the parties because to do so, is to protect the interests of the children. Further, not aligning themselves with either party should raise concerns for FDR practitioners about demands for equal time, when those demands are made by violent men with an agenda for control and not an agenda of child welfare.

Not only is neutrality important to mediators in practice, it is fundamental to the legitimacy of FDR. If FDR practitioners become simply a policy arm of government without independence of thought and action,

that legitimacy will begin to be eroded. People will start avoiding FDR if they feel that it is not reliable, that it is not protective of people's interests, that it is not producing fair agreements. They will use agreements and consent orders instead. If agreements are made with legal advice then we rely upon lawyers to correctly identify and deal appropriately with violence. Unfortunately, our research came up with some concerning statistics about the capacity of lawyers to identify violence. Although our research was not focussed on violence, we asked lawyers what percentage of the cases in their practice involved violence, and the numbers of cases that they identified was so low, and so different from what we know about the incidence of violence in separated and divorcing population, that I have some concerns about the capacity of lawyers to identify violence effectively. If violence is not identified then it cannot be taken into account when consent orders are being framed. If those agreements are made without legal advice and support, especially in cases of violence, they are unlikely to be fair and unlikely to be protective of the interests of the children.

Our research also showed another aspect of the practice of FDR practitioners that acts against the legislative push towards promoting equal time in parenting arrangements. I am not opposed to equal time or shared parenting after divorce per se. My concern is that these things will be bargaining chips in the hands of people who are violent. And whilst the present government may support a push towards equal time, the research does *not* support any particular formula or approach to parenting after separation and divorce. FDR practitioners, in our research, used behavioural science evidence about the best interests of children - they looked to the research about what benefits children when making agreements after separation and divorce. And that research does not support equal time arrangements, but emphasises the diversity of children's needs. Even the most enthusiastic of the experts who support shared parenting after divorce also recognise that the children who fared worst after divorce are children in families where there was shared parenting and also high conflict. FDR practitioners are grounded in and use social and behavioural science research and the understandings which are derived from it to guide their practice. Our FDR practitioners clearly had a focus not on the type of parenting arrangements but on the quality of parenting. That focus brings violence and controlling behaviours to the forefront for consideration.

A further finding from our research is the sophistication of the understandings of FDR practitioners about violence and its impact on mediation. They spoke in detail about the training that they had received and the policies that they were applying in this area. However, these findings came from only four services and, with the exponential increase in services in this area we must be concerned about the consistency of standards.

There are many other issues I could raise, for which there is not time. Let me close by saying, that we have been living in interesting times for almost two decades in this area of mediation of disputes involving violence. And although we will not always agree, I hope that we will continue to listen with care to all perspectives and continue the healthy dialogue that has marked this important area so far.