

Behind Closed Doors Family Dispute Resolution and Family Violence - New Discussion Paper

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DVIRC's new Discussion Paper considers the dilemmas and potential practice approaches for family dispute resolution (FDR) services in dealing with cases of family violence under the new family law system. This article provides an overview of DVIRC's interest in the issue, and an edited version of the executive summary of the Discussion Paper.

Background to the Discussion Paper

DVIRC is a statewide service that provides training and resources on family violence. Over several years, DVIRC has studied the evidence and debates about family dispute resolution (FDR) and family violence, developed relationships with FDR service providers and provided training for FDR practitioners.

In 2005, DVIRC and Relationships Australia Victoria (RAV) undertook research into women's experiences of dispute resolution (also known as mediation). We interviewed women who had experienced family violence and who had been through the dispute resolution process. Those interviewed had accessed a range of FDR services (for further information about the project see Bailey and Bickerdike 2005). The study showed that some women found mediators to be dismissive of their experiences of family violence, which affected their capacity to participate in the process. All the women found the sessions emotionally difficult and many found that they were dominated by their ex-partner. The ex-partners' intimidating behaviour was not always contained by the mediator. Some women felt pressured to make agreements that were not in the best interests of their children or themselves. The findings of the research have informed DVIRC's Discussion Paper.

Under the new family law system in Australia it is compulsory for separating parents to attempt FDR prior to taking their parenting dispute to court. FDR is a process in which an independent person assists separating parents to

resolve disputes through negotiation and compromise. The Federal Government is establishing Family Relationship Centres (FRCs) across the country to provide FDR services. The government wants separating parents to 'sit down, focus on their children and agree on parenting arrangements rather than going to court' (AGD 2005a: 1).

DVIRC, like many others working in the family violence field, is very concerned about family dispute resolution taking place in family violence cases where power imbalances between the parties are likely to result in risks to safety and otherwise disadvantage women and children. However, as outlined below, DVIRC believes that despite family violence cases being exempted from compulsory FDR, it is inevitable that many women who have experienced violence will attend FDR services. DVIRC's discussion paper therefore seeks to explore ways in which FDR professionals can most effectively respond to family violence and to inform other professionals seeking to support women through this process.

Executive Summary

FDR is promoted as a faster, cheaper and less adversarial way to resolve family disputes than court. However, there are also potential disadvantages with FDR and it may not be suitable for all separating couples. FDR is not required to adhere to legal principles and may therefore disadvantage the less powerful party to the dispute. Family violence services and other professionals are particularly concerned about FDR taking place where family violence has occurred. FDR may not be appropriate

in family violence cases for the following reasons:

- victims of family violence may experience risks to their safety and wellbeing in the FDR process
- FDR practitioners may not identify family violence and/or may underestimate the impact of the various forms of violence on women and children
- family violence creates a power imbalance that impacts on the parties' capacity to negotiate on an equal footing
- victims may feel intimidated or pressured into parenting arrangements that are unsafe, unfair and/or not in the best interests of the children.

There is an exemption from compulsory FDR in the new family law system in cases where family violence or child abuse is present. However, there are a number of reasons why FDR is still likely to occur in such cases. These include:

- For the exemption to apply and the parties to bypass FDR, the court must be satisfied that there are reasonable grounds to believe that violence occurred. Due to the hidden nature of family violence victims may be fearful that they will not be able to 'prove' to the court the family violence occurred.
- Although FDR services can 'screen out' family violence cases and provide a certificate for the court, family violence may not be identified by FDR services.
- Even where family violence is identified, FDR services have discretion in determining whether family violence cases are appropriate for proceeding with dispute resolution.
- Some women who have experienced family violence may choose to access FDR services rather than try to negotiate on their own with their ex-partner or go through the court process.

It is apparent that many women who have experienced family violence will be accessing FDR services in the new family law system. It is therefore imperative that FDR providers are fully aware of the impact

of family violence and are able to effectively respond to victims and perpetrators. Specific policies and practices are necessary to ensure that women's and children's safety is paramount.

It is also important that family violence workers, lawyers and other professionals are able to prepare victims for dispute resolution and support them through the process. The discussion paper explores ways that FDR providers can respond to clients who are 'screened out' due to family violence as well as those who proceed with FDR. Some of the approaches explored in the paper include:

Screening and risk assessment:

FDR services are required to undertake screening and risk assessment for family violence. Screening and risk assessment are necessary to ensure client safety. It is particularly important in FDR services because parties are in the process of separation, which is a time of heightened risk. In FDR, screening and risk assessment have the added dimension of being necessary to determine whether or not FDR is appropriate. Legislation prescribes that FDR practitioners are only permitted to undertake FDR in appropriate cases. This involves assessing whether both parties have the capacity and willingness to participate on an equal footing, and consideration must be given to family violence. There is a need for a detailed model for screening and risk assessment that is consistent across FDR services. This model should include a process for determining when it is appropriate to proceed with FDR in family violence cases, which takes into consideration the likelihood of reaching fair and safe agreements that are in the best interests of the children.

Safety measures and safety planning:

FDR services can implement a range of safety and security measures such as undertaking individual intake interviews

for all clients on separate days to their ex-partner and having separate waiting rooms. When family violence is identified, safety plans should be developed with the client regardless of whether FDR proceeds.

Specialised FDR formats: If the parties to a dispute provide informed consent to participate in FDR and the practitioner determines that it is appropriate to proceed, there are a number of specialised FDR formats that can be utilised. For instance, shuttle mediation, in which the parties are in separate rooms or venues, and co-mediation with a gender-balanced team, can be effective in reducing the risks to the victim's safety and wellbeing. Techniques such as short sessions, time-out and private sessions with individual parties can also be useful.

Advocacy and support: Having access to professional support from family violence workers before, during and after FDR can assist victims through the process. It is also particularly important for victims of violence to have access to legal advice. Ideally victims of family violence should be permitted to have a legal representative present during the FDR sessions; as this is not permitted in many services, however, FDR practitioners and family violence workers should encourage victims to access legal advice before participating in FDR and before signing any parenting agreements.

Addressing issues arising from family violence: Family violence continues to impact on the safety and wellbeing of women and children after separation. It is therefore necessary to address safety concerns in formulating parenting arrangements through FDR. It is in children's best interests to ensure that parenting arrangements do not place them at risk of experiencing or witnessing family violence.

Power imbalances between the parties may need to be addressed to ensure both parties are able to participate effectively in the FDR process and to ensure agreements reached are in the best interests of their children.

Practitioners may be concerned that addressing power imbalances will compromise their neutral role. However, there appears to be less focus on practitioner neutrality in the new family law system and practitioners are required to help parents to focus on the needs of their children.

Recommendations

DVIRC has made a number of recommendations regarding FDR and family violence. The key recommendations focus on the need for consistent policies across FDR services. This includes effective screening and risk assessment to identify family violence and to determine if FDR should proceed. In cases where FDR proceeds, a specialised approach that involves highly skilled practitioners, specialised FDR formats, and access to support and advocacy is essential. There is a role for family violence services to work with FDR services to develop policies, procedures and referral pathways, and to provide support to clients. Additional resources will be required by FDR services and family violence services to ensure responses are adequate.

It's too early to tell what the experiences of women undertaking FDR in the new family law system will be. There is a risk that victims of family violence may feel compelled to participate in FDR which could result in parenting agreements that continue to place their, and their children's, safety and wellbeing at risk. The fact that FDR occurs 'behind closed doors' (Boulle 2006) means that the impact of family violence can remain private. It is therefore essential that monitoring of FDR services to evaluate the safety and fairness of both the process and the outcomes start immediately.

References

- Attorney-General's Department (2005a), *Operational Framework – Family Relationship Centres*, October 2005, online: www.facs.gov.au
- Bailey, A. and Bickerdike, A. (2005), 'Family violence and family mediation', *DVIRC Quarterly*, Issue 1
- Boulle, L. (2005), *Mediation: Principles, process, practice*, second edition, LexisNexis, NSW.

