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# **FDR and victims of family violence: Ensuring a safe process and outcomes**

**Rachel Field**

## **Abstract**

Family dispute resolution (FDR) is a positive first-stop process for family law matters, particularly those relating to disputes about children. FDR provides the parties with flexibility within a positive, structured and facilitated framework for what are often difficult and emotional negotiations. However, there are a range of issues that arise for victims of family violence in FDR that can make it a dangerous and unsafe process for them unless appropriate precautions are taken. This article discusses the nature of FDR and identifies the many positive aspects of it for women participants. The article then considers the nature and dynamic of family violence in order to contextualise the discussion that follows regarding concerns for the safety of participants in the FDR process. Finally, it offers some suggestions about how Australia could approach FDR differently to make it safer for victims of family violence.

## **Introduction**

Australia's family law system now emphasises the use of family dispute resolution (FDR) for the resolution of post-separation disputes about children. Parents in such disputes are now effectively required to attend family dispute resolution before they can file proceedings to have their matter determined by a Family Court.<sup>1</sup> [1] Although victims of family violence can be screened out of FDR, or exempted from it by the court, many victims of family violence find themselves in FDR negotiating about arrangements for the children with the person who has perpetrated violence against them. This might be because they do not have other options for resolving the dispute (for example, they are unable to afford the costs of going to court or they are fearful of the prospect of representing themselves in court proceedings), or because they want to feel empowered by negotiating arrangements for the children themselves and feel that they can do this within the structured environment of FDR with the assistance of a family dispute resolution practitioner (FDRP).

When the new system was introduced in Australia in 2006 it was described as "the most significant reform to the family law system in 30 years".<sup>2</sup> [2] The reforms were based on a view that FDR is a positive process for post-separation disputes because it provides the parties with flexibility in terms of process and outcome, and it also provides a positive, structured and facilitated framework for what are often difficult and emotional negotiations. Therefore, FDR in Australia is now seen as the most appropriate dispute resolution process of first resort in post-separation parenting disputes. Court proceedings are considered a last resort, for use only when the parties cannot resolve matters for themselves through FDR. Before discussing issues for victims of family violence in FDR, it is important to acknowledge that the experiences of victims of violence, whilst sharing some commonalities, are diverse and informed by a range of factors specific to each individual person; for example, race or socio-economic background.

## **FDR in Australia**

The term "family dispute resolution" is defined in s 10F of the Family Law Act 1975 (Cth) as "a process (other than a judicial process): (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all the parties involved in the process".<sup>3</sup> [3] This definition emphasises FDR as a process that is "helping" and non-adjudicative. A range of informal approaches to dispute resolution, such as

counselling or conciliation, can satisfy this broad definition. However, mediation is the key form of FDR currently being used in Australia under the legislation.

Mediation is a dispute resolution process that is "an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited (or no) authoritative decision-making power".<sup>4</sup> [4] Critically, the mediator (or FDRP) does not make a decision for the parties. The mediator's role in the process is to assist the parties to negotiate together, to work co-operatively and collaboratively towards a mutually agreeable resolution of their dispute. The mediator's role is also to help the parties to reach outcomes that are in the best interests of the child or children. The fact that the mediator's role is focused on controlling the process is a positive aspect of FDR because it means that the process provides the parties with an opportunity to take control of the dispute itself. This is empowering. It also means that the parties are supported in working out imaginative outcomes to their dispute that address the particular needs and interests of their particular family – outcomes that may not be possible if the matter were decided by a court.

In mediation the parties' emotions can also be acknowledged and their capacity and competence in making their own decisions can be recognised. The mediation process can also be said to provide a more constructive, respectful dispute resolution experience for parties, at least when compared to the adversarial nature of court processes. Certainly, too, mediation can potentially save parties from the heavy individual costs (both financial and emotional) that almost inevitably result from going to court. The positive nature of mediation as a dispute resolution process in family matters is clear. For women in particular it can be said to be a gender appropriate and constructive approach to resolving post-separation disputes about children.

### **Positive aspects of mediation for women**

Mediation can be a very positive process for women. Indeed, mediation can even be said to be consistent with "feminist values and beliefs",<sup>5</sup> [5] and claimed as an "ally of feminism".<sup>6</sup> [6] This is because the aim of mediation is to be an empowering process that provides a constructive, positive, collaborative negotiation environment in which co-operative bargaining and consensus decision making are made possible.<sup>7</sup> [7] Research conducted in the United States has confirmed that many women react more positively to the mediation environment than to court processes. According to this research, "women in custody and divorce mediation have reported that mediation enabled them to have a voice and express their views, and they perceived that they had equal influence over the terms of the agreements".<sup>8</sup> [8]

Mediation has the potential to be empowering for women because the major goal of the process is to empower the parties to achieve self-determination.<sup>9</sup> [9] The principle of party self-determination means that the parties do not have a decision imposed on them by the mediator. Rather, the mediator helps the parties to reach their own resolution of the dispute.<sup>10</sup> [10] The mediator's role in FDR is to uphold party self-determination by:

- supporting the active and direct participation of the parties in communicating and negotiating with each other;
- facilitating party choice and control in their mutual decision making;
- involving the parties in the creation of options for settlement; and
- supporting the parties in taking control of both whether they will come to an agreement, and also the terms of that agreement.<sup>11</sup> [11]

In this way, women in mediation can experience a significant level of control over the dispute and its outcome. This is a level of control that they would not experience, for example, in

court. As Cooks and Hale have said, self-determination distinguishes mediation "from virtually all other third-party approaches to conflict resolution".<sup>12</sup> [12] It is empowering for women that the principle of party self-determination in mediation provides them with a high level of control over their dispute. It is also empowering for women that their right, and their capacity, to make their own decisions is recognised.<sup>13</sup> [13] The mediation process assumes that women have the knowledge, ability and competence to work out an outcome to the dispute that deals adequately with their own needs and interests.<sup>14</sup> [14] Mediation also allows women "to speak for themselves";<sup>15</sup> [15] it gives women a voice,<sup>16</sup> [16] which can express emotion, and recognise the relevance and importance of people and relationships.<sup>17</sup> [17] Therefore, as empowered parties in mediation, women are enabled "to determine their own fates",<sup>18</sup> [18] and they can experience fairness, dignity and validation.

Mediation is also a positive dispute resolution process for women because it empowers both parties and therefore creates a level playing field for negotiations. For this reason, mediation can be said to reject gendered notions of power which advantage and privilege men. This is partly a result of the fact that party self-determination in mediation is uniquely relational in nature. That is, party self-determination in mediation requires party connection, co-operation, collaboration and consensus. The rights and entitlements of the individual are not emphasised, as might be the case in the competitive, adversarial environment of the court room. Rather, in mediation the parties are supported in reaching an integrated solution to their dispute that responds to each party's concerns, needs and interests, not just the needs and interests of one party.<sup>19</sup> [19]

Therefore, in valuing women appropriately and respecting their autonomy and capacity to negotiate for themselves, mediation can be said to reject the usual dominance of men in traditional patterns of hierarchical relationships.<sup>20</sup> [20] Indeed, the increased power women can experience in mediation can even be said to create the potential for them to work towards overcoming many of the negative gendered social, political, and economic influences on their lives.<sup>21</sup> [21]

A particularly important aspect of party self-determination for women in mediation is that the parties are supported in reaching an agreement that is tailored to their individual, specific, personal circumstances. The range of outcomes and options available to the parties to resolve their dispute is limited only by the parties' own levels of creativity and imagination. Menkel-Meadow in the United States has coined the phrase "remedial imagination"<sup>22</sup> [22] to refer to solutions which the parties craft themselves to best address their own needs and circumstances.<sup>23</sup> [23] These individually tailored solutions are far more flexible and specific to the needs of the parties than the outcomes available through court processes.<sup>24</sup> [24] To some extent, at least, this means that mediation can be said to provide women with a means of achieving social change, because they are able to work around the restrictive limitations of gendered legal remedial norms; and they can challenge the male-centred, male-created legal forms and values of the legal system.<sup>25</sup> [25]

Clearly, then, from the perspective of women, there are many characteristics of mediation that support its increased use in post-separation parenting disputes. Women can experience mediation as a very positive process, and they can use it to achieve just and fair outcomes for their families.

On the other hand, the self-determination imperative of mediation can be a disadvantage for vulnerable parties. This is because it requires vulnerable parties to negotiate effectively on

their own behalf. Many parties to post-separation disputes have a significantly reduced capacity to argue rationally for their own interests, and also often a reduced capacity to focus on the best interests of the child, and to be creative in generating options to resolve the dispute. Power imbalances between the parties are a common feature of post-separation disputes. In particular, power imbalances caused by family violence are prevalent in post-separation disputes. When mediation is practised in a situation of power imbalance caused by family violence, the process itself can contribute to entrenching and exacerbating a party's vulnerability, and unjust outcomes can result. In order to contextualise the discussion of the disadvantages for victims of family violence in mediation, the next section briefly discusses the nature of family violence.

### **Family violence in Australia**

An understanding of the nature and dynamic of family violence is central to appreciating why mediation can be a problematic approach to resolving family disputes where there is a history of family violence.

The term "family violence" is used in this article to refer to all forms of violence perpetrated in domestic relationships; for example, physical, emotional, financial, psychological, and social violence.<sup>26</sup> [26] The Family Law Act 1975 (Cth) defines family violence as "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety".<sup>27</sup> [27]

There is a lot of evidence to support the fact that family violence is gendered violence. That is, whilst some perpetrators of family violence are women and some victims of family violence are men, most commonly it is women who are the victims of family violence. Therefore, it is also women who are most likely to potentially suffer disadvantage in the mediation process due to power imbalances caused by family violence.

The Time for Action Background Paper was released in Australia in April 2009<sup>28</sup> [28] and highlights the prevalence of domestic and family violence and its gendered nature. The Report establishes the following:

- One in three Australian women (33%) has experienced physical violence at some stage in her life since the age of 15.
- Most cases of family violence involve violence perpetrated by men against women and their children.
- Women are mostly assaulted at their home, often repeatedly, by a man they know and with whom they have or had an intimate relationship.
- In Australia, intimate partner homicides account for about one in five homicides nationally.<sup>29</sup> [29]
- Where violence occurs between current partners, more than a quarter of incidents involve children witnessing the violence. In situations of violence between former partners, children are witnesses to more than a third of cases.
- Almost one in four children in Australia have witnessed violence against their mothers or stepmothers.<sup>30</sup> [30]
- There is a high co-occurrence of adult partner violence and child abuse, estimated to be between 30% and 60%.<sup>31</sup> [31]
- One in six women has experienced violence by a current or previous partner in their lifetime.

### **Concerns for victims of family violence in mediation**

Issues of safety for women and their children are the key concern in mediations that take place where there is a history of family violence. In matters that involve a history of violence between the parties, the positive characteristics of mediation discussed above (relating to self-determination, party empowerment and party control) are all significantly undermined – particularly in relation to the victim's participation. As a result, mediation can become a very dangerous process for victims of violence because its party-focused nature provides perpetrators of violence with an opportunity to continue to exercise power and control over their victim. In this way, mediation can place victims of violence, and their children, at grave risk of suffering injustice in terms of not only the process, but also its outcomes.

In the following paragraphs, some of the main concerns for victims of violence in mediation are discussed in more detail. These issues illustrate how the positive aspects of mediation are difficult to make real in disputes where there is a history of family violence.<sup>32</sup> [32]

First, it cannot be assumed that a level playing field can be created for both parties, and that empowerment and party self-determination can be achieved, when there is a history of family violence between the parties. To do so would ignore the power differences that exist between the parties because of family violence. These power differences can put a victim of violence at a disadvantage in negotiating with the perpetrator in the mediation environment, and can result in her disempowerment rather than empowerment.<sup>33</sup> [33]

For example, in mediation it is difficult, if not impossible, for a perpetrator to work in a genuinely co-operative and consensual way to resolve the dispute. Family violence involves the perpetrator exerting power and control over the victim. Perpetrators of violence do not co-operate with their victims; rather, they impose their interests on their victims, they coerce and intimidate them, and they monitor and threaten them. Perpetrators of violence devalue their victims and also often deny their own violence.<sup>34</sup> [34] Therefore, co-operation is an approach that is diametrically opposed to a perpetrator's usual patterns of interaction with their victims.<sup>35</sup> [35] This means that it is very difficult to achieve party self-determination in matters where there is a history of family violence.

Further, because family violence is about a perpetrator's use of power and control over the victim, it is very difficult for a victim of violence to confidently represent, and negotiate for, their own interests, or those of the children.<sup>36</sup> [36] A victim of violence is fearful of the perpetrator. The power imbalance created by a history of family violence therefore makes it very difficult for a victim to experience a real sense of empowerment. Therefore, the entrenched pattern of domination, and the priority perpetrators demand to be given to their own interests, will in many cases result in inequitable outcomes from the mediation process. A number of additional assumptions about the positive aspects of mediation need to be avoided if fair and appropriate outcomes are to be possible in this context.<sup>37</sup> [37] The first is an assumption that if there is a history of family violence, a victim will seek a court exemption from the mediation process, or ask to be screened out of mediation at the intake stage. Certainly, it is possible for a victim of violence to apply to the court to be exempted from mediation; and it is also possible for victims to advise the mediator conducting the intake session about the history of violence, and on that basis they can be screened out of mediation. However, many victims of violence will not seek to opt out of the process. For some victims of violence, the prospect of engaging in a formal court procedure to seek an exemption (which might not even be successful) is too daunting and perhaps too expensive. In addition, some victims might choose not to, or feel unable to, identify the history of violence at intake (this is necessary if they are to be screened out of the process).

Victims might also choose not to disclose the violence for a range of reasons. For example, they often feel ashamed of the violence, or think that they will not be believed. Another reason why victims of violence might not identify the violence is if they feel that mediation is the only affordable option.

That is, if they cannot afford to pay for legal representation, if they cannot get legal aid,<sup>38</sup> [38] or if they do not feel they can represent themselves in court. In such a situation victims might feel that they cannot jeopardise their access to mediation by disclosing the violence, because disclosing the violence might result in being screened out of the process. Further, victims of violence might not disclose the violence because they might want to see if mediation can work. Mediation may be a safer option than negotiating with the perpetrator across the kitchen table. Victims might also hope to achieve some level of empowerment through the process even if they are aware of the possible dangers and disadvantages. Another dangerous assumption in mediation is that mediators are able to redress power imbalances between the parties simply by using aspects of the process that focus on party empowerment. It is problematic to assume that the fear a victim experiences (because of the history of violence) can be addressed through basic process interventions such as giving him or her a fair opportunity to speak, or asking the perpetrator to stop interrupting. The reality is that these interventions, whilst appropriate and positive in supporting constructive negotiations in most other matters, cannot reverse what might be years of violent domination, coercion and control.

Another dangerous assumption that is sometimes made in relation to victims of violence in mediation is that they are safe, and the impact of the violence ceases, because they have separated from the perpetrator.<sup>39</sup> [39] This belief inevitably places victims in danger as mediators may not then be alert to the true power and influence the perpetrator holds, and the process may actually exacerbate the dangers presented by post-separation violence.<sup>40</sup> [40] In truth, the time of separation itself is widely acknowledged as a time of increased danger for victims.<sup>41</sup> [41] Indeed, the impact and effects of violence continue well after separation. The healing process and the journey back to empowerment and confidence can be a very long one.<sup>42</sup> [42] Certainly, true empowerment cannot be achieved in the brief few hours of a mediation session.

It can be seen, therefore, that victims of violence suffer some potentially serious disadvantages when negotiating in the mediation environment. For this reason, special precautions are needed to promote their safety, and the safety of the outcomes reached through the process. The next section discusses how the system in Australia could be improved in order to do this.

Possible improvements to promote the safety of victims of family violence

There are a number of important improvements to current approaches to mediation in Australia that could promote the safety of victims of family violence. The Round Table Dispute Management process used at Legal Aid Victoria, and the Telephone Dispute Resolution Service operated by Relationships Australia, are two examples of good practice in this context. In addition, a specialist model of mediation for family violence matters could be developed with a more integrated and co-ordinated approach using professionals from a range of discipline backgrounds. Further, a greater involvement of lawyers in the process could address a range of the disadvantages identified above. Currently, for example, lawyers are not present in the mediation sessions that are conducted in the 65 Family Relationship Centres

around Australia. In particular, it is important that we better prepare both victims of violence and perpetrators of violence for their participation in the mediation process.

If the positive aspects of mediation are to be made a reality for participants who are victims of violence, then the range of disadvantages they can potentially face must (at least to some extent) be overcome. To achieve this, both victims and perpetrators of violence must be supported in learning how to negotiate in a way that makes real empowerment and self-determination possible in mediation. One way to do this is to coach victims and perpetrators about the mediation process, how to negotiate effectively in it, and how to communicate and participate positively.<sup>43</sup> [43]

In order to be able to engage positively with the process, both victims and perpetrators of violence need to understand, and be able to engage with, the co-operative and consensus-based philosophy of mediation. They also need to understand the various stages of the mediation process itself, how each stage in the process is likely to work, and what they need to do to contribute positively to each stage. In explaining the process thoroughly and clearly, a mediation coach can provide critical practical tips to help the parties participate effectively. For example, the parties can be assisted with preparing their opening statements in their own words so that they can clearly and calmly present their perspectives on the dispute, and articulate their concerns, needs and interests.<sup>44</sup> [44] Presenting a well-considered opening statement is important in terms of enabling the parties to take control of their own role in the process. Even preparing a brief statement can be a critical step in empowering them. Such a preparation strategy can help victims of violence, for example, to experience a boost to their confidence and to feel safe about the framework that is established for the communications and negotiations between the parties.

In terms of exploring and negotiating about issues during the mediation, it is important that each party is well prepared by having identified both a firm sense of what it would like the outcome of the process to be, as well as a flexible spectrum of satisfactory options. A mediation coach can help each party to individually work through what his or her bottom line is on each issue,<sup>45</sup> [45] but also to identify a range of options that both parties could live with. A mediation coach can also help the parties to identify issues on which compromise is possible.

It is also important to inform the parties' preparation with legal advice. Legal advice can be provided by the mediation coach if he or she is a lawyer, or by a lawyer brought in to the preparation process for this purpose. Legal advice allows the parties to effectively assess the legal implications of options for resolution. This knowledge can help the parties to "reality check" their own preferred options and to understand the claims of the other party about their legal rights or entitlements.<sup>46</sup> [46]

Finally, it is also important for a mediation coach to teach the parties some mediation participation skills. These include abiding by the ground rules of the process, active listening, effective communication and other negotiation skills. A good preparation process will teach the parties to be assertive but rational negotiators. For example, a coach can help the parties with strategies such as asking clarifying questions, summarising what the other party has said to check mutual understanding, and asking for a break to be able to think through an option or issue, or if negotiations are becoming stressful or difficult.

## Conclusion

Mediation has the potential to offer women the possibility of empowerment in reaching self-determination in family disputes. However, where there is a history of family violence between the parties, there is also a range of disadvantages for victims of violence in mediation. Most particularly, victims of violence find themselves affected by power imbalances that impact on the safety, justice and fairness of outcomes. In order to address the disadvantages that victims of violence encounter in mediation, it is important that a number of improvements are made to the practice of

FDR in Australia. A particularly important improvement is to prepare both parties more thoroughly for their participation in the mediation process. This will ensure that victims of violence have the best chance of achieving empowerment and self-determination in mediation. Providing and resourcing adequate mediation coaching and preparation processes for matters where there is a history of family violence is now a critical challenge in Australia's family law system.

## Footnotes

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A "family dispute resolution practitioner" is defined as someone who is accredited under the Accreditation Rules or authorised to act on behalf of an approved organisation, or authorised to act by the Family Court or other provisions of the Family Law Act 1975 (Cth) or the Federal Magistrates Act 1999 (Cth) : Family Law Act 1975 (Cth), s 10G .

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