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A Call for a Safe Model of Family Mediation

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A Call for a Safe Model of Family Mediation

Abstract

The Australian family law system has struggled for many years to provide processes and procedures that are less adversarial, and which ensure access to justice and fair outcomes for those needing to negotiate arrangements for their post-separation family lives. These challenges are exacerbated, and dealt with least well, in contexts where there is a history of domestic violence ('DV'). Since 2011 and the launch of the Family Violence Bill by the then Attorney-General the Hon Robert McClelland, the Federal Government has often expressed its commitment to addressing family violence and ensuring post separation agreements are safe. However, a key and proven initiative, the Coordinated Family Dispute Resolution model — a model that has the potential to offer a safe(r) family mediation environment in DV contexts — has not been made accessible to the Australian public. This comment argues that the Australian government has a social and ethical responsibility to introduce this model to the family law system.

Keywords

Australian, family law system, domestic violence

Comment: A Call for a Safe Model of Family Mediation

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The Australian family law system has struggled for many years to provide processes and procedures that are less adversarial, and which ensure access to justice and fair outcomes for those needing to negotiate arrangements for their post-separation family lives. These challenges are exacerbated, and dealt with least well, in contexts where there is a history of domestic violence ('DV'). Since 2011 and the launch of the Family Violence Bill by the then Attorney-General the Hon Robert McClelland, the Federal Government has often expressed its commitment to addressing family violence and ensuring post separation agreements are safe. However, a key and proven initiative, the Coordinated Family Dispute Resolution model — a model that has the potential to offer a safe(r) family mediation environment in DV contexts — has not been made accessible to the Australian public. This comment argues that the Australian government has a social and ethical responsibility to introduce this model to the family law system.

Feminist writing in the 80s and 90s questioned whether family mediation could be a fair process resulting in just outcomes where there was a history of DV. Informed and inspired by the work of some of Australia's great legal feminist thinkers — such as Hilary Astor, Kathy Mack, Reg Graycar and Jenny Morgan — my own stance was, for at least a decade, quite critical about the efficacy of the use of informal dispute resolution processes in such circumstances.¹

My work as a feminist dispute resolution academic has also always been informed by my involvement (as a volunteer member of the

* BA/LLB(Hons), LLM(Hons), Grad Cert Education (Higher Education), PhD, Professor of Law, Bond University Law Faculty. The first version of this comment was published on the ADR Research Network Blog in February 2016: Rachael Field, 'A Reflection on Whether a Safe Model of Family Mediation is Possible. Or: "Bring Back CFDR!"' on Australian Dispute Resolution Research Network, *ADR Research Network* (14 February 2016) <<https://adrresearch.net/2016/02/14/a-reflection-on-whether-a-safe-model-of-family-mediation-is-possible-or-bring-back-cfdr/>>. It draws on Rachael Field and Angela Lynch, 'Hearing Parties' Voices in Coordinated Family Dispute Resolution (CFDR): An Australian Pilot of a Family Mediation Model Designed for Matters Involving a History of Domestic Violence' (2014) 36(4) *The Journal of Social Welfare and Family Law* 392.

¹ See, eg, Rachael Field, 'Mediation and the Art of Power (Im)Balancing' (1996) 12 *QUT Law Journal* 264; Rachael Field, 'Family Law Mediation: Process Imbalances Women Should Be Aware of Before They Take Part' (1998) 14 *QUT Law Journal* 23; Rachael Field, 'Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution' (2005) 5 *QUT Law and Justice Journal* 28; 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(5) *Australian Journal of Family Law* 45.

Management Committee since 1993) with Women's Legal Service in Brisbane ('WLS'). A Service like WLS is very special; staff members make a significant contribution to access to justice for vulnerable women on a daily basis, specializing in complex family matters and DV. WLS is committed to respecting the lived experience of clients. This sometimes means questioning whether polemical theoretical feminist stances are supporting or hindering the cause of advocating for justice for them in a real sense.

In the mid to late 2000s, we started to question whether some clients who were victims of DV could in fact benefit from access to family mediation. Facilitative mediation, a model of mediation commonly used in family contexts, is a process that is designed to empower the parties and support the hearing of their voices in a number of ways. For example, the role of a facilitative mediator is focussed on implementing and facilitating the process rather than making a decision for the parties. This approach allows the parties to take control of the dispute and the terms of its resolution. Further, the mediator supports the parties to work collaboratively and cooperatively and to generate options and imaginative outcomes to their dispute that respond to and address the needs and interests of their particular family — outcomes that may not be possible if the matter were decided by a court. Finally, the process supports the hearing of the parties' emotions, and acknowledges and respects their capacity and competence in making their own decisions. In Australia, family mediation is known as Family Dispute Resolution ('FDR') and is an integral element of the contemporary family law system.

The Australian Institute of Family Studies concluded in its *Evaluation of the 2006 Family Law Reforms* that 'FDR appears to work well for many parents and their children'.² Further, US research has indicated that in family law matters some women experience the process as one that 'enables them to have a voice and express their views, and they perceive that they have equal influence over the terms of the agreements'.³ Herrnstein too affirms the potential for mediation to give women a voice not possible in other processes,⁴ and Lichtenstein comments on the capacity of the mediation process to support women by providing the opportunity for them 'to speak for themselves'.⁵ This research was relevant to our thinking because, while both men and women can be

² Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Commissioned Report, Australian Institute of Family Studies, December 2009), 110.

³ See for example, Joan B Kelly, 'Mediated and Adversarial Divorce: Respondents' Perceptions of their Processes and Outcomes' (1989) 24 *Mediation Quarterly* 71; Joan B Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Mediation Quarterly* 85; Joan B Kelly and Mary A Duryee, 'Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings' (1992) 30(1) *Family and Conciliation Courts Review* 34.

⁴ Becky Hoover Herrnstein, 'Women and Mediation: A Chance to Speak and to be Heard' (1996) 13(3) *Mediation Quarterly* 229, 240.

⁵ Marsha Lichtenstein, 'Mediation and Feminism: Common Values and Challenges (2000) 18(1) *Mediation Quarterly* 19, 21.

perpetrators of DV, it is well understood that DV is a gendered form of violence in which a majority of victims are women.⁶

We knew, however, that the standard facilitative model of mediation, which is built on the philosophy of party equality and relational party self-determination,⁷ could not be applied or experienced fairly and with just outcomes for victims of DV.⁸ This is because party empowerment where there is a history of DV is extremely difficult to achieve in the mediation context without upsetting the balance of the ethical requirement to treat each of the parties impartially.⁹ Further, the dynamic of DV, which centres on the perpetrator's use of coercive power and control in the relationship, means that perpetrators are generally unable to genuinely work collaboratively and cooperatively with their victim with a view to generating mutually beneficial and suitable options and imaginative outcomes.¹⁰ We also knew that the alternative options available to clients (who are also often unable to access legal aid) would not necessarily provide access to justice for them. The key alternative options are, on the one hand, to negotiate sitting at the kitchen table with the perpetrator of violence against them and, on the other hand, to be a self-represented litigant in the Family Court.¹¹

For a number of years we advocated at a national level, and in a range of forums, for a safe model of family mediation. We argued that in order to ensure that the voices of victims of DV can be heard in family mediation, and in order to ensure that safe process and outcomes are possible, a bespoke process with specific steps and strategies was necessary.

⁶ See, eg, Australian Law Reform Commission, *Family Violence — A National Legal Response*, Report No 114 (2010); 'Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children, 2009-2021' (Background Paper, The National Council to Reduce Violence Against Women and their Children, March 2009) 20–1. See also 'Personal Safety Survey: Australia' (Statistical Report No 4906.0, Australian Bureau of Statistics, first published 2005, 21 August 2006 reissue).

⁷ National Mediator Accreditation Committee, 'National Mediator Accreditation System' (Practice Standards, Mediator Standards Board, 1 July 2015) <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>. See also, Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey Bass, 4th ed, 2014).

⁸ See Field, *The Good, The Bad and The Ugly*, above n 2. See also Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100(6) *Yale Law Journal* 1545; Penelope E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40(2) *Buffalo Law Review* 441.

⁹ See Field, *Mediation and the Art of Power (Im)Balancing*, above n 2. See also Rachael Field, 'Mediation Ethics in Australia — A Case for Rethinking the Foundational Paradigm' (2012) 19 *James Cook University Law Review* 41.

¹⁰ See for example, Lundy Bancroft, Jay G Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (SAGE Publications, 2nd ed, 2012)

¹¹ Rosemary Hunter, Jeff Giddings and April Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (Study, Socio-Legal Research Centre, Griffith University, May 2003) <<http://www.nationallegalaid.org/assets/Family-Law/NLAselfrepFCA.pdf>>; John Dewar, Barry W Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000).

In 2009, the Australian Federal Attorney-General's Department initiated discussions with WLS about whether we would design the model we were arguing for. In collaboration with many experts and friends of WLS and in consultation with a national reference group, Angela Lynch (of WLS) and I designed a model of family mediation, which was called Coordinated Family Dispute Resolution ('CFDR'). It was an innovative, distinct, new model of family mediation with theoretical, scholarly foundations, using a multidisciplinary approach within a framework designed to 'provide a safe, non-adversarial and child-sensitive means for parents to sort out their post-separation parenting disputes'.¹²

CFDR was piloted between 2010 and 2012 in five different locations around Australia. CFDR was designed to support the achievement of safe and sustainable post-separation parenting outcomes for children and their families, by addressing some of the issues of vulnerability, and lack of capacity, arising where a power imbalance exists between the parties as a result of a history of DV. The model is comprised of four case-managed phases. The coordinated and multi-disciplinary nature of CFDR means that each professional participant is called upon to fulfil their unique professional function while contributing to collaborative decision-making. The model is therefore supported by, and relies upon, the diverse skills, expertise and knowledge of all professionals involved. The team of professionals required for the implementation of the model includes: mediators who specialise in the process and conduct of mediation; lawyers who provide each of the parents with independent legal advice, advocacy and representation; DV workers who conduct specialist risk assessment, counselling and support, as well as information and advocacy for victims of DV; and men's workers who work with a gendered analysis of violence and follow recognised best practice standards for working with perpetrators of DV, providing counselling and advice to perpetrators in the process. The model also envisages a specialist children's practitioner to be involved in matters where appropriate, along with other specialist workers, such as disability and migrant workers, depending on the needs of the family. The four phases of the model are as follows:¹³

First intake process for CFDR: In the first phase of CFDR, intake is conducted either by a CFDR mediator, who then refers the matter to the DV and men's workers for specialist risk assessment; or by the DV and men's workers only. This intake process includes: (1) an assessment of the likely suitability of the matter for the CFDR process and a specialist risk assessment; and (2) information provision to the parties about CFDR, the participation levels required of them throughout the process, the role of the mediator, and the role of lawyers and other advocates in the process. The perpetrators of violence in the relationship are required, as a minimum requirement for participation in the model, to acknowledge that

¹² Rae Kaspiew et al, 'Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases' (Final Report, Australian Institute of Family Studies, December 2012) ix.

¹³ Field and Lynch, above n 1.

a family member believes that DV has impacted on the family. The intake process also attains the parties' agreement to participate and to share information across services participating in CFDR.

Preparation for CFDR mediation: Phase 2 of the CFDR process focusses on preparing the parties for effective participation in CFDR mediation. Both parties are required to attend preparatory legal advice sessions, communication sessions (which are essentially counselling sessions), and a CFDR mediation preparation workshop. The clients' readiness for participation is discussed and confirmed at a case management meeting of the professional team, although the mediation practitioner has the ultimate legal responsibility for deciding on this.

Attendance at CFDR mediation: Phase 3 of the CFDR process involves the clients participating in CFDR mediation, which is based on the 'stepped' structure of the standard facilitative mediation model. CFDR mediation is intended to be practised as a co-mediation model, where there is a gender balance in the mediators, and where a legal advocate is present for both the victim of violence and the perpetrator, respectively. Other support people or advocates may also be present if this is assessed as necessary to best address the needs and interests of the parties. A range of variations on this model is possible, depending on the assessed needs of the family. For example, a non-lawyer advocate (that is, a social worker, family violence specialist, counsellor, or psychologist) could be present for each party instead of a lawyer. Additional alternatives include shuttle, telephone or video models of mediation. Also, a single mediator model might be used where the mediator is very experienced and the circumstances of the history of violence make this an appropriate approach. In CFDR mediation a greater number of private sessions may be required than in standard models of family mediation, as private sessions are critical to ensuring the parties' voices are heard.

Post CFDR follow-up: With the consent of the parties the conclusion of the mediation is followed by a formal follow-up process at 1-3 months and again at 9-10 months. The follow-up is undertaken by the DV and men's workers and includes ongoing specialist risk-assessment to ensure the safety of the family continues to be prioritised. Follow-up involves: an assessment of how the mediated agreement is working in practice for the family; a safety assessment; a discussion of ongoing needs for referrals, particularly if on-going safety concerns are identified; the gathering of feedback about the CFDR process; consideration of whether the matter needs to return to CFDR and further CFDR mediation; and an assessment of whether it is necessary for the DV, men's service workers, or both, to continue to work with the parties independently of CFDR. It is anticipated that, outside of the CFDR process, the parties may remain in contact, and engaged, with their DV or men's workers for some time after completion of the CFDR process, for ongoing support and counselling.

It is clear from the number of professionals involved in CFDR, and the requirements of each of the phases, that CFDR is complex and resource intensive. The process invests heavily in a coordinated multi-

disciplinary approach, integrating specialist risk-assessment, preparing the parties to build their respective capacity to participate, using a lawyer-assisted model of mediation, and harnessing the expertise of specialist DV and men's workers through the four phases. If safe and just outcomes are to be made possible through family mediation in DV contexts, however, this is the level of support and expertise required.

The CFDR pilot was evaluated by the highly respected researchers at the Australian Institute of Family Studies under the leadership of Dr Rae Kaspiew. A number of the evaluation findings affirmed the efficacy of the design elements of the model in terms of facilitating the safe and effective practice of family mediation where there is a history of DV.¹⁴ For example, it was found that adequate risk assessment for the parties' safety and well-being is critical in DV contexts where participation in mediation is envisaged; preparation for the parties' participation in the process was key; and vulnerable parties have more chance of making their voice heard in mediation in the context of lawyer-assisted models, as long as those lawyers are trained adequately in dispute resolution theory and practice. The report mentions on four occasions that the CFDR model is 'at the cutting edge of family law practice' because it involves the conscious application of mediation where there has been a history of DV in a clinically collaborative multidisciplinary and multi-agency setting.¹⁵

Despite the positive evaluation and the ardent belief by many in the pilot agencies that this model is necessary in the family law system as a safety measure for victims of violence and their children post-separation, CFDR has not been rolled out due to political, resource and funding issues. This is unfortunate, and the Australian government's failure to capitalise on the proven integrity of CFDR jeopardises the safety and efficacy of family dispute resolution practice in DV contexts.

The safety of victims of violence and their children post-separation is a critical family-governance and justice issue in 2016, which requires the reintroduction of the CFDR model. The Australian government has a responsibility to ensure that a safe model of mediation is available for parties in DV contexts, and needs to acknowledge that achieving this requires resources and expertise. CFDR represents an investment in the future lives of families who have experienced DV.

¹⁴ Kaspiew et al, above n 12.

¹⁵ *Ibid*, x, 18, 131, 138.