

Editorial Introduction

The safety implications for women and children experiencing ongoing domestic and family violence (DFV) after parental separation have long been recognised in Australia. Major family law reforms were introduced to divert families away from the court system and into a conflict resolution process designed to build a parental alliance, legislatively described as family dispute resolution (FDR). Amendments to the *Family Law Act 1975* (Cth) (FLA) were also instigated to improve the family law's systemic response to DFV. Recent evaluations have shown that the amendments were a step in the right direction, but major concerns over the safety of women and children remain due to ongoing DFV. This paper critically reflects on the interventions currently available for separating families with histories of DFV engaging in FDR and poses future directions in FDR research.

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Working with Ongoing Domestic and Family Violence in Family Dispute Resolution (FDR): Problems and Possibilities

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Introduction

In the past few decades, significant law reforms have been established to manage parental separation disputes and address the safety concerns that domestic and family violence (DFV) presents to women and children engaged in this process (ALRC, 2019). One of the initiatives has been providing accessible family dispute resolution (FDR) services to negotiate parenting arrangements, acknowledging that families in conflict are understood to have a relationship problem rather than a legal problem (Parkinson, 2016). Evaluations of these reforms have shown successful outcomes for many families; however, concerns remain for women with histories of DFV, and much more work needs to be done to address the complexities involved in ensuring women's safety (Kaspiew et al., 2017).

In 2019, a Western Australian father was convicted of murdering Sarah Thomas, his estranged partner and mother of his two children, by stabbing her in the neck with a knife he brought into a mediation session at a Perth courthouse (McNeill, 2019). The murder occurred when the couple attended mediation to discuss a property (not parenting) matter after a family court decision that the children reside primarily with their mother had been handed down six days earlier. Reports indicate that the perpetrator was upset by the court's decision as he was 'no longer in control' (McNeill, 2019) of the family dynamics, and for this, Sarah Thomas was killed. According to CCTV footage, the attack occurred within minutes of the mediation commencing. The mediator only had time to alert security and call for medical assistance for Sarah Thomas, who died at the scene. The court found that Sarah had been lured to her death by the perpetrator, who had been trained in the use of weapons, through the facade of mediation (White, 2021).

The circumstances leading up to Sarah Thomas's violent death are a tragic example of the complexity involved in working with women who have ongoing experiences of DVF after separation and the safety implications for them and their children. Knowledge gaps in the family law service system have been identified (Hooker et al., 2016), with a call for practitioners to develop their analysis to recognise and respond to the systemic abuse currently experienced by families (Douglas, 2018). The Australian Law Reform Commission (ALRC) has also recently identified the need for all practitioners to be highly skilled in

recognising and working with domestic violence, particularly the coercive control aspects apparent in ongoing DFV after separation (ALRC, 2019). This paper will draw on the findings from the literature and present policy and practice gaps for women entering family law processes. Suggestions for further research will also be presented.

FDR in Context

Since the 2006 family law reforms, there has been a significant increase in the use of FDR services by separating families, with a corresponding reduction in both the use of lawyers and the court (Kaspiew et al., 2017). This move has been facilitated by the government funding of Family Relationship Centres, located in the community sector, where mediation is affordable and accessible and ongoing support for families is available (Parkinson, 2016). Studies have found that families presenting at Family Relationship Centres and using FDR services were much more likely to have complex histories of DFV and other behavioural issues impacting on children's safety (Hooker et al., 2016). For example, parents often held concerns for the safety of their children due to the other parent's mental health, substance abuse or problematic behaviour (Kaspiew et al., 2017).

Women with histories of DVF can receive exemptions from attending FDR; however, it is still considered by many as an affordable and expedient alternative to court (Dobinson & Gray, 2016). For example, women who had been physically hurt by their child's father were three times more likely to use mediation than those who had not experienced physical or emotional abuse before or during separation (Qu, 2019). Although domestic violence presents

challenges to mediators in FDR, feminist scholars maintain that excluding women from mediation is also problematic (Field & Lynch, 2014). Models of FDR that account for gendered power imbalances, such as Coordinated Family Dispute Resolution (CFDR), have been shown to be most effective in supporting women's participation and their ongoing safety after FDR (Field & Lynch, 2014). In reviewing this model, Kaspiew et al. (2012) highlighted that the attention to collaborative processes and support provided to women helped ameliorate an otherwise traumatic experience; however, these successful aspects also presented a resource-intensive barrier to ongoing funding. Unfortunately, the rationing of funding to community services after decades of neoliberal governments and austerity welfare policies (Lavalette, 2019) has come at a high cost to those women living in fear or those who have lost their lives.

FDR and Ongoing Violence

There has been increasing acceptance that DFV is a gendered phenomenon encompassing a complex and continuing pattern of coercive and controlling behaviour that deprives the victim of her autonomy (Stark, 2007). However, because the FLA is written in non-gendered language and in the absence of accessible (funded) specialist models like CFDR (Field & Lynch, 2014), the knowledge and skills gaps of FDR practitioners working with the dynamics of violence in mediation settings has been raised as an issue in many evaluation reports (ALRC, 2019; Kaspiew et al., 2017). Kaspiew et al. (2017) interviewed women who experienced serious incidences of DFV—before, during and after separation—about their experiences of FDR to identify the gaps in social policy and service responses. Data emerging from these interviews

highlighted that 'DFV poses multiple ongoing challenges over the life course for mothers and children' (Kaspiew et al., 2017, p. 5). The report found that most women experienced ongoing or escalating abuse by the child's father after separation, including the use of legal and service systems by ex-partners to maintain abuse—which was the case for Sarah Thomas. Women tended to be worse off emotionally, physically and financially following separation due to the abuse and the restrictions on their abilities to protect their children from having unsupervised contact with abusive fathers under shared-care or high-care time arrangements (Kaspiew et al., 2017).

Further, women highlighted problematic gaps in knowledge when some FDR practitioners did not recognise the DFV as significant. This lack of knowledge meant that FDR practitioners continued to prioritise children's contact with both parents when negotiating parenting plans, making it difficult for women to challenge an ongoing parenting role for an abusive father. If mediators do not have the knowledge or skills to recognise or address the invisibility of patriarchal power, it is simply reproduced in the process. Negotiations are then shaped by patriarchal constructions of how things should be, which is especially concerning in the context of domestic violence (Putz et al., 2012). Most concerning were women's fears of being constructed as an 'alienating' parent by FDR practitioners when negotiating child contact arrangements rather than mothers seeking protective arrangements (Kaspiew et al., 2017). Women's experiences overall raised concerns for Kaspiew et al. (2017) that FDR

practitioners had focused on the ongoing parental relationship at the expense of protection from harm.

Policy and Practice Implications

The persistence of DFV in the population after separation, highlighted by Kaspiew et al. (2017) and others, has demonstrated the need for FDR practitioners to be skilled at recognising coercive control as a form of DFV. When developing contact parenting arrangements, FDR practitioners need the necessary practice skills to recognise the negative implications of DFV and how DFV affects parenting capacity and child wellbeing. Responding to a past or ongoing history of DFV, FDR practitioners informed by substantial expertise in DFV might shift the focus from shared parenting towards a more individualised and nuanced assessment of the child's needs, assessing the capacity of each parent to meet the needs of the child/ren and whether therapy is needed.

In response to the ongoing research, the Family Law Council (FLC, 2016) recommended that professionals across the family law sector, and not just FDR practitioners, receive enhanced training in DFV that focused on two main areas: examining the dynamics of abusive relationships in the making of successful parenting agreements (as discussed above); and examining systems abuse, which is further explored below.

Legal Systems Abuse

Feminist legal scholars have highlighted 'legal systems abuse' (Douglas, 2018, p. 84), describing how legal processes allow perpetrators to continue and even expand their repertoire of coercive and controlling behaviours post-separation. These behaviours include raising vexatious applications in family law or domestic violence courts, manipulating

engagement with family law services, including FDR, not complying with court orders and exhausting women's legal and financial resources (Douglas, 2018). The case of Sarah Thomas is a good example of legal systems abuse: the court's decision on parenting arrangements led the perpetrator to consider other ways of manipulating court processes to continue the abuse. He made an application for a property dispute to be heard, giving him unfettered access to Sarah, with devastating results.

The developing understanding of domestic violence as coercive and controlling behaviour may allow for changes to legal responses; however, legislative change does not guarantee cultural change (Douglas, 2018). Influencing the discourse that constitutes domestic violence can only be done by initially recognising the cultural constructions underpinning the violence; therefore, FDR practitioners should be skilled in understanding abuse as inclusive of coercive control and the gendered dynamics surrounding coercive control. With training, FDR practitioners can then determine when the legal system is being used as a method to further perpetuate abuse after separation. This shift may mean that mothers like Sarah Thomas can no longer be lured into danger under the guise of the law.

Future Focus

In Australia, the COVID-19 pandemic and its associated restrictions have led to increased rates of family violence (Carrington et al., 2021) and a corresponding increase in family court applications (Smyth et al., 2020). Court systems, including FDR, rapidly transitioned to online court processes, such as video conferencing (Smyth et al., 2020). Although the outcomes of these new initiatives are yet to be fully evaluated, early indications have

been positive, suggesting that parents who participated in online FDR found it easier to speak to each other from the emotional safety of their own homes (Sourdin et al., 2020). Further research into the use of low-cost technology in FDR and other family court processes could highlight the benefits, such as eliminating some of the safety concerns for women in ongoing DFV, as well as the limitations of this medium.

Future research should also focus on FDR practitioners' training and development needs and how practitioners can be equipped to work with ongoing DFV to address the safety issues for women and children. In summary, the skill and knowledge gaps identified in this research that require further work are:

- *Recognising DFV as coercive controlling behaviour and understanding how it may manifest in FDR as well as safeguarding against systemic legal abuse*
- *Formulating nuanced parenting agreements that take account of children's needs, including their perspectives on contact arrangements when there has been past and ongoing DFV*
- *Examining the ongoing use of technology to enhance the safety of women engaged in FDR.*

In addition, research focusing on cultural change and persuading justice system actors to account for gendered discourse in their decision-making processes is required to safeguard against ongoing systemic abuse.

This paper has raised many important questions about the knowledge base and skills required for practitioners providing FDR services, with a particular focus on ongoing DFV and the use of the legal system to continue coercive control after separation. Sarah Thomas may not have lost her life in the way that she did if all FDR practitioners, regardless of their professional background, understood patriarchal power and gendered violence. Despite the limitations of time and resources, there is an urgent need to work better within our systems, advocating for change where the legal system potentially endangers the very people it was set up to protect.

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