



# BEHIND CLOSED DOORS

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FAMILY DISPUTE RESOLUTION AND FAMILY VIOLENCE

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Domestic Violence and Incest Resource Centre, Melbourne

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## Summary

Under the new family law system in Australia it is compulsory for separating parents to attempt family dispute resolution prior to taking their parenting dispute to court. Family dispute resolution (FDR) is the new term for what was previously referred to as family mediation. 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 to separating couples. 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).

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 from the first point of contact. 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. This 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 for FDR sessions. When family violence is identified, safety plans should be developed with the client regardless of whether FDR proceeds. Safety planning involves developing strategies such as reducing the perpetrator's access to the victim and other vulnerable parties.

**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 in FDR sessions:** Family violence continues to impact on the safety and wellbeing of women and children after separation. It is therefore necessary to address safety concerns arising from family violence 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 parent's 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 and procedures for responding to family violence 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 is 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 processes 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.

## 1 Family Dispute Resolution in the New Family Law System

### Introduction

*the effects of the abuse ... I didn't realise that the mediation session would tap into the ongoing issue about having feelings about having no rights, no identity, no status, being undeserving, needing to be punished for leaving the marriage ... to ask for anything is very dangerous.*

(Kate, DVIRC interview)

Australia has one of the highest divorce rates in the world and many marriages and de facto relationships that break-down involve children (Brown and Alexander 2007). Resolving disputes about parenting post-separation is frequently complex and difficult. When family violence is present, this can be a dangerous time, with potential for parenting arrangements to be made that have negative consequences for women's and children's safety and wellbeing.

Recent changes to family law have made attendance at family dispute resolution (FDR, also known as mediation) compulsory before a parenting dispute can be taken to court. There is an exemption from compulsory FDR in family violence cases. This exemption recognises the extensive debate about the problems that can occur with FDR in the context of family violence.<sup>1</sup> However, there is no automatic exclusion from FDR for family violence cases (Rhoades et al 2006). It is evident that many women who have experienced family violence will undertake dispute resolution in the new system, either because the violence is not detected through screening or because the FDR professional determines that the violence does not affect the parties' capacity to participate. In some instances family violence victims may wish to engage in dispute resolution. Given the difficulties with litigation and the cost of obtaining legal representatives, dispute resolution may be the only viable option (Field 2005). Similarly, FDR may be viewed as a better alternative to attempting to negotiate directly with an ex-partner without assistance.

Given this situation, DVIRC has opted to take a pragmatic approach. This paper will focus on the ways in which FDR can most effectively identify and respond to family violence to achieve safe and fair<sup>2</sup> outcomes for women and children. It will explore a range of responses, from screening out family violence cases to ways of working as safely as possible with women who choose to undertake FDR.<sup>3</sup>

<sup>1</sup> See for instance the groundbreaking work of Hilary Astor (1991).

<sup>2</sup> The term fair is used to denote outcomes that are consistent with legal principles.

<sup>3</sup> This discussion paper was prepared during a period of significant change in the family law system. Some aspects of the changes were not implemented at the time of writing and it is therefore difficult to anticipate their full impact. There is a need for further work in this area, particularly as the new system unfolds.

This section of the paper outlines why DVIRC wrote this discussion paper. It describes the recent changes to family law that introduced compulsory FDR and have led to concerns about the safety of women and children and describes FDR and its role in the new family law system. It also gives an overview of the structure of the paper.

Why has DVIRC written a discussion paper on family dispute resolution?

DVIRC is a state-wide service that provides training and resources on family violence in Victoria. Over several years, DVIRC has studied the evidence and debates about 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. The project involved interviewing women who had experienced family violence and who had been through the dispute resolution process.<sup>4</sup> The women 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 the development of this discussion paper and quotes from interviews with the women are included throughout the paper to highlight relevant issues.<sup>5</sup>

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 above, DVIRC believes it is inevitable that many women who have experienced violence will attend FDR services under the new family law system. This 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.

<sup>4</sup> DVIRC has developed a tip sheet for women preparing for mediation which is available on our website at [www.dvirc.org.au/HelpHub/MediationTips.htm](http://www.dvirc.org.au/HelpHub/MediationTips.htm).

<sup>5</sup> Pseudonyms are used to protect the identity of the women.

## The impact of recent changes to family law on victims of family violence

*These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards co-operative parenting.*  
(Explanatory memorandum, Family Law Amendment (Shared Parental Responsibility) Act 2006)

On 1 July 2006 the *Family Law Amendment (Shared Parental Responsibility) Act 2006* came into effect. The Act implements a raft of changes described by Attorney-General Phillip Ruddock as the 'most significant reforms' to the family law system since the Act was introduced 30 years ago (Media Release, 31 March 2006). The changes are designed to create a major shift in the way disputes over children are resolved. This involves encouraging a culture of agreement-making and avoidance of an adversarial system (Field 2006) through a focus on dispute resolution processes outside the court system.

Changes to the Family Law Act that further promote the right of the non-resident parent to contact with children have occurred as a result of extensive lobbying from men's groups such as the Men's Rights Agency, Equality for Fathers, Dads in Distress and the Lone Fathers Association (Brown and Alexander 2007). There are concerns that the new legislation promotes the right to contact over safety. This undermines the child's best interests – the paramount principle in family law – because it fails to adequately prioritise the adverse effects that exposure to abuse, either directly or by witnessing the abuse of their parent, has on children (WLSA 2006).<sup>6</sup>

The new Family Law Act creates a two-tiered system of primary and additional considerations for determining what is in a child's best interests. The two primary considerations (as outlined in s60CC of the Act) are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The additional considerations are an extensive list that includes: views expressed by the child; the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent; and family violence involving the child or a member of the child's family.

<sup>6</sup> The shadow Attorney-General, Nicola Roxon, in her dissenting report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, stated that it is hard to see that the 'best interests of the child will remain paramount – and paramount over the rights and desires of any parent'. She also expressed concern that the Bill missed opportunities to improve the responsiveness of the family law system to family violence and abuse and that it could 'in fact make matters worse' (House of Representatives Standing Committee on Legal & Constitutional Affairs 2005: 209).

There is concern that the two primary considerations will conflict wherever violence or abuse has occurred. It is difficult in such a situation to protect a child from harm while allowing them to maintain a meaningful relationship with an abusive parent (WLSA 2006, DVIRC and NTV 2006). Furthermore, there is no definition of what a 'meaningful' relationship entails and nothing that specifies clearly that this ought to be a positive relationship free from violence (WLSA 2006). The requirement to consider the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent fails to recognise that a reluctance to do so can result from genuine concern about the wellbeing of the child where there has been family violence or child abuse (WLSA 2006). This requirement may further discourage women from disclosing family violence because they fear being perceived as a 'hostile' parent.

The definition of family violence in the amended Family Law Act is:

*Family violence means 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 reasonably fear for, or reasonably to be apprehensive about, his or her personal well being or safety.*

The definition differs to that previously in the Act by the inclusion of the word 'reasonably'. This is problematic due to the difficulty in making an objective assessment about a subjective emotion such as fear. However, the manner in which the courts will deal with the 'objective test' is yet to be tested.

The new terms of s60CC and the new definition of 'family violence' have the potential to 'endanger the extent to which family violence is properly taken into account in parenting matters' (Monohan & Young 2007:13).

The family law changes include a legal presumption of equal shared parental responsibility (post-separation) and where an order is made for equal shared parental responsibility, there must be a consideration of equal parenting time or substantial and significant time.<sup>7</sup> The presumption does not apply where there are 'reasonable' grounds to believe there has been family violence or child abuse. However, no definition or guidelines are provided as to what constitutes 'reasonable grounds' and it is not clear whether evidence will be required to substantiate such grounds (Brown and Alexander 2007). Women may find it difficult to satisfy the requirement of 'reasonableness'

<sup>7</sup> What was formerly referred to in the Family Law Act as 'contact' is now referred to as 'spends time with and communicates with'; and 'residence' is now referred to as 'lives with'.

(Tesoriero 2006) because family violence is a hidden problem and difficult to prove.

There is some community misperception that the changes create a legal presumption of equal shared time. While this is not the case, many women may enter family law negotiations, including FDR, afraid that the children may have to spend equal or substantial time with a parent who has been abusive towards the women or their children.

### **Compulsory dispute resolution in the new family law system**

From July 2007, FDR will be compulsory for separating parents. The courts will not be able to hear an application for an order concerning children unless the applicant files a certificate from an accredited family dispute resolution practitioner or the matter falls within certain exceptions. The circumstances for exception from the requirement of participating in FDR include where the court finds there are reasonable grounds to believe there has been, or there is a risk of, child abuse and/or family violence.<sup>8</sup>

Women experiencing family violence may be concerned that they will not be able to provide sufficient evidence to prove the violence occurred and may therefore be reluctant to raise issues of violence.<sup>9</sup> This is particularly concerning given that the new Act also includes cost provisions for false allegations, which means that the court must order the party to pay some or all of the costs of the other party if it is satisfied that the party made a false allegation or statement in the proceedings (s117AB). The explanatory memorandum to the Act describes this provision as addressing concerns that allegations of family violence and child abuse can be easily made. However, there are no studies that show that allegations of family violence and child abuse in family law proceedings are false. Research consistently and clearly shows that women and children rarely make false allegations (Brown et al 2001, Kaye et al 2003). This provision may discourage women from raising concerns about the impact of abuse on children and therefore poses significant risks to women's and children's safety and wellbeing. Brown and Alexander have raised the question 'What about false denials?' (2007: 31).

The certificates that can be issued by FDR practitioners after July 2007 include one that indicates dispute resolution was not suitable.<sup>10</sup> FDR practitioners may determine that dispute resolution is not suitable for a number of reasons including that family violence would affect the parties' capacity to participate.<sup>11</sup> Screening will be undertaken by practitioners to

<sup>8</sup> Even where a court is satisfied there are reasonable grounds to believe there has been violence or abuse an applicant must still state in writing that they have sought information from a family counsellor or FDR practitioner (*Family Law Act 1975* (Cth) s60J).

<sup>9</sup> Additionally, where consent orders are sought or there are urgent circumstances, if one of the parties cannot participate effectively or there have been flagrant breaches of orders, family dispute resolution is not compulsory (s60I(9)).

<sup>10</sup> They will also be required to certify whether each party made a 'genuine effort' to resolve their dispute (*Family Law Act 1975* (Cth) s60I(8)).

<sup>11</sup> At the time of writing limited information was available about the certificates to be issued by FDR practitioners but it appears that practitioners will not be required to provide reasons for the unsuitability of FDR on the certificates.

determine if family violence has occurred. However, it appears that practitioners will have discretion in determining whether parties affected by violence have the capacity to participate and whether it is appropriate to proceed with dispute resolution.

### **Family Relationship Centres**

Over a three-year period, commencing July 2006, the Commonwealth Government is establishing 65 Family Relationship Centres (FRCs) across Australia. FRCs are funded under the Family Relationship Services Program by the Attorney-General's Department (AGD) and administered by the Department of Families, Community Services and Indigenous Affairs (FACSIA) under a business partnership with AGD. The first 15 centres opened in 2006 and a further 25 in 2007.<sup>12</sup> The centres will provide dispute resolution services to separating parents.<sup>13</sup> One of the specified objectives of FRCs is 'to give separating families help to achieve workable parenting arrangements (outside the court system) through information, support, referral and dispute resolution services' (AGD 2005a: 1).

While dispute resolution can be provided by any accredited practitioner, the FRCs will provide three free hours of joint<sup>14</sup> dispute resolution to resolve parenting issues. Consequently, it is likely that the majority of separating couples requiring FDR services will access FRCs if they are geographically accessible. This paper will address issues pertaining to family dispute resolution which are relevant to all dispute resolution providers; however, given the emphasis on FRCs in the new system, their practices will be a focus.

In the new family law system, FRCs have an important role in screening for violence and child abuse and providing information, referral and assistance to those affected by family violence (as outlined in pages 5–7 of the Commonwealth Government's Family Law Violence Strategy). The operational framework for FRCs states that 'where it is appropriate' parents in violence or child abuse cases, although exempt from compulsory FDR, may choose to resolve their disputes through FDR (AGD 2005a: 1).

### **Parenting arrangements and property matters**

The primary focus of dispute resolution in FRCs is on reaching agreements about parenting arrangements – that is, who has responsibility for the children and for what proportion of time – rather than determining property matters. While FRCs

**12** The first four FRCs established in Victoria were in Mildura, Sunshine, Frankston and Ringwood. In 2007 additional FRCs were announced for Ballarat, Berwick, Geelong, Greensborough, Morwell/Traralgon and Wodonga. Further information about Family Relationship Centres is available at [www.familyrelationships.gov.au](http://www.familyrelationships.gov.au).

**13** There is no indication that same sex parents will be precluded from accessing these services.

**14** The term 'joint session' includes sessions with both clients in the room as well as shuttle sessions with clients in separate rooms or venues (AGD 2006a: 39).

are permitted to deal with both children's and property issues, 'subject to staff having the appropriate skills' (AGD 2005a), it would be difficult to resolve disputes regarding both property and children's matters in the three free sessions provide by FRCs. FRCs can provide additional services for a fee, however it appears likely that FRCs will focus on children's matters and refer clients to other family dispute resolution services to deal with property matters.

Because the emphasis in the new family law system is on reaching agreements in relation to children through FDR, this will be the focus of the discussion paper. However, it is important to acknowledge the interrelatedness of children's and property matters. Parenting arrangements have significant financial and legal implications. The Family Court takes account of these, but a dispute resolution practitioner may not necessarily address them. For instance, the parent who takes their child to the dentist or swimming lessons may need to pay for the cost of those activities. The amount of day-to-day responsibility of each parent will impact on their legal rights in property settlements and to financial support from the other parent.

### What is family dispute resolution?

Mediation has been utilised as a means of dispute resolution in family law matters for several decades.<sup>15</sup> Family mediation aims to improve parents' communication and facilitate consensual agreements about arrangements relating to children that are considered particularly important for ongoing parenting (Haynes and Charlesworth 1996: 1). Mediation has been embraced by policy makers in an attempt to reduce the pressure of family matters in the courts. Due to the rapid expansion of mediation over the last 20 years it is now considered a growth industry (Alexander 2000).

A definition of mediation frequently referred to in the literature is:

*The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs.* (Folberg and Taylor 1984: 7)

There are diverse models of mediation. Boulle identifies five models: facilitative, transformative, evaluative, settlement and

<sup>15</sup> Mediation is also used as an alternative to litigation to resolve a broad range of disputes including industrial relations, Native Title, commercial, personal injury, consumer and neighbour disputes (Boulle 2005).

narrative mediation (2005: 43).<sup>16</sup> The facilitative model forms the basis of most mediation literature and training in Australia and is also the most commonly used approach in family disputes. This model has a problem-solving focus with minimalist intervention by the practitioner. The aim is to identify the parties' underlying interests rather than their initial demands (Martin and Douglas 2006). The transformative model is also used in family disputes and has a greater therapeutic focus on dealing with underlying issues to enable empowerment of the parties (Boulle 2005). The evaluative model involves greater mediator intervention and focuses on reaching agreements that are consistent with legal rights and entitlements. Settlement mediation involves the mediator, often a barrister, using incremental bargaining techniques to assist the parties to reach a compromise agreement (Martin and Douglas 2006). The narrative model addresses the parties' stories about the social context of the conflict and seeks to create an alternative story that accounts for the experiences of both parties (Boulle 2005). Whichever model is used, the key principle is that parties make their own decisions through a process facilitated by the mediator.

There has been a shift in terminology in the new Family Law Act, which has meant that what was previously referred to as 'family mediation' is now referred to as 'family dispute resolution'.<sup>17</sup> FDR is defined in the *Family Law Act 1975* as a process '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 in which the practitioner is independent of all of the parties involved in the process' (s10F).

FDR is provided by a range of individual practitioners and services. Over recent years there has been a gradual shift away from mediation provided by family court practitioners towards external agencies and private practitioners. Victoria Legal Aid also provides family dispute resolution services to eligible parties; referred to as roundtable dispute management (RDM).

### **Changing principles of mediation**

Traditionally, mediation has been viewed as a 'voluntary system whereby a neutral mediator conducts a process but does not intervene in the content of a dispute' (Boulle 2005: 22). While these principles have been questionable in the past, they are significantly undermined in the new family law system.

<sup>16</sup> For a discussion of the characteristics of each model see Boulle (2005: 43–7).

<sup>17</sup> Throughout this paper the terms 'mediation' and 'family dispute resolution' (FDR) are used interchangeably.

**Voluntary participation:** Voluntary involvement in mediation was originally identified as a factor that distinguished it from the coercive nature of litigation through the courts and which was integral to party self-determination (Boulle 2005). The voluntary nature of dispute resolution has been viewed as important to ensure that parties want to participate and enter the process with a willingness to cooperate and communicate honestly. While for some time many parties have been compelled by court orders to attend FDR, the new system makes FDR compulsory for all separating parents before they can take their dispute to court. This compulsion may reduce the parties' commitment to the process and the likelihood of reaching lasting agreements. Compulsory FDR is particularly problematic when accompanied by financial disincentives to use other options such as lawyers or the court because it can force parties to compromise their rights (Boulle 2005). This is most likely to disadvantage the less powerful party to the dispute.

**Neutrality:** There has been extensive debate over the neutrality of mediators (Douglas and Field 2006). While theoretically mediators have no power to make decisions for the parties involved, in practice their personal views and values can impact on the outcomes (Field 1998). The sheer presence of the practitioner and their procedural power means that they influence the process (Flynn 2005). They are generally viewed as an authoritative figure. This is demonstrated by the comments of one woman in the DVIRC/RAV study (outlined above) who described the mediation process as like 'going for a job interview'.

Boulle argues that neutrality can be understood in three distinct ways: 'disinterestedness', meaning the practitioner has no interest in the outcome; 'independence' which indicates no prior relationship with the parties; and 'impartiality', that is, conducting the process fairly, even-handedly and without bias to either party (2005: 32). In the new family law system FDR practitioners are required to have an interest in the outcome. They are expected to help the government achieve certain philosophical goals and to focus on outcomes for the wellbeing of the children after separation (AGD 2005a: 7). The operational framework for FRCs states that:

*The Australian Government is seeking a cultural shift in the way we approach family relationships. Underpinning the Government's reforms are the importance of promoting healthy family relationships, preventing conflict and separation, encouraging agreement rather than litigation*

*and promoting the right of children to have meaningful relationships with both parents ... FRCs are central to achieving this cultural change and the operators of the Centres must be focused on achieving the Government's objectives. A Centre's performance in achieving outcomes will affect the amount of funding they receive. (AGD 2005a)*

FDR practitioners are required to help separating couples consider whether their relationships can be kept together (AGD 2005a: 4). They are also required to raise the notion of shared parenting time, which further counters the notion of neutrality (Field 2005). It has also been argued that neutrality cannot occur where practitioners have an interest in reaching an agreement (Astor and Chinkin 2002). However, one of the key performance indicators for FRCs is the number of agreements reached (AGD 2005a). Altobelli argues that the quasi-adjudicative role of dispute resolution practitioners in the issuing of certificates for the court transforms the mediator's role into a 'quasi-agent of the State' and further threatens the perception of neutrality (2006: 149).

Recent studies show that there is confusion about the nature and extent of mediators' neutrality obligation (Rhoades et al 2006). This is not surprising given that the definition of FDR in the Family Law Act does not mention 'neutrality'; however, it is clearly referred to in the tender documents for FRCs which define FDR as 'a service that assists families with the help of a *neutral* third party to identify and explore issues in dispute, develop options, consider alternatives, reconcile conflict, and reach agreements (in the case of parenting disputes reach agreements that are in the best interests of their child/ren without the need for litigation)' (AGD 2006b). The concept of neutrality also remains embedded in mediation training and discourse.

Nevertheless it is apparent that FDR, particularly within FRCs, will not be truly neutral. It may be that neutrality is no longer a relevant or desirable goal of FDR. The shift away from neutrality may have some benefits. In order to ensure that parties are able to participate equally to reach agreements that are safe and in the best interests of children, FDR practitioners will need to be somewhat interventionist and directive. It is likely to be more important that practitioners be independent (of the parties) and operate impartially in the process. This involves conducting FDR in a manner that is procedurally fair and that includes consistently applying the ground rules and ensuring that each party has adequate opportunity to speak (Boulle 2005).

## Family violence and child abuse

Family violence is a widespread social problem (WHO 2002) which is frequently the cause of, or a contributing factor to, relationship breakdown. Family violence is therefore an integral issue to consider in FDR.

For the purpose of this discussion paper, family violence is understood to be:

*violent or threatening behaviour or any other form of behaviour which coerces controls and/or dominates a family member and/or causes them to be fearful. Family violence includes causing a child to see or hear or be otherwise exposed to such behaviour. Family violence may include, but is not limited to assault or personal injury; sexual assault and other forms of sexually coercive behaviour; damage to a person's property; kidnapping or depriving a person of their liberty (eg forced social isolation); emotional, psychological and verbal abuse and economic abuse. (VLRC 2006:105)<sup>18</sup>*

It is often the case that various types of abuse occur in the same relationship; for instance, physical violence can be accompanied by psychological abuse and/or sexual abuse (WHO 2002: 89).

Family violence affects people regardless of socio-economic status, age, sexuality, cultural and ethnic background, religious belief and ability or disability. However, some groups experience higher levels of family violence. For instance, Indigenous women are far more likely to be the victims of family violence than non-Indigenous women and their experiences need to be considered in the context of the structural violence of colonisation and consequent race relations (Victorian Indigenous Family Violence Task Force 2003).

Women with disabilities experience high levels of violence from family members who may also be their carers (Salt-house and Frohmader 2004/2005). They can be vulnerable to the control of others and this can increase their experience of all forms of violence (DV Vic 2006). Women from rural communities may face specific problems such as greater social isolation and a higher risk of lethal violence from a partner because of the high number of guns in rural areas (DV Vic 2006).

Violence against mothers is an indicator that child maltreatment and abuse may also be occurring (Radford and Hester 2006: 52).<sup>19</sup> Child abuse has been found to coexist in a significant proportion of families where intimate partner

<sup>18</sup> The Victorian Law Reform Commission has recommended this definition be included in a new Family Violence Act, which would replace the *Crimes (Family Violence) Act 1987*.

<sup>19</sup> Similarly, child abuse and maltreatment are indicators that violence against the mother may be occurring.

abuse occurs (Bedi and Goddard 2007). Children are affected by family violence both as victims and as witnesses of violence (Humphreys and Stanley 2005). In approximately half of the 21,000 family violence incidents attended by police in Victoria over a 12-month period the presence of children was noted (Victoria Police 2004). Research shows that children are affected by witnessing family violence and that this may in itself constitute a form of emotional abuse of children (Shea Hart 2004). The Family Court of Australia's Family Violence Strategy recognises that children who are aware of, or witness actual or threatened violence of a parent, suffer both short- and long-term consequences. Exposure to family violence may result in a range of physical, psychological and behavioural problems with adverse affects on child development (Shea Hart 2004).

Family violence is a gendered phenomenon, predominantly perpetrated by men against women and children (VicHealth 2004, Statewide Steering Committee to Reduce Family Violence, 2005). For this reason, the focus of this paper will be on the impact of family violence on women and their children.

### Overview of the discussion paper

This discussion paper seeks to explore theoretical debates about family dispute resolution's responses to family violence and to encourage the implementation of good practice in this area. A landmark Australian study of family mediation practices and family violence identified the following components of good practice (Keys Young 1996: 50):

- routine screening for family violence or abuse of both parties in separate sessions prior to mediation
- routine development of safety plans with at-risk clients
- routine provision of gender-balanced co-mediation teams
- a range of service options offered, including shuttle mediation
- active support for mediators to follow up at-risk clients after mediation
- appropriate referral to local family violence services and other support services.

Other issues highlighted in the literature include the importance of family violence training for dispute resolution service staff, victim's access to support persons and legal advice, and accommodating the diverse needs of clients. This discussion paper seeks to consider each of the above.

Section 2 of the paper outlines why it is essential to be informed about the impact of family violence on FDR. It examines the potential benefits and disadvantages of FDR, focusing on the specific risks and concerns that arise in the context of family violence. In addition to safety concerns, family violence may impact on the parties' capacity to participate in the process and may result in agreements that are not in the best interests of the children. Section 3 considers screening and risk assessment practices for identifying family violence. It outlines the importance of validating disclosures of violence, of developing safety plans and of accurately assessing both parties' capacity to participate in FDR. Section 4 discusses a range of practices that can be used if dispute resolution proceeds in family violence cases. It describes the importance of careful consideration of the impact of family violence on women and children in determining parenting arrangements. It also discusses the role of lawyers and support workers throughout the dispute resolution process. The last section of the paper makes recommendations for responding to family violence in FDR.

## 2 Family Dispute Resolution in the Context of Family Violence

As shown previously, the intention of the new family law system is that separating parents will resolve their parenting arrangements through family dispute resolution rather than the courts. This section of the paper outlines the potential benefits and disadvantages of family dispute resolution. The most compelling disadvantages occur in the context of power imbalances between the parties which may negate the potential benefits. These problems are particularly evident in cases where there has been family violence.

### Potential benefits of dispute resolution

FDR, in the form of mediation, is viewed by its proponents as a favourable means of resolving disputes for separating couples. This is partly due to the difficulties with the family court process which is viewed as an expensive, lengthy process that, due to its adversarial nature, can heighten existing conflict. The key benefits of FDR are that it appears to be:

**Faster:** It is argued that FDR is a faster means of resolving family law disputes than litigation which can take years to finalise. FDR can occur soon after separation and can potentially be completed in one or several successive sessions. Resolving disputes quickly may be particularly important when young children are involved because even relatively short periods of uncertainty or instability can have a significant impact on children (Astor and Chinkin 2002). Women may be particularly hopeful of a quick resolution because they are more likely to experience financial difficulties after separation. This can make it difficult for them to be able to afford legal services (Alexander 2000).

**Cheaper:** For parties who cannot afford legal representatives or litigation and who cannot access legal aid services, dispute resolution may be an appealing option because it may be less expensive.<sup>20</sup> Under the new family law system, FRCs provide three free sessions of dispute resolution.

**Less adversarial:** It has been argued that FDR is better able to assist the parties to maintain or develop a cooperative approach to parenting arrangements by assisting them to communicate (Keys Young 1996). The process may foster learning about conflict resolution skills that can be utilised afterwards (Astor and Chinkin 2002). This is appealing

<sup>20</sup> The family law system is also expensive for the government and the potential to save costs makes dispute resolution an attractive alternative policy approach.

given that separating parents will generally need to continue to communicate and make decisions about their children.

**Empowering:** Family dispute resolution may offer the parties more control and involvement in resolving their dispute (Martin and Douglas 2006) and enable them to negotiate an agreement rather than having one imposed on them by the court.

*I was able to speak my mind and not have my opinions dismissed. The mediator gave me the opportunity to talk. He [ex partner] had to sit and listen.* (Claire, DVIRC interview)

Proponents of family dispute resolution argue that it gives parties the opportunity to speak about issues that matter to them, which generally does not occur in legal proceedings. Some feminist writers have argued that FDR can be a transformative process that helps parties clarify their needs and values, discover their resources and strengths, and make informed decisions, and that this is particularly empowering for women because it gives them an opportunity to have a voice (Lichtenstein 2000). Parties may feel they have more control over the process and that it involves less stress, tension and trauma than court hearings (Sheehan 2006).

FDR has the potential to enable both parents to have direct input into the development of detailed parenting plans that provide clear arrangements for the care of their children. Some studies of family dispute resolution have identified high rates of participant satisfaction, which were found to be linked to 'highly trained, debriefed, problem-solving mediation services that employ well paid practitioners and implement effective intake processes' (Wade 1998). This suggests that the benefits of FDR are most likely to occur if it is provided by well-resourced and highly skilled practitioners.

#### Potential disadvantages of dispute resolution

Given that family law disputes are frequently emotional and difficult, the benefits of dispute resolution outlined above are appealing. However, the benefits may not always occur. For instance, if the process fails to achieve agreements or the agreements are not adhered to, parties may still have to incur the costs of litigation to resolve their dispute. Parties may also need to access legal advice during the FDR process and this will increase the costs. If agreements reached through FDR produce unfair outcomes one party may be financially disadvan-

taged, thus negating the personal benefits of a cheaper process. There are a number of other potential disadvantages identified with FDR.

**Failure to ensure fair outcomes:** Procedural fairness is determined by individual dispute resolution practitioners and it is not necessary for dispute resolution outcomes to accord with legal rights and principles (Astor and Chinkin 2002, Field 2005). The Family Law Act stipulates that Family Court orders in relation to property must be just and equitable. However, concepts of fairness and equitable outcomes do not feature in the stated goals of family dispute resolution (Alexander 1999). Even if FDR is limited to determining children's matters, this will have significant implications for the division of property.

In family law litigation, decisions are based on a detailed consideration of past conduct and contributions to the relationship. For instance, past care-giving for children is relevant to determining the future care of children. In contrast, dispute resolution is future-focused and not required to account for history (Alexander 2000). If women have foregone paid work opportunities to be full-time homemakers and carers for children, this will impact on their employment and financial prospects after separation. It cannot be assumed that fathers will automatically have the parenting skills necessary to adequately care for children if they have not taken any responsibility for them in the past. However, these issues may not be considered in FDR.

The tendency of many dispute resolution practitioners is to treat parties as equal and to seek equal outcomes. However, as Hilary Astor points out, if two unequal parties are treated equally this will result in inequality (1994). There may be significant power disparities which are not always evident to the dispute resolution practitioner (Field 2005). Women frequently experience economic disadvantage after separation (HREOC 2007).<sup>21</sup> They may also have less access to information about family finances and to legal advice (Mack 1995). Women are often less experienced in negotiating and are socially conditioned to compromise, which means they may be less likely to focus on their rights and entitlements (Mack 2003). Assumptions of equality in mediation can be advantageous to the more powerful party and there is a risk that outcomes will reflect the reality of the bargaining power of the parties (Boulle 2005).

<sup>21</sup> For instance, many women receive very little superannuation in later years as a result of the unequal division of paid and unpaid responsibilities between men and women in Australia (HREOC 2007: 41).

**Lacks accountability:** FDR is a closed and private process, unlike the Family Court which is public. There are usually no observers and no records of what transpires (Boulle 2005: 60). Consequently, the process and nature of agreements made in dispute resolution are not available for public scrutiny. There are no safeguards to ensure that the information provided by parties is accurate and reliable (Alexander 1997). While FDR practitioners may seek to ensure all information is revealed (such as the amounts of superannuation held by the parties), dispute resolution does not have the protections of discovery available through the courts (Astor and Chinkin 2002). There is no basis to review or appeal FDR processes where substantively unjust outcomes occur (Boulle 2005). Courts, unlike FDR processes, are able to provide corrective or distributive justice by extending protection to weaker parties (Boulle 2005).

**Not suitable for all separating couples:** The notions of cooperation and improved communication between separating parents attributed to FDR are appealing. However, this is only likely to occur where there has already been some history of cooperation (Alexander 2000). For couples where there has been a high level of conflict, or where family violence has occurred, these goals may not be realisable. FDR is not suitable where there are significant power imbalances between the parties.

Parties going through separation generally have limited information and inaccurate perceptions of their cases and methods of dispute resolution (Hunter et al 2000). People from Indigenous and culturally and linguistically diverse (CALD) backgrounds, rural and remote areas, and those with disabilities are even less likely to get the information they need (Family Law Pathways Advisory Group 2001). They face barriers in obtaining appropriate services ranging from language barriers to concerns about their cultural beliefs and practices being misunderstood or judged negatively. For instance, parenting arrangements in Indigenous communities may be comparatively fluid and involve extended family members who play a prominent role in caring for children (Ralph and Meredith 2002). This approach is not easily accommodated by mainstream dispute resolution processes and may not fit FDR practitioners' expectations about parenting.

There is a lack of awareness and skill on the part of service providers in responding to diverse needs (Jennings 2003).

Western FDR models tend to be inappropriate for people from Indigenous, Asian and other communitarian backgrounds (Bagshaw 1997).<sup>22</sup>

Consequently, there are low rates of participation in mainstream dispute resolution services by people from CALD backgrounds (Frederico et al 2003). For instance, Indigenous people may not access mainstream dispute resolution services because of negative experiences of the legal system generally, concerns about forced removal of children and distrust of the welfare system and government departments (Ralph and Meredith 2002). Indigenous victims of family violence may be particularly reluctant to use mainstream services. In recognition of this difficulty, the Federal Government has funded several Aboriginal Family Violence Prevention and Legal Services. However, compelling women to access mainstream FDR services may, due to the reluctance of women to attend these services, again result in obscuring the issue of family violence in Indigenous communities.

The risks with family dispute resolution in family violence cases

The positive claims about FDR are most significantly undermined in the context of family violence (Field 2005). There is some consensus among dispute resolution practitioners, family violence workers and academics that dispute resolution is inappropriate in cases involving family violence and that these cases require special treatment (Murphy and Robinson 2005). There is a large body of literature on the problems that arise with dispute resolution in family violence cases. The key issues are addressed below.

### **Family violence is prevalent in separating couples**

Given the prevalence of family violence, it is likely that many couples attending dispute resolution will be affected by violence. In fact, the proportion of separating couples experiencing family violence is likely to be higher than in non-separating couples, given that violence increases at the time of separation (Jaffe et al 2003, Kaye et al 2003). A study by the Australian Institute of Family Studies found that 66 per cent of separating couples pointed to partnership violence as a cause of relationship breakdown, with 33 per cent describing the violence as serious (cited in Brown et al 2001). US studies show that family violence is present in at least half of custody and visitation disputes referred to family court mediation

<sup>22</sup> In consultation with Indigenous people NADRAC (2006) found that the development of new types of services by and for Indigenous people is necessary. However, it was noted that some Indigenous people may prefer to access mainstream services and Indigenous-specific services in other locations due to confidentiality issues.

programs (Thoennes et al 1995). Research shows that many women leaving violent relationships experience fear while negotiating parenting arrangements (Kaye et al 2003).

### **Family violence may not be identified**

*He [ex-partner] can be very charming, so I guess I was pretty scared that even if I said anything...that when [the mediator] met him then my story would be negated. It's been very difficult because of the history of abuse to trust whether someone's going to believe me anyway... Even my family didn't believe me until they discovered the abuse for themselves when my ex turned on them. (Kate, DVIRC interview)*

It is dangerous for dispute resolution to take place without the practitioner's knowledge that family violence has occurred (Kunce Field 2002). Barriers to disclosing and the fallibility of screening techniques may prevent FDR practitioners from identifying family violence. There are many reasons why women may not disclose family violence, including fear for their safety and that of their children or other family members, denial, embarrassment, concern about their children knowing about the abuse, and a lack of faith in other people's ability to help them (Keys Young 1998). The majority of victims do not report the violence to police or other services (Mulrone 2003). Women from CALD backgrounds, Indigenous women and women with disabilities can experience even greater barriers to disclosure, including cultural and communication barriers and isolation.

Research suggests that mediators are often unaware that family violence is affecting their clients. A study commissioned by the AGD found that mediators estimated that 30 per cent of mediated cases involved family violence (Keys Young 1996). However, when the women who participated in these mediations were surveyed, 75 per cent reported that they had experienced family violence (Keys Young 1996). Similarly, a recent US study found that mediators failed to recognise family violence in close to 60 per cent of cases and that this occurred even where screening and assessment was undertaken (Johnson et al 2005). A study by Kaye, Stubbs and Tolmie (2003) found that while women find it difficult to disclose violence to professionals, professionals believe that their clients *will* disclose to them. 'This belief in frank and easy disclosure' occurred even though these professionals recognised that there were factors that would impede disclosure (Kaye et al 2003: 79).

The presence of factors such as substance (mis)use and mental illness may overshadow family violence and make it less likely to be identified. However, such issues may in fact be indicators that violence has occurred. For instance, family violence is a leading cause of mental health issues in women (VicHealth 2004).

The DVIRC and RAV study showed that some FDR practitioners were able to identify and assess physical violence but were less likely to detect and respond to emotional violence and other controlling behaviour in the relationship. However, it is not only physical violence which places women and children at risk after separation. The impact of different types of abuse and multiple episodes of abuse over time is cumulative (Taft 2003) and may cause ongoing fear (OWP 2001: 31). All forms of abuse have the potential to impact on the capacity of the parties to participate in FDR.

#### **Experiences of family violence may not be validated**

Even when family violence is identified, dispute resolution practitioners may not respond adequately. Many professionals, like people in the general community, do not understand family violence or the importance of believing and supporting the victim (Bailey 2006). A study by Rendell et al (2000) shows that while women find it difficult to disclose violence to professionals in the family law process, they were unprepared for the negative attitudes they encountered when they did disclose. A mediator's personal views and attitudes about violence have an impact on their responses to disclosures (Astor 1991). For example, mediators may find it difficult to believe the violence occurred because of the influence of community perceptions that women lie about violence. A recent survey of community attitudes in Victoria found that almost half of the respondents believed that 'women going through custody battles often make up claims of domestic violence to improve their case' (VicHealth 2006: 24). However, as discussed earlier, research shows that false allegations are rare.

#### **Dispute resolution may exacerbate safety risks**

Even with the FDR practitioner's knowledge that family violence has occurred and efforts made to minimise the risks to a victim's safety, dispute resolution can be unsafe. The fact that FDR often occurs soon after separation may pose significant risks because this is the most dangerous time for women and children experiencing domestic violence and child abuse (Jaffe et al 2003). Women are more likely to be killed by a

male partner or ex-partner than by any other person (Mouzos 1999) and it is estimated that 25 to 50 per cent of women killed by intimate partners are killed in the context of separation (Polk 1994, Mouzos and Rushford 2003).

The process of dispute resolution 'may in fact exacerbate the dangers presented by post-separation violence' because it provides perpetrators with the opportunity to come into contact with victims (Field 2005: 12). It may also precipitate retaliatory violence in response to issues raised during the dispute resolution process such as disclosures of violence. Dispute resolution may also give perpetrators the opportunity to continue to exercise control over their victims and to extend that control into future interactions (Field 2005, Johnson et al 2005).

The DVIRC and RAV research showed that some women found the future focus of FDR negated their experiences of family violence. It is difficult to imagine how safe arrangements for children can be made without taking previous violence into account.

#### **Family violence affects the capacity of parties to negotiate**

*I wanted to be really strong and focused, but when it came to actually voicing what I wanted and his [ex-partners] response, I felt crushed and unsupported. (Annie, DVIRC interview)*

Perpetrators of family violence are unlikely to be willing to cooperate and negotiate with their ex-partner in dispute resolution. Perpetrators frequently coerce, intimidate, threaten and deny the interests of their victims (Field 2005). Despite this, they may present to the FDR practitioner as fair, reasonable and charming (Astor 1994), while the victims of violence may appear angry, obstructionist and unwilling to compromise (Kunce Field 2002). For instance, a woman's reluctance to agree to their ex-partner having unsupervised contact with their children may be viewed as obstructing the dispute resolution process; however, the woman may be seeking to protect the child (Johnson 2005). Much of the abuse of women and children after separation occurs in the context of agreements made through family law processes such as contact handover (Rendell et al 2000). However, women's attempts to protect themselves and their children may be perceived as hindering the goal of achieving agreement.

Family violence has severe, wide-ranging and persistent effects on women's physical and mental health (VicHealth 2004: 10). Even if the violence is not occurring at the time

of dispute resolution, the impact continues long after the violence has stopped (OWP 2001). The research by DVIRC and RAV into women's experiences of mediation shows that some women found mediation a difficult process to enter into when they were still traumatised by, or recovering from, family violence (Bailey and Bickerdike 2005). The research highlights the difficulties with participating in FDR when there has been a history of violence:

*Having to talk and think about the abuse is difficult in itself, and the hardest part is feeling you are not believed. Though I felt taken seriously, it is difficult to convey the reality of the situation to another person... (Bickerdike 2006, from RAV interview)*

In these circumstances it may be difficult for women to state their needs and concerns. Even women who thought they would be able to participate well in FDR reported that they experienced difficulties when they got into the sessions. Some women experienced post-traumatic responses such as fear and disassociation. Another study found that women can experience escalating levels of fear, intimidation and coercion generated by the ex-partner during mediation (DePorto and Miller 2005).

### Conclusion

*There were a lot of women who have been through family violence who want to mediate because the alternative for them is worse. The alternative for them is courts, is costs, is delay, is a decision they may not like anyway and they see this as a better option. (RAV dispute resolution practitioner, cited in Rhoades et al 2006: 112)*

Although proponents of dispute resolution assert high satisfaction levels by parties, research into the effectiveness of FDR remains contradictory (Alexander 2000, Mack 2003). The private and confidential nature of FDR makes it a relatively unobserved and unexamined practice (Boulle 2005). For many decades now efforts have been made to bring family violence into the public domain and to ensure that the whole community responds to the issue. Significant efforts have been made to improve responses to family violence through police and the courts. The law has come a long way in terms of acknowledging the interests, rights and entitlements of women and children and mediation poses a threat to these achievements (Mack 1995). It is therefore concerning that FDR, like family violence, also occurs 'behind closed doors' (Boulle 2005: 60).

DVIRC acknowledges that some separating couples may wish to participate in FDR. FDR is likely to be most effective for those couples who had some capacity to cooperate in the past and who were unlikely to have to resort to court to resolve their dispute. However, where there is a power imbalance in a couple dispute resolution may disadvantage the less powerful party. Because of social and economic gender disparities this is most frequently a woman. The greater the power imbalance, such as where there has been family violence, the less appropriate dispute resolution will be and it may result in unfair and dangerous outcomes for women and their children. It is therefore imperative that dispute resolution practitioners are fully aware of the impact of family violence and equipped to respond appropriately to victims and perpetrators. The next section of this paper looks at strategies that can be used to identify and respond to family violence within the new family law system.

### 3 Identifying Family Violence and Ensuring Safe Outcomes

The previous section of the paper outlined key problems with FDR in the context of family violence. The primary concerns are that the FDR process may place victims at risk and result in parenting arrangements that are unsafe or that otherwise disadvantage women and children. The need to inform practitioners and policy makers about the inappropriateness of FDR in family violence cases has meant that there has been less consideration given to ways in which dispute resolution services can effectively and safely manage family violence. However, in the current policy context it appears inevitable that separating parents who are affected by family violence will be attending dispute resolution services and it is therefore imperative to explore this issue further. This section of the paper considers how FDR services can identify family violence, minimise risks to women's and children's safety, and determine whether it is appropriate to proceed with dispute resolution.

#### Screening and risk assessment

*The purpose of risk assessment and safety planning is to work in partnership with the abuse victim to identify risks relevant to her situation and to build strategies to reduce risk and increase safety.*

(Agar 2003: 5)

Over the past two decades there has been a dramatic transformation in responses to family violence across health, criminal justice and community services sectors (Roehl et al 2006). Screening and risk assessment are now accepted as essential practice for professionals working with clients who may be affected by family violence (KPMG 2006a). *Screening* for family violence involves asking clients questions to determine if they have experienced violence (including emotional, physical or sexual abuse and threats of violence) or are at risk of experiencing violence (Braaf and Sneddon 2007: 3). *Risk assessment* involves assessing the nature and level of the risk faced by the victim. Screening and risk assessment generally occur during an intake process at FDR services.

This paper focuses on screening and risk assessment with victims of violence who are predominantly women. However, it is also necessary for screening and risk assessment to explore indications in men attending FDR services that they might be perpetrating family violence. This requires a different

approach and specific skills, which are discussed further in Section 4.

A variety of screening and risk assessment frameworks and tools have been developed within Australia and internationally. The AGD (2006a) has prepared a *Screening and Assessment Practice Framework and Guidelines for Family Relationship Centres and the Family Relationship Advice Line* (hereafter referred to as the 'Attorney-General's Guidelines'). FRCs and other accredited family dispute resolution practitioners are required to conduct screening and assessment processes to identify a range of issues including family violence and child abuse (AGD 2005a and 2006a).<sup>23</sup> They must apply the framework and guidelines to their screening and assessment tools, processes and practices.

The information about screening and risk assessment in this discussion paper is primarily drawn from the Attorney-General's Guidelines and two international sources recommended in the guidelines – from the US, the Nashville Police Investigative Services, *A Guide to Domestic Violence: Risk Assessment, Risk Reduction and Safety Planning*, and a Canadian report prepared by Sharon Agar for the British Columbia Ministry of Public Safety and Solicitor General, *Safety Planning with Abused Partners*. The Victorian Government has also recently developed a *Common Risk Assessment and Risk Management Framework for Family Violence Services in Victoria Discussion Paper* and a draft practice guide (KPMG 2006a and 2006b), which provides useful additional information to further inform screening practices in family dispute resolution.<sup>24</sup>

### Why is screening and risk assessment necessary in FDR?

Screening and risk assessment practices are necessary in FDR to ensure safety and to determine the suitability for proceeding with FDR and the appropriate practices for doing so.

#### *Ensuring safety*

Screening for the presence of domestic violence in clients presenting to dispute resolution services is critical for client safety (AGD 2006a: 80).<sup>25</sup> As outlined earlier, there is a heightened risk that family violence will occur during separation. Clients attend FDR services specifically to deal with issues relating to separation; therefore services have an important role in identifying and responding to family violence. The barriers to disclosing family violence mean that staff at FDR services may be the first person a victim has told about the abuse. The client's safety and the safety of their children may depend on an effective response.

**23** There are three risk domains that practitioners are required to explore in screening and risk assessment: domestic and family violence and violence towards others; child abuse or abduction; and self-harm.

**24** Under the new integrated approach to family violence service provision in Victoria, services are required to use the screening and risk assessment framework and tool developed by KPMG.

**25** The Attorney-General's Guidelines also state that screening and risk assessment is critical for worker safety. The focus of this paper is on victims of family violence. However, it should be noted that staff may be subjected to violence and threats from perpetrators of violence directly, or by witnessing abuse of other parties. There have been instances where professionals involved in family law disputes have been the target of violence. For instance, a car was driven into the front window of a Family Court in NSW and on another occasion a Family Court judge was murdered (Stockley and Wooltorton 2004)

The Australian Domestic and Family Violence Clearing-house point out that, due to the link between family violence and child abuse, identifying risk for the mother can be an important way to protect children (Braaf and Sneddon 2007). They suggest that screening for child abuse is an underdeveloped area. It is beyond the scope of this paper to explore screening and risk assessment for child abuse; however, there is clearly a need for further research on this issue.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* specifies exceptions from compulsory FDR in family violence cases in recognition of the risks that compulsory FDR poses in this context. It is therefore necessary to undertake screening and risk assessment to identify if family violence has occurred or is likely to occur.

#### *Determining suitability for FDR*

Screening and risk assessment for family violence is necessary to assess the appropriateness of the parties undertaking FDR (AGD 2006a). Unlike risk assessment undertaken by other professionals, dispute resolution services have the added dimension of having to assess the impact of the violence on the capacity of both the victim and the perpetrator to participate. This is necessary to ensure the victim does not feel pressured to make agreements out of fear and that the perpetrator will be able to respond to the needs and interests of the ex-partner and comply with the requirements of FDR (Keys Young 1996). Both parties should have the capacity to reach agreements that are in the best interests of their children.

In cases where violence is identified, there should be 'an extended assessment and intake process to determine if it is safe to proceed and that effective participation is feasible' (AGD 2006a).<sup>26</sup> The Attorney-General's Guidelines propose that the outcome of a screening assessment should usually be one of the following:

1. FDR is suitable for the parties seeking dispute resolution.
2. FDR is suitable but only if it is conducted with special conditions attached to the process, and that both parties are willing to agree to, and cooperate with these special conditions.
3. FDR is not a suitable and/or safe process for the parties seeking dispute resolution (AGD 2006a: 80).

<sup>26</sup> The guidelines also include undertaking a safety plan, linking with crisis and support services and using strategies for ensuring the most effective and safe process (these elements are discussed later).

*Determining appropriate practices*

If family violence is identified and the practitioner and the victim determine that it is safe and suitable to proceed, risk assessment is necessary to inform the most suitable approach to FDR. Depending on the client's circumstances there are a range of specialised formats and practices that can be utilised such as shuttle mediation and co-mediation (discussed below).

Information obtained through risk assessment can also assist FDR practitioners to 'reality check' with their clients the parenting arrangements considered in the FDR sessions to ensure they are safe and fair. The nature of the violence and the impact it has had on the children is an important consideration.

**Screening and risk assessment strategies**

*Relationships with family violence can appear to outsiders to be healthy relationships that meet our expectations of equality, mutual respect and primary concern for the children. Only by understanding the various tactics and manifestations of family violence and knowing what to do in a case where there is violence can mediators provide necessary relief to the victims. (Kunce Field 2002: 7)*

To identify the risks faced by victims, screening and risk assessment needs to be undertaken by staff who are skilled, highly trained and professional (AGD 2006a: 24). The Attorney-General's Guidelines state that screening and assessment should:

- be conducted in a safe supportive environment that allows privacy
  - ensure dignity and respect
  - enable a response to urgent requests for assistance
  - attend to cultural and language requirements
  - minimise need for client to retell their story
  - always provide for in-person screening before joint sessions are held
  - provide for screening of each party separately, preferably scheduled at difference times or locations
  - not involve the interviewing of one party directly after the other
  - ensure parties do not arrive at and leave the centre, near-by public transport stops or car parks, when there is a likelihood they will do so at the same time

- ensure parties do not wait in a room together before or after a screening interview
- avoid having a screening session interrupted
- ensure relevant information is provided about the purpose of screening and assessment, why certain information is required and how it will be used (ADG 2006a: 14).

DVIRC believes these factors are essential and also recommends the inclusion of 'respond to the needs of parties with disabilities'.

*In the first mediation, I couldn't talk about it as he was just outside the room. (Kate, DVIRC interview)*

Ideally, intake and risk assessment would occur on a separate day to any dispute resolution so that the client does not have to see her ex-partner that day (Keys Young 1996: 36). It is necessary to build rapport with the client before starting assessment questions to ensure they feel comfortable providing information that may be difficult to talk about. Because of the difficulties with disclosure and the complex nature of family violence, there needs to be adequate time to conduct the assessment (KPMG 2006a).

In order to develop rapport and ensure effective communication practitioners need to be culturally sensitive and to address any needs resulting from language barriers or disability. Accurate assessment of the need for interpreters during intake is important. There are a number of considerations in relation to the use of interpreters in family dispute resolution. Some parties may appear proficient in English; however, they may become lost at times during the discussion. It is important that they are able to follow fully the concepts raised through the dispute resolution. Friends and family members are not appropriate as interpreters as they may have vested interest in interpreting information in particular ways and the client may not want to disclose personal information about their relationship or their experience of abuse to their family and friends. The services of professionally trained interpreters are essential. It is crucial to have separate interpreters for each party (Keys Young 1996: 128). Female interpreters should be used for women who have experienced violence.

It is necessary to explain why the questions are being asked and what will happen with the information provided (KPMG 2006a). For instance, will the information be passed on to the perpetrator in dispute resolution if it goes ahead? It is important for the person conducting the screening and

risk assessment to explain to parties why talking about abuse and its impact is important in the context of dispute resolution: that violence and control may pose a risk to the victim's safety and may impact on their capacity to participate and negotiate an agreement in the best interests of their children.

Once rapport is established and the process of assessment explained, research shows that direct questions are the most effective in identifying violence and that they should be asked in a friendly and non-judgemental manner (DVIRC 2006). An example of a direct question is 'Has your partner ever pushed, hit, kicked, punched or otherwise hurt you?' (KPMG 2006b).

It is also necessary to ask questions about various forms of abuse. For example, 'Has your partner ever put you down, humiliated you or tried to control what you do?' (KPMG 2006b). The Nashville Police Investigative Services guide highlights the need to recognise that family violence is a problem of coercive control and not simply about assault. This is particularly important in dispute resolution because of the impact such control may have on the capacity of the parties to participate in the process and to achieve fair outcomes. There are many forms of abuse that result in a victim being intimidated by their ex-partner such as sexual abuse, threats to harm, emotional and psychological abuse. One form of coercive control that is rarely recognised is financial abuse in intimate relationships. Financial abuse generally occurs where women have been deprived by their partners of sufficient financial resources to fulfil their basic needs (Branigan 2004: 11).

#### *When the violence appears mutual*

If both parties state that they have experienced violence from the other party, it may be possible to determine if a primary aggressor can be identified. Mutual violence can occur as a result of victims defending themselves from the violence perpetrated against them (Lamont 2001). When considering this issue it is important to take account of the following:

- the distinction between offensive and defensive acts
- the meaning and intent behind the acts
- the distinction between the intent and the effect of the violent act
- the type and severity of violence perpetrated
- the history of violence in the relationship (Bagshaw et al 2000).

### The toolkit for risk assessment

Research on family violence risk assessment shows that the most accurate assessments draw on three elements:

- a list of risk factors or indicators
- the victim's own assessment of their level of risk
- the practitioner's professional judgement (Agar 2003, Roehl 2005, KPMG 2006).

Risk factors or indicators are warning signs that point towards the likelihood that a person's safety is at risk. There are a number of tools that have been developed to assist in measuring risk in family violence. Tools have been found to be useful; however, they cannot replace the professional judgment of the worker or the victim's perception of the danger (Agar 2003). The woman's own assessment of her risk of future assault has been found to be a better predictor than most tools (Roehl 2005). However, some clients affected by extended periods of violence may underestimate the gravity of the risk or the impact it has had (AGD 2006a: 23).

There are many examples of risk assessment tools or instruments that include different 'indicators' or 'risk factors'. There is a list of indicators in the AGD Guidelines which provides some useful information. However, DVIRC is concerned about the first three indicators listed as 'commonly identified' in family violence: 'excessive alcohol use, severe psychological problems and several prior arrests' (AGD 2006a: 27). Much family violence is unreported and therefore prior arrests are unlikely to have occurred. While alcohol/drug abuse and mental health issues are commonly listed as risk factors for both perpetrators and victims of family violence, DVIRC would argue that it is not helpful to suggest that these behaviours need to be 'extreme' or 'severe' to indicate risk. They need to be considered along side other risk factors such as the following:

- past assaults
- threats to harm or kill family members
- access to and/or use of weapons
- obsessive jealousy and/or preoccupation with partner
- stalking or monitoring partner.

KPMG has developed an *aide memoir* which has a list of risk indicators that would provide a useful model for FDR providers (2006b: 24-5).

Screening and risk assessment is usually undertaken during an intake process at FDR services. In some FDR services intake is not undertaken by FDR practitioners. For instance, in FRCs

'family relationship advisers' (FRAs) may carry out intake including screening and risk assessment for family violence. FRAs are not necessarily qualified FDR practitioners. While effective screening and risk assessment requires specific skills which FRAs may obtain if they receive appropriate training, it is problematic that victims should have to tell their story first to a FRA and then again to an FDR practitioner if FDR proceeds. Where this occurs, it is important that the FDR practitioners are well briefed by the FRAs regarding the violence to ensure they have a through understanding of the impact on the parties involved, can provide ongoing risk assessment, determine the most suitable approach to take, and consider safety concerns relevant to parenting options. DVIRC recommends that where family violence is identified extended risk assessment be undertaken by the FDR practitioner prior to FDR proceeding.

The presence of a risk indicator means that there is a 'need to explore more deeply to find out if something is happening or is likely to happen in the future' (AGD 2006a: 24). The Attorney-General's Guidelines state that the presence of one or more risk indicators for family violence should alert staff to the potential for danger and the need to take action to deal with the risk (AGD 2006a: 24).

### **Risk assessment as an ongoing process**

FDR practitioners should view risk assessment as an ongoing process because relationship dynamics can change. The need to review and revisit client risk and safety levels is an essential component of all risk assessment frameworks (KPMG 2006a). Research has found that a third of women predicted to be at quite low risk through risk assessment subsequently experienced violence (Roehl 2005: 16). Participating in the dispute resolution process can create risks to safety that may not have been present initially. The nature of family violence is that the violence generally escalates over time and can change rapidly at the point of separation (Radford and Hester 2006). For example one woman in the DVIRC study said:

*In my case I felt safe because of my circumstances having been changed but then when I voiced my request about the parenting plan, that changed, I did not feel safe anymore. (Annie, DVIRC interview)*

### **Responding to identified risk**

Research by DVIRC and RAV (outlined in Section 1) found that some dispute resolution practitioners are dismissive of women's experiences of violence. For instance one woman said,

*'They did not want to know and they didn't believe anything  
I said and constantly referred to the violence as 'allegations'.*

(Sue, DVIRC interview)

If a client discloses violence it is crucial that the person undertaking the risk assessment provides some validation or affirmation of their experience and their own assessment of their risk (KPMG 2006). This is a key step in assisting the client to recognise violence and to start the recovery process (Gondolf 1998). A lack of validation can impact on the victim's ability to participate in the FDR process effectively (Bickerdike 2006). Responses should not avoid or deny the perpetrator's responsibility for violence as this, in effect, would collude with the violence (Field 2005). However, it is not useful to criticise the perpetrator or the relationship as this can have a negative impact on how clients view themselves (Lamont 2001).

FDR services can provide important information to victims of violence about the dynamics and impact of violence. This may help decrease the victim's minimisation or denial of the violence (Agar 2003: 27). Victims of family violence should also be informed about their legal options for protection such as applying for intervention orders or reporting assaults to police and for obtaining victims of crime compensation. All victims of family violence should be referred to a lawyer for these purposes and to ensure they obtain legal advice regarding family law (see discussion in Section 4).

Referrals to appropriate support services are an important part of risk assessment and safety planning. The Attorney-Generals guidelines (2006a) suggest that FDR services build links with crisis and support services and refer to violence prevention services as appropriate for victim support and perpetrator programs. A range of referrals such as family violence services, housing services, counselling services, legal services, police, courts, children's services, health services, sexual assault services and drug and alcohol services, may be necessary, depending on the client's circumstances. All referrals should be made in consultation with the victim and consent must be obtained from the client before any contact with a referral agency is made, except in circumstances where the safety of the victim or others is in question (KPMG 2006a).

Under the *Family Law Act 1975*, communications made in FDR are confidential unless disclosure is required by state or Commonwealth law, as is the case with child abuse. If an FDR practitioner has reasonable grounds for suspecting that a child has been abused or is at risk of abuse they must notify child protection services of the suspicion and the basis of it. They may also notify child protection services if they have reasonable grounds for suspecting that a child has been ill-treated or is at risk of being ill-treated or has been exposed to, subject to or is at risk of being exposed to or subjected to behaviour which psychologically harms the child (AGD 2006a: 13). FRCs are not required to substantiate child abuse, but they are 'responsible for taking reasonable steps to establish whether or not there should be concern about child abuse and to report cases to the relevant authorities' (AGD 2006a: 31). In addition, an FDR practitioner may disclose communications if consent is given by the person making the disclosure, or if the practitioner reasonably believes that the disclosure is necessary for the purpose of protecting a child from physical or psychological harm or preventing a violent offence against a person or property (AGD 2006a: 13).

### Safety planning

*The screening process should always be linked to the provision of the timely development of and execution of a safety plan in the event that risk is identified. Where there is immediate danger, there must be immediate action to ensure safety.* (AGD 2006a: 15)

When risk is identified, it is important that adequate time and resources are utilised to ensure the safety of victims. Safety planning involves assisting the victim to analyse their risk and develop strategies for managing the risk such as reducing perpetrator access to the victim and other vulnerable parties (Agar 2003).

The Attorney-General's Guidelines suggest that safety planning be undertaken:

- with the client subjected to violence; for example, contingencies in the event of an incident (including pre- and post-service)
- with the person using violence
- contracting with the person using violence that any further use of violence will result in discontinuation of service and potentially the incident may be reported to police if it is a breach of a protection order, or constitutes criminal behaviour

(AGD 2006: 88).

Unfortunately the Guidelines do not provide any details about how safety plans should be completed by family dispute resolution services. Instead they refer to Nashville Police guidelines and Agar as models. Agar outlines three main goals of safety planning; to:

- reduce access to the victim, her children and other vulnerable parties (both direct and indirect)
- increase the victim's freedom and activities to strengthen her ability to resist her abuser
- increase the level of community support of the victim (Agar 2003: 23).

Safety plans generally include practical measures that include ensuring women have important telephone numbers for assistance; improving security at home through such means as installing window locks; and getting a silent phone number.

The strategies included in safety plans are intended to help the victim maintain safety without implying that she can change or stop the violence (Agar 2003). The woman herself is the best resource when planning safety and practitioners should 'respect a woman's ability to choose the course of action best suited to her situation' (Agar 2003: 23). She has had experience in protecting herself and her children in her particular circumstances.

It is important to recognise that safety includes psychological safety and freedom from fear; it is not simply a matter of physical safety (Radford and Hester 2006). Safety plans should also address basic needs for housing, childcare, employment, healthcare and food because a lack of material resources may contribute to risks to safety for women and their children escaping violence (Agar 2003: 28).

#### **Safety measures at FDR services**

Ensuring that parties are well prepared and understand the process of dispute resolution is an important aspect of safety planning. Victims need information about how often they will be required to attend and how to enter and exit the building safely. Providing written information is important but not sufficient. Clients should be informed about the degree of contact they are likely to have with their ex-partner and what form that will take. Opportunities for time-out or to request breaks should be explained. There is also a range of dispute resolution practices, such as co-mediation and shuttle mediation (discussed later), that may improve the safety of the woman

and her capacity to participate in dispute resolution. These should be clearly explained.

Special consideration should also be given to any existing arrangements for contact with the children. When violence against a parent is identified it is essential to consider how the children may be affected by the violence and to assess the safety of the children. Safety needs to be considered not only during the dispute resolution process but in the arrangements made between the parties; most importantly, the violence will impact on the safety of contact arrangements (discussed in Section 4).

Safety measures should not impede women's capacity to participate in the FDR process equitably. If such measures are necessary then it is likely that dispute resolution is not suitable. For instance, one woman in the DVIRC and RAV study was placed in another room during dispute resolution to keep her safe, while her ex-partner, their solicitors and their mediators discussed financial arrangements. She said:

*When I was asked to come in about 40 minutes into it ... all the figures were all over the board and they had been having quite an in-depth discussion around what was to happen. So in protecting me from the violence they actually left me out of the discussion.*

(Sophie, DVIRC interview)

In addition to an individual safety plan for clients, there are a number of safety procedures that FDR services can implement as a matter of practice. The following practices are based on Keys Young (1996: 39):

- alert system on files
- no written material sent to at-risk client's homes without their permission
  - no messages left on answering machines
  - no letters/phone contact with perpetrators without the permission of victims and discussion about the form and timing of any correspondence
  - reception desk designed so that no one can read client data while looking over the counter
- safety plan for the day of the appointment discussed with parties
  - separate waiting rooms
  - staggered arrival and departure times for parties
  - explaining to clients where they can park and the layout of the building
- clients accompanied to and from the premises

- adequate outdoor lighting
- encouraging clients to have a professional support person such as a family violence worker
  - alarm system linked to local police
  - rooms lockable from the inside where parties are in shuttle negotiations
  - not scheduling joint sessions after normal business hours.

Determining whether to proceed or to screen out  
due to family violence

*I have an obligation ... to investigate issues of power and inequality and violence ... And it is part of my responsibility to let parties know why I'm doing that and the impact violence can have on their capacity to participate in the mediation. I think it's my responsibility to let a person know that if she's frightened to ask for what she wants, mediation probably isn't going to be very helpful for her ... and also I've got an obligation not to mediate if I think there a risk of harm. If I think it is going to be a harmful process I have an obligation not to mediate. (RAV dispute resolution practitioner, cited in Rhoades et al 2006: 110)*

As outlined earlier, a key purpose of screening and risk assessment is to determine if the parties are suitable for FDR and if it is safe and appropriate to proceed. The Family Law Regulations 1984 state that in determining whether FDR is appropriate, FDR practitioners must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following:

- a history of family violence
- the likely safety of the clients
- the equality of bargaining power among the clients
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the clients
- any other matter relevant to the proposed FDR (Regulations 62(2)).

Although there is an exemption from compulsory FDR for family violence, these cases may proceed if the FDR practitioners assess them to be appropriate (AGD 2005b). The Attorney-General's Guidelines state that if proceeding, the dispute resolution service needs to be satisfied that:

- the threat of violence is not current
- safety can be assured and that any children of the parties are not currently at risk or likely to be put at risk by the process, or the presence of past violence
- the client who has reported being subjected to violence is giving genuine and informed consent (this includes helping them to consider other options where they feel they have no real choice but to participate).

The Guidelines state further that:

- the client who has been subjected to violence, and the practitioner, needs to be confident in their ability to be able to negotiate on their own behalf
- the person using violence is prepared to accept the 'ground rules' set for this process, to ensure that the process is fair and safe and does not allow further intimidation or disadvantage into the process (AGD 2006a Attachment J).

The Attorney-General's Guidelines provide valuable information about screening and risk assessment. However, there is a lack of specific guidance about how to use the risk indicators and information elicited from questions to determine if FDR is 'appropriate'. For instance, how do you effectively determine if a history of family violence affects a person's capacity to negotiate freely? The guidelines acknowledge that non-physical forms of violence can be as significant in affecting the capacity of the victims to participate on equal terms with the perpetrator as physical forms of violence and that professionals may find these forms more difficult to assess (2006a: 40) However, there is little guidance about how such assessments could be made.

Individual practitioners and services may use different approaches and have different notions about what constitutes being 'appropriate' for FDR. This lack of consistency is likely to result in different treatment of victims of violence across services. It is also concerning that studies of mediation have found tension in some agencies between the need to screen out family violence and the need to maintain adequate client numbers for ongoing funding (Keys Young 1996: 33). DVIRC recommends the development of a specific risk assessment model that all FDR providers must use to determine if FDR is appropriate in family violence cases. It would also be useful for practitioners to record why FDR is deemed to be appropriate or not, for the purpose of monitoring and evaluation of FDR services.

### **The 'currency' of violence**

It is generally accepted that in situations where there is current violence and/or current fears for the safety of the woman and/or the children, dispute resolution should not proceed. However, in the situation of FDR, where the parties have separated, the 'currency' or immediacy of violence is often unclear. This is the case in the following examples:

- where there has been little or no contact between the parties since separation.
- when the parties come into contact for dispute resolution or for contact with the children, violence may occur.
- where the perpetrator of violence is seeking to reconcile with the victim and may be on their best behaviour (also referred to as the 'honeymoon' phase of the cycle of violence in which there is a show of remorse and promises to change). This is a potentially dangerous situation as the process of dispute resolution may reinforce that the separation is final which may result in an escalation of violence (end of the 'honeymoon' phase).
- where the victim may be unsure of her ex-partner's current state of mind and how he will respond.

### **Contextual factors**

Keys Young's research on mediation found that a number of contextual factors, in addition to the current safety of the woman, need to be taken into account when determining whether or not to proceed to dispute resolution. These include the severity and frequency of the abuse during the relationship, the woman's level of fear, the woman's willingness to participate in the dispute resolution and the assessment of the ability of the agency to handle the case such as their level of expertise in family violence (Keys Young 1996: 37).

Victoria Legal Aid has developed screening and risk assessment tools in consultation with DVIRC for their roundtable dispute management (RDM) program. RDM considers a range of factors to determine whether to screen out family violence cases. Clients are screened out if there are current attempts, threats or developed fantasies to kill the ex-partner, children or other family members, or there have been threats to kill in the past which the victim believes could still be carried out if the opportunity arose, or where there is a risk of harm to children. Clients are also screened out when there is an unacceptable cluster of risk factors such as obsessive jealousy, stalking/excessive monitoring of partner, children or family members, gross psychological cruelty to partner or children,

including cruelty to pets, and threats of suicide. RDM does not proceed with dispute resolution if the victim of family violence will not permit safety concerns arising from the violence to be addressed in the RDM conference. This is due to concern about how effective and safe agreements reached through dispute resolution can be if safety issues are not addressed.

DVIRC believes that if a woman is too fearful to have these issues raised in the dispute resolution process then it is likely that it is not safe to proceed. Violence cannot be separated from other issues because it impacts directly on the arrangements in relation to the children (Astor 1994: 17). It is important that FDR practitioners explain to clients that violence issues are highly relevant to parenting arrangements post separation. (The importance of addressing safety concerns in the FDR sessions is discussed further in Section 4).

### **Preparation and informed consent to proceed**

*I was completely unprepared because I didn't know how mediation would go along or what protective mechanisms were in place for me.*  
(Sophie, DVIRC interview)

In family violence cases it is dangerous to proceed to dispute resolution if the victim fears the process or the likely outcomes and does not feel safe. A critical consideration in determining suitability for FDR in family violence cases is whether the client understands the risks involved and is making an informed choice to participate. It is imperative to ensure that parties fully understand the impact violence may have on dispute resolution and necessary to draw the client's attention to the possible risks posed by dispute resolution in the context of family violence. For instance, the client should be informed that dispute resolution will require them to negotiate with the perpetrator either in person or via a third party (Astor and Chinkin 2002).

Victims should be advised of the various forms of FDR available, what safety measures are in place, and the skills and experience of the practitioner in working with family violence. The practitioner should ensure that the client understands the exemptions to compulsory dispute resolution (discussed in Section 1). Clients should be provided with information about Legal Aid as they may be eligible for the RDM program, which includes access to legal representation. There is also a need for information about child support and how it will be affected by parenting arrangements.

Particular consideration should be made to ensure that clients who are from non-English speaking backgrounds, or who have a disability that may affect communication, understand the information provided to them and provide informed consent to participate. It is DVIRC's view that FDR practitioners should deem FDR unsafe and unsuitable where a victim of violence does not wish to proceed.

### **The perpetrator's capacity to participate**

Keys Young found that the decision of FDR practitioners to proceed appeared to rest on the women's capacity to demonstrate that she was willing to participate and that it would be safe to do so on a reasonably equal footing (1996: 38). There appears to be no real testing of whether an alleged perpetrator was willing and able to participate in the process equally (Keys Young 1996). Andrew Bickerdike from RAV has argued that the dispute resolution practitioner should 'also assess the abuser's capacity to abide by the terms of the agreement to mediate; follow ground rules, negotiate "fairly" and cooperate in ensuring a safe environment for mediation' (2006: 12). He also states that FDR practitioners should consider the likelihood that the perpetrator will abide by the agreements resulting from the FDR.

## Conclusion

All forms of family violence have the potential to impact on the capacity of both the victim and the perpetrator to participate in FDR and to reach agreements that are in the best interests of their children. FDR should not proceed unless practitioners and the clients are confident that the process and the outcomes are likely to be safe and fair. FDR services require consistent guidelines and policies for undertaking screening and assessing the suitability of proceeding with FDR. Information obtained during screening and risk assessment about the history and impact of family violence in the relationships should inform the approach taken in FDR if it proceeds. The following section of the paper will explore various approaches and practices that can be implemented when FDR is undertaken in cases where there has been family violence.

## 4 Responding to Family Violence through the Dispute Resolution Process

*FDR practitioners should design the most effective and safe process with the clients. (AGD 2006a: 88)*

The previous section considered the importance of effective screening and risk assessment for identifying family violence and determining whether FDR is suitable. If a victim of violence provides informed consent to proceed with FDR and both parties have been assessed as having the capacity to participate, it is imperative that FDR only proceed with special conditions in place. It is necessary to consider how safety concerns arising from the family violence can be addressed effectively to ensure the process and outcomes are safe. This section of the paper explores various approaches to undertaking FDR in the context of family violence.

### Addressing issues of safety in FDR sessions

If violence is identified through screening, the dispute resolution practitioner must determine how the issue will be dealt with in the dispute resolution sessions if they proceed. Johnson et al's (2005) study of family mediators in the US found that where domestic violence was recorded on a screening form, mediators directly addressed the issue in mediation sessions less than half the time (even when there was a protection order noted). However, as outlined in the previous section, concerns for the safety of the parties and children involved are important for developing parenting arrangements. While technically there is no legislative requirement for practitioners to address concerns arising from family violence in the dispute resolution sessions, they *are* expected to focus on the needs of children<sup>27</sup> (AGD 2005a) and the impact of family violence is an important consideration for ensuring the safety and wellbeing of children.

Some FDR practitioners may be concerned that addressing the violence to ensure a safe process and safe outcomes compromises the neutrality that is perceived to be critical for keeping both parties in the process (Bickerdike 2006). However, as outlined in Section 1, neutrality no longer appears to be a central principle of FDR. Bickerdike poses the question 'Can you actively ensure safety without having an acknowledgement

<sup>27</sup> Rhoades et al's recent study found that FDR practitioners perceive themselves to have a role in advocating for the children's interests (2006: iv).

of the presence of family violence and its effects? For example, can you stipulate separate waiting rooms and arrival and exit times if you don't acknowledge the presence and effect of family violence?' (2006: 13).

DVIRC believes that safety concerns arising from the violence should be addressed in FDR. This does not mean that details of past violence have to be discussed during FDR sessions, but it does mean that potential risks to safety should be considered when negotiating future parenting arrangements. It is, however, imperative that the practitioner does not raise the family violence, or safety concerns arising from it, without the victim's informed consent. Informing the perpetrator that the woman has disclosed family violence has the potential to result in retaliatory violence.

### Contact arrangements in family violence cases

Particular consideration must be given to how the family violence may impact on arrangements in relation to the children. The Family Court's Family Violence Strategy states that 'children and parents should not be placed in situations where they may experience harm' (Family Court 2004: 4). The strategy also acknowledges that 'some parents may threaten or cause harm to the other parent, when they are dropping off or picking up their children' after separation (2004: 4). Research shows that violence against women that continues after separation often occurs as a result of contact between the father and the children (Kaye et al 2003).<sup>28</sup> The following quote from the DVIRC and RAV research illustrates this:

*He has been stalking me at the current contact centre where he would park his car and stand and wait for me on the corner prior to me entering the premises. Staff at the contact centre attempted to stop him many times but he told them that he could do what he wanted and they can't stop him. (Kate, DVIRC interview)*

A key characteristic of family violence is psychological abuse centred on controlling the woman's life (Kaye et al 2003). A UK study of separated parents found that perpetrators of violence use contact as an opportunity to sustain power and control over their ex-partner and the children (Radford and Hester 2006: 87). It is in the best interests of the child that mothers feel safe about contact arrangements, as any distress will impact on the children (Radford and Hester 2006).

<sup>28</sup> New Zealand has a presumption against contact in family violence cases (Behrens 2005).

Women may have left the relationship to protect their children from the impact of violence (Radford and Hester 2006)<sup>29</sup>. They may therefore have concerns about the safety of their children on contact with the father.<sup>30</sup> There is well-established concern about sexual abuse, neglect and/or emotional harm to children on contact visits where the role of the protective parent is diminished (AGD 2006a: 30).

The Attorney-General's Guidelines state that FDR staff need to be aware of the impacts that witnessing family violence can have on children (2006a). As outlined in Section 1, witnessing family violence can have highly detrimental impacts on children's health and wellbeing (Shea Hart 2004). Children can also be fearful and insecure in the care of a parent who they have seen harm someone else (Family Court 2004: 4).

While it is generally accepted that contact with both parents is beneficial for children after separation,

*the child is much less likely to have had a beneficial relationship with the violent parent and it is difficult to repair the relationship if the child and mother fear the father and he is unwilling to accept his responsibility to change.* (Radford and Hester 2006: 87)<sup>31</sup>

Privileging the right to contact with both parents above the safety and wellbeing of children has for some time been recognised as a serious concern in family law cases (for instance see Rhoades, Graycar and Harrison 2000).

It is the view of the National Alternative Dispute Resolution Advisory Council (NADRAC) and the Family Law Council that 'it is both necessary and appropriate at times that mediators in parenting disputes advise parties about what is likely to be of benefit for children and what is likely to be harmful to them. It may well be appropriate to counsel parents that the arrangement that they are contemplating for organising the parenting of their child may not be one which would give the child the stability and security that he or she needs' (NADRAC and Family Law Council 2005: 5).

DVIRC commends this approach. FDR practitioners, and other workers seeking to support parties undertaking FDR, can provide information about parenting arrangements that promote the safety and wellbeing of the parents and the children. For example, Children's Contact Services can be utilised to provide facilitated changeovers that enable children to go from one parent to another in a safe environment. They can also provide supervised contact. Contact arrangements need

<sup>29</sup> Women's attempts to obtain safety by leaving the relationship or by seeking legal protections may be thwarted by contact arrangements that place them at risk.

<sup>30</sup> When mothers object to children having contact with their father, research shows that the main reasons are: concern about the father being a bad role model (such as displaying abusive behaviour); the father's lack of commitment to parenting; that contact would be unsafe for the children or themselves; or because the children did not want to have contact (Radford et al 1999).

<sup>31</sup> Radford and Hester provide some useful examples of specific issues to consider in determining the safety and suitability of contact (see pages 132–3).

to be reality-checked with the clients to determine if they are likely to be safe, effective and lasting. If it is evident that parties are deciding on arrangements that are not safe and fair for victims of violence or their children then the FDR should be terminated by the practitioner.

### Child-inclusive practices in FDR

The paramount principle in family law is 'the best interests of the child'. FDR practitioners are required to use 'child-focused' approaches (AGD 2005a). The term 'child-focused' involves considering the needs of children rather than the child's direct involvement in the process (Chisholm 2006). In contrast, 'child-inclusive' practices involve listening to the child's voice directly (Moloney and McIntosh 2004). The Family Law Act provides that children whose parents are having their dispute heard by the court can be represented by a separate lawyer. This provision recognises that 'parents are not always able to put aside their own adult concerns, and that on occasions children require a separate advocate to argue their best interests' (Family Court of Australia 2003).

There is clearly value in having children's input into parenting arrangements that will affect their lives. There are, however, risks involved, particularly where there has been family violence and child abuse. An abusive parent may question, pressure or punish a child for expressing views they do not approve of. It is therefore critical to assess the appropriateness of child-inclusive practices, including assessing the parent's openness to empathise with the child's situation.

Some FDR services such as Victoria Legal Aid's RDM program undertake separate interviews with children with the agreement of both parents, in appropriate circumstances. These interviews are undertaken by an independent, trained child consultant who gives feedback to the parents and the person running the RDM conference. It is unclear what child-inclusive practices will be utilised in FRCs and what qualifications staff interviewing children will have. DVIRC recommends that research be undertaken into the involvement of children in FDR processes in the new family law system.

## Working with perpetrators of family violence

Given the prevalence of family violence, a considerable number of male parties attending FDR services will have perpetrated family violence. It is therefore necessary for FDR practitioners to be skilled in recognising and responding to perpetrators and to provide suitable referrals to men's behaviour change programs.

In the DVIRC and RAV study one woman who found that the mediator ignored the violence stated:

*It only serves to fuel his denial of what he has done because it justifies to him this blame game which is working on others, strangers believing him. (Sue, DVIRC interview)*

Behaviour from the perpetrator that may intimidate or bully the victim during the sessions should be contained by FDR practitioners (Bickerdike 2006). Astor has also argued that practitioners should challenge such behaviour (1992: 15). However, it appears that practitioners differ in their views on challenging perpetrators of violence. Some practitioners believe that their obligation to neutrality precludes them from challenging perpetrators, while others coming from a more therapeutic approach see themselves as having an obligation to intervene (Rhoades 2006). The following quote from a FDR practitioner indicates a willingness to address the violence:

*with the perpetrator, I make it very clear that it is not for me to judge whether it [the violence] took place or not, but the fact that it's been mentioned, if there's an element of truth and reality to it then it's absolutely not on. That person needs to take account that they are a perpetrator of violence, that they need to acknowledge it and do something about it... (Family Court dispute resolution practitioner cited in Rhoades et al 2006: 115)*

Field suggests that if dispute resolution practitioners fail to respond to violent behaviour when it is observed they are effectively 'condoning the perpetrators behaviour and further entrenching the victim's disempowerment' (2005). Perpetrators are likely to minimise or deny their behaviour and may seek to draw FDR practitioners into excusing or justifying their behaviour. Research has found that interactions between professionals and perpetrators of violence can cause professionals to discount the severity of the violence to the child and other family members (Stanley and Goddard 2002).<sup>32</sup>

<sup>32</sup> An abusive party can use actual or implied violence towards professionals to disempower them and reduce the likelihood of their intervention (Stanley and Goddard 2002).

While it is important to acknowledge and respond to controlling behaviour, dispute resolution practitioners should never mediate about the violence itself (Astor 1992). That is, they should not permit the making of agreements that involve the perpetrator's conditional agreement to stop abusive behaviour. The victim has a right to safety regardless of what they do or do not do (Astor 1992).

No to Violence (NTV), a service in Victoria, provides training and resources for working with men who have perpetrated family violence. Their philosophical approach, principles and standards for working with men provide a useful model for FDR service providers and are available in *Men's Behaviour Change Group Work: A manual for quality practice* (NTV 2005). For instance, the manual states that all forms of violence are unacceptable and should be challenged at all times, and that the use of violence is a choice that the perpetrator is responsible for.

#### Addressing power imbalances

Rhoades et al's study of FDR practitioners found that practitioners acknowledge that a history of family violence is indicative of a power imbalance that can result in victims making 'inappropriate compromises' (2006: 111). Astor (1994) argues that family violence creates a power imbalance that cannot be effectively addressed in FDR because it is not possible to alter patterns established over long periods of time in a few sessions. Family violence can result in the victim being conditioned to relent, compromise and conform in order to avoid violent repercussions. Victims may agree to unsafe or disadvantageous outcomes in order to placate their ex-partner. They may be so affected by fear that even highly skilled FDR practitioners are not able to compensate for the power disparity (Johnson et al 2005).

There is considerable debate in the literature about whether or not FDR practitioners should address power imbalances and whether doing so compromises their impartiality. However, the question arises: how appropriate is mediation if it does not afford any additional protection to weaker parties than is the case in unassisted negotiations? (Boulle 2005: 151). If practitioners do not address power imbalances in the context of family violence then they are effectively allowing the process to favour the perpetrator (Bickerdike and Bailey 2005).

Mediators may need to take steps to redress power imbalances in order to ensure the safety of the parties and their children. If power imbalances cannot be addressed effectively by the FDR practitioner FDR should not take place. It would be useful if standards were developed to guide practitioners about their role in addressing power imbalances between parties.

#### Dispute resolution approaches in family violence cases

If an FDR practitioner and the parties to the dispute decide to proceed with FDR in a case where there has been family violence, a number of dispute resolution practices and formats can be utilised.

The following guidelines are suggested by the AGD:

- use short multiple sessions
- allow for individual follow up between sessions, or consider having short pre-mediation sessions before each session
  - include break-out private sessions (caucus) during sessions, and always have a private session to do a reality and safety check before moving towards finalising an agreement or parenting plan
  - consider drafting up a draft agreement/parenting plan and encourage the parents to discuss this with support people before returning to 'finalise' (i.e. sign and date) the agreement (2006a: 89).

The guidelines also suggest the use of specific FDR formats such as co-mediation and shuttle mediation (outlined below). DVIRC believes these should be available to all parties where family violence is identified.

#### Co-mediation

*I felt safer with two mediators ... I think it affected him [ex-partner] that there was another woman in the room, a woman in a position of real power, and so I think that that was really good. (Annie, DVIRC interview)*

Co-mediation involves two dispute resolution practitioners working together to facilitate dispute resolution and is used as a safeguard where there has been a history of family violence. Co-mediation by an interdisciplinary, gender-balanced team has been found to be ideal and particularly important in cases where family violence is identified (Keys Young 1996). The gender of the mediator may be an issue: for instance, a single male mediator can make a female feel marginalised and may

be intimidating, particularly for women who have been abused by male partners (Alexander 1997). It is important that the co-mediators work well together, provide a model of productive conflict resolution and have equal standing (Haynes and Charlesworth 1996).

Co-mediation has advantages for dispute resolution practitioners. It enables them to combine their skills and balance their approaches, and provides them with back up and support (Charlton and Dewdney 1996). Co-mediation is more likely to ensure that manipulative and abusive behaviour by one of the parties is detected and responded to. However, in order to do this effectively it is essential that both dispute resolution practitioners have training and experience in working with family violence.

Co-mediation is used fairly frequently in FDR in Australia (Astor and Chinkin 2002);<sup>33</sup> however, it is unclear how this will be funded in FRCs in the new system. Given the benefits, DVIRC recommends that additional resources be provided to ensure that co-mediation is consistently available to parties who have experienced family violence.

### Shuttle mediation

Shuttle mediation involves the dispute resolution practitioner(s) acting as a conduit between the parties by transferring messages from one to the other (Fisher and Brandon 2002). The parties remain in separate rooms or locations while the practitioner 'shuttles' between them. The benefit of shuttle mediation is that the victim of violence does not have to come face-to-face with the perpetrator. This may reduce the impact of controlling or intimidating behaviour. Skilled practitioners can use shuttle mediation to help parties focus on the task and reduce the likelihood of being distracted by emotive claims made by the other party because the dispute resolution practitioner can 'tone down' the communications when relaying information (Keys Young 1996: 40).

The use of shuttle mediation may not fully counter the impact of violence as victims may still experience intimidation via shuttle negotiations. 'Physical separation of the clients may not eliminate the patterns of fear and control that may be present in relationships where there has been a history of violence' (AGD 2006a: 88). It may also be the case that some parties would prefer to be face-to-face so that they know what the other party says to the mediator. They may be concerned about the perpetrator manipulating the FDR practitioner and that

**33** Another model of dispute resolution has been piloted in Victoria by the Family Mediation Centre and Relationships Australia. The model was developed for working with high conflict couples and involves a dispute resolution practitioner and a psychologist/counsellor working together to assess for family violence and assist separated couples to develop parenting agreements (Boyhan et al 2004). The project evaluation found that the dispute resolution practitioner was able to sort out decisions and future directions while the counsellor was able to assist with the emotional issues and negative experiences that created obstacles. This approach helped parents break impasses that prevented them from developing and maintaining post-separation agreements (Boyhan et al 2004).

the practitioner may not recognise the signs of intimidation or control (AGD 2006a). Shuttle FDR is frequently used in family violence cases by some FDR services in Victoria. Although it may take longer and require more resources it is a worthwhile approach if it enhances the parties' capacity to participate.

### **Private caucusing**

A private 'caucus' or 'session' involves a break in the direct communication between the parties in which the dispute resolution practitioner meets the parties separately (Fisher and Brandon 2002). Private caucusing allows parties to discuss matters they wish to raise privately, to vent emotions and to explore options that will enhance the safety and wellbeing of the child (Astor and Chinkin 2002). Private caucusing enables the dispute resolution practitioner to ensure the victim of violence is feeling safe, able to participate and to disclose any abuse or concerns for safety that arise during the process. In addition, private sessions may enable the dispute resolution practitioner to assist or support the less powerful party by helping them to frame options (Astor and Chinkin 2002). Private caucuses can be scheduled in advance and held with each party. However, it may be necessary to break into private sessions if it becomes evident that one party is being intimidated or pressured by the other party into making agreements that are likely to be unsafe or unfair. If this cannot be resolved through private caucusing, it is likely that FDR should be terminated.

### The role of support persons

*He actually threatened my girlfriend and so she wasn't comfortable coming with me ... It would have been good to have someone to talk to about, you know, what things could influence the mediation and what could go wrong. (Sophie, DVIRC interview)*

Having a support person may help victims of family violence engage with, and participate in, the dispute resolution process safely and fairly. Studies show that family violence victims require support that is non-judgemental and ongoing (Bagshaw et al 1999). Friends and family can provide support; however, they may have misperceptions about the complexities of family violence and be judgemental.

Family violence services are skilled in providing support to victims of violence. It is important that close working relationships be developed between family violence services and

FDR services. Currently many family violence services focus on providing a crisis response to family violence and due to funding shortages may not be able to provide ongoing support to women going through the dispute resolution process. Additional funding is required for family violence services to provide support to victims undertaking FDR.<sup>34</sup>

A Domestic Violence and Mediation Safety Project implemented in the US found that a partnership between a domestic violence service and a mediation service provided positive results (DePorto and Miller 2005). The partnership involved a protocol between the two services in which the domestic violence service provided counselling support to the victims of violence undertaking mediation. This helped clients explore the history of the relationship, recognise the level and forms of abuse and make sense of their own responses to the abuse. It also explored the ways in which the dynamics of the abusive relationship could impact on the mediation process and whether or not it was suitable to proceed. The domestic violence counsellor also prepared a safety plan with the woman, reviewed by the mediation centre staff (DePorto and Miller 2005). The domestic violence worker was able to advocate for the women during the mediation process and this was seen as a positive role by the mediator who felt it was not helpful or appropriate to advocate for victims themselves.

Victims of violence who wish to proceed with FDR should be offered the option of having a professional support person present during the process, including the FDR sessions. This can help to redress power imbalances between the parties. Having a support person present should not be reliant on the consent of the other party. However, if such consent is required but the other party does not provide it, the dispute resolution practitioner may need to determine that dispute resolution is not suitable. Ideally, the support workers would be trained in family violence, family law and FDR processes, and would be able to assist women by providing information about FDR, helping to decide if it is suitable to proceed with FDR, preparing them for FDR if they choose to proceed, supporting them through the process and discussing options that arise.

Partnerships between family violence services and FDR services, particularly FRCs, would enable the development of protocols and effective pathways for referrals to family violence services. If family violence services have an understanding of FDR and work collaboratively with service providers it is more

**34** There are some services providing post-crisis support to women involved in family law negotiations which may provide a useful model. For instance see the model of post crisis support outlined by Kirkwood (2006).

likely that FDR services will facilitate the involvement of support workers in the FDR process.

The diverse needs of clients are an important consideration for providing effective support. Family Court of Australia employs family consultants to meet with Indigenous family members prior to the commencement of dispute resolution (Ralph and Meredith 2002). They assess the cultural needs of the family, provide information about the process and liaise with the FDR practitioner.<sup>35</sup> They may also facilitate the involvement of extended family members and significant others in the dispute resolution process. This program was found to provide effective support to the client during dispute resolution and to assist the practitioner. Bicultural competence (the ability to switch between Aboriginal and non-Aboriginal ways of being) in the family consultant was found to be an important factor (Ralph and Meredith 2002).

During consultations in the preparation of this discussion paper, a suggestion was made that there is a need for policy to guide practices for FDR responses to the Indigenous community. Such a policy document could include the following:

- acknowledgement of the family violence issues in the Indigenous community and particular sensitivities
- commitment to working in partnership with relevant Indigenous services
  - commitment to ongoing cultural awareness training
  - commitment to training Indigenous FDR practitioners who are available as an option for the Indigenous community.
  - protocols for referrals to Indigenous family violence services.

#### The role of lawyers and legal advice

This paper has argued that the existence of family violence in a relationship creates a power imbalance that may place victims at a disadvantage in FDR. The presence of a lawyer or legal advocate can help to mitigate the disadvantages and redress inequalities in bargaining power (Field 2004, 2005). A Japanese study found that access to lawyers in divorce mediation empowered parties with legal information and guidance and provided better outcomes for women (Murayama 1999). NADRAC recognises that having lawyers present at some stages of the FDR process may be 'very helpful in providing parties with support and advice and reducing the time parents spend accessing different services' (2006: 7).

<sup>35</sup> NADRAC suggests that dispute resolution services 'should aim to be accessible to all groups in the community and should work toward achieving fairness in procedure so that their processes do not disadvantage particular groups or individuals as a result of culture, gender, age or other differences' (2006: 8).

While some dispute resolution practitioners are legally trained, it is not appropriate for them to provide individual legal advice to clients. In FRCs dispute resolution practitioners are not permitted to provide legal advice; however, they are able to give general legal information. FDR practitioners can refer clients to lawyers for legal advice.

Many FDR practitioners are reluctant to involve lawyers in FDR sessions because of the perception that the adversarial approach of lawyers is antithetical to the principles of mediation. FDR practitioners are critical of lawyers who are over-invested in their client's interests and fail to manage their client's expectations (Rhoades 2006). Government policy developments are shifting parties away from lawyers and courts towards FDR. Clients of FRCs are not permitted to have lawyers present during FDR sessions (AGD 2005a: 7).

Some FDR practitioners value the role of lawyers in advocating for less powerful clients, particularly victims of family violence, and allow lawyers to be present during FDR. For instance, the majority of clients accessing Victoria Legal Aid's RDM program are legally represented. If lawyers understand the principles of mediation and operate within this framework they can contribute to successful FDR (Wissler 2002 cited in Mack 2003). DVIRC believes that it is essential that lawyers have also been trained in family violence.

A recent study of the relationship between FDR practitioners and family lawyers in Australia found that good relationships between the two professions occurred where there was mutual collaboration and trust, an understanding of each others disciplines and where they each perceived the other made a valuable contribution to resolving family disputes (Rhoades et al 2006).

Field proposes a model of dispute resolution that centralises the role of a legal advocate through the process and includes their presence during the dispute resolution sessions. The lawyer is able to provide advice and clarify information through the process so that women are less likely to be pressured into agreements that are highly disadvantageous to themselves and their children.

The following benefits (based on Field's model) would also apply to parties who access legal advice and assistance without the lawyer being present during dispute resolution sessions. Lawyers may be able to be available during the course of the dispute resolution by telephone or to provide advice between sessions (Sordo 1996).

**Pre-mediation stage:** ensuring that the victim does not participate in dispute resolution if the risks to their safety are too great. If dispute resolution is appropriate a lawyer can prepare the client for dispute resolution by providing them with information about the process and skills for participation, and by generating some options to raise in the negotiation. The lawyer can assist the client to choose an appropriate dispute resolution practitioner such as one with family violence training and with effective practices for working with family violence cases such as co-mediation or shuttle mediation.

A lawyer can also provide the victim with an understanding of possible outcomes and establish a bottom line for matters to be agreed upon. The lawyer can help the woman prepare her opening statement for the first dispute resolution session outlining her needs and concerns.

**During the dispute resolution process:** the lawyer can provide advice and clarification through the process. If the victim is finding the dispute resolution sessions difficult, the lawyer can advise them of strategies to enable them to cope – such as asking for time-out, shorter sessions and, if necessary, withdrawing from the process. Lawyers may have a role in ensuring the high standard of conduct required of FDR practitioners (Sordo 1996). The lawyers' knowledge of legal principles can assist the victim to ensure that options which arise are thoroughly tested and 'reality-checked'. The lawyers can ensure the agreements are safe and fair before the client signs them.

**Post-dispute resolution:** lawyers can provide assistance in ensuring that agreements become legally binding by filing a consent order with the family court. If a victim experiences abuse from her partner at any of the above stages, the lawyer can provide advice and assistance in obtaining an intervention order.

DVIRC recommends that victims of violence have access to legal advice before, during and after participation in FDR. We also recommend that legal representatives be permitted at FDR sessions in FRCs for victims in family violence cases. In the absence of legal representation during sessions, DVIRC strongly recommends that family violence victims be referred to legal advice prior to proceeding with dispute resolution and be advised not to sign a parenting agreement without legal advice.<sup>36</sup>

<sup>36</sup> Once an agreement is signed it will have legal implications and can be taken into account as evidence by the court when making a decision should the agreement break down and proceed to court.

## Training for dispute resolution service providers

*I know it is not a popular view to be expressing but I started out thinking we could do this (work with DV) but now I'm not so sure. I think often they (the women) are not really coping at all and I think some of them are getting a really rough deal. And I am not sure we are doing the best thing by them by going along with all of this. I think a lot of my fellow mediators don't really know anything about what these women go through, and don't know really what they're doing.*  
(Mediator, cited in Keys Young 1996: 47)

The Attorney-General's Guidelines state that 'to respond appropriately to victims, service providers need to have adequate knowledge and awareness of partner abuse, have appropriate attitudes, take all reports seriously and treat all victims with respect' (2006: 16).<sup>37</sup> They also state that clients should be asked at the 'first point of contact' about any immediate threats to their safety (AGD 2006a: 23). It therefore follows that all staff in FRCs who have contact with clients, including reception staff, should be trained in family violence. The following quote from a woman who accessed mediation demonstrates this point:

*When I first rang I said something about the violence in the marriage and the secretary just said 'oh you'll have to talk to the worker about that', and that was very difficult. I felt that was dismissed. If she'd said 'I'll note that down and pass it on to the mediator, I would have felt heard. It was sort of like 'its not my business'. They don't know how hard it is, even to make that call.* (Kate, DVIRC interview)

Training is necessary to ensure staff can competently identify and respond to violence and can manage disclosures appropriately (Keys Young 1996: 35). Staff, including managers who supervise staff and develop organisational policies, also require family violence training.

FDR practitioners require extensive family violence training. They should be encouraged to reflect on their own values and experiences in relation to family violence, and understand how their values, attitudes and beliefs, and those of their community, impact on their work with people experiencing family violence (Lamont 2001). Research shows that mediators who attend external family violence training report significant shifts in attitudes and understanding of family violence (Keys Young 1996: 45).

**37** The Attorney-General's Guidelines state that dispute resolution practitioners involved in working with clients affected by family violence 'must have special training and be appropriately skilled in dealing with cases in which violence has been identified'. They 'must attend regular professional supervision for these cases, and must be supervised by someone who is experienced in working with domestic and family violence' (AGD 2006a: 89).

The *Model Standards of Practice for Family and Divorce Mediation* developed by the American Bar Association and the Association of Family and Conciliation Courts (2001) includes the following standard:

*A family mediator shall recognise a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.*

DVIRC believes that standards of practice for responding to family violence, including standards such as the above, should be developed for FDR practitioners in Australia.

In the new Family Law Act, FDR practitioners are required to be accredited. At the time of writing an accreditation system was being developed and there is a transition period until June 2009.<sup>38</sup> It is envisaged that the competency standards for accreditation will include core competencies on family violence.

DVIRC recommends that FDR service staff who undertake screening and risk assessment for FDR services receive training in areas that include the following:

- the nature and dynamics of family violence
- the impact of family violence
- barriers to disclosure
- the effect of family violence on children
- responding to victims of family violence
- working with perpetrators of family violence
- screening and risk assessment for family violence
- safety planning
- providing support to children affected by family violence
- ongoing professional development in relation to working with families affected by family violence.

To effectively respond to family violence it is also necessary that staff have an awareness of the impact of clients' diverse backgrounds and experiences. This requires training staff in diversity issues such as cultural awareness and disability. In providing culturally sensitive dispute resolution it is necessary to identify and understand cultural differences in conflict interaction and resolution; to acknowledge that other cultures have different preferred dispute resolution practices; and to promote strategies for increasing the accessibility and cultural appropriateness of dispute resolution services (Frederico

**38** Until then practitioners must comply with qualifications set out in the *Family Law Regulations 1984*.

2003). Failure to be culturally sensitive can result in increased anxiety and ambiguity for the dispute resolution practitioner and a decreased ability to build rapport with the parties (Frederico 2003). Cultural awareness is also important to ensure that FDR practitioners do not accept claims/excuses that violence and abuse occurs for cultural reasons.

It is apparent that there may be a shortage of skilled and experienced FDR practitioners after the rapid expansion in the provision of FDR that will occur over the next year. This is particularly concerning given that research shows that FDR is most likely to be successful when provided by highly skilled practitioners. It is unclear what quality assurance measures will be implemented.

#### Evaluation and monitoring of FDR in the new family law system

As this paper has outlined, there are serious questions about the capacity of FDR to provide justice to parties affected by family violence. Boule points out that FDR involves the privatisation of decision-making so that instead of objective and socially derived standards, it is the standards of the parties, and most often the stronger party, that are imposed (2005: 161). It is also likely that the standards of the FDR practitioner will have an impact.

While many existing dispute resolution services claim to implement appropriate screening and risk assessment processes, research is required to assess their practical effectiveness and impact (Field 2005). It is also imperative that FDR outcomes be monitored and evaluated to determine how fair and safe they are and how effective and sustainable they are over time. Research comparing outcomes from FDR to litigated outcomes should be undertaken (Alexander 1999).

Effective monitoring and evaluation requires thorough data collection that is consistent across FDR providers. It would be useful to collect data on the number of cases in which family violence, including child abuse, is identified; the proportion of these that proceed with FDR; what proportion of cases achieve satisfactory outcomes; and how effective the parenting arrangements are in ensuring the safety and wellbeing of women and children in both the short and longer term.

Evaluation of the effectiveness of FDR would need to measure factors such as:

- whether or not victims of family violence felt pressured to participate in FDR

- if they felt safe during the process
- if they felt pressured to make agreements that were not fair or in the best interests of their children
- whether agreements were adhered to in the long term and if not what the reasons were for changes to arrangements.

Another important condition for quality assurance of FDR services is the establishment of an independent complaints body for clients who have accessed FDR services. Complaints should be investigated and information about the number and nature of complaints be reported on publicly without information that may identify the clients.

### Conclusion

Family violence creates a power imbalance that impacts on the FDR process and outcomes. If power imbalances between the parties cannot be adequately addressed FDR should not proceed or should be terminated. It is DVIRC's view that FDR practitioners have a responsibility to ensure that clients they deem suitable to participate in FDR are able to do so safely and fairly. FDR practitioners need to be highly skilled in responding to family violence in order to ascertain the risks involved and manage the process effectively.

If FDR proceeds in family violence cases it is essential that special conditions are in place and that safety issues arising from the violence are taken into consideration in the development of parenting agreements. Parenting arrangements impact on the safety and wellbeing of women and children affected by family violence. Given that large numbers of parenting agreements will be made through FDR in the new family law system it is imperative that effective safeguards are implemented and that outcomes are monitored.

## 5 Conclusion and Recommendations

The family law system is notoriously difficult for those who have experienced violence to navigate. Women's experiences of the Family Court process vary, with some achieving safe and fair outcomes for themselves and their children, and others living with court orders that continue to expose them to violence and trauma (Rhoades et al 2000, Rendell et al 2000). The key advantages of the Family Court process compared to FDR in the new family law system are the potential to have an advocate to represent a client's interests and an open, accountable and appealable process. Some women may not want, or may not be able, to take their dispute to the Family Court. Also, they may not be in a position to negotiate directly with their ex-partner as this could be highly dangerous and traumatic. In this context, FDR may be the only option for determining parenting arrangements for their children with the assistance and facilitation of an impartial third party. DVIRC has come to the view that FDR may be useful for some victims of family violence where each of the following factors apply:

- there is specialised screening and risk assessment
- thorough safety planning and safety measures are implemented
- the parties do not have current or ongoing fears for their safety
- the victim has made an informed choice to participate
- the FDR practitioner assesses that both clients have the capacity to participate
- victims have received adequate preparation prior to entering into FDR
- FDR is provided by practitioners who are highly skilled in family violence
- legal representation or legal advice is accessible
- family violence support workers are accessible
- culturally appropriate services are provided
- needs arising from disability are responded to
- specialised forms of FDR are utilised
- victims receive follow-up contact and support.

It is difficult to envisage that these conditions will be universally accessible in the new family law system. DVIRC makes the following recommendations for FDR providers, govern-

ment policy makers and organisations that provide support to women who may participate in FDR. DVIRC remains highly concerned about the welfare and safety of victims of violence undertaking dispute resolution until these recommendations are implemented.

## Recommendations

DVIRC makes the following recommendations:

### *Family dispute resolution providers*

1. FDR providers should implement policies and practices that ensure parties who access their services are provided with safe processes and achieve safe outcomes.
2. Policies and practices for responding to family violence, including screening and risk assessment tools and guidelines for determining which cases are suitable to proceed with FDR, should be consistent across all FRCs and other FDR service providers.
3. Policies of FDR services should specify that no victim of violence should be compelled to participate in FDR processes.
4. Traditional notions of FDR as neutral and non-directive should be abandoned in the FDR industry. FDR training and core competencies should reflect this change of position.
5. FDR services should ensure that parties to a dispute do not come into direct contact with one another at any time without the consent of both parties.
6. Intake, screening and risk assessment should always be conducted separately with each party to enable disclosure of family violence.
7. All FDR service staff should receive training in the three distinct areas of family violence, cultural awareness and disability issues.
8. Staff involved in screening and risk assessment or in providing FDR services should be extensively trained in family violence and receive ongoing professional development regarding family violence.
9. When family violence is identified, safety planning should be undertaken with the client and appropriate active referrals should be made, regardless of whether FDR proceeds.

10. When family violence is identified, extended risk assessment should be undertaken to determine if dispute resolution is suitable and, should it proceed, which formats would be most suitable.
11. FDR should be deemed unsuitable for the parties where family violence is identified and the victim does not wish to proceed.
12. Clients who disclose family violence during screening or FDR sessions should receive follow-up contact from the service.
13. Clients affected by family violence, who may be eligible for legal aid and legal representation through the RDM program, should be referred, after initial screening and safety planning, to Legal Aid.
14. In cases where family violence is identified, short sessions, co-mediation, shuttle mediation and private caucusing should be offered as options for proceeding with FDR. These options should be clearly explained in preparation for FDR.
15. Co-mediation should be provided by a gender-balanced team.
16. Victims of family violence who proceed with FDR should be offered the option of having a professional support person present during the process. The consent of the perpetrator of violence should not be required for this to occur.
17. In all cases where family violence is identified there should be an automatic active referral to a suitable legal representative to obtain legal advice prior to FDR and before signing parenting plans.
18. Victims of violence should be permitted to have a legal representative present during the FDR sessions.
19. In cases where family violence is identified, FDR practitioners should ensure that safety concerns arising from the violence are addressed in formulating parenting arrangements.

#### *Lawyers*

20. Lawyers providing advice and assistance to victims of violence undertaking FDR should be trained in family violence and have an understanding of the FDR process. They should also be trained in cultural awareness and disability issues.
21. FDR providers, lawyers and other professionals coming into contact with parties undertaking FDR, should en-

courage parties who have experienced family violence to have parenting agreements made into consent orders through the family court, after obtaining legal advice.

*Other service providers*

22. Strong links should be developed between FDR services and local and state-wide domestic and family violence services.
23. FDR services should build strong links with Indigenous family violence services and work collaboratively to develop protocols for working with the Indigenous community.
24. FDR services should build strong links with diverse community services including disability services and services for CALD communities.

*Government policy*

25. FDR providers should receive additional resources to provide free and appropriate services to parties affected by family violence.
26. The Commonwealth Government should provide additional funding to state family violence services to provide resources and support workers to victims of violence attending FDR services.
27. A process for urgent independent monitoring and evaluation of FRCs and other FDR service providers should be implemented.
28. Funding should be provided to services such as community legal services and women's legal services to provide legal advice to victims of violence undertaking FDR.
29. The Family Law Act should be amended to remove compulsory FDR.
30. An independent complaints body for clients of FDR services should be established.

*Research*

31. Research should be undertaken into how FDR can respond effectively to perpetrators of family violence in the new family law system.
32. Research should be undertaken into screening and risk assessment for child abuse in FDR and the effectiveness of child-inclusive practices in the new family law system.
33. Research comparing outcomes from FDR to litigated outcomes should be undertaken.

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