

Family dispute resolution - Key Literature

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men.

See in particular from p 54 where the issue of disclosure is discussed. The article observes that fear of disclosing family violence is a significant issue in the context of Family Dispute Resolution (and more broadly). In particular, 'Only 60% of the respondents who attended FRCs said they disclosed their experiences of family violence and only 10.5% of those who reported violence to a FDR service were given a certificate of exemption (see s60I of the Family Law Act) from using the service. In this context, women were more likely than men not to disclose violence and twice as likely to report that family dispute resolution proceeded if family violence was disclosed' (p 54).

Caruana, Catherine, 'Dispute resolution choices: A comparison of family dispute resolution, family law conferencing services and collaborative law' [2010] (85) *Family Matters* 80.

This article provides a comparison of family dispute resolution, family law conferencing and collaborative law. Practitioners' views, differences in the lawyer's role, cost and the range of applicable issues in each theatre are discussed. Traditional mediation (known as Family Dispute Resolution - FDR) is discussed on p 81. The article identifies that careful screening processes for issues such as domestic violence and child abuse are conducted and FDR practitioners 'may refuse mediation where they believe there is a concern about the safety of the clients or the mediators, or where there is a power imbalance that cannot be adequately addressed within the process' (p 81). It points out that while the client must be able to negotiate on their own behalf, there are mechanisms available to support clients including conducting the mediation 'on a shuttle basis where the parties are located in separate rooms and the mediators move between the rooms' (p 81).

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See in particular from p 27 where the author discusses the 'victim's dilemma' where 'the victim has experienced family violence and has well-founded fears for the safety of the children if they are to be in the care of the perpetrator.' The dilemma relates to 'balancing the risk to the child from not taking protective action against the risk to the child of doing so unsuccessfully, with the consequence that the child spends more time with the perpetrator' (p 28). If a victim were to seek orders to protect the children from risk (such as no-contact or supervised contact orders), it may be seen 'as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator.'

This could result in the decision maker taking an adverse view of the victim and making orders which place the children with the perpetrator for longer periods 'to protect them from what it might see as a style of parenting by the victim that would harm the children by alienating them from the other parent. Such an outcome, the victim would believe, would place the children at *additional* risk of harm' (p 27).

The author notes that often, a history of domestic violence in the relationship which may not have previously been disclosed will contribute to the seriousness of the victim's dilemma. This may make it difficult for the victim to disclose the violence later (such as in Family Dispute Resolution (FDR) or court proceedings) because such disclosure 'may be met with the criticism that if such things had happened, the victim would have complained: it will be argued that the victim's lack of action at the time is a sign that there really had been no such family violence, or that it was of a trivial nature' (p 28). The author notes that the dilemma applies at all stages of proceedings and before proceedings begin. (p 28).

See further at p 152, where the author discusses the risks associated with delay in relation to FDR agencies.

De Maio, John, et al, 'Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011' (Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.'

At p E2, it is noted that the most common services accessed by separating parents were Family Dispute Resolution (FDR) (and lawyers). Further, where parents experienced the two broad categories of family violence (physical violence with or without the presence of emotional abuse, and emotional abuse alone), use of all types of family law services including FDR increased. In particular, '69% of parents who experienced physical violence before/during separation contacted a counselling, mediation or family dispute resolution service, compared with 40% of parents who did not report experiencing any family violence' (p 46).

Section 4.3.1 discusses FDR specifically. It is noted that, 'A smaller proportion of parents who reported experiencing family violence before/during the separation than those who didn't experience family violence reached an agreement through FDR' (Table 4.13) (p 52).

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: a number of issues including family dispute resolution (FDR).

FDR is considered in section 4.6 from p 59. The study identifies that dealing with family violence/abuse is 'core business' for FDR practitioners (p 67). The data suggests that 'although the experience of family violence/abuse is common among those parents who attempt FDR, those who do not reach agreement but who are not issued with a certificate, are more likely than those who reach agreement to report this experience, while those who are issued with a certificate are the most likely of all to make such a report. A similar pattern can be seen when safety concerns are examined. Those who reach agreement are the least likely to report safety concerns; those who do not reach agreement but are not issued with a certificate are somewhat more likely to report safety concerns; and those who are issued with a certificate are the most

likely to have such concerns' (p 62).

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

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

Chapter 5 discusses family dispute resolution (p 93). In situations where FDR or mediation was clearly reported as having been attempted, 'Parents who reported experiencing violence (physical or emotional) were much more likely to have attempted FDR (41% of those who experienced physical violence and 35% of those who had experienced emotional abuse only) than those who did not report experiencing violence (15%)' (p 100).

Table 5.6, which reports on the outcomes of FDR according to whether family violence had been experienced is particularly relevant. (p 100). Table 5.7 discusses FDR agreement rates for mothers and fathers 'by fear, abuse or threats an ability to negotiate'. (pp 100-101). Table 5.8 examines similar issues but in relation to the issuing of s 60I certificates. It suggests 'a strong correlation between mothers' reporting of fear, both generally and inside the sessions, and the issuing of a certificate. There is a weaker though still statistically significant correlation between fathers' reporting of abuse or threats outside the sessions and the issuing of a certificate' (p 102). Authors note there are cases where no certificates are issued but there are reports of fear and threats (p102). There were also reports from some who felt pressured into FDR or into reaching an agreement (p 110). A survey of 2335 clients of family relationships services suggested, in relation to the effectiveness of service responses to concerns and fears of the other person who attended the service in 35% of cases, the participant indicated their fears weren't adequately addressed.

Kaspiew, Rae, et al, 'Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases' (Commissioned Report, Australian Institute of Family Studies, 2012).

The Coordinated Family Dispute Resolution model was developed to provide a safe, non-adversarial, and child-sensitive means for parents to sort out their post-separation parenting disputes. The model was trialled in five sites across Australia. This report presents an evaluation of the model, examining whether the model addressed practitioner and family safety during the program, safe parenting arrangements, the best interests of children, and power imbalances between parents. The evaluation also examines challenges and advantages due to the interdisciplinary nature of the model.

Chapter 7 (p 102) discusses 'CFDR negotiation in the shadow of family violence'. See further at p 116 – Notes: '...FDR is based on the notion that the process supports parents in agreeing on parenting arrangements and is a step in the direction of future self-management. In the context of family violence, this ideal is recognised to be difficult to achieve because of the power dynamics such a history creates in a relationship, at a general level, and more specifically, because of the potential ongoing effects of trauma.'

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence in three respects:

- > Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- > Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives
- > Court Outcomes Project involving: a quantitative analysis of patterns in orders for parental responsibility and time made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia; a national analysis of court filings data provided by those courts and an analysis of published judgments

See in particular section 3.1.5 (esp. p24) – Family dispute resolution outcomes.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

See in particular figure 5.1, which shows, *inter alia*, 'the estimates of the proportion of cases that are unsuitable for family dispute resolution due to the presence of concerns about family violence and child abuse and neglect'. The findings show that these issues are relevant in a substantial proportion of cases though family violence is more frequently identified than child abuse' (p 89).

Qu, Lixia and Ruth Weston, 'Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms' (Commissioned Report, Australian Institute of Family Studies, 2010).

This report examines, 'the pathways that separating families have taken through the family law system, and the impact the changes to the family law system have had on these families. The Longitudinal Study of Separated Families examined relationships and wellbeing in separated families in Australia. Some 10,000 separated parents with children were interviewed for the first wave in 2008, as part of the evaluation of the 2006 Family Law reforms. This report presents findings from the second wave, when the parents had been separated for two to three years'. See in particular section 4.2 – 'Use of family dispute resolution (FDR)'. Recent use of FDR in the context of physical or emotional abuse is considered at p 49. Use of FDR was reported by around one in three fathers and one in four mothers who said that they had experienced physical or emotional abuse between survey waves and by only around 10% of parents who had not experienced either form of abuse' (p 49).

Qu, Lixia, *Family dispute resolution: Use, timing, and outcomes* (2019) *Australian and New Zealand Journal of Family Therapy* 24-42.

After the 2006 Australian family law reforms, it became mandatory for separating or separated parents to mediate disputes over children before filing an application for the courts. The process is known as Family Dispute Resolution (FDR).

This paper examines three cohorts of parents who had separated in different periods after the reforms. It shows that parents who went to FDR were typically able to reach an agreement, but also that the use of and outcomes from FDR were closely linked to circumstances surrounding separation. And finally that parents who used FDR typically did so in the early stage of separation, with its use much less common after a separation of three or four years.

Key points:

1. Use of FDR is quite common among separated parents and the take-up has increased. Among the two cohorts of recently separated parents (surveys conducted in 2012 and 2014), nearly four in 10 reported use of FDR within a year and half after separation, representing an increase from three in 10 for a similar 2008 survey.
2. Separated parents who used FDR differed from those who did not, with a higher likelihood of use associated with higher socio-economic status, separation from a registered marital relationship and having children of primary or junior high school age. More importantly, FDR use was closely associated with experience of toxic issues (family violence, mental health, or substance misuse) before or during separation and poor quality of inter-parental relationship and post-separation safety concerns.
3. Parents who used FDR were more likely to reach an agreement than to have other outcomes. The rate of reaching agreements increased over time, with close to one-half of FDR users among the more recent

cohort (2014 survey) reporting this positive outcome. On the other hand, the rate of issuing a certification fell.

4. The longitudinal data of separated parents who were interviewed at three time points after separation (1.5, 2.5, and 5.5 years) revealed that most used FDR once, which typically occurred soon after separation.
5. The data further reveal that the longer the separation, the less likelihood parents reached an agreement through FDR.