Il ruolo della mediazione nei casi di violenza familiare: L’esperienza delle corti indigene

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Abstract
In the past 15 years, Australian family law has placed an emphasis on alternative methods of resolving disputes before resorting to litigation, particularly when children are involved. This change in practice has seen an increase in the number of couples who use alternative dispute resolution, which is referred to in federal family law legislation as ‘family dispute resolution’ (FDR). This chapter considers the appropriateness of using FDR for couples that are engaged in a relationship that is impacted by family and domestic violence. The most common form of family and domestic violence is Intimate Partner Violence (IPV), and as such, the focus of this chapter will be on the appropriateness of using FDR when intimate partner violence is evident. Some scholars encourage the use of alternative dispute resolution processes where the victim has been subjected to IPV, because they believe that such a process can empower the victim (who is, more often than not, the female in a heterosexual relationship) by giving her the opportunity to participate in the process and by allowing her to tell her story, something which does not occur in the adversarial process. Others believe that alternative dispute resolution, while useful for many different types of disputes, is not suitable for matters involving IPV because of the presence of complex power imbalances that are normally part and parcel of such violence. There are strong philosophical arguments for and against the use of FDR (and other alternative dispute resolution practices) for cases involving IPV and very little empirical evidence to support either side of the argument. In looking to alternative models of dealing with disputes where IPV is present, we use Australia’s Indigenous sentencing courts as an example of a forum where offenders, victims, community members and justice personnel come together to discuss the relational and personal issues of the parties involved, in order to formulate positive and meaningful outcomes. The communal nature of Indigenous sentencing courts may offer some valuable lessons for FDR and other alternative dispute resolution practices when used to resolve family law disputes that contain evidence of the existence of IPV.

Keywords
mediazione, indigene, corti, delle, esperienza, l, familiare, violenza, di, casi, nei, della, ruolo, il

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The Role of Mediation in Family Law Disputes Involving Family Violence: Lessons Learned from Indigenous Sentencing Courts

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INTRODUCTION

In the past 15 years, Australian family law has placed an emphasis on alternative methods of resolving disputes before resorting to litigation, particularly when children are involved. This change in practice has seen an increase in the number of couples who use alternative dispute resolution, which is referred to in federal family law legislation as ‘family dispute resolution’ (FDR).3 This chapter considers the appropriateness of using FDR for couples that are engaged in a relationship that is impacted by family and domestic violence. The most common form of family and domestic violence is Intimate Partner Violence (IPV), and as such, the focus of this chapter will be on the appropriateness of using FDR when intimate partner violence is evident. Some scholars encourage the use of alternative dispute resolution processes where the victim has been subjected to IPV, because they believe that such a process can empower the victim (who is, more often than not, the female in a heterosexual relationship) by giving her the opportunity to participate in the process and by allowing her to tell her story, something, which does not occur in the adversarial process. Others believe that alternative dispute resolution, while useful for many different types of disputes, is not suitable for matters involving IPV because of the presence of complex power imbalances that are normally part and parcel of such violence. There are strong philosophical arguments for and against the use of FDR (and other alternative dispute resolution practices) for cases involving IPV and very little empirical evidence to support either side of the argument. In looking to alternative models of dealing with disputes where IPV is present, we use Australia’s Indigenous sentencing courts as an example of a forum where offenders, victims, community members and justice personnel come together to discuss the relational and personal issues of the parties involved, in order to formulate positive and meaningful outcomes. The communal nature of Indigenous sentencing courts may offer some valuable lessons for FDR and other alternative dispute resolution practices when used to resolve family law disputes that contain evidence of the existence of IPV.

TERMINOLOGY

Often critiques of alternative dispute resolution processes for matters involving IPV focus on the use of practices, such as restorative justice (RJ), rather than mediation per se. The various forms of alternative dispute resolution are ultimately attempting to utilise approaches that are more conciliatory in the resolution of disputes than the traditional adversarial court process. Mediation is a process, which involves an impartial third party meeting with the

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3 Family Law Act 1975 (Cth), s. 60(I).
disputants to determine the issues in dispute and how to ultimately reach a resolution.\(^4\) RJ is not easy to define because it covers a range of practices at various stages of the justice system.\(^5\) Despite this, a popular definition ‘is that those with a stake in a crime (or dispute) come together to discuss it with the aim of repairing the harm.’\(^6\) Julie Stubbs refers to victim-offender mediation, conferencing and sentencing circles as common RJ practices.\(^7\) While there are significant differences between these three practices, the criticisms of all three when IPV is involved, are similar in nature. As a result of such similarities and the similarities between various alternative dispute resolution practices, we draw on a broad range of literature that is not specific to FDR in considering the pros and cons of using FDR in family law matters involving IPV.

In addition, we mainly use the term FDR when describing the alternative dispute resolution process in order to reflect the terminology used in the *Family Law Act 1975* (Cth) (FLA). The FLA definition of FDR is broad, and practically speaking, synonymous with the definition of mediation:

*Family dispute resolution is a process (other than a judicial process):
(a) In which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
(b) in which the practitioner is independent of all of the parties involved in the process.*

We also use the term ‘victim’ to refer to women who experience IPV. We acknowledge that there is significant debate around the use of this term, with many preferring the use of terms such as ‘complainant’, ‘survivor’, or ‘alleged victim’.\(^8\) While the use of the word victim may carry with it various connotations, we believe it best describes the position of women who experience IPV and we therefore use it consciously, specifically, and as a matter of consistency.\(^9\) Furthermore, this chapter uses the term ‘perpetrator’ when referring to men who engage in violence against their partners within the context of family law. Statistics show that the majority of family and domestic violence perpetrators are male, and as such, it is necessary to reflect the gendered nature of family and domestic violence in scholarly work.\(^10\)

**FAMILY AND DOMESTIC VIOLENCE IN AUSTRALIAN FAMILY LAW**

*The Prevalence of Family and Domestic Violence*


Family and domestic violence in Australia is a significant and ongoing problem and is one of the most under-reported crimes in Australia, with estimates of reporting ranging from 2 to 52 percent.\textsuperscript{11} Studies indicate that 90-95 percent of victims of family and domestic violence are women, and the perpetrators are their male partners or ex-partners.\textsuperscript{12} The most recent \textit{Australian Bureau of Statistics Personal Safety Survey} reported that from age 15, 2.1 percent (160,100) of women experienced current partner violence, as compared to 0.9 percent (68,100) of men, and that 10 percent of women who had experienced violence by their current partner, had a protection order issued against the abusive partner. Despite the protection order, however, 20 percent reported that the violence continued.\textsuperscript{13} The survey defined violence as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault'.\textsuperscript{14} More disturbing are the statistics, which provide an estimate of how many women had experienced violence during their lifetime. The Australian Institute of Criminology's findings from the 2004 \textit{International Violence Against Women Survey} found that one third of women who had been involved in an intimate partner relationship had experienced at least one form of violence perpetrated by an intimate partner.\textsuperscript{15}

\textbf{Family and Domestic Violence Defined}

Up until December 2011, the FLA defined family violence as

\begin{quote}
\textit{conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.}\textsuperscript{16}
\end{quote}

However, a range of amendments to the FLA introduced into parliament through the \textit{Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)} will from July 2012, broadened the definition to:

\begin{quote}
\textit{... violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.}\textsuperscript{17}
\end{quote}

The new section provides a range of examples that may constitute family violence including (sexual) assault, stalking, derogatory taunts, intentional damage to property, causing intentional death or injury to an animal, denying a family member of financial autonomy, unreasonably withholding financial support, preventing a family member from maintaining connections to the outside world, or denying liberty.\textsuperscript{18} This new definition has been applauded by human rights organizations, and represents a significant milestone in the development of Australian family law.\textsuperscript{19}

\textsuperscript{11} Crime and Misconduct Commission, 'Policing Domestic Violence in Queensland: Meeting the Challenges' (2005) at 15.
\textsuperscript{15} J. Mouzos and T. Makkai, 'Women's Experiences of Male Violence: Findings From the Australian Component of the International Violence Against Women Survey (IVAWS) ' (Australian Institute of Criminology, 2004) at 44.
\textsuperscript{16} \textit{Family Law Act 1975 (Cth)}, s. 4.
\textsuperscript{17} \textit{Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)}, s. 4AB(1).
\textsuperscript{18} \textit{Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)}, s. 4AB(2).
Each Australian state and territory also has its own definition of family and domestic violence, some of which are wider than others. For example, in New South Wales the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPV Act) defines a ‘domestic violence offence’ as a ‘personal violence offence’ committed by, and against, those in a ‘domestic relationship’. A ‘domestic relationship’, defined in section 5 of the CDPV Act, includes a current or past marriage, a de-facto or intimate personal relationship, people living together, relatives or a member of the extended family (or kinship amongst Indigenous Australians). A ‘personal violence offence’ is defined in section 4 of the CDPV Act as including a range of offences against the person such as murder, manslaughter, wounding or causing grievous bodily harm with intent, assault, sexual assault, kidnapping, child abduction and destroying or damaging property, discharging a firearm with intent, not providing a wife with food, and setting traps. Comparatively, the Victorian definition is broader, and includes behaviour other than physical offences against the person. Section 5 of the *Family Violence Protection Act 2008* (Vic) defines ‘family violence’ as:

(a) behaviour by a person towards a family member of that person if that behaviour –
   (i) is physically or sexually abusive; or
   (ii) is emotionally or psychologically abusive; or
   (iii) is economically abusive; or
   (iv) is threatening; or
   (v) is coercive; or
   (vi) in any other way controls or dominates the family member and causes that family member to fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

In Queensland the definition is somewhat wider than the New South Wales definition, but narrower than that of Victoria. Section 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) defines ‘domestic violence’ as

any of the following acts that a person commits against another person if a domestic relationship exists between the 2 persons –
   (a) willful injury;
   (b) willful damage to the other person’s property;
   (c) intimidation or harassment of the other person;
   (d) indecent behavior to the other person without consent;
   (e) a threat to commit an action mentioned in paragraphs (a) to (d).

Of the three states outlined, Victoria offers the broadest definition of family and domestic violence and is most similar to the definition contained in the FLA. The varying definitions illustrate that while a woman in Melbourne may be considered a victim of IPV, that same woman may be denied state-based protection in Sydney or Brisbane. Alarming as it is, this is a result of the federal nature of Australian governance. While the definition of family and domestic violence is extremely important in each jurisdiction, the federal magistrates and family law courts are the only courts with jurisdiction to make rulings on, and in relation to, marriage. As such, the FLA definition is what is considered in determining whether FDR is appropriate in the circumstances. As such, the FLA definition is the focus of this chapter.

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20 Section 5, Family Violence Protection Act 2008 (Vic).
21 In accordance with s. 51 of the Australian Constitution.
THE RISE OF (MANDATORY) MEDIATION IN AUSTRALIAN FAMILY LAW

The Legislative Framework

In recent times, Australian family law has mandated the use of ‘family counseling’ and FDR before courts can hear and determine any applications under Part VII of the FLA, which deals with parenting orders. The idea of forcing victims of IPV to enter into ‘negotiation’ with their perpetrator is not ideal, which is recognised in the FLA by the introduction of exceptions to the FDR requirement. Section 60I of the FLA sets out a complex system whereby the parties of a custodial dispute must obtain a certificate, certifying their attendance at FDR before the court is able to hear an application for a parenting order.

Section 60I(9) provides exceptions to the certificate requirement where the parties have made the application by consent or where there has been, or is a risk of child abuse or family violence by one of the parties:

Subsection (7) does not apply to an application for Part VII order in relation to a child if:

...  
(b) the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceeding; or
(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
(iii) there has been family violence by one of the parties to the proceedings; or
(iv) there is a risk of family violence by one of the parties to the proceedings

This section requires the judge to make a determination of fact in relation to the existence of family violence. Similarly, section 65F of the FLA requires that the court must not make an order in relation to a child unless the parties have attended family counseling. This section, recognising that counseling is inappropriate in cases involving IPV, also has an exception:

(2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:

(a) the parties to the proceedings have attended family counseling to discuss the matter to which the proceedings relate; or
(b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstances (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a).

Other sections of the FLA that grant such discretion to the judge to determine whether family violence (or a threat of it) exists include section 61DA and 60K. Section 61DA creates the presumption of ‘equal shared parental responsibility’, which involves both parents equally sharing the responsibility for a child (although, this does not equate to spending equal time with each parent). Sub-section 61DA(2) provides an exception to the equal shared parental responsibility presumption where there is evidence of child abuse or family violence. Similarly, the equal shared parental responsibility presumption can be ignored in an interim order application under s61AD(3) if the court considers it appropriate in the circumstances. Zoe Rathus argues that section 61DA(3) can provide an “escape valve” for cases involving
unproved allegations of family violence,” allowing the court to set aside the presumption until the allegations have been fully considered. Under section 60K, the court is able to take ‘prompt action’ in relation to allegations of child abuse or family violence. This section states that the court ‘must … deal with the issues raised by the allegation as expeditiously as possible.’ These sections provide the court with a considerable amount of discretion in determining whether or not family violence exists. The discretion inherent in sections 60I and 65F is particularly relevant to this chapter because it will determine whether the court forces a victim to face her IPV perpetrator in FDR. As is discussed below, there are significant implications if this occurs.

The Problem with Judicial Discretion

Tom Altobelli, a Federal Magistrate, has written on the difficulty that judges face when hearing allegations of family and domestic violence, stating that ‘identifying family violence is perhaps the single most important component to appropriately respond to it.’ Altobelli argues that while this involves ‘screening and triage’ on behalf of the courts, legal practitioners also need to offer up ‘clear and persuasive’ evidence.” Similarly, Rathus warns practitioners to ‘be serious about how you present and prove allegations of family violence. It is very relevant and important – but you must do it properly, and obtain supporting evidence and present it cogently.’ Altobelli emphasises the fact that practitioners must treat allegations of family violence seriously:

Evidence of family violence that does not present consistently runs the risk of not receiving the weight it otherwise deserves … If family violence is argued seriously in a parenting case, it will be treated seriously. All too often, however, it is raised as a peripheral issue, almost an afterthought, thus exposing the case to robust criticism from the alleged perpetrator of the violence, to the effect that the allegation has been fabricated, or is grossly exaggerated.

Altobelli argues that it is an ‘onerous responsibility’ for a judge to make a determination when faced with allegations of family violence, particularly given the high caseload of the Family Law Court. Altobelli draws on research conducted by Peter Jaffe and Janet Johnston who developed ‘PPP’, a screening tool that considers three factors relevant in identifying family and domestic violence: Potency, Pattern and Primary Perpetrator. Altobelli believes that the

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22 Zoe Rathus uses the example of Leslie and Arbuthnot [2007] FamCA 253, ‘where Stevenson J concluded that it was not appropriate to apply the presumption where there were disputed matters of fact about “the wife’s allegations of physical and emotional abuse of her by the husband”’ (para 34): Z. Rathus, ‘How Judicial Officers are Applying New Part VII of the Family Law Act: A Guide to Application and Interpretation ’ (2008) 20(2) Australian Family Lawyer 5 at 11.
23 FLA, s. 60K(2)(c).
PPP screening tool is a ‘useful aide in order to undertake screening and triage’ for the bench, but recognises that there are ‘inherent limitations’ with such tools, and that ‘the risk of misdiagnosis must always be there.’\(^{30}\) As far as determining the credibility of the victim (who is alleging IPV), Altobelli stresses the importance of corroboration.\(^{31}\) He acknowledges that courts need to delve a bit deeper into allegations, because ‘an allegation made for the first time in the context of family litigation may appear to be quite self-serving, until one explores whether there are valid reasons for delaying disclosure.’\(^{32}\) There are various reasons why a victim of IPV does not disclose violence, including fear of the consequences or in order to avoid conflict. Studies have suggested that 50-70 percent of spousal violence claims are substantiated, and that false denials occur much more than false allegations.\(^{33}\)

A review of recent cases that have dealt with the question of whether or not FDR should be ordered when claims of IPV are made, shows how the court’s discretion can result in different outcomes depending on the standpoint of the judicial officer. Of three reported cases that have considered whether or not to exempt parties from attending FDR (in section 60I FLA), one exempted FDR on the basis of urgency/physical remoteness; another exempted FDR because there was evidence of family violence; and another stated that FDR would go ahead in the future (though not immediately), despite a history of violence.\(^{34}\) In *McGlennan and Don* [2011] (the second case referred to above) Justice Dawe considered an application by the father to adjourn the court proceedings so that the parties could undertake FDR in accordance with section 60I(7).\(^{35}\) In making his determination, Justice Dawe referred to an earlier case, in which the court had heard evidence of a history of family violence and was thereby satisfied that there were ‘reasonable grounds to believe that there [had] … been family violence by one of the parties to the proceedings.’\(^{36}\) Using similar reasoning, Justice Dawe in *McGlennan and Don* found that section 60I(7) was inapplicable and the parties were exempt from having to attend FDR.\(^{37}\) Had it not been for the findings of fact in relation to IPV made in the earlier case, Justice Dawe may have been forced to send the current matter to FDR. In *Starkey and Starkey* [2011] (the last case referred to above) the parties had previously signed consent orders, but there had been a ‘breakdown in communication’ and the parties required the court to make a parenting order.\(^{38}\) Because the parties had previously entered into a consent order, Harman FM did not require that they attend FDR. However, his Honour made it clear that the parties should review the orders upon their expiry through FDR in accordance with 60I.\(^{39}\) His Honour made this decision despite the fact that he had made reference to a previous (undisputed) history of IPV, which he described as ‘an historical event’ that ‘had arisen as a consequence of

\(^{35}\) *McGlennan and Don* [2011] FamCA 204.
\(^{36}\) *McGlennan and Don* [2011] FamCA 204 at paragraph 29.
\(^{37}\) Justice Dawe also relied on High Court authority which suggested that it was in the best interests of the parties that the case was expedient and not subject to undue delay or ongoing litigation.
\(^{38}\) *Starkey and Starkey* [2011] FMCA Fam 738.
\(^{39}\) *Starkey and Starkey* [2011] FMCA Fam 738 at paragraph 148.
the separation and the events and trauma surrounding the same.\(^{40}\) While the number of cases that have dealt with the discretion is limited, what is clear is that there is extensive judicial discretion in making any determination. This discretion is unlike many other forms of judicial discretion – it relates to a complex assessment of whether or not IPV exists, and whether it is serious enough to warrant an exemption from forced participation in FDR or counseling. Given the difficulty of the task, the lack of understanding amongst the judiciary regarding the hidden nature of IPV and the clear legislative agenda to force FDR upon families it seems more than likely that victims of IPV may be forced into FDR. As the next section of this chapter outlines, forced mediation (or other forms of alternative dispute resolution, such as FDR) upon victims of IPV, without appropriate support and procedures, can result in re-victimisation.

**CONCERNS RELATING TO THE USE OF FAMILY DISPUTE RESOLUTION FOR CASES INVOLVING INTIMATE PARTNER VIOLENCE**

Some of the difficulties that may arise during FDR where the relationship has a history of IPV include the disempowerment of the victim (rather than empowerment) as a result of the inherent unequal bargaining positions of the parties;\(^{41}\) the fact that a offender may be un-cooperative and a victim unable to participate as a result of the prolonged domination by the offender;\(^{42}\) and the psychological effects of the re-victimization of the victim in an organised and condoned manner (which may make the victim feel further isolated by society and legal processes).\(^{43}\) While victim participation has the potential to be empowering for most matters that use some form of alternative dispute resolution, in the case of IPV, there are complex feelings that can make some women feel like they should take responsibility or offer forgiveness.\(^{44}\) Given the participatory demands of FDR, there is a greater need for the recognition and control of existing power imbalances that may be present during the process.\(^{45}\) This would be a difficult task for any mediator, given that traditionally, such a role is charged with being neutral and un-biased. The mediator's failure to condemn IPV may result in a false belief in the perpetrator that his behavior is acceptable, resulting in the victim being disempowered and further isolated.\(^{46}\) While many claim that a mediator's techniques can address any imbalances of power, little empirical data exists which support such claims.\(^{47}\) In fact, various submissions to a recent Australian Law Reform Commission (ALRC) inquiry, which considered what legal reforms were necessary to better protect the safety of women

\(^{40}\) Starkey and Starkey [2011] FMCAfam 738 at paragraph 146.
\(^{42}\) B. Hart, 'Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation' (1990) 7(4) Mediation Quarterly 317 at 319. Hart also argues that '[c]ooperation by a batterer with his wife/partner is an oxy-moron. Cooperation, in common practice, means to act or work together for mutual benefit. A batterer is not someone who can cooperate. He understands mutual benefit as synonymous with his exclusive self-interest' (at 320).
and children, argued that mediators were often ill equipped and unable to deal with family violence.\textsuperscript{48} In particular, the Queensland Women's Legal Service submitted that 'many mediators lack[ed] the knowledge and skills' to deal with IPV and that they incorrectly believed that they could 'even-out' power imbalances.\textsuperscript{49} The ALRC Report, however, outlined a range of ways in which the mediation process could be 'managed', including the use of support persons and utilising 'shuttle' mediations.\textsuperscript{50} Joan Kelly argues that while such tactics are useful in the short-term, they are potentially quite aggravating in the long-term:

> Such interventions should not be expected to bring about personality change. Nor, in general, are they sufficiently powerful to alter the dyad relationship in a permanent way outside of the mediation session. Power-related interventions for vulnerable parties are intended to temporarily level the negotiation field.\textsuperscript{51}

Studies have shown that women are often at more risk of being killed by their abusive partner when leaving or attempting to leave the relationship.\textsuperscript{52} Thus, the risk of retaliation once the FDR is over is significant, and must be considered when determining whether mediation is appropriate in cases where there is evidence of IPV. Procedures for assessing the 'risk factor' when determining whether a couple is appropriate for FDR are ill developed, and 'our ability to predict violence is poor.'\textsuperscript{53} Scholars also criticize the use of mediation in family matters on a more ideological basis. Anne Bottomley, Jocelynne Schutt and Andree Gagnon argue that mediation makes what should be public and politicised issues, private ones, resulting in the 'evaporation' of the political nature of gendered disputes.\textsuperscript{54} As such, key societal issues, such as the position of women and the continued dominance of men, are hidden, which 'obscures the political implications of family conflict'.\textsuperscript{55}

Aside from the general issues of FDR in cases of IPV outlined above, mandatory FDR raises a separate set of concerns. Trina Grillo explains that for some women, mandatory mediation is commensurate to 'psychic rape.'\textsuperscript{56} Using Catherine MacKinnon's work, Grillo explains that for some women, the connection to others is potentially invasive and intrusive.\textsuperscript{57}

\textsuperscript{50} Australian Law Reform Commission, 'Family Violence - A National Legal Response' (ALRC Final Report 114, 2010) at 993. 'Shuttle' mediation refers to a situation whereby parties are in different rooms and the mediator 'shuttles' in between them (993).
\textsuperscript{52} S. Meyer, Understanding the Help-Seeking Decisions of Female Victims of Intimate Partner Violence (PhD Thesis, Griffith University, 2009) at 252.
It may seem a large leap, from acts of physical violence and invasion to the apparently simple requirement that a woman sit in a room with her spouse working toward the resolution of an issue of mutual concern. But that which may be at stake in a court-ordered custody mediation — access to one’s children — may be the main reason one has for living, as well as all one’s hope for the future. And because mandatory mediation is a forced engagement, ordinarily without attorneys or even friends or supporters present, it may amount to a form of ‘psychic breaking and entering’.  

Grillo submits that forcing victims to face their perpetrators when so much is at stake is a form of gendered violence. Because of the issues surrounding IPV FDR and the likelihood that courts will more often than not force victims into FDR, more thought needs to be given to the type of model FDR will emulate. It is important that the FDR process is set up in a way, which can cope with the risk that couples with a history of IPV will come before it. For this reason, lessons learned from other ‘best practice’ alternative justice models need to be considered.

FAMILY DISPUTE RESOLUTION AND INTIMATE PARTNER VIOLENCE:
A NEW MODEL BASED ON INDIGENOUS SENTENCING COURTS

As mentioned, current FDR practices lack the following guarantees:

- That power imbalances are acknowledged and dealt with appropriately;
- That the mediator/facilitator is appropriately trained;
- That the process is not privatized and hidden from the community; and
- That there are sufficient post-mediation support mechanisms for both the victim and the offender.

In considering what changes can be made to current FDR practices to better cater for matters involving IPV, we look to the practices adopted by the Australian Indigenous sentencing courts. These courts are known by different names depending on the Australian state or territory in which they are located. They are referred to as Nunga and Aboriginal Courts in South Australia, Koori Courts in Victoria, Murri Courts in Queensland, Community Courts in the Northern Territory and Western Australia, and Circle Sentencing in New South Wales and the Australian Capital Territory. There are now over 50 courts operating in all Australian states and territories, except Tasmania. The courts first emerged in South Australia, in order to redress the deep distrust Indigenous people felt toward the criminal justice system, however, they are now touted as also being used to decrease the over-representation of Indigenous people in custody. The initiatives also ‘indicate a transformation in [the Australian] justice system.’ The courts do more than provide a culturally appropriate forum for offenders to be heard in, they can ‘empower Indigenous elders and other community

members, and they may change attitudes of Indigenous offenders.\textsuperscript{62} The courts are sentencing courts, so only Indigenous offenders who have pleaded guilty or have been found guilty can elect to have their sentence determined in one of the courts. While some commentators believe that Indigenous sentencing courts represent a therapeutic or restorative justice process, Elena Marchetti and Kathleen Daly argue that ‘they are in a category of their own.’\textsuperscript{63} At Circle Court hearings (in New South Wales), the victim often plays a pivotal role in expressing how he or she has been affected by the offending.\textsuperscript{64} The victim will usually have a support person, as well as family and close friends also sitting in the circle. The process focuses on ‘communication between a judicial officer, the offender and other relevant people.’\textsuperscript{65} Indigenous Elders and Community Representatives actively participate in the sentencing process, and always speak frankly with the offender.\textsuperscript{66} Despite the input of Elders or Community Representatives in relation to the penalty that is imposed, the judicial officer retains the power to make the final decision as to the appropriate sentence. There can be up to four Elders or Community Representatives who sit in the process. The partnership between the Elders/Community Representatives and the judicial officer (usually a magistrate) is one of the reasons why the courts have been so successful.\textsuperscript{67} The Elders and Community Representatives would generally have known the offender since he was young, seen him grow up, and know, or know of, his family. For the offender, coming in front of Elders or Community Representatives can be much more daunting than facing a ‘white’ court.

The Indigenous sentencing courts are used for family violence offending in all jurisdictions apart from Victoria.\textsuperscript{68} The use of Indigenous sentencing courts for sentencing family violence offenders has been supported and encouraged by many of the key players and Elders/Community Representatives involved with the courts. However, others, including key players and Elders involved with the Koori Courts in Victoria, consider the dynamics surrounding the offence of family violence to be too complex for consideration by Elders/Community Representatives who sit on the Indigenous sentencing courts.\textsuperscript{69} Research conducted by Marchetti found that in most cases where a victim attended hearings relating to IPV, power imbalances were present. However, 75 percent of court workers and Elders/Community Representatives who were interviewed for the research and who offered a view in relation to whether or not power imbalances were able to be addressed,\textsuperscript{70} thought that ‘the presence of the Elders and giving the victim an opportunity to tell their story,

\begin{itemize}
\item \textsuperscript{64}\ The victim does not always attend in all jurisdictions. This is dependent on whether they wish to attend, and whether there is sufficient victim support available.
\item \textsuperscript{66}\ E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing’ (2010) 43(2) \textit{The Australian and New Zealand Journal of Criminology} 263 at 265.
\item \textsuperscript{67}\ The judicial officer is a magistrate in all jurisdictions, except in Victoria where the Koori Courts are now also operating at a District Court level (overseen by a judge).
\item \textsuperscript{68}\ Even in Victoria, however, some family violence offences come before the Koori Courts if the charge is one of assault rather than a breach of a protection order.
\item \textsuperscript{69}\ M. Harris, ‘A sentencing conversation: Evaluation of the Koori Courts pilot program October 2002-October 2004’ (Department of Justice, 2006).
\item \textsuperscript{70}\ Twenty out of 39 interviewees offered an opinion in relation to this issue.
\end{itemize}
allowed the imbalance of power to be equalised to some degree. Marchetti also found that
the victim was protected by the way Elders or Community Representatives gave the offender
a ‘dressing down’ or ‘shame job’. The role of the Elders and Community Representatives in
this process was crucial. During the process, Elders and Community Representatives
‘highlight the harm done by the offender’. One interviewee said:

... when you have an older man sitting across the table speaking to another young man saying
that you shouldn't be hitting your woman or shouldn't be hitting your wife. That does carry a
lot of power on the table in listening to an older person saying that to a younger person.

Indigenous sentencing courts are unique, and could not necessarily be replicated in non-
Indigenous society. However, key lessons can be learned from their processes. Firstly,
research suggests that one of the key equalisers in Indigenous sentencing courts is the role of
Elders or Community Representatives. An equivalent equaliser in non-Indigenous society is
difficult to identify, but may consist of parents, grandparents or uncles/aunties. It is
recognised that the status Indigenous Australians give to their Elders or Community
Representatives is not necessarily the same as how non-Indigenous Australians perceive their
parents, grandparents or extended family. However, consideration could be given to ordering
FDR when there are claims that IPV exists, only in cases where similar respected role models
can be present. It may even be necessary to ensure other professional representatives are
present, such as counselors, psychologists or child welfare specialists. Despite the fact that the
discussion in a FDR hearing would be quite different to that which would occur in an
Indigenous sentencing court hearing (since the former is dealing with parenting orders and
the latter with criminal offending), ultimately both are dealing with family relationships. In
both situations, the role and presence of extended family is often an important aspect of day-
to-day life. Having said that, the separation of the parties can create further complexities and
it would therefore be necessary to ensure that any extended family who was to be present in a
FDR hearing needed to have the best interests of the child or children in mind.

One of the benefits of having a victim present in the Indigenous sentencing court process is
that she is able to tell her story. In this way

[the power imbalance is broken down. It works both ways. It balances out in favour of the
woman because when she tells her story, and he tells his story, it comes to a conclusion. The
power an offender has in terms of using standover tactics don’t work anymore.

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71 E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and
Elders on Gender Power Imbalances During the Sentencing Hearing’ (2010) 43(2) The Australian and New
Zealand Journal of Criminology 263 at 274.
72 E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and
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Zealand Journal of Criminology 263 at 274.
73 E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and
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74 E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and
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Zealand Journal of Criminology 263 at 275.
75 E. Marchetti, ‘Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and
Elders on Gender Power Imbalances During the Sentencing Hearing’ (2010) 43(2) The Australian and New
Therefore, provided that the environment is safe (which may be created by the presence of supportive extended family and other professionals), the victim should be encouraged, rather than discouraged, to discuss her concerns relating to IPV. Despite the fact that in matters going to FDR, the perpetrator has not necessarily admitted to the violence, the victim is still a victim of IPV. Giving her the opportunity to tell others about the violence (but not forcing her to do so) in an open forum where others can offer support, may empower the victim and allow her to better deal with the custodial negotiations. It is often secrets and what is hidden that has more power than what is exposed.

Due to the vulnerable position of the victim, it may be necessary to allow her to have more family members or friends present to ensure she feels secure, and is able to confidently address issues that arise. The fact that the external parties (including family and friends) would attend the FDR hearing brings the process out of the private sphere and into the public realm, which may address the concerns articulated by Bottomley, Schutt and Gagnon. In addition, there should be sufficient case tracking to ensure that after FDR, the victim receives support, and is safe.


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