Submission to the Community Development and Justice Standing Committee

INQUIRY INTO THE MAGISTRATES COURT OF WESTERN AUSTRALIA’S MANAGEMENT OF MATTERS INVOLVING FAMILY AND DOMESTIC VIOLENCE

SUBMISSION 1

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A Pilot FVRO Mediation Research Project

Executive Summary

Submission One is threefold:

1. First, we suggest that mediating family violence restraining order (FVRO) applications in the Magistrates Court could be beneficial for applicants, respondents, the courts, and the community.

2. Second, we propose conducting a pilot study using similar research protocols such as those used in the UWA Mediation Clinic.

3. Third, we suggest using and training mediators in a mentalizing model of mediation (MBT-M), which is a proven practice model for working with the interpersonal complexities that occur between parties involved in high-conflict relationships.

Introduction

The Research and Practice team at the UWA Mediation Clinic is currently conducting theoretically grounded empirical research into the possibility of mediating matters that involve family and domestic violence (FDV). We submit that this research pilot could be extended to include mediating family violence restraining order (FVRO) applications in the Magistrates Court.

To date there is very little systematic or evidence-based research that can tell us clearly what the benefits and risks are to mediating family violence matters. The research at the UWA Mediation Clinic aims to discover whether mediating where there is FDV is tolerable for the parties, and whether the risks to parties and mediators are manageable.

We make the following submission therefore, in the absence of any fresh or theoretically grounded empirical evidence as to the merits of mediating FDV. However, we do make it with:

a. knowledge borrowed from contemporary research in psychiatry and psychology—disciplines which have already established practice frameworks to understand the mental behaviour of, and guide interventions for, working with people in high conflict,
b. literature from a previous pilot project into non-compulsory mediation of non-family intervention order cases (Tyler & Bornstein, 2006), which showed that the pilot achieved well on many indicators (see further below)¹,

c. the well-established Procedural Justice literature which shows that when people have some control and a say in decisions that involve them, then they are more likely to adhere to the decisions and view the process (and the institution enacting the process) as legitimate², and

d. recognition of the ACT Magistrates Court’s family and domestic violence mandatory mediation/conferencing program, which has been in existence for about 15 years and boasts a “95% success rate”.

Benefits and risks to mediating FVROs

Extrapolating from the above sources, we can make some educated guesses about the possible benefits and risks to the parties in a mediation program for FVROs. We outline these below.

Benefits

1. We are generally aware that court proceedings can increase the danger of violence in FDV relationships and that the most dangerous time for victim/survivors is after pursuing protection orders through the courts (similar to separating couples pursuing parenting or property orders through the courts). We are also generally aware that parties to mediation, regardless of whether there is violence or not, are more satisfied with, and emerge less anxious from, mediation as compared to litigation. Therefore, mediation could be a way of improving the safety for victim/survivors and satisfaction for both parties.

2. Research establishes that the mediation process can provide parties with a sense of procedural justice. The process gives both parties an opportunity to be involved in the decision-making, an ability to converse in a respectful, dignified, and polite environment, and with a trustworthy and impartial facilitator guiding the proceedings. This can occur regardless of whether the mediation is a shuttle mediation (parties are in separate rooms as the mediator moves between them, working on the terms of agreement), or a joint session mediation, with the parties in the same room. The parties having the opportunity to be involved in the process and in the decisions made raises the probability that the parties (both the application and the alleged perpetrator) will see the process as fair and satisfying and therefore by extension, improve the safety for both parties.

¹ Melissa Conley Tyler and Jackie Bornstein (2006) ‘Court referral to ADR: Lessons from an intervention order mediation pilot’ 15 Journal of Judicial Administration
³ This means that 95% of matters mediated end with a ‘consent agreement, no admission’ between the parties. Only 5% of cases proceed to a court hearing where the magistrate imposes the decision on the parties.
⁴ ibid
⁵ Davies & Ralph, 1998; Davies, Ralph, Hawton, & Craig, 1995; Raines, Choi, Johnson, & Coker, 2016
3. The ACT’s program is mandatory but the capacity to come to a ‘consent agreement with no admission’ gives the parties flexibility to decide whether there will be a restraining order in place, and if so, what the terms of that order will be (i.e., removing children off the order or agreeing various other arrangements as to contact etc). This increased flexibility can mean less risk for unrepresented litigants, can reduce the time and uncertainty of a judicial hearing, and can reduce the trauma and stress of both parties having to give evidence. Further, the effect of having mediation trained conferencing officers who are senior practitioners listen to them and consider their views contributes to the sense of procedural justice for the parties and therefore increases the sense of satisfaction and fairness. 

4. Other potential benefits of using mediation in FVRO applications include:
   - reduced costs, (reducing the average court time taken to deal with the case and reducing the number of cases which the court needs to hear),
   - faster resolutions,
   - greater empowerment through increased self-determination of the parties
   - increased workability of the orders,
   - improvements in knowledge and confidence among mediators and court staff in dealing with intervention order-related disputes,
   - greater knowledge of issues involved when creating policies and procedures,
   - increased reputation and profile of the Court; and
   - valuable relationships developed with other participating courts.

Risks

5. One of the reasons most cited against mediating with FDV is that often mediators cannot identify the family violence, and therefore cannot handle it appropriately. However, in the context of mediating an FVRO application:
   a. the violence will be identified (if not admitted to) in the application, and
   b. the model (outlined below) will be tailored specifically for mediating where there is family violence.

6. Other risks include the danger of re-traumatising the survivor/victim in an inappropriately conducted mediation process, and a fear that an imbalance of power between the alleged perpetrator and the applicant could result in unfair, unproductive, or unsafe outcomes.

However, our submission is that where the violence is identified, an appropriate model of mediation is employed, and the mediators are specially trained in this model, mediation in

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6 The voluntary nature of the Conley Tyler & Bornstein 2006 non-family intervention order mediation program (above n 1) had various drawbacks associated with its voluntary nature
7 Conversation with representative from ACT Magistrate’s Court, 15 October 2019
9 Ibid; Tyler & Bornstein, 2006, above n 1
10 Ibid
11 Ibid
12 Dobinson and Gray, above n 8
13 Australian Law Reform Commission Family Violence – A National Legal Response (ALRC Report 114)
cases involving FDV could have many benefits for the parties and their families, the courts and the judiciary, and the community.

**A tailored approach: an appropriate model of FVRO mediation**

As to the appropriate model for mediation involving family violence, we propose that taking a **Mentalization Based Treatment Approach** (MBT-M) could be effective and beneficial for both parties. Mentalization-based treatment (MBT) is a therapeutic approach to treating people with disorders which are associated with an impairment of mentalizing, which can include people who exhibit violent behaviour. Mentalizing refers to the fundamental human capacity to consider the internal mental states (thoughts, feelings, desires, and so on) that drive one’s own, and other’s behaviour. Mentalizing renders behaviour interpretable since we can understand it to be ‘about’ something.

A major objective of mentalization-oriented family work is to enhance and maintain mentalizing during the emotionally highly charged family discourse that often triggers and sustains family violence. It focuses on a person’s mentalizing and works to increase the capacity of mentalizing in the family or couple’s system. We propose that by approaching mediation from an MBT framework, the mediator can focus on raising the parties mentalizing capacities so that they can communicate in a way that each party understands each other. When people can accurately imagine each other’s perspective on a matter, it increases the possibility that any decisions or agreements made will be meaningful and sustainable. This is particularly important in the context of FVRO applications.

An MBT-M approach takes an individual approach to the mediation and assists the parties in pre-mediation to make their own decisions about how the mediation will proceed, for instance, whether it will be a shuttle or joint mediation, or take place by teleconference. Mediators will be trained in MBT-M interventions and trained to assist the parties to understand and make meaning of the violence or high conflict, and thereby, engage in actions and behaviours that will move towards resolution of the conflict, and reduction, or at least a non-escalation, of the violence.

The advantage of approaching mediation with family violence from an MBT-M approach is that it presents an organised framework for understanding and responding to interpersonal processes in mediation that is based on current knowledge from the psychiatric and psychology fields. This framework will not only assist mediators to conceptualise and manage the emotional and interpersonal dysfunction that often accompanies the parties in the high-conflict relationship, but it will also assist researchers in developing an evidence-based approach to mediation FDV.

**Conclusion**

We cannot say definitively whether mediating FVROs such as they do in the ACT would be effective and efficient without the empirical evidence to support it. Our submission therefore is that the Magistrates Court could pilot a mandatory mediation program for FVROs and evaluate it accordingly. We suggest that a pilot that uses strict research protocols such as those used in the UWA Mediation Clinic and takes a theoretically grounded approach to mediation (such as MBT-M) could prove to be an efficient, therapeutic, and effective solution to managing FVRO applications in the Magistrates Court.

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SUBMISSION 2

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Report on Family Property Disputes involving Family Violence: A Pilot Research Project.

In December 2018, a research collaboration between the legal assistance sector and WA university academics\(^{16}\) published a Report on Family Property Disputes involving Family Violence: A Pilot Research Project. The Report is available here. The Project investigated the unmet need for families affected by family and domestic violence (FDV) who cannot access legal assistance to resolve their dispute. Consultations were held with stakeholders including a representative from the Family Court of WA.

The Report contains several findings and recommendations that are relevant to the Terms of Reference and may be of interest to the Committee even though the project relates to property proceedings under the Family Law Act and Family Court Act in Western Australia.

We draw the Committees to the following points to address in a global way the Terms of Reference for the Inquiry into the Magistrate’s Court of Western Australia’s Management of Matters Involving Family and Domestic Violence.

1. The need to develop a common approach to identifying FVD, including a common approach to encouraging parties to report FDV, asking the ‘right’ questions and defining FDV;

2. The need to comprehensively capture and assess data from parties who are experiencing FDV to ensure the functionality of data collection systems;

3. The benefits of providing ‘wrap around’ services and referral systems for parties experiencing FDV;

4. The importance of FDV training for all practitioners working with people who experience FDV, including legal practitioners and mediators;

5. The importance of providing information for parties about the intersection of FDV and the multiple legal and other issues that they might be experiencing;

6. The importance of developing a comprehensive evidence base of the needs of parties and the best methods of service delivery.

We also encourage the Committee to consider the experience of the Family Court of Western Australia to the extent that it exercises state jurisdiction under the Family Court Act 1997 as well as federal jurisdiction under the Family Law Act 1975 (Cth). This is in addition to the operation of the Magistrates Court of WA co-located in the Family Court of WA.

From our consultations with stakeholders during the data collection for the Report, including the Family Court, there are many examples of challenges and methods by which the Family Court of WA deals with parties who experience FDV.

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\(^{16}\) Associate Professor Jill Howieson, Professor Robyn Carroll, Associate Professor Sarah Murray and Dr Ian Murray (UWA), Professor Lisa Young (Murdoch University), Ms Lisa Jarvis (University of Notre Dame) and Dominique Hansen (Law Access)