

Family violence and mediation. Does culture make a difference?

Associate Professor Dale Bagshawⁱ,

Director, Hawke Research Institute's Centre for Peace, Conflict and Mediation
University of South Australia
dale.bagshaw@unisa.edu.au

ABSTRACT

This paper argues that regardless of tradition, cultural background or religious persuasion, family mediators need to be aware of the gendered nature of domestic or family violence, which is prevalent in most, if not all, cultures in the world. Family violence occurs at all levels of society and is very hard to detect as the victims are too fearful or ashamed to report the abuse. Family mediators must therefore be educated and trained to screen for violence and abuse in family relationships, not only prior to mediation but also during the process, and if they mediate where there is family violence, they must put safeguards in place to ensure that the participants are safe and that mediated outcomes are fair and just for all involved.

Introduction

Domestic violence is prevalent in most, if not all countries and cultures in the worldⁱⁱ so it is important for mediators of all cultural and religious persuasions to be mindful of the tensions between the promotion of peaceful resolutions to conflict through mediation and the importance of making sure that the mediation process and outcomes are socially just and address the human rights of all involved, in particular the rights and safety of those who are relatively powerless, such as women, children and vulnerable older people.

In this paper I will examine the definitions and nature of domestic or family violence (to be called family violence from now on) and issues facing family mediators in Australia and Malaysia in relation to domestic violence. I will argue that regardless of tradition, cultural background or religious persuasion, family mediators need to be aware of the gendered nature of family violence and must be educated and trained to screen for violence and abuse in family relationships, not only prior to mediation but also during the process, to ensure that the participants are safe and that mediated outcomes are fair and just for all involved.

Domestic violence occurs at all levels of all societies and is very hard to detect as generally the victims are too fearful or ashamed to report the abuse. Women and children are most at risk during separation and divorce, when family mediators are likely to be asked to intervene. Family mediators need special knowledge and skills, therefore, to recognise and respond to different forms and levels of violence and to know when and how to refer, and when and under what conditions they should proceed with mediation. Mediators also need to be aware of their own cultural conditioning, personal values and tendencies to stereotype, which may prevent them from picking up signals that violence is occurring and lead them to respond inappropriately.

Definitions and nature of violence against women

The World Health Organisation's World Report (2008)ⁱⁱⁱ of a multi-country study of 'Violence against women by intimate partners', notes that in all of the countries in their study, 'one of the most common forms of violence against women is that performed by a husband or male partner.' They also note that 'this type of violence is frequently invisible since it happens behind closed doors, and effectively, when legal systems and cultural norms do not treat it as a crime, but rather as a "private" family matter, or a normal part of life'. The violence they identified in their study included 'physical and sexual violence, emotional abuse and controlling behaviours by current partners or ex-partners', which had serious consequences for women's health worldwide.

There are many definitions of domestic or family violence in use. In Malaysia, the *Domestic Violence Act* (1994) was enforced in June 1996 and the definition includes the following acts:

1. Willfully or knowingly placing, or attempting to place the survivor in fear of physical injury.
2. Causing physical injury to the survivor by such an act that is known, or ought to have been known would result in physical injury.
3. Compelling the survivor by force or threat to engage in any conduct or act, sexual or otherwise, from which the survivor has a right to abstain. A crucial limitation is that this does not include marital rape. This is because the DVA is attached to the Penal Code, which specifies that a woman does not have the right to abstain from sexual relations unless she is divorced, judicially separated, or has obtained a restraining order on her husband.
4. Confining or detaining the survivor against the survivor's will.
5. Causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the survivor.

However, this definition is narrow as it focuses more on physical rather than non-physical acts of violence that cause a person to live in fear. In addition, although the DVA recognises spouses who do not share the same residence, it does not protect those who live together but are not married¹, or survivors of dating violence^{iv}.

The following definition captures the broader range of behaviours that many studies have found commonly occur in domestic violence situations and was framed by the *Partnerships Against Domestic Violence Statement of Principles* agreed by the Australian Heads of Government at the 1997 National Domestic Violence Summit^v:

Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women both in relationship and after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most

¹ Malaysian family law does not recognise these relationships. It is illegal for unmarried Muslims to cohabit as they can be charged for close proximity (*khalwat*) and even jailed. Violence between unmarried couples in Malaysia falls under the jurisdiction of the Penal Code.

commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.

The Malaysian Women's Aid Organisation (WAO) website^{vi} similarly defines domestic violence as 'an abuse of power. It is when one partner, usually a boyfriend or husband, attempts to control and dominate the other, usually a girlfriend or wife through violence, threat of violence, or by controlling the couple's finances and social life'. However, by using the term 'battered women' the website tends to highlight the physical side of abuse, however it is important to note that the non-physical forms of abuse are often more subtle and harder to detect and can be just as devastating as physical abuse.

Family violence occurs at all levels of society and is often subtle, hard to detect as it more often than not takes place behind closed doors. In our large research study in South Australia (2000)^{vii} victims said that they found it extremely difficult to leave abusive situations and found family violence hard to report for many reasons. Many thought that 'domestic' or 'family violence' was only physical; others did not want to shame their family or felt responsible for the violence and blamed themselves; some feared losing or harming their children if they reported it, or feared that they would not be believed; some still loved their partner and hoped he would change. Victims, who are usually women, are often isolated from family and friends, do not have enough funds to leave or to employ a lawyer, and do not know where to go for assistance. Women with disabilities, from indigenous or culturally and linguistically diverse backgrounds and from rural areas are doubly disadvantaged^{viii}.

Mediation and domestic violence in Australia

The Australian Government's initiative, *Partnerships Against Domestic Violence*, has funded numerous research and evaluation of practice initiatives to address the problem of domestic violence in Australia, which are available on their website, including two studies undertaken by myself with colleagues^{ix}. However, in spite of this, domestic violence is still prevalent and relatively 'invisible' in Australia. 'Intimate partner homicide' reports indicate that abused women are most at risk when separating from their partners – at the extreme end of domestic violence, murder is the ultimate attempt to exert power and control^x. Safety of women and children should be given priority in all dispute resolution processes during and after separation, and all allegations of abuse should be treated seriously.

In Australia, family violence is significant in the population of families that attend for dispute resolution and other support services during separation and divorce and is even more likely to be present in the client population that proceeds to trial in the family court system^{xi}. The needs of these families and their children are currently not being attended to in any significant way, in particular where children who are at risk of abuse fall between the national family law system and the State child welfare systems^{xii}.

As family mediation has grown in popularity in Australia, feminists have been concerned that the rights of the participants could be compromised in mediation, in particular those of women and children in situations where there are structural imbalances or abuses of power^{xiii}. In mediation there is the potential for women to be

coerced into negotiating with their abusive partners or ex-partners in the privacy of the mediation room, in particular with a mediator who (in spite of screening) is not aware of the violence, or who has patriarchal attitudes, thereby placing the women's safety in jeopardy and making it difficult, if not impossible, for them to negotiate fair outcomes for themselves. The mediation field in Australia, along with family law policy-makers and legislators, have therefore paid close attention to this issue.

Three earlier reports were influential in ensuring that the issue of family violence was drawn to the attention of family mediation policy makers and practitioners when family mediation was first introduced in family law proceedings in Australia: Hilary Astor's *Position Paper on Mediation* for the National Committee on Violence Against Women^{xiv}, the Australian Bureau of Statistics' *Women's Safety Australia*^{xv} and Keys Young's 1996 *Research Evaluation of Family Mediation Practice and the Issue of Violence*^{xvi}. The Keys Young research indicated that abused women generally experienced less pre-mediation anxiety, a more positive experience of the mediation process and a higher level of satisfaction with agreements where they:

- had been subject to emotional abuse or one-off physical threats or threats only;
- had been separated from their ex-partners for a considerable time;
- had received personal counselling (as opposed to *relationship* counselling);
- reported that they no longer felt intimidated by their ex-partner; and
- felt confident in their legal advice and knew what they could reasonably expect from settlement;

and where *mediators*

- asked specific questions about violence and abuse, including non-physical types;
- offered women specific guidance in considering the possible impact of violence and abuse on the mediation process;
- offered women separate time with the mediator before, during and after sessions;
- worked as a gender-balanced co-mediation team;
- demonstrated that they understood the women's concerns both within and outside the mediation session by implementing specific strategies to deal with these concerns;
- demonstrated they could control abusive behaviour within the session; and assisted women to deal with any harassment and intimidation which occurred outside the actual mediation sessions itself.^{xvii}

Since July 2006 separating couples have been required by law to see a family dispute resolution practitioner before a judge will hear their case, but are exempt if they can provide evidence of family violence. The definition of family violence has also been amended in the Family Law Act and the word 'reasonably' added:

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^{xviii}.

This change has brought criticism as the word ‘reasonably’ is not defined and if allegations of violence cannot be substantiated sanctions can be imposed.

Central to family violence is the inappropriate exercise of power and control, leading to fear and intimidation^{xix}. It is difficult, if not impossible, to make an objective assessment about a subjective emotion such as fear in order to say whether or not it is ‘reasonable’^{xx}. There are also no definitions or guidelines as to what constitutes ‘reasonable grounds’ to believe there has been family violence or child abuse and it is not clear what evidence is required to substantiate such grounds^{xxi}. Even where evidence can be provided, many adult victims choose to proceed with mediation, as the alternative is too costly. It is therefore important to focus on ways in which family mediators can effectively identify and respond to family violence to achieve safe and fair outcomes for those victims, or are usually women and children^{xxii}.

The 2006 changes to the Family Law Act are making it harder for women to report violence as they risk incurring costs or losing their primary caretaking role with the children if they cannot prove it. In the last decade the co-occurrence of domestic violence, child abuse and pet abuse has been recognised and children witnessing violence is also now seen as a form of child abuse^{xxiii}. There is increasing criticism of the risks that are taken where decisions are made for children to have unsupervised contact with a parent who is mentally ill or an alleged perpetrator of abuse. There are also escalating concerns that allegations of abuse (usually made by mothers against fathers) are often not believed in the Family Court context, in spite of evidence that allegations of child abuse are rarely false and that false denials of abuse by perpetrators (who are more often than not men) are more prevalent^{xxiv}.

Two Australian family mediators - Susan Gribben^{xxv} and Andrew Bickerdike^{xxvi} - point out that, in reality, family dispute resolution (FDR) services in Australia have always provided mediation to clients affected by family violence, and over the years community-based organisations have improved their capacity to provide specialist services to these clients. With the recent introduction of 65 new Family Relationship Centres (FRCs) across Australia offering free dispute resolution services, many more people are coming for family mediation and may not be aware that they are exempt from attending mediation where there is family violence^{xxvii}. These FRCs, along with other government-funded community-based organisations, are compelled to use a comprehensive screening and assessment framework before proceeding with mediation. The Family Court of Australia and the Family Magistrates Court also have family law violence strategies and there are now many written guidelines for screening procedures available to family mediators so they can detect family violence before selecting mediation as an approach^{xxviii}. Of significance for mediators is that the victims interviewed in our South Australian family violence study in 2000^{xxix} said that they needed to be asked *specifically* and *directly* about violence and abuse in their relationship. Women also talked frequently about the need for non-physical forms of family violence to be more widely understood in the community.

Feminist research and practice tends to be based on the theoretical premise that women are oppressed and need to be protected. However, Kelly stresses the importance of understanding how women categorise their own experience^{xxx}. Women experiencing family violence may not see themselves as oppressed and may choose to proceed with mediation. Denying women individual agency and choice can further

add to their oppression. Where they have left the abusive relationship, and the perpetrator has accepted responsibility for the violence, mediation may offer some women a welcome opportunity to negotiate for themselves, significantly increasing their self-esteem and sense of empowerment. Thus, some mediators in Australia may proceed with mediation where violence has been identified if the victim makes an informed choice to do so and if the conditions identified by the Keys Young research are in place and the safety of all parties is assured. However, where the perpetrator is not accepting responsibility for the violent behaviour, or where the woman is fearful and her ability to negotiate a fair outcome for herself is likely to be compromised, litigation may be the preferred option. Much more research is needed to be sure that mediation leads to satisfactory outcomes in the short and long term in these cases^{xxxii}.

Mediation can be difficult, if not impossible, where there has been a history of family violence and, if not handled carefully, can lead to unfair and unjust outcomes for the victim(s). If the victim makes an informed choice to participate in mediation where violence has been acknowledged, desirably the mediation should only proceed if the perpetrator has admitted responsibility for the violence, the victim is aware of his/her legal rights and entitlements and is linked to sources of support, strict guidelines and rules are in place and enforced by two highly experienced, trained mediators (male and female), the mediators use 'shuttle' mediation or offer separate interviews, and an advocate or support person is available for the victim during the process^{xxxii}.

Family mediation and family violence in Malaysia

The WAO website states that 'battering is an offence in Malaysia, punishable by both criminal law under assault and the Domestic Violence Act, and the Muslim *Syariah* law as part of cruelty to the wife. Unfortunately battered women are seldom given the protection to which they have a legal right'^{xxxiii}. Similar to our Australian experience, the website states that the 'invisibility' of the problem in Malaysia 'is largely attributed to the sensitivity of the issues surrounding the problem, especially the traditional belief in the sanctity and privacy of the family and the intimacy of marital relationships'. The WAO's national research study on *Battered Women in Malaysia: Prevalence, Problems and Public Attitudes* (1995)^{xxxiv} estimated that 'in 1989, 1.8 million or 39% of women over the age 15 were beaten by their husbands or boyfriends and only 909 women actually reported the violence to the police'. The WAO's research and annual data collection have documented that many abused women who seek help from agencies have been suffering repeated assaults and/or psychological abuse from their husbands for a number of years. Their website states the following:

It is only when the violence reaches an intolerable level that threatens their physical and emotional well being that battered women reach out for help. Even then, very few women do this. ... Many battered women have told WAO their stories of seeking assistance and how they were not listened to, were advised to be more patient, told not to provoke their husbands and to persist with the marriage. Behind these responses are the common attitudes that domestic violence is not a serious offence, that the woman is to blame for instigating violence in some way and that the role of a wife is to accommodate her husband's demands and behaviour. Many people in Malaysian society still believe that violent domestic

disputes should be worked out privately between husband and wife and that if the situation is really as bad as women say, then battered women would leave their husbands rather than stay.

In Malaysia mediation (*sulh*) has traditionally been used formally in the *Syariah* Courts and informally by religious officials and community-based mediators for a long time and is the favoured approach for the resolution of disputes in the Qur'an, in particular for the reconciliation of relationships between conflicted family members. However not all of these mediators are trained and at this stage of writing, there are regulations for Muslim mediators (*pegawai sulh*) which were drafted and available in 2002 in the state of Selangor, but no regulations for mediators working with non-Muslim families in Malaysia or Muslim family mediators from other States. Therefore, a family mediator in Malaysia may not be required to receive formal education and training in family mediation or family violence. Nor would the mediator be required to see the couple separately prior to the mediation to screen for family violence, as is now required of all Australian family dispute resolution practitioners by the Australian *Family Law Act*, 1975. Therefore, the untrained mediator may not be aware of, or know how to recognise or effectively respond to the presence of family violence in order to protect the woman and any children who are involved, and a patriarchal mediator's notions of women's place and role in the family may come into play to the detriment of their safety.

In Malaysia today it would not be unusual for couples who have separated because of family violence to contact a traditional mediator in the village, or an untrained counsellor or a mediator through the religious office, who may not look for, or even recognise, the presence of family violence or may only focus on one incidence of physical violence without understanding the patterns and forms that family violence takes. In Malaysia when assisting the Muslim couple to reach consensus and reconcile in mediation, for example, the mediator may 'use arguments about virtue, obligations for past assistance, compassion and family solidarity'^{xxxv}. The mediator may also emphasise Qur'anic ideals about their parental and spousal responsibilities and focus on promoting behaviours that will restore harmony and keep the family intact. If the couple cannot agree, the mediator may also propose a solution or solutions and a specific time frame might be suggested for each or both of them to change their ways.

If the case goes to the *Syariah* Court, a judge (who can mediate contested divorces, property disputes and maintenance claims) would possibly exert more influence on the process and outcomes as an *ulama* and religious mentor. If the judge or *hakim syari'e* decide to mediate the matter, the judge may suspend the hearing and invite concerned friends and relatives to give information, in this case the couple's parents who are embroiled in the conflict. At all levels, the emphasis in the mediation would be first of all on reconciliation.

In mediation, an abused woman may be too fearful and lack the competence and power to negotiate with her husband on her own behalf in the privacy of the mediation room, even if she appears on the surface to be assertive or has an advocate or support person to assist her^{xxxvi}. The perpetrator may simply be chastised by the mediator for his abusive behaviour and the woman may also be encouraged to change her behaviour in order to fulfil her spousal duties, if he treats her well. If her husband does not treat her well, however, she would be under no obligation to change her

behaviour in order to serve her husband, but in her relatively powerless position, she may comply with her husband's demands so that he will not take another wife or to avoid being further abused.

Conclusions

From a human rights and social justice perspective, family mediators of all religious and cultural persuasions should be educated to be aware of any personal, interpersonal and structural inequalities that may affect the balance of power between the parties in dispute. This is essential in order to ensure that mediated solutions and agreements are fair and just for all involved, and to maintain the credibility of the mediation process. Because of the prevalence of family violence in family disputes, in particular during separation and divorce, all family mediators need special knowledge and skills to recognise and respond to different forms and levels of family violence and to know when and how to refer, and when and under what conditions they should proceed with mediation. Mediators also need to be aware of their own cultural conditioning, personal values and tendencies to stereotype, which may prevent them from picking up signals that violence is occurring and lead them to respond inappropriately.

Unless family mediators are trained to recognise and understand the nature of family violence and its effects on the victims, who are usually women and child witnesses, the victim's status and relative powerlessness in a marriage may not be identified, acknowledged or dealt with, and if a victim leaves the marriage she may be at risk of being pressured into agreeing to return home, where the abuse is likely to continue. If oppressive, intimidating, controlling, harmful behaviours in the disputants' relationship are not viewed or named as 'domestic' or 'family' violence, then the private nature of the mediation, the patriarchal values in a culture, and the influence of the extended family could place a victim at risk of ongoing and escalating violence or abuse, which is often the case when the perpetrator does not admit responsibility for the violence and seek help^{xxxvii}.

Abdullahi A An-Na'im (2002)^{xxxviii} questions how equality and fairness can be achieved for Muslim women, within an Islamic perspective, without compromising the religious identity of Islamic societies and personal piety of individual believers. This question poses a challenge for Muslim family mediators and for family mediation trainers in Malaysia. Othman (1996)^{xxxix} has also stated concerns that mediation can potentially lead to unjust outcomes. Abu Nimer^{xl} notes that the Qur'an constantly reminds Muslims of the value of justice:

Islam emphasizes social justice, brotherhood, equality of mankind, ... tolerance, submission to God, and the recognition of the rights of others'. ... [Muslims have a] 'duty to work for justice and reject oppression and injustice on interpersonal and structural levels'. [They must] resist and correct conditions of injustice which can be corrected, both through activism and third party intervention...

It is essential, therefore, that Islamic mediators are mindful of the structural factors contributing to conflict and work toward findings ways of achieving socially just outcomes for all parties in marital disputes, in particular for women and children who are at risk of ongoing violence and abuse.

Faridah Abraham (2006)^{xli} notes that in 1999, the Malaysia Bar Council established and funded the Malaysian Mediation Centre and mediators are now drawn from a panel of trained, accredited mediators (who are lawyers and professional from other fields and charge fees for their services), but it is not clear as to whether or not those who mediate family disputes have been specifically educated and trained to understand the complex nature of family relationships and family dynamics, in particular where there are disputes over children, or to understand the nature and impact of family violence. In Australia and other Western countries such as the New Zealand, the United Kingdom, Canada and the United States, it has been found that family law dispute resolution practitioners need a background in the social sciences (such as social work or psychology) in order to deal with the complex matters that arise during separation and divorce, in particular where there are protracted, complex disputes over children and issues of family violence and child protection.

Although the legal profession in most Western countries has initially been threatened by the idea, the combination of well-trained lawyers and social scientists (social workers or psychologists) as family mediators, in particular working as a co-mediation team, has been found to be ideal for the mediation of disputes during separation and divorce. This may also be true for Malaysia and other non-Western countries.

In summary, given the prevalence and general invisibility of family violence in most countries in the world, including Australia and Malaysia, family mediators involved with marital disputes should receive regular education, training and supervision in order to recognise, understand and effectively respond to the complex and private nature of family violence, which is commonly present when couples are separating and divorcing. Mediators have a responsibility to ensure that the victims of abuse (who are usually women and children) are safe and, at the very least, are not worse off as a result of the mediator's attitudes or the process and outcomes of mediation. Whilst it is important to honour traditional and religious mediation practices in Malaysia and other countries in the Asia-Pacific, I would argue that it is also essential for family mediators from all cultural groups and religious persuasions to be educated and encouraged to be self-reflexive; that is, to develop a critical awareness of their own religious, cultural and gendered biases in relation to the behaviours of disputants, so their 'impartiality' and 'neutrality' is not compromised^{xlii}.

The widespread development and introduction of family mediation standards in Malaysia and other countries in the Asia Pacific will contribute to ensuring that appropriate screening occurs for family violence in all family law cases and that mediation is not chosen as a dispute resolution process in cases where there is family violence, unless the mediators are highly experienced and know how to put safeguards in place to ensure that the mediated outcomes are equitable and just. In Malaysia, which is predominantly a Muslim society, this would fit with the teachings of the Qur'an, which emphasise that the rights and entitlements of all Muslims must be upheld in order to build a just *and* peaceful society.

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Endnotes

ⁱ Associate Professor Dale Bagshaw PhD is the founding President of the Asia Pacific Mediation Forum and the Director of the Centre for Peace, Conflict and Mediation, Hawke Research Institute, University of South Australia. She has conducted a number of research projects for the State and Commonwealth Governments in Australia in the area of domestic violence and has many publications on the topic.

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