



# “Supporting the Participation of Victims of Domestic Violence in Family Mediation.”

- **Rachael Field**
- Lecturer  
School of Justice Studies, Faculty of Law  
Queensland University of Technology
- Faculty of Law Equity Chair
- President, Women's Legal Service, Brisbane
- Formerly: Family Law solicitor  
Women's Legal Service solicitor  
Intake Officer, Dispute Resolution Centres, QLD  
Legal Policy Officer, ADR Branch, Dept of Justice  
Legal Officer, Litigation Reform Commission  
Management Committee Member, dv refuge

- Domestic violence is about:
- “a masculinity of domination, control, humiliation, and degradation of women.”
- “a masculinity of status competition and bravado among peers.”
- “shameless masculinity of unconnectedness and unconcern for others.”
- (Braithwaite and Daly (1995) at 222)

# Domestic violence =

- Physical violence
- Emotional violence
- Financial violence
- Psychological violence
- Social violence

- Women who are victims of domestic violence face significant practical and process disadvantages as participants in family mediation.
- As a result, feminist scholarship generally rejects mediation as inappropriate where there is a history of domestic violence.

- The reality is that many victims of violence are participating in mediation.

**Because there is:**

- Increased emphasis on mediation in family matters eg 1996 and 2006 amendments to the *Family Law Act 1975*.
- Mandatory family dispute resolution from 2006 in children's matters.

**And**

- Some mediators genuinely believe they can empower a victim of violence to participate equitably.
- Some believe the feminist critique about victims' participation is overstated.
- Intake procedures are not always adequate.
- Poverty issues for victims can mean that denying access to mediation denies access to any structured dispute resolution assistance.

## Disadvantages for Victims of Violence in Mediation:

- **Self-determination, party empowerment and party control are all significantly undermined in relation to a victim's participation.**
- **Mediation can entrench and exacerbate the patriarchal control and domination of women rather than providing any emancipation from it.**
- **The party-oriented nature of the process provides perpetrators with an opportunity to continue to exercise power over their victims and to extend that control, through their influence over the outcome of mediation, to future interactions between them.**
- **In this way, mediation places victims at grave risk of suffering injustice in terms of the process itself and its outcomes.**

## Disadvantages for Victims of Violence in Mediation:

- In wanting to create a level playing field for all parties through party empowerment and self-determination, the mediation process ignores the realities of power differences between perpetrators and victims of violence.
- Perpetrators of domestic violence cannot cooperate with their victims; they impose their interests over them, they coerce, intimidate, monitor and threaten, they devalue their victims and deny their own violence.

## Disadvantages for Victims of Violence in Mediation:

- Mediation theory on mediator neutrality belies the reality of mediator values, influence and judgment entering the process.
- Victims of violence are living chaotic lives, they may not be very 'likeable', they may appear 'difficult' and 'unreasonable'.
- A mediator may feel favourably drawn to the persuasive charm of the perpetrator.
- Crucial issue in terms of mediator reports and assessments.

## Disadvantages for Victims of Violence in Mediation:

- Mediation theory on mediator neutrality conflicts with mediator claims to be able to redress imbalances of power.
- These claims also often do not fit with the reality of the dynamics of a violent relationship.
- For example, providing a victim with a fair opportunity to speak does not unravel years of perpetrator dominance and power.
- Non face-to-face mediation models do not negate uses of perpetrator power and threats.

## Disadvantages for Victims of Violence in Mediation:

- Mediation theory on confidentiality can endanger victims.
- Some perpetrators use mediation as a fishing expedition for facts, attitudes or issues relevant to credibility that can be used in later legal proceedings.
- If victims are drawn into, and are trusting of, mediation confidentiality they may disclose information that will later be used against them.
- The fact of mediation and its failure has been used as a credibility issue in later legal proceedings.

## Disadvantages for Victims of Violence in Mediation:

- The private nature of the process results in little accountability about how victims experience the process or about the appropriateness of outcomes.
- There is no real way to later reveal or address injustices suffered in mediation.
- Mediation has the potential to reverse the positive effects of work to make domestic violence a public concern by confining it to a private environment with no formal protections, and no ability to set precedent or reinforce developing societal and legal norms that contradict violence against women.

## Disadvantages for Victims of Violence in Mediation:

- Mediator training is not yet adequate to allow for the safe participation of victims of domestic violence in mediation.
- Mediators may often not even be aware that there is any history of domestic violence.

# THE GOOD NEWS!

Mediation Theory Can Arguably Support the Participation of Victims of Violence for the Following Reasons:

1. Subjective and party-based.
2. Cooperative, non-coercive, and non-adversarial.
3. Respectful of parties' self-determination.
4. Removed from legal hierarchies of dominance.
5. Empowering because it can give control back to the parties.
6. Informed by real context and not driven by abstract principle.
7. Accommodating of emotions and story-telling.

The reality is that to deny victims of domestic violence access to mediation is to deny access to professional affordable assistance in resolving a dispute.

What are the alternatives for victims?

- Give up and give in?
- Self-represent?
- Litigate – somehow? And endure cross-examination and attacks on credibility.

Therefore:

We need to develop ways to support the participation of victims of domestic violence in mediation.

- Better information for victims
- Best practice intake processes
- More thorough mediator training
- Mediator interventions?

Another way is through a central advocacy role for family lawyers.

This approach is consistent with NCVAW's mediation guideline that emphasises:

access to independent legal advice for victims

and

consideration of the possibility of lawyer (or other) support in mediation sessions.

## THREE STAGES OF SUPPORT AND ASSISTANCE:

1. Lawyers in a pre-mediation role
2. Lawyers in a mediation advocacy and support role
3. Lawyers in a post-mediation role

## The Pre-Mediation Role involves:

- assessing the risk mediation poses for the victim
- ensuring informed consent to participate by preparing her with information about process and power imbalances
- coaching the victim about participation skills and strategies
- assisting with generating appropriate options and a BATNA.

## Mediation Advocacy and Support Role involves:

- advocacy if/when required
- assistance dealing with inequalities in bargaining power
  - providing legal information and advice,
  - contextualising perpetrator's claims,
  - asking for time-out
- assistance with content and process (second pair of ears)
- physical presence with formal authority
- reality checking outcomes and options
- on the spot assistance with final agreement

## Post-Mediation Role

- safety and support at conclusion of mediation
- making agreement legally enforceable
- advice in the event of breach.

## Conclusion

- Domestic violence is a gendered issue and affects outcomes for women in mediation.
- We need to better support victims of violence in mediation – mediator interventions are not enough.

One way for victims of violence to participate equitably in mediation involves:

an approach to mediation that guarantees a legal advocate for victims

who will support the informed participation of the victim

who will work to redress power imbalances effectively, and

who will prioritise the victim's safety and the equitable nature of the outcome.