MEDIATION OF INTRA-LESBIAN DISPUTES

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[This article considers the current trend to use mediation to resolve intra-lesbian disputes. It argues that mediation can only provide a fair and just method of resolving such disputes if mediators understand the powerful and pervasive effects of homophobia on lesbian lives and on lesbians as disputants and take this into account effectively in their practice. The ways in which the homophobia of the formal justice system affects the options open to lesbians in mediation are reviewed, as are problems associated with the potential privatisation of intra-lesbian disputes in mediation. Problems affecting capacity to mediate, including violence, are also considered.]

I INTRODUCTION

A *Lesbians as a Mediation 'Market'*

This article considers the utility of mediation as a method of resolving disputes between lesbians. Mediation is increasingly being used and supported as an 'alternative' to litigation in Australia.[1] Its status as a true alternative to litigation is somewhat compromised since it is frequently encountered as part of the litigation process, with parties encouraged to go to mediation when they approach the formal justice system or after they have commenced litigation.[2] However, whether its relationship to litigation is intimate or at arm's length, mediation is increasingly a significant focus for legal scholars. Refining our notion of which disputes are suitable for mediation and the circumstances in which mediation has the capacity to provide a just and equitable outcome for disputants are important issues. This article examines these matters in relation to lesbians — a group which the formal justice system might reasonably be described to have failed.

Homophobia has created an inhospitable environment in the formal justice system for lesbians and gay men. Both groups have, of necessity, found or created other methods of resolving disputes. Whilst many lesbians and gay men have negotiated satisfactory resolutions to their disputes there are also, no doubt, others who have been forced to accept inequitable or unjust settlements because

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1 See, eg, Attorney-General's Department, *The Justice Statement* (1995) 23-35.

2 See Bridget Sordo, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 *Australian Dispute Resolution Journal* 62.

accepting less than justice was preferable to using the formal justice system. Whilst the formal justice system should be providing appropriately for the needs of citizens in all their diversity, the full realisation of this goal seems likely to be some way off. The recent development and expansion of mediation as a method of dispute resolution has led to an interest in its capacity to provide an acceptable and appealing method of dispute resolution for the lesbian and gay communities.

Lesbians become involved in the same broad range of disputes as anyone else. Potentially any dispute between two women which comes to mediation could be an intra-lesbian dispute. For example, mediation is employed to resolve disputes between business partners, employer and employee, landlord and tenant, or neighbours. These disputes could be intra-lesbian disputes, even though the sexuality of the parties may not be immediately apparent. However, intra-lesbian disputes about property or children which arise when a relationship ends are perhaps the most obvious candidates for mediation and are a target of mediator advertising.

Mediation is now 'marketed' as a good way to resolve disputes between lesbians and between gay men. Relationships Australia (formerly the Marriage Guidance Council) in New South Wales, for instance, advertises its mediation services in the Sydney lesbian and gay press and there is increasing mediator interest in mediation of disputes between same sex couples. Lesbians may respond to the availability of mediation by choosing to use it. However, given increased use of court-connected mediation, they may be sent to mediation if they are involved in litigation or apply for legal aid. If mediation is to provide an appropriate and sympathetic service for lesbians and gay men it will be useful if mediator practice is informed by a literature which considers and debates relevant issues and which can support the development and refinement of policy and practice. However, there is presently very little published material dealing with the mediation of same sex relationships. The sparse published literature which exists originates almost entirely from the United States.[3] This article raises and discusses relevant issues in the Australian context. The author hopes to provoke debate and further writing in the area, including work which reflects the experience of mediators working with lesbians and gay men.

[3] See Suzanne Bryant, 'Mediation for Lesbian and Gay Families' (1992) 9 *Mediation Quarterly* 391; Bonnie Englehardt and Katherine Triantafillou, 'Mediation for Lesbians' in Boston Lesbian Psychologies Collective (eds), *Lesbian Psychologies* (1987) 327; Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law* (1992), especially 171-6; Annette Townley, 'The Invisible-*ism*: Heterosexism and the Implications for Mediation' (1992) 9 *Mediation Quarterly* 397; Douglas McIntyre, 'Gay Parents and Child Custody: A Struggle Under the Legal System' (1994) 12 *Mediation Quarterly* 135; Isabelle Gunning, 'Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas McIntyre's Article' (1995) 13 *Mediation Quarterly* 47. In Australia, conference papers have begun to deal with lesbian and gay issues. See Alan Campbell, *Mediation of Children Issues When One Parent is Gay: A Cultural Perspective*, Conference Proceedings Second International Mediation Conference (1996) 17; Hilary Astor, *Same Sex Mediations*, Conference Proceedings Famcon 95 (1995) 211.

B *Focus on Lesbians*

The focus of this article is intra-lesbian disputes and the circumstances in which mediation may be a useful and appropriate mechanism of resolving such disputes. Mediation is compared throughout with the formal justice system. Although many of the issues which are raised are applicable to the mediation of disputes between gay men, and reference is sometimes made to the situation of gay men, they are not the primary focus of this article. Mediation of disputes between gay men deserves separate treatment. Despite some similarities between the issues relevant to lesbians and gay men in mediation, there are also many differences. Gender is the most obvious difference, but it is not the only one. The differential impact of HIV/AIDS on the two communities is also likely to be important where mediation concerns relationship breakdown or inheritance, for example. Disputes between lesbians and heterosexuals are also not considered in detail. Again such disputes raise different, though related, issues. For example, in any dispute between a lesbian and a heterosexual where sexuality is an issue (or could be made an issue), the lesbian will almost always be powerfully disadvantaged by the privilege the homophobia of society and the formal justice system accords to the heterosexual. The relationship between the parties in mediation will be affected by heterosexual privilege in ways which call for separate and careful analysis.

However, despite the focus of this article on intra-lesbian disputes, it is important to remember that there is no necessary or enduring clarity about an individual's sexuality; nor does social reality reflect a neat, binary gay/straight dichotomy. Whether a woman describes herself as a lesbian or as heterosexual may change. For some individuals, sexual orientation and practice are not immutable and have different meanings at different times, for them and for those who are close to them.[4] Disputes between husband and wife where one of them has moved into a gay or lesbian relationship are presently mediated[5] as, no doubt, are disputes between lesbian or gay partners where one has moved into a heterosexual relationship.

Being a lesbian is also not the only, or necessarily the defining, aspect of an individual's identity. For example, all lesbians have a race, some have a disability, others are poor. To assume that sexuality explains the whole of a person's identity would be to fall into the common error (usually of heterosexuals) of assuming that the single remarkable or defining feature of homosexuals is sex. Ignoring other aspects of identity also privileges some lesbians over others. As Gail Mason points out, '[w]ithout racial specificity, the term *lesbian* focuses on and refers to white lesbian culture'.[6]

The impact of sexuality on mediation is a complex topic and only part of that topic is examined in detail here. The purpose of this refinement of focus is to

[4] Kristen Walker, 'The Participation of the Law in the Construction of (Homo)sexuality' (1994) 12(1) *Law in Context* 52, 70.

[5] See Campbell, above n 3.

[6] Gail Mason, '(Out)Laws: Acts of Proscription in the Sexual Order' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 66, 85.

permit a closer analysis of the material under review, to allow a teasing out of issues, a disentangling of different threads. With the benefit of such a close examination familiar colours and textures can be recognised when they occur elsewhere and their significance in the whole cloth may be made clearer.

C *Lesbians and Mediation*

Arguably mediation has a number of advantages for lesbians. These include the same advantages it has for the heterosexual population.[7] If the dispute is successfully resolved, mediation can provide an inexpensive and speedy service. It is less formal, and therefore more approachable and accessible, than litigation. It may provide a more consensual, flexible method of dealing with a dispute.

In addition to these general advantages, mediation arguably also has a number of particular advantages for lesbians. It has been argued that mediation is a method of resolving disputes which is particularly suitable for women — and it would therefore logically seem to have some appeal where the disputants are both women. Other potential advantages for lesbians are that mediation avoids the homophobia of the formal justice system and the imposition of legal rules which may be inappropriate for lesbian and gay relationships, and allows privacy for parties who do not wish to risk being 'outed' in the course of using a more public procedure. If mediation does have these qualities it can provide significant benefits for lesbians. However, as we shall see below, the claimed advantages of mediation may be mitigated by a number of factors. Mediation is certainly not unproblematically beneficial for intra-lesbian disputes.

The first of mediation's claimed advantages, the 'gender advantage', may be dealt with succinctly. There was a period in the mid 1980s when feminist writers were enthusiastic about the potential of Alternative Dispute Resolution (ADR) for women. It was argued that litigation is not a hospitable environment for women; it is imbued with patriarchal values and fails to take account of women's needs and interests. Mediation and other alternative methods were thought to have greater potential to respond to women's concerns and create a less combative method of resolving disputes, emphasising co-operation and communication.[8] However, the initial feminist enthusiasm for mediation was short-lived and feminists have since been amongst the most trenchant critics of mediation. They have emphasised the power differential between men and women in mediation and its capacity to create injustice;[9] the difficulties and dangers of family mediation, particularly for women who are the target of violence and;[10] the privatising impact of mediation.[11]

[7] For a discussion and evaluation of these advantages, see Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (1992) 30-58.

[8] See Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39; Janet Rifkin, 'Mediation from a Feminist Perspective: Promise and Problems' (1984) 2 *Law and Inequality* 21.

[9] A summary of the issues may be found in Hilary Astor, 'Feminist Issues in ADR' (1991) 65 *Law Institute Journal* 69.

[10] See Hilary Astor, *Position Paper on Mediation* (for the National Committee on Violence Against Women) (1991); Hilary Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Aus-*

Those few commentators who have addressed the issue of alternative dispute resolution for lesbians have utilised and built upon the work of feminist scholars.[12] However the feminist work alone is not enough to elucidate all of the issues relevant for lesbians. Lesbian disputants are not simply two women in dispute — they are two lesbians. They have an identity which shapes their experience, including their experience of disputing, in ways which are very significantly different to the experiences of heterosexual women. For example, the homophobia of society and its impact on the law affects lesbians' choices about dispute resolution very profoundly. The law and its instruments can be blatantly oppressive or, more frequently, ignore or distort the experience of lesbians. The violence and discrimination against lesbians may fuel a need to conceal identity and to prioritise a confidential dispute resolution process. Ignorance and denial of the experience of lesbians affects the capacity of dispute resolvers to deal appropriately with lesbian disputants. These issues are considered in detail below.

II HOMOPHOBIA

A *Homophobia in the Formal Justice System*

A very significant potential advantage of mediation is that it allows the parties to avoid the homophobia of the formal justice system. Perhaps most frequently this homophobia takes the form of excluding or failing to provide appropriately for the needs of lesbians. However, it can also take the form of rules, precedents and attitudes which are discriminatory or offensive.

In 1994 the Anti-Discrimination Board of New South Wales examined legislative provisions for discrimination against people in gay or lesbian relationships.[13] It found 28 instances of discriminatory provisions.[14] In Tasmania the situation is even more parlous. Until recently the Tasmanian Criminal Code criminalised sexual activity between gay men. Arguably it also criminalised lesbian sex.[15] Tasmania has not amended its Criminal Code, but the effect of the law has been nullified as a result of international legal action and federal government intervention.[16] Although sex is not the beginning and end, or even necessarily the

tralian Journal of Family Law 3; Susan Gribben, 'Violence and Family Mediation: Practice' (1994) 8 *Australian Journal of Family Law* 22.

11 See Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733; Anne Bottomley, 'What is Happening to Family Law? A Feminist Critique of Conciliation' in Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (1985) 162; Martha Fineman, 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making' (1988) 101 *Harvard Law Review* 727.

12 See in particular the pioneering work of Robson, above n 3.

13 New South Wales Anti-Discrimination Board, *Balancing the Act: A Submission to the NSW Law Reform Commission's Review of the Anti-Discrimination Act 1977 (NSW)* (1994).

14 Ibid 298-9.

15 Walker, above n 4, 71.

16 Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740; Ivan Shearer, 'The Communication of Nicholas Toonen Concerning Australia: Communication No 488/1922 — Explanatory Note' (1995) 69 *Australian Law Journal* 600. It is regrettable that the *Australian Law Journal* chose

defining feature, of lesbian relationships (as many heterosexuals appear to believe),[17] nevertheless it is not encouraging of trust in the legal system if one's sexual activities constitute criminal offences.

Most lesbians would be reluctant to litigate disputes concerning children in the Family Court of Australia. Determination of the fitness of lesbian and gay parents is achieved by reference to a 'handy check list' of questions[18] which includes such offensive items as '[w]hether a homosexual parent would show the same love and responsibility as a heterosexual parent.'[19] In 1992 Justice Hannon in the Family Court, whilst granting custody to a gay father, nevertheless noted in his judgment:

> There is no doubt that in a perfect society children would be reared in a household which comprises heterosexual parents living in a harmonious and stable household. Unfortunately, we do not live in such a society and regard must be had to the fact that parents do separate and some parents have a homosexual orientation and live in a homosexual relationship.[20]

Not surprisingly there appears to be a level of mistrust of the Family Court in the lesbian and gay community,[21] despite support from Chief Justice Alastair Nicholson for the extension of the jurisdiction of the Family Court to include property disputes between lesbian and gay partners.[22]

Apprehension about the homophobia of the courts was expressed by lesbians responding to the Australian Law Reform Commission's inquiry into equality before the law. One submission reported that '[f]ear about the nature of justice which will be administered by a court prevents many lesbians from seeking

to compound the problem by repeating, out of context and with no explanation, on the cover of the journal one of the most egregious examples of the homophobia of which Mr Toonen complained.

17 Marc Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511, especially 537-68.

18 *In the Marriage of Doyle* (1992) 15 Fam LR 274. Hannon J adopted this checklist from *In the Marriage of L* (1983) FLC 91–353, 78, 363-4.

19 *In the Marriage of Doyle* (1992) 15 Fam LR 274, 277. See further Jenni Millbank, 'Lesbian Mothers, Gay Fathers: Sameness and Difference'(1992) 2 *Australian Gay and Lesbian Law Journal* 21. On lesbian and gay custody cases in Australia see also Margaret Bateman, 'Lesbians, Gays and Child Custody: An Australian Legal History' (1992) 1 *Australian Gay and Lesbian Law Journal* 47; Frank Bates, 'Child Law and the Homosexual Partner — Recent Developments in the United States' (1992) 1 *Australian Gay and Lesbian Law Journal* 21; Frank Bates, 'Child Custody and the Homosexual Parent: Some Further Developments in Australia and the United States' (1992) 2 *Australian Gay and Lesbian Law Journal* 1.

20 *In the Marriage of Doyle* (1992) 15 Fam LR 274, 279. See also *In the Marriage of A and J* (1995) 19 Fam LR 260.

21 See, eg, Lesbian and Gay Legal Rights Service, *'The Bride Wore Pink: Legal Recognition of Our Relationships'* (1993) 3 *Australian Gay and Lesbian Law Journal* 67. The Legal Rights Service notes the improvements in the approach of the Family Court to lesbian and gay relationships but observes that the court may still consider a parent's homosexuality to be detrimental to a child's welfare: ibid 77. It is interesting to speculate on the position of court-connected mediation in this situation. The Family Court has its own mediation service, which may or may not share the values expressed in some judgments. From the point of view of lesbians and gay men, will the acceptability of this service be judged on the basis of what they know about the judicial attitudes?

22 See Alicia Larriera, 'Judge: give gay couples equality', *The Sydney Morning Herald* (Sydney), 4 January 1995, 1.

remedies except in absolute crisis situations.'[23] Sometimes extra-judicial comments also betray attitudes which can only deter lesbians from seeking recourse to the courts. Justice Meagher of the New South Wales Supreme Court has had his remarks about the 'infiltration' of the courts by 'bearded lesbians' and references to 'hairy legged lesbians' widely reported in the press.[24]

B *Exclusion or Distortion — Lesbian Experience with the Formal Justice System*

The homophobia of the formal justice system perhaps more often takes the form of excluding or failing to provide for lesbians and gay men, or distorting their experience, rather than overt prejudice. One example of exclusion and distortion, considered below, concerns the legal provisions for resolving property disputes consequent on the breakdown of a relationship.

Lesbians cannot use the Family Court of Australia to resolve property disputes which arise when their relationship ends. The property jurisdiction of the federal Family Law Act 1975 extends only to the parties to a marriage and (even if they wish to do so) lesbians cannot marry. In those States which have enacted legislation to provide for disputes between de facto couples, the legislation generally does not provide for lesbians. The de facto relationships legislation in New South Wales, Victoria and the Northern Territory[25] provides a framework for the resolution of disputes between heterosexual de facto couples but does not apply to lesbian or gay partners. However, in the Australian Capital Territory the Domestic Relationships Act 1994 does include lesbian (and gay male) relationships. Proposals to enact inclusive legislation in Queensland[26] appear to have been overtaken by government support for the reference of power over de facto relationship to the Commonwealth. This new proposal appears not to include lesbian and gay relationships.[27]

The rules concerning property division and maintenance for heterosexual couples differ depending upon whether they are married or are living in a de facto relationship. Where a heterosexual couple is married there is an assumption of partnership and rules that the parties will share their assets in a way which takes account of their contributions and their future needs. Patrick Parkinson asserts that the Family Law Act:

> takes seriously the old marriage vow 'with all my worldly goods I thee endow.' Whether or not this vow or a similar one was made by the couple on their wedding day, the Family Law Act implies it as a term of their marriage contract, to

[23] Submission of the Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service, as cited in Australian Law Reform Commission, *Interim Report No 67, Equality Before the Law: Women's Access to the Legal System*, (1994) 41.

[24] Tony Stephens, 'Roddy Meagher: A Law Unto Himself', *The Sydney Morning Herald* (Sydney), 5 December 1992, 39.

[25] De Facto Relationships Act 1984 (NSW); Part IX of the Property Law Act 1958 (Vic) (enacted in 1987); De Facto Relationships Act 1991 (NT).

[26] Queensland Law Reform Commission, *De Facto Relationships*, Report No 44 (1993).

[27] Queensland Attorney-General, *Press Release*, 11 October 1995.

> the extent that a spouse may be compelled to disgorge some of that wealth according to settled principles if the relationship breaks down.[28]

The same assumptions are not applied to heterosexual de facto relationships. When a de facto relationship ends, the financial obligations of the parties to each other are much more limited. It has been argued that such differences are appropriate, since heterosexual de facto couples could have married but one or both of them chose not to do so, and the parties thus chose not to import the financial consequences of marriage into their relationship. There are some practical difficulties with this argument in that many people do not in fact make, or share, such conscious choices about property and financial obligations. Nevertheless, the fact that some heterosexual couples do not advert to the ways that the law structures their financial relationships is not a sufficient reason for removing the possibility of choice for those that wish to use it.

However, the situation for lesbians is more complex. It cannot be assumed that lesbians in a de facto relationship did not make marriage vows to each other. They may have made them, although they had no legal effect. It certainly cannot be assumed that the absence of marriage imports any assumptions about the nature of the parties intention regarding their property. They may have considered their relationship to involve mutual financial obligations like those of marriage, or involving lesser obligations like those embodied in de facto relationships legislation. Their personal and financial relationship may have been unlike those contemplated by either of these legal frameworks. Whatever their understanding, both avenues of legal redress are closed to most lesbians. Lesbians who come within the jurisdiction of the Domestic Relationships Act 1994 (ACT) have an option which may be appropriate to their needs. However, the only course of action available to the majority of lesbians who need to litigate about property matters at the end of a relationship, or who seek a legal framework within which to negotiate, is calculating property distribution on the basis of the principles of equity and trusts.

There are significant difficulties associated with using the equity jurisdiction to resolve property disputes arising from intimate relationships. Those courts are not well equipped to deal with the consequences of relationship breakdown and do not have the specialist counselling and mediation services of the Family Court.[29] Problems have also been identified with the capacity of this jurisdiction to do justice between domestic partners. Contributions to de facto relationships by way of work in the home may not be adequately compensated. Also inade-

[28] Patrick Parkinson, 'Intention, Contribution and Reliance in the De Facto Cases' (1991) 5 *Australian Journal of Family Law* 268, 274.

[29] See Danny Sandor, 'Paying for the Promise of Co-Parenting: A Case of Child Maintenance in Disguise?' (1996) 43 *Family Matters* 24. The absence of counselling and mediation facilities in State Supreme Courts is one factor which has led to the suggestion by Chief Justice Alastair Nicholson that the Family Court of Australia should have jurisdiction over the property of de facto couples; see Larriera, above n 22. State Supreme Courts may have generalist mediation services. In NSW, for example, the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 provides (amongst other things) for mediation in the Supreme Court. The service is new, and whether it will accommodate the needs of disputes consequent upon the ending of relationships remains to be seen.

quately compensated are the financial detriments which occur when one party, relying on the continuation of the relationship, leaves the work force to care for children or because of the job requirements of the other party.[30] Whilst the problems created by the deficiencies of these laws are confronted by heterosexual, lesbian and gay couples, they do not impact on them equally. Lesbians and gay men do not have a choice about the legal regime which is applied to their relationships — the equity jurisdiction is likely to be the only avenue available. It is not a choice which is appealing to lesbians and gay men who have criticised it for being expensive and difficult to use.[31]

However, even if the options of the laws relating to marriage, de facto relationships and equity could be made available and free of homophobia, the problem for lesbians is not necessarily solved. Lesbian relationships are developed in the context of societal homophobia and widespread denial of their existence and significance. In the absence of images or blueprints of what a lesbian relationship should look like, lesbians must 'write their own lives' and relationships.[32] Whilst lesbian relationships may borrow from the norms and values of heterosexual relationships they are not the same. Most obviously, whilst lesbian relationships may display other forms of inequality, they do not embody those derived from gendered inequalities between men and women. Lesbians whose relationships are informed by feminist critiques of the family and a rejection of traditional gender roles may be strongly opposed to the imposition of assumptions related to marriage on their relationship.[33]

The diversity of opinion and practice of lesbians and gay men concerning relationships is evident in Australian debates about legal recognition of lesbian and gay relationships, just as it is in other jurisdictions.[34] *The Bride Wore Pink*, for example, a discussion paper of the New South Wales Lesbian and Gay Legal Rights Service on legal recognition of lesbian and gay relationships, grapples with the difficulty of adapting legal forms constructed around heterosexuality to homosexual realities. In doing so the paper takes into account the lack of trust of lesbians and gay men in the formal justice system as well as the wide ranging differences of opinion in the lesbian and gay community about relationships and law:

> All lesbians and gays will not be united on the best options for reform. Marriage to some is the ultimate recognition. To others it is meaningless. For some,

30 Parkinson, above n 28, 272-3, 275-6.

31 Lesbian and Gay Legal Rights Service, above n 21, 76. I am grateful to Jenni Millbank for the point that, in *W v G* (1996) 20 Fam LR 49, a claim for child support heard in the equity jurisdiction involved a three day hearing. Obtaining child support is a relatively simple administrative procedure for heterosexual couples.

32 See Carolyn G Heilbrun, *Writing a Woman's Life* (1989).

33 For a concise discussion of the relationship between the diversity of lesbian and gay relationships and the issues relevant to the legal regulation of those relationships see Susan Boyd, 'Expanding the "Family" in Family Law: Recent Ontario Proposals on Same Sex Relationships' (1994) 7 *Canadian Journal of Women and the Law* 545, especially 554-63.

34 See ibid; Robson, above n 3; Didi Herman, 'Are We Family? Lesbian Rights and Women's Liberation' (1990) 28 *Osgoode Hall Law Journal* 789.

> registered partnerships hold promise for a legal recognition which we define. To others a registered partnership is a second rate marriage.[35]

The Legal Rights Service debated the pros and cons of campaigning for marriage; for incorporation of lesbian and gay relationships into de facto relationships legislation; for registered partnerships; for no particular legal recognition of lesbian and gay relationships, but for the removal of discriminatory provisions from legislation. The difficulties of achieving consensus on these options are evidenced by the fact that after the first edition of *The Bride Wore Pink* was released and discussion took place in the communities, the Legal Rights Service published a second edition in which their recommendation changed from support for registered partnerships to support for inclusion in de facto relationships legislation.[36]

The debates about legal recognition of lesbian and gay relationships will no doubt continue.[37] The nature of lesbian relationships and their relationship to the law is different and more complex than for heterosexuals. Whilst lesbians may need rules and mechanisms for resolving disputes, they may not necessarily desire or feel comfortable with those which are provided for heterosexuals. So far as the formal justice system is concerned, the options are limited and unsatisfactory. Can mediation as a method of dispute resolution deal with these difficulties and complexities?

C *Does Mediation Avoid the Problems of the Formal Justice System?*

Given the deficiencies of the formal justice system, mediation appears to be an attractive alternative for lesbians who have intractable disputes. At least in theory, lesbians in mediation are not constrained by legal rules and institutions which may be homophobic, objectionable, irrelevant, inapplicable to their lives or distorting of their experience. They can negotiate on the basis of their own understandings about the nature of their relationship. However, it is important to consider carefully the extent to which mediation does, in practice, avoid the homophobia of the law and allow the parties to apply their own values to their dispute.

It has become a platitude that, in mediation, parties bargain in the shadow of the law. When they go to mediation they may have had legal advice concerning the law and procedure which will be applied if they use the formal justice system and about the likely outcome of litigation. This advice may have revealed the deficiencies of the law for lesbians and gay men, but will it be entirely irrelevant in mediation? The rules and procedures of the formal justice system can be entirely irrelevant if both (or all) parties in mediation agree that they are to be irrelevant. However, what looks homophobic, objectionable or irrelevant at the beginning of a relationship may take on an entirely different appearance at the

[35] Lesbian and Gay Legal Rights Service, *The Bride Wore Pink: Legal Recognition of Our Relationships* (2nd ed, 1994) 6.
[36] Ibid 1-5.
[37] Boyd, above n 33, 563.

end of the relationship. Even if they were united in criticism of the law during the relationship, when the parties approach mediation they may no longer be in agreement about the rules or assumptions which should be applied to the resolution of their dispute. This may be especially likely if resorting to litigation will benefit one party over the other.

One obvious example would be a dispute over custody of a child between two lesbians where one was the biological mother of the child. The fact that one is the biological mother may have been seen by both as being irrelevant at the time of conception when the parties took a joint decision to parent a child. However, at the end of a relationship it may not seem to the biological mother to be so irrelevant, since it gives her a legal advantage. The Family Court does have jurisdiction over this dispute and makes its decision about custody and access on the basis of the best interests of the child. However, the biological parent approaches the Family Court as a parent of the child. The non-biological mother, however intense her involvement in parenting the child, must apply, not as a parent but as an 'other person who has an interest in the welfare of the child.'[38] Whilst it has been held that there is no legal presumption in favour of a biological parent over a social parent, the absence of biological parenthood combined with judicial attitudes towards lesbians in the Family Court, discussed above, are not encouraging of applications by lesbian mothers who are not the biological parent of the child. There appear to be no reported cases of such applications.[39] The legal disadvantage of the non-biological mother translates into an advantage in mediation for the biological mother, since she can terminate the mediation if it is not going as she wishes and resort to the courts.[40]

To take another example, if one lesbian is the legal owner of substantial property, whereas the other has foregone the opportunity to acquire property or to improve her earning capacity, the legal owner may resile from earlier understandings about sharing of property at the end of the relationship. She may bargain in mediation for the share she would have received had she litigated. Of course, like many heterosexual couples, lesbians may simply not have adverted to the issue of property and income entitlements during the relationship. At the end of the relationship they will find themselves confronted with the deficiencies of the legal system and its limited options for lesbians, the need to decide what they regard as fair, and the puzzle of how to negotiate for, or enforce, a fair resolution.

Some lawyers, justifiably critical of that which the law offers to lesbians, have suggested that lesbians should not be constrained by the law but should create their own rules out of their own values. Ruthann Robson argues that lesbians

[38] Family Law Act 1975 (Cth) s 63C(1)(c).

[39] Cf, *CMcC and HT* (Full Court of Family Court, No EA70 of 1992).

[40] An example is provided by the case of *W v G* (1996) 20 Fam LR 49. This case involved an application by the biological mother against the non-biological mother in the equity jurisdiction of the NSW Supreme Court for child support. The case broke new ground in granting equitable compensation (grounded in promissory estoppel) to the biological mother against the co-mother for the support of two children. Had the case gone to mediation the biological mother would have had to negotiate on the basis that she had no recognised legal rights. For an analysis of this case see Jenni Millbank, 'An Implied Promise to Parent: Lesbian Families, Litigation and *W v G* (1996) 20 Fam LR 49' (1996) *Australian Journal of Family Law* (forthcoming).

should avoid 'domestication', by which she means 'the circumscription of lesbian lives and possibilities by the unthinking adoption of legal categories and protections.' She looks to the possibility of a 'feral future' in which lesbians create and live by lesbian values.[41] However appealing and important these ideas are, it is asking a great deal of two human beings who are in dispute to develop a critique of the legal rules, agree to apply their own ethics or standards, reach some consensus about what these are and maintain it over time and in the face of the distress attendant upon the ending of a relationship. The reality, when lesbians approach mediation, is likely to be much more confused and lacking in consensus. At such a time, the only certain, prescribed framework is that of the law, which may cast a significant shadow over the process of mediation.

D *The Mediator's Response to the Homophobia of the Law*

Mediation of intra-lesbian disputes is likely to present mediators with some interesting challenges. The mediator will have to work with the parties to discover the norms and values which informed their relationship, the extent to which these are still shared, and how they impact on the way the parties wish to resolve their disputes. It cannot be assumed that their norms and values will be the same as those which inform the disputes of heterosexual couples. However, mediators may justifiably remind us of the heterogenous nature of heterosexual relationships and assert that establishing the values according to which the parties wish to resolve their disputes is exactly what they seek to assist heterosexual couples to achieve. Indeed, some heterosexual disputants go to mediation because they do not wish to be constrained by the framework created by the law, but desire the freedom to resolve their dispute according to their own understandings. If mediators have honed these skills, mediation has significant advantages over other methods of resolving disputes, such as lawyer/lawyer negotiation.

However, the extent to which heterosexual couples use mediation because they wish to avoid the norms and values of the formal justice system is debatable. Many go to mediation because they want a cheap or speedy method of resolving disputes. Others begin by approaching the formal justice system and are referred to mediation rather than choosing it. However, couples (of whatever sexual preference) may appreciate the discovery that mediation offers them the freedom to depart from established rules. There will also be cases when the values and assumptions of lesbian disputants about the nature of their relationships may not, in fact, be very different from the values of people in heterosexual relationships.[42] However, it remains true that lesbians are likely to present mediators with challenges to accepted values about relationships perhaps more often, and in different forms, than heterosexual couples.

Certainly mediators cannot simply map assumptions relevant to heterosexual relationships onto lesbian relationships. They need to take particular care to

[41] Robson, above n 3, ch 1.
[42] See Boyd, above n 33.

discover and clarify the parties' assumptions. For example, some lesbians have strong beliefs about community which include the idea that all lesbians should remain friends after a relationship breakdown. Achieving such friendly relations may be extremely important, especially for lesbians who live in small communities. Continuing hostility between parties may result in a woman being excluded from the community which is the source of her social life and emotional support. A further example of a challenge for mediators is that the accessibility of services which provide emotional and practical supports around relationship breakdown may be deficient for lesbian (and gay) couples.[43] Consequently lesbians may seek more support from mediation services. They may also look to mediation services to provide effective referrals to other resources appropriate to their needs.

Maintenance of a balance of power between the parties also becomes more complex in disputes between lesbians. For example, one way in which mediators deal with power imbalance is to refer the weaker party for legal advice so that they may bargain with a clear understanding of what a just outcome might be in their case. However a weaker lesbian cannot necessarily be referred to legal advice to ensure that she knows what a just or fair outcome might be. What is equitable for lesbians and gay men may have nothing to do with the law, and the mediators may need to confront competing ideas of fairness without the fallback position of legal rules and precedents.

E *Mediator Attitudes Toward Lesbians*

The problem of homophobia is not confined to the formal justice system. It is pervasive and can no doubt be found also in mediation. In teaching a final year option on dispute resolution in a law course,[44] I give the students a mediation role play which involves two gay men who are in a relationship and have a business partnership. In the facts the students are given, the dispute about the business and the breakdown in the relationship are intertwined. Some of the students take the relationship issues in their stride. Others do not even see the relationship — although it is clearly set out in the facts. Others decide that, although the parties have a personal relationship, they are only going to mediate the business issues. Debriefing this role play is always interesting, providing an opportunity for students to examine their own values and discover the range of attitudes of their classmates. They learn lessons about their own attitudes and values and the way that these impact on mediation. The same lessons are relevant for all mediators.

Mediation schemes often allow the parties to have some input into the choice of mediator. Lesbians are likely to ask about the attitudes, training and knowledge of mediators. Selection of appropriate mediators for the parties and their dispute is a feature of mediation schemes that employ careful intake procedures and many mediation services report that they will take care to find mediators with relevant experience and who are acceptable to lesbian or gay disputants. It is

[43] Claire Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* (1992).

[44] Hilary Astor and Christine Chinkin, 'Teaching Dispute Resolution: A Reflection and Analysis' (1990) 2 *Legal Education Review* 1.

essential that mediators dealing with intra-lesbian disputes have confronted their own attitudes and values about lesbianism if they are to provide a service which is appropriate, accepting, effective, informed and not tainted by homophobia.[45]

It could be argued that the only suitable mediator for disputes between lesbians is a lesbian mediator. Only a lesbian mediator, the argument could run, has a real and nuanced understanding of the nature of homophobia and its impact on relationships; understands the reality, the values and diversity of lesbian relationships; has confronted her own internalised homophobia and is entirely comfortable and accepting. However, being lesbian is not a guarantee of all of these qualities. Homophobia is internalised by lesbians and gay men as well as by heterosexuals. Nor is being a lesbian a guarantee of skill or experience in mediation.[46] Finding a lesbian mediator may be extremely difficult. Outside metropolitan areas suitably qualified lesbian or gay mediators may be inaccessible. Given the closeness of lesbian communities in small towns there may also be concerns about the neutrality and confidentiality of a mediator who is known to most other lesbians and who may be perceived to have affiliations or alliances with either of the parties or their associates.

Lesbian disputants may prefer a suitably qualified lesbian mediator. Certainly lesbians will need mediators who are skilled at their task; have confronted their own homophobia and questioned their attitudes and beliefs; have an understanding of lesbian relationships and are comfortable with lesbians; understand the impact of homophobia on lesbian relationships; understand the legal issues surrounding relationship breakdown for lesbians. As familiarity with mediation develops in the lesbian and gay communities, and given the closeness of many communities, the reputation of mediators and mediation services and their capacity to provide a good service for lesbians is likely to become known and disseminated.

It is important to note that lesbian and gay male mediators are not interchangeable. With all due deference to queer politics and its emphasis on coalition between the lesbian and gay male communities, the experience of being homosexual is not the same for men and women. Mediation schemes cannot deal with same sex relationships by having an (ungendered) homosexual as mediator. For example, gender may be a more significant issue than sexuality for some lesbian disputants. Some lesbians may want women mediators, although anecdotal evidence suggests that (subject to positive attitudes) gay men may also choose women mediators. There is presently no data beyond anecdote on the needs and preferences of lesbians or gay men in this respect. Any generalisation about the sexuality or gender of the mediator must be unreliable and careful discussion of the parties' needs and preferences at intake is essential.

The issues raised above suggest a number of items which might be included on an agenda for training mediators who mediate disputes between lesbians and gays. Other matters relevant to training are raised below. Training clearly needs

[45] Bryant, above n 3; Townley, above n 3.
[46] Englehardt and Triantafillou, above n 3.

to include information about the law and its deficiencies for lesbians as well as attitudinal work which will confront internalised homophobia and allow the selection (including the self selection) of those who have aptitude for mediating intra-lesbian disputes. Mediators should not be complacent about homophobia. It is pervasive and requires addressing in a careful and conscious way. Some mediation schemes will be well advanced in their work on these issues and it would assist lesbian and gay disputants, as well as support the development of best practice for mediators in this area, if those organisations produced information about the nature of their training, as well as reflect on their practice.

III PRIVACY

A *The Advantages of a Confidential Process*

Privacy is a very significant advantage of mediation for some lesbians. Mediating does not necessarily involve coming out to anyone but the mediator. Many lesbians fear discovery of their lesbianism by employers, workmates, family or others. The level of discrimination and violence against lesbians and gay men is very high.[47] For example, the GLAD report on discrimination and violence against lesbians and gay men in Victoria surveyed 1002 people. Forty five per cent reported discrimination in employment and substantial numbers reported discrimination in education, in the provision of services including medical services and accommodation, and by police and other public agencies. Seventy per cent of lesbians and 69 per cent of gay men reported being verbally abused, threatened or bashed in a public place.[48]

The GLAD report also establishes that the more open lesbians and gay men are about their sexuality the more likely they are to suffer discrimination and violence.[49] This data is supported by similar results in the United States where Fajer, for example, demonstrates convincingly that tolerance is purchased at the price of concealment.[50] Fajer also points to the difficulty of concealment of sexuality in times of stress.

> The negative effects of leading a closeted life become particularly acute when a person is upset by gay-related problems, such as the separation from, death or illness of, a long-term companion. Distraught gay people may have no outlet for their grief without going through the dangerous process of coming out.[51]

[47] See Gay Men and Lesbians Against Discrimination (GLAD), *Not A Day Goes By: Report of the GLAD Survey into Discrimination and Violence Against Lesbians and Gay Men in Victoria*, GLAD (1994); Anti-Discrimination Board NSW, *Discrimination and Homosexuality* (1982); Lavender (ed), *What is Lesbian Discrimination?*, Proceedings of an October 1987 Forum held by the Anti-Discrimination Board NSW (1990); New South Wales Police Service, *Out of the Blue: A police survey of violence and harassment against gay men and lesbians* (1995).

[48] GLAD, above n 47, 5.

[49] Ibid.

[50] Fajer, above n 17, especially 570-91.

[51] Ibid 597.

If disputes about relationship breakdown, or other matters, lead to litigation it may become increasingly difficult for lesbians to conceal their sexuality. If a matter is resolved quickly by lawyer/lawyer negotiation, privacy may be relatively easy to maintain. If litigation is threatened, the level of stress increases as more people will inevitably learn of the dispute and its nature as the case progresses. It is likely to become increasingly difficult for the parties to conceal from their employers, family or friends the reason why their financial and emotional resources and time are in such demand. The parties' need for emotional and other support will increase. However, seeking such support can involve coming out and lesbians may fear that the result will be rejection and increased stress rather than the support which is needed. If the matter goes to a hearing, that hearing is likely to be public and may even receive attention from the press, depending on the nature of the proceedings.

Of course, coming out is not without its advantages. The GLAD report also points out that the invisibility and the self-censorship that goes with being closeted is regarded by lesbians and gay men as a pervasive and damaging form of discrimination. Lesbians and gay men report the liberation and advantages of being free of concealment.[52] However, it is not a risk that all are prepared to take. It is perhaps especially difficult to contemplate the risks of coming out at the same time as dealing with the stresses associated with a dispute. The confidentiality provided by mediation may therefore be very appealing.

B *The Mediation Closet*

Resolving disputes in the confidential environment of mediation may be important and advantageous for the individuals involved. However, it is questionable whether the resolution of disputes in mediation is a general good for the lesbian and gay community, particularly if it is widely used. Mediation takes place in private and confidentiality is usually protected by agreement or statute. When mediation is used the homophobia of society and the legal system is not publicly challenged, the rules are not changed and those who administer the system are not educated.[53] The existence, identity and needs of lesbians (and gay men) are put into a new closet — the mediation closet.

Of course it would be misleading to present the choice for lesbians as 'mediate or litigate'. Lesbians and gay men have been finding ways to resolve their disputes and avoid the courts for centuries. Mediation may simply provide a very useful addition to existing informal methods. It may provide a better quality of dispute resolution than supported or unsupported negotiation or 'lumping it'. For many lesbians litigation would not have provided a remedy anyway or would have been unacceptable as a method of dispute resolution. Criticism of the 'mediation closet' is also an argument which it is easier to pursue as an academic

[52] GLAD report, above n 47, 28-30.

[53] Similar points have been made by feminist writers. Recently some legal gains have been made for women, uncertain and imperfect though they are, but just as the legal system responds to women's needs they are re-privatised in mediation: see Thornton, above n 11; Bottomley, above n 11; Fineman, above n 11.

than as a practitioner since the scholar is not confronted by clients who insist on mediation because they have been unable to resolve a dispute informally and they believe that coming out will ruin their lives.

However, it is worth pursuing the issue of the 'mediation closet' for a number of reasons. First, there are important interests beyond the immediate concerns of the individual with a dispute. Second, the problems which may flow from the privacy of mediation are not irrelevant to those individuals who are, justifiably, afraid to reveal their lesbianism. Litigating important issues has the potential to improve the quality of life for lesbians and gays and is perceived by many to be an important site of struggle. The role of some litigated cases in challenging homophobia can be far reaching. The courage and tenacity of individuals such as Nick Toonen and the Tasmanian Gay and Lesbian Rights Group provide an excellent example. Toonen successfully challenged the provisions of the Tasmanian Criminal Code (which made gay male sex a criminal offence) before the United Nations Human Rights Committee.[54] The activities of the Tasmanian group and the decision of the Committee have publicised the problem, raised the level of debate, educated many individuals (including those in positions of power), effectively decriminalised gay sex in Tasmania, and had a broad potential impact in many countries beyond Australia.[55]

It is instructive to contrast the effectiveness of the Toonen case with the problems of dealing with discrimination against lesbians and gay men in New South Wales. In common with other domestic human rights instruments, the Anti-Discrimination Act 1977 (NSW) provides for conciliation of complaints. Many complaints relevant to lesbians and gay men, such as those on the grounds of homosexuality and disability, therefore go to conciliation.[56] The Board receives very few complaints of discrimination from lesbians,[57] but those it does receive are likely to be conciliated, or not to proceed.[58] Conciliation may provide a satisfactory outcome for the individual lesbian and gay complainants. However, in the interests of protecting the confidentiality of conciliation, the Board does

[54] Shearer, above n 16.

[55] Morgan, above n 16, 745-6. It is important, however, to note that the positive potential of litigation is a potential, not a certainty. As well as positive gains there have been examples of detrimental uses of litigation. For example, lesbians have been known to employ homophobic arguments in litigating against other lesbians; see for example *W v G* (1996) 20 Fam LR 49; *Wilkins v Johnson* (Supreme Court of New South Wales, McLelland J, 6 February 1987); *Anderson v Luoma* (1986) 50 RFL (2d) 127.

[56] The disability provisions of the Act are important in relation to discrimination on the ground of HIV/AIDS; see John Goodwin, Julie Hamblin, David Patterson and David Buchanan, *Australian HIV/AIDS Legal Guide* (2nd ed, 1993) 107.

[57] In 1993-4 the Board received 17 complaints by lesbians. Complaints on the ground of homosexuality decreased by three per cent compared with the previous year: Anti-Discrimination Board NSW, *Annual Report 1993/4*, 24.

[58] In 1993-4 the Board conciliated 47 per cent of the complaints it received. Cases that did not go to conciliation do not, however, necessarily go to litigation. They may be referred elsewhere, be referred to the Equal Opportunity Tribunal, be declined because of lack of jurisdiction or for other reasons, or they may not be proceeded with. Thirty eight per cent of complaints were not proceeded with from the total complaints received by the Board. However, complaints on the ground of homosexuality were the least likely to proceed with 76 per cent being dropped. The Board's Annual Report does not distinguish between complaints from gay men and lesbians in its statistics on complaints which did not proceed: ibid 20.

little to publicise the nature of these complaints and their outcomes beyond brief examples in its annual report. This achieves very little public education about discrimination, nor does it effectively inform other lesbians of what can be done to deal with discrimination. It does not inform those who are the target of discrimination about the work the Anti-Discrimination Board is doing. Consequently there was, at one time, an erosion of community confidence in the Board and its capacity to deal effectively with discrimination against lesbians and gay men. This led to open conflict between the Board and (predominantly) the gay male community over the Board's perceived failure to act, particularly on discrimination and HIV/AIDS. The Board has had to work very hard to overcome this problem and improve its relationship with the communities.[59] It still, however, receives very few complaints from lesbians and gay men.

The privacy of mediation could have particular consequences for lesbians. Writing in the early 1970s, Abbott and Love commented that less is known about lesbians than about the Newfoundland dog.[60] In the 1990s lesbians still complain about the problem of invisibility and have commented that mediation could contribute further to that invisibility and to the social ignorance of lesbian relationships.[61] The confidential forum of mediation produces little information about lesbian disputes, no reported cases and no publicity. One consequence of this is that the fuel for social and legal change may be dampened.

What should mediators who understand and accept this problem do to deal with it? Sending clients to litigate because lesbian relationships need the publicity is hardly a viable option. However, mediators should be prepared to discuss the advantages and disadvantages of all dispute resolution processes, including litigation, with lesbian clients. If they lack the skills to do this, they should be an effective referral agency, sending clients to those who can advise on these issues. Mediators can also publicise their work with lesbians and gay men. In doing so they should distinguish lesbians from gay men, since lesbians tend to disappear when the category 'homosexual' is used.[62] Within the limits of confidentiality, agencies should produce information about the amount and nature of the work they do with lesbian clients and the issues raised by that work. They should develop strong links with the lesbian community to inform their own work and to inform the community about the pros and cons of mediation. To provide a mediation service for lesbians and gay men and to be covert about it would be to become part of the problem of prejudice in our society, rather than part of the solution.

[59] The Board has taken many steps to improve its relationship with the lesbian and gay communities. See, eg, 'Gay and Lesbian Roadshow: Breaking City Limits' (1995) 24 *Equal Time* 4.

[60] Sidney Abbot and Barbara Love, *Sappho was a Right-On Woman: A Liberated View of Lesbianism* (1972) 13.

[61] Robson, above n 3, 171-4.

[62] For example, lesbians rarely complain of discrimination under the 'homosexuality' provisions of the Anti-Discrimination Act 1977 (NSW); see Carmel Niland, 'Opening Address: The Silent Twin — Lesbian Discrimination' in Lavender (ed), above n 47; Anna Chapman, 'Sexuality and Workplace Oppression' (1995) 20 *Melbourne University Law Review* 311.

IV CAPACITY TO MEDIATE

A *Assessing Capacity to Mediate*

It is generally accepted that disputes should not be accepted for mediation where the parties lack the willingness or capacity to mediate.[63] Assessing whether or not this is the case happens prior to mediation during an intake procedure. Intake should include assessing whether both parties can negotiate effectively for their own needs or interests in the context of mediation. Mediation may prove unsuitable for a number of reasons, such as the emotional state of the parties, or a strong dynamic of control in the relationship which precludes fair negotiation. Assessment of willingness and capacity to mediate should, of course, be carried out for intra-lesbian disputes as it is for all disputes. However, there are a number of particular issues worthy of consideration in relation to intra-lesbian disputes.

An informed mediator, understanding the severe difficulties which the formal justice system presents for lesbians, may be tempted to accept intra-lesbian disputes for mediation in circumstances where they would exclude heterosexual couples. We have seen that reliance on law and the formal justice system may be extraordinarily problematic for lesbians. Mediators may thus find it harder to turn away intra-lesbian disputes, knowing that they are sending the parties to other dispute resolution mechanisms which are very unsuited, or indeed antagonistic to, their needs. The less acceptable the alternative, the greater the pressure to make a judgment at intake which would admit a dispute to mediation. Paradoxically, it is likely to be the most suitable and best trained mediators who will experience this dilemma most acutely, since they will have the most sensitive understanding of the difficulties faced by lesbians. The pressure from the parties to be accepted for mediation may also be correspondingly stronger since they may have investigated the option of using the formal justice system and found it abhorrent or unacceptable.

Strong pressure to accept disputes into mediation may also be exerted by lesbians desperate to find a way to deal with an intractable dispute. Their enthusiasm for mediation may be supported by the lesbian community. Community values may be that lesbians should stay friends, resolve disputes consensually and avoid going to court. This pressure may be present even where capacity to mediate is severely compromised by violence. One woman in the United States who was the target of violence by her partner, was told to drop criminal charges because '[w]e in the lesbian community take care of our own.' Several women suggested that she should meet with her partner and that they would mediate the dispute. She refused mediation, commenting, 'I can think of few crueler demands on a woman who has been attacked than to insist that she sit down with her attacker and talk things out.'[64] However, others may not be so resolute in the face

[63] Susan Gribben, 'Mediation of Family Disputes' (1992) 6 *Australian Journal of Family Law* 126.

[64] Mary Lou Dietrich, 'Nothing Is the Same Anymore' in Kerry Lobel, *Naming the Violence: Speaking Out About Lesbian Battering* (1986) 155, 159.

of pressure, and may present themselves for mediation insisting that this is the only acceptable method of dispute resolution for them. How should mediators respond to such pressures?

The simple answer is that if mediation is not a suitable method of resolving a dispute because of a lack of capacity of either or both parties, the fact that there are also deficiencies in *other* methods of dispute resolution does not thereby make mediation suitable. However, the issues which face the practitioner are rarely susceptible of simple answers and decisions often involve difficult value judgments. 'Does this person have the capacity to mediate?' is not a question which is always open to a simple 'yes' or 'no' answer. In some cases capacity to mediate can be improved to an acceptable level. Steps such as ensuring expert legal advice, financial advice, counselling, or other supports before the mediation may make the difference between capacity and lack of it. However, ensuring appropriate supports presents another challenge for intra-lesbian disputes. Expert advice and services will be harder to locate than they are for heterosexuals. Referral to homophobic agencies, or any agency which has not developed appropriate expertise, is likely to compound the problem rather than resolve it. Availability of appropriate services will vary according to many factors, including the location and resources of the mediation services. The availability and suitability of other dispute resolution mechanisms will also vary widely.

There will no doubt be some cases where mediators are faced with a dilemma about the capacity of the parties, or one of them, in an intra-lesbian dispute. They will wish to accept lesbian disputants into mediation in circumstances where they would probably have declined to accept a heterosexual couple. A powerful factor in the decision will be the homophobia which their clients are likely to find in the legal profession and the formal justice system. However, if there are doubts about the capacity of lesbian parties to bargain effectively for their own needs and interests, mediation may fail or may provide an unjust outcome. Is it acceptable — or ethical — for mediators to take greater risks with lesbian couples than heterosexual couples? Mediators who understand these issues will be faced with difficult dilemmas.

Some commentators have argued that there is little that mediators can do to resolve these dilemmas. They cannot change social realities but must work within them.[65] Mayer, for example, argues that, given prevailing social structural inequalities, if mediation provides the best option for disputants (even if not an entirely favourable one) it should still be used. If mediation is likely to increase a power differential between the parties it should probably not be used.[66] Lesbian disputants are likely to present mediators with many such difficult issues. On a practical level, mediators clearly cannot use each intra-lesbian dispute as an opportunity to fight homophobia. If they took such a view of their task they would be less than helpful to most of their lesbian clients, who no doubt wish to

[65] Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75, 83-4; Gwynn Davis and Marian Roberts, 'Mediation and the Battle of the Sexes' (1989) 19 *Family Law* 305.

[66] Mayer, above n 65.

resolve a dispute rather than to change the world. Mayer's dictum may therefore provide some comfort to mediators who have honestly struggled with difficult decisions.

However, mediators should not leave the issue there, relinquishing any responsibility for change. In relation to individual clients, where mediators have doubts about their capacity to mediate, mediators could improve the alternatives to mediation. They can identify other dispute resolution providers who will give sensitive and appropriate assistance to lesbian disputants. Lawyer/lawyer negotiation, when carried out by skilled and informed practitioners, may provide a better dispute resolution mechanism in some cases. Arbitration, or med/arb, may be suitable options when carried out by an informed arbitrator. Further, mediators cannot be entirely driven by the demands of their clients. Their ethics must define those occasions on which they say, 'This may be what you, the disputants, desire — but I will not be a party to it.' Mediators also have roles and responsibilities beyond working directly with disputants. In addition to mediating individual cases, mediators and mediation agencies have social policy and political roles. They can and do influence those who make and implement law and policy. They support, initiate and carry out research. In all of these roles they can and should point out the problems that homophobia creates for them and their clients. They can and should press for and support change. As Piper has pointed out, so long as mediators do not initiate or endorse criticisms of social inequalities and their effects 'mediation is doing more than failing to remedy — it is reinforcing the inequalities.'[67]

B *Violence in Lesbian Relationships and Capacity to Mediate*

The presence of violence in the relationship usually precludes the parties from mediation.[68] There is, of course, violence in lesbian and gay relationships.[69] However, it would be a mistake for mediators to treat such violence exactly as if it were violence in a heterosexual relationship. What, then, are the similarities and differences and how might they affect mediation? It is impossible to give a definitive or complete answer to this question. There is comparatively little research on violence in lesbian relationships and the developing literature is almost entirely North American.[70] However, with that caveat, it is worth examining the available research which does contain some helpful and suggestive material.

Hart gives a much cited definition of violence in lesbian relationships which has strong parallels with definitions of violence in heterosexual relationships. She describes lesbian battering as 'that pattern of violence and coercive behaviours whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate

67 Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (1993) 165.

68 Astor, 'Violence and Family Mediation: Policy', above n 10; Gribben, above n 10.

69 See the summary of research in Renzetti, above n 43, 17-24.

70 There appears to be even less on violence in gay male relationships, but see David Island and Patrick Letellier, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* (1991).

partner or to punish her for resisting the perpetrators control over her.'[71] Many of the descriptions of personal experiences of violence in lesbian relationships also have strong similarities with the stories of women in heterosexual relationships. Studies of violence in lesbian relationships detail patterns of controlling behaviour, physical and emotional abuse and social isolation.[72] Descriptions by lesbians of the emotional impact of violence will sound remarkably familiar to those who have heard such accounts from heterosexual women. Some services for women who have been the target of violence may provide appropriate support for both heterosexual women and lesbians. One lesbian in the United States, for example, confirmed the utility of a support group for battered women, 'I went to the group. I am still going. It has been helpful even though all the other participants are coming out of heterosexual relationships .... The feelings are the same, I've realised.'[73]

The fact that there are similarities however, does not mean that there are no differences. Available data suggests that lesbians' experiences of violence, of leaving, of seeking help and of attempting to resolve disputes associated with the termination of a violent relationship are not the same as the experiences of heterosexuals. It has recently been argued persuasively that focusing on the similarities has meant that the differences have been insufficiently considered and investigated.[74]

The available research suggests that some of the causes and dynamics of violence in lesbian relationships may be different from those of heterosexual relationships. It has been hypothesised, for example, that one cause of violence in lesbian relationships is that the perpetrator internalises societal disapproval of same sex relationships and projects this disapproval onto her partner, manifesting this in violence.[75] Renzetti, perhaps the leading researcher in this area, suggests that the pressures of conducting a relationship in a homophobic environment result in relationships which are particularly intense closed systems. These relationships may be susceptible to tension around the dependence and autonomy of the partners. The perpetrator is likely to be the most dependent of the two and to be less powerful in terms of resources, education and intelligence. Violence is an attempt to equalise power between the parties.[76] Whilst these suggestions are made on the basis of small samples, and research on the causes and dynamics of intra-lesbian violence is not well developed, they do suggest that caution should be exercised in simply mapping ideas about the causes and dynamics of violence which are based on heterosexual relationships onto lesbian relationships.

[71] Barbara Hart, 'Lesbian Battering: An Examination' in Lobel, above n 64, 173.

[72] Renzetti, above n 43.

[73] Dietrich in Lobel, above n 64, 159.

[74] Mary Eaton, 'Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence' in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) 195-223.

[75] Elaine Leeder, 'Enmeshed in Pain: Counselling the Lesbian Battering Couple' (1988) 7 *Women and Therapy* 81.

[76] Renzetti, above n 43 and below n 83.

Homophobia may make it very difficult for lesbians to leave a relationship where there is violence. There is likely to be greater fear of the consequences of separation and the disputes which will attend it. Going to the formal justice system, either to seek protection from the violence or to deal with issues such as custody of children, may raise fears of coming out. The fear that she may lose custody of her children is present for many heterosexual women, but is even more acute for lesbians.[77] An element of abuse which is not a factor for heterosexual women is that the perpetrator of the violence may threaten the target with outing if she leaves. This threat may be carried out when her partner does leave. A lesbian may, therefore, be coping not only with the termination of a relationship but with the burden of homophobic reactions to her sexuality. These reactions may come from her family or those she would wish to rely upon for support. They may compromise significant areas of her life such as employment or accommodation.

Resources for the support of women who are the target of violence do not always respond to lesbians who seek help. Renzetti, in the United States, examined what happened to the lesbians she surveyed when they sought help. One important (if unreliable) source of help for heterosexual women is the police. Of the 100 participants in Renzetti's sample only 19 called the police for help and they reported generally negative experiences. One woman commented, 'The police basically took the attitude "So two dykes are trying to kill each other; big deal".'[78] Another significant source of support and safety for heterosexual women is refuges. However, the experience of refuges for the lesbians in Renzetti's sample was not positive. Women approaching refuges reported that they were referred elsewhere or turned away; that their partners were employed at the refuge; that there was homophobia amongst women in the refuge; that refuge workers did not wish to confront the idea that there could be violence in a lesbian relationship.[79] In the Australian context, Jude Irwin and her colleagues examined the experiences of homeless lesbian and gay youth who reported their experience of homophobia in refuges and from other agencies.[80]

Denial that there is abuse in lesbian relationships is not confined to refuges. Renzetti and others report that it appears to be widespread in the lesbian community.[81] Again, it is at least partly a consequence of homophobia.[82] The silence and denial around violence is fuelled by fear that acknowledging intra-lesbian violence will increase homophobia, especially the characterisation of lesbians as

[77] Susan Boyd, 'What is a Normal Family?: *C v C (A minor) (Custody Appeal)*' (1992) 55 *Modern Law Review* 269; Millbank, above n 19; Bates, above n 19.

[78] Renzetti, above n 43, 91; see also Susan L Morrow and Donna M Hawxhurst, 'Lesbian Partner Abuse: Implications for Therapists' (1989) 68 *Journal of Counselling and Development* 58.

[79] Renzetti, above n 43, 93-6.

[80] Jude Irwin, Barbel Winter, Mel Gregoric and Simon Watts, *'As Long as I've Got My Doona'; A Report on Lesbian and Gay Youth Homelessness* (1995) especially 33-36.

[81] See Dietrich in Lobel (ed), above n 64; Morrow and Hawxhurst, above n 78 and Renzetti, above n 43.

[82] Mary Eaton, above n 74, especially 215-20.

sick and lesbian relationships as dysfunctional.[83] Acknowledging violence in lesbian relationships may challenge ideals held by some lesbians about the lesbian community and lesbian relationships.[84] As Eaton puts it:

> Many lesbians, especially those who became lesbians through their involvement in feminist politics, have aspired to create a women's community superior to that of the dominant heterosexual society, in the bosom of which each individual woman may pursue her own development free of inappropriate coercion and constraint by others. Confronted with the ugly reality that the creation of all-woman space did not necessarily promise an environment in which self actualization would flourish, the problem of battering within lesbian communities was downplayed, even denied, by lesbians themselves.[85]

This dynamic may deter help-seeking by lesbians[86] or may provoke hostility from her community towards the target if she attempts to protect herself by taking action which reveals the violence publicly, such as calling the police or taking another lesbian to court.

C *Violence in Intra-Lesbian Relationships: Lessons for Mediators*

What consequences does our admittedly limited understanding of intra-lesbian violence have for mediation? In some respects mediators will be on familiar territory. They will need the same skills they need when mediating with heterosexual couples. For instance, it is just as necessary to test for willingness and capacity to mediate and to check carefully and appropriately for violence in the relationship. It is also important that the mediator not be reticent to explore and deal with violence in lesbian relationships. Skills will be needed in dealing with violence when it is revealed during the mediation, such as terminating the mediation appropriately and referral to resources outside mediation.

However, despite the similarities there are differences. We have noted that the silence and denial which always surrounds violence may be heightened in lesbian relationships by dynamics such as fear of homophobia or a perceived need to preserve idealised notions of lesbian relationships. If the mediator or the mediation agency is perceived as part of the heterosexual community, fear of homophobia may operate. If a specialised gay and lesbian mediation service is involved there may still be a perceived need to deny violence. The importance of clear and direct raising of the existence of violence in some lesbian relationships is therefore essential.

Whilst acknowledging the similarities of experience and the dynamics of control in relationships where there is violence, again mediators should not make assumptions that they will find exactly the same patterns in lesbian and gay

[83] Claire Renzetti, 'Building a Second Closet: Third Party Responses to Victims of Lesbian Partner Abuse' (1989) *Family Relations* 157.

[84] Renzetti, above n 43, 105-7.

[85] Eaton, above n 74, 217.

[86] Renzetti, above n 43, 79: 10 women reported that a desire to protect the ideal of a 'lesbian nation' played a major part in the decision to stay. Twenty four women reported that it played a minor role.

relationships as are present in heterosexual relationships. Whilst the present state of knowledge about the causes of abuse in lesbian relationships would not necessarily suggest clear consequences for mediation, a careful assessment of the balance of power between the parties must be indicated. Such an assessment should be made without applying assumptions based on the distribution of power in heterosexual relationships. If Renzetti's hypothesis (above) is correct it may be that the party who has most of the external indicators of power is the one who is the target of violence. Intake questionnaires which probe carefully for issues of control and violence should not in any way contain assumptions based on gender. They may be appropriate to detect intra-lesbian violence, but should be scrutinised for appropriateness and changed and developed as necessary.

As mediation becomes better known in the lesbian community, pressure from the parties to use mediation may be strong, even where there is violence which affects capacity to negotiate. The problems of the formal justice system or the fear of having to come out may mean that the parties insist on mediation or may lead to the denial or minimisation of violence to retain mediation as an option. Where the mediator makes a decision that a dispute is unsuitable for mediation issues of providing for the safety of the target of violence and of making appropriate referrals will provide challenges which should be carefully considered in advance. All mediation schemes, but perhaps particularly those that seek out lesbian clients, should be able to make effective referrals for lesbians, taking into account that agencies which provide an excellent service for heterosexual women may not be suitable for lesbians.

V CONCLUSIONS

This article forms part of a larger project to look at the impact in mediation of aspects of identity (such as gender, race, disability and sexuality) and their intersections. A mediator once expressed to the writer the opinion that all disputants in mediation are 'just people'. But people do not come to mediation identity free. Their identity impacts on their experience of life and on mediation. Mediators are far more likely to provide an appropriate service to lesbians if they are fully trained in the legal and practical manifestations of prejudice against lesbians; are aware of their own attitudes and biases; understand the needs of lesbians; have the resources to provide a proper service; have developed appropriate policies and protocols and; have developed appropriate referral networks.

For lesbians, as for other groups who are not served well by the formal justice system, the *in*formal justice system is a promising place to resolve disputes, but it is not necessarily a safe, responsive and appropriate place. At worst, mediation can replicate many of the problems of the formal justice system without providing its protections. As well as the possibility that individuals will be disadvantaged (or even put at risk) by poor practice in mediation there are other dangers. By creating the appearance that there is an effective, problem free alternative to the formal justice system, mediation could be dangerously seductive. It may subdue the enthusiasm in the community for needed legislative reform. It could allow governments and politicians to neglect the need for changes which they

were never enthusiastic to make. Homosexuality is a 'politically sensitive' issue and lesbians are often invisible within that category. In practice, the interdependence of the formal and informal justice systems means that the existence of informal dispute resolution cannot be an excuse to neglect the deficiencies of the formal system. It has been suggested also that one consequence of this is that mediators have a responsibility to play a role in changing the formal justice system.