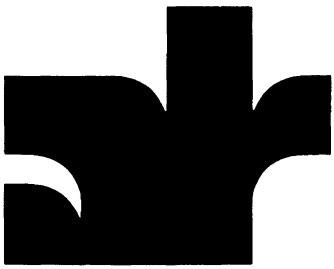

NOTE

*Kathy Mack**

ALTERNATIVE DISPUTE RESOLUTION AND ACCESS TO JUSTICE FOR WOMEN

INTRODUCTION

THE report of the Access to Justice Advisory Committee[1] asks whether access to justice for women will be enhanced or reduced by greater emphasis on Alternative Dispute Resolution (ADR).[2] The main points made in the Report are a concern that women may be coerced into unsuitable ADR because they lack financial (and other) resources needed for access to the formal justice system and that once in an

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1 Access to Justice: an Action Plan (Access to Justice Advisory Committee, Canberra 1994).

2 In this paper, I am using the abbreviation ADR because that is the term used in the Access to Justice Report, which defines ADR as "resolution that occurs by agreement between the parties facilitated to some extent by a neutral third party without the power to compel settlement [Para 11.1]. It is important to note that many criticise the ADR label as inaccurate and misleading. See, for example, Astor & Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney 1992) p67.

ADR process, women's lesser bargaining power will lead to systematic disadvantage [para 11.5]. The major remedies for these difficulties are said to be *screening* so that inappropriate cases do not go to ADR [para 11.6]; *training* of mediators or other third parties in the problems of systemic bias against women [para 11.6]; and careful *evaluation* of programs, looking at satisfaction, longitudinal study of results, outcomes for particular groups and cost effectiveness [para 11.65].[3] Some centralised registration of agreements is also suggested to provide a data base for evaluation and to avoid complete privatisation of disputes resolved through ADR [para 11.65-6].

In this comment, I briefly address some of the specific barriers confronting women in dispute resolution processes. I then identify features which I regard as essential in any dispute resolution process which claims to provide fair access and just outcomes in a world of gender inequality.

INEQUALITY OF BARGAINING POWER

The Access to Justice Report recognises that women may face systematic inequalities of bargaining power, and I agree with this observation. It is important to note, though, that relativities of bargaining power depend on many different sources of power,[4] are not static,[5] and can be affected by substantive and procedural rules. This leads to two more specific questions: What is the basis for women's inequality of bargaining power? Is it possible to close the gap? Two legal contexts in which women most characteristically appear *as women*, divorce and equal opportunity claims, are also areas where there has been the greatest official emphasis on ADR. In both these areas there are several factors which create systematic power differences which disadvantage women. Though it is beyond the scope of this paper to fully explore them all, the major ones identified now are disparity created by male violence against women; disparity in economic power; disparity in information; uncertainty of legal entitlements and the impact of what I call the credibility gap between men and women. Examining these specific sources of inequality in bargaining power suggests

3 Existing research in the US is somewhat conflicting on these points. See Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279 at 283-284. There is very little empirical research on ADR in Australia. For one of the few examples see Prior, "What do the Parties Think? A Follow-up Study of the Marriage Guidance South Australia Family Mediation Project" (1993) 4 *ADRJ* 99.

4 Wade, "Forms of Power in Family Mediation and Negotiation" (1994) 8 *AJFL* 40.

5 Astor & Chinkin, *Dispute Resolution in Australia* pp105-109.

that there are ways to reduce the likelihood that ADR will result in systematic exploitation of women's greater vulnerability. However, it is important to remember that as long as we are situated in a world in which women do not have access to the same economic power as men and are vulnerable to male violence, especially in the home, there is no way to fully ensure that any dispute resolution process does not reflect these vulnerability.

Disparity Created by Violence Against Women

As the Australian Law Reform Commission Reports on Equality show, violence and the threat of violence against women is pervasive and undermines women's access to the formal civil and criminal justice system as well as making participation in some forms of ADR inappropriate.[6] The problem of violence against women in the context of ADR is recognised in the Access to Justice report [para 11.65]. It is now widely accepted that mediation is rarely if ever appropriate if there is violence or serious threats of violence by one of the participants.[7] Not only is any agreement likely to be unfair in content and based on exploitation of the woman's vulnerability, but mediation also continues the privatisation of violence against women. Perhaps worst of all, mediation in a context of family violence may actually increase the danger by requiring a woman to confront the perpetrator of the abuse at or shortly after the point of separation, which is the most dangerous time.[8] Screening to exclude cases where violence is present, the solution suggested by the Access to Justice Report, is not always reliable in identifying situations of family violence [para 11.65].[9] Conditioning participation on informed consent or capacity to negotiate may also be unsatisfactory because of the difficulty of making those assessments.[10]

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6 See especially Australian Law Reform Commission, *Equality before the Law: Women's Access to the Legal System* (Interim Report No 67, 1994).

7 Astor, *Position Paper on Mediation* (1991) prepared for the National Committee on Violence against Women; Astor, "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3; Gribben, "Violence and Family Mediation: Practice" (1994) 8 *AJFL* 22. For a slightly different view, see Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279 at 288-289.

8 Astor, "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3 at 4-11.

9 Gribben, "Violence and Family Mediation: Practice" (1994) 8 *AJFL* 22; Astor "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3 at 13.

10 Astor "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3 at 18-19.

Economic Differential

In ADR, as with any dispute resolution process, the party with greater resources who can hire a lawyer, afford to wait out extended delay and raise more issues will have an advantage over a party who cannot.[11] These are factors which are likely to disadvantage women, who are likely to have lower incomes than men.[12] At the point of divorce, women may have little money readily available, and very likely less than their husbands.[13] In Equal Opportunity claims, women face respondents who are proprietors of businesses, employers or public service departments, with much greater access to financial resources.[14] Thus, women may not be able to hire a lawyer or other relevant expert advice, such as an accountant. Their weaker financial circumstances may force women to accept an early settlement, reached through inexpensive ADR, even if the settlement is inadequate and does not reflect her actual legal rights to a share in marital property or a right not to be discriminated against. In theory legal aid could help limit the harm done by the economic disparity between men and women, but adequate legal aid is rarely available.[15]

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11 Ingleby, *Solicitors and Divorce* (Clarendon Press, Oxford 1992) p11.

12 Aust, Parl, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Halfway to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS 1992) p89; Australian Law Reform Commission, *Equality before the Law* (Discussion Paper 54 July 1993) para 5.7.

13 Weitzman, "Gender Differences in Custody Bargaining in the United States" in Weitzman & Maclean (eds), *Economic Consequences of Divorce: The International Perspective* (Clarendon Press, Oxford 1992) pp402-403; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 449-50; Schafran, "Gender and Justice: Florida and the Nation" (1990) 42 *Fl LR* 181 at 187; Ricci, "Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women" (1985) 8 *J Divorce* 49 at 49-52. In Australia in 1984, at the end of the marriage, 59% of women had incomes of less than $10,000 per year; 78% of men had incomes over $17,000: Weston, "Changes in Household Income Circumstances" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Australian Institute of Family Studies, Prentice Hall of Australia, 1986) p136. In 1990, in a South Australian study, 59% of women had incomes under $18,000; 89% of men had incomes over $18,000 (67% had incomes over $26,000): Prior, "What do the Parties Think? A Follow-up Study of the Marriage Guidance South Australia Family Mediation Project" (1993) 4 *ADRJ* 99 at 103.

14 Astor & Chinkin, *Dispute Resolution in Australia* p262.

15 Access to Justice Report Para 9.42; Australian Law Reform Commission *Equality before the Law* (discussion paper 54, July 1993) para 5.9; *Halfway to Equal*, p234; Australian Law Reform Commission *Equality before the Law: Justice for Women* (Report No 69 Part I 1994) Chapter 4.

Information Differential

In most marital households, husbands will have greater information, especially about family finances. If, as is usual, his income is the major cash resource for the household,[16] he will know its amount, its disposition, other related entitlements such as superannuation and the status of assets purchased with family funds, all of which may be wholly or partly concealed from his wife. In litigation, contempt and discovery powers are intended to overcome this gap, but may not be adequate,[17] especially if the wife does not have the expertise to know what information to request or how to interpret or analyse material disclosed.[18] Men's readier access to money and legal advice, and greater knowledge of family finances can be an even more powerful advantage in mediation than in litigation, unless there are mechanisms to compel disclosure or to prevent dissipation of assets.[19]

Similar problems may face women in the conciliation process used to resolve complaints of discrimination. The employer may have access to or be in control of written records or be in a position of influence towards other workers who may be witnesses. As with divorce, greater economic power can also mean greater information.[20]

Another form of information imbalance which occurs in informal processes is the lack of information about the process itself and about typical or likely outcomes in similar disputes.[21] Again, a party with access to expert advice from someone with experience in previous disputes, which may be available from lawyers or through employer or business organisations, will be

16 Regan, "Divorce Reform and the Legacy of Gender: a Review of *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*" (1992) 90 *Mich LR* 1453 at 1467; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 449-50; Funder, "Work and the Marriage Partnership" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p67.

17 Maryland, Special Joint Committee, *Gender Bias in the Courts* (1989) at xxxiii-xxxv; *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts* (1989) at 70-72.

18 Ingleby, *Solicitors and Divorce* p11.

19 Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 *Med Q* 179; Lefcourt, "Women, Mediation and Family Law" (1984) 18 *Clearinghouse Rev* 266 at 268; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 *Buffalo LR* 441 at 487.

20 Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *MLR* 733 at 743.

21 At 741.

advantaged.[22] Lack of information about outcomes may particularly disadvantage women, who will remain unaware of the remedies which are actually given in recognition of their legal rights, when claims are made against their more powerful husbands or employers.[23]

Uncertain Legal Entitlements

Women's bargaining power is further reduced by uncertain legal entitlements. Although both family law and equal opportunity law are intended to create legal rights or protection for women, for example, a fair share in the marital property or freedom from some forms of discriminatory treatment, neither has the clarity or certainty or predictability needed to provide a real bargaining chip for the women whom the law is designed to protect.

Legal rules governing both property settlement and custody after divorce in Australia are explicitly discretionary.[24] Uncertainty (and direct disadvantage) is created when discretionary criteria are interpreted and applied by judges who lack awareness of the real economic and social context of women's lives. In Equal Opportunity law, though the legal rules are stated in more positive terms, the secrecy imposed on outcomes when virtually all matters are resolved through conciliation means that the fuller understanding and clarification of legal rules which comes with repeated applications is not available.[25] Thus a threat to take a matter to the appropriate public forum will carry little weight.

Discretionary standards tend to look "feminine" in the sense articulated by Carol Gilligan,[26] emphasising relationships and flexibility and reflect

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22 As above.

23 Lack of information about the law and legal services has been identified as a particular barrier facing women by the Australian Law Reform Commission in *Equality before the Law: Women's Access to the Legal System* (Report no. 67 interim 1994) paras 2.10-2.12.

24 *Mallet v Mallet* (1984) 156 *CLR* 605; Finlay & Bailey-Harris, *Family Law in Australia* (Butterworths, Sydney, 4th ed 1989), p347 [849]; Scutt, *Women and the Law: Commentary and Materials* (Law Book Company, Sydney 1990) p217.

25 Astor & Chinkin, *Dispute Resolution in Australia* pp274-5.

26 Gilligan, *In a Different Voice* (Harvard University Press, Cambridge, Mass 1982) suggests that women are more likely to display a characteristic form of moral reasoning emphasising connections and flexibility, in contrast to a rights orientation more often associated with men. See also Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 12 *Berkeley Women's LJ* 39 at 52-54; Rhode, *Justice and Gender* (Harvard University Press, Cambridge, Mass 1989) pp152-153. This is not to suggest

qualities associated generally with women in our society, but discretion and uncertainty instead of clear legal rules can be bad for women in practice. Even though the law promises equality, if the exercise of discretion by judges reflects bias against women (whether those biases are intentional or not or whether widely shared or not), women's needs and interests will not get fair or adequate consideration.[27] Discretionary rules also will often mean that a bad decision is practically speaking a final one because of the inability to challenge an exercise of discretion on appeal.[28] Similarly, if there is no developed understanding of the meaning of legislation, an incorrect interpretation applied in a conciliation process cannot be challenged.

Discretionary legal rules and legislation, without the clarification of application and interpretation, create uncertainty and uncertainty adds to costs, which hurts the economically weaker party and reduces the bargaining power of the weaker party:

> [T]he only bargaining chip of the economically weaker party is the possibility of using the court process. The greater the discretion in the court, the less strong is the bargaining chip. The more uncertain the possible result of a contested hearing, the less secure is the position of the party in greater need of a court order.[29]

The Credibility Gap

One of the most powerful barriers to access to justice for women is the failure to accord women the same credibility men automatically receive.[30]

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that women somehow inherently or essentially have these qualities, or to deny that some women in some situations are quite different.

27 Rhode, *Justice and Gender* p152, Weitzman, "Gender Differences in Custody Bargaining in the United States" in Weitzman & Maclean (eds), *Economic Consequences of Divorce: The International Perspective*.

28 Harrison, "Introduction" and McDonald, Funder, Harrison & Weston, "Directions for Law Reform and Social Policy" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p310.

29 Ingleby, "Australian Matrimonial Property Law: The Rise and Fall of Discretion" in Ellinghaus, Bradbrook & Duggan (eds), *The Emergence of Australian Law* (Butterworths, Sydney 1989) p180.

30 Recognising this persistent denial of credibility, feminist scholars have identified belief in women as a central element of feminist method: Cain, "Feminist Jurisprudence: Grounding the Theories" (1989) 4 *Berkeley Women's LJ* 191; Littleton, "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 *Stan LR* 751.

In society generally as well as in law, women are consistently treated as less worthy of belief than men, specifically because they are women.[31] This refusal to listen to women seriously, this denial of credibility, is very often unintended and seems natural, so it is hard to understand or identify.[32] Examples of this credibility gap between men and women can be seen in legal and non-legal settings. Once identified, the denial of equal credibility to women has significant implications for women and ADR.

There are a number of language features associated with powerlessness. Examples include: superlatives, intensifiers ("so", "such"), fillers ("um", "you know"), qualifiers ("maybe", "perhaps"), empty adjectives, tag questions with rising intonation (even with an accurate assertion), hedges ("sort of"), and politeness markers.[33] It appears that these features are used more often by women than by men, especially hedges and tag questions, though class, age, education and the particular power relationship between the speakers may be significant factors.[34] Other qualities more likely to occur when women speak are high pitched voices and frequent smiling.[35] These are also associated with powerlessness (or fear) and hence lack of credibility.

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31 Schafran, "Gender Bias in the Courts: Time is not the Cure" (1989) 22 *Creighton LR* 413 at 415-416; Schafran, "Eve, Mary, Superwoman: How Stereotypes about Women Influence Judges" *The Judges' Journal* (Winter 1985) reprinted as Appendix A in Schafran and Wikler, *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (Women Judges Fund For Justice, Washington 1986); Scutt, "The Incredible Woman: A Recurring Character in Criminal Law" in Easteal & McKillop (eds), *Women and The Law* (AIC, Canberra 1993).

32 New Jersey Supreme Court Task Force on Women in the Courts, *Report of the First Year* (June 1984) p1.

33 Ross, "Proving Sexual Harassment: the Hurdles" (1992) 65 *So Cal LR* 1451 at 1455, citing Conley, O'Barr & Lind, "The Power of Language: Presentational Styles in the Courtroom" (1978) *Duke LJ* 1375 at 1380-1381, 1386; Morrill & Facciola, "The Power of Language in Adjudication and Mediation: Institutional Context as Predictors of Social Evaluation" (1992) 17 *Law and Social Inquiry* 191 at 193.

34 Morrill & Facciola, "The Power of Language in Adjudication and Mediation: Institutional Context as Predictors of Social Evaluation" (1992) 17 *Law and Social Inquiry* 191 at 196; Epstein, *Deceptive Distinctions: Sex, Gender and the Social Order* (Yale University Press, New Haven 1988) Chapter 10; Preisler, *Linguistic Sex Roles in Conversation: Social Variation in the Expression of Tentativeness in English* (Mouton de Gruyter, Berlin 1986) Chapter 8, discussing hedges and tag questions, Chapters 9 and 10 discussing age. Some criticism of this research is contained in Spender, *Man Made Language* (Routledge and Kegen Paul, London, 2nd ed 1985) Chapter 1.

35 Estrich, *Real Rape* (Harvard University Press, Cambridge Mass 1987) p218.

Women are more likely to speak in hesitant language even if they are sure, where men are more likely to speak with assurance, even if unsure or wrong.[36] However, with eye-witness identification at least, a confident manner does not necessarily reflect accuracy.[37] Men, regardless of age or class, are more likely to use imperative forms whether making suggestions, expressing an opinion or giving information.[38]

When I speak at conferences or in professional legal or academic settings, I use speech styles associated with powerful, eg masculine speakers. If I were to speak in a more characteristically socially appropriate female style, um, y'know, like this, and, uh, in a softer, higher pitched voice, y'know, and, uh, with rising intonations at the end of statements, or, um, worse, um, in the accents of my native American South, listeners would take what I say much less seriously. A brief demonstration of the different styles usually makes the point.

Other significant differences are the patterns and expectations about who speaks and who is silent. It is well established that, in mixed male/female groups, men talk more than women, men interrupt women much more often, and men control the conversational topic.[39] It is very rare for men to be silent for long periods in a mixed group, while women carry on the conversation, though it is frequently the case that men will carry on a conversation in the presence of silent women.[40] Though frequent interruptions of women by men are often not regarded as rude by men or women, women tended not to speak after being interrupted. If a woman fails to comply with these gendered conversational roles, she is seen as rude or hostile.[41] Discussion groups are more likely to accept proposals from men than identical suggestions made by women and listeners remember more of what a man says, even when presenting the same material in the same manner.[42]

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36 Kinports, "Evidence Engendered" (1991) *U Ill L Rev* 413 at 446.

37 Loftus, *Eyewitness Testimony* (Harvard University Press, Cambridge, Mass 1979) pp100-101.

38 Preisler, *Linguistic Sex Roles in Conversation* p284.

39 Spender, *Man Made Language* pp41-50; Preisler, *Linguistic Sex Roles in Conversation* pp18-19.

40 Spender, *Man Made Language* p42.

41 As above p45.

42 Czipansky, "Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts" (1993) 27 *Family Law Quarterly* 247 at 263, fn 52.

The cumulative effect of these patterns makes it much harder for a women to be perceived as an effective speaker even when she is accurate and honest. However, if a women uses a more credible or authoritative speech pattern, she may be penalised by listeners for deviating from the appropriate gender stereotype.

This credibility gap is a major factor in making mediation and conciliation inappropriate for women. In litigation, a woman has a trained advocate acting for her, whose professional voice will be heard. In ADR, a woman has to assert her own needs and interests in her own voice. In part because of experiences of not being heard or taken seriously, of being denied credibility, women generally expect fewer entitlements and are less experienced at asserting their own entitlements.[43] It is often harder for a woman to identify and claim her own needs; she may be readier to assert another's interests (eg her children's needs),[44] or she may feel the need to clothe her own claims in the form of another's needs. The mediator or conciliator may defer to the more assertive, "powerful" male,[45] or pressure an apparently more compliant woman, who speaks less powerfully, to settle.[46] Gendered patterns of speech and silence will give the man more air time, and a mediator who attempts to balance this inequality may be perceived as improperly favouring the woman.[47]

ELEMENTS OF A FAIRER PROCESS

I first began thinking of the problem of evaluating ADR for women from the point of view of a lawyer advising a client, and I asked the question, which

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43 Bagshaw, "Gender Issues in Family Mediation" FIRM National Conference June 1990; Weitzman, "Gender Differences in Custody Bargaining in the United States" in Weitzman & Maclean (eds), *Economic Consequences of Divorce: The International Perspective* pp401-402; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 474-477; Ricci, "Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women" (1985) 8 *J Divorce* 49 at 52.

44 Astor & Chinkin, *Dispute Resolution in Australia* p110.

45 Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 460-463.

46 Astor & Chinkin, *Dispute Resolution in Australia* p111; Ricci, "Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women" (1985) 8 *J Divorce* 49 at 52.

47 This is similar to the problem which arises in classrooms where talkative boys are implicitly encouraged by teachers, who believe that they are giving equal time: Graddol & Swann *Gender Voices* (Basil Blackwell, Oxford, 1989) pp71-3; Wildman, "The Question of Silence: Techniques to Ensure Full Class Participation" (1988) 38 *J Legal Educ* 147.

dispute resolution method should a woman choose? Is one process better or worse for women? Does one process produce outcomes which are better or worse for women?

That led to asking, better or worse compared to what? An ideal of "fair"? As well as men? As well as women in another process? The next question became, what is included in outcome? Are tangibles and intangibles considered? Is it a better outcome if there is more satisfaction or improved communication? Is it better if she gets less money but feels more comfortable about it? Is it better if the property division or child support or discrimination award is lower than her legal entitlement, but it is enforceable?

When both litigation and mediation are embedded in a social structure in which men are more powerful and more credible than women, and women and men are socialised into accepting this as normal, a more important question might be, what would a fairer system of dispute resolution look like? What would be the features of a dispute resolution process which takes into account the overall differences in the social context in which men and women live?[48] The main elements, I argue, are a flexible process with good faith participation (whether initially consensual or compelled), backed up with fixed entitlements for those whom society has placed in a systematically weaker position, with access to effective assistance of counsel, which provides satisfaction to users, is accountable to users and the public, and is administered by those who have good awareness and understanding of the nature of bias against women. Some of these elements are discussed in the Access to Justice Report; I will consider a few additional points or cautions.

Flexible Process

ADR which provides a flexible, needs-based approach, with a skilled mediator or conciliator offering improved communication and problem-solving skills can be very *good* for women (and for men).[49] Some of the

48 Thanks to Susan Magarey and the participants in the Women's Studies Research Centre seminar for suggesting this additional focus.

49 Saying something is good for women does not necessarily mean it is bad for men. Gender relations are not necessarily a zero sum game. Some gains for women may come at men's expense, in the sense that a particular man, or men in general, may be (financially) worse off than under other dispute resolution processes, but that is because men were never entitled to that superior outcome in the first place. What is lost is an advantage unfairly acquired by men simply because they were men and unfairly denied to women simply because they were

advantages of ADR for women are the qualities that make it look better for everyone. An emphasis on co-operation, on relationships and on emphasising trust and care, look "feminine" in the cultural sense.[50] Co-operation is good for children of divorcing parents: "Where parents have a co-operative relationship, children benefit economically and emotionally, but it is doubtful how many couples are capable of this level of co-operation in the context of divorce".[51] Mediation can help parents achieve this level of co-operation, though the "short-term mediation practiced in most court settings ... has limited ability to alter basic relationship patterns".[52]

Women can benefit (as can men) from mediation's focus on interests and needs and its emphasis on communication[53] and modelling of good communication skills.[54] Good mediation is really about effective communication, especially communication of emotions, and improving understanding of feelings.[55] Among the ground rules a family mediator usually lays down are requirements that participants not interrupt each other, that they listen to each other, that each speak for himself or herself and avoids putting words into the other person's mouth. These will all help women who are attempting to speak in a world where men are much more likely to interrupt women or to monopolise conversation time.[56] A good ADR process which focuses on creating value, sharing, seeking inclusive

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women. Men may be relatively worse off compared to their previous situation, but they will still generally be relatively better off than women, and there will be other intangible shared gains from a system that is fairer overall.

50 Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 12 *Berkeley Women's LJ* 39 at 52-53; Rifkin, "Mediation from a Feminist Perspective" (1984) 2 *Law & Inequality* 21 at 24; Rhode, *Justice and Gender* p631.

51 Rhode, *Justice and Gender* p159.

52 Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279 at 297.

53 Kinports, "Evidence Engendered" (1991) *U of Ill LR* 413 at 429; Law Society of British Columbia Gender Bias Committee, *Gender Equality in the Justice System* , pp5-73.

54 Kelly, "Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes" (1989) 24 *MQ* 71 at 84.

55 Pearson & Thoennes, "Divorce Mediation: An American Picture " in Dingwall & Eekelaar (eds), *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford 1988) pp74-75; Gribben, "Mediation of Family Disputes" (1992) 5-6 *AJFL* 126 at 129-130; Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *MLR* 733 at 751-2, describing benefits of the "therapeutic" model of conciliation.

56 Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441.

solutions and recognising that conflicting positions can both be legitimate[57] can be helpful to women if it leads to a better recognition of their needs. Skilled mediators who are well-informed about family violence and follow strict guidelines may be able to provide some benefits of mediation in some cases even if there has been previous violence.[58]

Similarly, there are aspects of the flexibility and the informality of conciliation in Equal Opportunity claims which can be good for women.[59] It is inexpensive, which is important to those with less money. The confidentiality within the process makes it easier for women to speak about private matters, especially in sexual harassment claims. The informality of the process is less intimidating than the alienating formality of a courtroom with its adversarial cross-examination. Respondents may be more willing to participate in an informal process which is confidential and so does not involve public accusations.

Consensual or Compelled Participation?

The Access to Justice Report emphasises the consensual nature of the ADR processes under consideration and the corresponding goal of not coercing participation [para 11.46]. However, the truly "consensual" nature of any mediation or informal process is somewhat doubtful, since choices of dispute resolution processes are always made under more or less drastic constraints. Apart from formal compulsion to participate, one party may be motivated or pressured into ADR by the other party, by legal advisers, by financial constraints or by a perceived judicial or institutional expectation of participation. In light of these factors, how useful is it to sharply distinguish consensual from coerced participation? For example, in a personal injury claim, if need for immediate settlement is a factor which causes a person to go into mediation and accept lower settlement than the full legal entitlement, is this "involuntary" coerced participation, or is rapid settlement via mediation, even if for significantly less than legal entitlement,

57 Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 12 *Berkeley Women's LJ* 39 at 51-52; Kelly, "Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes" (1989) 24 *MQ* 71 at 85.

58 Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279; Gribben, "Violence and Family Mediation: Practice" (1994) 8 *AJFL* 22; Astor, "Domestic Violence and Mediation" (1990) 1 *ADRJ* 143 at 146-150.

59 Astor & Chinkin, *Dispute Resolution in Australia* pp275-6; Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *MLR* 733 at 735.

an advantage of mediation? Similarly, if a judge says, "Wouldn't you like to try mediation?", is that consensual mediation, if parties go off and try it?

Experience with ADR so far seems to show that if parties (and their legal representatives) are not strongly motivated or encouraged to participate in mediation or arbitration, few will use ADR[60] and many disputes which could reach a quicker or more suitable settlement without litigation might not be resolved. "[E]ither some ... will be forced to litigate against their will, or some will be forced to mediate against their will".[61] Is it better that some be forced to mediation or that some disputes which could be better resolved by quicker cheaper, informal processes are litigated unnecessarily?

I would say that the fundamental assumption of ADR methods is *good faith*. Parties must want to resolve the dispute and be willing to participate honestly for these methods to work. These qualities cannot be produced by compulsion, but they are not necessarily absent from compulsory processes, especially if those processes are carefully structured, with attention to concerns about women's participation. Research suggests that good outcomes and participant satisfaction "depend more upon the quality of the program and the issue being mediated than whether the program is voluntary or mandatory."[62]

Good faith must be shown not only by the participants, but by the institution which sponsors or administers the ADR process,[63] especially if that institution is a court. "[G]overnments have a special responsibility for the quality, integrity and accountability of the ADR processes provided by their courts and tribunals."[64] Adequate information must be provided to potential participants especially through the very important intake procedures.[65] Thorough and skilled case assessment is needed to identify matters which are not suitable for ADR, especially to screen and exclude cases where there is violence against a woman or, where mediation is made available, to ensure that the parties have the capacity to negotiate in good faith and that there is informed consent to participate.[66] Ensuring the

60 Marks, "No Excuses" *L Inst J*, August 1994 at 682-683.
61 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1583.
62 Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279 at 287.
63 Dawson, "Non-Consensual Alternative Dispute Resolution: Pros and Cons" (1993) 4 *ADRJ* 173.
64 *Access to Justice* Report para 11.52.
65 Payget, "The Purpose of an Intake Process in Mediation" (1994) 5 *ADRJ* 190.
66 Astor, "Violence and Family Mediation: Policy" (1994) 8 *AJFL* 3 at 18-20.

woman's safety must be the first priority.[67] Funding must be sufficient to have separate intake processes and to allow for the multiple short sessions that will probably be required.[68] It is also essential that no abusive blaming language be tolerated, and that there be no mediation of the violence itself (eg no conditions that he will stop violence if she ...).[69]

Compulsory ADR is not necessarily wrong in principle. However, it can be very wrong in practice if it means the poor and the less powerful, categories which too often describe women, are effectively coerced or legally compelled into second class ADR, with untrained mediators with insufficient time, while rich or powerful disputants, especially commercial litigants, get, partly by buying it and partly with public money, quick, efficient, personally tailored dispute systems, including access to a court system that suits them better, now that the "minor" or "trivial" disputes are out.[70]

Clearer Entitlements

While it is neither possible nor desirable to eliminate discretion entirely,[71] it is important for women to have clear entitlements. Laws which give clear rights and entitlements for the financially dependent and vulnerable partner and/or to the primary care giver of children, usually women in both categories,[72] can enhance personal and social growth, empower women, and contribute to their autonomy.[73] Guaranteeing adequate financial

67 Gribben, "Violence and Family Mediation: Practice" (1994) 8 *AJFL* 22 at 31.

68 Astor, "Domestic Violence and Mediation" (1990) 1 *ADRJ* 143 at 149; Gribben, "Violence and Family Mediation: Practice" (1994) 8 *AJFL* 22 at 34.

69 Astor, "Domestic Violence and Mediation" (1990) 1 *ADRJ* 143 at 147, 149.

70 Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *MLR* 733 at 737.

71 Schneider, "The Tension between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27 *Fam LQ* 229.

72 Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation" in Brophy & Smart (eds), *Women in Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul, London 1985) p184; Woods, "Mediation: A Backlash to Women's Progress on Family Law Issues" (1985) 19 *Clearinghouse Review* 431; Bryan "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 *Buffalo LR* 441 at 442-444. Some writers suggest that the current move to informal justice is a backlash against progressive gains in substantive law. See generally Abel (ed), *The Politics of Informal Justice* (Academic Press Inc, New York 1982).

73 Rhode, "Feminist Critical Theories" (1990) 42 *Stan LR* 617 at 634-635; Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Mich L Rev* 2320; Schneider, "The Dialectic of Rights and Politics: Perspectives for the Women's Movement" (1986) 61 *NYULR* 589; Astor and

support for children may lessen the burden of uncertainty on the spouse who has day to day care of the children, again, usually a woman. Australia's Child Support Scheme attempts to create this sort of certain entitlement, though evasion of child support obligations through tax evasion can still occur.[74] Other examples in family law include explicit recognition of the long term financial harm suffered by women who are primary home makers and child carers,[75] and the long term economic as well as personal harm suffered by women who are subjected to domestic violence.[76]

In Equal Opportunity law, the formal terms of the law do specifically state rights to be free of certain forms of discrimination in certain circumstances. The uncertainty is created by the lack of information on the meaning and application of the bare words in the Act. If the outcomes of Equal Opportunity complaints were more widely known, women would have a better understanding of their rights, respondents would have a better understanding of the legal obligations imposed on them, and a woman with a strong claim would have the bargaining power commensurate with the strength of her claim.

In a more general way, information is an important entitlement. If a participant in an ADR process is not acting with the good faith and honesty envisaged, there must be mechanisms to compel production of relevant information. In some informal processes, parties promise to provide all information needed as part of the agreement to participate. In a truly consensual process, there is usually little incentive to conceal information, as concealment means that any resolution reached may be unsatisfactory and unlikely to last. In a court-annexed or less voluntary process, concealment of information can be a problem. If the information differential is too great, it must be a basis for terminating an ADR process.

Chinkin, *Dispute Resolution in Australia* pp57-58; Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 *Harv Civ Rights - Civ Lib L Rev* 401 at 406-407.

74 Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, NSW, 1990) pp140-142 (though there are some criticisms: Kingshot, "Complacent about the Child Support Agency" (1992) 17 *Alt LJ* 71).

75 Funder, "Work and the Marriage Partnership" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p67 at 98; McDonald, Funder, Harrison & Weston, "Directions for Law Reform and Social Policy" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p310 at 310-311.

76 Behrens, "Domestic Violence and Property Adjustment: A Critique of No-Fault Discourse" (1993) 7 *AJFL* 9.

The regulations for mediation in the Family Court recognise the importance of information as a factor in bargaining power. Under Order 25A, rule 10, the mediator can compel preparation or production of documents, which is especially important in the case of financial matters. It is recognised that refusal to comply may indicate that the party is not mediating in good faith and that the denial of information creates such an unacceptable inequality of bargaining power that the mediation should be halted.[77]

However, these rules may not fully overcome the information differential. A mediator may not have the expertise to know what financial information is missing, what to ask for, or how to interpret information given, especially where business records are manipulated to conceal assets. It may be necessary for the Family Court staff to include independent auditors.[78]

Most Equal Opportunity laws empower an investigator or a conciliation officer or a relevant Board or Tribunal to compel production of documents and information.[79] If experienced and well trained, this officer will be able to assist in identifying what to seek and interpreting information provided. This will help empower a woman claimant who lacks expertise. Thus investigation skill as well as power is an important adjunct to the conciliation process to limit information difference as a source of women's lesser bargaining power.

Clear entitlements and complete and accurate information can then be used in the bargaining process. As pointed out above, recourse to court may be a woman's only strength, and if the outcome of this is uncertain, it is of no real assistance. To put it in terms of mediation, if legal rules are uncertain and essential facts can be withheld, her BATNA (Best Alternative To Negotiated Agreement) is uncertain, and she is left with the accurate recognition that the short end of the deal is better than no deal. Clear entitlements increase her options, without really reducing flexibility. These

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77 "Alternative Dispute Resolution: Mediation and Arbitration - A New Scheme for Family Law Disputes" (1992) 1 *Current Family Law* 36 (hereinafter "ADR a New Scheme") at 37.

78 McDonald, Funder, Harrison & Weston, "Directions for Law Reform and Social Policy" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, Sydney 1986) p320.

79 *Racial Discrimination Act* 1975 (Cth) s24B; *Sex Discrimination Act* 1984 (Cth) s54; *Disability Discrimination Act* 1992 (Cth) s73; *Anti-Discrimination Act* 1991 (Qld) s156; *Equal Opportunity Act* 1984 (SA) s25, s94; *Equal Opportunity Act* 1984 (Vic) s55(2); *Equal Opportunity Act* 1984 (WA) s86(1); *Discrimination Act* 1991 (ACT) s85(1); *Anti-Discrimination Act* 1992 (NT) s92(1).

entitlements can still be bargained away, but she will still realise the value of her entitlement by getting more of what she wants. Greater predictability of outcome will allow her and her legal adviser to make a more accurate estimate of the fairness of any proposed settlement. [80]

Effective Assistance of Counsel

Legal representation is a critical factor which can help offset the features of dispute resolution processes which disadvantage women. Mediation and conciliation cannot provide substitute legal assistance for divorcing partners.[81] Because of the obligation of equal opportunity staff to enforce the laws, they do give information about legal rights, but their obligations as conciliators makes it inappropriate for them to act as real advocates for a claimant. Skilled, supportive advocates are important for those less able to assert their own interests.[82] Lawyers can ensure women are aware of their entitlements, and can, if needed, assist women to assert their entitlements.[83] Separate legal representation is especially important for women who have been subjected to violence.[84]

The importance of effective assistance of counsel is recognised in the Family Court mediation rules.[85] Under Order 25A rule 12, the mediator must advise parties, both at the commencement of the mediation and before any agreement becomes binding, that they should seek legal advice. In practice in the pilot programs, the need for legal advice is emphasised at several points in the process.[86] Rule 11 allows lawyers to attend the mediation sessions. Similarly, in Equal Opportunity matters, parties may be

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80 McDonald, Funder, Harrison, Weston, "Directions for Law Reform and Social Policy" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p310.

81 Pearson, "Ten Myths about Family Law" (1993) 27 *Fam LQ* 279 at 281-282, 298, noting the large number of divorces where parties do not have separate representation.

82 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1597-1600; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441; Bottomley, in Brophy & Smart (eds), *Women in Law: Explorations in Law, Family and Sexuality* pp184-185.

83 Ingleby, *Solicitors and Divorce* p179.

84 Astor, "Domestic Violence and Mediation" (1990) 1 *ADRJ* 143 at 148.

85 Family Court Rules Order 25A.

86 "Alternative Dispute Resolution: Mediation and Arbitration - A New Scheme for Family Law Disputes" (1992) 1 *Current Family Law* 36 (hereinafter "ADR a New Scheme") at 37.

allowed to bring counsel, but in some jurisdictions this is only with permission of the conciliation officer.[87]

The emphasis in Australian family law on out-of-court settlements and wide judicial discretion has accentuated the role of lawyers, with the Court's role seemingly reduced to enforcement of negotiated agreements.[88] For example, applications for consent orders need not set out particulars of property if each party is separately represented,[89] yet such orders can be very difficult to set aside.[90] In this context, careful review by lawyers is a crucial safeguard in divorce mediation. However, it appears that mediated settlements are rarely reviewed carefully.[91]

There are risks associated with involvement of legal advisers in ADR. Automatic inclusion of a legal representative for husbands or employers could simply aggravate the existing power imbalance. A legal adviser with a non-adversarial orientation may appear to be selling out the client's interests,[92] while lawyers who are very committed to a win-lose, adversarial, rights-based approach may subvert an informal dispute resolution process, causing it to look more like a court.[93] This is the risk created by allowing lawyers to be present at the mediation sessions, as is permitted in mediation in the Family Court[94] or in conciliations sessions when discrimination claims are made. Lawyers are often quite ignorant of alternative dispute resolution processes and may be sceptical about their value. Lawyers may also fear loss of clients, or loss of control of the client. Better training for lawyers and judges, in the theory and practice of

87 Astor & Chinkin, *Dispute Resolution in Australia* p268.

88 Harrison, "Attitudes to Lawyers and the Legal Process" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* p243.

89 Form 12A, Order 9a rule 1.

90 *Family Law Act* 1975(Cth) s79A.

91 Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 *Med Q* 179 at 194; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 515-519; Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *UFTLR* 162 at 186-188; Mnookin, "Divorce Bargaining: Limits on Private Ordering" (1985) 18 *Mich J Law Reform* 1015 at 1016. In the UK, the advice of the Solicitors Family Law Association is that solicitors should be reluctant to overturn settlements reached before consultation with the lawyer: Ingleby, *Solicitors and Divorce* pp41-42.

92 Ingleby, *Solicitors and Divorce* pp161-164.

93 Charlesworth, "The Acceptance of Family Mediation" (1991) 8 *Mediation Quarterly* 265; Hyams, "Lip Service or Real Changes?" (1992) 17 *Alt LJ* 95.

94 Order 25A, Rule 11; "Alternative Dispute Resolution: Mediation and Arbitration - A New Scheme for Family Law Disputes" (1992) 1 *Current Family Law* 36 at 37.

mediation is essential.[95] It is important that lawyers accept that their role is to support not subvert the process, to inform and empower clients, and to contribute to building better dispute resolution processes.

Thus, direct participation of lawyers in ADR may sometimes be a mixed blessing. One way to ensure beneficial participation of lawyers is to allow direct participation only in limited circumstances, subject to control of the mediator or conciliator who can assess the actual power imbalance in the circumstances. This is provided for in all Equal Opportunity legislation.[96]

What is essential is that women get adequate legal advice about substantive rights and the advantages and disadvantages of the available dispute resolution processes. Legal aid must be available as early as possible so that women's greater economic vulnerability doesn't result in the double disadvantage, of lesser bargaining power and lesser access to legal advice. It is of particular concern that, in some circumstances, participation in ADR is a precondition to the grant of legal aid.[97] Such a rule disadvantages women twice, denying them the right to participate in ADR on an equal basis with other more powerful participants, and denying them assistance to use the formal justice system as well.

Accountability

Confidentiality for the parties in the mediation process itself is essential to achieve the honesty and openness in communication needed to get the benefits of mediation and conciliation. Both family disputes and equal opportunity claims require discussion of matters generally regarded as private and which are particularly difficult for some claimants to discuss.[98] However, some method of public accountability is also essential, so that privacy does not become a smokescreen for coercion and systematic exploitation of weaker parties.[99]

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95 Altobelli, "Mediation Set to Transform Family Law Practice" (May, 1993) *L Soc J* 34 at 35.

96 *Racial Discrimination Act* 1975 (Cth) s25G(1); *Sex Discrimination Act* 1984 (Cth) s56(4); *Disability Discrimination Act* 1992 (Cth) s85; *Anti-Discrimination Act* 1977 (NSW) s93; *Anti-Discrimination Act* 1991 (Qld) s163; *Equal Opportunity Act* 1984 (WA) s92(1); *Anti-Discrimination Act* 1992 (NT) s62.

97 Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69) Para 4.23.

98 Astor and Chinkin, *Dispute Resolution in Australia* pp274-275.

99 Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *MLR* 733 at 742.

At present, judicial supervision over mediated and negotiated agreements presently provides a mostly symbolic constraint.[100] If the substance of all negotiated and mediated outcomes had to be disclosed to the Court, judicial review could be used to limit some of worst disadvantage suffered by women in this area. In Equal Opportunity matters, published reports of Board and Tribunal decisions are made available through CCH publication. This is clearly insufficient when only a very small percentage of Equal Opportunity claims emerge from the conciliation process. The proposal by the Access to Justice Report [para 11.65-66] to maintain a register or database of agreements reached by ADR and to conduct studies of outcomes is essential to establish whether an ADR process is providing fair access to justice.

The community should know, at least in general, what sort of deals women are making (or being forced to accept) and how women are being treated.[101] If outcomes are fair to women, then public information has an important educative effect about conduct which is (not) acceptable and that legal recognition of women's legal rights is available. The privacy of ADR must not limit the legal system's institutional obligation to articulate and enforce laws about the fair treatment of women.

Satisfaction

One of the evaluation criteria suggested for ADR processes in the Access to Justice Report is satisfaction [para 11.65]. When we look at why women and men express satisfaction with divorce mediation, and greater satisfaction than with litigation, the problematic nature of satisfaction as an evaluation measure becomes apparent. Men appear to be more satisfied with mediation because they believe they will do better,[102] while women are more satisfied because they believe open conflict will be avoided.[103]

100 Ingleby, *Solicitors and Divorce* p177.

101 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1565; Astor & Chinkin, *Dispute Resolution in Australia* p57; Teitelbaum & DuPaix, "Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law" (1988) 40 *Rut LR* 1093 at 1116.

102 Teitelbaum & Dupaix, "Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law" (1988) 40 *Rut LR* 1093 at 1119-1120. Men are more likely to get joint custody: Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 491-492; Astor, "Feminist Issues in ADR" (1991) 65 *Law Inst J* 69 at 70; Bagshaw, "Gender Issues in Family Mediation" FIRM National Conference June 1990 at 10.

103 Bagshaw, "Gender Issues in Family Mediation" FIRM National Conference June 1990; Pearson and Thoennes, "Divorce Mediation: An American Picture " in

Parties may believe they are equally informed when assessing outcomes, but they may be unaware of the assets or choices available or their legal entitlements. Parents who do not live with their children (overwhelmingly men) generally gave a higher fairness rating to mediated custody arrangements, partly because the process provided them with greater control so was less distressing than litigation or attorney negotiation where personal control was less.[104] Generally men and women reported high satisfaction with property arrangements reached through mediation, but sex stereotyping in the property division was perpetuated.[105]

Perhaps the most practical justification for women's satisfaction with ADR is shown by the application of the concept of BATNA: best alternative to a negotiated agreement. Even though women might not do as well as men in ADR, the short end of a mediated deal may be better than no deal[106] given the financial and emotional costs of litigation and the uncertainty of litigated outcomes, all of which will impose a greater burden on women.

Education About Systemic Bias Against Women

It is essential to create better awareness of the nature of bias against women and its impact, on the part of judges, legal practitioners, legal academics, law students and other present and future decision makers in the formal and informal justice systems. Information about bias against women should be given in law schools, in the pre-professional or practical legal training programs, in continuing legal education, and in judicial education, before judges take up their appointment to the bench and as part of continuing judicial education. Education about systemic bias against women and the sources of women's disadvantage must also be an element in the training of mediators, arbitrators, conciliators and other decision makers in the formal and informal justice systems.

However, there are limits to the effectiveness of training, which can be seen when we understand how pervasive are the barriers limiting access to justice

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Dingwall & Eekelaar (eds), *Divorce Mediation and the Legal Process* p79; Astor, "Feminist Issues in ADR" (1991) 65 *Law Inst J* 69 at 70.

104 Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 *Med Q* 179 at 188; Harrison, "Legal Process" and "Attitudes to Lawyers and the Legal Process" in McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* at 244.

105 Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 *Med Q* 179 at 187.

106 Rose, "Women and Property, Gaining and Losing Ground" (1992) 78 *Va L Rev* 421 at 429-430, 437-438, 459.

for women. If the goal of mediation is for the parties to create their own agreement, the ideology of mediator neutrality appears to limit mediator intervention, even to correct systemic power imbalance recognised by the mediator. Neutrality in this sense simply masks an acceptance of gendered social norms and has the effect of enforcing those norms.[107]

Even where mediator intervention is accepted in principle to assist women burdened by a severe disparity in bargaining power, intervention may not be effective, for several reasons. First, intervention incorrectly focuses on the woman as the problem, suggesting that if she can be somehow propped up, the problem is solved.[108] Second, mediator intervention may also be ineffective if specific pressure to settle is "offstage", as is often the case.[109] Third, the very informality of mediation and the enormous control the mediator has over the process may permit greater scope for bias.[110] Even a well-trained, experienced mediator is socialised into gendered views,[111] which we all are to a greater or lesser extent. Thus the mediator may suppress a woman's legitimate expressions of anger,[112] accept male work obligations as of more importance than those of women,[113] expect a woman to be less assertive and more co-operative, then penalise her if she fails to conform.[114] If a woman claims a legal right, in a departure from a previously subservient role, she may be blamed for being uncooperative in a negotiation.[115]

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107 Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *UFTLR* 162 at 185.

108 Astor & Chinkin, *Dispute Resolution in Australia* at 109.

109 Lonsdorf, "Coercion: A Factor Affecting Women's Inferior Financial Outcome in Divorce" (1989) 3 *Am J Fam L*. Note that Equal Opportunity law recognises this problem to some extent by providing further remedies for victimisation of a claimant.

110 Delgado, Dunn, Brown, Lee & Hubbert, "Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution" [1985] *Wis L Rev* 1359; Astor and Chinkin, *Dispute Resolution in Australia* pp102-105.

111 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1587ff; Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *UFTLR* 162 at 184-185; Bagshaw, "Gender Issues in Family Mediation" FIRM National Conference June 1990 at 3.

112 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1574-1575.

113 As above at 1570-1571.

114 Rose, "Women and Property, Gaining and Losing Ground" (1992) 78 *Va L Rev* 421; Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1601-1604; Bagshaw, "Gender Issues in Family Mediation" *FIRM National Conference* (June 1990) at 5.

115 Ingleby, *Solicitors and Divorce* p139.

The fundamental problem with training and intervention as a solution to the effects of gender inequality in mediation is that gender inequality exists as something embedded in the organisation of society, well beyond the ability of a mediator or conciliator to correct. The mediator cannot give the wife a job, or an income, or immediately and completely erase the impact of sex role ideology on men or women.[116]

CONCLUSION

We must not engage in a wasteful, polarised debate of traditional adversarial adjudication versus ADR, or make extravagant claims for any process. Our goal must be to try to construct dispute resolution processes that embody the best features of different processes, are fair in process and in outcome, that meet the legitimate needs of the disputants and are appropriate to the dispute.

Any fair system of dispute resolution must ensure that the benefits of the process are achieved without systematically burdening women to supply these benefits, that outcomes are not determined by gendered inequalities of power or by exploitation of women's particular vulnerabilities. A dispute resolution process in which "jerks win systematically and nice people finish last, also systematically",[117] is not satisfactory, and most especially so if the consistent winners are men and the regular losers are women. If we wish to encourage the cooperative relationships which reliance on ADR requires, we cannot continue to penalise women's cooperative behaviour.[118]

The risks which face women in dispute resolution process are direct reflections of the factors by which women's subordination is maintained in society generally. The real long term goal must be to attack the sources of women's vulnerability directly, by limiting violence against women, especially within the family and by providing real opportunities for economic independence and full participation in public life. Improving access to justice for women is one step towards creating full, true equality for women.

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116 Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale LJ* 1545 at 1561; Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 *Med Q* 179 at 195; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power"(1992) 40 *Buffalo LR* 441 at 498-515.

117 Rose, "Women and Property, Gaining and Losing Ground" (1992) 78 *Va L Rev* 421 at 459.

118 Rhode, *Justice and Gender* p154.