

FEDERAL FAMILY LAW REFORM IN 2005: THE PROBLEMS AND PITFALLS FOR WOMEN AND CHILDREN OF AN INCREASED EMPHASIS ON POST- SEPARATION INFORMAL DISPUTE RESOLUTION

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I INTRODUCTION

The Government's proposed New Family Law System¹ will potentially endanger many women post-separation and jeopardise the justice of post-separation arrangements for women and children. The proposed new approach is unlikely to improve outcomes for families. Rather, it will possibly fail to protect the best interests of children by putting them, as well as their primary care-givers, at risk through an over-emphasis on informal dispute resolution close to the time of separation. The reforms also promote terminology that invites a focus on the pursuit of fathers' interests post-separation rather than on the best

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¹ Family Law Pathways Advisory Group, *A New Approach to the Family Law System Discussion Paper*, (2004) available and accessed via www.ag.gov.au/agd/WWW/familylawhome.nsf in November 2004, referred to in this article as the *Discussion Paper*. See also *Australian Government A New Family Law System: Government Response to Every Picture Tells a Story*, (June 2005) available and accessed via www.ag.gov.au/agd/WWW/familylawhome.nsf in June 2005.

interests of children. The proposed reforms first articulated in the Discussion Paper of November 2004, and finalised in June 2005, appear to be a concession by the current Coalition Government to the demands of men's rights lobbyists,² and ignore the justice implications of the significant disadvantages that potentially arise for women and their children in the context of informal dispute resolution processes.

This article discusses dilemmas for women and children arising out of the Government's decision to increase the use of informal dispute resolution processes in family matters. It suggests that in the light of the disadvantages that women can face in informal processes, a model of dispute resolution that includes lawyers is justified. This is in direct contrast to the approach suggested in the reforms which states that lawyers are to be excluded from the proposed Family Relationship Centres on the basis that they are likely to make the processes practised in the Centres adversarial.³

It is important to acknowledge that a discussion of common concerns for women in the context of post-separation dispute resolution must avoid essentialising those concerns. Women's experiences of life post-separation, and of informal dispute resolution processes in the context of family disputes, are diverse and informed by their individual identities and histories, and are influenced by factors such as race and socio-economic background. The intention of this article is not to homogenise women's experience, but to raise and emphasise, in the context of the Government's reform proposals, issues relevant to many women's perspective. These issues illustrate how informal dispute resolution processes used in post-separation family disputes can result in compromised outcomes for many women, and consequently for their children also.

This article is written from a feminist perspective. It is therefore important also to acknowledge that there are many manifestations of feminism and feminist thought and practice. As it is beyond the scope of the article to explore these, however, the word "feminist" is used here inclusively and with a focus on the common feminist aim; namely, the promotion and protection of the interests of women in the context of redressing the continuing patriarchal oppression of women. This aim is directly related to the protection and promotion of the best interests of children also. This is because women continue in most Australian families, both in intact families and post-separation, to be the primary carers of children.⁴

² See on the issue of men's rights influence on Australian family law reform, for example: Reg Graycar, 'Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 158, Miranda Kaye and Julia Tolmie, 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 19, Miranda Kaye and Julia Tolmie 'Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 162, and R Kaspiew 'Equal Parenting or the Effacement of Mothers?: B and B and the Family Law Reform Act 1995 (Cth)' (1998) 12 *Australian Journal of Family Law* 69, 71 and references at footnotes 13, 14 and 25.

³ *Discussion Paper*, above n 1, 6.

⁴ Lyn Craig, 'Do Australians Share Parenting? Time-diary evidence on fathers' and mothers' time with children' (Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003) available at <http://www.aifs.org.au/institute/afrc8/craig.pdf>. Craig's research indicates that women spend three hours per day of absolute time on child-care in comparison with one hour for men. Even though employment patterns for women and domestic contribution patterns for men have changed, most mothers still do the bulk of the 'work' and nurturing associated with children. This continues to be what children experience and expect of their respective parents. Mothers also spend much more

II “A NEW FAMILY LAW SYSTEM IN AUSTRALIA”: COMPROMISING JUSTICE FOR WOMEN AND THEIR CHILDREN POST-SEPARATION

The new family law system’s centrepiece involves an expansion of “counselling, mediation and similar services” through newly created Family Relationship Centres around Australia. The Centres will aim to assist parents who have separated to reach agreement about post-separation arrangements in non-adversarial environments.⁵ For the sake of brevity, and because the issues and dangers arising for women in these processes are similar in many respects, they are discussed here collectively as “informal dispute resolution processes”.

The feminist literature on dispute resolution, both in Australia and internationally, has identified significant concerns about the practical and process disadvantages that women participants potentially face in informal dispute resolution processes.⁶ These concerns are particularly emphasised in the context of family mediation and its use in the resolution of post-separation disputes.⁷ Some of these disadvantages are discussed in more detail below in order to demonstrate how, for women, informal dispute resolution processes may well merely “substitute another objectivist, patriarchal, and even more damaging form of conflict resolution for (their) adversarial counterpart.”⁸

A *Compromising Justice for Women and Children: Examples of the Disadvantages and Dangers Women Face in Informal Dispute Resolution Processes*

Informal dispute resolution processes can only facilitate the reaching of just and fair outcomes for women, and consequently for their children, if the dangers women face in private informal negotiation environments are overtly acknowledged and addressed. There remains, particularly at political levels, an insufficient awareness of the gendered realities

time alone with children. They spend nearly half their time with children alone with them, whereas fathers, who spend less time with children anyway, are only alone with the children for 16-18% of that time.

⁵ *Government Response to Every Picture Tells a Story*, above n 1, 1; *Discussion Paper*, above n 1, 1.

⁶ For example, Murayama refers to the ‘universal concern with the fairness of the procedure and in particular outcomes of informal dispute resolution processes.’: M Murayama, ‘Does a Lawyer Make a Difference? Effects of a Lawyer on Mediation Outcomes in Japan’ (1999) 13 *International Journal of Law Policy and the Family* 52, 53.

⁷ The Australian critique has been fundamentally informed by the seminal work of Hilary Astor for the National Committee on Violence Against Women: Hilary Astor [Commonwealth of Australia] (1991), *Position Paper on Mediation* (ref 6.1.3 AGLC @ p.5a). Issues for women in informal dispute resolution have also been a consistent theme in my own writing, for example, ‘Mediation and the Art of Power (Im)balancing’ (1996) 12 *QUT Law Journal* 264; ‘Participation in Pre-Trial Negotiations of Family Law Disputes: Some Issues for Women’ (1998) 12 *Australian Journal of Family Law* 240; ‘Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part’ (1998) 14 *QUT Law Journal* 23; ‘Convincing the Policy Makers that Mediation is Often an Inappropriate Dispute Resolution Process for Women: A Case of Being Seen But Not Heard’ (2001) *National Law Review* (January) <http://pandora.nla.gov.au/tep/10130>; ‘Victim – Offender Conferencing: Issues Of Power Imbalance For Women Juvenile Participants’ (2004) *E Law - Murdoch University Electronic Journal of Law* Vol 11 (1) (March) available at: <http://www.murdoch.edu.au/elaw/issues/v11n1/field111.html>; ‘A Feminist Model Of Mediation That Centralises The Role Of Lawyers As Advocates For Participants Who Are Victims Of Domestic Violence’ (2004) 20 *The Australian Feminist Law Journal* 65.

⁸ Trina Grillo ‘The Mediation Alternative: Process Dangers for Women’ (1991) 100 *Yale Law Journal* 1545, 1548.

for women who participate in such processes. The Government's reforms do not indicate the level of understanding of issues required from the perspective of women and their children. In particular, the policy objective of excluding lawyers from informal justice processes to be practised in the Family Relationship Centres, fails to take account of the additional protection many women participants need to ensure that agreements reached are appropriate, just and fair. The feminist scholarship explored below will make this clear.

Indeed, the knowledge, information and factual bases that underpin the feminist position on informal dispute resolution make it reasonable and necessary for the Government to seriously and substantially revise its approach to informal dispute resolution in the 2005 reforms. The following section briefly discusses two key areas of disadvantage for women in informal justice processes: first, that agreements reached through informal processes cannot be assumed to be consensual. That is, women may often effectively be coerced into agreement. Secondly, that third-party facilitators cannot in reality be considered to be neutral, and this means that patriarchal perspectives can easily enter and even drive informal processes to the detriment of many women.

First, in relation to the process of reaching agreement through informal processes, there is strong evidence to support the notion that women may experience coercion as opposed to consensus. The evidence relates to gendered vulnerabilities in terms of women's social, psychological and economic experience of life post-separation.⁹ These vulnerabilities confirm the continuation of patriarchal influences on women's lived experience and paint "a dreary picture of women's position in society".¹⁰

Economic vulnerability, or as Kathy Mack puts it the "economic differential",¹¹ is one of the most significant post-separation problems for women that compromises, for them, the reality of consensual agreements in informal dispute resolution processes. There is evidence that women are usually poorer than men, and that, for example, women continue to earn less than men.¹² It is also known that the concept of the "feminisation of poverty" applies particularly to the post-separation financial situation of women, and compromises their negotiation power in terms of agreement options.¹³

⁹ Renata Alexander, (1997) 'Family Mediation: Friend or Foe For Women?' 8 *Australian Dispute Resolution Journal* 255, 257. See also Mack (1995) at 135-137. Kathy Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17 *Adelaide Law Review* 123 at 125.

¹⁰ Penelope Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40(2) *Buffalo Law Review* 441, 448.

¹¹ Mack, above n 9, 126 where she says: "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."

¹² House of Representatives Standing Committee on Legal and Constitutional Affairs, Federal Parliament of Australia, *Halfway to Equal: Report of the Inquiry Into Equal Opportunity and Equal Status for Women in Australia* (1992) 89. See also, Sylvia Hewlett, *A Lesser Life: The Myth of Women's Liberation in America* (Morrow, 1986).

¹³ In terms of the feminisation of poverty the following studies conclusively show that women face higher levels of poverty after separation than men: Office of Women's Policy *A Social and Economic Profile of Women in Queensland in 1999* Department of Equity and Fair Trading (1999); John Beggs and Bruce Chapman, ANU Centre for Economic Policy Research (1988), *The Foregone Earnings from Child-Rearing in Australia*, Discussion Paper No.190; Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice Hall of Australia, 1996) and Kathleen Funder, Margaret Harrison and Ruth Weston, *Settling Down: Pathways of Parents After Divorce* (Australian Institute of Family Studies, 1993). See also for additional perspectives on this issue:

Issues of poverty impact on the availability of dispute resolution options to parties in dispute. That is, if you are poor you are unlikely to be able to choose to litigate. Difficulties in accessing legal aid exacerbate the dilemma,¹⁴ along with the significant problems associated with parties attempting to self-represent as litigants.¹⁵ For many women the inaccessibility of litigation means, then, that an agreement must be reached in an informal process, whether it is an appropriate and fair agreement or not. It is because women cannot afford to risk not reaching an agreement in an informal process, or risk the potential of the matter being taken to court by the other party, that they may feel coerced into accepting an early settlement reached informally, even if it is one that fails to respect their needs or interests or legal entitlements.¹⁶

The impact of economic vulnerability on the issue of consensual agreement in informal dispute resolution processes is exacerbated by additional difficulties that women face post-separation associated with, for example, their social and psychological situation.

Socially, single mothers experience a status disparity with their former partners. For example, (consistent with what was said above about women generally) single mothers are likely to continue to earn substantially less than their former partner, they will continue to

Lenore Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985) and Lenore Weitzman and Mavis Maclean (eds), *Economic Consequences of Divorce: The International Perspective* (Clarendon Press, 1992); Kate Hughes (ed), *Contemporary Australian Feminism 2* (Addison Wesley Longman Australia, 2nd ed, 1997); Ruth Fincher and John Nieuwenhuysen (eds), *Australian Poverty: Then and Now* (Melbourne University Press, 1998); Miiko Kumar, 'Justice Sally Brown: Educating the Bench' (1995) 6(2) *Polemic* 93; Marcia Neave, 'Women Divorce and Redistributing the Cost of Children' in Ann Edwards and Susan Magarey (eds) *Women in a Restructuring Australia: Work and Welfare* (1995), 223. For a Canadian perspective see Mary Jane Mossman and Morag MacLean, 'Family Law and Social Welfare: Toward a New Equality' (1986) 5(1) *Canadian Journal of Family Law* 79. See also Bruce Smyth and Ruth Weston, Australian Institute of Family Studies (2000) *Financial Living Standards After Divorce: A Recent Snapshot* Research Paper No.23.

¹⁴ John Dewar, Jeff Giddings and Stephen Parker, *The Impact of Changes in Legal Aid on Criminal Law and Family Law Practice in Queensland* Faculty of Law Griffith University Brisbane 1998 (the Griffith Legal Aid Report). Bagshaw et al comment that in their study 'a common issue for female victims (of violence) was the lack of access to legal aid.': Dale Bagshaw, Donna Chung, Murray Couch Sandra Gail Lilburn, Ben Wadham, *Reshaping Responses to Domestic Violence: Executive Summary and Final Report* Partnerships Against DV and South Australian Department of Human Services: University of SA 1999, 24.

¹⁵ John Dewar, Bruce Smith and Cate Banks *Litigants in Person in the Family Court of Australia*. Research Report No.20 (2000), available: www.familycourt.gov.au/papers (accessed 8 June 2004).

¹⁶ Having the financial credibility to "threaten to terminate or extend the length of negotiations if the other party fails to meet his demands", inevitably increases the negotiating strength of a male party to post-separation disputes: Bryan, above n 10, 449.

bear a heavier parenting and care burden,¹⁷ they will have fewer opportunities to achieve an equal or higher level of education, and are likely to remain at a lower occupational rank.¹⁸

In terms of issues of psychological vulnerability, research has established that women experience higher levels of depression and distress, sometimes associated with learned helplessness and sex role identity, than men;¹⁹ and that “among all marital status categories, depression rates are highest for separated and divorced women.”²⁰

These vulnerabilities work to compromise a woman’s ability to participate in consensus bargaining in informal environments because they diminish her negotiating authority and impact negatively on her capacity to engage in constructive problem-solving behaviour as an advocate for her own and her children’s interests. They might also be said to compromise both a woman’s ability to judge accurately the appropriateness and acceptability of an informally reached outcome, and to diminish any real opportunity she may have to reject an agreement she is not happy with.²¹ As Alexander has contended, women may agree to settlements not because they are reached through consensus but because of other factors such as “ignorance, fear, guilt or low expectations.”²²

It is right, then, to be concerned that an increased emphasis on informal dispute resolution through the Family Relationship Centres will result in negotiated outcomes that compromise justice for women and their children by directly reflecting the factual circumstances of poverty, and other vulnerabilities that women face post-separation. These are issues that lawyers for women parties in informal dispute resolution processes can help to address.

The second disadvantage for women in informal dispute resolution discussed here derives from the continued centrality of neutrality on the part of the third-party facilitator to assertions and assumptions about informal dispute resolution.²³ This is illustrated by the fact that there are few descriptions of informal processes that do not include a reference to

¹⁷ Michael Bittman, *Juggling Time: How Australian Families Use Time* Office of Status of Women, (Department of Prime Minister and Cabinet, 1991). For further discussion of women’s work as carers see also for example, Jane Lewis ‘It All Really Starts in the Family ...’ *Community Care in the 1980s* (1989) 16 *Journal of Law and Society* 8, and Janet Finch and Dulcie Groves *A Labour of Love: Women, Work and Caring* (Routledge and K Paul, 1983). Also important in this context is the overt failure of society to value the work women do as carers – on this point see for example, Marilyn Waring *Counting for Nothing: What Men Value and What Women are Worth* (University of Toronto Press, 2nd ed, 1999).

¹⁸ See Alice H Eagly ‘Gender and Social Influence’ (1983) 38 *American Psychologist* 971 and Charlan Jeanne Nemeth ‘Reflections on the Dialogue Between Status and Style: Influence Processes of Social Control and Social Change’ (1983) 46 *Social Psychology Quarterly* 73.

¹⁹ Susan Noel-Hoeksema, ‘Sex Differences in Unipolar Depression: Evidence and Theory’ (1987) 101 *Psychology Bulletin* 259, Ester D Rothblum, ‘Women’s Socialisation and the Prevalence of Depression: The Feminine Mistake’ (1982) 1 *Women and Therapy* 5, Sarah Rosenfield, ‘The Effects of Women’s Employment: Personal Control and Sex Differences in Mental Health’ (1989) 30 *Journal of Health and Social Behaviour* 77 and Sarah Rosenfield, ‘Sex Differences in Depression: Do Women Always Have Higher Rates?’ (1980) 21 *Journal of Health and Social Behaviour* 33.

²⁰ Bryan, above n 10, 469.

²¹ LM Leitch, ‘The Politics of Compromise: A Feminist Perspective on Mediation’ (1986-7) 14-15 *Mediation Quarterly* 163.

²² Alexander, above n 9, 259.

²³ Hilary Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part I’ (2000) 11 *Australian Dispute Resolution Journal* 73, 73.

facilitators as third-party neutrals;²⁴ and by the fact that mediator neutrality remains firmly entrenched in statements of mediator ethics.²⁵

Neutrality is generally taken to infer in informal processes that third-party facilitators will specifically avoid blaming the parties, and will avoid making judgments about the dispute and the possible options for its resolution.²⁶ Facilitator neutrality infers respect for the agency of the parties and the idea that families know what is best for them on separation. It also represents fairness and objectivity in terms of approaches to the content of the dispute, and the process used to resolve it. The reality of the concept of neutrality is increasingly being questioned, however, with it now being regarded as somewhat of a myth, at least in its application to third-party facilitators of informal dispute resolution processes.²⁷

Concern for women, and the potential for the compromise of just outcomes for them in informal processes, arises because we know that third-party facilitator values and judgments can, and often do, enter informal processes. Further, we know that they can directly influence outcomes.²⁸ Greatbatch and Dingwall have shown, for example, that

²⁴ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey Bass 1986) 14. Also, for example, Boule acknowledges that 'definitions of mediation frequently assert that the mediator is a neutral intervener in the parties' dispute': Laurence Boule, *Mediation: Principles Process Practice* (Butterworths 1996) 18. Further one of the most commonly accepted and often cited definitions of mediation, that of Folberg and Taylor, refers to mediation as a process involving 'the assistance of a neutral person or persons': Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey-Bass 1984) 7-8. Interestingly Sir Laurence Street's three fundamental principles of mediation do not include a reference to neutrality on the part of the mediator: Laurence Street, 'The Language of Alternative Dispute Resolution' (1992) 3 *Australian Dispute Resolution Journal* 144, 146; see also for example Australian Law Reform Commission, *Review of the Adversarial System of Litigation – ADR – its role in federal dispute resolution*, Issues Paper 25 Commonwealth of Australia (1998) 26.

²⁵ See for example the former Society of Professionals In Dispute Resolution (SPIDR) *Ethical Standards of Professional Responsibility* (1996) SPIDR US – note that SPIDR merged in 2001 with the Academy of Family Mediators (AFM) and the Conflict Resolution Education Network (CREnet) to form the Association for Conflict Resolution – information and publications are available from www.acrnet.org. See also Note 'Standards of Practice for Family Mediators' (1984) 17 *Family Law Quarterly* 455; Christopher Moore *SPIDR's Ethical Standards: Six Viewpoints* (National Institute of Dispute Resolution 1987); John Feerick, Carole Izumi, Kimberlee Kimberlee, Lela Love, Robert Moberly, Leonard Riskin, Edward Sherman, 'Symposium: Standards of Professional Conduct in Alternative Dispute Resolution' (1995) 1 *Journal of Dispute Resolution* 95; Richard Cohen, 'Mediation Standards' (1995) 6(1) *Australasian Dispute Resolution Journal* 25.

²⁶ See again Hilary Astor 'Rethinking Neutrality: A Theory to Inform Practice – Part I' (2000) 11 *Australian Dispute Resolution Journal* 73.

²⁷ Boule, above n 24, 19. See also Gregory Tillet, *Resolving Conflict – A Practical Approach* (Sydney University Press 1991), George Kurien, 'Critique of Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43, and Field (1996) above n 7.

²⁸ Robert Dingwall, 'Empowerment or Enforcement? Some Questions About Power and Control in Divorce Mediation' in Robert Dingwall and John Eekelaar (eds), *Divorce Mediation and the Legal Process* (1988) 150; David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 23(4) *Law and Society Review* 613; Bernard Mayer 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75. See also Marion Roberts 'Who is in Charge? Reflections on Recent Research on the Role of the Mediator' (1992) *Journal of Social Welfare and Family Law* 372. Some writers also clearly acknowledge that the idea of neutrality and its application in the context of mediation practice is difficult: Boule, above n 24, 19; Hilary Astor and Christine Chinkin *Dispute Resolution in Australia* (Butterworths 2nd ed, 2002); John H Wade 'Forms of Power in Family Mediation and Negotiation' (1994) 8 *Australian Journal of Family Law* 40.

mediators can use their process skills to selectively facilitate discussion of issues they think should be the focus of negotiations.²⁹ Research has also shown that facilitator influence may be gendered, and that “women (are) significantly more likely to report that mediators pressured them into agreement or tried to impose their viewpoints on them.”³⁰

The gendered nature of facilitator influence should not surprise us. In contemporary society it remains almost unavoidable that facilitator views and values will be, at least to some extent, patriarchally informed and that they will therefore possibly work to disadvantage women parties.

If we accept, however, that third-party facilitators will inevitably bring their views and values about the position of women in society and what is appropriate for, or to be expected from, women into their professional practice, then we must also recognise the concomitant potential for those views and values to compromise, from the perspective of women, the justice of outcomes reached.

For example, a facilitator who takes the view that issues of violence against women in society are overstated, may well use the future focus of informal processes, and a reliance on the notion of his or her own neutrality, to specifically ignore clear indicators of violence that are working to a victim’s disadvantage and disempowerment in negotiations.³¹ Further, a facilitator who thinks that fathers should always be assisted in developing arrangements that allow for consistent post-separation contact with their children, may again, simply ignore indicators of violence and direct negotiations to this end. The reform agenda of encouraging equal shared parenting indicates that facilitators in situations such as this will in fact be required to direct discussions in this way.³²

Gendered constructions of, and responses to, women’s lives and stories impacts significantly on their ability to represent and advocate confidently for their own interests and those of their children.³³ If the third-party facilitator is gender biased, then a result of that bias, combined with the fact of their influence and control over the process, is that a woman participant in an informal process will most certainly face potential disadvantage.

²⁹ Dingwall, above n 28, 150; Greatbatch and Dingwall, above n 28.

³⁰ Sophy Bordow and Janne Gibson *Evaluation of the Family Court Mediation Service* (Family Court of Australia Research and Evaluation Unit 1994) 112.

³¹ Andree Gagnon, ‘Ending Mandatory Divorce Mediation for Battered Women’ (1992) 15 *Harvard Women’s Law Review* 272, 276. Zylstra has said that ‘not only does mediation fail to stop the violence but the future focus of standard informal dispute resolution processes styles rather than a focus on past behaviour actually absolves the abuser of accepting responsibility for past behaviour.’ Further ‘the perpetrator may be excused for his actions under this model and further critics argue this may be perceived by the victim as the mediator condoning the behaviour thus jeopardizing mediator neutrality.’: Alexandria Zylstra, ‘Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators’ (2001) *Journal of Dispute Resolution* 253.

³² See *Discussion Paper*, above n 1, 11 where it says that those “helping parents develop a parenting plan would need to raise with parents the possibility of considering equal parenting time as a starting point.” See also s 63DA “Obligations of Advisors”, *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 (exposure draft, 23 June 2005) (referred to as “the Bill”).

³³ Central to achieving the promotion and protection of the interests of women and children is a belief in the realities of women’s lives and experiences: Patricia Cain ‘Feminist Jurisprudence: Grounding the Theories’ (1989) 4 *Berkeley Women’s Law Journal* 191, C A Littleton ‘Feminist Jurisprudence: The Difference Method Makes’ (1989) 41 *Stanford Law Review* 751.

It must also be noted that these concerns are certainly not limited to male facilitators - a woman facilitator might equally position herself against a woman party, particularly if she takes the view that the woman party is difficult or uncooperative (behaviour that the stresses associated with the post-separation vulnerabilities discussed above can exacerbate). A woman who gets angry or who swears or who appears to be uncooperative may well be judged negatively by a facilitator of either gender who enters the process with a stereotypical view of what amounts to appropriate feminine behaviour.³⁴ In fact, informal dispute resolution processes are environments where very restrictive gendered views can go unchecked in terms of what is appropriate or acceptable behaviour for women.³⁵

It is not possible then, to rely on the notion of third-party neutrality as insurance for appropriate, objective and fair treatment of the parties in informal dispute resolution processes. Indeed, as the discussion above demonstrates, there is wide scope for inappropriate and patriarchal views of women to enter informal processes to their detriment. With an increased emphasis on the use of informal processes through the proposed Family Relationship Centres, and without the protection of legal representation, the breadth of the negative consequences that arise for women and their children, and the implications for the justice of post-separation agreements, are significant. This is an issue that the proposal developed in section 3 below aims to address.

B *Compromising Justice for Women and their Children: The Dangers of Rhetoric Not Reflecting Reality With Regard to Victims of Violence in Informal Dispute Resolution*

The issues discussed in the above section can be argued as having a generic relevance to women as a gender. They demonstrate the reality of women's potential disadvantage in informal dispute resolution, and justify concern about the reforms as they are currently expressed. This section focuses on a group of women for whom the dangers identified above are manifestly exacerbated; victims of domestic violence.

Importantly, there is now wide acknowledgment that many informal dispute resolution processes, such as mediation, are generally not appropriate where there is a history of domestic/family violence.³⁶ This is because the ability of a victim of violence to represent

³⁴ Stubbs has said, in terms of how women's behaviour in informal processes might be judged or controlled, that "we shouldn't presume that the informal is necessarily benign or even neutral." Julie Stubbs quoted in Margaret Baines 'Viewpoints on Young Women and Family Group Conferences' in Christine Alder and Margaret Baines (eds.) ...*and when she was bad?: Working with Young Women in Juvenile Justice Related Areas* (1986) 46.

³⁵ Ibid.

³⁶ The terms family and domestic violence are used in this article to refer to all forms of violence perpetrated against women in domestic relationships; for example, physical, emotional, financial, psychological, and social violence. The *Domestic and Family Violence Protection Act 1989* (Qld) defines domestic violence as wilful injury, wilful damage to property, intimidation or harassment, or indecent behaviour without consent committed against (or threatened against) another person if a domestic relationship exists between the parties: s.11. A domestic relationship is said to be present in a spousal relationship, an intimate relationship, a family relationship and an informal care relationship: s.11A. The *Family Law Act 1975* (Cth) defines family violence as 'conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.': s.60D. Throughout this article victims of violence are consistently

her own interests and negotiate effectively in consensual bargaining contexts is known now to be severely compromised by the history of violence.³⁷ The 2005 reforms, too, acknowledge that ‘people who have been victims of violence should not be required to have contact with the perpetrator of that violence’,³⁸ and compulsory attendance at family dispute resolution will not apply where there is evidence of a history or risk of family violence. Further, the Discussion Paper confirms the importance of identifying cases involving family violence or child abuse issues,³⁹ and of training parenting advisers in the identification process.⁴⁰

What the reforms do not sufficiently recognise, however, is the true complexity of problems for women arising as a result of violence and abuse. This complexity cannot be addressed simply through identification processes such as intake screening, or by limiting victim and perpetrator contact, or by ensuring that facilitators have access to training. The nature and dynamics of a violent relationship create the possibility for significant injustice in negotiated outcomes for victims of violence because of the way in which they undermine the fundamental core values of informal processes relating to self-determination, party

referred to as being women. This is because it has long been acknowledged, both by Australian and international research, that “women constitute the large majority of domestic violence victims.” – Queensland Domestic Violence Task Force, (1988) “Beyond These Walls”, Brisbane: Goprint at 13. “Beyond These Walls” refers to research pre-1988. Further confirmation that women continue to make up the majority of victims of violence can be found in, for example, National Committee on Violence Against Women, Commonwealth of Australia, *National Strategy on Violence Against Women* (1992), and Department of the Prime Minister and Cabinet (Office of the Status of Women) *Community Attitudes to Violence Against Women – Detailed Report* (1995), AGPS: Canberra. This is not to deny, however, that men are also sometimes victims of violence.

³⁷ Of particular importance in gaining this acknowledgment was Hilary Astor’s paper for the National Committee on Violence Against Women in 1991. Kelly a firm proponent of mediation as a first dispute resolution option for most people, also acknowledges this: Joan Kelly, ‘Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention’ (1995) 13(2) *Mediation Quarterly* 85, 91 referring to Barbara Hart, ‘Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation’ (1990) 7 *Mediation Quarterly* 317. See also Susan Gribben, ‘Violence and Family Mediation: Practice’ (1994) 8 *Australian Journal of Family Law* 22. Further the Family Law Council of Australia has acknowledged that informal dispute resolution processes are not appropriate where there is a fear or threat of violence or abuse or where violence or abuse is occurring: Family Law Council of Australia *Report on Family Mediation* 1992 at preface xiii. The Family Court’s practice direction on family violence states that ‘the existence of family violence may have an effect upon the conciliation and mediation processes. For those who are in fear of family violence: mediation will normally be regarded as inappropriate.’: Family Court of Australia Chief Justice’s Direction as to the Management of Cases Involving Family Violence 15 January 1993 Introduction and at point 4. The Chief Justice also commented in 1991 that some matters where there is a real inequality in bargaining power or where there is violence may not be suitable for mediation: Alastair Nicholson, ‘Mediation in the Family Court’ (1991) 65 *Law Institute Journal* 61, 62. The Australian Law Reform Commission’s *Reports on Equality Before the Law* also discussed the pervasive nature of violence against women and acknowledged that a history of violence makes participation for women in alternative dispute resolution processes problematic. See Australian Law Reform Commission *Equality Before the Law: Women’s Access to the Legal System*, Report No 67 (1994). See also Mack, above n 9, 125.

³⁸ *Discussion Paper*, above n 1, 6; see also the Bill at s 60J(1).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

empowerment and party control.⁴¹ A history of violence creates, instead, the potential for the entrenchment and exacerbation of the perpetrator's patriarchal domination of the victim.

It is dangerous for women generally that informal processes can work to ignore the 'power differences between men and women that put women at a disadvantage in negotiating with men.'⁴² This danger is clearly increased for victims of violence.

In terms of issues of intake and screening for victims of violence, the reforms place a heavy reliance on the role of Family Relationship Centres in identifying cases involving family violence or child abuse issues;⁴³ and acknowledge that parents 'can be reluctant to disclose such issues' and that as a result 'parenting advisers will need to be trained to ensure they have skills in identifying them.'⁴⁴

It is certainly important that parenting advisors be knowledgeable about violence and its impact on victims and families. It is also imperative that they have skills in relation to identifying matters where there is a history of violence, and are able appropriately to raise these issues with the victim and the perpetrator, without exacerbating the risk of further violence.⁴⁵ It is also crucial that intake and screening procedures developed for the processes administered through the Family Relationship Centres are adequate in terms of informing victims of violence about the disadvantages they may face,⁴⁶ and ensuring that victims of violence who do choose to participate do so only if they have been able to make a free and informed choice.⁴⁷ Intake processes are of course vital to screening out victims of violence where the dangers can be identified as simply too great.

⁴¹ See for example Grillo, above n 8. Hart, above n 37. Field, above n 7, Lisa Lerman, 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) 7 *Harvard Women's Law Journal* 57.

⁴² Marsha Lichtenstein, 'Mediation and Feminism: Common Values and Challenges' (2000) 18(1) *Mediation Quarterly* 19, 20 referring to Martha Fineman 'Dominant Discourse Professional Language and Legal Change in Child Custody Decision Making' (1990) 101(4) *Harvard Law Review* 727. See also Carol Gilligan, 'In a Different Voice: Women's Conceptions of Self and Morality' (1977) 47 *Harvard Educational Review* 481; Carol Gilligan, *In a Different Voice* (Harvard University Press 1982); Nell Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press 1984); Jennifer Nedelsky, 'Reconceiving Autonomy: Sources Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7; Susan Moller Okin, 'Justice and Gender' (1987) 16 *Philosophy and Public Affairs* 42; Susan Moller Okin, 'Reason and Feeling in Thinking About Justice' (1989) 99 *Ethics* 229. Note also Kathy Mack's comment that 'The risks which face women in dispute resolution processes are direct reflections of the factors by which women's subordination is maintained in society generally.': Mack, above n 9, 146.

⁴³ *Discussion Paper*, above n 1, 6; Government Response to Every Picture Tells a Story, above n 1, 3.

⁴⁴ *Ibid.*

⁴⁵ Note Gribben's comment that 'It can be difficult to identify a relationship with a history of violence, because the man can be frightened that disclosure will threaten his control, and the woman can be frightened of what he will do if this happens, and they may both have become expert at rationalising, minimising, and hiding the violence and its destructive consequences.': Gribben above n 37, 25.

⁴⁶ Linda Girdner, 'Mediation Triage: Screening for Spouse Abuse in Divorce Mediation' (1990) 7 *Mediation Quarterly* 365. See also National Council for Violence Against Women prepared by Hilary Astor, *Guidelines for Use if Mediating Cases Involving Violence Against Women* (NCVAW 1992). Elements of the guidelines include that intake officers need to be trained in issues of violence against women and to have good interpersonal skills, at 7; also intake interviews need to be done in person not over the phone and need to be done with the parties separately, at 7.

⁴⁷ Astor, above n 46, 2: 'The only circumstance where mediation can be considered a viable course of action is where there is free and informed consent by the victim.' For an intake officer to be satisfied of free and informed consent the victim needs to have expressed a clear wish to proceed, she needs to

Thorough intake and screening processes are, however, costly, time consuming and resource intensive. Government needs, then, as a part of the reform implementation process, to prioritise an explicit commitment to justice for women and children through adequately funding the development and implementation of best practice intake and screening processes in the Family Relationship Centres.

It is important to note, however, that notwithstanding the current rhetoric about the inappropriateness of the participation of victims of violence in informal justice processes, and notwithstanding the awareness of the potential for severely compromised outcomes and the increased use of screening procedures, many victims continue to participate in informal processes.

There are a number of reasons for this. First, for some time there has been a generally heavy emphasis on informal dispute resolution processes in the context of family law,⁴⁸ and when the number of women in the general population increases in these processes, inevitably so does the proportion of victims of violence who are participating.⁴⁹ The proposed reforms, even with intake and screening processes, will work to increase that number further.

have chosen to go to mediation – not have been sent (or referred), she needs to indicate a clear understanding of what happens in mediation and what is required of her in the process, she needs to show that she understands the alternatives, she needs to show that she is not under duress or pressure/persuasion from the perpetrator or anyone else to participate, she needs to show that her capacity to make decisions hasn't been affected by the violence, and she needs to show that she's received independent legal advice.' 10-11. See also Hilary Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3, 18-19.

⁴⁸ For example, the 1996 amendments to the *Family Law Act 1975* (Cth) in relation to disputes about children have resulted in informal dispute resolution processes becoming dispute resolution processes of first resort. For example s.63B of the *Family Law Act 1975* (Cth) states that 'The parents of a child are encouraged: (a) to agree about matters concerning the child rather than seeking an order of the court'. Also under s.60B(2)(d) it is a stated object of Part VII of the Act regarding children that 'parents should agree about the future parenting of their children.' Further Part III of the Act is devoted entirely to 'primary dispute resolution' procedures which include informal dispute resolution processes. S.14(a) states that one of the objects of Part III is 'to encourage people to use primary dispute resolution mechanisms (such as counseling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act provided the mechanisms are appropriate in the circumstances and proper procedures are followed'. The fact that the practice directions of the Court include a statement against the use of informal dispute resolution processes in cases where there is a history of violence does not guarantee that this happens in practice.

⁴⁹ See for example, Keys Young for Legal Aid and Family Services, *Research/Evaluation of Family Mediation Practice and the Issue of Violence* (AGPS Canberra 1996) which at 8 states: 'Clearly the fact that the incidence of violence against women in the family is high and especially high in the divorcing population is reflected in the population presenting to mediation agencies. The evidence would suggest the numbers are far from small, and that a substantial proportion of the couples approaching family mediation services will have had some experience of spousal abuse.' Gagnon argues that prior to the introduction of mandatory divorce informal dispute resolution processes in the US 'even with exemptions for victims of domestic abuse battered women often found themselves in the mediation process.': Gagnon, above n 31, 278. Maxwell asserts that in the US 50-80% of family disputes referred to court based mediation programs involve domestic violence: Jennifer Maxwell, 'Mandatory Mediation of Custody in the Face of Domestic Violence: Some Suggestions for Courts and Mediators' (1999) 37 *Family and Conciliation Courts Review* 335.

Secondly, we know that social, economic and psychological factors limit the dispute resolution options available to many victims of violence post-separation. Not disclosing or minimising a history of violence may be the only way for a victim to ensure that she has access to a structured assisted dispute resolution process, even if she fully understands, and many victims may not, that her participation in that process, and the fairness of the outcome, are likely to be directly compromised by the history of violence.

For these reasons it is important to recanvass what we know about the disadvantages victims of violence face in informal processes in order adequately to realise the process and outcome protections that can be offered to victims by the presence of a legal representative. As Hart has said, the idea of cooperative bargaining with a perpetrator of violence is an oxymoron.⁵⁰ Perpetrators of violence are not able to genuinely cooperate with their victims. Rather they coerce, intimidate, monitor, threaten, devalue their victims and deny their own violence.⁵¹ True consensuality conflicts directly with how perpetrators of domestic violence approach the resolution of disputes.⁵² Domestic violence is about the gendered assertion of power and control.⁵³ When perpetrators of domestic violence are placed in an environment focussed on cooperation and consensuality, there are few constraints on their exercise of that power and little to stop the outcome of the dispute from representing their will and interests, rather than, for example, the best interests of the child/ren, or the mutual interests of the parties.⁵⁴

It is also important to note that the perpetrator's control of his victim is most often rooted in his ability to make her fearful.⁵⁵ A person in fear of their physical or emotional safety, or in fear of the physical or emotional safety of their children, is thoroughly compromised in terms of her ability to advocate for her own interests in informal processes. When there is no-one else present to advocate for those interests, they are unlikely to find a place in the final agreement. Having a legal representative for the victim playing a role in the Family Relationship Centres would work towards addressing this concern.

Strategies such as shuttle or telephone mediations, that also pertain to address such issues, are based on the premise that if a victim doesn't have to sit face to face with the perpetrator then the imbalance created by the violence is resolved. This is simply not the case, because the effects and impact of violence on the parties' relationship, and their interaction in a negotiation environment, are not necessarily altered by the mere fact of physical separation

⁵⁰ Hart, above n 37, 320.

⁵¹ Ibid.

⁵² 'Cooperation in common practice means to act or work together for mutual benefit. A batterer is not someone who can cooperate. He understands mutual benefit as synonymous with his exclusive self-interest.': Ibid. And as Gagnon says 'equality of bargaining power and mutual cooperation do not exist in a battering relationship.': Gagnon, above n 31, 274.

⁵³ Hart, above n 37, 318.

⁵⁴ Informal dispute resolution processes for victims of violence can sometimes involve a process of giving in to get it over with or compromising financial interests or personal safety. For example Gagnon has said that 'The battered woman may give up her right to support or agree to give up assets to avoid further confrontation with the batterer.': Gagnon, above n 31, 280. Bagshaw et al's study also states that 'Participants reported compromising with ex-partners so as to finish their associations with them despite not achieving what they felt was a fair settlement in relation to division of property.': Bagshaw, Chung, Couch, Lilburn and Wadham above n 14, 27.

⁵⁵ Hart, above n 41, 319 referring to Desmond Ellis, 'Marital Conflict Mediation and Post-separation Wife Abuse' (1989) *Law and Inequality* 8 and L Woods 'Mediation: A Backlash to Women's Progress on Family Law Issues' (1985) *Clearinghouse Review* 431.

or by avoiding direct contact. A tone or phrase used on the part of the perpetrator, or mention of a particular issue or incident, can work to instil grave fear in the victim without his being physically proximate. Supported by a legal representative, a victim of violence may be in a much better position to contradict the power of the perpetrator.

Further, concerns about the falsity of facilitator neutrality, raised more generally above, have particular resonance for victims of violence. This is because, notwithstanding their claim to a neutral status, many facilitators also claim that they are able to redress power imbalances between parties. This is said to be achievable using aspects of practice that focus on party empowerment.⁵⁶ There is, however, little clear articulation on the part of dispute resolution professionals themselves about how in fact this is done, and there is almost no empirical evidence to support the assertion.⁵⁷

The reality is that whatever strategy or intervention a third party facilitator may choose to employ, it is unlikely to be able to reverse what might be years of dominance and control. Facilitators, in the relatively brief time they are with the parties in the dispute resolution process, are simply not able to achieve what might take 'trained psychologists years to accomplish working with violent offenders and abuse victims'.⁵⁸

An additional critical dilemma arises for victims of violence in terms of the Government's policy determination in the reforms to ensure that negotiations between separated parents occur as close to the time of separation as possible. This is a time when, in the context of both parties experiencing the stresses associated with separation, the victim could be enduring the full panoply of dangers associated with the power dynamic of post-separation violence.⁵⁹ The time of separation and divorce is acknowledged as one of the most dangerous times for victims. This is a time when the perpetrator desperately wants to reassert his power and control over his victim.⁶⁰ The reforms will therefore be placing

⁵⁶ See for example Anthony Love, Laurie Moloney and Tom Fisher *Federally-Funded Family Mediation in Melbourne - Outcomes Costs and Client Satisfaction* (National Centre for Socio-Legal Studies La Trobe University 1995) and the Editor's Note in Rachael Field, 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Law Solicitors' (1996) 7 *Australian Dispute Resolution Journal* 5, 12. Hart refers to the fact that 'most mediators subscribe to the position that mediation is a system by which fair and just custodial arrangements can be fashioned even when one party to the mediation has battered and continues to intimidate the other.': Hart, above n 37, 317.

⁵⁷ Kelly for example refers to 'general techniques for empowerment': Kelly, above n 37, 96. Davis and Salem contend that 'the essential values and characteristics of mediation make it a particularly effective means of dispute resolution in situations where power imbalances play a role.': Albie Davis and Richard Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) 6 *Mediation Quarterly* 17, 18. Their eleven point plan fails however to flesh out adequately how these essential values and characteristics redress imbalances in practice. Similarly the discussion of power issues relating to violence offered by Charlton and Dewdney does not explicitly evidence how any real disadvantage to victims of violence can be practically alleviated: Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook - Skills and Strategies for Practitioners* (LBC Information Services 2nd ed 2004) 310-311. See also Stephen Erickson and Marilyn McKnight, 'Mediating Spousal Abuse Divorces' (1990) 7 *Mediation Quarterly* 377.

⁵⁸ Zylstra, above n 31, 253. See also Maxwell, above n 49, 344. Maxwell refers to advice from the American Psychological Association in 1996 which advised against the use of informal dispute resolution processes when family violence was an issue citing the lack of psychological training on the part of mediators, judges and lawyers at 349-350.

⁵⁹ See Zylstra, above n 31.

⁶⁰ See for example Bagshaw, Chung, Couch, Lilburn, Wadham, above n 14, 23.

many victims of violence who engage in the processes practised in the Family Relationship Centres close to the time of separation in potentially grave danger.

The focus on early negotiation after separation appears to be based on an aspiration to prevent conflict between the parties from becoming entrenched.⁶¹ It is also perhaps linked to the false belief that victims of violence are safe once they have separated from the perpetrator.⁶² Both premises indicate a need for the Government's reforms to be more closely informed by what we know about the dynamics of domestic violence. This is because negotiations close to the time of separation are likely only in fact to exacerbate the dangers presented by post-separation violence,⁶³ and any agreements negotiated in this context are most certainly likely to reflect the will and dominance of the perpetrator and consequently are unlikely to represent safe or just outcomes for victims of violence and their children.

The reforms fail, then, adequately to address the need for substantive protections to be in place for women generally, and for victims of violence more particularly. Section 3 of this article explores one way of achieving some level of adequate practical protection for women in terms of process and outcomes through the proposal to ensure their legal representation in informal processes practised in Family Relationship Centres.

C *Compromising Justice for Women and Children: Removing Post-Separation Agreements from the Context of Established Legal Protections*

The dangers women face in informal dispute resolution processes impact on the justice of women's experience of those processes and, consequently, impact on the justice of outcomes reached informally.⁶⁴ The emphasis in the reforms on informal, private, post-separation dispute resolution where lawyers, and the law, have little or no presence, creates the possibility of moving to a system of family law in Australia where legally established norms, that offer some protection to women and children in the post-separation context, will have little or no relevance to most post-separation agreements. In this way important legal rights that have been obtained for women and their children in the context of family law will potentially be lost or obscured in "the shadows of informality."⁶⁵ Post-separation justice for women is removed in this way from the public domain into the private sphere.⁶⁶ Of particular concern is the probable detrimental impact on society's awareness of issues relating to the existence and impact of domestic violence on women's lives. Channelling the vast majority of post-separation disputes into informal dispute resolution processes will relegate issues of violence in the family to private negotiation contexts with no formal

⁶¹ *Discussion Paper*, above n 1, 2.

⁶² Hart, above n 37, 324.

⁶³ *Ibid*, above n 37, 325 referring to Desmond Ellis, 'Postseparation Wife Abuse: The Contribution of Lawyers as "Barracudas" "Advocates" and "Counselors"' (1987) *International Journal of Law and Psychiatry* 10; Desmond Ellis and Laurie Wight, 'Wife Abuse Among Separated Women: The Impact of Lawyering Styles' (Paper presented at the meeting of the International Association for the Study of Aggression Chicago 1986). Bagshaw, Chung, Couch, Lilburn and Wadham, above n 14, 24 have also acknowledged the use of litigation as a form of post-separation abuse.

⁶⁴ Grillo, above n 8, 1548. Janet Rifkin, 'Mediation from a Feminist Perspective: Promises and Problems' (1984) 2 *Law and Inequality* 21.

⁶⁵ Bryan, above n 10, 523.

⁶⁶ Astor, above n 7, 17.

protections, and no ability to set precedent or reinforce developing societal and legal attitudes that might work to continue to contradict violence against women.⁶⁷ There is a significant likelihood, therefore, that the inherently political nature of violence will be lost in the privacy of informal dispute resolution processes.⁶⁸ As Hilary Astor has warned, removing family disputes into the private sphere of mediation, for example, will work to undermine “efforts to expose the relevance of power differentials between men and women.”⁶⁹

Further, the current accompanying reform focus on promoting unrealistic notions of equality in post-separation parenting, creates a significant chance that the politics of power-through-violence in the family will be recast in informal negotiations as ‘individualised instances of miscommunication or misunderstanding.’⁷⁰

The private nature of informal dispute resolution processes also results in their having little accountability in terms of how women, and in particular victims of violence, are treated during the process, or in terms of the appropriateness of informally reached outcomes. Informal dispute resolution processes occur behind closed doors, with no public record of what has been said, or necessarily of the outcome, and no real way to address any injustices suffered, for example via appeal.⁷¹ Rather, key issues of justice for women in family law will be entrenched in unscrutinized contexts away from publicly accountable systems.⁷²

The private nature of informal dispute resolution processes and the unregulated nature of, for example, the mediation profession in Australia mean, also, that in most instances there is little available protection of the parties’ interests against any misuse, or inappropriate use, of facilitator power. Third-party facilitators are, in fact, overtly protected by the “self-determination” and “party empowerment” rhetoric of informal processes that places responsibility for outcomes and agreements squarely in the hands of the parties.

As Abel has noted, the informal nature of processes like mediation ‘obviates the need for the full panoply of procedural and constitutional protections.’⁷³ This can be contrasted with litigation, for example, where to some extent, the rights and interests of the parties are protected from misuse of judicial power.⁷⁴

The proposal articulated below aims to address some of the dangers presented for women parties by the private nature of informal dispute resolution processes, through the

⁶⁷ Lichtenstein, above n 42 comments at 20 that ‘mediation takes events and situations that are primarily political and privatises them.’ See also Jocelyn Scutt, ‘The Privatisation of Justice: Power Differentials Inequality and the Palliative of Counselling and Mediation’ (1988) 11(5) *Women’s Studies International Forum* 503.

⁶⁸ Lichtenstein, above n 42, 20.

⁶⁹ Astor, above n 7, 17.

⁷⁰ Ibid.

⁷¹ J L Waltman and K M Holland, *The Political Role of Law Courts in Modern Democracies* (Macmillan Press Ltd 1988).

⁷² Rebecca Emerson Dobash and Russell Dobash, *Women Violence and Social Change* (Routledge 1992) 174.

⁷³ Richard L Abel, ‘The Contradictions of Informal Justice’ in Richard L Abel (ed) *The Politics of Informal Justice: Volume 1* (1982) 271.

⁷⁴ John B Thomas, *Judicial Ethics in Australia* (LBC Information Services 2nd ed, 1997).

introduction by a legal representative of the presence and associated protections of, amongst other things, the ‘shadow of the law’ in the post-separation environment.

III A RECOMMENDATION AS TO HOW THE GOVERNMENT COULD MITIGATE THE DANGERS FOR WOMEN IN INFORMAL DISPUTE RESOLUTION PROCESSES PRACTISED IN FAMILY RELATIONSHIP CENTRES

The issues raised above confirm a need for careful measures to ensure that the informal dispute resolution processes practised in the proposed Family Relationship Centres are able to deliver equitable process and outcomes for women participants and their children. It is argued that these aims are more likely to succeed through the inclusion of lawyers in a role that offers coaching, support and advocacy for women parties.⁷⁵ This approach draws on the protective benefits to women offered by legal representation, which are supported by feminists such as Martha Fineman, and are known to be particularly important for victims of violence.⁷⁶

It is acknowledged that this proposal requires a significant funding commitment from Government.⁷⁷ The making of such a commitment would constitute, however, an appropriate investment in the fairness and justice of the reform outcomes. Support for the legal representation of women parties in Family Relationship Centres would ensure a significant response to the issues and concerns for women in informal dispute resolution processes discussed above. As such, the adoption of this simple measure in the proposed reforms could provide for a model that would represent both a positive development in the creation of the new system of family law, and also a fundamental commitment to the protection of women and children and their post-separation interests.

D *Lawyers Assisting Women in Informal Family Dispute Resolution: Coach, Advocate and Support*

This section discusses some benefits and practical issues associated with including lawyers in the informal processes to be practised through the Family Relationship Centres. The proposal here is made specifically in relation to the provision of a lawyer for women parties. This is based on the depth and breadth of the issues of disadvantage arising for women in informal dispute resolution environments, and particularly for victims of violence (only some of which have been discussed above). The proposal here does not preclude the presence of a lawyer for the male party, but does not presume, either, that equal representation is provided. This is based on the clearly gendered nature of the

⁷⁵ McKay has discussed the following roles for lawyers in mediation: ‘They may represent parties in the mediation performing a less aggressive more conciliatory role than that required in a formal proceeding. In other circumstances the lawyer may simply advise the client in advance of the mediation or serve during the mediation as a silent adviser mindful of the fact that mediation is a process by which the parties seek a resolution through their own efforts.’: Robert McKay, ‘Ethical Considerations in Alternative Dispute Resolution’ (1990) 45 *Arbitration Journal* 15, 22.

⁷⁶ Fineman, above n 42, 760-768.

⁷⁷ Issues relating to the funding of the model, for example, what criteria would apply to deciding how funding would be allocated, are not explored here.

difference of experience of informal justice processes, and on a prioritisation of the allocation of scarce resource funding to the party most in need.

It is an important proviso in relation to this proposal that in bringing their expertise and assistance into the informal dispute resolution environment as the woman party's legal support and advocate, and in working to protect the woman and her children's interests, the woman party's lawyer does not allow the environment to become a courtroom-style contest.⁷⁸

1 *A Lawyer's Potential in Preparing Women to Participate Effectively in Informal Processes*

The role of the lawyer advocate for women prior to the commencement of informal dispute resolution processes would be focussed on assessing the risk the process poses for the client, preparing the client with information about the process, providing her with some skills for her participation, and beginning a process of generating satisfactory options for the resolution of the dispute. Samuels and Shawn refer to this preparatory interaction between the lawyer and client as 'the beginning of a relationship of trust and confidence'.⁷⁹

A risk assessment of a potential informal process is of key importance if a party is to be in a position to make an informed decision to participate. An informed decision to participate is central to her being able to engage in the process competently and effectively, and involves a preliminary 'balancing (of) the client's strengths and weaknesses against those of the other spouse'.⁸⁰ The risk of informal processes must also be balanced against the risks present in any alternative options available.⁸¹

The provision of clear and detailed information about the processes practised in the Family Relationship Centres will perhaps be 'the most important aspect' of the lawyer's role in preparing clients.⁸² As the NCVAW intake recommendations indicate, this sort of advice and information is particularly crucial to fair participation in informal dispute resolution processes by victims of violence.⁸³ It is because intake officers and facilitators are not, practically or ethically, in a position to provide individual participants with the depth of information necessary to ensure specifically party-contextualised understandings of process, that it is appropriate for this task to fall to the woman party's legal representative.

Providing participation skills to the client can also be understood in terms of a coaching role for the woman party's lawyer. This clearly requires that lawyers involved in this model have a good understanding of, and ability to practice, informal negotiation skills themselves. It is imperative that lawyers engaged in this model also have a thorough understanding of issues relating to domestic violence, the impact of violence on victims and

⁷⁸ Bridget Sordo 'The Lawyer's Role in Mediation' (1996) 7(1) *Australian Dispute Resolution Journal* 20, 23.

⁷⁹ M Dee Samuels and Joel Shawn, 'The Role of the Lawyers Outside the Mediation Process' (1983) 2 *Mediation Quarterly* 13, 15.

⁸⁰ P Bryan, 'Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation' (1994) 28 *Family Law Quarterly* 177, 207.

⁸¹ To make a sound decision 'clients who consent to mediation should do so only after being briefed of all other options available to them.': Sordo, above n 78, 22.

⁸² Ibid.

⁸³ Astor, above n 46.

on a victim's capacity to engage in negotiations. Susan Gribben has written that the benefit of coaches applies especially where there is a history of domestic violence.⁸⁴

Coaching can involve teaching women a variety of abilities and attributes relating to consensual bargaining processes. For example, abilities in terms of identifying their key needs, interests and issues, assertiveness skills,⁸⁵ active listening skills,⁸⁶ ways of maintaining confidence and self-esteem throughout the process, and ways to adopt protective behaviours.⁸⁷

A lawyer would also assist their client in identifying and exploring 'the worst, best and possible outcomes' and 'ways of achieving (their) desired outcomes and priorities.'⁸⁸ Whilst the woman herself would remain the decision-maker on any agreement, just outcomes are more likely to result if the lawyer has assisted in the generation of a spectrum of appropriate and acceptable options and alternatives, as well as a 'benchmark against which to compare an emerging settlement',⁸⁹ and strategies for dealing with the other party's 'last gap' in negotiations.⁹⁰

2 *A Lawyer's Support and Advocacy Role to Facilitate Women's Effective Participation in Informal Processes*

As a woman's support person and advocate in the informal processes practised through the Family Relationship Centres, lawyers could have a number of significant contributions to make, all of which allow for the protection of the interests of women and their children, and the pursuit of just and appropriate negotiated outcomes.

Essentially the key element of this role is to provide assistance to women through the course of the process, as required.⁹¹ This assistance could take various forms depending on the needs and skills of the woman and her capacity to engage in an informal dispute resolution environment. It is likely that the assistance would at the very least take the form of a supportive presence, the speedy provision of appropriate advice where it is requested, and the affirmation of her own abilities.

It is also important, particularly in relation to victims of violence, that the lawyer would be in a position to redress, at least to some extent, inequalities in bargaining power. This might be done by naming those situations where the imbalances impede the potential justice of negotiated outcomes, by taking some level of control over the content of issues in discussion, or by contributing to the way the process is managed. For example, the lawyer could insist where necessary that several short sessions take place rather than one exhausting and lengthy one; and they could ask for a break, or for some time out, or for a

⁸⁴ Gribben, above n 37, 34.

⁸⁵ Ibid 34-35.

⁸⁶ See for example, L Hawkins, M Hudson and R Cornall *The Legal Negotiator*. (Longman Professional 1991) section D(3), H Mackay, *Why Don't People Listen?* (Pan Australia 1994), and J Brownell Building, *Active Listening Skills* (Prentice-Hall 1986).

⁸⁷ Gribben, above n 37, 34-35.

⁸⁸ Sordo, above n 78, 23.

⁸⁹ Bryan, above n 80, 217-218.

⁹⁰ Sordo, above n 78, 23 referring to John H Wade, 'The Last Gap in Negotiations – Why is it Important? How can it be Crossed?' (1995) 6 *Australian Dispute Resolution Journal* 190.

⁹¹ See Sordo, above n 78, 24.

private session with the facilitators when pressure from the male party is resulting in the woman losing energy for the negotiations. Further, a lawyer could assist a woman party by taking responsibility, where necessary, for advising that it is appropriate to withdraw from or terminate the process.⁹²

In the event that the woman feels she has lost the confidence or assertiveness necessary to negotiate effectively, the lawyer may assist with the expression of her position and her response to the other party's communications.⁹³ The lawyer could also be called upon to take a more active role in assisting the women by clarifying issues, 'ensuring the discussions stay on track',⁹⁴ acting as a 'second pair of ears',⁹⁵ working with her on alternatives to proposals made by the other party, and through applying the lawyer's legal knowledge and expertise to the process of 'bargaining in the shadow of the law'.⁹⁶ In this way the woman will be more able to contradict, for example, inaccurate assertions on the part of the other party about his legal rights and entitlements.⁹⁷

The final key role of the lawyer advocate is that of protecting and promoting the woman's interests, and those of the children, in relation to advising on the detail of any final agreement.⁹⁸ The balance here is to assist women in terms of pursuing what is equitable,⁹⁹ whilst also acting on their instructions,¹⁰⁰ and remaining flexible to just and appropriate agreement possibilities that are nevertheless outside legal remedial norms. It would be appropriate for a lawyer to use a private session with the woman to discuss any offers for agreement and to determine whether or not they are appropriate.¹⁰¹

The lawyer can also act as an 'agent of reality' in relation to possible agreement options by helping to test their strengths and weaknesses.¹⁰² Altobelli believes that lawyers have particular skills in terms of 'turning decisions into workable plans.'¹⁰³ These skills allow the lawyer to provide assistance in the process of drawing up the agreement¹⁰⁴ to ensure that it accurately represents what has been agreed between the parties.

⁹² See Gerard Sammon, 'The Ethical Duties of Lawyers Who Act for Parties to a Mediation' (1993) *Australian Dispute Resolution Journal* 190, 193.

⁹³ 'Participation may involve: presenting their client's position and negotiating on their behalf while the client sits passively beside them ... or adding to what their client expressed when necessary but otherwise acting as legal advisers to their clients whenever required to do so.': Sordo, above n 78, 24.

⁹⁴ Tom Altobelli, 'Family Lawyers as Mediators' (1995) 9 *Australian Journal of Family Law* 222, 229.

⁹⁵ Sordo, above n 78, 24.

⁹⁶ On the issue of bargaining in the shadow of the law see R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

⁹⁷ Murayama comments on the empowering aspect of the knowledge of legal rules and principles that lawyers can bring to informal dispute resolution processes which provides at least a sound and objective baseline for negotiations: Murayama, above n 6, 73.

⁹⁸ Samuels and Shawn, above n 79, 15, Note 'Lawyer Mediation in Family Disputes' (1985) 59 (11) *Law Institute Journal* 1163.

⁹⁹ Altobelli, above n 94, 229.

¹⁰⁰ Sordo, above n 78, 26 referring to T Bishop, 'Mediation Standards: An Ethical Safety Net' (1984) *Mediation Quarterly* 5, 8 and Sammon, above n 92, 196.

¹⁰¹ Sordo, above n 78, 26

¹⁰² Altobelli, above n 94, 229. See also Sordo, above 78, on the issue of reality checking at 26.

¹⁰³ Altobelli, above n 94, 229.

¹⁰⁴ Sordo, above n 78, 27.

3 *The Lawyer Advocate's Post-Process Role*

Although the reforms do not appear to support the formalisation of parenting agreements it is argued that this provides parties with security in relation to what has been agreed. In order to provide this security, the role of filing consent orders is one that the lawyer for the woman party could fulfil, with the male party benefiting from this also.

Where the informal dispute resolution process has been unsuccessful or no agreement has been reached, the lawyer also has a role in terms of ensuring that the woman is safe in the period immediately after the dispute resolution session; and that she is advised of future options.

E *Addressing Concerns about Involving Lawyers in Informal Dispute Resolution Processes*

The reform documents present the view that lawyers will inevitably make the processes practised in Family Relationship Centres more adversarial. However, lawyers have argued for some time that they have an important role to play in informal dispute resolution processes generally,¹⁰⁵ and the idea of lawyers fulfilling the role of mediator, for example, is now relatively well accepted.¹⁰⁶ There are, indeed, a number of reasons why a model of informal dispute resolution that creates a role for a legal support and advocate for women parties, and particularly for victims of violence, should be accepted.

Ellen Goodman, for example, has argued that lawyer involvement has the potential to help mitigate issues such as an ignorance of the law, lack of assertiveness, lack of self-esteem and an inability to articulate persuasive and compelling arguments on the part of a party.¹⁰⁷

Murayama has also found in a study of Japanese divorce matters that legal representation in informal dispute resolution processes correlates consistently with just and fair outcomes,¹⁰⁸

¹⁰⁵ Professor David has commented that 'as lawyers we need to ensure that we retain our pre-eminent position as dispute resolvers and that we are not by-passed by other professions or by other organisations providing dispute resolution services that are more relevant for the 1990s.': Jenny David, 'Lawyers - Engage in ADR!' (1991) 65 *Law Institute Journal* 51. Further Davies and Clarke have commented: 'it is a myth which needs to be dispelled that lawyers play no role in the ADR process.': Iyla Davies and Gay Clarke, 'ADR Procedures in the Family Court of Australia' (1991) *Queensland Law Society Journal* 391, 397. And Finlay also claims that 'it is well-established that lawyers have a definite role to play in family mediation.': H Finlay, 'Family Mediation and the Adversary Process' (1993) 7 *Australian Journal of Family Law* 63, 72. See also Sordo, above n 78, 20, Altobelli, above n 94, 222, and P McCarthy and J Walker, 'Involvement of Lawyers in the Mediation Process' (1996) 26 *Family Law* 154 for a discussion of the various roles for lawyers discussed here as well as results of a survey of FMA (Family Mediator Association) trained mediators on the issue of lawyer involvement in informal dispute resolution processes.

¹⁰⁶ Informal dispute resolution processes in fact form a significant part of some family lawyers' practices and it has been acknowledged that 'because of their special knowledge of the legal and financial aspects of divorce and their skills in negotiating and problem-solving lawyers are ideally suited to perform this task.': J Ryan, 'The Lawyer as Mediator: A New Role for Lawyers in the Practice of Non-adversarial Divorce' (1986) 1 *Canadian Family Law Quarterly* 105, 132.

¹⁰⁷ Ellen Goodman, 'Dispute Resolution in Family Law: Is 'Conciliatory Procedure' the Answer?' (1986-1987) 1 *Australian Journal of Family Law* 28 and 35-37.

particularly in terms of the absence in the outcomes of any reflection of the actual power relationship between the parties.¹⁰⁹

It must nevertheless be acknowledged that opposition to the involvement of lawyers in informal dispute resolution processes, such as that apparent in the reforms, is supported by some commentators.¹¹⁰ Many of these concerns, however, can be answered by consideration of the fact that contemporary lawyers possess a diverse skill base that extends beyond the adversarial and litigious and is most certainly relevant for positive participation in informal dispute resolution processes.¹¹¹ Further, the inclusion of alternative dispute resolution subjects in legal education curricula now means that many lawyers are formally educated about non-adversarial principles and approaches for dispute resolution.¹¹²

These developments in legal education reflect a broader changing legal environment that is requiring lawyers to be aware of, and conversant with, informal dispute resolution process techniques and practices across a huge range of legal disciplines from commercial law to criminal justice.¹¹³ It must also be remembered that whilst lawyers may be trained to be able to represent their client's interests in adversarial environments, they are not thereby unavoidably unable to appreciate non-adversarial procedures and dispute resolution methodologies. Sordo has commented that only 'a small percentage of lawyers are more comfortable with a traditional adversarial formal dispute resolution approach.'¹¹⁴

It is also important to acknowledge that the ability of a lawyer to alter inappropriate power dynamics between the parties by injecting the authority of the law, is a part of the positive protection that a legal advocate can offer women, and particularly victims of violence, through their presence in the Family Relationship Centres' processes. One of the achievements of legal representation in this context is to empower women in taking control of their role in dispute negotiations through an awareness of their rights and the

¹⁰⁸ Murayama, above n 6, 72 comments from the Japanese perspective that 'When wives retained lawyers they were better off than when neither party retained a lawyer. However when husbands had lawyers but wives did not outcomes tended to be least favourable to wives.'

¹⁰⁹ Murayama, above n 6, 73.

¹¹⁰ For example, Roberts has also said that lawyers pose a threat to the integrity of informal dispute resolution processes: Simon Roberts, 'Mediation in the Lawyers' Embrace' (1992) 55 *Modern Law Review* 258, 261; and McKay has commented that some lawyers 'are so thoroughly committed to the adversary process that they would be uncomfortable and probably unsuccessful in the informal give-and-take of a mediation proceeding which seeks an answer that may be outside the normative boundaries of the law.': McKay, above n 75, 22. See also Carrie Menkel-Meadow, 'The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does not Tell Us' (1985) *Missouri Journal of Dispute Resolution* 31-34, and Leonard Riskin, 'Toward New Standards for the Neutral Lawyer in Mediation' (1984) 26 *Arizona Law Review* 329, 330.

¹¹¹ Patricia Winks, 'Divorce Mediation: A Non-Adversary Procedure for the No-Fault Divorce' (1981) 19 *Journal of Family Law* 615, 646. McKay, above 75, 22 makes a similar statement.

¹¹² See for example Jenny David, 'Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australian Dispute Resolution Journal* 5. Also J Effron, 'Breaking Adjudication's Monopoly: Alternatives to Litigation Come to Law School' (1991) 2 *Australian Dispute Resolution Journal* 21; K Kraemer and D Singer, 'Teaching Mediation: The Need to Overhaul Legal Education' (1992) 47 *Arbitration Journal* 12.

¹¹³ We should not however assume an understanding of informal dispute resolution processes on the part of law graduates, and there is a need for law faculties to prioritise the teaching of alternative dispute resolution. See for example, Richard Calver, 'Teaching Alternative Dispute Resolution in Australian Law Schools: A Study' (1996) 2 *Commercial Dispute Resolution Journal* 209.

¹¹⁴ Sordo, above n 78, 25.

confirmation of their confidence to pursue an outcome that is consistent with their interests and those of their children.

It is acknowledged in making this recommendation that an awareness of the current limitations of some lawyers' knowledge of issues for women, and particularly of issues relating to domestic violence, is important. In particular, Nan Sueffert's work with women in New Zealand indicates a need to develop the understanding that many lawyers have of the dynamics of domestic violence.¹¹⁵ This is a matter then for legal education, both at the tertiary level and within the profession. Nevertheless it should also be acknowledged that, in general, lawyers have particular skills in 'providing for participation on an equal basis,'¹¹⁶ and that 'because of their experience in negotiation, (lawyers) are sensitive to issues of both power and rights.'¹¹⁷

IV CONCLUSION

A critical perspective on informal dispute resolution processes, such as that articulated here, can be confronting for those who want to see informal dispute resolution as an answer to the problems posed by adversarial approaches to family law disputes. The ability of Government, for example, to promote informal processes as uniformly balanced, equal and level negotiation fields is challenged by being explicit about the possible disadvantages that women can face.

If women are to be assisted in reaching fair post-separation agreements that support the best interests of their children through the proposed Family Relationship Centres, it is essential that our knowledge of issues for women in informal dispute resolution contexts is used to inform the family law reform agenda. It is certainly true that if the disadvantages and dangers for women participants are addressed that informal dispute resolution in the context of family disputes can potentially be used appropriately and safely. However, the 2005 reforms create the possibility for women and their children to be seriously disadvantaged because the heavy emphasis on informal dispute resolution is not accompanied by a sufficient acknowledgement of the dangers women may face.

This article proposes one way of making the approach to a new family law system in Australia equitable for women, and particularly for victims of violence, through providing a lawyer for the woman party to assist in the post-separation negotiation process. The role of the lawyer would be to prepare women for informal dispute resolution processes, to help represent and protect their interests during the process where necessary, and also to assist women with the terms and filing of a final agreement.

This proposal, through promoting the presence of a legally trained representative for women, addresses some of the many serious risks women can face in informal processes. It

¹¹⁵ Nan Seuffert, 'Locating Lawyering: Power Dialogue and Narrative' (1996) 18 *Sydney Law Review* 523.

¹¹⁶ Altobelli, above n 94, 229.

¹¹⁷ Altobelli, above n 94, 230, raises an important issue from the perspective of victims of violence, namely, that it can be argued that 'the legal profession has a history of accepting the responsibility for protecting the rights of traditionally disempowered members of society.'

also contributes to ensuring that fair and appropriate outcomes are reached through the processes to be administered by the proposed Family Relationship Centres.

A lawyer's involvement in informal family dispute resolution processes presents far greater opportunities for making these processes more equitable than it does threats. However, the costs associated with involving lawyers in this way requires a serious resourcing commitment from Government informed by an understanding of the many issues of disadvantage that women may face. In making this commitment the Government could clearly demonstrate an intention to work towards reducing the potential for unjust and inappropriate outcomes for women and their children in post-separation disputes.