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THE ARBITRATOR & MEDIATOR

MEDIATION: THE LGBTIQ+ DIMENSION

The Hon. Michael Kirby AC CMG

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ABSTRACT

This article addresses questions that may arise in a mediation involving people with a minority sexual orientation or gender identity (SOGI). It begins with references to recently publicized disputes involving leading sporting personalities. It recounts the instance of the social media and other statements by the successful Rugby Union footballer, Israel Folau, condemning LGBTIQ+ people and others believed by him to be in breach of Biblical instructions. The Folau litigation was ultimately settled by mediation. From this instance, the article proceeds to describe the categories and the topics that can arise in mediations involving sexual minorities. Some of the potential difficulties facing mediation in this context are mentioned. One of these is the issue of disqualification or recusal on the part of a mediator handling such matters. The need to extrapolate from particular approaches for this minority to other minorities is mentioned. Understanding the voice of sexual and other minorities is essential to any mediation involving such minorities, likely to result in a successful outcome.

Sexuality litigation, Israel Folau and mediation

The way that expression of religious opinions sometimes cause hurt or damage members of sexual minorities came to public notice recently in the context of a number of Australian sporting champions:

[*] Based on topics discussed at a seminar of Resolution Institute held in Sydney on 18 September 2018 at the offices of Colin Biggers and Paisley, Lawyers, Sydney. "LGBTIQ+" stands for Lesbian, Gay, Bisexual, Transgender, Intersex and other Queer persons. See below.

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- Cricket Australia imposed a $7,500 fine on the Melbourne professional cricketer, Marcus Stoinis. They found him guilty of using homophobic language during a Big Bash League match.[1]

- The legendary tennis player Margaret Court allegedly criticised the family of another Australian player, Casey Dellacqua and her partner and compared transgender children to the "work of the devil". This led to strongly opposing views concerning the call on Tennis Australia to uphold its commitment to include LGBTIQ+ people in tennis. And to discourage Ms Court from making comments that might be seen as promoting exclusion of LGBT players from the sport. As a result of the reported opinions by Margaret Court, calls have been made to rename the Margaret Court Arena in Melbourne to avoid association with her allegedly discriminatory opinions;

- The most publicised case in the genre involved the talented professional Rugby Union player, Israel Folau. He is an active member of the Assemblies of God Christian Fellowship in Western Sydney, conducted by his father Eni Folau, a pastor. In 2015, Israel Folau joined in condemnation of homophobia in football. However, the debate in 2018 over whether same-sex marriage should be legalised in Australia, caused him to make many critical remarks on social media related to that topic and also against legal amendments to facilitate gender change for transgender persons. Of this, Mr Folau reportedly informed a follower of his Instagram account that "God's plan for homosexuals" was "Hell… unless they repented their sins and turned to God." Facilitating the re-expression of gender identity was condemned as "the work of the Devil.";

- Australia's only openly gay male professional soccer player condemned Israel Folau's comments as liable to cause distress and negative feelings in an already vulnerable population.[2]

Eventually, after Mr Folau continued expressing his views, in and out of his Church setting, his contract with Ruby Australia was terminated by his code on the basis that his conduct breached the "inclusiveness" policy deemed essential to upholding the game's inclusiveness strategy. In the result, Mr Folau commenced proceedings in the Fair Work Commission claiming relief under the *Fair Work*

[1] Daniel Churny, "Stoinis Ashamed After Slur Sanction", *Sydney Morning Herald*, 13 January 2020 (online edition, accessed 12 February 2020). Mr Stoinis declared that he was "carrying the shame of being sanctioned by the organisation for making a homophobic slur". But he was hopeful that others would learn from his error. He said that it did not "sit well with my character and who I want to be". See also, M. Barnett, "Can Tennis Australia Honour Margaret Court and Promote LGBT+ Inclusivity at the Same Time?", *The Conversation*, 23 January 2020 (online).

[2] Monique Schafter, "Folau Comments 'Awful' says Australia's Only Openly Gay Professional Footballer", *ABC News*, (retrieved 3 September 2019).

Act.[3] An appeal by him to *GoFundMe* raised $3 million said initially to be to cover the costs of a challenge in the courts. When the fund shut down the campaign as contrary to its policies an alternative campaign was initiated raising over $2 million in two days.[4] Rugby Australia claimed to be protecting inclusiveness in a game that had earlier been unwelcoming to LGBT people, especially school children and young players. It was trying to change its ethos. Mr Folau alleged that he was being punished for expressing his religious views by which he was seeking to bring Biblical instruction into the lives of those who needed it.

The proceedings commenced in the Fair Work Commission concluded with a certificate confirming that all attempts to resolve the dispute between the parties had proved unsuccessful. Thereupon Mr Folau lodged a legal claim in the Federal Circuit Court of Australia seeking damages for unlawful termination of his work contract on the basis of his religion; also breach of contract; and restraint of trade. He also sought an apology and the right to return to playing the sport. His damages claim exceeded $14 million. The parties entered into confidential negotiations reportedly with the assistance of a "marathon mediation" ordered by the judge. The amount paid by Rugby Australia to secure an end to the distracting litigation was not disclosed; but a multi-million dollar payment was suggested. Both sides "wished each other well" for the future and apologised for any "hurt or harm" they had caused each other.[5] Rugby Australia affirmed that it did not agree with the content of Mr Folau's media posts. He asserted that he had only been fighting for his religious freedoms and that his case demonstrated the need for new legislation then being proposed by the Federal Government.

Commentaries on social media ranged from expressions of despair by LGBT interest groups to disappointment by some religious organisations. Mr Folau was urged to fight his case to the High Court so as to uphold his "religious freedoms" and to recover a big "win for religion and make himself $14M".

The Folau case illustrated the value of mediation from the point of view of terminating proceedings with huge cost potential and risky outcomes. However, the case also showed a disadvantage of mediation. Claims of the parties arguably involved important issues of public policy. Neither side secured a win for the contested principles they were each asserting, unless the speculated recovery by Mr Folau showed that it was he who scored the most wins. The whole matter may not have been wrapped up. The Anti-Discrimination Board of New South Wales quickly announced that it had

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[3] *Fair Work Act* (2009) (Cth), s 772.
[4] "Pause button hit after Folau's Christian Lobby fund passes $2M mark", *Sydney Morning Herald*, 27 June 2019 (retrieved 27 June 2019).
[5] Homophobic Australian Rugby player allegedly gets millions in settlement from Union" https://www.lgbtnation.com/2015/12/homphobic-australian-rugby-player-allegedly-gets -millions-settlement-league/; A. Livingstone, "Israel Folau, Rugby Australia settle dispute over his sacking", *The New Daily*, 4 December 2019: retrieved https://thenewdaily.com.au/news/national/2019/12/04/israel-folau-rugby-australia-settle/

decided to investigate a complaint that Mr Folau had engaged in vilification of homosexuality, contrary to New South Wales law.[6]

Classification by sexual orientation and identity

A portion of humanity can be identified by reference to their minority sexual orientation or gender identity (SOGI). Individuals may view themselves as falling into, or approximating, various sub-classifications by reference to their self-identification and the subject of their sexual and/or emotional interests and attractions. Thus, they may accept their sexual orientation to be Lesbian (L), Gay (G) or Bisexual (B), or mainly L, G or B. In some cases they will view their assignment to one such category as relatively stable or even permanent, such that they are prepared to view themselves as exclusively lifelong L, G or B. In other cases, individuals may regard their sexual orientation as fluid, changing over time, depending on the period, the circumstances or the then applicable objects of their sexual or emotional feelings.

These classifications of sexual orientation are to be contrasted with the self-classification of most members of society who regard themselves as exclusively heterosexual, so that the usual object of their sexual or emotional interests is a person of a sex or gender different from themselves.

In his examinations in the 1940s and 1950s of human sexuality, Alfred Kinsey, a professor of zoology at Indiana University in the United States, concluded that it was possible to classify all people on a scale of 0-6 as between an exclusively or overwhelmingly lifelong heterosexual orientation and identification or as purely or lifelong homosexual in sexual orientation. Although Kinsey did not then use the terms (LGBT) which have become common since his reports were written and although he favoured a continuum rather than strict categories, his research had a great impact. It has led to much more research.[7]

In addition to the foregoing sub-classifications, further categories are now commonly used in these respects. These reflect movements away from a "gender binary" assignment whereby gender identities are conceived of by reference mainly to the suggested appearance of their genitalia rather than sexual and gender identity or feelings. Such individuals include transgender persons (T) who regard, or come

[6] Julian Drape, "NSW Board accepts complaints against Folau", *Sydney Morning Herald*, 13 December 2019.
[7] A. Kinsey and Ors, *Sexual Behaviour in the Human Male* (1948) W.B. Saunders, Philadelphia; A. Kinsey and Ors, *Sexual Behaviour in the Human Female* (1953), W.B. Saunders, Philadelphia. Cf W.N. Eskridge Jr. *Dishonorable Passions: Sodomy Laws in America 1861-2003* (2008), Penguin, New York, Ch.4 109 ff. At p 116, Eskridge cites Kinsey as declaring: "Only the human mind invents categories and tries to force facts into separate pigeonholes".

to regard, their gender identity as different from that assigned to them at birth (usually by parents or doctors by reference to the appearance of their sexual organs). Additionally, another sub-classification involves the categorisation of ambiguous genitalia or reproductive organs or diversity of hormones that result in the person being forced to fit in an assigned category and sometimes to undergo surgical and hormonal intervention to confirm a parental or medical assignment, that may later come to be contested by the subject. Such persons may be described as "intersex" (I). In cases of gender identity, degrees of discomfort and contest over an earlier parental or medical classification may emerge later in the individual's lifetime. In some cases, the persons involved may be deemed suitable for, and they may perhaps be desirous of, surgical, hormonal or other interventions and sometimes correction ("reparation") of earlier designations or interventions with which the individual concerned has come to feel alienated.

On top of all of the foregoing categories there are now two additional groups commonly referred to. These include "queer" (Q) or asexual (A) persons who physically, intellectually or for both reasons object to such classifications generally or in their case. They insist on their entitlement to non-classification or to be classified by reference to the variability of their sexual interests. If these further sub-classifications do not embrace the whole range of sexual orientation and gender identities, it is not uncommon to add a "+" sign, in order to signal any other intermediate or shifting sub-classifications that resist assignment to any of the foregoing LGBTIQA categories.

In addition to the foregoing taxonomies of SOGI, there may, in some contexts, be added reference to "allies". This is done out of recognition of the fact that individuals necessarily go through life in relationships with others, most of whom may be blissfully uncomplicated in their own SOGI. They may still be happy to lend support to the right of all persons to be comfortable, and at peace, in their sexual and emotional lives and in their felt personal identities and feelings. As one notable Australian transgender leader (Catherine McGregor) often observed: (in effect) 'We commonly call peoples' sexual organs their "private parts". They are private and nobody else's business. We must get the state out of bedrooms and out of the obsession that some hostile people have over sexual classifications. People must be respected for who they are. Certainly, so long as other individuals are adults and competent to give and receive sexual, emotional or identity support for their lives, they should just be left alone.

Further sub-categories of sexuality

The foregoing primer on terminology needs to be understood by decision-makers and other persons who have the responsibility of determining matters that affect the lives and legal interests of LGBTIQA

people. It is useful to add to the classifications mentioned, various other taxonomies that have been applied to human beings over time:

* After European settlement, it was assumed by most Australians that everybody was, by nature, heterosexual in their sexual orientation and either male or female in their gender identity. There were biblical texts that were viewed as supporting this strictly binary classification of SOGI. To the extent that anyone claimed to be in doubt about their sexual orientation or gender identity, they had to get over it. Any "desires" they may feel for sexual or emotional relations with a person of the same sex as themselves, as determined by reference to the appearance of their genitals at birth, this was "unnatural". It was "contrary to the order of nature". Such feelings were "abominable". So objectionable were they, in biblical times, that they were even regarded as deserving the punishment of death.[8] Criminal law in English-speaking countries uniformly enforced this approach.[9]

  In this extreme way, anyone tempted to manifest or act out a minority SOGI was to be required by law to reject that temptation. If they had problems in doing so, they simply had to pretend otherwise. They had to act as if they were heterosexual, ("straight") or pretend that they had been "cured" of such "unnatural" feelings.

* Scientific research at the end of the nineteenth and throughout the twentieth century, increasingly demonstrated that such a response to an individual's SOGI was not, in practical terms, normally a workable option. It led to the deception of others and suffering for the subject and those in close personal relationships with them. With growing scientific awareness of the variability of sexual orientation came a demand for recognition and adjustment both of social attitudes and of the law that reinforced those values. Similar developments were to occur in relation to the earlier binary approach to gender identity by reference to the classification of sexual organs as perceived at the time of birth. It was at that time that it normally fell to the parents to register the birth. Such registration invariably required classification of the newborn infant as 'male or 'female'. In that way, quite quickly, classification for life was usually given effect. After the middle of the 20th century, dysphoria (serious discomfort) over the sexual feelings of persons and the state of their sexual organs ultimately led to surgical possibilities of "re-assignment" that have progressed in their possibilities over the past 70 years. However, some who identify as trans (T) do not wish to undergo the surgery involved in such "re-

[8] See e.g. *Genesis*, Ch. 18 v 20; *Leviticus*, Ch. 20 v 13. Cf. Holy See, Catholic Congregation on Education, *Male and Female He Created Them*, Vatican, Rome (June 2019).
[9] See e.g. *Crimes Act* 1900 (NSW).

assignment" which is radical and may be irreversible. In such cases, the person concerned feels no special discomfort with their body.

* In recognition of the changes of experience and outlook that were disclosed in increasing numbers, new expressions came to be used in this discourse. A nineteenth century word "gay", which had earlier been deployed to identify sex workers in England, came to be applied to "homosexual" persons, i.e. those (male or female) who felt sexual or emotional interest in, or attraction towards, persons of the same sex as themselves. However, this new binary classification differentiating "straight" and "gay" people soon also broke down. Some women with physical and emotional desires for other women preferred to describe that "orientation" or "choice" as Lesbian (L). At the same time some men who engaged in, or sometimes desired, physical or emotional contact with men, rejected classification of themselves as "gay" or homosexual. They did not regard themselves as appropriately classified by reference to their occasional sexual activity. Least of all as "gay", a commonly stigmatised category. For this reason, a further sub-classification has emerged (particularly in United Nations taxonomies) of "MSM" or men who have sex with men. In their own view many men in this category were primarily heterosexual or "straight". They did not wish to be classified as homosexual or "gay" by reference to any occasional sexual activity on their part which they viewed as immaterial to their basic identity or "lifestyle".

Expectations of justice, equality and non-discrimination

Although tedious, I have begun this analysis with these classifications and sub-classifications because anybody embarking upon decision-making affecting sexual minorities (LGBTIQA+) needs to be alert to the categories, at least in general terms. They also need to be sensitive to where particular individuals may feel comfortable in placing themselves, should it be necessary or relevant to identify their SOGI. Many will be happy to accept a label, whether it is LGBTIQA+. A minority may contest any label or reject it as applied to them. They may demand respect for their fluidity or their right to change their classification at different times.

Most of those who classify themselves as L, G, B or T, and in particular as L, G or B, do not regard the classification, in their own case, as fluid at all. Some of them, like the present writer, regard their classification as permanent and probably "wholly or partly" genetic in origin. As such, it is not regarded by them as "unnatural" or anything to be ashamed of. Those who are religious may regard it as part of God's design or one of Nature's variations for the human species. Because appearing in nature and in generally stable although relatively small numbers; because appearing in other mammalian species; and

because not eliminated by the normal circumstances of lack of progeny, they regard hostility toward people by reference to their SOGI as "unscientific", "irrational" and "ignorant" and in need of speedy change. They expect SOGI to be protected by anti-discrimination law and other measures of law reform as well as by social and educational developments.

The trend of modern informed opinion in Australia, and in an increasing number of countries worldwide, is towards acceptance of SOGI minorities and the removal of discriminatory laws against them.[10] An increasing number of legislative[11] and judicial[12] decisions have provided for the recognition of marriage and other civil rights for members of those minorities. These trends increasingly affect the perception by LGBTIQA+ people of themselves. And of their rights to justice and equality of treatment under the law. They also affect the attitudes of other non LGBTIQA+ persons towards the legal and social rights of that minority – although hostility still persists in some quarters particularly amongst older or religious persons and certain cultural groups.

The Legislature and Judiciary: Sexual and gender minorities

Having provided a broad outline of the applicable taxonomies for sexual minorities, it is now appropriate to recognise that decision-makers and public officials of every kind are inevitably going to become involved in decision-making that may affect the lives of individuals who fall into one or more of the categories of minority population groups, identified by reference to their SOGI, i.e. LGBTIQA+.

This paper is not addressed to how courts and other independent decision-making tribunals perform their duties in a way that is informed about, sensitive to, and aware of, the special needs that may exist in the application of laws and public policies affecting sexual minorities. Occasionally, those laws will require re-consideration because they were originally drafted on an assumption of strictly binary classifications. Sometimes they may need modification, in order to ensure equal treatment under the law for persons who may have special needs because of their minority SOGI status. In a sense, the important cases that have come before the High Court of Australia in recent times, relating directly or indirectly to the LGBTIQA+ minority in respect of same-sex marriage, have been instances where judicial adjustment to the pre-existing law was proposed to accommodate the needs or desires of SOGI minorities and what scientific research revealed about them.

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[10] As in the decision of the Supreme Court of the United States in *Lawrence v Texas* 529 US 558 (2003); and the recent decision of the Supreme Court of India in *Navtej Singh Johar v Union of India*, [2020] 1 LRC 3 (SCI).
[11] M.D. Kirby, "Marriage Equality: A Tale of Three Cities" (2016) 22 *University of Auckland Law Review* 11; M.D. Kirby, 'The Centenary of Sir Harry Gibbs: 'Constitutional Methodology, Lawmaking and the Marriage Plebiscite' (2016) *University of Queensland Law Journal*, 239.
[12] *Fourie v Minister* [2005] ZACC 19, SACC; (Constitutional Court of South Africa); *Obergefell v Hodges* 578 US (2015); 135 SCt 2584 (2015) (Supreme Court of the United States).

In *The Commonwealth v Australian Capital Territory*,[13] an adjustment was urged in the hearing of the challenge to the constitutional validity of the third attempt by the Australian Capital Territory legislature to provide relationship recognition beyond heteronormative personal relationships. Whilst the High Court of Australia invalidated the ACT law, it afforded a ray of hope to LGBTIQA+ people by its conclusion that the power to enact same-sex marriage in Australia was afforded by the federal constitutional provision for the making of laws with respect to "marriage" (*Australian Constitution* sec 51 (xxi)). This conclusion was affirmed despite the fact that the word "marriage" might, in 1901, have been generally understood by the founders of the Commonwealth as confined to heterosexual marriage.[14] This holding by the High Court removed a possible source of a further constitutional challenge to same-sex marriage in Australia by holding that the Federal Parliament, and only that legislature, could enact same-sex marriage. There was no constitutional impediment to its doing so.

The High Court's subsequent rejection of the challenge to the constitutional validity of the later proposed postal survey, established without specific legislation or express appropriation to the Executive Government,[15] led to another disappointment for the LGBTIQA+ minority, but also a second "silver lining". This was the affirmative vote in the postal survey then conducted, that returned a majority in favour of enactment of same-sex marriage. That vote, in turn, gave rise to the enactment, in December 2017, of amendments to the *Marriage Act* 1961 (Cth), permitting same-sex marriage in Australia.

ADR and Sexual and gender minorities

Many issues, some of them of a legal character, remain to be dealt with as the Australian legal system is opened up to adjustment of the law to accommodate the realities and legal needs of SOGI minorities and their relationships with others and with each other.

Just as in other public decision-making, there is a need for professional education to inform judges, tribunal members, legal practitioners, police and other public office-holders about the existence, variety and special characteristics of SOGI minorities. The field of alternative or additional dispute resolution (ADR) also presents needs for adjustment and change. This is especially the case because processes of alternative or additional dispute resolution may occur 'in the shadow of the law.' ADR is not independent of the court process; but parties are commonly referred into its processes as a "first port of

[13] (2013) 250 CLR 441; [2013] HCA 55.
[14] Ibid at 455; [2013] HCA at [14].
[15] *Wilkie v Minister* (2017) 91 ALJR 1035 (HC); [2017] HCA 40.

call" to ascertain whether they can resolve their differences consensually. In these situations, referral into processes such as mediation is often afforded to parties as a mechanism expediting access to justice, saving legal and other costs and improving self-determination. ADR can be a time sensitive process when relationships are at an impasse or where a formal legal mechanism might prove unduly burdensome costly or public (Productivity Commission 2014: 286). However, when its practitioners are not cognisant of the identities of the diverse social groups involved in their matters, such as SOGI minorities, insensitivity in any ADR process may aggravate the existing conflict and heighten the vulnerability of parties should they be required to proceed back to the sources of their referral.

In the case of arbitrations, the requirements for education and the provision of information to, and understanding of, the parties are much the same as in the case of litigation coming before the judiciary. In the past, the self-denial and silence of the SOGI minorities concerning their existence and the reality of their lives contributed to their invisibility. The consequent masquerade frequently diminished the necessity of decision-makers to address many of the injustices involved in unequal dealing with sexual minorities. Those injustices, arising from unequal treatment of like cases by reference to the identities of persons within SOGI minorities, have occasioned courses of instruction; seminars and workshops; and the preparation of papers, such as the present paper, in order to bring those who discharge arbitral duties, expert determinations, and other forms of private decision-making to awareness of the special needs and challenges that these minorities may present. Only by affording public and private decision-makers access to a full understanding of (and hopefully some empathy with) persons in the sexual minorities will injustices arising from ignorance and hostile attitudes be avoided or overcome.

If changes of this kind are necessary in judicial, arbitral and expert decision-making, they are even more important in the case of those forms of alternative (or additional) dispute resolution that involve mediation and conciliation. These are forms of decision-making procedures that involve a larger element of self-determination on the part of those who participate in them.[16] As such, it is imperative that the professional mediator or conciliator who is involved should be empowered to facilitate such self-determination lying at the heart of the mediation and/or conciliation process in question.[17] Further, the need to train private decision makers such as mediators and conciliators about at least some of the applicable realities of SOGI experience are heightened given the confidentiality obligations of mediation and conciliation. Such confidentiality, whilst designed to empower parties to speak freely during the ADR process, will often foreclose later external scrutiny of what occurred during the ADR.

[16] Lawrence Boule, *Mediation: Principles, Process, Practice*, LexisNexis (2nd ed) 2005, Sydney, 5, 200, 224.
[17] Jan Paulsson, *The Idea of Arbitration*, OUP, Oxford, 2013, 256-7.

Forms of mediation and conciliation vary, in part, by reference to local law and the nature of the issues being mediated or conciliated; in part, by reference to the terms of the agreement of the participating parties; and, in part, by reference to the inclinations and attitudes of the professional mediator or conciliator who has been appointed. However, the distinctive feature of mediation, at least, as taught in professional mediation instruction courses in Australia, demands that the mediator should not impose a solution on the parties. Certainly, this should not be done without the clear and express agreement or request of all of the participating parties. This is because the result of such an imposition is effectively to change the process from one of mediation (which is self-empowering for the parties) to one of determination (which is one of the imposition of a solution, either de facto or de jure, by consent).

In the ordinary case of a mediation, it is essential that the mediator should facilitate the reaching of a decision with the full, informed and assisted participation of the parties and any representatives whom they may have appointed to advocate for, or help, them. How can a mediation of this character exist, with true empowerment of the parties, if the mediator is unaware of important circumstances in the life of the parties, or of one of the parties, who may be completely (or mainly) unknown and possibly not understood by the mediator? If the mediator has never previously been consciously exposed to (or aware of) a particular sexual minority, he or she may not be able to draw from experience the necessary sensitivities and awareness of special difficulties or impediments without which the true empowerment of the parties may be impossible, or at least extremely difficult.

In contemporary Australia few people could probably now be unaware of individuals in the sexual minorities. However, this does not necessarily mean that the existence of awareness has developed into a full understanding, still less empathy and familiarisation about relevant features of the lives concerned. Yet such understanding and empathy may be important attributes for assisting the parties who are in dispute to move to an appreciation, or at least an awareness, of the viewpoint of the "other" and eventually to facilitate the resolution of a conflict that will ordinarily be the underlying objective of entering into mediation in the first place. Indeed, a common feature of mediation as practised in Australia involves participation in private sessions. These provide parties with an opportunity to convey to the mediator(s) their feelings on how the mediation is going; to share any concerns they may have about the nature of the communication that is taking place; and to consider possible options for moving forward in negotiations that seem to have stalled. A lack of trust and empathy during private sessions would be particularly unsettling to SOGI parties where it is important that mediators provide a safe environment for exploring any proposals that the party may want to bring back to negotiation, and reassuring them that their feelings have been heard and understood.

Much depends upon the subject matter of the dispute submitted to mediation and whether the SOGI status of one or both parties is in any way relevant to that subject matter or to the other parties who are

in dispute. In many cases, the fact that one participant to a mediation is, say, gay, will be completely or mainly irrelevant to the issues in contest and the needs of the parties to the mediation. However, that will not always be the case.

Hostility towards people in the sexual minorities has been of such long standing and so sharp and emotional, that it can occasionally lead to distaste or disgust that may be expressed or unexpressed but still apparent. A mediator sensitive to this possibility will have to handle it with care. A person may in some circumstances, when dealing with trusted friends and colleagues, be open about their sexual orientation or gender identity. Yet they may be deeply insulted or hurt if that issue were raised in a public way in a formal mediation procedure that includes strangers. This may especially be so if they regard their sexuality as completely irrelevant to the issues in dispute. Or if they see reference to the issue as the introduction of an irrelevant consideration intended to cause prejudice against them or hostility towards their contentions.

It is true that there should be no prejudice against LGBTIQA+ minorities in any mediation conducted in Australia. But the fact remains that prejudice does exist in our society. Attitudes of hostility and an insistence on unequal treatment was inherent in the demand of a number of Australia's political leaders, elected to the Australian Parliament, causing them to insist upon the unavailability of the legal status of marriage to that minority and then the interposition of an additional hurdle (first a proposed compulsory plebiscite and then a voluntary postal survey) before they would even consider a free parliamentary vote on affording the marriage status to individuals in Australia (mostly fellow citizens) who were LGBTIQA+.

If such hostility towards LGBTIQA+ Australians existed in the Federal Parliament (and was shown to exist at least amongst some of the 38% of citizens who voted against permitting the facility of marriage for LGBTIQ+ persons in Australia[18]), it should not be surprising that a similar attitude of disapproval or even hostility may sometimes arise in a mediation and amongst some mediators. Where such hostility exists, a mediator needs to consider the possibility that he or she may not be capable of exhibiting the empathy and creative outreach that are essential attributes of a professional and successful mediation, depending on the issues concerned. Candour and ethical participation will then demand a conscientious decision of recusal, if feelings of antipathy on sexuality grounds exist. Especially so if such feelings manifest themselves in emotions of distaste, disgust or prejudice towards a particular party or an identifiable issue that raises questions special to the SOGI status of a party to a mediation.

[18] Odette Mazel, "The politics of difference. Posting my 'vote' on marriage equality" (2018) 43 *Alternative Law Journal* 4 at 7.

Issues of the kind just mentioned, may sometimes arise *sub silentio*, simply because of the identity, conduct or statements of a party to a mediation who happens to be LGBTIQA+. However, if the issue in the mediation is expressly addressed to an attempted resolution of a question that is bound up in the SOGI status of one or more parties, then the matter will have passed from *sub silentio* to an aspect of the conflict between the parties. In that circumstance, the SOGI issues may need to be directly addressed and taken into account if the dispute between the parties is to be successfully mediated in an impartial and professional way.

Disputes that could involve the SOGI status of a person in a mediation include:

- Disputes in relation to the schooling of a pupil who has identified as LGBTIQA+ and who claims against a school that he or she has suffered unequal or unjust treatment, discrimination, bullying, hostile conduct either on the part of school authorities, teachers or fellow students;[19]

- Disputes in relation to the inclusion of a person who has identified as LGBTIQA+ in a religious institution or community, and who claims that he or she has suffered unequal or unjust treatment either on the part of religious authorities, or fellow faith adherents;

- Disputes in employment situations where an employee, who identifies as LGBTIQA+, claims discrimination by language, name-calling, bullying, cyber bullying, hostile texting and inadequate or wholly absent protection from discrimination on the part of the employer or the employer's officers; [20]

- Disputes between neighbours or community members and in civil society or other organisations. These may involve incidents of hate speech or verbal abuse (for example calling a person who is LGBTIQA+ a "freak" or "poofter" or "faggot"). In order to mediate the resolution of such a dispute successfully, awareness of the common life experience of SOGI

[19] If the time of publication of this article proposals for new legal protections for "religious liberties" in Australia had been advanced by the Federal Government. The potential of such provisions, if enacted, to lead to painful disputes between religious individuals and institutions (schools, colleges and hospitals) and LGBTIQ minorities emphasising the potential importance of ADR in such areas. Compare Patrick Parkinson, "The Future of Religious Freedom" (2019) 93 ALJ 600; Nicholas Aroney, "Can Australian Law Better Protect Freedom of Religion?" (2019) 93 ALJ 708; Harry Hobbs and George Williams, "Protecting Religious Freedom in a Human Rights Act" (2019) 93 ALJ 721.

[20] Joel Harrison, "Towards Re-Thinking "Balancing" in the Courts and the Legislatures Role in Protecting Religious Liberty" (2019) 93 ALJ 734 at 739; Cf. Brendan Gogarty & Ors "Religious-based exemptions from anti-discrimination law: Comparing jurisdictions that permit same-sex marriage" (2018) 43 *Alternative Law Journal* 225. This refers at 228 to the provisions of the *Sex Discrimination Act* 1984 (Cth) allowing religious organisations to discriminate on the basis of sexual orientation where it is "necessary to avoid injury to the religious susceptibilities of adherents of the religion"; as well, the *Marriage Act* 1961 (Cth) has provided a broad exemption to ministers of religion declining to officiate in a marriage.

minorities will often be essential if the mediator is to bring both sides to an understanding of the viewpoints of the other so that each can step into the shoes of the other and realise the needs for an adjustment in behaviour in the future and for a resolution to unlawful or unjust conduct in the past;

* Disputes within families will sometimes involve seemingly intractable problems where, for suggested personal, religious, cultural or other reasons, families have diametrically opposed positions in the mediation. A mediator who is unaware of the pain and hostility suffered by SOGI minorities and their contestants may not be able to assist much in such family disputes. Such disagreements can arise in cases of disputed wills or in *Family Provision Act* or equivalent proceedings. A mediator who is ignorant about such issues or unaware of the wellsprings of conduct and attitudes on both sides may not be able to play a constructive part that a mediator with awareness and understanding may be able to contribute;

* Disputes involving LGBTIQA+ participants may manifest an additional difficulty for mediation where a party or both parties may be suffering from a physical, mental or intellectual disability.[21] That disability might involve, for example, deafness to varying degrees or mental disabilities that add to the complexity of the SOGI element in the mediation. In such instances there may be needs for the engagement of specialised expertise if a full appreciation of the sources causing, or aggravating, the dispute are to be clarified and brought into full awareness for all of the parties involved;

* Particular disputes involving SOGI minorities may also arise in healthcare settings, in hospitals and in aged care facilities. Just as in the general community there are varying degrees of awareness, knowledge and understanding of SOGI people and their issues, so in hospitals, healthcare and aged care facilities staff in contemporary Australia, may increasingly derive from nationalities, religions and cultures less empathetic to LGBTIQA+ minorities than will generally now be the case in the broad Australian community. Likewise in regional, rural and remote Australia, attitudes may be different from those prevailing in metropolitan areas. An informed and alert mediator may be able to offer particular skills in bridging the gulf of experience and understanding that will be necessary if mediation procedures are to be successful, or at least useful. Aged care facilities in Australia are often managed by religious institutions. Sometimes (but by no means always) this fact might give rise to events involving perceived hostility that needs to be adjusted, including by reference to any applicable legal norms. Manifestations of SOGI identifications and expression of feelings may be upsetting to

[21] Alastair McEwin, "Q&A: Issues Facing LGBTI People Living with a Disability", *Star Observer* (August 2018), 46.

some other residents in aged care facilities who will possibly come from older generations less accepting of SOGI diversity than is now more commonly the case in the general Australian community. Relatives of aged care residents may also be less empathetic towards, or embarrassed about, manifestations of SOGI realities of family members or their relationships. Mediating disputes of this kind will require sensitivity and awareness that can only really exist if they are built upon an appreciation of the pain and humiliation that will often have been the experience in life of many older LGBTIQA+ persons in Australia; and

* Particular difficulties may arise in relation to transgender or intersex persons who are desirous of undergoing particular medical interventions. Although recent authority[22] of the Full Court of the Family Court of Australia has discarded a universal necessity of that court's intervention before access to hormonal and surgical procedures, in favour of a competent and informed decision-making of the young person and guardians concerned. Disputes of an acute kind may sometimes arise in family mediations aimed at deciding the course of intervention that will be in the best interests of the person most closely involved. Gender reassignment surgery involves some of the most radical surgical interventions that are possible, normally irreversible. The guiding principle must be the best interests of the patient involved. Where those interests lie can only be ascertained by an attitude of understanding, empathy and respect for self-determination, together with the provision of the best expert medical and other advice available for the case. If a mediator, with whatever skills in other fields of endeavour, is unable to bring heart and mind into harmony to assist parties in a mediation involving particular LGBTIQ issues, it is important that this should be acknowledged. It may then be possible for the parties to consider whether a different mediator should be appointed. If so, the occasion can possibly be used to secure agreement on the qualifications and identity of that mediator.

Disqualification, recusal: the basic approach

A person who is not themselves publicly identified as a member of a minority SOGI classification should not necessarily accept an argument of disqualification or incompetence unless the apparent difficulties appear too great. Many LGB persons themselves have had little experience or acquaintance with trans (T*), intersex (I) or asexual (A) minorities. They also may sometimes feel remote from the challenges faced by such minorities. Just as the minorities themselves sometimes feel disconnected from the rest of the LGB community.

[22] *Re Kelvin* [2017] FamCA 78.

Gay men may feel little or no common ground with lesbians and vice versa. So it should not be surprising that people in other SOGI sub-categories may sometimes feel no common ground with others. Mediators who are heterosexual or "straight" should not feel as if they have failed if, despite their own best endeavours, they cannot help the parties to resolve a dispute involving SOGI issues. Although understanding is certainly growing in most parts of the Australian community on these issues, the journey is only partly completed. Perhaps it will never be fully completed. *Tolerance* is an incomplete staging post on the journey of understanding. *Acceptance* and a recognition that all people are somewhere, ultimately uniquely, on the scale of SOGI categories, some of which were described by Alfred Kinsey, should reassure a newcomer to a dispute involving persons or issues of sexual minorities that the ground rules are relatively few.

Some basic rules would include:

* If a mediator feels out of their depth in terms of empathy, knowledge and experience, they need to say so and to consider recusing themselves from participating. At least this may be an appropriate course if such empathy, knowledge or experience appear likely to be important to the successful conduct of the mediation;

* The primary requirement is to fully understand any applicable law affecting the dispute and the SOGI minority involved. To the extent that the law has something to say about the dispute that law will prevail. It will prevail over attitudes, wishes and desires of the parties, whoever they may be;

* The professional development of mediators, who both do, and do not, fall within a SOGI minority status, in terms of their understanding of SOGI identity and community status, should be encouraged. It is necessary for mediators in Australia to complete 25 hours of professional development biannually under the National Mediator Accreditation Scheme (NMAS).[23] The NMAS recognises the relevance of Cultural and Linguistic Diversity (CALD) status to mediator capabilities.[24] In future reform of this requirement, a similar reference could also be made to proficiency in mediating matters relating to SOGI identity.

* If a lingering attitude of hostility or lack of empathy, or the possible appearance of such feelings on the part of a mediator still exists, recusal is the only proper course.[25] This is because

[23] Mediator Standards Board (2015), p.5
[24] Mediator Standards Board (2015), p.5.
[25] *Concrete Pty Ltd v Parramatta Design & Development Pty Ltd* (2006), 229 CLR 577; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; *Ebner v Official Trustee in Bankruptcy* (2000)

mediation is aimed at assisting the parties to bring self-determination to bear on their dispute. Ultimately that can often only happen if the mediator can engage effectively with the parties, supporting and helping all sides to see the other points of view that may exist in their dispute;

* Even where mediators consider themselves skilled and able to conduct a mediation with a SOGI element, it will sometimes be advisable, funds permitting, for them to arrange a co-mediator to host the meeting between the parties. This is because mediating in particularly sensitive areas, such as family disputes or where core aspects of an individual's identity are 'up for discussion' (including SOGI status), this is inevitably a challenging and sometimes a confronting process. The additional safeguards that a co-mediation provide may help mediators to offset each other's professional 'blind spots' and to facilitate constructive discourse with all the parties.

* Top down imposition of outcomes, except by clear agreement and request of the parties (and then only where that is lawful and appropriate) is not normally the way of mediation. Mediation respects and helps the parties to agree, if they can. But it respects and accepts the parties if they cannot agree. Where that occurs, access to the courts, which will impose a solution according to law, may be the only solution to the dispute, if the parties feel the need to press the dispute so far. But it is often an unsatisfactory, temporary solution leaving the basic cause of the disagreement unaddressed and the fractured relationships unrepaired.

* The role of pre-mediation meetings between the mediator and parties cannot be underestimated where SOGI elements loom on the horizon. Pre-mediations may be used to estimate the overall tone of the relationship between the parties, their ability to anticipate any challenges that are likely to occur in the mediation and proactively to consider ways of handling these challenges and strengthening rapport between the mediator and the parties themselves so that every participant has a sense of trust and confidence in the process. Pre-mediation may also be used to detect whether the antipathy between parties is such that mediation is not an appropriate process. In such circumstances, at least where the case or dispute has been referred to mediation 'in the shadow of the law', the parties can revert to the court or tribunal that referred the matter to mediation so as to request a recommendation.

* Where, after pre-mediation, continuing onto mediation remains an option but is likely to be particularly challenging, mediators can build additional safeguards into the process. These include allowing parties to nominate accompanying support people to participate in the mediation with consent of all parties. They may also involve encouraging parties to enlist the

205 CLR 337 at 156 [54] ff; 386 [157] ff. *Johnson v Johnson* (2000) 201 CLR 488 at 492 [10]ff; 503 [44] ff. Although cases involving judges, some of the same principles may apply by analogy in the case of mediators.

support of cognate services such as SOGI minority attuned social workers or psychotherapists. Or possibly organising a skilful co-mediator to facilitate the discussion. In the examples above, conflicts involving enduring relationships or co-existing identities that may be important to LGBTIQA+ community members are particularly apt for pre-mediation. For example, mediations involving conflict between family members and an individual regarding their transgender status or conflict in a religious setting relating to the faith adherence of a SOGI minority individual may call for the presence of support people for both parties.

* Mediations relating to the LGBTIQA+ status and situations of value-based conflict are in one sense a cause for optimism. This is because these discussions may be important when, the 'stakes are high.' Whereas previously SOGI identity was addressed by silence and stigma, a skilfully conducted mediation has the potential to buttress a fundamental aspect of an individual's self-identity and generate both empathy or, at least, understanding. There are often emotional and interpersonal consequences that should not be underestimated.

Conclusion: Giving LGTIQA+ a voice

LGBTIQA+ Australians are human beings with full and complex lives extending far beyond the SOGI elements of their existence that results in their classification at some point on the scale of sexual diversity. All human beings have "dignity and rights".[26] SOGI status is only one aspect of an individual's human dignity and rights. The commonalities and intersectionalities of human beings will generally contribute to the finding of solutions to their disputes that the disputants can all accept.[27] The inability to do so in particular cases may sometimes derive from, or be influenced by, the SOGI experience.

Where this happens, the mediator should not necessarily count an inability of the parties to agree as a "failure". It is only a failure if the ultimate disagreement derives from hostility, ignorance or lack of human empathy on the part of the mediator. Or from ignorance, abiding hurt or irremediable differences on the part of the parties. In mediations, the guiding principles are always: lawfulness, professionalism, empathy and self-determination. If these features of professional mediation are upheld, and faithfully applied in all matters affecting or involving LGBTIQA+ minorities , they will often be useful in dispute resolution in Australia concerning other vulnerable persons. Giving a voice and achieving a measure of empathy and acceptance is often necessary in matters that involve an LGBTIQA+ element. In the past

[26] *Universal Declaration of Human Rights*, art 1.
[27] 'Intersectionality' is a reference to possession of two or more cross cutting characteristics of marginal status. It was first mentioned in the context of feminist theory but is now taken to apply to the interplay of several categories of disadvantage, e.g. gender, race, sexuality etc.

this was often missing. The scars are still felt. This is why mediation is a process of special utility where persons in the LGBTIQA+ categories are involved in a dispute.

It may be hoped that this description of some of the challenges and opportunities of ADR involving people and issues concerning sexual orientation and gender identity will help professionals to help others. Until recently the law, and the entire paraphernalia of dispute resolution, were uniformly hostile in Australia towards LGBTIQA+ people, their lives and disputes. The challenge now is to bring this category of fellow citizens into full engagement with the complete range of dispute resolution mechanisms so that equal justice under law can become a reality for all Australians.