

Justice Quality and Accountability in Mediation Practice: A Report

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Justice Quality and Accountability in Mediation Practice

Executive Summary

Introduction

Changes in government policy have led to greatly increased use of mediation as a means of resolving disputes arising in family law, commercial law and civil matters in both courts and tribunals. State and Federal Attorneys-General have seen mediation as an important tool in improving access to justice for ordinary citizens. Ensuring mediation reflects values of the access to justice movement is a goal which policy makers, practitioners, courts and tribunals aspire to. In Victoria, the government has mandated ADR processes (including mediation), stating that the 'civil litigation system has become out of balance and is increasingly unable to achieve essential goals of accessibility, affordability, proportionality, timeliness and getting to the truth quickly and easily.'¹ Drawing on insights provided by practitioners, mediation service-providers and policy makers, tribunal members and magistrates, we explore the justice quality of mediation and comment on accountability within the mediation field. We examine issues relating to mediation and justice, particularly whether mediation should be concerned with justice and, if so, should it be concerned with procedural or substantive justice or both? In concluding we suggest how the justice quality of mediation could be measured.

The research

This document reports on findings from empirical research conducted on the issue of justice quality and accountability in mediation practice. For purposes of this research, procedural justice refers to fairness of process; substantive justice refers to fairness of outcome; and justice quality refers to the fairness of both the process and the outcome of a mediation. Accountability refers to compliance with and enforceability of the ethical responsibilities of mediators in relation to the justice quality of mediation. Views of practitioners, policy makers, magistrates and other stakeholders on whether and how the justice quality of mediation is and should be maintained are reported. It presents views on whether mediation should be concerned with procedural and/or substantive justice and it presents views on issues of accountability in mediation practice.

The research consists of two stages. The goal of stage one was to develop a pilot mechanism by which to measure the quality of mediation, including developing a robust set of criteria for measuring quality and ensuring accountability in mediation practice. The second stage will involve the trialing of the criteria against a range of mediation practices. This report details stage one. A literature review of the issue of justice in mediation and accountability in the practice of mediation was conducted and a qualitative research method adopted to gather the views of mediators about justice in mediation.

Findings from stage one highlight practitioners' views on justice quality and accountability in mediation practice. In conclusion, the researchers present criteria by which the justice quality of mediation practice can be measured.

¹ Attorney-General, Rob Hulls' Second Reading Speech (Civil Procedure Bill 2010(Vic), 24 June 2010.

Research findings

Identifying and addressing disadvantage in mediation

In this research, justice quality refers to a combination of substantive and procedural justice. Participants were asked questions about how the justice quality of mediation is guaranteed in practice, particularly as it relates to disadvantaged parties. Participants were asked how they would identify disadvantage and what they would do to address disadvantage in order to ensure the justice quality of mediation.

- **Circumstances resulting in disadvantage:** Participants were of the opinion disadvantage could result from a range of factors and disadvantage may affect capacity to mediate effectively. Circumstances identified as resulting in disadvantage include lack of legal representation by a party in mediation, lack of skills, lack of information, gender, ethnicity, relative status of parties, health issues and other factors which may result in power imbalance.
- **How disadvantage is identified:** Participants identified various ways in which disadvantage may be identified, including interviewing parties during the intake process. Participants also reflected that disadvantage may only become obvious during the mediation process and spoke about the difficulty of identifying disadvantage which may affect capacity in a mediation process.
- **Addressing disadvantage:** In relation to addressing disadvantage, this is dependent on the type of disadvantage. Ways of addressing disadvantage identified by participants include using cultural advisors, allowing support persons in the room, legal representation, provision of information, referral to other services, or any other support which may be required based on the parties' circumstances.
- **The scenario:** Participants were presented with a scenario (see below page14) and were asked to identify the issues they would be concerned with if the matter were referred to them for mediation. The researchers found a marked difference in responses provided by participants. The response provided reflected the background of participants. Some participants with a legal background identified some of the legal issues that may impact on the justice quality of the outcome, while others identified non-legal issues including language, lack of legal representation, cultural issues and so on. For some participants, awareness of legal position is critical to mediation in certain cases.

Mediators do attempt to identify disadvantage. They use different methods to address disadvantage and aim to enable a party's capacity to mediate effectively. In relation to the intake process, the research found that practices differed between mediators and mediation service-providers. Some organisations have robust intake processes while others did not. There was also heavy reliance on the skills and experience of a mediator in ensuring justice quality. In addition, while support may be sought for parties either in terms of legal representation or other support, participants spoke about the quality of support that may be provided. Whether or not justice quality is ensured therefore depends on a number of factors including robustness of intake processes, the skills, knowledge and experience of the mediator and the quality of support available to parties in mediation.

Should mediation be concerned with procedural and/or substantive justice?

Literature shows a difference of opinion about whether mediation should be concerned with substantive justice. The popular view is that mediation is about process and so justice quality should only be measured in terms of procedural justice elements and not substantive justice. Participants were asked whether mediation should be concerned with justice and, if yes, should it be concerned with procedural and/or substantive justice.

- **Should mediation be concerned with justice?** Most participants questioned what justice really means. However most agreed that mediation should be concerned with and deliver justice. Most problematic was how justice should be defined if it is going to be used as a metric for measuring quality. Is it justice as conceived by the parties or legal justice? Some participants were of the view that any mediation conducted within the ambits of the legal system should be concerned with justice as defined within that system.
- **Should mediation deliver procedural justice?** All participants agreed that mediation should deliver procedural justice. Some spoke about the correlation between procedural justice and substantive justice. Some were of the opinion that once procedural justice is ensured, any outcome resulting from that process would be just or acceptable to the parties.
- **Should mediation deliver substantive justice?** Some participants found this more problematic. This was due to the difficulty they associated with measuring substantive justice. Another issue relates to the fundamental value of most mediation models, which is self-determination. To promote self-determination, parties must be left to determine outcomes without interference from the mediator. In a situation where a party is about to agree to an outcome in breach of a legal right, some participants felt that a mediator should not interfere except to check with the party if they were sure they wanted to agree to that term of settlement. Some participants were, however, of the view that they had ethical responsibilities to ensure that a party unaware of a legal right is not allowed to agree to a term which fails to accommodate that legal right. Some participants would ensure that this does not happen. The level of intervention also varied among participants – some would call a private session and be more direct with the party about the issue and some would use indirect methods to ensure that the party knows the implications of the decision they are about to make.

Processes for ensuring justice quality

Participants identified a range of processes used to ensure justice quality, including having a complaints mechanism, provision of training and professional development sessions for mediators, ensuring the fundamental principles of mediation are complied with, intake processes and private sessions.

- **Intake:** The intake process or initial assessment was identified as a key factor in maintaining quality and the justice quality of mediation, As stated above, however, the intake process differs across organisations and practitioners. In addition, there is no standard guide on how the intake process should be conducted. Some participants, however, had in place what could be referred to as intake best practice.
- **Reality testing of options in private sessions:** Private sessions were identified as a process which ensures the justice quality of mediation. Reality testing of options are conducted in private

sessions. This involves the mediator engaging with the party without providing advice in order to assist the party to consider alternative outcomes. As with the intake process, the research found that conduct of private sessions differed across organisations and practitioners. Some practitioners would provide advice even when using a facilitative model, some would be direct and some indirect. In addition, the skill, knowledge and experience of a practitioner would determine whether the private session ensures the justice quality of the mediation.

- **Evaluation of services/programs:** Periodic evaluation of services was identified as a means of ensuring justice quality in mediation practice. However, it was found that most evaluations focused on procedural justice and not substantive justice. One participant, however, spoke about the current organisational evaluation which considers substantive justice but which results are not yet publicly available.
- **Accreditation:** Although not part of the mediation process, accreditation was identified as a means of ensuring the justice quality of mediation. Accreditation of mediators is currently a voluntary process in Australia. It ensures, however, that those who go through that process have received the required training and have been accredited to practice through a Recognised Mediator Accreditation Body (RMAB). The RMAB also has the responsibility of making available professional development programs for its accredited mediators. All these are to ensure justice quality in mediation practice. All accredited mediators are required to comply with the National Mediator Practice Standards set out by the Mediator Standards Board (MSB) as part of the National Mediator Accreditation System (NMAS).

Benchmark for measuring the justice quality of mediation outcomes

Participants were asked to suggest benchmarks for measuring the justice quality of mediated outcomes. As discussed above, participants were divided about whether to use legal or parties' standards in measuring justice quality. Some participants did identify a number of benchmarks including legal norms. Others were of the opinion that a range of benchmarks should be used, including whether the parties were asked if they required information or legal advice. On the whole, there was more focus on procedural rather than substantive measures of justice quality.

Public accountability in mediation

Participants were asked how accountability in mediation is ensured and whether there are complaints mechanisms in place for use by parties dissatisfied with mediation practices. Participants spoke about how confidentiality of the mediation process and outcomes may do more harm than good in relation to accountability. Also, as mediated outcomes are not publicly available, unlike court judgments, it is impossible for the public to evaluate the justice quality of outcomes. Also raised as an issue, and flowing from confidentiality, was the lack of capacity to address systemic issues through mediation. On the issue of complaints mechanisms, the researchers found that accrediting bodies are required to have complaints mechanisms in place, but the quality and rigorousness of the mechanism differed across organisations. Also, parties may not be aware of whether there is such a process and how to use it. For unaccredited mediators, there may be no complaints mechanism available to the parties to use.

Conclusion

The goal of stage one was to develop a pilot mechanism by which to measure the quality of mediation, including developing a robust set of criteria for measuring quality and ensuring accountability in mediation practice. The findings of this small research project suggest there needs to be further discussion about what does justice mean in the mediation content and attention given to how to measure the justice quality of mediation. The content and context of the mediation will have a bearing on the assessment of justice.

In the interim, the researchers suggest justice quality could be measured using values which are widely accepted within the society, including social and legal values (principles), and which the parties understand as applicable to their dispute. In addition, the five principles of access to justice articulated by the Federal Attorney-General – accessibility, appropriateness, equity, efficiency and effectiveness – may be developed for use as benchmarks for measuring justice.²

² Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 62

Background and Introduction

Alternative (or Appropriate) Dispute Resolution (ADR) is now an integral part of the civil justice system in Victoria and Australia.³ So much so that the label 'alternative' is now challenged due to the many ADR processes accepted 'within, outside and beside the formal civil and criminal justice systems'.⁴ The 'A' in ADR now refers in many quarters to 'appropriate' rather than 'alternative'.⁵ Growth in the use of ADR processes is connected to the access to justice movement, which began in the 1960s and 1970s. This movement led to the establishment of dispute resolution institutions such as ombudsmen services, specialist tribunals and community/neighbourhood justice centres.⁶ Since this time the use of ADR processes has continued to grow. In addition, the exponential growth of ADR is associated with its institutionalisation. Courts now provide ADR options to parties and ADR is now mandatory in some cases, whilst in others it is a pre-condition to accessing the courts. Nowadays court- annexed dispute resolution schemes dominate the dispute resolution landscape.⁷

Many nations have identified and attempted reforms to their civil justice systems.⁸ Problems identified in the operation of the civil justice system include high costs, delay, uncertainty, fragmentation and the adversarial nature of litigation.⁹ In 1994, the Access to Justice Advisory Committee (AJAC) was commissioned '... to make recommendations for reform of the administration of the Commonwealth justice system in order to enhance access to justice and render the system fairer, more efficient and more effective'.¹⁰ The Committee found that the 'law has been more than inaccessible and unfair to some groups, but has been an active agent of oppression and discrimination'¹¹ and recommended 'resort to ADR'.¹²

³ See Victorian Law Reform Commission (2008). Victorian Law Reform Commission Civil Justice Review: Report. Melbourne. See also National Alternative Dispute Resolution Advisory Council (2009) *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction – A Report to the Attorney General*, Barton ACT. See also Victorian Parliament Law Reform Committee (2009) Inquiry into Alternative Dispute Resolution Parliamentary Paper No. 184, Session 2006-2009 pp 18-12.

⁴ Gutman, Judy (2010) 'Legal Ethics in ADR Practice: Has coercion become the norm?' *Australasian Dispute Resolution Journal* p 21

⁵ Victorian Parliament Law Reform Committee (2009) Inquiry into Alternative Dispute Resolution Parliamentary Paper No. 184, Session 2006-2009 p21.

⁶ Victorian Parliament Law Reform Committee (2009) *Inquiry into Alternative Dispute Resolution* Parliamentary Paper No. 184, Session 2006-2009 p 19.

⁷ Spencer, David, and Hardy, Samantha, *Dispute Resolution in Australia: Cases, Commentary and Materials*, 2009 Pymont, NSW, Thomson Reuters.

⁸ Most notable of these is the reforms in the UK initiated by Lord Woolf. See Woolf, Lord, *Access to Justice: the Final Report* 1996. Available from <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>. Accessed April 2011. In the UK, expansion of ADR processes (including increased community education about ADR and providing legal aid funding for ADR) was identified as a large part of the solution to the problems of the civil justice system in the UK. Reforms to the civil justice systems in Australia have followed similar paths to the UK, attempting to improve accessibility, affordability, proportionality, timelines and the ability to get to the truth quickly and easily.

⁹ King, Michael, Freiberg, Arie, Batagol, Becky and Hyams, Ross, *Non-Adversarial Justice*, The Federation Press, 2009 at 10-11.

¹⁰ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at xxiii.

¹¹ Access to Justice Advisory Committee, Access to Justice – An Action Plan 1994 para 2.4

¹² Access to Justice Advisory Committee, Access to Justice – An Action Plan 1994 p. 279

All Australians regardless of means should have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.¹³

The Committee thus recommended 'continued development of ADR programs in Australia.'¹⁴ ADR was viewed as relevant to providing access to justice.¹⁵ Some of the advantages of ADR identified by the Committee included provision of broader remedies and less-costly and less-formal processes:

ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes ... the outcomes are those which the parties themselves have decided and are not imposed on them.¹⁶

Thus, ADR processes are now considered to be one solution to the civil justice system's increasing inaccessibility, heavy caseloads and rising costs. Recent reviews of, and recommended reforms to, the Victorian and federal civil justice systems, identify further development and utilisation of ADR processes as integral to improving access to justice in the civil justice system.¹⁷ These reviews identify that because most disputes are resolved outside of the court system, elements that allow for every citizen to achieve 'everyday justice' must be viewed as a necessary part of policy and legislative attempts to ensure a just society.

Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible—whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals).¹⁸

At the federal level, access to justice principles include: accessibility, appropriateness, equity, efficiency and effectiveness,¹⁹ with elements of effectiveness including 'delivery of fair and appropriate outcomes, and maintaining and supporting the rule of law.'²⁰ In line with or alongside reforms occurring at the federal level, the States have also made ADR a priority within the civil justice system. In 2004, Victoria released Justice Statements which focused on ADR as a process which could address some of the concerns about the State's civil justice system. The goal was to

¹³ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at 7.

¹⁴ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at 300.

¹⁵ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at xxxix.

¹⁶ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at 278.

¹⁷ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p. ix. See also Law Reform Committee, 'Inquiry into Alternative Dispute Resolution and restorative Justice' Parliament of Victoria, May 2009.

¹⁸ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p. 4.

¹⁹ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at pp 62-63.

²⁰ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 63

address 'systemic discrimination', reduce the cost of justice, institutionalise ADR, and improve the civil justice system and the court system.²¹ ADR was to be expanded to benefit the community, businesses and industries:

Mediation in the community will be encouraged and, if people need to go to court, the courts will actively seek out ways to identify the core issues in dispute and resolve them using ADR techniques.²²

In the new landscape for civil litigation, it was envisaged that court proceedings would be the last resort, used only after other more appropriate means had been attempted. Court case management approaches and pre-trial reviews would, among other things, consider whether parties had reasonably attempted ADR processes to resolve the dispute and/or prescribe steps to be taken by parties to resolve the matter out of court. The reforms also focused on simpler rules; effective use of timetables to determine the length of a trial; and an estimate of costs fixed. Legislation has been introduced at the federal level and in Victoria to institutionalise ADR.²³ In 2010, the Victorian Government passed the *Civil Procedure Act 2010*. Section 7 (1) states:

The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.²⁴

In 2008, the federal Attorney General, Robert McClelland, requested the National Alternative Dispute Resolution Advisory Council (NADRAC) to report on how to encourage greater use of ADR in civil proceedings. In his letter to NADRAC, he stated:

I am concerned about the barriers to justice that arise in the context of civil court and tribunal hearings. It is very important to encourage parties to civil proceedings to make greater use of ADR to overcome court and tribunal barriers to justice.

I am currently in the process of considering a range of measures aimed at increasing accessibility to justice.²⁵

In 2009, NADRAC delivered its report *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, which contained a number of recommendations to the Federal Government on increasing and enhancing ADR processes. This report informed the *Civil Dispute Resolution Act 2011* (Cth). The object of this Act is:

to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.²⁶

Recent policy and legislative reform to the civil justice system is couched in aspirations to improve access to justice. Further access and use of ADR processes is identified as one of the avenues through which to achieve this. In 2009 Federal Attorney-General Robert McClelland stated that access to justice is 'central to the rule of law and integral to the enjoyment of basic human rights. It

²¹ Hulls, Rob, Victorian Government Attorney-General, Attorney General's Justice Statement 2, Introduction, October 2008, p. 5.

²² Hulls, Rob, Victorian Government Attorney-General, Attorney General's Justice Statement 2, Introduction, October 2008, p. 39.

²³ *Civil Dispute Resolution Act 2011* (Cth) and the *Civil Procedure Act 2010* (Vic).

²⁴ *Civil Procedure Act 2010* (Vic).

²⁵ National Alternative Dispute Resolution Advisory Council, 'The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction - A Report to the Attorney General' 2009 Barton, ACT.

²⁶ *Civil Procedure Act, 2010* (VIC), *Civil Dispute Resolution Act 2011*.

is an essential precondition to social inclusion and a critical element of a well-functioning democracy.²⁷

Although increase in the use and institutionalisation of ADR, as discussed above, are aimed at addressing systemic issues within the civil justice system, the connection between increasing ADR processes and institutionalisation and improved access to justice has caused some debate.²⁸ It appears that the Access to Justice Advisory Committee recognised the possibility that ADR may struggle to deliver justice in certain circumstances when it encouraged 'appropriate training for mediators', and establishment of 'screening processes to identify parties whose disputes may not be suitable for mediation', and said that court-annexed mediation programs would need to be evaluated regularly 'to identify whether any of the potential risks have eventuated and to introduce measures to correct any identified problems.'²⁹ It is now argued that policy attempts to increase and mandate the use of ADR processes may be more focused on cost savings for governments than on improving access to justice. Fiss, Genn and Noone, among others, have raised issues in relation to the potential of ADR to deliver justice. Fiss argues that settlement in ADR is a 'truce more than a reconciliation',³⁰ Genn argues that mediation is not about 'just settlements' but 'just about settlement'.³¹ Welsh argues that the mediation field's focus is on skills and little attention is paid to issues of justice.³² Noone argues that there is a disconnect between transformative mediation and social justice and that ADR may not promote public interest issues.³³ In addition, Waldman asks whether mediation should focus on procedural justice alone and not on both procedural and substantive justice.³⁴ Akin Ojelabi evaluates mediation in light of Rawls' categories of procedural justice and argues that mediation does not fit perfectly into any of the pure, imperfect or perfect procedural justice categories enunciated by Rawls. She argues that policy makers and regulators need to pay more attention to issues of justice so that mediation could address the ills of the civil justice system it was set up to do and, if not a panacea to the ills, it should not contribute to them and should avoid being labelled an unjust process as there are many benefits to be realised from the use of mediation.³⁵

Specific issues raised in relation to justice and mediation include the loss of public interest law cases due to the mandated and private nature of ADR, inherent power imbalances, the informal nature of mediation, inequities and cultural differences present in some disputes. In addition, the current

²⁷ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p. ix.

²⁸ See for an overview of the debate, Akin Ojelabi, Lola 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 318 from 320.

²⁹ Access to Justice Advisory Committee, 'Access to Justice – An Action Plan' Commonwealth of Australia, 1994 at 279-280.

³⁰ Owen, Fiss, 'Against Settlement' *The Yale Law Journal*, Vol 93 (1984) 1073 at 1075.

³¹ Genn, Hazel, *Judging Civil Justice*, The Hamlyn Lectures 2008, Cambridge: Cambridge University Press at 117.

³² Welsh, Nancy, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' *Journal of Legal Education*, Volume 54 Number 1, 2004 at 49.

³³ Noone, Mary Anne 'The Disconnect between Transformative Mediation and Social Justice' (2008) 19 *Australasian Dispute Resolution Journal* 114. See also Noone, Mary Anne 'ADR, Public Interest and Access to Justice' (2011) 37(1) *Monash University Law Review* 57. Cf Baruch Bush, Robert A, and Folger, Joseph "Mediation and Social Justice: Risks and Opportunities" *Ohio State Journal on Dispute Resolution* Vol 27 2012. Bush and Folger argue that mediation 'can be supportive of, or at least not inimical to, social justice' if transformative mediation practices are utilised. These include a party-oriented or party-driven process supporting self-determination and empowerment. See pp 1-2, 35-42.

³⁴ Waldman, Ellen (ed.) *Mediation Ethics: Cases and Commentaries*, 2011 Jossey-Bass, A Wiley Imprint.

³⁵ Akin Ojelabi, Lola 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 318

diverse, complex and largely unregulated ADR landscape and the inherent principles within some ADR processes create complexities for ascertaining the ability of ADR to improve access to justice or provide justice outcomes. While ADR processes may lead to increased access to settlement of disputes, increased access to justice may be a different matter and may require additional resources and further development.

Other mediation proponents have however argued that mediation promotes justice and that this is because it delivers outcomes that are acceptable to the parties.³⁶ Stulberg, for example, argues that mediation could be 'referred to as a process of "pure procedural justice"'.³⁷ He does this by first identifying factors that may lead critics to the conclusion that mediation is not a just process: involuntary decision-making; negotiating away fundamental interests, for example, freedom; agreeing to illegal terms; agreeing to terms that violate human dignity; lack of informed decision-making; agreeing to terms that contradict fundamental societal values. Stulberg then argues that the mediation process has the capacity to address these issues either through codes of conduct, allowing legal representation or through the skills of the mediator. Mediators can 'build conditions and constraints into the conception of the mediation procedure that minimize or escape the impact of those criticisms'. The procedure or constraints include voluntariness; inalienability of interests; publicity of outcomes; dignity and respect; informed decision-making; and toleration of conflicting fundamental values.³⁸ These are benchmarks for measuring the justness of the outcome, according to Stulberg but the questions remains whether these benchmarks will be met with a focus only on procedural justice without adequately or directly addressing power imbalances on the mediation process.

On the other hand, Bush and Folger argue that mediation has the potential to promote social justice although interventions by facilitative mediators are limited in relation to achieving this goal.³⁹ According to Bush and Folger, mediators have responded differently to the issue of substantive justice in mediation, and in particular, facilitative mediators take steps to balance the power between the parties and ensure that the outcome is mutually acceptable and that in this way, facilitative mediators are concerned about substantive justice.⁴⁰ Other responses include a departure from the facilitative model of mediation to mediators 'informing and educating parties about the larger structural context of their conflict, or showing them how their problems might relate to and stem from larger structural inequities'.⁴¹ Bush and Folger question whether strategies employed to address issues of substantive justice 'are reliable or sufficient to avoid the risks of

³⁶ Hyman, Jonathan and Love, Lela P, "If Portia Were a Mediator: An Inquiry into Justice in Mediation" (2002–2003) 9 *Clinical Law Review* 157.

³⁷ Stulberg, Joseph B, "Mediation and Justice: What Standards Govern?" *Cardozo Journal of Conflict Resolution* Vol. 6 213, 2005 pp 215, 221-222. Cf Akin Ojelabi, Lola 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 318 who argues that empirical research and review of mediation processes do not lead to the conclusion that mediation is a case of pure procedural justice as enunciated by Rawls. See also Stulberg, Joseph B, "Must a Mediator Be Neutral? You'd Better Believe it" 95 *Marquette Law Review* 829 (2012) where Stulberg argues that mediator neutrality better facilitates social justice than impartiality.

³⁸ Stulberg, Joseph B, "Mediation and Justice: What Standards Govern?" *Cardozo Journal of Conflict Resolution* Vol. 6 213, 2005 pp 215, 227-228.

³⁹ They define social justice as 'the absence of structural injustice or inequality'. They also argue that 'Social justice can be understood to encompass two "levels" at which equality among groups can be affected, for better or worse – the micro [individuals] and macro [groups etc] levels'. Baruch Bush, Robert A., and Folger, Joseph P., "Mediation and Social justice: Risks and Opportunities" *Ohio State Journal on Dispute Resolution*, Vol 27, Issue 1, 2012 pp 3 and 4 respectively.

⁴⁰ The idea that facilitative mediators are concerned about substantive justice is not one that is generally held by facilitative mediators.

⁴¹ Baruch Bush, Robert A., and Folger, Joseph P., "Mediation and Social justice: Risks and Opportunities" *Ohio State Journal on Dispute Resolution*, Vol 27, Issue 1, 2012 p 19.

micro-level injustice posed by mediation'⁴² and argue that these interventions have limitations and may not address issues of substantive justice.⁴³

As such there is a lack of agreement on the relationship between justice and mediation. Waldman commented on this lack of agreement:

The mediation field is conflicted on the question of whether fairness of result matters. Some mediation scholars contend that mediators should be concerned with questions of fairness, however one might define that term. Others contend that courts and judges are uniquely situated to determine what is fair and that mediators have neither the institutional authority nor the expertise for such judgments. But while not explicitly adopting substantive fairness as a formal value, many of the commentators in this book express concern about the possibilities for the injustice and structure their interventions to guard against it.⁴⁴

This document reports on findings from an empirical research conducted on the issue of justice quality and accountability in mediation practice. For purposes of this research, procedural justice refers to fairness of process; substantive justice refers to fairness of outcome; and justice quality refers to the fairness of both the process and the outcome of a mediation. Accountability refers to compliance with and enforceability of the ethical responsibilities of mediators in relation to the justice quality of mediation. Views of practitioners, policy makers, magistrates and other stakeholders on whether and how the justice quality of mediation is and should be maintained are reported. It presents views on whether mediation should be concerned with procedural and/or substantive justice and it presents views on issues of accountability in mediation practice.

⁴² Baruch Bush, Robert A., and Folger, Joseph P., "Mediation and Social justice: Risks and Opportunities" *Ohio State Journal on Dispute Resolution*, Vol 27, Issue 1, 2012 p 23.

⁴³ Bush and Folger argue that the practices of transformative mediation are more suited to assuring social justice. According to them, '... party-driven, transformative practices in mediation, all based on and shaped by the fundamental principle of genuinely supporting party choice, are likely to avoid unfair outcomes in individual cases, even when the parties are of unequal power'. See Baruch Bush, Robert A., and Folger, Joseph P., "Mediation and Social justice: Risks and Opportunities" *Ohio State Journal on Dispute Resolution*, Vol 27, Issue 1, 2012 p 44.

⁴⁴ Waldman, Ellen (ed.) *Mediation Ethics: Cases and Commentaries*, 2011 p 6.

The Research: Goals, Methodology and Participants

The research project consists of two stages. The goal of stage one was to develop a pilot mechanism by which to measure the quality of mediation, including developing a robust set of criteria for measuring quality and ensuring accountability in mediation practice. The second stage, yet to be carried out, involves the trialing of criteria against a range of mediation practices. For stage one, a literature review of the issue of justice in mediation and accountability in the practice of mediation was conducted and a qualitative research method adopted.

The researchers conducted ten (10) semi-structured interviews with public and private stakeholders to gather data to inform the development of standards for measuring quality and establishment of accountability protocols for mediators. The number of interviews reflects the limited funding and time constraints of the research project and the availability and willingness of interviewees. Some of these interviews were conducted with two or three interviewees employed by the same organisation. All interviews were about an hour in duration. There were a total of fourteen (14) participants. The participants included mediation practitioners in civil, family and commercial areas; court and tribunal representatives; staff from the ADR Directorate in the Department of Justice (Vic); Victoria Legal Aid; Consumer Action Law Centre (CALC); Footscray Community Legal Centre; and the Dispute Settlement Centre of Victoria (DSCV).

Participants' involvement with the mediation process differed. Some were very experienced private practitioners also involved in policy-making and setting standards for mediation practice; some represented organisations involved in provision of mediation services, including court-connected/referred/annexed mediations and community mediations. Some participants also provided mediation training and accreditation, and some represent parties in mediation processes. In addition, some of the participants are involved in policy-making and operations in relation to ADR and some individual participants had dual roles in mediation depending on which organisation they were working for at any point in time. Although the research was only concerned with civil mediations, some participants provide family dispute resolution (family mediation) services to parties. This presented an interesting opportunity for comparison between mediation practice in the family law area and civil mediation practice. Given the diversity of participants, different perspectives were presented, making the debate more robust and creating an opportunity to explore issues of justice in mediation from different standpoints.

The interviews involved two aspects. A set of questions aimed at eliciting details about the participants' role and involvement in mediation and the participants' views about justice in mediation. Additionally the researchers developed a scenario that raised a number of issues of disadvantage and vulnerability or disadvantage. The participants were asked questions focused on this scenario to illustrate aspects of justice in mediation.

Scenario

Frank Mediba arrived in Australia from a refugee camp 3 years ago and took up a factory job. Frank speaks very little English and is unable to read or write English. Frank and his wife have a set of twins, their only children. Due to Frank's low income, his family also receives social security payments from the government. Frank had been desirous of buying a car for easy transportation for his family. He approached Easy Car Yard in January 2010 and negotiated purchase of a car after completing an application for credit. Unknown to Frank, repayments would mean that he would have paid five times the market value of the car upon completion of payments in 12 months. Frank claims that he was not aware of the repayment terms, and that the sales representative had informed him that repayments would be in three years. Unfortunately, Frank has not been working in the last six months due to an injury and his family is barely surviving on the social security payments. He has also defaulted on the repayments for the car. Easy Car Yard disputes these facts and insists that Frank would need to pay up in 6 months due to his defaulting on the loan as per the contract of sale and finance. Easy Car Yard has filed an action at the magistrates' court to recover the amount owed by Frank.

The matter is now before you for mediation. You have been told neither party would have legal representation in the mediation. Frank will have an interpreter in the mediation.

The scenario was focused on disadvantage, as international and Australian research has found consistently disadvantaged members of the community experience more barriers to access to justice than others. Disadvantage could be a result of poor language skills for newly arrived migrants, illiteracy, cognitive impairment, poverty, poor health, and a range of other factors resulting in a lack of capacity. People with a disadvantage may lack the capacity to meet a fundamental aspect of mediation, self-determination or party autonomy. Capacity can affect participation, making informed decisions, understanding of the process and what is required, as well as understanding the effect of participation in the process. Lack of capacity may have variable effects depending on the nature of the dispute and the approach taken by the practitioner, but is very likely to affect the justice quality of the outcome.

As stated above, researchers developed the following broad working definitions:

1. Procedural justice to fairness of process;
2. Substantive justice refers to fairness of outcome;
3. Justice quality refers to fairness of both outcome and process; and
4. Accountability refers to compliance with and enforceability of the ethical responsibilities of mediators in relation to the justice quality of mediation.

Participants were asked the following questions:

1. Please describe your current involvement in mediation practice?
2. Please describe your organisation's involvement in mediation practice?
3. What processes has your organisation/practice in place for ensuring the justice quality of mediation?
4. Has your organisation/practice evaluated the justice quality of its mediation practice from the perspective of clients?
5. How does your organisation/practice address issues of disadvantage for parties to the mediation and the potential for the mediation process to exacerbate the disadvantage?
6. How would you identify disadvantage on the part of a party to mediation?
7. What type of support is available for disadvantaged parties?
8. Please read this scenario.
 - a. What issues do you identify?
 - b. How would you respond?
9. If interviewee is practitioner: Have you been involved in a mediation involving a disadvantaged party? If yes, ask for details.
 - a. How did you address the issues?
10. In your opinion, should mediation deliver justice?
 - a. If yes, how?
 - b. If no, why not?
11. Should mediation be concerned with procedural justice?

- a. Please explain your reasons
- 12. Should mediation be concerned with substantive/outcome justice?
 - a. Please explain your reasons
- 13. How do you think the justice of mediation outcomes should be measured?
- 14. For organisations: Has your organisation/practice established a complaint process for dissatisfied clients?
 - a. If yes, is this information provided to clients? How?
 - b. How are complaints processed?
 - c. Could you give an example of a complaint that was processed and the outcome?
 - d. Do you have any current data on complaints?

In asking the questions, the researchers were interested in participants' interests or involvement in mediation; the processes they have in place for ensuring the justice quality of mediation practice where disadvantage has been identified on the part of one party and the process for identification of disadvantage; whether processes are in place for supporting disadvantaged parties and what they are; practical steps taken by mediators to address disadvantage. These questions were followed with the broader questions or whether mediation should be concerned with substantive and/or procedural justice; criteria for measuring the justice of outcomes and the issue of public accountability. This report presents participants' views particularly in the areas of evaluation of justice quality and processes for ensuring justice quality, measuring the justice quality, concern of mediation with justice and accountability. These views will be presented with reference to relevant literature on the topic where available.

Discussion: Justice Quality in Mediation

As stated above, justice quality, for the purposes of this research refers to the fairness of both the process and the outcome of a mediation process. Quality is thus about procedural and substantive justice. As argued by Akin Ojelabi elsewhere, justice in mediation has to combine elements of procedural and substantive justice as both are necessary conditions for ensuring just outcomes.⁴⁵ The next section addresses, from the perspective of participants, the concepts of procedural and substantive justice in mediation with a focus on how the justice quality of mediation is and/or should be maintained. It begins by presenting views on whether mediation should be concerned with procedural or substantive justice followed by identification of processes for ensuring justice quality and how justice quality should be measured. It finally reports on how disadvantage have been identified and disadvantaged persons supported in mediation.

Identifying and addressing disadvantage in mediation practice and process

Issues about the justice quality and accountability in mediation practice concern, but are not limited to, parties who may be disadvantaged in a mediation process. Since disadvantage may be overt or covert, participants were asked how they would identify disadvantage in parties and whether the organisations they worked for or their own practices have processes for addressing identified disadvantage. Participants were then presented with the scenario and asked to identify issues that may be relevant to the mediation process and outcome and how they would respond. In addition, participants were asked about their experiences in mediating a dispute involving a party they had identified as disadvantaged.

Circumstances resulting in disadvantage

Participants agreed that disadvantage could result from a series of circumstances and could impact on the capacity of parties to mediate effectively. The disadvantage may impact on parties in a number of ways.

*Well, there are a number of criteria. One is the relative ability of the parties to negotiate in the context of their dispute. It is necessary that parties can freely and evenly negotiate their matter with the other side. One party can be disadvantaged for a number of reasons due to gender, ethnicity, lack of skills, the presence of a lawyer on one side not the other –
Barrister/Mediator*

Circumstances which may result in disadvantage include those in which one party has legal representation and the other does not, the dispute involves a large company and an individual or a 'repeat player' in mediation and a first timer, or where there is a history of violence between the parties. Participants also noted that disadvantage could result from life circumstances inhibiting capacity to negotiate, English language or literacy difficulties, capacity to negotiate due to mental health issues or cognitive impairment, the impact of the experience of trauma, cultural dislocation, financial disadvantage, and the level of knowledge of the legal system.

... a large number of respondents are institution respondents who are represented by very expensive lawyers and a large number of complainants are individuals who are often vulnerable so there is disadvantage – ADR Member, VCAT.

⁴⁵ Akin Ojelabi, Lola 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 320.

... the parties' capacity to mediate, is there a level of fear, power imbalances that we cannot overcome, have the police been involved, if they have been that is a bit of a red light for us that there might be behaviour that is not suitable for mediation – Dept of Justice, DSCV

... one party to the proceedings simply has no understanding of the transactions, any of the law surrounding the transactions, any of the practices surrounding the transactions, any of the body of evidence or law around it and the other party is a frequent flyer, I don't see how you can mediate in that situation – Solicitor

One participant also spoke about perception of disadvantage by parties. In some cases a party may perceive they are in a situation of disadvantage which may impact on their ability to participate in the mediation effectively. Questions about perception would be asked by the participant during intake in the following manner:

I actually ask people who can influence whom and how would you do that and how would you know if you are being over influenced or satisfactorily influenced? [So you do ask direct questions?] I do. In my intake, what do I have to look out for – one of my questions is how will I know when you say yes and mean no, what are the buttons that can be pressed and where do they come from, how can you avoid pressing the other person's buttons and still speak the truth, you know, say what you have to say, what help can I give you there – Principal Mediator

How disadvantage is identified

Once one of the circumstances or situations identified above are present, the mediators or intake workers are alerted to disadvantage which may impact the process. Identifying disadvantage occurs during the intake process most of the time, however occasionally disadvantage may become apparent only during the mediation process. Where a circumstance that may result in disadvantage is identified, mediators and intake workers investigate further. Most participants spoke about identifying disadvantage through an efficient and detailed intake process as discussed below and issues of disadvantage may lead to a decision that the mediation is unsuitable for mediation.

I think that is partly to do with how you enter into a mediation process to begin with. I never now go straight into a mediation, even if I am retained to do a mediation, I do what I call a 'dispute analysis' first. That is what they get with me. So my contract now has a 'dispute assessment step' first before I go any further ... I will talk to the lawyers and I will find out what sort of issues the lawyers think are important to raise. It is about preparation for the mediation process amongst other things ... Firstly the intake, and then what the objective of the process is ... if the objective is smart decision making, then that means people who enter into it have to have a good understanding – Practitioner

So it can be tricky, you know and I think the thing is that once we have parties in the room, we hand the file over to the mediators and the mediators use their skills to determine and ... may assess it as not suitable. All the intake beforehand, the DAO might have said yes, this is fine for mediation, and then something happened in the mediation, someone throws something out in a private session or a joint session and it's just unsuitable for mediation. The mediators will terminate then – Dept of Justice, DSCV

A participant also commented on the role of mediators in identifying disadvantage in the mediation process and not at intake.

We take parties as they come ... I suppose there are ... disadvantages that become apparent during the mediation. Then again, one adjusts, or attempts to deal with those through mediation – Practising Mediator

In addition, participants spoke of the difficulty of identifying disadvantage:

... it can be quite difficult to actually work out. You can do quite lengthy intake and as I said, many people, particularly in the workplace area are quite damaged ... it can be hard to ascertain I think, until you spend a lot of time, and that is why in workplace situations I spend a lot of time talking to the people and talking to the lawyers. So sometimes I think it is very hard to identify disadvantage. It is less of an issue when they have a relationship with a lawyer, where the lawyer has been a lawyer that they trust. You know and you can tell the lawyer has worked with them and prepared them, not just in terms of rights but also in terms of interests. They engage with them and that makes it a lot easier. Sometimes it is really hard to pick up when there are other issues there, sometimes it is obvious and sometimes it is not – Practitioner

Addressing Disadvantage

On the question of how to address disadvantage, participants identified interpreters to address disadvantage resulting from language difficulties, use of cultural advisors when mediating with people from different cultural backgrounds – although this was seen more as good practice rather than addressing disadvantage, allowing support persons, providing relevant information to parties and so on. Participants would provide different types of support or allow participants to use whatever support they require. Participants spoke about the need to provide customised support to parties, that is, support which is required based on their circumstances.

Whatever support they need. If someone wanted to bring their Labrador in ... and I am not referring to someone who is blind, but if someone wanted to bring their dog in ... I have had people bring in all kinds of icons, taking a break whenever they want one, length of session, location of session, to a point, so long as it does not disadvantage the other party, interpreters, more than once I have put a whole lot of information in writing for clients who were deaf and I also provided ... opening statement and other comments that link stages of the mediation into writing so that they could read them in advance, each time they had limited hearing with their hearing aids but I thought I would put them in writing because they are fundamental to how the mediation goes. So I guess it is individualising which is one of the principles of mediation anyway, situational and individualised – Principal Mediator

Other types of support include referral to other services including to legal practitioners and advocates.

... we might refer them to Consumer Affairs. The ... organisation has a ...database, where we can refer people off to services where they need it, a whole range of types of referrers that we can use. For civil matters, it is mainly legal advice – making sure that people have legal advice. That's why we refer them off to community legal centres ... with any of these types of matters with civil, we would say to the parties, 'Have you had legal advice?' If they say, 'No', we would say, 'Look, we strongly encourage you to get some legal advice before you come along to the mediation' – Dept of Justice, DSCV

... but the first thing I might do is see if they can get somebody on the phone because often they have spoken to a lawyer or something. Can they get somebody on the phone or is this something where they want to come back another day and get that advice outside of the room, I talk to them about what they think will work for them – Practitioner

In the Aged Care sector there are a number of advocacy services now that represent parties in mediation and often a relative or somebody else can help so you can often obtain support for them to help them and you do this before you go into the mediation – Barrister/Mediator

In addition, emphasis was placed on the importance of mediators' skills in addressing disadvantage.

I undertake to mediate well. I believe that if you mediate well, if you follow the process according to the principles of mediation, communitarian principles, if you are responsive to individuals rather than applying some blanket guidelines, if you are even handed. I use interpreters where I need to use them, I err on the side of caution, I constantly tell people they should only stay at mediation if it is working for them ... they should only stay if they are getting a better 'deal' than in the next best forum for them ... I take the time to develop good rapport – Principal Mediator

One issue raised was the quality of intervention accessed. One participant highlighted the importance of genuine and reliable support persons and legal advice or representation as follows:

... I encourage people to have a support person with them for justice and sometimes I refuse to go ahead unless someone has a support person with them and people often have lawyers with them but sometimes I will only go ahead if they do. And often enough I will only go ahead if people can show me their legal advice, I don't care what it says, I just want to know that it is not from some lawyer over some bar or some aunty's cousin or something like that. I regard that as essential to practice – Principal Mediator

Participants raised issues around the quality of interpreters and legal representation a party might have, highlighting the fact that legal representation may not in itself guarantee just outcomes.⁴⁶

In terms of support, again, most of mine are legally represented. It is pretty unusual not to do it and often I'll rely on the legal representative and I think the amount of support they give varies according to how good the legal representative is – sadly that is the case – Practitioner

I have to be honest, every time you have an interpreter, whether it is interviewing a client, whether it is in mediation, in court ... the lack of language and understanding is always a problem ... a lot is dependent on the interpreter. I had an interpreter the other day ... and I just said can you ask X and they talked for three minutes, then [the client] would reply for another three minutes and she came back and said 'No'. That was on the telephone ... it is difficult with a telephone interpreter to pull them in. It is easier when that person is there, because you have a physical control. Most of the interpreters, I would say most of the interpreters I have experienced at mediation, tend to be full-time interpreters, they are the good ones. It is always bad when the interpreter is a friend or something. That has sometimes happened when there has not been an interpreter. I guess what I am saying, is that yes it would concern me. There is another level of concern, that even with an interpreter, whether they really understand the whole picture to agree to anything that is really disadvantageous to them – Practising Mediator⁴⁷

⁴⁶ See, for a brief discussion on this, Akin Ojelabi, Lola 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 325.

⁴⁷ This comment was made in the context of the scenario which is discussed in the next section.

In addition, whatever support is provided must be targeted to the need of the disadvantaged party, but this may not be the case where an organisation is providing support to an employee in a mediation process.

In an organisation disputing case, where you have an organisation or a HR department and an employee, you often bring in support people, union people, to ensure the disadvantage is not too great. One of the problems in the organisational context is a lot of the mediation preliminary work is done by the HR department or other parts of the organisation and research shows those departments have a bias to the organisational needs rather than a party's needs. Often you can have a HR person working to assist a party, but they are not necessarily working towards a party's needs, so often you have to separate them from the HR person supporting them and getting them some better representation or independent representation – Barrister/Mediator

The scenario

As stated above, participants were presented with a scenario and asked what issues they identified and how they would respond to the scenario. There was a marked difference between the response of participants with a legal background and whose role was to support parties in mediation as legal representatives and who had knowledge of legal issues in regards to social security payments, and those who, being legal practitioners or mediators only, were not familiar with those issues.

Disadvantages identified based on the scenario include language, cultural issues, illiteracy, lack of legal representation, lack of understanding of contractual issues and so on, all leading to an imbalance of power.

There's cultural, there's language, new arrival, refugee status. They both don't have a representative but nonetheless, there's a different status between parties in society ... Again without knowing Frank and how he presents on the day ... Frank could be an ex High Court judge ... take Frank on the day, he could be educated, someone who has just come from a country ... we don't know, I would have to take him on the day – Practising Mediator

The thing that struck me is that even though neither party is represented, one is, maybe, a company and the other is an individual who is a person who has particular disadvantages. They may not have a great grasp of the language, even though they have an interpreter, and that is another question, is the interpreter someone who is very experienced in this person's own language, because sometimes they are not – Dept of justice, DSCV

Well ... superficially ... I am really reluctant to say because I would need to interview both parties. But superficially, there looks like an issue with power dynamics, there is language, there's ... Easy Car Yard you would think would be more powerful ... and there has been financial abuse, in terms of the value of the car, and yet there is a whole lot of stuff I don't know... it is impossible and irresponsible and unjust to make a static assessment of something which is dynamic – Principal Mediator

... he has only arrived in Australia recently. He is obviously under a lot of financial pressure. He doesn't have a job and he has got twins and he is unable to access much information about what happens by accessing the internet or elsewhere. We are dealing with a person who has very limited understanding about what his options might be ... and he may not be able to negotiate that effectively; certainly not without a lot of support – Practitioner

Other participants identified legal issues and rights which Frank may not be aware of, among other things:

There are so many issues in this because there are legal issues and there are issues around the original contractual arrangements that he has entered into and whether they could be valid ... if they reach an agreement at mediation, is it going to be final and binding and that means it has to be an informed decision and they have to make sure that they understand what's required – Practitioner

Also identified were more complex legal issues around social security payments, but it is interesting to note that only one participant identified the issue of being judgment proof so that Frank had no obligation to repay out of social security payment and his social security income could not be attached to the debt. Frank does not have to agree to repay out of his earnings.⁴⁸ This meant that Frank, in the scenario, would be better able to negotiate and that Easy Car Yard had fewer options.

I think there are a lot of issues there. And they are quite technical, consumer law issues. So there are issues of unconscionable conduct, over-commitment, credit legislation and link credit provisions, and misleading and deceptive conduct and hardship. Obviously the client is judgement proof – CALC

Most participants agreed that the issue of social security payments being judgment proof is not one which would be easily identifiable by non-lawyer mediators and that some legal practitioners may also not be aware of that legal principle. The issue is whether such lack of information or awareness on the parts of both the mediator and the party meant that the party could not be expected to exercise the right to self-determination and party autonomy to achieve a just outcome. Should Frank be allowed to agree to attach his earnings when the agreement itself may be unconscionable in terms of the price of the car, unfair terms of the contract and bullying? If Frank is not legally represented, what options are open to the mediator? Can the mediator mediate well if unaware of some of the issues? Can the mediator empower Frank if unaware of factors that give Frank more bargaining powers? These and more are some of the issues that may arise, so how the mediator can mediate in a way that will lead to just outcomes for both parties or for the disadvantaged party in a mediation is the question that requires some consideration and participants had views on this.

Participants spoke about the importance of having a very good intake or pre-mediation meeting with each party and why they will be taking that approach, some identified the difficulties involved in mediating such matters, and many spoke about the need for legal advice, legal representation on the day, support persons, referrals and so on.

Neither party has legal representation. I would be really concerned about doing much if neither party has had advice on what might happen if the matter should proceed through to a hearing. It does not mean the matter is impossible to deal with as a mediator but I would be pretty concerned about it ... So he might actually need a support person or someone else there to assist him on the way through. I don't know who is going to be there for Easy Car Yard ...to what extent they will understand the legal issues, although they are not legally represented, often times representatives like this will have a grasp of the legal issues and I would be a bit concerned that they may say ABC will happen when it might be quite the opposite in terms of what a Magistrate may do. I have lots of issues with this. I probably would

...

initially, I would have a chat with each of them about what could happen at the mediation and I want to have a chat with them about how they need to make sure that any agreement, if they reach an agreement at mediation, is it going to be final and binding and that means it has to be an informed decision and they have to make sure that they understand what's

⁴⁸ Section 60 of the *Social Security (Administration) Act 1999* (Cth)

required. And then I would ask them questions around what sort of advice they had had so far and what could happen at the mediation and elsewhere. I would talk to them about the mediation process and what could happen and then I would probably say to them, well, for me I can do this mediation at a time that is going to suit each of you but for you to be able to make a decision it would be really helpful for you to have that background so that you really understand what you are getting into. Because otherwise you might make an agreement or sign up to something that is not going to stick and you need to be aware that may be a possible outcome. And I would say that to both of them together. And so I would be reluctant to proceed without having more support there for Frank of some sort or other. It does not necessarily need to be legal support, it can be someone from a refugee support area or it might even be a friend from the community. But you would want them to have some idea about what the options might be in terms of legal advice because otherwise I really don't think he would be any placed to make a decision – Practitioner

I think another thing we might have suggested to Frank ... is 'has he been to Consumer Affairs?' In terms of credit and so on, I mean Consumer Affairs, that is their area, so suggest that he gets some advice from Consumer Affairs as well, and provide him with details of that ... we would certainly, strongly suggest, even if you don't want legal representation, at least go and get legal advice so that when you come to the table, you know exactly what your position is and what the position of the other person is, so you can actually negotiate – Dept of Justice, DSCV

In addition to having a thorough intake process with parties before making a decision about how to proceed, participants also spoke about adjusting the process to accommodate any disadvantage and using interpreters if the need arises. In addition, they would be careful about having a support person who has an interest in the dispute.

And, yes, we arrange interpreters as well through our service – Dept of Justice, DSCV

I would be wondering about the effects of trauma, before Frank even came upon this horrible situation. I used to work in that field as well ... I would be looking for short sessions ... as well as having an interpreter [and] a support person and the support person would need to be someone who ... the way I define a support person is someone who does not have their own needs met by the mediation, so and in this situation I think it would need to be someone who did not have any of the issues that Frank has, I could find a ... support person but I prefer not to do. So, for example I would not have Frank's wife, his wife would be welcome to come but probably not as his support person – Principal Mediator

Participants also spoke of the need for Frank to be aware of his legal rights but not prejudging issues.

I talk to people about their rights and say how mediation is not an alternative but a complement to working with your rights ... I don't have to make up my mind as to who is in the right and who is in the wrong, who am I to do that? I'm not contracted to do that ... – Principal Mediator

Also linked to the issue of legal information is the need for the mediator to be aware of legal issues that may impact on the outcome and address them the best way possible within the limits of the mediation model that is being practised and if impossible to address within the limits of that model, to refer to another process.

How do you respond? I have been involved in a number of these mediations and most of the time you can do a deal, because the credit legislation now protects people like Frank fairly well, compared to how it used to, the credit provider often does not want to go in front of a tribunal or court because usually the tribunal or court is going to be sympathetic to Frank and not give the credit provider too much lee way.

...

The problem with mediating these matters is the mediator needs to know what the law is because if they don't, someone like Frank could make compromise or make a bad decision. Sometimes these matters are better to go through to the court, where someone can hear both sides and make a decision. The legislation these days is quite good. The problem for people who are defaulting and are in a serious situation like this, their room to move and compromise is pretty limited. They can just severely disadvantage themselves, they commit to things they can't adhere to. The ability to compromise and negotiate a compromise in a mediation is pretty limited and if the mediator does not know their stuff, because they have not got legal representation, someone like Frank could be really disadvantaged without legal representation so they are better to go to court. The reason it is better to go to court is because court has some investment in ensuring a fair outcome, than with mediation which is just about a fair process – Barrister/Mediator

Is something that depends so much on your knowledge as a mediator as to what can be done and whether that is something that can be solved – Practising Mediator

Participants were asked to comment on how they would approach the issue if the Easy Car Yard representative at the mediation put forward attachment or garnisheeing Frank's income for repayment of the debt as a bargaining tactic or insisting on having that as the agreement. Participants spoke about how they would: possibly withdraw from the mediation or terminate proceedings if the Easy Car Yard representative was no longer willing to engage with the process and insisted on that position; reality test that option along the lines of how possible that could be or whether that was legally possible and in relation to Frank what that would mean for his family in terms of welfare and what he thinks are his legal rights in that respect. A mediator talked about two situations, one in which Easy Car yard is using it as a threat and the other is where Easy Car Yard is putting it forward as an option.

Then I can't mediate. But I just don't assess it like that, privately I might say to the Easy Car Yard person, one option you have put on the board is that these payments are made out of Centrelink payments and the payments are this amount etc, if Frank was to suggest an option that was \$20 less than that would you be open to considering that and invariably people say well ... of course I would. And then I say well that's another option so let's just keep generating options – Principal Mediator

I would raise hypothetically the legality of what they were proposing, and speculate it and ask both parties if they were aware whether that was able to be done ... Then I would say that that needs further... I would be uncomfortable ... I would have said that it can't be done ... [If] one party uses it as a threat; 'I am going to do this and this' as technique to leverage ... [and] the other is panicking, I guess what I would do is call a hold, talk to the party who are doing the leverage and clarify with them what they understand as their legal right

...

So I would be pushing them in a private session to explain to me why they think they have a right to do it ... I would talk to Frank and ask if he had any legal advice. I think we need to hold to the mediation maybe, and I would say to Frank, I think you need to talk to Social Security ... about whether that is possible. I think that is what we would do if it came to a

loggerhead, we would call a halt to the mediation to find out if is legally possible. Hopefully when we return, hopefully Frank has talked to someone at Social Security... and knows that the threat can't be done and so will dissolve. And so I guess that would apply with any legal threat; that is what we would have to do

...
If it is an agreement, for example, Easy Car Yard representative saying to Frank, 'Frank, how about paying X dollars' and I am thinking that would be pretty tough with three kids, that would probably be where I would talk to, I wouldn't challenge the other party, but I would talk to Frank and explore what that would mean if he would agree to that amount of repayments – Practising Mediator

There were other comments around what could or could not be done during the private session by the mediator in terms of addressing Frank's disadvantage in this scenario. Those are reported in the private session section below. It is important to note that most participants agreed that the reason why steps would be taken to address issues of disadvantage is to ensure that an unfair outcome does not result from the mediation of the dispute between Frank and Easy Car Yard. The next section discusses issues around whether mediation should be focused on substantive or procedural justice.

Procedural and/or substantive justice

As noted above, views differ on how mediation and mediators should approach 'justice' in mediation processes and practice. The research highlights differences in views in relation to procedural and substantive justice. Participants were asked whether mediation should deliver justice broadly and follow up questions were asked about whether mediation should be concerned with procedural and substantive justice. Most participants were of the view that mediation processes within the legal system should deliver justice but some struggled with what 'justice' means. Views varied in terms of what justice meant and that was mostly dependent on professional perspectives and involvement in mediation or ADR processes:

- 1. It should deliver justice, but it should deliver a ... well justice, what is justice? – Practising Mediator*
- 2. Should mediation deliver justice? Um, yes. I am not quite sure what that means. Justice like beauty is often in the eye of the beholder ... I think people should feel as though it has been a just process, I think that they should feel at the end of a mediation as though the outcome might not be what they wanted but feel that it was a just outcome. It is all part of the justice system, all of this ADR is part of the system – Practitioner*
- 3. Of course, it should. It is sort of like a motherhood statement, should your mother love you? Of course it should, it doesn't always. Look and there are four sorts of justice from my understanding. One is distributive, one is procedural, one is interpersonal and one is informational. My research and other research has shown that there is a high correlation between procedural and distributive justice – Barrister/Mediator*
- 4. Yes from a collective parties' and advisors' point of view ... [but] there are exceptions, like safety ... It does not need to be within legal constraints but people need to be physically, financially, legally safe – Principal Mediator*
- 5. I am talking from a court perspective and we are in the business of justice. If there is a process that we mandate we would be most concerned to think that the process did not deliver a just outcome – Magistrate*
- 6. But, in our work, in the shadow of the law then it becomes more important. In the court system – you cannot divorce yourself from the framework in which you work, the legal framework, I don't think. I would be really concerned if someone said well, it doesn't matter what the legal context or the justice system is around your decision making because it does,*

because it has legal effect, and we would say that at Legal Aid – Victoria Legal Aid, Roundtable Dispute Management (RDM).

The above indicates that most participants are of the opinion that mediation should deliver justice. However, the basic questions about what justice actually means remain an issue. Is it justice as conceived by the parties or justice according to the legal framework, that is, justice according to legal rights or is it merely procedural justice?

As stated above, there is no legislation or accreditation standard that defines justice or imposes a general requirement for justice. The NMAS Practice Standards provide that mediators must conduct the mediation in a procedurally fair manner. This involves supporting parties to reach a decision without any pressure from the mediator, providing an opportunity to speak and be heard, encouraging and supporting balanced negotiation, supporting fair and orderly negotiation, encouraging parties to obtain independent professional advice and assessing the feasibility and practicality of any proposed agreement.⁴⁹ These standards are there to ensure that the process is fair and ultimately leads to a perception of fairness of outcome on the part of disputants. Participants were of the opinion that mediation should be concerned with procedural justice.

More problematic, however, is whether mediation should be concerned with substantive justice, that is, fairness of outcomes. The difficulty in accepting that mediation should be concerned with substantive justice relates to whether the justness of outcomes could be measured and, if possible, how.

I think it is easier to measure whether processes are just than whether the outcomes are just because the outcomes are so much in the eye of the beholder. We have a notion of process justice, procedural fairness and those sorts of things; whether outcomes are just is another thing ... I think it is a difficult one to try and, I mean I think it is a good thing to assess but the more I think about it the more I get myself into knots because it is so much about what the parties went in expecting and there is only so much a system can deliver ... what you can hope that our justice system aims to deliver is that those who come before it get at least a fair and just process. I don't know that you can guarantee that they are going to get a fair and just outcome ... we aspire to that, but I would not like to say we achieve it – Dept of Justice, DSCV

It is almost impossible to try and go in and evaluate the outcomes that are reached at a mediation are just and you can't because you never have all the information and if you set it up for a judge to examine it, they would probably all have different views, so it is just not possible to test – Practitioner

Another issue raised by participants relates to the purpose of mediation. Mediation is a self-determinative process and so it is not the role of mediation to assess the substantive quality of mediation.

If it is justice in a substantive way, that people have received damages or people need damages for some injury caused by another or breach of contract, then no, I don't think mediation is the means to do that – Practising Mediator

I think if the parties have decided through some reason to agree to something that appears substantively unjust, I think all you can do is ensure that procedurally everything is 'ridgy-didge' clean – Practising Mediator

⁴⁹ National Mediator Accreditation Standards, Practice Standards, Section 9.

Although participants were of the view that mediators should be concerned when a party is about to agree to settlement terms that are substantively unjust, most considered that the process has limitations and there is not much a mediator can do to stop the party from entering into such agreements.

I think it should be concerned with it, I guess all I would say is I am not sure it will necessarily achieve it. But every mediator should be concerned with a fair outcome for the parties or the parties feel that they should get a fair outcome – Dept of Justice, DSCV

I think as a mediator your job is to set up the process so it is fair to parties, so it is not going to disadvantage or disempower or revictimise a party. That is your first concern. When you have done that your second concern is to ensure the party you have set up has some reasonable outcomes from the party's perspective. Now the party's perspective can be quite different to your own. And that is ok, so long as they think it is fair and they have had adequate advice and they are not at a disadvantage in making that decision, I am happy for them to make the decision, even if it doesn't seem as entirely fair as it could be – in the end that is a trade. Whereas the court would not say that, they would say I am going to decide this – I think this is what the law says is just in this situation. Mediation ... is based on self-determination ... and some parties really do want to make a bad decision. They do want to give up things ... often quite advantaged, well-resourced parties who will say, I am not really that concerned, you can have this, this and this, I don't really care that much, even though they don't need it, they want to buy some goodwill or maintain a relationship. They don't have to do it ... that is backed up in research, you know the zero sum game, parties who are winning in that sort of thing will often say I have won but I don't have to have all these, so I will give you, the other party back something, not because I need to but because it is fair – Barrister/Mediator

Arising though from the comment directly above is that disadvantaged parties may be able to trade off certain things which are not that important to them, but some disadvantaged parties may not be in a position to trade off anything. This point was also noted in response to the scenario presented to the participants in relation to how far a mediator should go in preventing unfair outcomes.

It certainly should deliver procedural justice. There is no question. The substantive justice is the trick though, the fairness of the outcome and that boils down to, in some sense, and the mediators read of what is happening in the room. Because even if a party isn't feeling comfortable they might not want to say that in mediation and you know, it may be tricky to discern. I know that some programs ... there is a cooling-off period, which I think is an interesting concept in civil type mediations and I think it is not a bad safeguard. With ours, with the personal safety intervention order ones or the non-monetary ones, we don't have that, but in some respects the stakes aren't quite as high either because people are not going to be financially disadvantaged. But, the fairness of outcome is very much dependent on what's the balance like between the parties and what is their capacity to enter into an agreement bearing in mind the job of the mediator is to ensure the fairness of the process, you kind of hope that that then leads to a fair outcome – Dept of Justice, DSCV

For some participants, the most important aspect for some parties is that they want to see the end of the dispute. They want to move on with their lives and so long as the parties agree and are able to do that, they have achieved something substantial.

What is justice? I mean you have procedural and substantive justice, obviously what mediation is really focused on is that everybody feels they are achieving something, that it is under their control and they can live with it. It gives them some advantage, doing that on the

day and they don't have to worry about it in the future. If that's justice, yeah OK, it is very important ... That's what it is about for me – Practising Mediator

Similar to the comment above is the alternative open to parties should the dispute remain unsettled after mediation or if the matter was never referred to mediation. Will the alternative process, for example, out of court negotiation, produce a fairer outcome for parties?

... [Mediation] should always be concerned with what would happen if there wasn't a mediation, what would be the outcomes. That's part of what we should ask in every mediation ... that might refer to legal rights-based outcome or a raft of others or both. It should always consider these issues around what would happen if there was not a mediation, this should be a big part of the process – Practitioner

A different view of what should happen in mediation was presented by participants involved in mediation through the courts and acting as supports for parties involved in mediation.

... I think it has to be about access to just outcomes – CALC

We are concerned about ... the outcome itself. If the outcome itself is unfair ... you would be most concerned if that was happening because you would be forcing people to engage in this process, we would not want it to be that the outcomes were unjust – Magistrate

An issue that arose relates to how to achieve justice outcomes, that is, whether a process or standards apply by which justice outcomes may be achieved. This issue is not totally separate from standards that may be used to measure justice but it focuses more on the procedure for achieving a just outcome. For some participants outcomes would be just if the procedure is just, and for some, the justness of outcomes would need to be assessed through legal rights.

... I am one of those that say that the process is so well integrated with the principles that it looks after justice. If the process is followed ... and departures from the process and especially from the principles can put at risk the justice that can be delivered. Fundamental to the process are the principles of mediation – Principal Mediator

...I think it has to be about access to just outcomes ... Broadly reflective of their legal rights, and their strategic rights taken into account – CALC

There has to be legal ... If it is just and it is in the court, it must be decided and settled according to law. Yes you can give up your rights but you must know your rights. You must know the legal strengths and weaknesses of your case and the other person's case – CALC

In addition, it is assumed mediation practitioners would be aware of outcomes that may likely be unjust and address any issue of injustice that arises either by stopping the parties from concluding unjust agreements or referring the parties to a process that would deliver better outcomes to ensure the justice quality of mediation. This is due to self-determination as a purpose of mediation and inability to provide advice to parties.

With the panel [of mediators, used at VCAT], most of the panel have been doing this for nearly 20 years, in their list, so they know that legislation inside out, and most of them know the VCAT Act. The majority of them are lawyers but not all of them. I certainly have an expectation that if there was ... for example, signing up to something that was unlawful they would know that and know to stop it or know to intervene and refer people – ADR Member, VCAT

We assume it until there is evidence to the contrary ... you assume they know the law or at least know the law relevant to the area. That is one of the cores of this system ... [they] generally choose as mediators those who they think have some knowledge in a particular area ... if it is defamation you go to someone with a defamation background – in a way that regulates itself. We have no system as such. It regulates itself until we have evidence to the contrary – Magistrate

Processes for ensuring justice quality

Participants were asked what relevant processes their organisations or practices had in place for ensuring the justice quality of mediation. Participants mentioned a range of processes used, generally including having a complaints mechanism, provision of training and professional development to mediators, ensuring mediators follow the fundamental principles of mediation, including self-determination and independence (neutrality), conducting intakes to ascertain the best procedure in terms of sitting arrangements and assessing suitability for mediation. They also talked about guiding the process strictly, including reality testing of options, provision of guidelines to mediators in relation to conduct in specific fields, periodical or ongoing evaluations, building trust with parties and making them feel comfortable to ask questions or raise issues they might have in relation to fairness, counting on the experience and knowledge of the mediator. In addition, for court-referred mediation, participants mentioned oversight of the court in terms of matters that are referred to mediation. For RMABs, they also included ensuring mediators satisfy requirements of the National Mediator Accreditation System (NMAS).

The intake

The intake process or initial assessment was identified by most participants as a key factor in quality and, in particular, justice quality, in mediation practice. However, it was also identified that intake processes varied greatly between mediators and there is no standard criteria on how to conduct them.⁵⁰ The National Mediator Practice Standards provide that the 'mediator will ensure that the participants have been provided with an explanation of the process and have had an opportunity to reach agreement about the way in which the process is to be conducted'.⁵¹ Objectives of the intake process include determination of appropriateness of the dispute for mediation, assisting parties to prepare, provision of information about roles in mediation, checking whether exchange of information is required, and settlement of procedural issues. The Standards are not prescriptive in relation to intake.⁵²

Research participants spoke about their intake practice. One participant, a mediation service-provider recently introduced a pilot role of ADR intake worker for 12 months. Prior to this, there was no intake process.

So just this year, I think it was this year or late last year, we have employed an intake, just a 12 month position and we will review it after 12 months – an ADR intake coordinator, so we have not had a formal intake process – ADR Member, VCAT

The Magistrates' Court identified the importance of the intake process in the Civil Mediation Scheme.

... we have an intake officer, which is an essential part of the Civil Mediation Scheme, provided by the DSCV – Magistrate

⁵⁰ National Mediator Accreditation Standards, Practice Standards, Section 3(1).

⁵¹ National Mediator Accreditation Standards, Practice Standards, Section 3(2).

⁵² Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 215.

It was also acknowledged that established intake processes were set up only for the Civil Mediation Scheme and Early Neutral Evaluation, whereas for the large volumes of other mediation and pre-hearing conferences for civil matters at the Magistrate Courts, there is no intake process.

Well, we only have an intake officer in the DSCV and the ENE, we don't have an intake worker for any of the mediations or in the volumes of the pre-hearing conferences – they list 15 of those a day or 10-15 per pre hearing conference convener. So, there are a lot of them going on and I don't think they would assess ... an assessment could be made at the time, but it is a wee bit late then isn't it? – Magistrate

Other participants noted the importance of intake processes in ensuring quality in their practice.

... having a good intake and assessment process prior to getting in the room – Practitioner

So that is the part on the phone, so I call that intake or phone call or whatever. Then I move on to a face-to-face meeting. And, I don't know if it is relevant, I don't charge for time on the phone. Then at the face-to-face meeting I have a set of questions, about 70 questions – Principal Mediator

The Dispute Settlement Centre of Victoria has a very detailed intake process for every case:

But we certainly run through our criteria to make sure that it is actually suitable for mediation ... People's capacity to mediate, if there is any fear, that sort of thing. This is across the board for DSCV so it applies a lot with our intervention matters, given some of the behavioural issues that are often involved. But it is really about making sure that people should be sitting in a room together. And it is about making the assessment about whether or not this is the best environment for them to do so in - Dept of Justice, DSCV

We have dispute assessment officers and they are all trained through the DSCV. So they are all gazetted mediators, they all go through our mediation program, and basically the role of the DAO is to assess the matter for suitability. So we have a mentoring program for all dispute assessment officers once they start at the DSCV. All of those DAOs attend at the courts. I know I mentioned the civil program, we also have our ... Personal Safety Intervention Order Program ... So they [Dispute Assessment Officers] will interview them face-to-face and from gaining a history from the parties to what the issues are, they will make a decision as to whether it is suitable for mediation or not. And that was the criteria I was talking about, whether the parties have capacity to mediate, is there a level of fear, power imbalances that we cannot overcome, have the police been involved, if they have been that is a bit of a red light for us that there might be behaviour that is not suitable for mediation. There are about 16 criteria that we use and DAOs use that on a daily basis. And that is actually for every single case they get, whether they are on the phone or if they are actually out in the courts - Dept of Justice, DSCV

The Dispute Assessment Officers are also required to assess the behaviour of parties to determine the balance of power and suitability of mediation.

... we don't just look at the context of the issues; we look at the behaviour of the parties as well. And obviously we take that into consideration, and if there is a lot of animosity, from one party to another or there is a high power imbalance and we are not able to make it a mutual ground for both parties, we could potentially assess that as being unsuitable - Dept of Justice, DSCV

The DSCV would also check whether parties have received legal advice and if not, may refer them to the appropriate organisation for legal advice. In situations where the level of power imbalance

identified at intake is insignificant compared with that identified during mediation, DSCV mediators are free to terminate the process.

The DSCV, as an organisation has a ... database, where we can refer people off to services where they need it. [There are] a whole range of types of referrers that we can use. For civil matters, it is mainly legal advice – making sure that people have legal advice. That's why we refer them off to community legal centres.

Interviewer: Would that be a normal thing if somebody is unrepresented?

Definitely ... with any of these types of matters with civil, we would say to the parties, 'Have you had legal advice?' If they say, 'No', we would say, 'Look, we strongly encourage you to get some legal advice before you come along to the mediation.' I think that it is less than 2% of parties who don't have legal assistance at all with our civil mediations. So most of them at least go and get some legal advice. They may not have a solicitor with them in mediation, but most would at least have legal advice.

Interviewer: And if they don't, the matters can still proceed too?

Yes.

Generally and as indicated above, the intake process is regarded by mediation service providers as an information gathering and assessment exercise. Assessment or intake officers are expected to identify issues that may lead to unsuitability of the mediation process or issues that mediators are required to address in mediation. Where required, referral is provided, but intake officers (who may also be the mediator) are not expected to give advice during the process. However, some may.

At intake you might advise somebody of the existence of social security payments or worker's compensation but it is not the general part of the mediator's job – Principal Mediator

*... the key part to addressing disadvantage in mediation is doing an initial assessment and preparing the parties properly for the mediations before you start. I have a feeling many mediations are entered into without proper intake procedure and preparation of the parties. If that is not done you cannot identify it and you cannot address it and you will go into a mediation and find they are either both disadvantaged or one is disadvantaged against the other. In private mediations I always do an intake to establish those things –
Barrister/Mediator*

Reality testing of options in private sessions

Most participants acknowledged that the experience and skills of the mediator are critical to ensuring the justice quality of mediation as it is their job to ensure that the process of mediation delivers justice to the parties. As noted above, there is an assumption the mediation process will deliver a just outcome if it is well executed by the mediator. One way the mediator can ensure justice quality is by reality testing options. Reality testing of options is a step in the mediation process which 'can assist parties to recontextualise options, alternatives and possible outcomes. It can assist parties to ensure that they understand enough to make a 'smart' decision by encouraging alternatives and options to be tested'.⁵³ However, understanding and practice of reality testing differs across mediators. Reality testing generally occurs during private sessions.

The private session is mainly used in facilitative mediation processes and is described as a process with the objectives of 'exploring issues; reality testing or assessing the alternatives and options;

⁵³ Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 239.

option generation; and negotiation development'.⁵⁴ In addition, the session allows parties to discuss confidential issues which they had not been comfortable disclosing in the joint sessions. According to Sourdin, facilitative mediation practitioners are not allowed to give advice in private sessions but evaluative and determinative mediators may. Furthermore, the mediator is not permitted to generate options for parties, although views differ on this.⁵⁵ This reflects the provision of the NMAS Practice Standards which restrict advice giving and provide that processes in which mediators give advice should be referred to as conciliation rather than mediation.⁵⁶

The private session was seen by research participants as a valuable tool in mediation practice. Many saw the private session as an opportunity to talk to disadvantaged parties in a mediation process about their options, and whether what they were agreeing to was right for them. Many participants remarked they would not make such suggestions in a joint setting, but wait for a private session.

... we can call private sessions if mediators are concerned around, perhaps, the capacity around individuals to negotiate. They might ask them some questions around what assistance they have had and so on and, if need be, obviously the mediators don't tell the parties what to do but they might ask them those sort of questions around what assistance have you had, that sort of thing ... You just have to think of a form of words that will not make it seem that the private session is an odd thing to do, and you are going to have a private session with both of them, you are not going to have a private session with one ... you know you might just say 'Before you reach final agreement, just have a little break, so I can check in with both sides and I can make sure that everyone ...' I think you just have to – Dept of Justice, DSCV

In answering questions based on the scenario, one participant felt it was proper to be direct where a party is about to agree to an unconscionable agreement. In the scenario, if Frank was going to agree to attach his income to debt repayment, the participant felt they had an obligation to stop him from doing so.

In a private session, I would tell Frank that is probably not something he has to agree to. And that if I work through with him that he can't really agree to that because of his other commitments. He needs to understand whether he can actually do that. I mean it is up to him in that mediation. On social security and commonwealth benefits he can't actually afford to do that.

Interviewer: If he insists on part payment – part of his income, if he says I will give part of my income?

I don't see why he should have to agree to that.

Interviewer: Would you take other steps, what would you do?

I would say go to court. I wouldn't agree. I would advise him in a private session that I am not sure this is a good agreement for you.

Interviewer: So you would be saying that to Frank?

In a private session, yes, I don't like parties making unconscionable agreements.

⁵⁴ Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 237.

⁵⁵ Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 241.

⁵⁶ Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 242.

Interviewer: Some mediators wouldn't?

That's alright. They can have that on their conscience – Barrister/Mediator

Some mediators were of the opinion that mediators could be more direct in private sessions, steering parties towards terms they felt were fair.

Because in a way you can answer questions, address issues and tell people certain expectations are unrealistic, often to do with costs, in that sort of environment that you can't do in a more open environment – Magistrate

There were also strong views that if the mediator is going to practice facilitative mediation, it is pertinent that legal representation be provided to disadvantaged parties. It is also critical for the mediator to be able to identify when it would be necessary to insist that the party seek legal advice. Knowledge of the law may be an advantage.

... if you are going to have the facilitative model, you have got to have legal representation or advice for Frank. Because otherwise you have the trader who 9 times out of 10 will know their legal rights and you have Frank who 9 times out of 10 won't know his legal rights – then you have a charade. You have a mediator who also does not know his rights – then whatever the process is; it is nothing to do with justice – CALC

We have Chairs with a lot of experience in the Family Law system. Understanding the law and understanding the jurisdiction. And social scientists and lawyers, so that cross-disciplinary expertise is valued here. And long experience in delivering equality of process. So our Chairs have either been Family Court Report writers, so preparing reports for the court, so they really know what is important in terms of outcomes for children and our lawyers do have many years of experience in this jurisdiction – Victoria Legal Aid, RDM

Substantive justice, maybe you could ask lawyers who represented the parties, spot checks from time to time, because they represent all kinds of different people, they might be advocating for their client but you also get a view if I had taken this to court, was this a reasonable outcome for my client – Victoria Legal Aid, RDM

Where pure reality testing (without giving substantive advice or advice on course of action to take) is going to be the approach taken by the mediator, the level of experience a mediator has may determine whether the reality testing achieves the goal of justice or not. However, reality testing along personal circumstances rather than legal lines may achieve the result. Also responding to the scenario where Frank was going to agree to attaching his income to the debt repayment where he had a right not to, one participant said:

Well, it is the back-end of whether you can enforce an agreement or not, the reality testing. I have no doubt that a practitioner who is more experienced in some areas of law will do more reality testing work. Whereas [others] will do more work around personal circumstances, which could be even more useful for Frank, in a way – Practitioner

Views were expressed about how advice giving and how the private nature of mediation may negatively impact on the justice quality of the mediation.

I've got a strong view that mediators should not give advice. I have a very strong view on that. I think advice giving should happen outside the mediation room or in the room with the

lawyers and representatives. I have a strong view on that because I am troubled by the notion of anybody giving advice after having a private session with people where you could have been told a pack of lies, I just don't think it is procedurally fair and I have concerns around justice and I also know that it really significantly changes the dynamics of the room because they are no longer trying to persuade each other, they are trying to persuade you – Practitioner

For some participants there was an expectation that behind the closed doors of mediation, justice was being served in a cost-effective and self-determined manner; whereas, for other participants, often involved in supporting parties who go to mediation or private practitioners, there was a suspicion that behind those closed doors, the quality of justice in mediation may be diminished.

I suspect a lot of malpractice and misuse and so on that never sees the light of day – Barrister/Mediator

The issue of justice in mediation practice may even be tricky for mediators with the best intentions. Whilst procedural justice elements are critical, at what point a party may consider they are being pressured is an issue.

Did I have an opportunity to have a say, was my voice heard, was the mediator unbiased, did he give me a fair say, did I feel pressured? That is a tricky one to answer because there is always pressure sometimes, it is not the issue, sometimes pressure ... because I do not want to go to court, so I do want to settle so there is pressure but was I forced or was I bullied? – Victoria Legal Aid, RDM

It also appears as noted above that a lot depends on the role of the mediator and the duty to address any imbalance of power evident in the mediation process.

Well, it depends on what mediators say they are doing. If they say they are a genuine honest broker between two parties to a dispute, the question is at what point the imbalance of power inhibits that role. Now in something like motor finance wizard, for instance, we already know there is a gross imbalance of power, now turning a blind eye to gross imbalances of power does not make you an honest broker between two even parties – Solicitor

Evaluation of mediation services/programs

Another process identified by participants for ensuring the justice quality of mediation is evaluation of services. Evaluations could involve various methodologies. Participants were asked whether they had evaluated services from the perspectives of clients. Some evaluations had been carried out from parties' perspectives. Questions included various components of procedural fairness rather than substantive fairness.⁵⁷ For example, in the evaluation of the Supreme and County Court mediations in Victoria, parties were asked whether they considered the process was fair, whether they felt pressured to settle, whether they were treated with respect and whether they had control over the outcome.⁵⁸ Similar questions were asked in the evaluation of the short-mediation process at the

⁵⁷ See Akin Ojelabi, Lola "Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice" *Civil Justice Quarterly* Vol 31 Issue 3 2012 p 318 for a discussion on mediation and justice. The article, among other things, discusses evaluation of court annexed mediations in the supreme and County Courts of Victoria and issues and how fairness was measured.

⁵⁸ Sourdin, Tania, 'Mediation in the Supreme and County Courts of Victoria – A Research Report' (Victoria:

Victorian Civil and Administrative Tribunal (VCAT). Overall, most evaluations focus more on aspects of procedural justice rather than substantive justice. In the Supreme and County Court evaluation, the researchers noted that measuring substantive justice, that is, the fairness of outcomes 'may require a value judgement by a neutral party and this is inconsistent with the defined role of a mediator'.⁵⁹

Some participants discussed ongoing evaluations of mediation programs and one participant, in particular, noted that in the current evaluation of its service, questions are asked relating to quality as opposed to process, although these are not yet made public.

A participant who also uses feedback forms commented on the procedural justice focus of the forms used but also spoke about how the justice quality of outcomes is ensured. This involves asking participants to reflect on a number of issues.

I think justice is assumed, if you were not getting what a person would call justice, I suppose you would complain. Actually, looking at my form it is about procedural justice, but I tell people in terms of substantive justice ... if you reach an agreement, before signing off, you have to be able to say to yourself, the process of reaching the agreement has been fair, and that you can live with the outcome even if it is different to what you had been expecting. You have to be able to explain why you reached the outcome to people who need to hear the explanation and that in 1 year and 5 year's time when you look back on the agreement you can say, I know why I agreed to that – Principal Mediator

Complaint mechanisms

Another means discussed by parties used in ensuring the quality of the mediation process is to have a complaints process which allows parties to complain about aspects of mediation or the conduct of a mediator which they considered unethical or in breach of any requirements of mediation. Views of participants in relation to complaint mechanisms are discussed below in the section on accountability.

Accreditation

Another process for ensuring the justice quality which is not directly part of the mediation process, but relates to the training of mediators, is accreditation. The process and requirements of accreditation have been discussed above. It is also important to note here that accreditation is not compulsory as mediators are required to opt in. However, many, but not all, organisations providing mediation services now require mediators to be accredited. Some of these institutions are also recognised as accrediting bodies (RMABs) under the National Mediator Accreditation System. Participants were of the opinion that an accredited mediator would have to comply with practice standards which includes addressing power imbalance and maintaining procedural justice.

Well as far as ... being an RMAB, it also has obligations under the National Mediator Accreditation System to adhere to practice standards ... It also ... has its own internal ethical guidelines and practice standards – Barrister/Mediator

I don't think we should be employing mediators these days who are not accredited – Practitioner

Department of Justice, 2010). See also Appropriate Dispute Resolution Directorate, Department of Justice, *Evaluation of the Victorian Civil and Administrative Tribunal Civil Claims List Alternative Dispute Resolution Pilot for Small claims Final Report* (March 21, 2011).

⁵⁹ Sourdin, Tania, 'Mediation in the Supreme and County Courts of Victoria – A Research Report' (Victoria: Department of Justice, 2010), p.104; Transformation Management Services, *Court-Annexed Mediation: Broadmeadows Pilot Evaluation* (October 2008), pp.14–15.

Benchmark for measuring the justice quality of mediation outcomes

As noted previously, justice quality relates to both substantive and procedural justice and so in asking questions about measuring the justice quality of mediation, the researchers were focused on both substantive and procedural justice. Participants were asked how the justice quality of mediation could be measured. Given the differing views about whether substantive justice should be a concern of mediation, most participants found the idea of measuring the justice quality from a substantive justice perspective problematic.

Literature in this area highlights that the difficulty with assessing the justice in mediation relates to how to measure and what standards to apply.⁶⁰ Should legal standards be applied? Should the outcome be compared to outcomes that could have been obtained had the matter been decided by a court of law? Should it be in accordance with social norms, that is, standards which are acceptable to the society or societal values?

There are at least three ways in which the justice quality of mediation could be measured: one is through the application of legal norms; second is the application of social norms and third is the application of personal values or norms. Mediators tend to measure the justice quality from the parties' perspectives. Effectively, measurement only relates to procedural aspects of the mediation because it is perceived that ensuring a procedurally fair process leads to a more favourable perception of fairness of the outcome.⁶¹

When asked about measuring substantive justice, some participants re-echoed concerns they had about whether mediation should be concerned with substantive justice. As such, most of the benchmarks suggested related to procedural justice and the durability of the agreement.

I don't think you can do the substantial ... It has to be procedural. It has to be that every person who goes through it feels that they are in control, they understand what is happening, they understand what they agreed to, and what they agreed to is workable for them – Practising Mediator.

... as long as the procedures are good and as long as the parties are comfortable, that they understand, that they don't feel they have been under pressure, it is a decision of their own choice and they can live with it, then I think that's as good as it's going ... that's what it should be measured on. The way you do it is you get the participants to come back and you do a survey a year later and you say do you think what happens is fair or not? – Practising Mediator

In research on mediation in the Supreme and County Courts, the researchers considered what it would mean to evaluate mediation from the substantive justice angle. They referred to debate on the issue and the need to have objective criteria by which to measure the justice quality of mediation outcomes. They also identified benchmarks by which mediation outcomes had been measured in the past, including whether the outcome is a win-win solution, whether the outcome

⁶⁰ See discussion in Akin Ojelabi, Lola "Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice" *Civil Justice Quarterly* Vol 31 Issue 3 2012 pp 320-323.

⁶¹ Note that Welsh argues that this is not necessarily the case and that in some instances fairness of process may not necessarily result in perception of fairness of outcome. See Welsh, Nancy, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' (2002) 1 *Journal of Dispute Resolution* 179. Welsh argues that '... vesting decision control in the disputants does not guarantee that the disputants will perceive the dispute resolution process or its outcome as fair'.

resulted in mutual gains, whether integrative bargaining was employed and whether 'wise' agreements or mutually beneficial and realistic agreements were reached.⁶²

Having highlighted the difficulty participants had with substantive justice, nonetheless a number of benchmarks were identified for measuring the justice quality of mediation. Some participants suggested that legal norms must be used as a benchmark for measuring the justice of outcomes. If the outcomes are the same or close to those that would be obtained in court, then they are just outcomes.

[A just outcome is one that is] broadly reflective of their [parties'] legal rights, and their strategic rights taken into account – CALC

Other participants were of the opinion that there are a broad range of benchmarks that should be considered in relation to the justice of outcomes, but only from the perspective of parties, including legal, social and personal values.

The role of the mediator is to say to the parties: How do you measure fairness of this outcome? Do you need legal advice to make sure it is OK? Do you need more information? Is it fair in terms of other things that could happen to you? ... Using objective criteria and saying to the parties: How do you know this is fair – Barrister/Mediator

The above comment indicates the need for objective criteria which is contextualised: a set of criteria that is considered on the basis of the parties' views of what is required. In other words, it is both objective and subjective. One participant grappling with the idea of measuring the justice quality of mediation outcomes identified four generic questions to ask parties:

Are the parties happy with what they agreed on? Are those parties happy with the process? Has the agreement worked ... in terms of, has the agreement been adhered to by both parties? And has it removed the issue that brought the parties to the dispute? – Practising Mediator

Measuring the justice quality was also said to involve the parties' perception of a win-win solution. If both parties feel they have had a good outcome, the agreement should be considered just.

People should be asked about what their perceptions were, who they thought won, whether both sides did. All those sorts of questions are good questions to ask – Practitioner

Another comment which also related to whether the issues have been resolved by the outcome, as identified above, also distinguished between self-executing and non-self-executing agreements.⁶³ Non-self-executing agreements should be flexible so as to have the capacity to accommodate the changing needs of the parties or the change in their circumstances post-agreement making. Where the agreement is self-executing, durability should be a criterion for measuring the justice quality, and where non-self-executing, flexibility should be replaced with durability.

It is workability, flexibility, adaptability, durability where it is a self-executing agreement, but for a non-self-executing agreement it needs to be flexible – Principal Mediator

The above excerpts indicate the issue of measuring the justice quality of mediated outcomes is a difficult one. Whilst mediators agree that outcomes should be fair, the issue of how to measure this

⁶² Sourdin, Tania, 'Mediation in the Supreme and County Courts of Victoria – A Research Report' (Victoria: Department of Justice, 2010) p 104.

⁶³ A self-executing agreement effective immediately and a non-self-executing agreement is one which does not become effective immediately.

remains controversial. As discussed by Akin Ojelabi,⁶⁴ NADRAC has raised the issue of justice of outcomes through various discussion papers and reports. NADRAC has said, however, fairness of mediation outcomes should not be considered the same as fairness of outcomes of court or tribunal processes. Rather, the mediator must address issues that lead to disadvantage and the outcomes must be acceptable. On the issue of the criteria for measuring the justice quality of outcomes, NADRAC has suggested that legal standards may be a criterion for measuring justice quality.⁶⁵

In relation to the quality of programs, one participant spoke about having consistent referrals as an indication of quality services.

One way to evaluate the justice quality of the mediation is that clients refer clients to me, years later. I figure I must be doing something right ... most of my referrals come from lawyers – Principal Mediator

Public accountability in mediation

As stated earlier, justice could be measured based on three elements: the perspectives of parties in a mediation process – participants' values; social values; and legal values. Measuring the justice quality of mediation from the perspective of the public is, however, problematic to an extent due to the confidentiality of the mediation process and outcomes. The outcomes of mediation are only known to the parties and are generally not published.

The issue with, often the issue around justice and mediation is that it is a private process, private negotiation, without public oversight or scrutiny like the courts have ... they don't have a process for precedence to help people to decide what is a fair range. And so a lot falls on the mediator to ensure that fairness is done in a process where the parties themselves have the authority to make decisions for themselves – Barrister/Mediator

Participants suggested publishing de-identified agreements so the public could form views on the justice quality of outcomes.

I am interested to see mediated family matters published. It's a confidentiality thing; you can hear that I have a bee in my bonnet, about this. People come to me and say ... can you mediate me the normal outcomes here. And I say there is no such thing as a normal outcome ... But I really think that people should have access to the creative outcomes that come from mediation as they do have access to legal matters. And it is true that you do not always have the facts of a mediation matter, but you do not always have the facts of a legal matter written up either – you have only the narrow band of the legal facts – Principal Mediator

Other participants were concerned about the minimal capacity of mediation to address systemic issues as outcomes are not made public.

Well I think in any system, there has to be the capacity to identify systemic problems. And maybe, that is one of the ways in which both the courts and the Magistrates could deal with it. Because it is a requirement under ASIC and corporations laws that the ombudsmen schemes do identify systemic issues, they don't have to engage in necessarily investigations in systemic issues, although FOS is increasingly doing that. But they do have to report them. And I think it ought to be a requirement of the court that they do report evidence of systemic issues – Solicitor

⁶⁴ Akin Ojelabi, Lola "Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice" *Civil Justice Quarterly* Vol 31 Issue 3 2012 pp 335 - 336.

⁶⁵ NADRAC, *Issues of Fairness and Justice in ADR*, Discussion Paper (1997), p.23.

Also linked to the issue of accountability is whether parties in mediation are given the opportunity to complain about the conduct of mediation sessions. In addition to the Approval and Practice Standards as a means of maintaining the integrity of mediation, the NMAS requires that all RMABs have internal complaints systems in place to process client's complaints. Complaints systems are a compulsory part of becoming a RMAB. The National Standards provide that a RMAB must have a:

... complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute⁶⁶

This, according to the commentary, would ensure that existing complaints systems can be used. As will be discussed below, complaints systems overlap between RMABs, and between RMABs and other professional or governmental bodies.

There is a complaints process which applies to Members, mediators and staff ... it applies across the whole organisation. And the process with any complaints about mediators is that wherever it comes to, it usually comes into the President, it will be sent on to [the President who] will follow the process set out in the complaints document that I can print out for you and give to you. If a complaint is about a Member mediator then it will go from the President to the head of that person's List and then the process will be followed. [The President] if it is a panel mediator, or Head of List, if it is a Member mediator, will speak to that person, put the complaint to them, write a response and deal with it in whatever way is appropriate – ADR Member, VCAT

Other participants said it was common for mediators to come under a number of regulatory bodies and different complaints processes, depending on where they were mediating and due to the fact they are members of a number of RMABs.

It depends. If I am mediating under the rubric of LEADR which isn't very often, then of course I would go through the complaints process ... If I am doing it associated with the much larger organisation, one of the government departments and I am doing it as a workplace or something else, then the complaints process would go through that government department and LEADR, probably LEADR ... If I was going through VCAT, I would go through there ... There is cross referral arrangements in place for complaints – Practitioner

Yes I have a complaints process. In fact on my profile I say they can complain to the Law Society, I am not a lawyer but I am a member of the Law Society, they can complain to LEADR ... so my profile says people can complain to the Law Society, LEADR, International Mediation Institute ... but you know there are a number of ways to provide feedback and direct to me of course – Principal Mediator

Some participants are also required to comply with professional codes in addition to mediators' standards. As such, complaints could be made to the professional body as well as the mediation body.

Because we are lawyers we come under the jurisdiction of the Legal Practice Act under the jurisdiction of the Legal Services Commissioner, so complaints can be made to the Legal

⁶⁶ National Mediator Accreditation System, Approval Standards, Section 3(6).

Services Commissioner to investigate. In fact if a complaint is made to the bar, there is an obligation to consider if it is appropriate to send it on to the legal commissioner. We are administered because we are lawyers with a couple of levels of responsibility and obligation – Barrister/Mediator

Some participants were not aware of complaints processes established by their organisations. The information about complaints may not be visible to clients. Some had only just recently established a complaints process, which may require additional work.

I believe so ... We have not been informed; I do not know the process. I think that is a failure of the organisations that I mediate for. I don't know what happens, all I know is that people get telephone calls discussing the outcome – Practising Mediator

For mediators who are not members of any RMAB or other professional body, there may be no complaints process that could be used by their clients. One participant was asked if there was another complaints body for non-RMAB mediators.

No, not if they are not accredited, and they should all be accredited. I mean, I don't think we should be employing mediators these days who are not accredited – Practitioner

Many participants were unsure about dissemination of information about mediation to parties. Participants had the following to say when asked whether clients are made aware of the complaints process:

I imagine they must be. (Interviewer: Is it part of the procedure for clients?) No – Practising Mediator

Um, about complaints, do we have a brochure about that as well? I can't remember if it is on the brochure or not. It is on the website – but you are saying whether it is elsewhere? No, we have not done a mediation brochure. (Interviewer: When people get sent information about mediation?) Yes, we will have a look at it, and if it is not, we should probably include it. (Interviewer: Your client services charter does not say where to make a complaint, does it?) It is more about, what we undertake to do. So we will follow this up. I don't think people usually have any problems making a complaint – I think they don't – Dept of Justice, DSCV⁶⁷

Certainly when I am mediating at VCAT it is – it is available and they are advised beforehand about the mediation process. For individual mediators we generally have a mediation agreement and often – a lot of mediators have a procedure in there. But also parties, when they are dealing with lawyers, they often know they can complain about lawyers through professional organisations, Legal Services Commissioner. If they are legally represented it is usually easier because the lawyers know what their clients' rights are – Barrister/Mediator

(Interviewer: Is information [about complaints process] given to clients at the start of the mediation process?) We are not sure. It would have to be in our brochure? There is a brochure at the front, but I am not sure – we will have to check if it is in our brochure – Victoria Legal Aid, RDM

The importance of a well established and easy to access complaints process was identified by one participant.

I think [for] the particularly disadvantaged clients I sometimes deal with in the mental health

⁶⁷ The DSCV now has its complaints process on its website under the Client Services Charter: <http://www.disputes.vic.gov.au/client-services-charter> Accessed, August 2012.

aged care sector, the ability to mediate outcomes without feeling further put upon and feeling they are creating problems they will be further stigmatised by is difficult. It is really important that the complaints process be well thought through and graduated for those situations – Barrister/Mediator

Participants were also asked whether records of complaints and outcomes are stored. Some identified that reporting on complaints and their resolution was not something uniformly done by institutions and organisations.

... Because all of the complaints come through the President's office and then back out through the President's office and she is highly organised so she would have record of that – ADR Member, VCAT

Yes ... we kept data in the dispute settlement centres. I think VCAT do as well. The Legal Services Commissioner would keep them but I don't know if he or she is receiving any complaints about mediators or lawyers engaging in mediation. I think there are very few ... As an RMAB they are obliged to keep those sorts of records, so they would, but they don't report on it I don't think – Barrister/Mediator

The Mediator Standards Board (MSB), launched in September 2010, is the central body responsible for mediator standards and accreditation in Australia. The role of the MSB is to promote quality standards in mediation. All RMABs are members of the MSB and, as such, the MSB monitors the process and procedures of all RMABs. The MSB's objectives include overseeing 'the application of the Standards with a view to achieving consistency, quality and public protection regarding mediation services and mediation training'. The MSB does have the role of ensuring quality and accountability in mediation practice. The MSB intends to do this by maintaining and amending the NMAS, encouraging and supporting members to meet National Mediator Standards, maintaining a record of accredited mediators and ensuring mediators receive relevant training to carry out their work. It might be that the MSB will, in the near future, make public a procedure for ensuring accountability and quality in mediation practice.

Conclusion

In this small research project, the views of participants in relation to the justice quality of mediation and public accountability in mediation practice are reported.

Disadvantage and mediation

Participants were in agreement that disadvantage results in gross power imbalance and that this can limit the ability of a disadvantaged party to use or engage in the mediation process effectively. Without measures to address disadvantage, the outcome of the mediation process may be unjust. In order to identify and address disadvantage in mediation practice, several processes are used by mediators to ensure that disadvantages are identified. For example, mediators ask parties a series of questions in the intake process for the purpose of identifying, among other things, any disadvantage or other issues which may necessitate adjustments to the process, provision of information or a recommendation to the party affected to seek legal advice. Where it is in the power of the mediator or the organisation to do so, referrals are provided or support sought for the parties. However, the quality of intake may vary across organisations and/or practitioners and as a result disadvantage may not be uniformly identified or addressed. This can lead to outcomes that are unjust for parties.

In context of identifying and addressing disadvantage, participants spoke about the importance of the skills and knowledge of the mediator, as some disadvantage may only be identifiable by mediators knowledgeable in that area and not necessarily during the intake process. The level of knowledge and skill of the mediator are critical to identifying and addressing issues of disadvantage.

When presented with the research scenario, participants identified a number of issues which may result in disadvantage for Frank. However, participants did not necessarily identify the same issues or all the issues. This was reflective of the varying professional backgrounds and experiences of participants. This exercise highlights the relevance of knowledge on the part of a mediator in identifying potential issues of disadvantage.

Also raised by the research scenario is the issue of whether some types of matters are not suitable for mediation. Again, suitability may be judged differently and this, it also appears, is dependent on the knowledge, experience and skills of the mediator. Some mediators might consider a dispute suitable for mediation because of disadvantage on the part of a party while others may not.

In terms of having support persons or legal representation for purposes of addressing disadvantage, participants agreed that these were options for addressing disadvantage and the role of the mediator is to ensure that a party has been given the opportunity to access the information, support and advice that is required. However, it was also noted that the *quality* of support, legal representation and interpreting services are critical to achieving a just outcome from the process. Since mediators are limited in terms of what action may be taken to address disadvantage due to the principle of self-determination, reliance may be placed on legal advice/representation or support persons in order to achieve a just outcome, but such assistance must be of good quality.

Mediation and justice

In relation to whether mediation should deliver justice and whether the focus should be on substantive or procedural justice, participants' views reflected the literature. There was agreement that mediation should be concerned with achieving justice but there were concerns about what justice really means and what standards to apply in determining justice. There were also issues in relation to whether mediation is able to achieve substantive justice. Participants were in agreement that mediation should deliver procedural justice because mediation is concerned with process rather than substantive justice. Most participants took the view that once procedural justice is ensured, whatever outcome was arrived at would be just. As such, where a party is about to enter into an

agreement which would be unfair by legal standards or even unfair according to the mediator's understanding of fairness, the mediator can only use the process, in form of reality testing, to ensure the party has thought through the issues but is not to give advice. Thus, the process is a tool in the hand of the mediator for ensuring substantive justice.

It was generally agreed that the intake process could be used to improve the justice quality of mediation; however, lack of uniformity in the practice of intake was also evident. In addition, the quality of the intake processes differs across service-providers. Some services have more detailed intakes and some do not. The absence of any mandatory requirement for intake makes it difficult to generalise that having an intake process serves as a justice buffer for mediation. For services with an elaborate intake process, justice quality may be improved for their clients.

In relation to reality testing and what happens in private sessions, participants were of the opinion that reality testing is critical in evaluating the justice quality of options. It is during private sessions that parties may be alerted indirectly to the unfairness in options or paths they have chosen. Some participants would, however, be more direct and advisory where a party is about to enter into an unconscionable agreement which cannot be justified by prevailing legal standards. However, whilst private sessions are to be used to promote justice quality, participants were wary of pressuring parties to accept a particular offer or to settle the dispute. The foregoing indicates that practice is not uniform in relation to giving advice and reality testing in private sessions or at all in mediation. It appears the training mediators receive, their backgrounds and, in particular, if they have any legal training, are factors responsible for the difference in mediators' practice. Overall, the general understanding from the interviews with participants was that the quality of mediation was very much dependent on the style, practice philosophy and training or knowledge of the mediator.

Similar to the observation in relation to the quality of the intake process and skills of a mediator in identifying disadvantage, effective reality testing is also dependent on the skills and experience of a mediator so that, regardless of background, a mediator would be able to address all issues that may result in disadvantage

Participants also discussed the importance of conducting evaluations, although they focus mostly on procedural aspects of mediation for purposes of ensuring justice quality. Also mentioned were complaint mechanisms and accreditation. Accreditation at the moment is voluntary which means mediators must opt in.

Measuring justice quality and accountability in mediation

On the issue of how to measure justice quality, that is, the benchmarks for measuring justice quality, most participants thought benchmarks should focus on procedural and not substantive justice as substantive justice is difficult to measure. Participants were also of the view that any evaluation of justice quality should be conducted from the perspective of parties. Established criteria could be developed that parties apply to their situations. For example, in introducing the values-based approach to mediation, and in particular, the values of equality and mediation, Akin Ojelabi and Sourdin said:

The mediator is therefore required to have an understanding of the dispute and its circumstances and inject the value of equality in relevant proportions. The value of equality can be linked to mediator standards concerning bias, impartiality and neutrality ... In one sense, neutrality may not be consistent with accepted mediation practice that is focused on a values-based approach because it requires that mediators intervene to address power imbalances and promote procedural fairness and just outcomes ... a values-based approach

would require the mediator to raise these criteria (or an appropriate formulation) at an agreement-making stage.⁶⁸

In addition, some participants spoke about measuring justice quality by evaluating durability, flexibility (for non-self-executing agreements) and workability. Other participants spoke of the need to use legal standards in measuring the justice quality of outcomes, in other words, is the outcome that which would have resulted from the application of legal standards? In contrast, others were of the opinion that legal standards are not always reflective of justice. The differences in opinion here are also similar to what appears in the literature, as already discussed above.

On the issue of accountability, participants spoke about the need to make mediation outcomes available to the public. However, this is not yet possible in most cases because of the confidential nature of mediation. Connected to this issue and the confidential nature of mediation is the way in which precedence informs justice standards. This is certainly the case in the civil justice system where the doctrine of precedent operates. Similarly, agreements reached at mediation should contribute to the development of values within the society and as parties bring into the mediation personal values and values learnt from the society and enter into agreements with the assistance of the mediator, so, also, values embedded in the agreements should inform decision-making in the wider community by making them public. The fear may be that the agreements could be seen as not reflective of social values and, as such, criticised.⁶⁹ Confidentiality of the mediation process may mean that values which inform decision-making in mediation are prevented from influencing the wider society, and the wider society is also prevented, to an extent, from influencing decision-making or scrutinising outcomes of mediation based on societal values.

Also in relation to accountability, complaints processes are not always made known to parties nor are they accessible. It is also unclear what procedure the MSB may develop to ensure accountability.

The foregoing provides a summary of how some in the mediation field identify and address disadvantage and also conceive the justice quality of mediation and benchmarks for measuring justice quality. It is quite clear that an awareness of disadvantage and the possibility of reaching unjust outcomes in mediation are present. There is also an understanding that focusing on procedural justice alone might not be sufficient to assess the justice quality of mediation. The process is not always just. However, unjustness resulting from the procedure may not be a flaw of the process itself but may result from lack of experience or skills on the part of mediators. The principle of self-determination which forms a fundamental value of the mediation process, however, needs to be reconsidered in the context of parties who may be subject to one form of disadvantage or another and the process adjusted in order to arrive at a just outcome. Relying on individual mediators to ensure the process results in a just outcome may not be enough.

Criteria

The difficulty associated with identifying benchmarks for measuring the justice quality in mediation, including both procedural and substantive justice, can be addressed by developing objective criteria which is then applied contextually. Objective criteria could be developed based on certain norms which are generally acceptable. An example is the values-based mediation idea developed by Akin Ojelabi,⁷⁰ which can be applied based on the agreement of and understanding by parties as to what

⁶⁸ Akin Ojelabi, Lola and Sourdin, Tania, 'Using a Values-Based Approach in Mediation' (2011) 22 *Australasian Dispute Resolution Journal* 258.

⁶⁹ See Akin Ojelabi, Lola, 'Transforming Communities through Conflict Resolution Practices' *The International Journal of Diversity in Organisations, Communities and Nations*, Vol 7 No 2 at 67.

⁷⁰ Akin Ojelabi, Lola, 'Values and the Resolution of Cross-Cultural Conflicts' (2010) 291 *Global Change, Peace and Security* 53. This idea was expanded to mediations in Lola Akin Ojelabi and Tania Sourdin, 'Using a Values-Based Approach in Mediation' (2011) 22 *Australasia Dispute Resolution Journal* 258.

each value means in the context of the dispute. In addition, using legal standards as benchmarks is unlikely to be detrimental as certain legal principles are fairly straightforward and can be applied based on parties' understanding of the principles. The goal is not to enforce the law, but to provide a framework within which the justice quality of options may be tested before arriving at the final terms of settlement.

Applying legal standards and societal values will not drown the voice of parties in the mediation process, it only means that the parties can consider these values and apply them based on their own understandings. This would also mean providing support to parties when required as already is the case in the mediation.⁷¹ In this way, mediation could do more in promoting justice as a societal value.

The role social norms could play in mediation has been explored. Waldman⁷² argues that attention must be paid to the role of social norms in mediation and that there are three different models of mediation categorised on the basis of the role social norms play in mediation. The three models are 'norm-generating,' 'norm-educating,' and 'norm-advocating' models. Waldman further argues that although the models are similar in their use of mediation techniques, 'they differ in their relationship to existing social and legal norms'.⁷³ The norm-generating model is reliant on the parties to generate rules or criteria they want to employ in resolving their dispute. According to Waldman, it pays no attention to social norms.⁷⁴ The mediator in this model promotes self-determination and refrains from interventions that contribute to the content of the conversation between the parties. The mediator in the norm-educating model on the other hand refers to social and legal norms in order to 'enhance autonomy'.⁷⁵ The social and legal norms are used according to Waldman, to 'provide a baseline framework for discussion of dispute issues'.⁷⁶ Finally the mediator in the norm-advocating model informs the parties of social and legal norms relevant to the dispute and goes further to ensure that the norms are incorporated into any agreement reached. The mediator has been referred to as 'a safeguarder of social norms and values'.⁷⁷ Waldman asserts that different models are suitable to different types of disputes. The values approach⁷⁸ discussed above fit into the norm-educating model of mediation in which the value of self-determination is preserved but exercised with knowledge of values or criteria that should guide the process.

Although current mediator standards focus on procedural justice, developments in the family law area indicate the possibility of having a substantive justice criterion imposed on mediation outcomes and on mediators. This is the requirement to ensure that outcomes reflect the 'best interest of the

⁷¹ See Akin Ojelabi, Lola and Sourdin, Tania, 'Using a Values-Based Approach in Mediation' (2011) 22 *Australasian Dispute Resolution Journal* 258 on how the values framework can be translated into practice using the Education, Recognition, Support and resolution (ERSR) approach.

⁷² Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703.

⁷³ Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703 at 708.

⁷⁴ Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703 at 718.

⁷⁵ Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703.

⁷⁶ Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703 at 730.

⁷⁷ Waldman, Ellen, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' 48 *Hastings Law Journal*, 1996-1997 p 703 at 745.

⁷⁸ Akin Ojelabi, Lola and Sourdin, Tania, 'Using a Values-Based Approach in Mediation' (2011) 22 *Australasian Dispute Resolution Journal* 258.

child'.⁷⁹ The 'best interests of the child' goes to quality of the outcome, but it also has to be considered on a case-by-case basis. Such conditions may be imposed on specific aspects of mediation. A legislative approach is already being taken in relation to mediation of personal safety matters.⁸⁰ The legislation in this area provides for certain principles which must be applied before a matter is found suitable for mediation.⁸¹

Additionally or alternatively, the justice quality of mediation could be tested against five principles of access to justice developed by the Commonwealth Government as noted above: accessibility; appropriateness; equity; efficiency and effectiveness. *Accessibility* refers to the goal of making the justice system less complex so that it becomes accessible to all. It is about developing 'mechanisms to allow people to understand and exercise their rights'⁸² where rights may be created, altered or where a decision has to be made in relation to rights in a process. As indicated in the analysis above, participants in the research stated that mediation is not generally about enforcement of legal rights and that rights may be traded away during negotiation. The most important question, however, is whether the individual trading away rights is aware of or has an understanding of what those rights are about in the first place. In measuring the justice quality of mediation, participants could be asked, depending on the context, whether they were aware or understood their legal rights prior to the mediation. Participants could also be asked whether in reaching an agreement they traded away the rights and why, if they did.

Appropriateness is about directing 'attention to the real causes of problems that manifest as legal issues'.⁸³ For example, a health issue may have resulted in an inability to fulfil contractual obligations. Participants spoke a lot about ensuring the dispute is suitable for mediation, that is, that mediation is the most appropriate process for the dispute. In relation to the scenario, some participants queried whether mediation is the most appropriate process for the dispute. Some preferred a judicial determination so that systemic issues may be addressed to reduce disputes into the future or to alert consumers to systemic issues they need to be aware of. Mediators would use the process of intake to ensure that support and referrals are provided where needed. In relation to appropriateness as a criterion for measuring justice quality, this can be tested by asking parties whether, in their opinion, the mediation addressed all the underlying issues in the conflict. This may, however, be problematic as in some situations, parties may not be aware of what the underlying causes are. However, one of the advantages of mediation is that it may assist the parties to better understand or define the issues in the conflict.⁸⁴ Asking parties about how well the mediation assisted in defining issues and addressing underlying causes may thus be a good way for measuring justice quality. Some mediation evaluations already ask the question in any case. The caveat, though, is that parties may not have that understanding in all cases, for example, where the focus is predominantly on the legal issue rather than the health issue or lateness of an employee to work

⁷⁹ Family Relationships Services Guidelines, Appendix C; 'Operational Framework for Family Relationship Centres', Pt One; 'Assistance Provided By Family Relationship Centres; available from the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') and online at: http://www.facs.gov.au/sa/families/progserv/FRSP/contractual_arrangements/Documents/frsp_guidelines/ap_p_c.htm [Accessed May 2, 2012]; see also the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth).

⁸⁰ Section 34, *Personal Safety Intervention Orders Act 2010* (Vic).

⁸¹ The Attorney-General is yet to provide guidelines as required by legislation.

⁸² Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 62

⁸³ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 62.

⁸⁴ Sourdin, Tania, *Alternative Dispute Resolution*, 2012 4th edition, Lawbook Co. Thomson Reuters p 67.

without addressing the underlying issue of bullying or discrimination. One could, however, fairly confidently say that the process should aim at uncovering underlying issues by focusing on parties' interests and not positions. However, as pointed out by participants, doing this effectively will depend on many factors, including time, skills and expertise of the mediator. It will also depend on a focus on resolution rather than settlement of the dispute.

Equity is about the fairness of access or equality of access.⁸⁵ It involves removing barriers that may hinder a party from accessing mediation services. Once a party is in mediation, it would appear that barriers have been succumbed. The only issue would relate to whether the disadvantages translate into barriers to participating effectively in the mediation process. Participants may be asked, how easy or difficult it was for them to access the service-provider or how they heard about the service.

Efficiency is about delivery of outcomes 'in the most efficient way possible'.⁸⁶ It involves 'early assistance and support to prevent disputes from escalating'.⁸⁷ It is also about proportionality of the cost of dispute resolution to the issues in dispute. The first aspect could be tested from the parties' perspectives, but the second from the service-providers' or relevant expert's perspective. In relation to the first aspect, early assistance could be in relation to the time between accessing the service and when the mediation process took place and whether sufficient support was provided by the service-provider, including the mediator, in assisting with dispute resolution. Participants can be asked questions along those lines.

Effectiveness relates to 'how the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining support for the rule of law.'⁸⁸ This principle focuses on delivery of fair outcomes to parties. It is not only about procedural but also substantive justice. It is also not only justice based on the parties' perspectives, but also justice based on legal and social norms. It is about preventing disputes into the future. As such, the concept of justice as is within the mediation field is narrow in comparison with justice of outcomes in relation to the effectiveness principle. This could accommodate the above discussion on values and objective criteria which the mediator or evaluators can use to test the justice quality of the outcome. The mediator should know, objectively, types of outcomes that would be classified as a just outcome which the parties may wish to negotiate away if they wish, but at least they have been made aware of them. Questions may be asked in relation to whether the mediator discussed the issue of justice with parties, whether there was an objective criteria which was discussed with the parties at the start of the process, and how that impacted on their views and ultimate decision.

⁸⁵ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 62.

⁸⁶ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 63.

⁸⁷ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 63.

⁸⁸ Federal Attorney General, Australia in 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Foreword) Report by Access to Justice Taskforce, Attorney General's Department, September 2009 at p 63.

While the foregoing analysis and suggestions for measuring the justice quality of mediation could provide relevant criteria, the divergent views of the participants in this research indicate that more research is required into whether specific criteria may be required for specific disputes and how such criteria may be applied given the value of self-determination in mediation.

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