

# ENSURING ACCESS TO JUSTICE IN MEDIATION WITHIN THE CIVIL JUSTICE SYSTEM

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*This article addresses the issue of access to justice and mediation. Australian state and federal Attorneys-General have identified mediation as an important tool in improving access to justice for ordinary citizens. Shifts in government policy have greatly increased the use of mediation as a means of resolving disputes in civil matters in both courts and tribunals. Policy makers, practitioners, courts and tribunals aspire to reflect the values of the 'access to justice movement' in the increased use of mediation. This article reports on findings from empirical qualitative research that sought to identify what those in the mediation field think about mediation and justice and how they seek to guard against perpetuating disadvantage in mediation and thus improve access to justice. The insights provided by practitioners, mediation service providers and policy makers, tribunal members and magistrates, about issues relating to mediation and justice are detailed. Whether mediation should be concerned with justice and, if so, whether it should be concerned with procedural or substantive justice or both is explored. The conclusion suggests how the justice quality of mediation could be measured to ensure access to justice is enhanced for the disadvantaged and not diminished.*

## I INTRODUCTION

Changes in government policy have contributed to the greatly increased use of mediation as a means of resolving disputes in civil matters in both courts and tribunals. Australian state and federal Attorneys-General have identified mediation as an important tool in improving access to justice for ordinary citizens. Ensuring mediation reflects the 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 alternative dispute resolution (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'.<sup>1</sup>

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1 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2607 (Rob Hulls, Attorney-General).

This article addresses the issue of access to justice and mediation. It reports on findings from empirical qualitative research focused on justice quality and accountability in mediation practice. The research sought to identify what those in the mediation field think about mediation and justice and how they seek to guard against perpetuating disadvantage in mediation and thus improving access to justice. We examine issues relating to mediation and justice, particularly whether mediation should be concerned with justice and, if so, whether it should be concerned with procedural or substantive justice or both. In concluding we suggest how the justice quality of mediation could be measured to ensure access to justice is enhanced for the disadvantaged and not diminished.

To contextualise the research we discuss the connection between the access to justice movement and the increased use of mediation, highlighting recent government initiatives. Our research methodology is detailed below. Then, drawing on insights provided by practitioners, mediation service-providers and policy makers, tribunal members and magistrates, we examine four related issues:

- (1) should mediation be concerned with justice;
- (2) how to identify and address disadvantage in mediation practice;
- (3) what processes ensure the justice quality of mediation; and
- (4) how the justice quality of mediation is measured.

We suggest criteria for measuring the justice quality of mediation and conclude that further research is required into issues of justice and accountability in mediation practice.

## II ACCESS TO JUSTICE AND MEDIATION

Concern to improve access to justice came from a realisation by many in the legal arena that the liberal claim of a justice system that ensured ‘equality before the law’ was a mere formal right with little substance and practical effect. In the mid 1970s, Cappelletti and Garth surveyed access to justice developments across many western industrialised countries and identified three waves in the access to justice movement.<sup>2</sup> The first wave addressed economic matters and sought to provide citizens with legal means to seek justice through legal aid schemes.<sup>3</sup> The second wave focused on organisational matters that facilitated class actions and standing in a representative capacity. The third wave was procedural and included the development of a range of ADR processes.<sup>4</sup>

2 Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The World-Wide Movement to Make Rights Effective’ in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjhoff & Noordhoff, 1978) 21.

3 For a discussion of the Australian legal aid system from 1970s to date, see Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (Federation Press, 2006).

4 Cappelletti and Garth, above n 2, 21–54. See also Mauro Cappelletti, ‘Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement’ (1993) 56 *Modern Law Review* 282, cited in Geraint Howells and Rhoda James, ‘Litigation in the Consumer Interest’ (2002) 9 *ILSA Journal of International and Comparative Law* 1, 3 n 4. More recently Parker identified a fourth wave, competition policy reform of legal service provision Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 38–41.

Since then, many nations have attempted to implement reforms to their civil justice systems.<sup>5</sup> Problems identified in the operation of civil justice systems include high costs, delay, uncertainty, fragmentation and the adversarial nature of litigation.<sup>6</sup> An aspect of the access to justice movement was the establishment of dispute resolution institutions such as ombudsmen services, specialist tribunals and community/neighbourhood justice centres.<sup>7</sup> In 1994, the Australian Access to Justice Advisory Committee (AJAC)<sup>8</sup> recommended resort to ADR as one way of improving access to justice. The Committee identified the advantages of ADR as including the provision of broader remedies and less-costly and less-formal processes.<sup>9</sup> It recommended that '[t]he Commonwealth should continue to support the development of ADR' programs in Australia.<sup>10</sup> In the two decades since the publication of this report, ADR processes have become an accepted part of the Australian civil justice system at both state and federal levels.

Recent reviews of the Victorian and federal civil justice systems recommended the further utilisation of ADR processes as integral to improving access to justice.<sup>11</sup> These reviews identified that because most disputes are resolved outside of the court system, mechanisms that allow all citizens to achieve 'everyday justice' must be viewed as a necessary part of policy and legislative attempts to ensure a just society.<sup>12</sup> Courts and tribunals now provide ADR options to parties. Parties may be required to use ADR processes as a result of a court order or as a condition for accessing the courts. Court-annexed dispute resolution schemes are now an

5 Most notable of these is the reforms in the United Kingdom initiated by Lord Woolf. In the United Kingdom, 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 United Kingdom. Reforms to the civil justice systems in Australia have followed similar paths to the United Kingdom, attempting to improve accessibility, affordability, proportionality, timelines and the ability to get to the truth quickly and easily. For a critical assessment of these reforms see Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 *Yale Journal of Law and the Humanities* 397.

6 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 10–11.

7 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, (2009) 19 ('*Inquiry into Alternative Dispute Resolution and Restorative Justice*'), citing Chris Field, 'Alternative Dispute Resolution in Victoria: Supply-Side Research Project Research Project' (Research Report, Department of Justice Victoria, 26 February 2007) 22.

8 See Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994) xxiii.

9 *Ibid* 278. In particular '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'.

10 *Ibid* 300.

11 See Access to Justice Taskforce, Attorney-General's Department, Commonwealth, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) ix ('*Access to Justice Taskforce*'); *Inquiry into Alternative Dispute Resolution and Restorative Justice*, above n 7.

12 *Access to Justice Taskforce*, above n 11, 3–4 at 4, citing Parker, above n 4, 64:

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).

integral part of the dispute resolution landscape.<sup>13</sup> ADR occurs within the civil justice system with a focus, at the federal level, on accessibility, appropriateness, equity, efficiency and effectiveness with the overall aim of ‘maintaining and supporting the rule of law’.<sup>14</sup>

In 2008, the federal Attorney-General requested the National Alternative Dispute Resolution Advisory Council (NADRAC) to report on how to encourage greater use of ADR in civil proceedings. The Attorney-General was particularly concerned about the ‘barriers to justice that arise in the context of civil court and tribunal proceedings’ and he wanted to ‘encourage parties to civil proceedings to make greater use of ADR to overcome (sic) court and tribunal barriers to justice’.<sup>15</sup> In 2009, NADRAC delivered a report which ultimately informed the *Civil Dispute Resolution Act 2011* (Cth). The object of this Act is to ensure that ‘people take genuine steps to resolve disputes’ before instituting civil proceedings.<sup>16</sup> Similarly, the purpose of the *Civil Procedure Act 2010* (Vic) is to ‘facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’.<sup>17</sup>

In the new landscape for civil litigation, it is envisaged that court proceedings will become the ‘last resort’, used only after other more appropriate means of dispute resolution are attempted.<sup>18</sup> Court case management approaches and pre-trial reviews will, amongst other things, take into consideration whether parties have reasonably attempted ADR processes to resolve the dispute and/or prescribe steps to be taken by parties to resolve the matter out of court.<sup>19</sup> This recent policy and legislative reform to the civil justice system reflects concerns with access to justice and aspirations to improve it.<sup>20</sup> Further access to and use of ADR processes is identified as one of the avenues through which to achieve enhanced access to justice.

Although ADR is aimed at addressing systemic issues within the civil justice system, the connection between increasing ADR processes and improved access

13 See generally David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2<sup>nd</sup> ed, 2009); Arie Frieberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205.

14 *Access to Justice Taskforce*, above n 11, 62–3.

15 National Alternative Dispute Resolution Advisory Council, Commonwealth, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (September 2009) ix (‘*The Resolve to Resolve*’).

16 *Civil Dispute Resolution Act 2011* (Cth) s 3.

17 *Civil Procedure Act 2010* (Vic) ss 1(c), 7(1).

18 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 115.

19 At the Commonwealth level, s 3 of the *Civil Dispute Resolution Act 2011* (Cth) provides that the object of the Act is ‘to ensure that, as far as possible, people take genuine steps to resolve disputes’ before instituting proceedings. Section 4 defines genuine steps as ‘sincere and genuine attempt[s] to resolve the dispute’. This includes considering whether the dispute may be resolved through alternative dispute resolution processes. At the state level — in particular in Victoria — pre-litigation requirements compelling parties to take reasonable steps to resolve their disputes were to come into effect on 1 July 2011 under ch 3 of the *Civil Procedure Act 2010* (Vic). These requirements were repealed on 30 March 2011. However, Victorian courts may impose pre-litigation requirements they deem fit on parties.

20 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 is an essential precondition to social inclusion and a critical element of a well-functioning democracy’: *Access to Justice Taskforce*, above n 11, ix.

to justice is debatable.<sup>21</sup> Scholars question the potential of ADR to deliver justice. Fiss argues settlement in ADR is a ‘truce more than a ... reconciliation’,<sup>22</sup> while Genn argues that mediation is not about ‘just settlement’ but ‘just about settlement’,<sup>23</sup> and Welsh argues that the mediation field’s focus is mainly on skill-development with little attention being placed on issues of justice.<sup>24</sup> Noone argues that a disconnect exists between transformative mediation and social justice and that ADR may not promote public interest issues.<sup>25</sup> Additionally, Waldman asks whether mediation should concern itself with substantive justice or simply focus on procedural justice alone.<sup>26</sup> 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 policy makers and regulators need to pay more attention to issues of justice.<sup>27</sup>

The potential for the institutionalisation of ADR to create access to justice difficulties was identified by the 1994 Access to Justice Advisory Committee. The Committee consequently encouraged ‘appropriate training for mediators’, and the establishment of ‘screening processes to identify parties whose disputes may not be suitable for mediation’.<sup>28</sup> The Committee also noted the need for regular evaluation of court-annexed mediation programs ‘to identify whether any of the potential risks have eventuated and to introduce measures to correct any identified problems’.<sup>29</sup> Specific issues raised in relation to access 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 and inequities. The current diverse and complex ADR landscape may create hurdles for disadvantaged parties and further hinder access to justice.<sup>30</sup> In addition, the mandatory nature of some ADR regimes can mean that inappropriate matters are

21 For an overview of the debate see Lola Akin Ojelabi, ‘Mediation and Justice: An Australian Perspective Using Rawls’ Categories of Procedural Justice’ (2012) 31 *Civil Justice Quarterly* 318, 320–1; Mary Anne Noone, ‘ADR, Public Interest Law and Access to Justice: The Need for Vigilance’ (2011) 37 *Monash University Law Review* 57.

22 Owen M Fiss, ‘Against Settlement’ (1984) 93 *The Yale Law Journal* 1073, 1075.

23 Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 117 (emphasis altered).

24 See Nancy Welsh, ‘Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories’ (2004) 54 *Journal of Legal Education* 49.

25 See Mary Anne Noone, ‘The Disconnect between Transformative Mediation and Social Justice’ (2008) 19 *Australasian Dispute Resolution Journal* 114; Noone, ‘ADR, Public Interest Law and Access to Justice’, above n 21. Cf Robert A Baruch Bush and Joseph P Folger, ‘Mediation and Social Justice: Risks and Opportunities’ (2012) 27 *Ohio State Journal on Dispute Resolution* 1, 2, 35–42. Bush and Folger argue that mediation ‘can be supportive of, or at least not inimical to, social justice’ if transformative mediation practices are utilised: at 3. These include a party-oriented or party-driven process supporting self-determination and empowerment.

26 Ellen Waldman (ed), *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011).

27 Akin Ojelabi, ‘Mediation and Justice’, above n 21, 339.

28 Access to Justice Advisory Committee, above n 8, 280.

29 *Ibid* 279.

30 See, eg, Lola Akin Ojelabi, ‘Community Legal Centres’ Views on ADR as a Means of Improving Access to Justice — Part I’ (2011) 22 *Australasian Dispute Resolution Journal* 111; Lola Akin Ojelabi, ‘Community Legal Centres’ Views on ADR as a Means of Improving Access to Justice — Part II’ (2011) 22 *Australasian Dispute Resolution Journal* 173.

referred to ADR. This can result in inequitable settlements or no settlement, further increasing the cost and stress associated with dispute resolution.<sup>31</sup>

Mediation proponents argue, however, that mediation promotes justice because it delivers outcomes acceptable to the parties.<sup>32</sup> Stulberg, for example, contends mediation could be ‘referred to as a process of “pure procedural justice ...”’ because it has the capacity to address issues of injustice through codes of conduct, allowing legal representation in the mediation or through the skills of the mediator.<sup>33</sup> Stulberg first identifies the factors which may lead critics to the conclusion that mediation is not a just process including involuntary decision-making; negotiating away fundamental interests (for example, freedom); agreeing to illegal terms, terms that violate human dignity, or those that contradict fundamental societal values; and lack of informed decision-making.<sup>34</sup> Stulberg then argues mediators can build conditions and constraints into the conception of the mediation procedure that minimise injustice — including ensuring that the process is voluntary; that interests are inalienable; that outcomes are publicised; that there is dignity and respect; that decision-making is informed; and that conflicting fundamental values are tolerated.<sup>35</sup> According to Stulberg, these are benchmarks for measuring the ‘justness’ of the outcome,<sup>36</sup> but the question remains whether these benchmarks are always met and whether they are sufficient in addressing issues of substantive justice.

Bush and Folger posit that mediators have responded differently to the issue of social justice in mediation. In particular, they say that facilitative mediators take steps to balance the power between the parties and to ensure that the outcome is mutually acceptable, and in this way, facilitative mediators are concerned about substantive justice.<sup>37</sup> They argue mediation has the potential to promote social justice, although interventions by facilitative mediators are limited in relation to achieving this goal.<sup>38</sup> 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’.<sup>39</sup> Bush and Folger recognise

31 Tamara Goriely, Richard Moorhead and Pamela Abrams, ‘More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour’ (Research Study No 43, The Law Society and Civil Justice Council, 2002).

32 See generally Jonathan M Hyman and Lela P Love, ‘If Portia Were a Mediator: An Inquiry into Justice in Mediation’ (2002) 9 *Clinical Law Review* 157.

33 Joseph B Stulberg, ‘Mediation and Justice: What Standards Govern?’ (2005) 6 *Cardozo Journal of Conflict Resolution* 213, 215, 221–2. Cf Akin Ojelabi, ‘Mediation and Justice’, above n 21; Joseph B Stulberg, ‘Must a Mediator Be Neutral? You’d Better Believe It!’ (2012) 95 *Marquette Law Review* 829 (where Stulberg argues that mediator neutrality better facilitates social justice than impartiality).

34 Stulberg, ‘Mediation and Justice’, above n 33, 221–7.

35 *Ibid* 215, 227–8.

36 *Ibid* 221, 227.

37 See Bush and Folger, above n 25, 13. The idea that facilitative mediators are concerned about substantive justice is not one that is generally held by facilitative mediators or their critics.

38 Bush and Folger define social justice as ‘the absence of structural injustice or inequality’: *ibid* 3. 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’: at 4.

39 *Ibid* 19.

these interventions have limitations and may not address issues of substantive justice.<sup>40</sup> They conclude by suggesting transformative mediation practices as a means of achieving social justice in mediation.<sup>41</sup>

### III THE RESEARCH: GOALS, METHODOLOGY AND PARTICIPANTS

Part II of this article highlighted the diversity of views about the connection between mediation and justice. Against the backdrop of the increased use of mandatory mediation in the civil justice system, the research discussed in this article sought to discover what those currently working in the mediation field thought about mediation and justice. International and Australian research has consistently found that disadvantaged members of the community experience more barriers to access to justice than others.<sup>42</sup> The authors were interested to discover how mediators sought to guard against perpetuating disadvantage in mediation and therefore improve access to justice. The views of practitioners, policy makers, magistrates and other stakeholders on whether justice is achieved through mediation and how the justice quality of mediation is and should be maintained are reported. The research aimed to develop a set of criteria for measuring the quality of and ensuring accountability in mediation practice. These pilot criteria will be used in later research.

During 2011 and 2012 the researchers conducted 11 semi-structured interviews in Victoria, Australia with public and private stakeholders to gather qualitative data to inform the development of standards for measuring the justice quality of mediation.<sup>43</sup> The 16 participants included mediation practitioners in civil, family and commercial areas; Magistrates' Court and Victorian Civil and Administrative Tribunal (VCAT) representatives; staff from the ADR Directorate in the Department of Justice (Vic);<sup>44</sup> the Roundtable Dispute Settlement Centre, Victoria Legal Aid (VLA); the Consumer Action Law Centre (CALC); the Footscray Community Legal Centre; and members of the Victorian Association for Dispute Resolution (VADR) and LEADR Association of Dispute Resolvers.

40 Ibid 44. They 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': at *ibid*.

41 But see Noone, 'The Disconnect between Transformative Mediation and Social Justice', above n 25.

42 Christine Coumarelos et al, 'Access to Justice and Legal Needs Volume 7 — Legal Australia-Wide Survey: Legal Need in Australia' (Law and Justice Foundation, August 2012) 5–6, 16 ('*Legal Australia-Wide Survey*'); Alexy Buck, Nigel Balmer and Pascoe Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups' (2005) 39 *Social Policy & Administration* 302.

43 For details of the research and methodology see Lola Akin Ojelabi and Mary Anne Noone, 'Justice Quality and Accountability in Mediation Practice: A Report' (Report, Latrobe University School of Law, 2013). 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 an hour in duration. There were a total of 14 participants.

44 Now disbanded.

Participants' experience of mediation differed and several had multiple roles. Amongst the participants nine were very experienced private practitioners, seven of whom are involved in policy-making and setting standards for mediation practice; two were involved in professional organisations for mediators; five were overseeing the provision of mediation services including court-connected/referred/annexed mediations and community mediations; nine provided mediation training and accreditation, and four had represented parties in mediation processes. Although the research was only concerned with civil mediations, four of the 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. The diversity of participants made the debate more robust and created an opportunity to explore issues of justice in mediation from different perspectives.

The interviews involved two aspects. The participants were presented with a scenario focused on aspects of party disadvantage. Based on this scenario, they were asked questions aimed at exploring justice in mediation. Participants were requested to identify the factors that could impact on the justice quality of a mediation and which they would be concerned about if the matter were referred to them for mediation. In particular, they were questioned about circumstances that could result in disadvantage for a party to the mediation; processes for identifying disadvantage in their organisations/practice; and strategies for addressing disadvantage. Additionally, a set of questions aimed at eliciting the participants' views about justice in mediation were posed. These questions included whether mediation should be concerned with justice generally, and with procedural and substantive justice specifically.

The following broad working definitions were adopted in this research. *Procedural justice* refers to fairness of process; *substantive justice* to fairness of outcome; *justice quality* refers to fairness of both outcome and process; and *accountability* to compliance with and enforceability of the ethical responsibilities of mediators in relation to the justice quality of mediation.<sup>45</sup>

#### IV JUSTICE IN MEDIATION

This section addresses the preliminary question of whether mediation should deliver justice, and if so, whether it is procedural or substantive justice (or both) that should be delivered. As stated in Part II of this article, views differ across the mediation field as to whether mediation should be concerned with justice and the type of justice it should be concerned with. While some mediation proponents agree that it should be concerned with justice, they consider the concern should be limited to procedural justice. They argue substantive justice issues are best left

45 For the definition of procedural justice and substantive justice, see Waldman, above n 26, 4–5. For a discussion on mediator accountability, see Judith L Maute, 'Public Values and Private Justice: A Case for Mediator Accountability' (1991) 4 *Georgetown Journal of Legal Ethics* 503; Margaret S Herrman et al, 'Supporting Accountability in the Field of Mediation' (2002) 18 *Negotiation Journal* 29.



to the parties to determine in accordance with their own standards of justice.<sup>46</sup> As such, the researchers sought the opinion of participants to ascertain consistency or otherwise with the literature. The research highlights differences in participants' views about whether mediation should be concerned with procedural and substantive justice and how mediators should approach 'justice' in mediation practice.

While all participants generally agreed mediation should be concerned with justice, three participants —including two active mediators with legal backgrounds, and one an experienced mediator with a private practice (Principal Mediator) — queried whether it should since justice is difficult to define. A practising mediator, also a legal practitioner said 'it should deliver justice, but ... what is justice?', highlighting the fact that justice is difficult to define and focus on as a goal of the mediation process. Another participant who is an experienced mediator with a legal background and also involved in mediation policy making said: 'Should mediation deliver justice? I am not quite sure what that means. Justice like beauty is often in the eye of the beholder.' This highlights the fact that justice means different things to different people. However, this participant was also of the opinion that if mediation is used within the justice system, the process must be just:

I think people should feel as though it has been a just process ... 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).

The Principal Mediator was of the view that 'from a collective parties and advisors point of view' mediation should deliver justice. This goes beyond the suggestion in the literature that justice should only be measured from the parties' perspective. It suggests that justice should also be viewed from the perspective of the parties' advisors who may be legal practitioners or family members. The Principal Mediator also went on to comment that some of the values of mediation — for example, confidentiality — may need to be modified to accommodate the justice goal of mediation:

Confidentiality needs to be assessed on a case by case basis, and really importantly from each participant's perspective (Principal Mediator).

Views about whether mediation should be concerned with justice were to some extent dependent on professional perspectives and involvement in mediation processes. For example, two participants (including one affiliated with the justice sector — a Magistrate) were of the view that mediation conducted within the ambits of the justice system should deliver justice as defined in the system. Accepting otherwise would cast the justice system in a negative light:

46 See, eg, National Alternative Dispute Resolution Council, Commonwealth, *Issues of Fairness and Justice in Alternative Dispute Resolution* (Discussion Paper, November 1997); *The Resolve to Resolve*, above n 15.

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).

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 legal framework ... 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 (Victoria Legal Aid, RDM).

The responses highlight that participants are concerned about justice. In relation to the question of whether mediation should deliver procedural justice, there was consensus among participants that it should, and that if mediation had a justice agenda, procedural justice was it. As one participant put it:

the most important thing for me is that the procedural steps are as fair and equitable as possible (Practising Mediator).

Two participants made a clear connection between procedural justice and substantive justice and were of the opinion that a just and fair process will deliver justice:

From fair process comes unique justice. All the research shows that people who get an outcome they don't like, as long as they got it through a fair process, they are much more content (Principal Mediator).

[R]esearch seems to indicate that people who get good outcomes generally feel good about the process and people who get bad outcomes feel bad about the process. In fact, my own research shows that when a person receives an adverse outcome, they feel bad not only about the outcome but also about other aspects of the procedure (Barrister/Mediator).

More problematic is the question of whether mediation should be concerned with substantive justice, that is, fairness of outcome. A related concern of the participants was the difficulty in measuring the justness of outcomes. Participants with experience of evaluation of mediation were very alert to this issue:

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 ... it is so much about what the parties want ... 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 (Department of Justice, DSCV Staff).

Another participant had the same concern:

It [mediation] should be fanatical about procedural justice ... how can you possibly assess substantive justice (Principal Mediator).

Related to the place of substantive justice in mediation is the *purpose* of mediation. Mediation proponents state that it is a self-determinative process and that it is not the role of facilitative mediators (or transformative mediators) to assess the substantive quality of mediation outcomes.<sup>47</sup> Although most participants thought that mediators should be concerned when a party is about to agree to settlement terms that are substantively unjust, six participants considered that the process has limitations and a mediator cannot stop a party from entering into an agreement of their choice even if it is unfair by the mediator's view of acceptable standards.

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 ... your second concern is to ensure the process 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 ... 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. Mediation ... is based on self-determination ... and some parties really do want to make a bad decision. They do want to give up things ... 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).

Parties may be able to trade off certain 'things' that are not important to them, but some disadvantaged parties may not be in a position to trade off anything. This point was noted in response to the scenario presented to the participants in relation to the level of concern a mediator should have about substantive justice in a mediation process:

It certainly should deliver procedural justice. The substantive justice is the trick though, the fairness of the outcome and that boils down to ... the mediator's 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. 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 (Department of Justice, DSCV Staff).

Three participants noted the most important aspect for some parties is to see the end of the dispute. If the parties agree and are able to move on with their

47 Mediator Standards Board, *National Mediator Accreditation Standards — Practice Standards* (at September 2007) r 2(5) ('*National Mediator Accreditation Standards — Practice Standards*').

lives, they have achieved something substantial. Similarly, the alternative open to parties should the dispute remain unsettled after mediation, or if the matter was never referred to mediation, is important. 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).

Different views about what should happen in mediation were expressed by participants involved in court-based mediation compared to those representing or supporting parties involved in mediation. As stated above, for two participants, outcomes would be just if the procedure is just. For participants who worked within the justice system or for organisations representing parties in court-ordered mediation, substantive fairness should be measured by legal standards, that is, in relation to the parties' legal rights:

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).

I am one of those that say the process is so well integrated that it looks after justice ... departures from the process 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 ... 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, participants assumed mediation practitioners would have the requisite knowledge to recognise an outcome that may be unjust and address any issue of injustice. Given that self-determination is a purpose of mediation and facilitative mediators are unable to provide advice to parties, mediators can either stop the parties from concluding unjust agreements or refer the parties to a process that would deliver better outcomes to ensure the justice quality of mediation.

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).

You assume they [mediators] 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).

There were also strong views that in facilitative mediation processes, disadvantaged parties should have legal representation and the mediator must be able to identify when knowledge of the law may be an advantage and it is therefore necessary to insist that the party seeks legal advice. The next section deals with the types of disadvantage experienced by parties that may affect their participation in a mediation process.

In conclusion, while participants are of the view that mediation should be concerned with justice, views diverge as to whether the concern should be about procedural or substantive justice. While some were of the view that the concern should be about procedural justice alone, others emphasised the relationship between procedural and substantive justice. A third group were of the view that mediation should be concerned about substantive justice particularly when it is a process that arises from the justice system.

## V IDENTIFYING AND ADDRESSING DISADVANTAGE IN MEDIATION

Whether access to justice is improved with mediation processes depends in part on how those who are disadvantaged in the justice system fare in mediation. The justice quality of a mediation process, that is, issues relating to procedural and substantive justice, may be affected by the nature and level of disadvantage experienced by parties. Disadvantage is recognised as having many aspects. It can result from poor language skills, illiteracy, cognitive impairment, poverty, poor health, and a range of other factors resulting in a lack of capacity.<sup>48</sup> People with a disadvantage may lack the capacity to meet a fundamental aspect of mediation, self-determination or party autonomy. Capacity can affect participation, informed decision-making, 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.<sup>49</sup>

In the research, participants were asked how they would identify disadvantage on the part of parties within a mediation. They were also asked whether they or the organisations they work for have processes for addressing identified disadvantage. To further elaborate on this aspect, participants were presented

48 *Legal Australia-Wide Survey*, above n 42, 5–6, 16.

49 See generally Waldman, above n 26.

with the scenario extracted below and were asked to identify issues that may be relevant to the mediation process and outcome and how they would respond. In addition, participants were questioned about their experiences in mediating a dispute involving a party they had identified as disadvantaged.

**Scenario**

Frank Mediba arrived in Australia from a refugee camp three years ago and took up a factory job. Frank speaks very little English and is unable to read or write in 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 six 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.

Participants agreed disadvantage could result from a range of circumstances and impact on the capacity of parties to mediate effectively. Examples of such disadvantage include where one party has legal representation and the other does not; where 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 disadvantage could result from factors inhibiting capacity to negotiate such as language or literacy difficulties, mental health issues or cognitive impairment, experience of trauma, cultural dislocation, financial disadvantage, and a lack of knowledge of the legal system. The important consideration in any mediation is how disadvantage impacts the capacity to negotiate or participate effectively in the process.

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).

[O]ne 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 the perception of disadvantage by parties. Parties may or may not perceive they are in a situation of disadvantage which may impact on their capacity to participate in the mediation effectively. Questions about perception can be asked of parties during intake:

one of my questions is how will I know when you say yes and mean no?  
(Principal Mediator).

### **A Disadvantage Identified in the Scenario**

Participants were asked what issues they identified in the scenario and how they would respond. Disadvantages in the scenario identified by most participants included language, cultural issues, illiteracy, lack of legal representation and lack of understanding of contractual issues 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 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 ... he could be educated ... we don't know, I would have to take him on the day (Practising Mediator).

[E]ven though neither party is represented, one is, maybe, a company and the other is an individual who is a person who has particular disadvantages (Department of Justice, DSCV Staff).

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 (Principal Mediator).

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).

There was a marked difference between the responses of participants who had knowledge of legal issues regarding social security payments, and those who were not familiar with those kinds of issues. Only two participants (both of whom are legal practitioners) clearly identified that Frank's social security income could not be attached to repay the debt even where a judicial determination is made.<sup>50</sup> With

50 See *Social Security (Administration) Act 1999* (Cth) s 60.

this knowledge, the suggestion is that Frank would be better able to negotiate as 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 judgment proof (CALC).

The issue is whether lack of knowledge on the part of both the mediator and the party means the party could not be expected to exercise the right to self-determination to achieve a just outcome. Is it just for Frank 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 the factors that give Frank greater bargaining power? Given the range of issues that may arise, how can the mediator mediate in a way that leads to just outcomes for both parties?

One participant said the mediator needs to be aware of legal issues that may impact the outcome and seek to address them within the limits of the mediation model being practised. If this is not possible, then a referral to another process is appropriate. All participants said that they would advise a party to seek legal advice if in their view the party had no information about the issue in dispute.

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 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 ... 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).

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 the only solution. Participants discussed a range of responses including withdrawing from the mediation, terminating proceedings if the Easy Car Yard representative was no longer willing to engage with the process and insisted on that position, reality testing the option in relation to whether it was legally possible and what that



would mean for his family's welfare and what Frank thinks are his legal rights. One participant talked about two situations, one in which Easy Car Yard is using it as a threat and the other, where Easy Car Yard is putting it forward as an option.

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 that is what we would do if it came to a loggerhead, we would call a halt to the mediation to find out if it is legally possible (Practising Mediator).

In the context of the scenario, participants spoke about the importance of having a thorough intake process with parties before making a decision about how to proceed. Although the participants agreed that the intake process was critical in this process, the research found intake practices differed between mediators and mediation service-providers. Some organisations have robust intake processes while others do not (see discussion below) which suggests that the quality of justice in these mediations will vary.

All participants identified the difficulties involved in mediating matters, and spoke about the need for legal advice, legal representation, support persons, interpreters and referrals. They spoke about adjusting the process to accommodate any disadvantage and using interpreters. In addition, they would be careful about having a support person who has an interest in the dispute.

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 ... 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 not as his support person (Principal Mediator).

Participants also spoke of the need for Frank to be aware of his legal rights although they would not prejudice the 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 (Principal Mediator).

Participants noted that disadvantage is usually identified during the intake process (for detailed discussion of the intake process see below). Eight participants spoke about identifying disadvantage through an efficient and detailed intake process, which may lead to a determination that the matter is not suitable for mediation. However, occasionally disadvantage may only become apparent to the mediator during the mediation process. 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 ... sometimes I think it is very hard to identify disadvantage ... sometimes it is obvious and sometimes it is not (Practitioner).

Participants expressed the concern that, as mediators, they were limited in what action they may take to address disadvantage due to the principle of self-determination. Individuals use different approaches to enable a party's capacity to mediate effectively. This highlighted the impact that the skills, experience and approach of a mediator can have on ensuring justice quality.

On the question of how to address disadvantage, participants identified solutions including using interpreters to assist those with language difficulties, using cultural advisors when mediating with people from different cultural backgrounds (although this was seen more as good practice rather than addressing disadvantage), allowing different types of support and providing relevant information or referrals to parties including to legal practitioners. However, it was noted the *quality* of support, legal representation and interpreting services are critical to achieving a just outcome from the process.<sup>51</sup> Participants spoke about the need to provide customised support to parties.

Whatever support they need ... 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, I put a whole lot of stuff in writing for a client who was deaf ... one of the principles of mediation anyway, situational and individualised (Principal Mediator).

In addition, emphasis was placed on the importance and quality of mediators' skills in addressing disadvantage. One participant highlighted the importance of genuine and reliable support persons and legal advice or representation:

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 ... 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

51 This issue is also relevant to court and tribunal hearings. See, eg, Lucinda O'Brien, 'Alternative Dispute Resolution in the Civil Justice System' (Submission to the National Alternative Dispute Resolution Advisory Council, May 2009).

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.<sup>52</sup> In addition, whatever support is provided must be targeted to the needs of the disadvantaged party. 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 get them better representation or independent representation (Barrister/Mediator).

Participants identified a number of disadvantages that may result in lack of capacity to participate effectively in the mediation process. A significant issue is whether or not the knowledge of the mediator is critical to identifying disadvantage experienced by a party. In the scenario, it was more obvious to participants with knowledge of social security law that social security payments are 'judgment proof', a fact which could improve Frank's bargaining position, and which if not identified may place Frank in a position of further disadvantage. Participants also identified the importance of a thorough intake process for purposes of identifying any disadvantage that may inhibit participation. Finally access to competent and appropriate advice and support was seen to be highly relevant to improving a party's capacity to participate effectively.

## VI PROCESSES FOR ENSURING JUSTICE QUALITY

Participants were asked what processes their organisations had in place for ensuring the justice quality of mediations. Participants referred to a number of safeguards including the provision of training and professional development of mediators, ensuring mediators follow the fundamental principles of mediation — including self-determination and independence (neutrality), providing guidelines to mediators in specific fields, periodic or ongoing evaluations, conducting detailed intake session with parties to ascertain the most appropriate procedure, assessing for suitability, and the existence of a complaints system. Participants also discussed the need to guide the process strictly, including reality testing of options, building trust with parties and making them feel comfortable to

52 For a brief discussion on this see Akin Ojelabi, 'Mediation and Justice', above n 21, 325.

ask questions they might have in relation to fairness. The success of this will depend on the experience and knowledge of the mediator. In addition, for court-referred mediation, participants mentioned the importance of court oversight of the matters that are referred to mediation. For Recognised Mediation Association Bodies, safeguards also included ensuring mediators satisfy requirements of the National Mediator Accreditation System (NMAS).<sup>53</sup>

### **A The Intake Process**

The intake process or initial assessment was identified by most participants as a key factor in the quality — in particular the justice quality — of mediation practice. Objectives of the intake process include determining the appropriateness of the dispute for mediation, assisting parties to prepare, providing information about roles in mediation, checking whether exchange of information is required, and settling procedural issues. Participants' responses indicated that intake processes varied greatly between organisations and mediators. There are no standard criteria on how to conduct intake,<sup>54</sup> although the National Mediator Practice Standards provide 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'.<sup>55</sup> The Practice Standards are not prescriptive in relation to intake.<sup>56</sup>

The DSCV has a very detailed intake process for every case. The Dispute Assessment Officers are required to assess the behaviour of parties to determine the balance of power and suitability of mediation:

we certainly run through our criteria to make sure that it is actually suitable for mediation. This is across the board for DSCV... 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... We have dispute assessment officers [DAOs] ... trained through the DSCV ... the role of the DAO is to assess the matter for suitability... the criteria ... 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... 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 (Department of Justice, DSCV Staff).

53 Mediator Standards Board, *National Mediator Accreditation Standards — Approval Standards* (at March 2012) r 3(1)(b) ('*National Mediator Accreditation Standards — Approval Standards*').

54 *National Mediator Accreditation Standards — Practice Standards* r 3(1).

55 *Ibid* r 3(2).

56 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4<sup>th</sup> ed, 2012) 215.

The DSCV also check whether parties have received legal advice and if they have not, the DSCV 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.

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 per cent 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 (Department of Justice, DSCV Staff).

Generally, as has already been indicated, 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 make mediation unsuitable or that mediators need to address during mediation. Where required, referral is provided, but intake officers (who may also be the mediators) are not expected to give advice during the process.

## **B Reality Testing of Options in Private Sessions**

Participants identified the reality testing of options as a key way to ensure justice quality. Reality testing 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’.<sup>57</sup> However, understanding and practice of reality testing differs across mediators.

Reality testing — which involves the mediator putting a series of questions to the parties in order to test the veracity of options generated to resolve the dispute — usually occurs during private sessions. The private session is used mainly in facilitative mediation processes and is described as a process with the objectives of ‘issue exploration; reality testing — assessing the alternatives; option generation; and negotiation development’.<sup>58</sup> In addition, the session allows parties to discuss confidential issues with the mediator which they may not have 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 are permitted to do so. Furthermore, the mediator is not permitted to generate options for parties (although views and practice differ on this as illustrated by participant below).<sup>59</sup> The private session was seen

57 Ibid 239.

58 Ibid 237.

59 Ibid 241. This reflects the provision of the *National Mediator Accreditation Standards — Practice Standards* which restrict advice giving and provide that processes in which mediators give advice should be referred to as conciliation rather than mediation.

by research participants as a valuable tool in mediation practice. Many saw the private session as an opportunity to discuss options generated and remarked they would only make such suggestions in the 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 ... you know you might just say 'Before you reach final agreement, just have a little break, so I can check in with both sides ...' I think you just have to (Department of Justice, DSCV Staff).

In answering questions based on the scenario, one participant felt it was proper to be direct in situations where a party is about to agree to unconscionable terms. 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 it 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 (Barrister/Mediator).

If he insists on part payment — part of his income, if he says I will give part of my income? (Interviewer)

I don't see why he should have to agree to that (Barrister/Mediator).

Would you take other steps, what would you do? (Interviewer)

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 (Barrister/Mediator).

So you would be saying that to Frank? (Interviewer)

In a private session, yes, I don't like parties making unconscionable agreements (Barrister/Mediator).

Some mediators wouldn't? (Interviewer)

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

Where 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 of the mediator may determine the extent to which reality testing may ensure just outcomes. Reality testing need not focus on legal rights alone, it may also revolve around the parties' personal circumstances. Also responding to the scenario, 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).

Reality testing occurs in private sessions as well as during negotiation in joint sessions. Mediators use the opportunity of being with a party in private session to test options that are being proposed and to determine the acceptability of proposals. In this way, justice can be served in a cost-effective and self-determined manner. However, for one participant (a participant who is often involved in supporting parties who go to mediation), 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).

Whilst procedural justice elements are critical, the point at which 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)

As is evident from the preceding discussion about the intake process and reality testing, all participants agreed that the experience and skills of the mediator are critical to ensuring the justice quality of mediation. Participants were of the opinion that it is the mediator's role to ensure the process of mediation delivers justice to the parties. As such, participants conceived that mediators have a duty to address any imbalance of power evident in the mediation process. The general perception among mediator participants is that a just process, if executed properly, would deliver a just outcome. However the responses of the participants indicate that how this principle plays out in mediation practices varies between mediators.

## **C Complaint Mechanisms**

Participants referred to the importance of having a complaints process to ensure the quality of the mediation process. Parties need to be able to complain about aspects of mediation and any conduct on the part of a mediator that they consider to be unethical or a breach of any requirements of mediation. All Recognised Mediator Accreditation Bodies (RMABs) are required to have a complaints process in place.<sup>60</sup> Views of participants in relation to complaint mechanisms are discussed below in the section on accountability in Part VII below.

60 RMABs 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 Statute'. See RMABs Checklist available at Mediator Standards Board, *RMAB Checklist* <<http://www.msb.org.au/accreditation-bodies/rmab-checklist>>; *National Mediator Accreditation Standards — Approval Standards* s 3(6)(c).

## **D Accreditation**

Another process for ensuring the justice quality which is not directly part of the mediation process but rather relates to the training of mediators, is accreditation. Accreditation is not compulsory, as the National Mediator Accreditation System (NMAS) is an opt-in scheme. Despite this, many organisations providing mediation services now require mediators to be accredited. Some of these institutions are also RMABs under the NMAS. Participants were of the opinion an accredited mediator would have to comply with practice standards which includes addressing power imbalance and maintaining procedural justice.

## **E Evaluation of Mediation Services/Programs**

Finally, participants emphasised the importance of evaluation in ensuring the justice quality of mediation. One participant noted in the current evaluation of its service, questions are asked relating to quality as opposed to process. One participant who uses feedback forms to monitor quality, commented on the procedural justice focus of the forms but spoke about how the justice quality of outcomes is ensured. The participant outlined how 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 one year and five year's time when you look back on the agreement you can say, I know why I agreed to that (Principal Mediator).

Evaluations can involve various methods and can be from different perspectives. For instance, evaluations can be from the perspective of parties or their representatives, mediators, court/tribunal officials or service providers. Questions often focus on procedural fairness rather than substantive fairness.<sup>61</sup> 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.<sup>62</sup> Similar questions were asked in the evaluation of the

61 Akin Ojelabi, 'Mediation and Justice', above n 21, 318. 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.

62 Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Research Report, Department of Justice (Vic), 2009) 110.



short-mediation process at VCAT.<sup>63</sup> Overall, most evaluations focus 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 judgment by a neutral party and this is inconsistent with the defined role of a mediator’.<sup>64</sup>

In conclusion, a number of processes were identified by participants for ensuring the justice quality of mediation including intake, reality testing options in private sessions, the process of accreditation, having avenues through which parties may lodge complaints about a mediation process or mediators and periodic evaluation of mediation services. The extent to which intake and reality testing of options may achieve the goal of ensuring the justice quality of mediation depends on a number of factors, including the knowledge and skill of the mediator. Also, the extent to which complaints mechanisms and evaluation of programs would go to ensure justice quality depends on each provider organisation.

## VII MEASURING THE JUSTICE QUALITY OF MEDIATION

Justice quality relates to both substantive and procedural justice. As argued by Akin Ojelabi, justice in mediation has to combine elements of procedural and substantive justice as both are necessary conditions for ensuring just outcomes.<sup>65</sup> Therefore, in asking questions about measuring the justice quality of mediation, the research 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. 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.<sup>66</sup>

This section reports the views of research participants on how to measure the justice quality of mediation. In relation to the quality of programs, one participant spoke about consistent referrals as being 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).

63 Appropriate Dispute Resolution Directorate, Department of Justice, Victoria, *Evaluation of the Victorian Civil and Administrative Tribunal Civil Claims List — Alternative Dispute Resolution Pilot for Small Claims* (2011).

64 Sourdin, ‘Mediation in the Supreme and County Courts of Victoria’, above n 62, 104.

65 Akin Ojelabi, ‘Mediation and Justice’, above n 21, 320.

66 Nancy A Welsh, ‘Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice’ (2002) 1 *Journal of Dispute Resolution* 179. 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. Further, that ‘vesting decision control in the disputants does not guarantee that the disputants will perceive the dispute resolution process or its outcome as fair’: at 180.

Literature in this area highlights the difficulty in assessing the justice in mediation, what standards to apply and how to measure substantive justice.<sup>67</sup> There are at least three ways in which the substantive justice quality of mediation could be measured: through the application of legal norms; the application of social norms; and the application of personal values or norms. For example, should the outcome be compared to outcomes that could have been obtained if the matter been decided by a court of law? Should the outcome be in accordance with social norms, that is, standards which are acceptable to the society or societal values?

In research on mediation in the Victorian Supreme and County Courts, the researchers considered what it would mean to evaluate mediation from the substantive justice angle. They recognised 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 resulted in mutual gains, whether integrative bargaining was employed and whether 'wise' agreements or 'mutually beneficial' and realistic agreements were reached.<sup>68</sup>

When asked about how to measure substantive justice, some participants 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, what they agreed to, and what they agreed to is workable for them ...

as long as the procedures are good and as long as the parties are comfortable, they understand, 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 (Practising Mediator).

Although participants highlighted the difficulty associated with measuring substantive justice, a number of benchmarks were identified for measuring the justice quality of mediation. One participant who represents disadvantaged parties at mediations suggested legal norms must be used as a benchmark for measuring the justice of outcomes:

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

67 See discussion in Akin Ojelabi, 'Mediation and Justice', above n 21, 320–3.

68 Sourdin, 'Mediation in the Supreme and County Courts of Victoria', above n 62, 104.

Another participant considered 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 suggests the need for objective criteria that are 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 aspect related to whether the issues have been resolved by the outcome distinguishes between self-executing and non-self-executing agreements.<sup>69</sup> Non-self-executing agreements should be flexible so as to accommodate the changing needs of the parties or any changes in their circumstances after the making of the agreement. 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 participants' responses and research indicates that measuring the justice quality of mediated outcomes is difficult. Whilst mediators agree outcomes should be fair, the issue of how to measure this remains controversial. NADRAC has discussed the issue of justice of outcomes in mediation. NADRAC states 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 to the parties.

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

However, NADRAC has also suggested that legal standards may be a criterion for measuring justice quality.<sup>70</sup>

Participants were divided about whether to use legal or parties' standards in measuring justice quality. Participants with a legal background and those who represent parties 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. Six participants were of the view that the evaluation of justice quality should be conducted from the parties' perspectives. The NMAS Practice Standards support this approach as they provide that any assessment of the terms of settlement generated during negotiations should be assessed by the mediator 'in accordance with the participant's own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account'.<sup>71</sup>

### **A Public Accountability in Mediation**

As stated earlier, justice can 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 (social values) is problematic due to the confidentiality of the mediation process and outcomes. The outcomes of mediation are generally not readily available to the public.

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).

One participant suggested publishing de-identified agreements so the public could form views on the justice quality of mediation:

I am interested to see mediated family matters published. It's a confidentiality thing ... 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 (Principal Mediator).

70 National Alternative Dispute Resolution Advisory Council, 'Issues of Fairness and Justice in Alternative Dispute Resolution' (Discussion Paper, November 1997) 22–3.

71 *National Mediator Accreditation Standards — Practice Standards* r 9(7).

One participant — a legal practitioner involved in the mediation process as a representative — was 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 (Legal Practitioner).

Also linked to the issue of accountability is whether parties in mediation are given the opportunity to complain about the conduct of mediation sessions. As detailed above, the NMAS requires all RMABs to have internal complaints systems in place to process clients' complaints.<sup>72</sup> In addition, the complaints mechanism must meet '[b]enchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute'.<sup>73</sup>

The Mediator Standards Board (MSB), which was 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 'oversee[ing] the application of the Standards with a view to achieving consistency, quality and public protection regarding mediation services and mediation training'.<sup>74</sup> The MSB has the role of ensuring quality and accountability in mediation practice. The MSB intends to do so by maintaining and amending the NMAS, encouraging and supporting members to meet the National Mediator Standards, maintaining a record of accredited mediators, and ensuring mediators receive relevant training to carry out their work. It might be the MSB will, in the near future, make public a procedure for ensuring accountability and quality in mediation practice.

Complaints systems overlap between RMABs, and between RMABs and other professional or governmental bodies. Participants said it was common for individual mediators to be subject to a number of regulatory bodies and different complaints processes, depending on where they were mediating and due to the fact they are sometimes 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

72 *National Mediator Accreditation Standards — Approval Standards* r 3(6)(c).

73 *Ibid.*

74 Mediator Standards Board, *Constitution* (at 2013) cl 3(b).

VCAT, I would go through there ... There is cross referral arrangements in place for complaints (Practitioner).

[T]here are a number of ways to provide feedback and direct to me of course (Principal Mediator).

Mediators may also be 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. As one participant said:

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 Services Commissioner to investigate (Barrister/Mediator).

Awareness of the availability of complaint processes varied. One participant was not aware of the complaint process available in the organisation in which they work. Furthermore, information about complaints may not be readily available to parties. For mediators who are not members of any RMAB or other professional body, there may be no complaints process that can be used by their clients. When asked whether clients are made aware of the complaints process one participant had the following to say:

I imagine they must be (Practising Mediator).

Is it part of the procedure for clients? (Interviewer)

No (Practising Mediator).

Other participants had the following to say:

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 (Department of Justice, DSCV Staff).<sup>75</sup>

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 (Barrister/Mediator).

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 aged care sector, the ability to mediate outcomes without feeling further put upon and feeling they are creating problems

75 The Disputes Settlement Centre Victoria now has its complaints process on its website under the Client Services Charter: Disputes Settlement Centre Victoria, *Complaints Policy* <<http://www.disputes.vic.gov.au/complaints-policy>>.

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).

In summary, participants identified a range of processes used to ensure justice quality, including having a complaints mechanism, the provision of training and professional development sessions for mediators, ensuring the fundamental principles of mediation are complied with, proper intake processes, and the use of private sessions. In relation to accountability, the importance of complaints mechanisms was acknowledged. However, participants spoke about how confidentiality of the mediation process and outcomes may do more harm than good in relation to accountability. Mediated outcomes, unlike court judgments, are not publicly available and consequently it is impossible for the public to evaluate the justice quality of outcomes. Also raised as an issue, and flowing from the private nature of mediations, is 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. Additionally, parties may not be aware of whether there is such a process and if there is one, how to use it. For unaccredited mediators, there may be no complaints mechanism available for the parties to use.

## VIII CRITERIA FOR MEASURING THE JUSTICE OF MEDIATION

Having discussed the views of participants on how to measure the justice quality of mediation, this section attempts to provide criteria for measuring the justice quality of mediation.

The basic question about what justice in mediation actually means remains contentious,<sup>76</sup> and consequently so too does the question of how to measure the justice quality of mediation. Is it justice as conceived by the parties, justice according to the legal framework and legal rights, or is it only procedural justice? There is no consensus on the standards of justice in mediation. Whilst legal justice is recognised by some, others are of the opinion that justice can refer to whatever the parties accept it to be. One approach to resolving the difficulty associated with identifying benchmarks for measuring the justice quality in mediation, including both procedural and substantive justice, could be to develop objective criteria which can then be applied contextually.

76 See, eg, National Alternative Dispute Resolution Council, 'Issues of Fairness and Justice in Alternative Dispute Resolution', above n 70; Welsh, 'Disputants' Decision Control in Court-Connected Mediation', above n 66; Hyman and Love, above n 32; Welsh, 'Remembering the Role of Justice in Resolution', above n 24; Noone, 'The Disconnect between Transformative Mediation and Social Justice', above n 25; Judy Gutman, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm?' (2010) 21 *Australasian Dispute Resolution Journal* 218; Noone, 'ADR, Public Interest Law and Access to Justice', above n 21; Akin Ojelabi, 'Mediation and Justice', above n 21; Bush and Folger, above n 25.

Provisions of the NMAS *Practice Standards* and *Approval Standards* cater for procedural justice.<sup>77</sup> Elements include voluntary participation, free and informed decision-making, equal participation, and the provision of support for balanced negotiations. Practices developed to ensure procedural fairness include good intake processes, ability to make referrals, and the capacity to offer support people and allow parties to seek legal advice/representation. The recognition that certain types of disputes — for example credit disputes and car finance disputes — are more likely to involve disadvantaged parties, is also critical.<sup>78</sup> Also important is ensuring that agreements are durable and flexible.

In addition to these criteria the justice quality of mediation could be measured using the norms approach and/or access to justice principles. These two approaches (as will be discussed below) may address inconsistencies in practice, thereby seeking to ensure procedural fairness, which will also have some effect on the outcome of the mediation process.

### A Norms Approach

Despite the concern about measuring substantive justice expressed by the research participants and in the literature, it is possible to develop objective criteria based on norms which are generally acceptable, and which are sourced from legal, social and personal values.<sup>79</sup> These are based on the agreement and understanding of parties as to what each value means in the context of their dispute. In addition, using legal principles and standards as benchmarks can be useful for court-connected and tribunal-connected mediations.<sup>80</sup> The goal is not to enforce the law but to provide a framework within which the justice quality of options for resolving the dispute may be tested before arriving at the final terms of settlement. The application of legal standards and societal values need not come at a cost to the voice of parties in the mediation process. Rather, the parties can consider these values and apply them based on their own understandings. This requires providing support to parties when required in the mediation.<sup>81</sup>

Waldman argues attention must be paid to the role of social norms in mediation and there are three different models of mediation categorised on the basis of the role social norms play in mediation.<sup>82</sup> The three models are ‘norm-generating’, ‘norm-educating’, and ‘norm-advocating’.<sup>83</sup> Waldman further argues that

77 *National Mediator Accreditation Standards — Practice Standards* ¶ 9; *National Mediator Accreditation Standards — Approval Standards* ¶ 2.

78 See *Legal Australia-Wide Survey*, above n 42, 79–91.

79 See Lola Akin Ojelabi and Tania Sourdin, ‘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.

80 Matt Harvey, Maria Karras and Stephen Parker, *Negotiating by the Light of the Law: A Report of the Effect of Law on the Negotiation of Disputes* (Themis Press, 2012).

81 See *ibid* regarding how the values framework can be translated into practice using the ERSR approach.

82 See Ellen A Waldman, ‘Identifying the Role of Social Norms in Mediation: A Multiple Model Approach’ (1997) 48 *Hastings Law Journal* 703.

83 *Ibid* 707.



although the models are similar in their use of mediation techniques, ‘they differ in their relationship to existing social and legal norms’.<sup>84</sup> 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.<sup>85</sup> The mediator in this model promotes self-determination and refrains from interventions that contribute to the content of the conversation between the parties. On the other hand, the mediator in the norm-educating model refers to social and legal norms in order to ‘enhance autonomy’.<sup>86</sup> According to Waldman, the social and legal norms are used to ‘provide a baseline framework for discussion of disputed issues’.<sup>87</sup> 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’.<sup>88</sup> Waldman asserts that different models are suitable to different types of disputes. The values approach<sup>89</sup> discussed above fits into the norm-educating model of mediation in which the value of self-determination is preserved but exercised with knowledge of the 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 in civil matters. In family mediation the outcomes should reflect the ‘best interests of the child’.<sup>90</sup> The ‘best interests of the child’ criterion 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.<sup>91</sup> The legislation in this area provides for certain principles which must be applied before a matter is assessed suitable for mediation.<sup>92</sup>

In the values based approach suggested above, the criteria for assessing justice quality in mediation could include asking the following questions of the mediator: are they familiar with the legal principles applicable to the dispute and do they have knowledge of the application and possible outcomes; are they familiar with societal values around the subject matter of the dispute; have they had a conversation with the parties about how the preceding two issues may affect their decision-making; and have they ensured parties are aware and understand their legal rights prior to and in the mediation. Additionally, the mediator should

84 Ibid 708.

85 Ibid 718.

86 Ibid 732.

87 Ibid 730.

88 Ibid 745.

89 See Akin Ojelabi and Sourdin, above n 79.

90 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Relationships Services Guidelines* (at 4 January 2011) 7.5.2.6; Attorney-General’s Department, Commonwealth, *Operational Framework for Family Relationship Centres* (June 2009) 1.

91 See *Personal Safety Intervention Orders Act 2010* (Vic) s 34.

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

be encouraged to ensure, as far as is reasonably practicable, that the underlying causes of the dispute or underlying needs and interests are identified.

## **B Access to Justice Principles**

Additionally or alternatively, the justice quality of mediation could be tested within the access to justice framework. A starting point could be the five principles of access to justice developed by the Commonwealth Government and noted above: accessibility, appropriateness, equity, efficiency, and effectiveness. The following are some examples of how these principles could form the basis of justice quality in mediation assessment criteria.

*Accessibility* refers to the goal of making the justice system less complex so it becomes accessible to all. This requires ‘mechanisms to allow people to understand and exercise their rights’<sup>93</sup> 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 about enforcement of legal rights and rights may be ‘traded away’ during negotiation. However, it is important that the individual ‘trading away’ rights should be aware of or have an understanding of those rights. In measuring the justice quality of mediation, participants could be asked 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 their rights and if so, the reason for that decision.

*Appropriateness* relates to directing ‘attention to the real causes of problems that may manifest as legal issues’.<sup>94</sup> For example, a health issue may result in an inability to fulfil contractual obligations. Participants spoke frequently about ensuring the dispute is suitable for mediation. For example, some participants queried whether mediation was appropriate in the scenario given to participants. Some preferred a judicial determination so that systemic issues could be addressed and to reduce future disputes. Judicial determination would also alert consumers to certain practices. Mediators rely on the intake process to assess the suitability of a dispute for mediation and to ensure support and referrals are provided where needed. To assess this criterion, parties could be asked about the intake process, whether they considered the matter to be appropriate for mediation, and if the mediation addressed all of their underlying issues in the conflict.<sup>95</sup> The mediation process is aimed at uncovering underlying issues by focusing on parties’ *interests* instead of their *positions*. As was pointed out by the participants, the effectiveness of this depends on many factors including time and the skills and expertise of the mediator. It also depends on there being a focus on reaching a *resolution* rather than a *settlement* of the dispute.

93 *Access to Justice Taskforce*, above n 11, 62.

94 *Ibid.*

95 Sourdin, *Alternative Dispute Resolution*, above n 56, 67.

*Equity* concerns the fairness of access or equality of access.<sup>96</sup> 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 overcome. However, research participants identified a range of issues that can inhibit a party's capacity to participate. In assessing the justice quality of mediation, access to interpreters, legal advice and other relevant support could be measured. Equally, parties may be asked how easy, or difficult, it was for them to access the mediation service-provider and the level of service they received.

*Efficiency* is the 'deliver[y] of [fair] outcomes in the most efficient way possible'.<sup>97</sup> It involves 'early assistance and support to prevent disputes from escalating'.<sup>98</sup> It is also about the proportionality of the cost of dispute resolution to the issues in dispute. The first aspect could be tested from the parties' perspectives and the second from an economic assessment of the service provided. Parties could be asked questions about the length of 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.

*Effectiveness* relates to how 'the various elements of the justice system should be designed to deliver the best outcomes for users ... directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law'.<sup>99</sup> This principle focuses not only on procedural but also substantive justice. It relies on the concept of justice based on the parties' perspectives, legal and social norms. This could accommodate the above discussion on values and objective criteria that the mediator or evaluators can use to test the justice quality of the outcome. The mediator should know objectively the types of outcomes that would be classified as a just outcome. The parties may wish to negotiate away their 'rights' if they wish, but they would have been made aware of them. Questions may be asked about whether the mediator discussed the issue of justice with parties, whether there was an objective criteria of justice which was discussed with the parties at the start of the process, and how this impacted on their views and ultimate decision.

## IX CONCLUSION

In this research project, empirical data gathered from practitioners, mediation service-providers and policy makers, tribunal members and magistrates was utilised to examine issues relating to mediation and justice. In particular this research explored the question of whether mediation should be concerned with justice for disadvantaged people and, if so, whether it should be concerned with procedural or substantive justice, or both. Insights provided by the participants were drawn upon to explore how mediation can enhance and not diminish access

96 *Access to Justice Taskforce*, above n 11, 63.

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

to justice for the disadvantaged. Aspects of the justice quality of mediation were canvassed as well as comments on accountability within the mediation field.

It is clear that whether or not access to justice for the disadvantaged is enhanced, and whether the justice quality of mediation is ensured, depends on a number of factors including the robustness of the intake processes; the skills, knowledge and experience of the mediator; and the quality of support available to parties in mediation. The content and context of the mediation also has a bearing on the assessment of justice.

We have proposed some preliminary suggestions for how the justice quality of mediation could be measured. However the findings of this research project clearly indicate the need for further discussion about what justice means in the mediation context. Additionally, further research on how mediation impacts on access to justice is warranted.

In the interim, the researchers suggest that justice quality should be measured using values which are widely accepted within the mediation sector and 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 former Federal Attorney-General — accessibility, appropriateness, equity, efficiency, and effectiveness — could be developed for use as benchmarks for measuring justice in mediation.<sup>100</sup> In order to ensure and maintain accountability in mediation practice, this research suggests that the Mediator Standards Board may be well placed to put rigorous processes in place.

100 Ibid 62–3.