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Abstract
Power is a dynamic that every mediation practitioner and academic will have confronted at some stage. Much has been written on the nature and types of power, and the implications of power differences for participants, the mediator and the process itself. How mediators should attempt to deal with power differences and the impact of mediator interventions on both neutrality and the parties' perceptions of the legitimacy of the process are fundamental issues of on-going concern. This article focuses attention on the increasing number of statutes in Australia and New Zealand that provide for the resolution of disputes by mediation and conciliation, and the ways that statutory processes address power differences between the parties. While the statutory examples are drawn from these jurisdictions, the power issues and statutory mechanisms will be pertinent in other jurisdictions.

Keywords
mediation, power, balance of power, statutory regulation, Australia, New Zealand, conciliation

THE NATURE AND IMPORTANCE OF MECHANISMS FOR ADDRESSING POWER DIFFERENCES IN STATUTORY MEDIATION

Claire Baylis and Robyn Carroll***

Introduction

Power is a dynamic that every mediation practitioner and academic will have confronted at some stage. Much has been written on the nature and types of power, and the implications of power differences for participants, the mediator and the process itself. How mediators should attempt to deal with power differences and the impact of mediator interventions on both neutrality and the parties' perceptions of the legitimacy of the process are fundamental issues of on-going concern. This article focuses attention on the increasing number of statutes in Australia and New Zealand that provide for the resolution of disputes by mediation and conciliation, and the ways that statutory processes address power differences between the parties.[1] While the statutory examples are drawn from these jurisdictions, the power issues and statutory mechanisms will be pertinent in other jurisdictions.

We have surveyed Australian and New Zealand statutes for provisions that deliberately or incidentally address power differences between the parties. Many of the provisions are described as 'statutory mechanisms' because they are a device or instrument by which the power dynamic is in some way altered.[2] It is our aim to encourage a more principled approach to the questions of whether these mechanisms are provided for by legislation at all and whether they would be better provided for in other ways. By reviewing the mechanisms, we also seek to raise awareness of the beneficial use that might be made of them in other statutory contexts to protect the parties and the integrity of the process.

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1 When we refer to legislation we are including all forms of subsidiary legislation.

2 It is conceded that in some sense, every statutory provision is capable of affecting the power dynamic, especially provisions conferring substantive legal rights. We are seeking to identify provisions that impact on the process itself, rather than the parties' claims against each other.

This article reviews the concept of power in mediation, its effects on the legitimacy of the mediation process and the many ways that it has been suggested that mediators and the design of the process can address power differences. Typically, these methods have been identified by researchers and practitioners and are recommended by commentators in the context of voluntary mediation. We also outline the growing use of codes of practice and standards and their impact on this area. The focus then shifts to statutory mediation. We explain why the impact of power differences is so significant when a statute provides for mediation and address the issue of whether legislation should incorporate mechanisms to address power differences. We then discuss the statutory mechanisms that we have identified. Finally, we suggest a more principled approach to the question of what mechanisms should be incorporated into legislation.

The primary focus is on mediation and conciliation rather than other forms of dispute resolution. In most instances, the term 'mediation' is used here to include 'conciliation' unless it is suggested otherwise by the context.[3] We use the term 'statutory mediation' broadly to mean mediation that is subject to some form of statutory regulation.[4] This can range from simply providing that mediation may be used to resolve disputes arising under the statute to more comprehensive procedural models.[5] We are not confining our attention to statutes where mediation is compulsory, although, arguably, in these cases the need to address power differences is most compelling. Although in many cases where mediation is

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3 In Australia and New Zealand, mediation and conciliation are generally considered to refer to distinct processes. In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) definitions provide that the key distinguishing feature between mediation and conciliation is that in mediation the neutral third party fulfills a facilitative, but not an advisory role, whereas in conciliation the neutral third party may play an advisory role as well as a facilitative role. See NADRAC, *Alternative Dispute Resolution Definitions* (Canberra, 1997) currently under review by NADRAC, see 'ADR Terminology: A Discussion Paper' (Canberra, 2002). In other jurisdictions the distinction is not as finely drawn and mediation is often defined in sufficiently broad terms to include conciliation, eg the US *Uniform Mediation Act* which provides that "Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute'. s2(1). The important distinction for the purpose of the analysis in this article is between mediation and conciliation where the third party neutral does not have a determinative role and those processes where the neutral third party does.

4 For an overview of types of mediation legislation see R. Carroll, 'Trends in Mediation Legislation: "All for One and One for All' or 'One at All" (2002) 30 *University of Western Australia Law Review* 167.

5 In this way we distinguish private mediation, even though the subject matter of the mediation may be statutory in nature. We are not directly examining statutes that provide for court based mediation, although many of the comments made concerning statutory mediation may apply with some or equal force to mediation in the courts.

provided for by statute the process is not compulsory, in practical terms parties are compelled to use the process because of the lack of realistic alternatives.

In our view the aim of any mediator intervention or mechanism to address power differences is to ensure that agreements made result from a process in which both parties have been able to participate equitably, so as to be able to influence the outcome in terms of their own needs. We will not be continuing the debate in this article about *whether* mediators *should* seek to address power issues in mediation. Our concern is *how* issues of power imbalance can and should be addressed in statutory mediation, as we accept that mediators do and should have some impact on the power dynamic between the parties.

Power issues in mediation

The nature of power in dispute resolution

Power is defined as 'the capacity to influence the behaviour of others, the emotions, or the course of events'.[6] Mayer suggests that '[f]or the purpose of understanding the dynamics of conflict, power may be defined as the ability to get one's needs met and to further one's goals.'[7] This type of power can be understood only in context.[8] In mediation, the concern is with the parties' ability to meet their needs and further their interests during the process and in any agreements reached as a result of the mediation.

At the broadest level of analysis, power can be categorised as either structural power or personal power.

> Structural power is lodged in the situation, the objective resources people bring to a conflict, the legal and political realities within which the conflict occurs, the formal authority they have, and the real choices that exist. Personal power has to do with individual characteristics, such as determination, knowledge, wits, courage and communication skills.[9]

The majority of statutory mechanisms that we will be analysing affect the structural power dynamic. Personal power, however, is also capable of influence by statute.[10] Within these two broad categories, there are many types of power, and each of these can be used by the parties and the mediator during mediation.[11]

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6 *The Concise Oxford Dictionary* (10th ed, 2000).
7 B Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000) 50.
8 Ibid.
9 Ibid 54.
10 The status and identity of the mediator being a prime example.
11 In his earlier and highly influential work on power, Mayer identified 10 types of power: 'The Dynamics of Power in Mediation and Negotiation' (1987) 6 *Mediation*

The power dynamics in mediation are not confined to the relations between the parties to a dispute. Another critical type of power is the power of the mediator over the process and in relation to the parties. Mediator power can be understood as 'the ability … to affect the perceptions, attitudes and behaviour of others'.[12] There are a range of views on the ability and the extent of the mediator's responsibility to address power imbalances between the parties.[13] It is argued that for mediators to be effective in any case where one party seeks to use power to determine the outcome '…they must know how to manage the means of influence and power that the parties exercise and how to exert pressure themselves'.[14] As Boulle notes,[15] this is a major policy issue, and although there may be good reasons for seeking to redress a power imbalance between the parties,[16] there are also dangers in doing so.[17] As we will see below, the expectation that a mediator operating in a statutory context will exert power and influence over the parties, and the parameters within which they do so, will be influenced by the express provisions of the legislation under which the mediator is operating.

The following propositions about power are drawn from the extensive literature on this subject and provide a basis for analysing statutory mediation.

(a) There are many types of power.

These include:

- Resources power, which includes financial power, skills, information power, education, position[18] and familiarity with the process;

Quarterly 75, 78. More recently Mayer has extended the list to 13 types of power, see above n 7, 55-60.

12 L Boulle, *Mediation-Skills and Techniques: Butterworths Skills Series* (2001) 181.

13 For example, Wall argues that a mediator's primary task is to manage the power relationship of the disputants and in unequal relationships the mediator may attempt to balance power. J Wall, 'Mediation: an Analysis Review and Proposed Research' (1981) 25 *Journal of Conflict Resolution*, 157, 164. For discussion see C Moore*, The Mediation Process; Practical Strategies for Resolving Conflict* (2nd ed, 1996) 333-337. Mayer, on the other hand, argues that that the idea that power can be balanced is misleading, see above n 7, 51 and below, n 35 and n 36.

14 Moore, ibid 327. For discussion of the sources of power mediators and other intervenors have in disputes, and a framework for understanding the roles that interested and powerful intervenors play in disputes see M Watkins and K Winters, 'Intervenors with Interests and Powers' (1997) *Negotiation Journal*, 119.

15 Boulle, above n 12, 225.

16 For example, NADRAC, *Issues of Justice and Fairness in Alternative Dispute Resolution Discussion Paper* (1997) 28-29; GR Clarke and IT Davies, 'Mediation – When is it not an Appropriate Dispute Resolution Process?' (1992) *Australian Dispute Resolution Journal* 70, 70-71.

17 Boulle, above n 12, 226-227.

18 G Tillett, *Resolving Conflict: a Practical Approach* (2nd ed, 1999).

- Strategic power, for example, when the apparently more powerful party has more to lose by not reaching an agreement, or the apparently weaker party has strong public support;
- Emotional or psychological power, intelligence, social status, personal power over an individual;
- Cultural power, through being of the dominant race or ethnicity, sexual orientation or by being able-bodied;
- Physical power, the ability to intimidate the other party and influence their decision-making on grounds of fear of violence or due to previous physical or emotional abuse; and
- Gender power,[19] which may involve an aggregation of resources and emotional or psychological power.

(b) Power is not a characteristic of an organisation or person but is an attribute of a relationship. A party's power is directly related to the power of an opponent.[20] Therefore power is very contextual and situational. A person may have power in one situation and less in another. Even a person who is very powerful in *some* situations will not be powerful in *all* situations. [21]

(c) There is always some power disparity in the resolution of disputes.[22] Power relations can be symmetrical or assymmetrical. Although symmetrical power relations are optimal for effective bargaining, this symmetry is not the norm between disputing parties.[23]

(d) Power is not capable of measurement.[24] As a result, an imbalance of power is not something that can be 'balanced' by a mediator simply giving more power to one party.

(e) Power is dynamic. During the course of a negotiation the existence of many different types of power will mean that there will be shifts in the balance of power.

(f) Power is not easily located and preconceptions about where it lies need to be avoided.[25] There are dangers in making assumptions and generalising about

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19 See for example, R Alexander, 'Family Mediation under the Microscope' (1999) *Australian Dispute Resolution Journal* 18; and K Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123.

20 Moore, above n 13, 333.

21 Tillet, above n 18, draws the broad distinction between positional and situational power.

22 Boulle, above n 12, 224.

23 Moore, above n 13, 336-337.

24 NADRAC, *Issues of Fairness and Justice in ADR*, above n 16, 29. See also Mayer, above n 7, 51.

25 R Charlton and M Dewdney, *The Mediator's Handbook* (1995) 239.

the location of power. The complex and dynamic nature of power means that assumptions about power based on stereotypes will often be misleading.

(g) A person may have power but choose not to use it.[26] There may be strategic reasons why a person who has power chooses not to exercise it in some situations. For example, a large business with economic power may have the power to put a small supplier out of business simply by litigating a dispute and imposing legal costs which the supplier cannot meet. The large business may decide, for various reasons, not to litigate but to use a less expensive method of dispute resolution.

(h) A person may have power but be unable to use it.[27] There may be reasons why, despite having certain types of power, a person is unable to use it in a particular dispute to negotiate effectively. For example a person with resources power may be unable to use it because the conflict is affecting them emotionally or because of other events in their life.

(i) The power relations between the parties may be a cause of concern at different points in time in the process. The first point in time is when a dispute is being assessed for suitability for mediation. A significant power difference is often regarded as a contra-indicator to the suitability of a consensus-based process[28]. Secondly, the issue may arise when a mediation takes place and the question becomes one of identifying the proper role of the mediator in relation to the power relations between the parties, and what level of power the mediator should exercise.[29] Thirdly, the exercise of power by one of the parties or by the mediator during the mediation may also be a concern if a mediated agreement is reviewed after the mediation and the reviewing body is required to decide whether any agreement made at the mediation should be set aside on grounds of duress or unfairness.[30]

Mayer states that one of the many misleading images of power is that power can be balanced. He argues that while it is meaningful to look at differences in power (whether someone has power to make something happen), at sources of power and at vulnerabilities to other people's power, the notion that power can be balanced so as to produce some equality of power fails to account for the dynamics of power and the interactional context within which it must be understood.[31] It is more

26 NADRAC, *Issues of Fairness and Justice in ADR,* above n 16, 29.
27 Ibid.
28 For example, see Clarke and Davies, above n 16.
29 For a discussion of power issues and how they are dealt with in a conciliation model, see D Bryson, "And the Leopard Shall Lie Down With The Kid': A Conciliation Model for Workplace Disputes' (1997) 8 *Australian Dispute Resolution Journal* 245.
30 The grounds of review and for setting aside a mediation agreement will depend on what legal rules, including statutory provisions, apply to the mediation.
31 Mayer, above n 7, 51.

useful, argues Mayer, to think that people need '…an adequate basis of power to participate effectively in conflict.'[32]

This view of power is significant to an understanding of the role of the mediator and the purpose of statutory mechanisms. It is also consistent with the notion that mediation must be consensual for it to be legitimate as it ensures that the parties have enough power that others '…must at least consider their concerns and enough power to resist any solution that fundamentally violates their interests'. [33]

Power and the legitimacy of mediation

Power is a concern in mediation and other facilitative forms of dispute resolution because in these processes there is no third party decision-maker. This means that to reach an outcome the parties must negotiate with each other.[34] There is a general view that the fairness of the outcome will be affected by the ability of each of the parties to negotiate effectively on their own behalf.[35] Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome to the extent that the agreement reflects largely only that party's needs and interests.[36] In these circumstances:

> The stronger party is likely to be less motivated to compromise and more likely to use tactics of coercion and intransigence. The less powerful party may react with either passive concession making or reactive defiance, neither of which provides a sound basis for arriving at a durable settlement.[37]

On an individual and practical level there is a real danger that in situations of significant power differences the agreements reached will be unfairly advantageous to one party,[38] or that no agreement will be reached.

The issue of how power is used in mediation, however, also has broader repercussions. Ultimately it may affect the legitimacy of the mediation process itself in these types of disputes. For the mediation process to be legitimate, it must

32 Ibid 52.
33 Ibid. The meaning of 'consensual' is discussed in the text below.
34 NADRAC, above n 16, 28.
35 See, for example, J Maute, 'Mediator Accountability: Responding to the Fairness Concerns' [1990] *Journal of Dispute Resolution* 347.
36 NADRAC, above n 16, 28. The Discussion Paper refers to the danger that one party will dominate the outcome, rather than the process. In the writers' view, domination of the process is also a concern.
37 K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (1985) 52.
38 See for example, 'Access to Justice Advisory Committee Access to Justice: An Action Plan' (1994) 298-299 where it is recognised that women may obtain unfair results in the family mediation context due to power imbalances.

be able to deal fairly with disputes involving significant power differences. Where this is not possible, it may be that mediation is inappropriate. This fundamental concern with legitimacy, the integrity of the process itself, and the tension between neutrality or impartiality and empowerment has been recognised for some time. For example, in 1987, Mayer wrote:

> The ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process, which is based on the assumption of mediator neutrality, without letting the process be used to violate important interests of the community or of interested but unrepresented parties. The problem becomes even more complicated when the mediator has a great deal of clout. The maintenance of impartiality under these circumstances is not an academic question, but one that is basic to the credibility of the process.[39]

Astor has, more recently, argued that mediation derives its legitimacy from two core concepts, neutrality and consensuality. Consensuality involves the parties' ability to both choose the mediation process[40] and '…to arrive at an agreement to which both (or all) consent… .'[41] She states:

> Clearly the reality of consensuality is crucially affected by the reality of the consents made by the parties. It is also affected by the ways in which all of the participants in mediation, including the mediator, use power. Consequently the issue of power relations in mediation is of central importance. [42]

Consensuality can only exist if both parties are making real and free choices based on effective participation in a mediation.[43] In circumstances involving significant power differences the mediator must attempt to ensure that the participation of all parties is both genuine and active, and that any agreement formed is not based on coercion or pressure.

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39 Mayer (1987) above n 11, 83.

40 Astor does acknowledge though that there may be circumstances where mediation may be mandated but that in that case the process itself should then proceed consensually. H Astor, 'Rethinking Neutrality: A Theory to Inform Practice- Part I' (2000) 11 *Australian Dispute Resolution Journal* 73, 81.

41 Ibid 73.

42 Ibid 73-74.

43 Similarly, Galligan argues that the guiding principle in making informal agreements in administrative contexts (that is using negotiation and mediation) is that the agreement be real and that it be voluntarily entered into. The factors he identifies as contributing to a real and voluntary agreement are knowledge of the options, open willingness to enter negotiations and a genuine decision to accept a compromise. DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) 383.

Neutrality, Astor's other key legitimating principle, is also inextricably linked to the issue of power relations. Neutrality is often taken to include fairness and even-handedness by the mediator, although these characteristics are sometimes categorised separately as impartiality, in which case neutrality is '…used more to describe a mediator's sense of disinterest in the outcome of the dispute.'[44] The on-going difficulty, in both the theory and practice of mediation, is that there can be a contradiction between even-handedness and fairness: if the parties are treated in the same way, then power differentials are not addressed, leading to a lack of fairness in process and outcome. Astor suggests that what is needed is a re-definition of neutrality:

> It must take into account the particular qualities of mediation, and the sources of legitimacy of mediation. It must take into account the fact that mediation takes place in private and does not necessarily apply the law, and must therefore take particular care to protect from exploitation those who are vulnerable… it is necessary to abandon the 'grand theory' of neutrality in which neutrality is conceived of as a great – though essentially undefined – goal. Further, we should move away from a focus on neutrality as an attribute of the mediator… Instead, we should focus on maximising party control as the legitimating principle of mediation. [45]

If neutrality is focused on '…what the mediator is doing to ensure that, to the maximum extent possible, the parties control the content and the outcome of the dispute',[46] then ensuring that both parties can act free from pressure or coercion is imperative. If neutrality is understood in this way, addressing power differences becomes an even higher priority.

Strategies to address power differences in mediation

Process design and mediator interventions and strategies

Numerous commentators have written about ways to address the disparity of power between the parties.[47] The purpose of this section is to provide a brief overview of the ways in which power issues may be addressed in mediation. It is

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44 R Field, 'Neutrality And Power: Myths And Reality' (2000) 3(1) *ADR Bulletin* 16, 16. NADRAC also accepts this distinction but includes impartiality as part of the responsibility of the mediator in remaining neutral. See NADRAC, *A Framework for ADR Standards*, April 2001, 114 fn1.

45 Astor, above n 40, 81.

46 Ibid 73.

47 A Davis and R Salem, 'Dealing with Power Imbalance in the Mediation of Interpersonal Disputes' [1984] 6 *Mediation Quarterly* 17; Mayer (1987) above n 14; D Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' [1992] 9 *Mediation Quarterly* 227; Clarke and Davies, above n 16, 73-76; Boulle, above n 12, 226; B Wolski, 'Mediator Settlement Stategies: Winning Friends and Influencing People' (2001) 12 *Australian Dispute Resolution Journal* 248.

sometimes stated that power differences can be addressed by the mediation process itself, and by specific mediator strategies and interventions.[48] While efforts to separate these are problematic because the way the mediator applies the process is a itself a strategy, it can be helpful to look at it this way.

(a) Features of *the process* that enable power imbalance to be addressed include:

- An intake or screening process provides the mediator with some information about the parties' relationship and may allow the mediator to anticipate power issues. This also provides an opportunity for the mediator to refuse to mediate.
- In voluntary mediation, the parties' agreement to participate in the process.
- The process is structured to give each party an opportunity to speak;
- By agreeing to 'ground rules', parties give each other an opportunity to speak without interruption and without abuse or criticism from each other.[49]
- The presence of a neutral third party, usually on neutral ground, provides support to the parties.
- Confidentiality, especially between the mediator and each party, provides an opportunity for parties to 'express emotions and their true interests'.[50]
- Creating steps in the process when parties are to exchange documents and other information can assist them to prepare for the mediation.
- Parties are encouraged to treat each other as equals, and the mediator can model this in the way that he or she relates to the parties.[51]
- Separate sessions provide an opportunity to check how the parties are coping with the process.
- Shuttle mediation can be used where the parties are not prepared to be, or best not put, in a room together.
- The number of meetings that are held can be increased and can be held over an extended period of time so that the parties do not feel rushed into making decisions, and
- Whether a voluntary or mandatory process, the parties cannot have a decision imposed on them by the mediator.

(b) There are many strategies and interventions available to mediators, and the list below is not intended to be comprehensive.[52] These include:

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48 For example, Neumann, ibid; Clarke and Davis, above n 16, 73 refer to 'safeguards and techniques', 'some of which are inherent in the mediation process itself and others which can be specifically employed by a skilled mediator, to address the issue of power imbalance between disputants in the mediation process.'

49 Clarke and Davis, above n 16, 74.

50 Ibid.

51 Ibid.

52 Moore identifies 12 forms of influence to 'incline the parties towards agreement' that can be used when the parties have unequal power. Above n 13, 327. See also D Eliades, 'Power in Mediation - Some Reflections' (1999) 2 *ADR Bulletin* 4.

- During the intake session or a preliminary conference, and at any time during the mediation session, explaining the process and indicating what information the parties may need to assist their decision making.
- Ensuring that the physical setting of the mediation is conducive to effective negotiation.
- Reflecting on whether the process is 'fair' after using a series of questions to focus attention on the parties' ability to negotiate.[53]
- Enforcing the mediation ground rules to reinforce the role of the mediator as being as objective and neutral as is possible.
- Encouraging parties to seek legal advice before and during the mediation.
- Improving communication between the parties through use of specific forms of questions; and reframing, paraphrasing and summarising what the parties have said.
- Using private sessions:
- to provide opportunity for a party to disclose and discuss information they are not prepared to disclose or discuss in joint session;
- to test out whether the party has sufficient knowledge or information to negotiate effectively;
- to reality check options that have been raised;
- to discuss whether there are cultural issues that are impacting on the negotiation process;[54] and
- to rehearse techniques that the party can use in joint session.
- Using a support person, or friend for the parties;
- Using an interpreter where the parties cannot communicate with each other and the mediator in the same language;
- Encouraging and advising parties on how to seek assistance to collate information or material needed for the mediation;
- Where one party has been violent against the other, amongst other things, at least:
- requiring strict adherence to the terms of contact agreed to between the parties; and
- maintaining contact with the parties between meetings;
- Calling adjournments;
- Encouraging the parties to agree to a cooling off period *before* signing an agreement;[55]

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53 K Severens, *Mediation Manual* (IINCM, 1998) (adapted by) T Sourdin, in 'Conciliation Processes', LEADR – The Third Millennium Conference - 28 July 2000, 7.

54 Eliades, above n 52.

55 Cooling-off periods during mediations are sometimes used by third parties in situations where there are '…highly emotional confrontations in which one or more of the parties has become intensely angry…' Conflict Resolution Consortium, University of Colorado, 'Cooling-Off Periods' International Online Program on Intractable Conflict, <http://www.colorado.edu/conflict/peace/treatment/cooloff.htm>.

- Encouraging parties to include a 'cooling off' clause in their agreement, (that is allowing a party to rescind the agreement during a short period *after* the agreement is made);
- Reality checking all the likely consequences of a proposed course of action, including the long term consequences of using their power unfairly during the mediation, creating doubts in the minds of the parties over 'the facts, the law, the evidence and their likelihood of their being successful in litigation';[56]
- Terminating the mediation where the process is operating unfairly against one party or where the agreement reached between the parties is so unfair that it would be a miscarriage of justice;[57] and
- Threatening to terminate or terminating the mediation.

The ability of a mediator to employ these many and varied strategies and interventions will depend on their knowledge, skills and ethics as a practitioner.[58] It will also depend on any parameters placed on the mediator's powers. In private mediation any parameters placed on the mediator's or the parties' power would need to be agreed upon by the parties. In mediation within a statutory context the various interventions may be allowed, required or disallowed by the legislation.

Mediators working in a statutory context will often have a wide discretion as to how they exercise their powers and the extent to which they exert pressure on the parties. Increasingly though, the discretion of private and statutory mediators is likely to become subject to regulation as, in the interests of developing quality practices, voluntary codes and procedures shape the expectations of mediator standards of practice.

Non-statutory codes and practice standards

Many industries and organisations have established codes and procedures for handling complaints and grievances that aim for early intervention in a non-adversarial manner.[59] In these situations there is often recognition of the potential for power to be used unfairly and this is addressed in the procedures adopted.[60]

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56 Boulle, above n 12, 227.

57 Maute, above n 35, 348.

58 NADRAC has used these three aspects of a mediator's qualification as a basis for categorising the standards applicable to ADR practitioners, NADRAC*, A Framework for ADR Standards*, 100. The components listed for each category provide a useful checklist of practitioner standards that can be adapted to suit a wide range of areas of dispute resolution.

59 For an overview of developments in dispute resolution in the Australian business sector see T Sourdin, 'The Future of Dispute Resolution in Business - New Rules' in *The Arbitrator* (2000) 23.

60 Criticisms about elements of conduct in the Australian franchising sector were identified in Finding a Balance, the May 1997 report of the Inquiry Into Fair Trading of the House of Representatives Standing Committee on Industry, Science and

For example, within business organisations, complaint procedures are likely to have been adopted for employees complaining of discrimination or unfair treatment in the workplace. Similarly, many industries have developed schemes to handle consumer complaints. [61]

Compulsory codes have been developed in some areas of industry to manage dispute resolution.[62] Other initiatives in Australia have been the development of benchmarks for avoiding and resolving disputes[63] and the formulation of standards for use in the prevention, handling and resolution of disputes.[64] More recently the Australian NADRAC recommended the adoption of Codes of Practice by all alternative dispute resolution service providers and associations.[65] The Codes of Practice would specify the standards of knowledge, skills and ethics that practitioners require in specific areas of practice. The following areas, pertinent to the role of the mediator in addressing power issues in mediation, were identified by NADRAC for consideration. In terms of knowledge, a mediator should know 'how to ensure fairness in procedure'.[66] In terms of skills relating to assessing a dispute for mediation, a mediator may need to be able to assess power differentials between parties, including the timely and effective exclusion of mediation where appropriate, and evaluate

> factors such as apprehension of violence, security issues, age of the parties, issues affecting a party from a non-English speaking background, the need to seek advice, the legal or factual complexity of the matter, the precedent value

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Technology. The Franchising Code of Conduct was one element of the Commonwealth Government's New Deal: Fair Deal package, announced in September 1997, in response to concerns identified during the inquiry.

61 For examples see Sourdin, above n 53, 25 and T Sourdin, *Alternative Dispute Resolution* (2002) 120-124.

62 For Australian examples, see the Oil Industry Code of Practice administration Committee Oil Code: Voluntary Code of Practice and Administration of Agreements in the Petroleum Industry (1989); Commonwealth of Australia Department of Workplace relations and Small Business Franchising Code of Conduct (1998).

63 ACCC, *Benchmarks for Dispute Avoidance and Resolution – A guide* (1997).

64 Standards Australia, AS 4608–1999, October 1999. These developments mark 'a shift away from a focus on resolution processes towards communication management': Sourdin, above n 53, 28. Sourdin suggests the benefits of using mandatory and non-mandatory frameworks need to be questioned, and that it is unclear what impact the Standards will have on business practices. She suggests the main role of the Australian Standard may be to inform courts and tribunals, in addition to the business community, about norms of operation and expected responses as well as informing the sector about negotiation practices. She also questions the educative function of the Standard so far as it applies to ADR processes, noting that there is already clear evidence that the business sector is using ADR processes in preference to litigation (see page 28).

65 NADRAC, *A Framework for ADR Standards*, 71.

66 Ibid 103.

> of a formal resolution of an issue and the need for public sanctioning of particular conduct.[67]

Other skill areas relate to managing the process, and managing the interaction between the parties. Areas relating to ethics involve ensuring effective participation by parties, eliciting information and ensuring appropriate outcomes.

Thus, there are clear signs of moves towards better documented dispute resolution processes and mediator standards. In many areas these standards apply in the absence of statutory provisions.[68] In areas where the mediation process is provided for by statute, it may well be the case that standards and codes of conduct can usefully deal with matters that need not be in legislation.

Power issues in statutory mediation

The need to address power in statutory mediation

We have provided an overview of the nature of power dynamics in mediation and examined why addressing significant power differences between the parties is necessary to maintain the legitimacy of the process. We have also outlined the many ways in which mediators and organisations have responded to concerns about power differentials in mediation. As we have shown there is a complex web of skills, ethical standards, and practical strategies and interventions for addressing power differences between the parties. Without in any way seeking to detract from the importance of these strategies and interventions, we turn now to consider what additional mechanisms do and should exist in statutory mediation - in particular where the process is compulsory.

It is clear that successive governments in New Zealand and Australia (at both State and Federal levels) are increasingly legislating for mediation as a dispute resolution process in a wide variety of areas.[69] Often mediation will be established in conjunction with other new or existing dispute resolution processes. There are various motivations for parliaments to enact mediation or conciliation models and these are often interlinked. Cost-effeciency is often a prime motivator,[70] but so too

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67 Ibid 105.

68 For examples of ADR standards and Guidelines in Australia see NADRAC, *The Development of Standards for ADR Discussion Paper* (Canberra 2000) Appendix 1.

69 For example C Baylis, 'Statutory Mediators and Conciliators: Towards a Principled Approach' Forthcoming June Issue (2002) 20(1) *New Zealand Universities Law Review*; T Altobelli, 'Mediation in the Nineties: The Promise of the Future' (2000) 4 *Macarthur Law Review* 103, 106. The same trend is evident in other jurisdictions, for example in the US, see S Press, 'International Trends in Dispute Resolution – a US Perspective' (2000) 3 *ADR Bulletin* 21.

70 For example, in New Zealand, the Hon Margaret Wilson (Minister of Labour) commented that 'The whole purpose of the new institution, namely relating to

can be the belief that mediation offers a more appropriate form of dispute resolution in the circumstances.[71]

This legislative trend has given rise to a number of concerns. It has been argued that statutory models of mediation set up a second class system of justice,[72] that mandatory mediation is antithetical to the consensual nature of the process[73] and that the institutionalisation and legalisation of mediation destroys the informal and flexible nature of the process.[74] The latter concern is exacerbated by legislation that formalises the process and increases mediator powers. While we recognise that these are important issues that must be acknowledged and addressed, our analysis proceeds on the basis that now that there is a body of legislation that incorporates mediation, there is a corresponding need to analyse the ways that statutory provisions can and do influence the power relations in the mediation.

In the analysis of power undertaken earlier in this article, it was acknowledged that there can be dangers in making assumptions about the power relations that exist in a mediation. This may lead some to argue that it is inappropriate to attempt to address power differences by statutory mechanisms in any situation. Our response is to point to the fact that it is not uncommon and often highly appropriate for the law to create legal rules or design processes that acknowledge the harm that can occur when one person is likely to be, but will not always be, vulnerable to pressure and may possess insufficient power to protect their interests. The law acknowledges that such relationships exist and attempts to provide protection for vulnerable parties.[75] Similarly, in many areas where mediation is provided for by statute, the law recognises the potential for

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mediation … is quite simply to enable the parties an efficient, prompt and cheap method to be able to resolve their disputes as quickly as possible.' Hansard NZPD 9 Aug 2000, 4480. See also Martin Gallagher MP's comments on Health and Disability Commissioner Act: Hansard NZPD 16 June 1994, 1813.

71 See, for example, the comments by Hon JK McLay (New Zealand Minister of Justice) on the Family Proceedings Bill: Hansard NZPD 19 Nov 1980, 5104; and Martin Gallagher MP's comments on the Health and Disability Commissioner Act: Hansard NZPD 5 Dec 1995, 10378.

72 See for example, R Abel, *The Politics of Informal Justice: Volume One: The American Experience* (1982).

73 See, for example, the submissions from the Arbitrators' and Mediators' Institute of New Zealand (at 2), the Law Commission (at 7), the Legal Services Board (at 4), and the NZ Law Society at 4 and 8), in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution June 1997.

74 M Thornton noted over a decade ago, '…informality is being subtly transformed by creeping legalism'. 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733, 754.

75 Consumer credit laws are a clear example. Section 51AC of the *Trade Practices Act 1974* (Cth) stipulates in great detail what types on conduct are capable of constituting unconscionable conduct.

significant power differences and attempts to provide mechanisms to protect the party presumed to be at a disadvantage. There are a number of areas where the nature of the relationship between the parties, or the circumstances leading to the dispute, suggest an inherent power inequality. This inequality may then be intensified or ameliorated depending on the types of power that each party possesses. In some areas inequality is presumed to exist to some degree, such as in farm debt cases, employer-employee relationships,[76] discrimination and sexual harassment cases,[77] and health disputes.[78] In other areas some form of inherent power inequality is not presumed to exist but will be considered likely in specific circumstances. For example, in family disputes where one party has been violent towards the other.

Although examples of mechanisms will be drawn from a range of statutes it is disputes where the legislation presumes a degree of inequality of power between the parties with which we are largely concerned in this article. In these circumstances, we argue that it is appropriate for legislation to operate on a presumption that a party lacks power, or that the differential in power is high, and in some circumstances statutory mechanisms are necessary if the legitimacy of the process is to be maintained. At the same time, the fact that mediation is provided for by legislation, sometimes as a mandatory step in the overall dispute resolution process, is significant to the parties, the integrity of the process of mediation and the dispute resolution role of the state itself. The role of the law in addressing the power differences thus becomes an issue of paramount importance. There are two main reasons why this is so.

First, increasingly (and to some alarmingly), the statutory models are compelling parties to use mediation as a first step in the dispute resolution process. Even under statutory models where the process is not mandated but is the usual

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76 For example, P Churchman and P Roth comment that '[t]he *Employment Relations Act* acknowledges the inherent inequality of bargaining power…. one party (almost invariably the employer party) possesses overwhelming bargaining power….': '*Employment Relations Act 2000*' (NZ Law Society Seminar, Oct 2000) 5. See also R Guthrie, 'Power Issues in Compensation Claims' (2001) 12 *Australian Dispute Resolution Journal* 225 where the author examines the effects of the implementation, in 1993, of informal dispute resolution processes in the Western Australian workers compensation system under the *Workers Compensation and Rehabilitation Act 1981* (WA) and argues that pre-existing power imbalances have been aggravated by these procedural changes, in particular by the exclusion of legal practitioners from the dispute resolution process.

77 For example see J Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality Morality and Manners' in M Thornton *Public and Private: Feminist Legal Debates* (1995) 89-110; C Baylis, 'The Appropriateness of Mediation for Sexual Harassment Complaints' (1997) 27 *Victoria University Wellington Law Review* 585, 595-601.

78 See for example comments by Bill English (MP and Parliamentary Under Secretary for Minister of Health): Hansard NZPD 16 June 1994, 1808.

procedure, parties may feel they have little choice but to use the process. This perception may be reinforced by the legislation. For example, under the Residential Tenancies Act 1986 (NZ) if a party refuses to mediate 'without reasonable excuse' in a case which in the opinion of the Tribunal 'ought reasonably' to have settled at mediation, the Tribunal can award costs against that party.[79] In these ways consensuality, a central tenet of mediation, is reduced in that the parties do not have control over the choice of process. This makes the genuine consensuality of the outcome all the more necessary.[80] Mandatory mediation also has the potential to affect the integrity of the process itself. Many commentators and practitioners believe voluntariness is essential to the process.[81] Further, the element of compulsion may also have potential implications for the integrity of the state's role in dispute resolution. A basic precept of the justice system in New Zealand and Australia since colonisation has been that 'recourse to the courts is a fundamental right of all citizens'.[82] Making mediation mandatory in some areas fetters this right.[83]

The second reason why the role of law in addressing power differences in statutory mediation is important is because the process is state sanctioned. Ultimately, the fair and just administration of justice is central to the legitimacy of the government itself. Western style governments have attempted to ensure that disputes are resolved in a fair and just way through the primary state-sanctioned dispute resolution mechanism, the Courts. The adversarial system contains a range of mechanisms that attempt to enhance the equality of the parties. For example, parties speaking through professional, trained lawyers according to strict rules of evidence before an impartial judge increase the ability of both

79 *Residential Tenancies Act 1986* (NZ) ss 87(2) and 102(2)(c).

80 As Galligan points out, unless agreement is genuinely consensual, '…negotiation and mediation become a means of coercion and injustice… Such informal processes may be less consensual than they appear, with parties having no real choice whether to participate or to accept a particular outcome. (footnote omitted) And if, in addition, the parties are in positions of inequality, the pressures on the weaker party to settle for compromise will be compounded', above n 43, 276.

81 See R Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56 *Modern Law Review* 441; and T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 106 *Yale Law Journal* 1545. For an examination of the concepts of 'voluntariness' and 'consensuality' as they relate to mediation see B Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213.

82 Law Commission of New Zealand Submission in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution, June 1997, 8.

83 Ibid 3. NADRAC, in A Framework for ADR Standards, considered that extra attention is required where mediation is mandatory and recommended 'That bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR': Recommendation 10 (at 78).

parties to put their case.[84] Similarly, a system of rules of natural justice attempts to ensure that the effect of power differentials is minimised in administrative decision-making bodies. Thus, as informal, consensus-based forms of dispute resolution like mediation and conciliation are being incorporated into legal processes, it is necessary for the process to be able to deal fairly with parties in disputes involving significant power differentials to ensure, as far as possible, the administration of justice; albeit informal justice. Procedural protections are necessary to ensure that agreements reached through a process based on compromise are voluntary and informed.[85]

This analysis suggests that where statutes establish models of mediation, particularly mandatory mediation, interventions or mechanisms should be available to ensure that the parties can participate meaningfully in the process and outcome. So far, however, the question of how this should occur is left open. Central to this question, in areas where the law presumes that there are significant differences in power, is whether the legislation should incorporate mechanisms to mitigate the effects of such a power differential or whether it should be left to the statutory body responsible for administration of the particular statute to formulate policies or guidelines, or even to the individual mediators acting in each case. Before addressing this question some statutory examples will be outlined.

Existing statutory mechanisms

Whilst it is evident that there are statutory mechanisms that have the aim or the effect of addressing significant power differences between the parties in existing models of statutory mediation, there are some difficulties in conducting a meaningful review of these mechanisms. First, the legislation covers a wide

84 See discussion in R Delgado, C Dunn, P Brown, H Lee and D Hubbert, 'Fairness & Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] *Wisconsin Law Review* 1359, 1367-1375. We acknowledge the extensive critiques of the adversarial process as being mono-cultural and patriarchal, but our point here is that in setting up alternatives the state has a responsibility to attempt to achieve fair and just processes.

85 Galligan, above n 43, 280. See also Law Commission of New Zealand's submission in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution June 1997:3. Welsh, who reports that research into court-ordered mediation shows that 'when disputants bring their disputes to the courthouse, they expect something more than bargaining assistance. They expect and value procedures that feel fair' and that 'the failure to consider issues of procedural justice in court-connected mediation has the potential to threaten the legitimacy and the authority of the judiciary and to reduce disputants' compliance with the agreements they have reached.' NA Welsh 'Making Deals in Court-Connected Mediation: What's Justice got to go with it?' (2001) 70 *Washington University Law Review* 787, 816. A similar finding might also be expected of statutory mediation.

variety of areas and, consequently, the comparison of power issues may become strained. Second, some features of a particular statute may have the effect of addressing power differences even though this may not have been the primary reason for their incorporation. An example of this is where the statutory models include statements of principle, for instance, under the Australian *Family Law Act 1974* (Cth), any agreement made between couples who have children is to be in 'the best interests of the child'.[86] Whilst this principle establishes the parameters of possible settlements, it may also impact on the power dynamic between the parties, particularly if the mediator uses it as a reality check when concerned about a potentially unfair agreement. Our focus, though, is on mechanisms that address power issues more directly.

Notwithstanding these difficulties, we suggest, albeit tentatively, that these mechanisms can be placed into four broad categories. These are, first, mechanisms that impose the mediation process on the parties; second, mechanisms relating to the appropriateness of commencing mediation and continuing mediation; third, those relating to the manner in which the mediation is conducted; and finally, mechanisms relating to the outcome of the mediation.

Mechanisms imposing the process

Compelling the process

It is usually clear from the legislative provisions whether mediation is voluntary or mandatory.[87] Compelling mediation is a means by which the power dynamics are altered. For example, by compelling the process a party may be precluded from using their resources power to dictate the process to be used or to impose pressure on the other party to settle by threatening protracted and expensive litigation. Usually each party is compelled to use mediation by the legislation. However, the *Farm Debt Mediation Act 1994* (NSW) provides an unusual model, based on a presumed power imbalance, where the compulsion to mediate is placed only on the creditor, while the farmer can opt not to mediate.[88]

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86 Section 63B of the *Family Law Act 1975* (Cth) provides that '[t]he parents of a child are encouraged (a) to agree about matters concerning the child rather than seeking an order from a court; and (b) in reaching their agreement, to regard the best interests of the child as the paramount consideration.'

87 Although sometimes a model may appear to be voluntary, it actually may have an element of compulsion, such as the New Zealand Residential Tenancies Act. Examples of mandatory models include, the *Federal Court of Australia Act 1976* (Cth) s53A(1A), the *Children Young Persons and their Families Act 1989* (NZ) s 175, *the Family Proceedings Act 1980* (NZ) s 17, the *Anti-discrimination Act 1991* (Qld) ss 158-160, the *Workplace Relations Act 1997* (Qld) s 219, the *Freedom of Information Act 1992* (WA) s 83 and the *Worker's Compensation and Rehabilitation Act 1981* (WA) s 84Q.

88 Sections 8-11. Although if the farmer does opt to mediate he or she must do so in good faith: s 11(2)(a).

Compulsion both confirms the mediator's power to manage the process and fetters the rights of one or both parties to resolve their dispute in court without first mediating. The extent to which the mediator's power is enhanced by a statute will depend on the coercive powers conferred on the mediator. For example, some statutes allow the imposition of costs on parties who refuse to participate while others make it an offence not to attend without reasonable excuse.[89] Where there are power inequalities between the parties, compulsion can be problematic[90] and may need to be tempered with other legislative mechanisms, particularly an intake process, to ensure that the agreement is balanced and reflects the needs of both parties.[91]

Modifying the process or providing for a different process

The type of process specified in the Act can of itself have an impact on power differences. It is not always possible to draw a bright line between mediation and conciliation. If we apply the NADRAC definitions of mediation and conciliation,[92] it is clear that the legislative framework within which the process is situated will have a greater impact in conciliation, where, at least in theory,[93] the Act will expressly or implicitly confer some power on the conciliator to influence the outcomes of the process.[94] In this situation, a conciliator may be in a stronger position to address a significant power difference between the parties by providing advice on the substantive outcome and the relevant law.

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89 For example, costs can be imposed under section 102(2)(c) of the *Residential Tenancies Act 1986* (NZ); while s 83 of the *Freedom of Information Act 1992* (WA) makes it an offence with a potential penalty of a fine or six months imprisonment.

90 Ironically, there may be a danger that a court may view the prescription of mediation as leaving the parties to the consequences of any inherent inequality of bargaining power. See *Commonwealth Bank of Australia v McConnell* (Unreported NSW SC, 24 July 1997, BC 9705442) where Rolfe J responded to the mortgagee's assertion that at the time of executing the Heads of Agreement in the mediation there existed material inequality in bargaining power between them and the Bank by saying 'The Bank is entitled to respond that it was forced by the Act to mediate… In so far as a lack of equal bargaining power comes about that is not the fault of the Bank, but of the legislature, which has created the circumstances in which the mediation is to take place.' (at 38).

91 The intake process as a mechanism will be discussed further below. See also C Baylis 'Reviewing Statutory Models of Mediation/Conciliation: Three Conclusions' (1999) 30(1) *Victoria University Wellington Law Review* 279, 287-290.

92 NADRAC, above n 3.

93 See Baylis above n 77, for discussion of confusion of roles of mediators and conciliators.

94 For discussion, see D Bryson, "Insider Mediators' and the ADR Practice of Spitting on the Spear' (2001) 12 *Australian Dispute Resolution Journal* 89. See also RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

Mechanisms to determine the appropriateness of commencing and continuing the process

Intake process

There is a significant body of literature that suggests that mediation is not appropriate for all types of disputes involving power imbalances, particularly in cases where there is a history or danger of violence between the parties or to third parties.[95] One way to deal with this issue is for the legislative models to incorporate an intake or screening process, both to protect one party from the danger of physical harm from the other, and also to ensure that disputes are not mediated in situations where one party would not be able to negotiate effectively on their own behalf due to the prior actions of the other party.[96] An intake process both enhances the power of the mediator or other official exercising statutory powers by giving that person the discretion to refuse mediation and, at the same time, fetters the parties' rights to use mediation. Usually the discretion would be exercised where either or both parties do not wish to use the process, but it is possible that an agency or mediator could decide mediation was unsuitable even though both parties agreed to it.[97]

The Australian *Access to Justice* Report identified a screening process as a necessary limitation on institutionalised mediation that required a national minimum standard to ensure justice in this area.[98] Similarly, the Western Australian Law Reform Commission, in suggesting increased use of ADR in the civil justice system, recognised the need for an intake process to determine the suitability of a dispute for ADR and included as one relevant factor, 'the potential for, or degree of, power imbalance between the parties, if any.'[99] However, the degree to which statutory models incorporate or make reference to such a mechanism varies significantly. An intake process is particularly important in legislative models that compel mediation.[100]

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95 For example, see H Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3; K Rowe 'The Limits Of The Neighbourhood Justice Centre: Why Domestic Violence Cases Should Not Be Mediated' (1985) 34 *Emory Law Journal* 855; and M Irvine, 'Mediation: Is it Appropriate for Sexual Harassment Grievances?' (1993) 9 *Ohio State Journal of Dispute Resolution* 27, 28.

96 For a general discussion on factors affecting the appropriateness of mediation see Clarke and Davies above n 16.

97 For example, in a situation where one party had been violent to the other.

98 Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, above n 38, 295.

99 Western Australian Law Reform Commission (WALRC), *Review of the Criminal and Civil Justice System in Western Australia* Final Report, Project 92 (1999) Recommendation 48, 86.

100 Even supporters of compulsory mediation often suggest that where this occurs there needs to be an intake process. For example, see M Vincent, 'Mandatory Mediation of

Some models incorporate a detailed intake procedure[101]. For example, under the *Family Law Act 1975* (Cth), both the *Regulations*, which apply to community and private mediators under the Act,[102] and the *Family Law Rules 1984* which apply to Court mediators,[103] contain similar provisions that establish a screening process. Both require that before mediation occurs, disputes must be assessed to determine their suitability for mediation. The factors to be taken into account include the potential risk of child abuse, family violence, the emotional and psychological state of the parties, as well as the degree of equality of the bargaining power between the parties. In terms of the latter, the *Family Law Regulations* give two possible examples, which are 'whether a party is economically or linguistically disadvantaged'.[104]

Obviously one of the difficulties of a screening mechanism is that the power differences will not always initially be apparent as, for example, parties may be unwilling to discuss violence that has occurred or has been threatened. One response to this difficulty, is to provide, as in the *Family Law Regulations*, specific information that must be given to the parties before mediation is commenced, including the information 'that mediation may not be appropriate for all disputes, particularly if a dispute involves violence that renders one party unable to negotiate freely because of another's threats'.[105] This has the potential to encourage a person who has been subjected to violence to opt out of mediation or at least bring the issue of violence to the attention of the mediator.[106]

Many legislative models have less explicit intake processes. A common mechanism is for the legislation to empower an official to refer a dispute to mediation or for the official to mediate where they believe it appropriate to so do.[107] Another example is seen in the *Health Services (Conciliation and Review) Act 1995* (WA),

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Custody Disputes: Criticism, Legislation, and Support' (1995) 20 *Vermont Law Review* 255, 288. See also CC Hutchinson, 'The Case for Mandatory Mediation: Practitioner's Note' (1996) 42 *Loyola Law Review* 85, 90.

101 Another example is the *Residential Tenancies Act 1986* (NZ) which states that when an application is filed, the tenancy officer refers it to a Tenancy Mediator unless in terms of any regulations made under the Act, the application is of a class that is to be referred directly to the Tribunal....': s 87(1).

102 Family Law Regulations 1984 Reg 62.

103 Family Law Rules 1984 Order 25A Rule 5.

104 Family Law Regulations 1984 Reg 62(2)(c).

105 Family Law Regulations 1984 Reg 63(1)(d).

106 It is interesting to note that an assessment of suitability of mediation where there is a history of violence between the parties does not take place in all cases involving family disputes. In some States, family disputes over property are heard in the Supreme Court or equivalent, where provisions equivalent to the Family Law Regulations or Rules do not necessarily exist.

107 For example, section 61 of the *Health and Disability Commissioner Act 1994* (NZ).

which sets out the process to be followed if, in the Director's opinion, the complaint 'is not suitable for conciliation…'[108] but does not address what factors would make it unsuitable. An obvious difficulty with this model is that cases may not be filtered out on a consistent basis if guidelines are not established, as it may depend on the level of experience and training in power imbalance issues that the official happens to have and their views of the appropriateness of mediation in different circumstances.

Finally, many legislative models are silent as to an intake process while others mandate that all disputes must be mediated. A particularly problematic example of the latter was the *Human Rights Act 1993* (NZ) which compelled the Commission to conciliate once the investigating officer formed an opinion that a complaint had substance.[109] This removed the power of the Commission to decide that a case was inappropriate for conciliation. However, since the enactment of the *Human Rights Amendment Act 2001* (NZ) the Commission can only compel attendance at a dispute resolution meeting in cases which are referred back to it from the Human Rights Review Tribunal or the Director of Human Rights.[110] The initial use is voluntary. Thus mediation may be used at three points in time under the Act. However, there is only an intake process at the last point in time, in that the Tribunal must refer the complaint back to the Commission for dispute resolution services (or further services) unless it is satisfied that this will not contribute constructively to resolving the complaint or will not be in the public interest or will undermine the urgency of the proceedings.[111]

The fact that there is no statutory intake process for the first two referrals to mediation was raised in submissions on the *Human Rights Amendment Bill* that resulted in the 2001 Act. The Select Committee agreed that there were difficulties raised by the use of consensus-based processes in situations of significant power differences between the parties. It believed, however, that a formal intake procedure would be 'overly prescriptive' and that it was 'more acceptable to allow the Commission the flexibility to determine the best way to proceed in any given situation.'[112] This tension between flexibility and prescription is central to the use of legislative mechanisms as will be discussed below. With this legislation, however, it is difficult to understand why an intake process would be included for

108 Section 31. Another similar example is the *Community Justice Centres Act 1983* (NZ) s 24(1), which states that 'The Director may decline to consent to the acceptance of any dispute for mediation under this Act at a Centre.'

109 Section 81 of the *Human Rights Act 1993* (NZ).

110 Section 84(4) of the *Human Rights Act 1993* (NZ).

111 Section 92D of the *Human Rights Act 1993* (NZ). Similar provisions exist in the *Employment Relations Act 2000* (NZ) in relation to the Employment Relations Authority (s159(1)) and the Employment Court (s188).

112 Justice and Electoral Select Committee Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 15-16; see also C Baylis, 'The Human Rights Complaints Process' [2000] *New Zealand Law Journal* Nov 2001, 410.

one use of mediation but not the others, even though the Select Committee 'expected [the same factors] to be borne in mind by the Commission when providing assistance to a complainant in the first instance'.[113]

Termination

Another important mechanism for preventing the abuse of power in mediation is the ability of the parties and the mediator to terminate the mediation. How realistic it is for the parties to choose to terminate the mediation will be determined to some extent by whether the process is compulsory under the statute. Although the courts have made it clear that only participation in the process, not reaching an agreement, is compulsory,[114] the parties, and indeed the mediator, may perceive themselves to be constrained from terminating the mediation. The exercise of the right to terminate may need to be weighed up against any statutory obligation to mediate in good faith that exists in any particular statutory context.[115]

Whilst relatively few legislative provisions expressly provide for termination, an example is found in Regulation 64 of the *Family Law Regulations* (Cth), which states that the mediator must terminate if 'requested to do so by a party' or 'if the mediator is no longer satisfied that mediation is appropriate'.[116] Presumably the screening factors set out in the regulations to determine whether mediation is appropriate in the first place, which include the equality of the bargaining power between the parties, are also relevant in determining whether mediation has become inappropriate.[117] In terminating mediation where there are concerns about abuse of power, however, it is necessary to use strategies that attempt to ensure the safety of all concerned.[118] This type of termination provision should ensure that the question of whether the mediation is working in a legitimate consensual

113 Justice and Electoral Select Committee Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 15.

114 For example, *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

115 For example, the *Employment Relations Act 2000* (NZ); and the *Farm Debt Mediation Act 1994* (NSW) s 11(2)(a).

116 Other provisions confer a discretion to terminate. For example, section 24(2) of the *Community Justice Centres Act 1983* (NSW), provides that '…a mediation session may be terminated at any time by the mediator or by the Director.'

117 See Regulation 62.

118 It is particularly important that the mediator attempts to ensure that the perpetrator of the abuse does not blame the other party for the termination of the mediation. For example, see A Barsky, 'Issues in Termination of Mediation Due to Abuse' (1995) 13(1) *Mediation Quarterly* 19 which discusses P Charbonneau, Report from the Toronto Forum on Woman Abuse and Mediation (Belfast, Maine: Fund for Dispute Resolution, Academy of Family Mediators, Ontario Association for Family Mediation, Family Mediation Canada, Ontario Anti-Racism Secretariat, Guelph-Wellington Women in Crisis, and Women's Law Association, 1993).

way is kept to the forefront of the mediator's mind. Such a provision may have an educative function, but it may also be useful for the mediator to have the express *duty* to terminate, especially in situations where one or both parties may appear to wish to continue, but due to the abuse of one party the mediator does not believe this will achieve a fair outcome.

Mechanisms that affect the manner in which the mediation is conducted

The role or status of the mediator

Even where mediation rather than conciliation is used, some statutes enhance the mediator's role in some way. For example, the *Residential Tenancies Act 1986* (NZ) states that mediators shall 'make suggestions and recommendations and do all such things as they think right and proper for inducing the parties to come to a fair and amicable settlement.'[119]

The identity of the mediator may also enhance their power. Under some statutes a judge or decision-maker acts as mediator and then may hear a subsequent proceeding if the case does not settle.[120] The knowledge that this may occur may act as a check on a stronger party's tactics. However, these models are also problematic.[121] The difficulties that arise from having the same person act as mediator and subsequently as judge have been recognised by some courts, and are avoided by ensuring that different court officers participate in the different processes.[122] The identity of a mediator as a person appointed under a statute may also operate to enhance their status in the eyes of the parties, which could have an impact on the power relations in the mediation.

Timing of the process

The time at which the mediation occurs in the overall dispute resolution process can affect the power relations between the parties. Perhaps the clearest example of legislation where this was an issue was the process under the *Human Rights Act 1993* (NZ) before its amendment by the *Human Rights Amendment Act 2001*.[123] Previously, one of the main uses of conciliation under the Act was

119 Section 76(5)(b). Similarly, s 23 of the *Residential Tenancies Act 1987* (WA) allows the magistrate to '…interview the parties in private…' (with or without any representative present): s 23(1)(a); and 'endeavour to bring about a settlement of the proceedings on terms that are fair to all parties': s 23(1)(b).

120 For example, *Family Proceedings Act 1980* (NZ) s16.

121 See Baylis, above n 69 for discussion of these issues.

122 See Australian and New Zealand Council of Chief Justices, Position Paper and Declaration of Principle on Court-Annexed Mediation (Canberra, March 1999).

123 This Act deals with complaints of discrimination, sexual harassment and racial harassment and disharmony. The Amendment Act removed the Commission's investigative role, although it retains an information gathering function.

compulsory conciliation after the Complaints Division had conducted an investigation and reached an opinion that the complaint had substance. In other words, the process took place against the backdrop that the Commission had already formed an opinion that a complaint was genuine and a breach of the Act had occurred. The focus of the conciliation then was based around a remedy and future conduct. That aspect of the process had a significant impact on the power balance between the parties because if conciliation was taking place, it would always be the presumptively weaker party who was supported by the Commission's opinion. A limitation of this as a mechanism to address power difference is that because it involved only an 'opinion' of the Commission, it may not have had enough weight to prevent the respondent from challenging the facts and attempting to broaden the conciliation focus back to the alleged breach.

A related mechanism appears in the *Federal Magistrates Act 1999* (Cth) which allows a party to a primary dispute resolution process (which includes mediation and conciliation) to apply to the Court for determination of a question of law. The application must be consented to by the person conducting the mediation or conciliation who must state that the determination is 'likely to assist the parties in reaching an agreement.'[124] Whilst the primary purpose of this mechanism may not have been to alter the power dynamic between the parties, there is potential for it to have this effect.

Legal representation

The issue whether parties should be legally represented in a mediation has attracted a range of views. On the one hand, it is not uncommon to hear mediators complain that some lawyers are unwilling to or incapable of acting in a way that is conducive to the mediation process. On the other hand, in areas where there are serious differences in the parties' power, the argument is made for legal representation to ensure real and effective participation from both parties and a genuinely consensual agreement.[125] For example, in the context of conciliation of discrimination complaints, Thornton states:

> The problem of imbalance of power between the disputants is a critical issue in mediation and it can only be hoped that the legislature's desire to simplify, expedite and decrease the cost of resolving disputes does not blind the legislature to the very positive role that the legal profession plays in ensuring that negotiation, even facilitated negotiation, takes place on a 'level playing field.' [126]

This argument is particularly strong in cases of statutory mediation where parties may be foregoing potential legal entitlements.

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124 Section 27.
125 For example, in the context of worker's compensation claims see Guthrie, above n 83.
126 Ibid.

Some statutes are silent on the question of legal representation,[127] but others make express reference to it.[128] The express provisions take a range of forms. First, an Act may specify that one set of interests must be legally represented. For example, the *Children Young Persons and their Families Act 1989* (NZ) states that any lawyers of the child must be present.[129] This type of provision enhances the rights of the child and recognises the child's inability to exercise power on his or her own behalf. The second approach is that an Act may confirm the parties' right to legal representation by allowing representation if they so choose. For example, the *Family Proceedings Act 1980* (NZ) allows any lawyer representing the parties to be present at the request of the parties.[130]

Finally, an Act may enhance the power of the mediator or another official to allow or refuse legal representation during mediation;[131] this obviously has a significant effect on the rights of the parties. For example, the *Children Young Persons and their Families Act 1989 (NZ)* allows legal representation unless the mediator proscribes it.[132] Sometimes the legislation sets out the grounds for the exercise of the discretion, at other times it does not.[133] An example of the former is the *Disability Services Act 1993* (WA), which gives the Commissioner the discretion to allow representation only 'if the Commissioner is satisfied that the process will not work effectively otherwise.'[134] Similarly, under the *Commercial Arbitration Act 1986* (WA), which covers mediations or conciliations conducted by an arbitrator,[135] the arbitrator must grant leave for representation if satisfied that this would reduce costs, shorten proceedings or 'that the applicant would, if leave were not granted, be unfairly disadvantaged.'[136]

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127 For example, the *Retail Leases Act 1994* (NSW), the *Human Rights Act 1993* (NZ), the *Medical Practitioners Act 1995* (NZ). Alternatively some statutes allow advocates to be present, for example *Disability Services Act 1993* (WA) section 39(3).

128 Thornton, above n 74, 754 notes that '[r]enunciation of the role of lawyers has been one of the most notable characteristics of conciliation.'

129 Sections 170 and 175.

130 Section 14(3). Other examples are the *Health and Disability Commissioner Act 1994* (NZ) s61(3); and the *Farm Debt Mediation Act 1994* (NSW) s17(4).

131 Section 163 the *Anti-Discrimination Act 1991* (Qld).

132 Section 172(2)(d). Note: In this case a Family Court Judge is the mediator.

133 For Example, *Equal Opportunity Act 1984* (WA) s 92.

134 Section 39(3).

135 Section 27.

136 Section 20 (3)(b). Similarly, section 25 of the *Community Justice Centres Act 1983* (NSW) provides more generally, that a party to a mediation session is not entitled to be represented by an agent unless it appears to the Director of the Centre that it would facilitate the mediation, that the agent has sufficient knowledge of the matter in dispute to represent the party effectively and the Director approves.

Interpreters

Where an Act specifically confirms the parties' right to an interpreter it provides a safeguard against unfairness for a party who may be disadvantaged by their inability to communicate well in English. For example, the *Anti-Discrimination Act 1991* (Qld) explicitly states that '[a] person has a right to use a professional or voluntary interpreter at a conciliation conference.'[137]

Requiring documents and other information to be shared

An important mechanism for dealing with power imbalance that may be caused by a lack of information needed for effective negotiation, is to provide a procedure by which parties share information and documents.[138] Power may be given to a mediator to *require* parties to give information and produce documents[139] or to make a similar *request* of the parties.[140] Conferring formal power on a mediator to influence the conduct of the mediation may be seen, of course, as increasing the formality of the process and in some way detrimental to the mediation process. This was the view of the Select Committee considering the Bill which became the *Human Rights Amendment Act 2001*(NZ):

> Adding a power to compel information would re-introduce a formal and adjudicatory element to the initial dispute resolution process, which would conflict with the general policy direction of the bill in this area.[141]

However, this type of power can be an important mechanism to reduce potential disadvantage to one or both parties in a statutory process.

Imposition of costs and requirements of good faith

Some statutes enhance the mediator's powers to affect the abuse of power by a party by allowing the mediator to report to a body on the conduct of the parties during the mediation. The body may then use this report in determining costs.[142] For example, the New Zealand *Human Rights Amendment Act 2001* introduced a provision allowing the Tribunal, in determining whether to make an award of

137 Section 162 of the *Anti-Discrimination Act 1991* (Qld). See also section 84T of the *Workers' Compensation and Rehabilitation Act 1981* (WA).

138 There may be overriding policy reasons why a mechanism like this is specifically precluded. For example, the *Freedom of Information Act 1992* (WA) specifically precludes a conciliator from ordering that a document be produced: s 71(4).

139 For example, *Residential Tenancies Act 1987* (WA) s 19; and *Workers' Compensation and Rehabilitation Act 1981* (WA) s 84Q.

140 For example, *Agricultural Practices (Disputes) Act 1995* (WA), Schedule 1 cl 7.

141 Justice and Electoral Committee, Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 17.

142 See for example, the *Residential Tenancies Act 1986* (NZ) sections 88(4) and 102(2).

costs, to consider the extent to which parties 'participated in good faith in the process of information gathering…' and 'acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.'[143] Failure to mediate in good faith can have other implications for one or both of the parties. One example of a mechanism that may have a similar effect to the reporting mechanism is found in the *Farm Debt Mediation Act 1994* (NSW), which provides that certain orders can only be made where it is found that a party has attempted to mediate in good faith.[144] Similarly, under section 164 of the *Employment Relations Act 2000 (NZ),* the Employment Relations Authority can only make certain orders if a party has acted in good faith.[145] To a large extent it will be the threatened use of these mechanisms that affect the parties' conduct in a mediation and enhance the mediator's ability to inhibit abusive behaviour.

Exceptions to confidentiality

Another statutory mechanism that may protect a party is where exceptions to confidentiality provisions are created to allow the reporting of the unacceptable use of power. For example, the *New Zealand Residential Tenancies Act 1986* (NZ), while establishing a general duty of confidentiality for Tenancy Mediators, allows mediators to disclose any statement or information if they have reasonable grounds to believe it is necessary to prevent or minimise the danger of injury to any person or damage to any property.[146] Similarly, the *Family Law Regulations 1984* (Cth) provide that a private mediator may disclose communications if he or she:

> reasonably considers that it is necessary for him or her to do so to protect a child, or to prevent or lessen serious and imminent threat to a person or property, or to report the commission of an offence or prevent the likely commission of an offence of violence or damage to property.[147]

The *Family Law Regulations* exception is wider in scope than the *Residential Tenancies Act* in that it allows the mediator to report an offence that has already been committed. Where an offence is threatened during a mediation, whether against the other party or another person who is connected to them, not only does

143 Section 92L(2).

144 S 11(1) requires the Authority established by the Act to issue a certificate that the Act does not apply to the farm mortgage where the farmer has, inter alia, failed to take part in mediation in good faith, ss 11(2)(a). In this event the creditor will be free to commence proceedings in respect of the farm debt.

145 Section 164.

146 Section 90. In addition, there is an exception to the principle that statements made in mediations are subject to privilege (section 89) where the statement would otherwise be admissible in criminal proceedings (section 89(4)). See also section 88(d) *Human Rights Act 1993* (NZ).

147 Regulation 67.

this place their safety at risk, but it is likely to have a dramatic effect on the negotiating power between the parties. Enhancing the mediator's power to respond to such threats may in itself reduce the likelihood of the abusive party making such threats.

Professional mentor

Some legislation provides a mechanism aimed at ensuring that a statutory mediator has access to a process expert. For example, the *Health Rights Commission Act 1991* (Qld) establishes a model of conciliation that can be used for health service complaints under the Act.[148] It provides that all conciliators 'to the extent practicable' are to have professional mentors.[149] These are 'persons with knowledge or experience in the field of dispute resolution' who are to advise the conciliator on the performance of their functions. The provision includes an exemption for the conciliator from confidentiality in this regard and also imposes a duty of non-disclosure on the professional mentor. This mechanism would allow the conciliator to discuss a case at any stage of the conciliation. If it seemed likely that a particular case would involve a significant power imbalance the conciliator could discuss this before the conciliation started. Further, he or she could also discuss difficulties that arose in this regard during the conciliation and debrief after it. While this mechanism may have an important educative function, generally it would seem more appropriate for mentoring processes to be provided for in subsidiary legislation or practice standards and guidelines.

Mechanisms relating to the outcome of mediation

Solicitor approval

Some statutes include lawyer approval clauses if one or both parties did not have legal advice during the mediation process. This provides a check to ensure that one party is not unduly disadvantaged by the agreement. It also recognises that the mediator is not in a position to advise the parties on the terms of their agreement. For example, the *NZ Family Proceedings Act 1980* (NZ) states that, if a party does not have legal representation at a mediation conference, a consent order cannot be made 'unless that party states expressly that that party does not wish the conference to be adjourned to provide an opportunity for legal advice to be taken.'[150]

148 See also the *Health Complaints Act 1995* (Tas) Part 5.
149 *Health Rights Commission Act 1991* (Qld) s87.
150 Section 15(2).

Cooling off periods

The cooling off mechanism is used in contract law and has been codified in some jurisdictions in areas where there is a 'presumptive' power imbalance.[151] A statute may prescribe a cooling off period after an agreement is reached at mediation. During the cooling off period the agreement is not enforceable and the presumed 'weaker' party, for whose benefit the mechanism operates, may opt to rescind the agreement. An example of this mechanism is provided by the *Farm Debt Mediation Act 1994* (NSW) which requires that where any written agreement is entered into between a farmer and creditor as a result of a mediation there must be a cooling off period of at least 14 days. During this time it is possible for the farmer, but not the creditor, to rescind the agreement.[152]

In part this mechanism reflects the notion that a presumed 'weaker' party may have been pushed into an agreement in the heat of a mediation by the 'stronger' party and later realise they have been disadvantaged. It may also reflect that the 'weaker' party, unlike the 'stronger' party, is likely to be inexperienced in the process and therefore they are less likely to be able to negotiate as effectively. In the farm debt mediation context, for example, it gives a farmer the chance to talk to family members, others with an interest in the farm, and lawyers (if they were not present at the mediation) about the agreement. The ability of one party to opt out of a mediated agreement will undoubtedly have some impact on the mediation itself, as each of the parties know that there is time for the party with that option to reconsider the terms of settlement.[153]

Developing a principled approach to the incorporation of statutory mechanisms to address power differences in mediation

From the review of statutory provisions above, it is clear that whether mechanisms for addressing power differences exist, and what those mechanisms

151 For example Australian federal legislation incorporates cooling-off periods for financial supplement contracts under the *Social Securities Act 1991* and the *Student Assistance Act 1973*, for life insurance and consumer credit insurance under the *Insurance Contracts Act 1984,* and for employees under the *Retirement Saving Accounts Act 1997*. In New Zealand the Credit Contracts Act 1981 and the *Door to Door Sales Act 1967* both incorporate the concept of a cooling off period.

152 *Farm Debt Mediation Act 1994* (NSW) s11B. If this occurs, either party can claim compensation or adjustment where the other party has received a benefit under the agreement (but a claim cannot be made only on the basis of the rescission itself).

153 One commentator advocates for the adoption in court-connected mediation of a three-day, non-waivable cooling-off period before mediated settlement agreements become enforceable, in a bid to preserve party determination in the face of evaluative mediation techniques commonly used in this context: see N Welsh 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?' (2001) 6 *Harvard Negotiation Law Review* 1, 6-7.

are, varies considerably between statutes and statutory models of mediation. There is also considerable variation between statutes that incorporate the same type of mechanism. This is illustrated by the various provisions that relate to legal representation. In some statutes there is a high level of detail in either the Act or the Regulations relating to the model of mediation to be used, and a range of mechanisms that address significant power differences. From the discussion above it will be clear that the Australian *Family Law Act* and the New Zealand *Residential Tenancies Act* fall into this category. In contrast, New Zealand's *Employment Relations Act 2000* establishes a permissive regime explicitly leaving the procedure to be adopted to the discretion of the mediator and states that the nature, content or manner of the mediation services cannot be challenged.[154] At times, mediation is provided for in scant detail and consequently does not incorporate any or many mechanisms. An example of this is the New Zealand *Medical Practitioners Act 1995* which does little more than state that a Complaints Assessment Committee can attempt conciliation.[155]

The approach taken will depend, in part, on the specific context in which the statute is operating. We have seen that statutes which provide for mediation in areas of law where there is some presumed inequality of power between the parties will often incorporate some form of statutory mechanisms for addressing power differences. There may be other factors that explain the use of a particular mechanism. For example, the requirement for solicitor approval under the *Family Proceedings Act 1980* (NZ) reflects the significance of the outcomes in matters such as custody. Sometimes the variation is more a factor of the level of prescription adopted by the legislature at the time, for example whether where a discretion is granted, the grounds are set out for its exercise. Where the state wishes to exercise more control over outcomes (often in areas where there is a greater likelihood that disputes will involve an inequality of bargaining power), conciliation will usually be favoured over mediation. Accordingly, many statutes covering anti-discrimination and health complaints provide for conciliation,[156] although there are exceptions to this.[157]

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154 Sections 147, 149(3)(b) and 152. This was recognised as being potentially problematic during the Parliamentary debates on the Bill: See the Hon John Luxton, Hansard NZPD, 9 August 2000, 4480.

155 See section 94. See also *Freedom of Information Act 1992* (WA) and the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).

156 For example, the *Health Rights Commission Act 1991* (Qld), the *Anti-discrimination Act 1991* (Qld), the *Equal Opportunity in Public Employment Act 1992* (Qld), the *Medical Practitioners Act 1995* (NZ), *Health Services (Conciliation and Review) Act 1995* (WA), the *Racial Discrimination Act 1975* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

157 For example, the *Health and Disability Commissioner Act* (NZ). Recently, the *Human Rights Act 1993* (NZ) has been amended to change the process used from explicitly being conciliation to being '…services designed to facilitate resolution of the complaint,

Many of the mechanisms incorporated in the legislation operate by enhancing and confirming the powers of the mediator or by fettering one or both parties' rights. Earlier we drew on Astor's work relating to neutrality and her suggestion that mediators should work to maximise party control. Many of these mechanisms may at first glance appear to be in direct opposition to this principle, however this is too simplistic a view. Where there is a real inequality of power between the parties, it may be necessary to reduce one party's power, for example by precluding legal representation; or to bolster the other party's power, for example, by allowing an advocate or interpreter or having a cooling off period. The Western Australian Law Reform Commission recognised the need to address power issues in mediation stating 'when there is a significant power imbalance between the parties, it may be that less control in the hands of the parties will afford a greater potential for fairness in the outcome.'[158] Similarly, mechanisms that increase the power of the mediator, for example by requiring conciliation rather than mediation, or by compelling mediation in a situation where one party may use litigation to their advantage, can have a positive impact on power imbalance. Alternatively, the mechanisms can operate by precluding or limiting the use of mediation, for example, through intake procedures or termination provisions, in situations where there does not appear to be the possibility of real control of the process and outcome by both parties.

The statutory examples outlined above illustrate that there is a range of approaches to the issue of power differences in mediation. Our aim has been to draw attention to the range of mechanisms used in legislation and to suggest that some may usefully be adopted in other statutory contexts. In our view a principled approach would involve more explicit recognition of likely power differentials in process design and closer attention to the potential impact of statutory mechanisms on the integrity of the process.

There is a range of opinion as to the appropriate degree of regulation in the legislation as compared to the agency or mediator self-regulation. In Australia and to some extent in New Zealand, these opinions have led to overt debate about the adoption of mediator standards. There has been little explicit recognition, however, of the issue of the appropriate level of regulation for mechanisms addressing power differences in a statutory context. There are advantages and disadvantages to legislating for these mechanisms, and ultimately there is a need for a balanced and principled approach to the issue. On the one hand, incorporating mechanisms into statutes is likely to lead to a more consistent approach to their use than if they are left for individual mediators to use as they deem appropriate. Consistency of process is all the more important where the

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including information, expert problem solving support, mediation and other assistance.' s 76(2)(c).

158 WALRC, above n 99, paragraph 11.11.

process is part of the state machinery of dispute resolution, because of the principle of the rule of law. The use of mechanisms such as cooling off periods or excluding legal representation should be applied on a more principled basis than merely the knowledge and belief of individual mediators.

On the other hand, weighed against the consistency argument are the arguments of diversity and flexibility. Each dispute is unique, as are the power relations that exist between the parties. Thus there is the argument that each individual mediator should have the flexibility to deal with the dispute before them as befits it, without being fettered by the legislation into a 'one-process for all' approach. There is a danger that too much regulation in legislation results in the process being co-opted and overly legalistic. In some cases, issues may better be addressed through non-statutory provisions; for example the detail of an intake procedure. It may also be appropriate in some cases, to provide for certain mechanisms to apply simply by agreement between the parties and the mediator; for example the right to terminate a mediation.

A compromise between consistency on the one hand, and diversity and flexibility on the other, is for legislation to be used to empower the mediator in terms of a range of possible mechanisms to address power without necessarily compelling their use in all cases. It is not our aim to prescribe whether particular mechanisms should be set out in the enabling Act or in some form of subsidiary legislation. The latter has the obvious advantage of allowing for review and amendment of mechanisms as necessary without recourse to the cumbersome parliamentary process. In our view, there are certain mechanisms that should be provided for in some form of legislation, namely those mechanisms which determine the parties' legal rights, or empower the mediator to determine their rights, or give one party rights but not the other. At a minimum we suggest that some form of legislation is needed where there is an interference with a party's right to legal representation, where a cooling off period is provided, and where sanctions can be imposed on a party for their conduct during mediation.

By making procedural powers and choices more transparent, and by giving mechanisms statutory force where appropriate, the public and parties are more likely to perceive the statutory process as fair. If statutory mediators are seen to regulate the process other than by agreement of both parties (as would be the case in private mediation), for example by creating a cooling off period, mediators and the statutory body to whom they are accountable may no longer be seen as being impartial. If the legislature provides for such mechanisms, this should reduce the degree to which parties might view the mediator as lacking neutrality or impartiality and in this way preserve the legitimacy of the process.

Conclusion

Increasingly disputes arising under statute are being directed to mediation. There is also a trend to compel parties to attend and participate in mediation. In many of these disputes the law regards the parties as being in positions of unequal power. While power is a complex dynamic in any mediation and the concept of 'balancing' power is fraught with difficulty, many aspects of process design, and strategies and interventions employed by mediators aim to ensure that parties are able to negotiate effectively in their own interests to reach fair outcomes. In this article we have shown that in many statutory models of mediation there are mechanisms that have the purpose or the effect, or both, of addressing differences in power. We argue that compelling reasons to address issues of power in mediation in this way are to preserve the integrity of the process itself and to maintain the legitimacy of the state's role in dispute resolution. We suggest that some of these mechanisms might be appropriate for consideration in other statutory contexts and that a more principled approach to their inclusion in legislation be adopted. This is not to suggest that statutory mechanisms should in any way detract from the value and importance of practice-based interventions or from non-statutory mechanisms, such as professional guidelines and codes of practice. In our view, the integrity of statutory mediation will be better maintained if there is greater awareness of the power issues at play in any statutory context and the question of what process mechanisms should be given statutory force is addressed.