The Controversy over Mediator Neutrality:

Input from New Zealand Mediators

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1. INTRODUCTION

Mediators are expected to be neutral. Though not regulated in New Zealand in any overarching way, mediators typically seek training, and this training invariably emphasises the importance of neutrality. Neutrality is considered to lead to trust and acceptance by the parties, and fairness in the resolution of their dispute. But what does it mean to be neutral? Neutrality is an elusive concept and its meaning is subject to wide debate.[1] Hung explains "existing definitions are inconsistent and concepts are entangled. The result is confusion."[2]

The meaning of neutrality aside, there are further puzzles. Mediators need to consider when an action on their part would constitute a departure from neutrality, and whether such departures are ever justified. For example, if a mediator sees a submissive party about to accept a raw deal from a powerful other party, perhaps under a subtle threat of violence, should the mediator take any notice of that or act in any particular way? This is a controversial area.

In New Zealand there are over 50 Acts incorporating mediation in some form.[3] However, there is no overarching statute that regulates mediation or mediators. Two private trade organisations provide training and accreditation schemes for mediators, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and the Association of Dispute Resolvers (LEADR), but membership is voluntary. Because there is no legislative regulation of mediators, there are no compulsory standards of practice or safeguards for parties, especially against rogue providers.

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1 Kathy Douglas and Rachael Field "Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence" (2006) 13 eLaw J. 177 at 180.

2 Hung Hin "Neutrality and impartiality in mediation" (2002) 5 ADR Bulletin 45 at 45.

3 Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 238. For example, the Employment Relations Act 2000, the Weathertight Homes Resolution Services Act 2006, the Māori Land Act 1993 and the Resource Management Act 1991 all refer to mediation.

This thesis addresses the following issues. First, what do actual mediators think about neutrality and how do their opinions influence their behaviour in mediations? Second, should uniformity be encouraged and is regulation the best means to achieving this?

This thesis will explore mediator neutrality in depth and touch on uniformity and regulation. There are three parts to this thesis. The first part is a review of the literature with respect to the meaning of mediator neutrality, and the justifications for requiring it. The second part focuses on a questionnaire that was emailed to hundreds of mediators practicing in New Zealand. The methodology is discussed and the results explained. The questionnaire comprised questions that elicited both quantitative and qualitative data on mediator neutrality. The third part of this thesis analyses the results in light of the research questions.

2. LITERATURE REVIEW

This chapter reviews the current literature with respect to the meaning of, and justifications for, mediator neutrality. Consideration is given to difficulties defining neutrality and whether neutrality is achievable in practice. Finally, arguments as to the desirability of neutrality and alternative guiding principles will be addressed.

2.1 The Orthodox Approach: Neutrality is Essential

Under the orthodox view, neutrality is one of the founding concepts of mediation. The traditional understanding of mediator neutrality is that "the mediator does not influence the content or outcome of the mediation."[4] This idea encompasses four main elements: the mediator has no conflicts of interest; processes are conducted in a way which treats both parties equally; the mediator has no interest in the outcome; and the mediator is free of bias, prejudice, or favouritism toward any party.[5] The idea of the mediator as a neutral third party reflects Western understandings of what is fair and just.[6] Whilst in some cultures "the term *neutral* is associated with being inactive, ineffective, or even cowardly", in the West it forms the "sine qua non for the third parties to establish respect."[7] The role of the mediator is to assist the parties in reaching an agreement. If the mediator were not neutral, his or her involvement would do more than help the parties reach their own agreement. Instead, it would amount to biasing the process and/or the result in one party's favour. Neutrality is also viewed as having practical benefits, such as fostering a relationship of trust between the disputants and the mediator, and enabling the process to run smoothly. Conversely, a mediator who violates neutrality "will not be trusted or respected" by the parties.[8]

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4 Carol Izumi "Implicit Bias and the Illusion of Mediator Neutrality" (2010) 34 Wash. U.J.L. & Pol'y 71 at 82.

5 At 79.

6 Hilary Astor "Mediator Neutrality: Making Sense of Theory and Practice" (2007) Soc. Leg. Stud. 221 at 221.

7 Izumi, above n 4, at 77-78.

8 Hung Hin "Neutrality and impartiality in mediation" (2002) 5 ADR Bulletin 45 at 45.

Mulcahy states "for many the notion is important that without the neutrality of the mediator the process can not even be called mediation".[9] Mediators are not only expected to be neutral, but to avoid anything which may give the appearance of partiality.[10] This view of neutrality is reflected in many codes of conduct for mediators which require that they remain "neutral and impartial" at all times.[11] For example, the Texas Mediation Association Code's section on "Neutrality" states:[12]

> Neutrality refers to the relationship that the mediator has with the participants. If the mediator feels, or any one of the parties or their attorneys states, that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator should withdraw from mediation unless all parties agree to proceed.

In Australia, *The Mediator's Handbook* contains a checklist reminding mediators to describe their role to the parties as that of a "neutral facilitator."[13] Other texts at times use the words "mediator" and "neutral" interchangeably.[14]

More recently the orthodox view has been challenged. The principle of neutrality has been attacked as ambiguous, unattainable and undesirable. These matters will be addressed later. In this section, the focus is on reasons for mediator neutrality.

2.1.1 Self-determination

One of the central justifications for mediator neutrality is the promotion of party self-determination. Boulle, Goldblatt and Green describe neutrality as "the other side of the self-determination principle, in that the mediator is disinterested in the mediated outcome and is

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9 Linda Mulcahy "The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?" (2001) 10 Soc. Leg. Stud. 505 at 509.

10 Izumi, above n 4, at 77.

11 Hung, above n 8, at 45.

12 Suzanne McCorkle "The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct" (2005) 23 Conflict Resol. Q. 165 at 171.

13 Rachael Field, "The Theory and Practice of Neutrality in Mediation" (2003) 22 IAMA 79 at 8.1.

14 Astor, above n 6, at 222.

not responsible for imposing his or her own standards or fairness or appropriateness."[15] Self-determination means that the parties, not the mediator, are responsible for any decisions made. They are free to come to whatever terms they think appropriate, and can choose to consent or not consent. The mediator is simply there to provide and support the procedural framework in which the mediation occurs.[16] If a mediator compromises his or her neutrality by "taking sides or promoting solutions", the parties' freedom to "craft their own solutions" is jeopardised.[17] Hence, this would be a violation of the mediator's neutrality and a threat to party self-determination.

Welsh outlined the elements of self-determination as follows:[18]

- the parties are at the center of the mediation process;
- the parties are the principal actors and creators within the process; they actively and directly participate in the communication and negotiation;
- the parties choose and control the substantive norms to guide their decision making;
- the parties create the options for settlement; and the parties control whether or not to settle.

For some authors, self-determination in mediation is linked with the Reaganite revolution. Self-determination embodies the ideas of freedom to contract and the free market; the parties, unencumbered by the law, can apply individualised standards of justice.[19] Unlike the formal court system where judges, arbitrators or professional advisors make decisions on what is in the best interests of the parties, in mediation individuals are assumed to be most capable of forming solutions that will be right for them.[20] The outcome derives from the party's own values, norms and subjective view-point. This is in contrast to formal court proceedings

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[15] Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 52.

[16] Astor, above n 6, at 223.

[17] Evan M Rock "Mindfulness Meditation, the cultivation of Awareness, Mediator Neutrality and the possibility of Justice" (2005) 6 Cardozo J. Conflict Resol. 347 at 348.

[18] James R Coben "Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-determination and Neutrality" (2004) 5 Cardozo J. Conflict Resol. 65 at 71.

[19] At 76.

[20] Boulle, Goldblatt and Green, above n 15, at 50.

where legal norms inform the outcome.[21] The principle of self-determination also supports concepts of responsibility for choices and dignity of individuals.[22] Finally, on a more pragmatic level, if the parties form their own decisions it is argued there is an increased likelihood they will stick to them.[23]

2.1.2 Neutrality as a legitimising factor

Mediator neutrality plays an important legitimising function by shadowing the judicial neutrality in the court system. The standard of judicial neutrality requires a judge to act as "a political, economic and social eunuch, and have no interest in the world outside [their] court when [they] come to judgement."[24] Similarly, the role of the mediator has been described as that of a "eunuch from Mars, totally powerless (and totally neutral)."[25] Mediators are expected to be free from bias (and the perception of bias). Accordingly, mediators should not have any personal or business connections with the parties which could bring the mediators' impartiality into question. This strongly reflects the bias rule and the maxim that "justice must not only be done but be seen to be done" in the legal system.[26]

Culturally, neutrality plays an important role in Western liberal democracy. In various academic writings it has been described as "instinctive," "universal", "vital" and "reflecting a shared understanding".[27] Judicial neutrality has been written into many "human rights codes, constitutions, the common law and legislation."[28]

Without neutrality, mediation arguably would be less appealing to the legal profession, government and court administration as a viable means of dispute resolution.[29] Neutrality

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[21] At 51.

[22] At 50.

[23] At 23.

[24] Mulcahy, above n 9, at 506.

[25] Hung, above n 8, at 45.

[26] Astor, above n 6, at 223.

[27] Mulcahy, above n 9, at 506.

[28] At 506.

[29] Kathy Douglas and Rachael Field "Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence" (2006) 13 eLaw J. 177 at 178.

provides "a sense of security regarding the fairness of the process."[30] Given the context of mediations this is especially important. Unlike the court system where "for justice to be done it must be seen to be done", mediations mostly operate in private. Moreover the parties are free to reach agreements that are different from what a court would decide; the parties are not strictly bound by the law.[31] Mediator neutrality therefore provides a legal gravitas to the proceedings which, arguably, would otherwise be lacking.[32]

2.2 Difficulties with Neutrality

The mediator neutrality requirement has been subject to a number of criticisms. Neutrality is hard to define, and is frequently described as "elusive."[33] In practice, it is argued that neutrality is unattainable as mediator processes affect substantive outcomes and bias is inevitable. In turn, others have sought, with these criticisms in mind, to reframe neutrality to form a working definition. The following sections discuss these criticisms.

2.2.1 Definition

Neutrality is recognised in much of the literature as a key term. Despite this, it is an elusive concept and its meaning is the subject of wide debate within the mediation field.[34] Hung writes "existing definitions are inconsistent and concepts are entangled. The result is confusion."[35] The following list by Norris outlines some of the various ways the term neutrality is used:[36]

- 'impartiality' or 'neutrality' are not defined, or the terms are used synonymously; or
- 'impartiality' means unbiased, and fair to all parties equally; or
- 'impartiality' refers to an unbiased attitude and 'neutrality' refers to unbiased behavior and relationships; or

[30] At 178.

[31] Astor, above n 6, at 222.

[32] Mulcahy, above n 9, at 522.

[33] Rock, above n 17, at 354.

[34] Douglas and Field, above n 29, at 180.

[35] Hung, above n 8, at 45.

[36] At 45.

- ‘neutrality’ is comprised of two contradictory concepts — impartiality and ‘equidistance’ between the parties; or
- ‘neutrality’ means non-intervention; or
- ‘impartiality’ and ‘neutrality’ mean (or include) objectivity.

As Norris’ list shows, neutrality is used in conflicting ways. Sometimes it is used synonymously with impartiality; sometimes they are distinct concepts. The following, originally printed in a Code of Conduct for mediators, shows the meaning given to neutrality and impartiality when separated:[37]

> Neutrality: A mediator should determine and reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual neutrality of the professional in the performance of duties. If the mediator or any one of the major parties feels that the mediator’s background will have or has had a potential to bias his or her performance, the mediator should disqualify himself or herself from performing a mediation service.
>
> Impartiality: The mediator is obligated during the performance of professional services to maintain a posture of impartiality toward all involved parties. Impartiality means freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties as opposed to a single party in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role in the process of dispute resolution.[38]

Amidst the confusion, Boulle, Goldblatt and Green choose not to define the term, preferring to refer to “shades of meaning”.[39] These include aspects of both neutrality and impartiality:[40]

> [T]hat the mediator has no personal views or opinions on the dispute; that the mediator is disinterested, that is, that he or she has no personal interest in the outcome of the dispute; that the mediator has no prior knowledge of the particular dispute; that the mediator does not know the parties, nor has had any prior association with them; that the mediator will not,

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37 Alison Taylor “Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process” (2007) 14 Conflict Resol. Q. 215 at 218.

38 At 218.

39 Boulle, Goldblatt and Green, above n 15, at 25.

40 At 25.

> directly or indirectly, sit in judgment on the parties; that the mediator will not use his or expertise in the subject matter of the dispute to influence the decision making; and that the mediator will conduct the process even handedly, fairly and without bias to either side.

Astor advocates a wide meaning of neutrality which encompasses impartiality. This is appropriate considering the terms are already frequently defined in relation to each other.[41] Furthermore, mediation literature often uses them interchangeably.[42] Like Boulle, Goldblatt and Green, Astor extracts a number of meanings from this broadened definition. First and most fundamentally, the mediator does not "influence the content or outcome of the mediation."[43] This relates to the principle of self-determination: the decision is for the parties, and the mediator is simply there to provide the framework. A second meaning is that the mediator "is not partisan". Third, is the idea that the mediator should be free from any connections with the disputants which could arouse bias or the perception of bias.[44] Fourth, mediators should be free from government influences.[45] Despite these relatively clear elements, Ascot also recognises that there are still ambiguities and a lack of consistent interpretation among mediators. She states:[46]

> There is no consistency or agreement among mediators about how neutrality is defined: it is a highly debated and contested term. Some mediators, for example reject the first element of neutrality described earlier. They acknowledge that they inevitably bring to mediation their own perspective, experience and opinions and, although they may try to exclude these things, they will influence the mediation.

Confusion as to the exact meaning of neutrality is not confined to academic discussion. Practicing mediators are also confused and often have a "very limited vocabulary" for describing exactly what is meant by neutrality.[47]

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41 Astor, above n 6, at 223.

42 At 223.

43 At 223.

44 At 223.

45 At 223.

46 At 223.

47 Douglas and Field, above n 29, at 180.

Cobb and Rifkin's research into mediator neutrality found most practicing mediator definitions bubbled around the ideas of justice, power and ideology.[48] These concepts were interlinked:[49]

> Justice is served if power is balanced; power is balanced if hidden interests are uncovered; hidden interests can lead to injustices; practitioners speak of neutrality as necessary to the promotion of procedural *justice*, the management of *power* imbalances, and the avoidance of *ideology*. Thus neutrality, ideology, power and justice function as discursive unity.

However "within this unity" the definitions of neutrality are multiplied. Cobb and Rifkin categorise them into two main types – neutrality as "impartiality" and neutrality as "equidistance".

This definition presents neutrality as the absence of bias. That is, a neutral mediator would be one able to "separate his or her opinion from the outcome of the dispute ... the parties ... must perceive that the intervenor is not overtly partial or unneutral ...".[50] Mediation literature which defines neutrality in this way usually focuses on the lack of "feelings, values, or agendas; 'bias' is to be avoided."[51]

The second definition, neutrality as "equidistance", refers to the necessity for mediators to maintain a "balance of power" between disputants:[52]

> From this perspective, practitioners assume that the quality of justice is served and enhanced if mediators facilitate a context where neither side is favored or disfavored, functionally defining neutrality as 'equidistance.'

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[48] Sara Cobb and Janet Rifkin "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 Law Soc. Inq. 35 at 39.

[49] At 41.

[50] At 42.

[51] At 42.

[52] At 44.

Consequently, it is acceptable that the mediator may at times take actions that might seem to favour one party over the other, in order to maintain an overall balance of power between the disputants.[53]

In both conceptions of neutrality (impartiality and equidistance) the mediator addresses underlying interests and agendas – whether the mediator's own or those of the parties – to "balance power, avoid ideology, and promote justice."[54]

Douglas' study of mediator neutrality in Australia also found differences in the way in which mediators perceived neutrality. Her research identified four main definitional groups. These included definitions of neutrality as impartiality,[55] as even-handedness,[56] through the distinction between process and content and outcome[57] and finally, through party self-determination.[58] The differences between these definitional groups were often subtle. Overall, Douglas found the emphasis on self-determination to be the most significant aspect of her research as it showed mediators had adapted neutrality to make it a functional concept:[59]

> The most important finding of this study is the emphasis placed by participants on the principle of party self-determination in their attempts to deal with the dilemmas of neutrality. This finding is important because it points to the development of an alternative conception of neutrality, one that avoids a binary, or dualistic, construction. Instead of looking to the presence or absence of neutrality, it is possible to reformulate the concept as one that makes sense in relation to another relevant concept, that of party self-determination. In this alternative neutrality is abandoned in an absolute sense but its meaning is reframed in relation to that of party self-determination.

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53 At 44.

54 At 47.

55 Susan Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 Queensland U. Tech. L. & Just. J. 139 at 144.

56 At 145.

57 At 147.

58 At 148.

59 At 149.

Mediators who focus on party self-determination emphasise the principles of party ownership of the dispute and of client-centered practice.[60] This was described by one mediator as meaning the dispute was the client's problem, not the problem of the mediator:[61]

> I would say that it's really important not to take any ownership. It is the client's problem. It's not your problem. Therefore while you can encourage their communication you are not having any direct input into what might be appropriate for them to do to resolve that. I think sometimes as a mediator that can be quite difficult because sometimes it seems obvious to you as a mediator as to what the solution will be. But you need to be very careful that you are not directing them in a way you think it should go. There could be a number of other solutions as well that may be more appropriate for them.

Whilst self-determination expresses an overall principle, impartiality can be utilised as a way to get there. Hence, even mediators who defined neutrality as impartiality were ultimately aiming their definition towards giving the parties freedom to make their own decisions. For example, impartiality meant having no vested interest in the dispute, but the purpose of this approach is to allow room for the parties to "own" their dispute and its solution.[62] As one mediator described it:[63]

> There is a distancing thing ... that sets the boundary from the outset. It's not my problem. I haven't got a vested interest in it. I have nothing in it. All I am (there) to do is direct the flow of communication.

Douglas' second definitional group referred to neutrality as even-handedness. These mediators expressed the concern that even-handed treatment may sometimes result in unfair outcomes if there are power imbalances.[64]

The third definitional group describes neutrality by distinguishing between process and outcome. Whilst the mediator may have control of the process, he or she should be neutral to

[60] At 148.

[61] At 148.

[62] At 144.

[63] At 114.

[64] At 146.

the substance of the dispute and its resolution.[65] One mediator from Douglas' research used this as the basis for distinguishing between neutrality and impartiality, stating:[66]

> Neutrality I would always attach to outcome - that there are issues about outcome and neutrality. The outcome is theirs and their journey to get there is theirs. Impartiality to me speaks more about the process and the way that the process is managed to allow the parties an equal footing to get to the outcome.

Mediators in Douglas' research also recognised the challenge of appearing to remain neutral whilst reality testing unrealistic parties. One mediator noted that even "the slightest raise of the eyebrow" could trigger a response from a party that "You don't think that's a good idea."[67] The potential for reality testing to genuinely encroach on neutrality was also mooted, the danger being that the mediator could be "imposing some other community standard which may or may not be applicable given the nature of the relationship between the parties."[68]

Evidently, there was no one shared understanding of the meaning of neutrality by practicing mediators, as emphases differed. Although the definitions of neutrality in Douglas' research often emphasised party self-determination, there were still clear shades of difference. Some definitions focused more on traditional understandings of neutrality (by referring to differences between process and outcome), others focused on impartiality. Interestingly, many of the mediators often recognised the limits of neutrality in providing their definitions, showing that, to some degree, the term is being reframed as a functional definition.[69] Douglas argues these results prove that neutrality can be retained as a fundamental principle "with the challenge of reconstructing its meaning away from a pure or absolute sense and towards a construction which sees its meaning in relation to that of party self-determination mediated by a post-modern conception of power".[70] However, as earlier extracts show, the matter is still far from resolved in academic literature.

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65 At 147.

66 At 147.

67 At 147.

68 At 148.

69 At 157.

70 At 157.

2.2.2 Is neutrality attainable?

As well as being difficult to define, it is argued that neutrality is in practice unattainable. In this context, Boulle has referred to neutrality as the "most pervasive and misleading myth about mediation".[71] Claims against neutrality are made on two grounds. First, that a mediator cannot possibly be neutral because the slightest action, including a decision concerning process, can have a tangible effect on the substance and outcome of the dispute. Hence, the distinction between process and outcome (mentioned in the first part of Astor's definition and by some of the mediators in Douglas' research) is a fallacy. The second complaint focuses more on the understanding of neutrality as impartiality: that is, that mediators should be free from bias. The assertion is made that it is impossible for a mediator – as for any human being – to be free from bias. The two are linked because feelings of bias will likely find expression (consciously or unconsciously) in process. These claims will now be considered in more detail.

2.2.2.1 Neutrality is unattainable because process inevitably affects outcome

There are a multitude of ways in which mediators (by virtue of their role) can influence or apply pressure on the parties during a mediation. As a result, it would seem it is inevitable that neutrality will be breached at some point. This is partly due to the blurred line between process and content. In practice there is a myriad of subtle ways in which a mediator can (consciously or unconsciously) affect the outcome of a mediation through their actions. For example, the body language displayed by the mediator can express disapproval or approval, potentially stimulating or stifling the participants.[72] It is suggested that parties are vulnerable towards being swayed by mediator signals as parties are often unfamiliar with mediation and its norms.[73] This is exacerbated by mediators who explicitly use the gravitas of their role to push the parties towards an outcome by declaring "superior authority based on their

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[71] Douglas and Field, above n 29, at 185.

[72] Tony Bogdanoski "The 'Neutral' Mediator's Perennial Dilemma: To Intervene or Not to Intervene?" (2009) 9 Queensland U. Tech. L. & Just. J. 26 at 33.

[73] Mulcahy, above n 9, at 512.

experience and training."[74] Such behaviour is problematic as it undermines party self-determination.

Moore has listed some of the various ways in which a mediator can exert influence:[75]

- managing the negotiation process (agenda control);
- managing communication between and within parties (active listening; reframing; use of caucus);
- control of physical setting and negotiations (seating arrangements; table shape, room size);
- timing decisions (imposition or removal of deadlines for settlement; when to convey offers or responses);
- managing the information exchange (packing information so it will be heard);
- engineering associational influence (choosing who is at the table with settlement in mind);
- using authority (the mediator's own, as an expert or respected elder, or that of outsiders);
- managing doubt (encouraging doubt as a way to moderate a party's position);
- rewarding behavior (the offer of friendship, respect or interest in a parties well-being).

Mediator omissions can also affect the substantive outcome. For example, some mediators have been found to avoid issues which they perceive may hinder settlement. Instead, these issues are suggested for counseling.[76] Thus, through omitting the emotive issues from discussion, the mediator is affecting the substance by increasing the likelihood of an outcome. For a mediator to "avoid eye contact with one party, allow one party to speak at far greater length than another, or focus on a subject that is important to one party" can also likely impact upon substance, by advancing the interests of one party at the expense of the other.[77] In this sense, the fine dividing line between process and substance is closely related to the issue of mediator bias.

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[74] At 512.

[75] Coben, above n 18, at 75.

[76] Mulcahy, above n 9, at 512.

[77] At 513.

Empirical evidence from Mulcahy[78] and Dingwall and Greatbatch[79] suggests that even mediators who claim to be neutral fail to achieve it in practice. Dingwall and Greatbatch's research involving detailed recordings from divorce mediations drew particular attention to the use of framing by mediators.[80] They found that mediators would use framing (outlining the issues) to broaden the discussion beyond that initially laid out by the parties. This is not strictly neutral behaviour as the mediator is using their control over process to add to the content of the mediation. Mediators also drew attention to particular facts and understandings "inducing the parties to comply with such interpretations".[81]

Particular models of mediation have come under scrutiny as running counter to the principle of neutrality. For example, the idea of a neutral evaluative mediator has been described as an "oxymoron."[82] The very idea of evaluation, it is argued, is inherently non-neutral as it requires "engagement with the parties, their issues and their dispute" in a way vastly different to the understanding of neutral in the traditional facilitative model.[83] In the same way, transformative mediators argue facilitative mediators by nature cannot be neutral as their processes are deliberately geared towards achieving an outcome.[84]

2.2.2.2 Neutrality is unattainable due to bias

Neutrality has also been criticised as unattainable from the standpoint of impartiality. It is argued that the mediator, as a human being, will inevitably have human, emotional reactions to the parties. Grillo states, "mediators, like all human beings, have their own conceptions of 'reality,' and those conceptions give rise to viewpoints and values that may differ from 'objective' reality (if there is such a thing) and result in biases."[85]

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78 At 505.

79 Robert Dingwall and David Greatbatch "Who is in Charge? Rhetoric and Evidence in the Study of Mediation" (1993) 15 Journal of Social Welfare and Family Law 367.

80 David Greatbatch and Robert Dingwall "Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators" (1990) 28 Family Court Review 53 at 53; Mulcahy, above n 6, at 511.

81 Mulcahy, above n 9, at 511.

82 Douglas and Field, above n 29, at 186.

83 At 186.

84 Bogdanoski, above n 72, at 33.

85 Joshua D Rosenburg "In Defense of Mediation" (1991) 33 Ariz. L. Rev. 467 at 488.

A mediator may identify with one party more than the other on the basis of race, gender or ideology.[86] Meyer argues neutrality as impartiality (the lack of bias) is even more difficult for mediators to achieve. As humans, mediators inevitably are likely to sympathise more with one party than the other.[87] Perhaps unconsciously, the mediator will reflect these biases in how he or she runs the mediation. For example, research has shown that mediators provide more opportunities for the parties to discuss the outcomes that the mediators themselves favour.[88]

Mulcahy's research also found the existence of partisan (or biased) behaviour by mediators. Over a period of 18 months Mulcahy conducted a primary in-depth case study of mediators at the Southwark Mediation Centre in London. This included shadowing mediators, formal interviews with mediators and housing officers and participant observations of 38 shuttle mediations.[89] The research found that mediators who used the rhetoric of neutrality nevertheless engaged in partisan behaviour. In the context of a dispute over noise problems, mediators informed the parties that "this was not an individual problem but a systemic one", provided information to help the tenants in their battle against the local council, and were willing to lobby on the tenants' behalf.[90]

Additional scholarship in North America has found that mediators with social science backgrounds are more likely than their legally trained counterparts to be interventionist in the bargaining stages of a mediation. Mediators with an interest in social justice have also been found to be less neutral.[91] Similarly, Taylor has drawn attention to the impact of self-perception on neutrality in the context of family mediations. She argues "[i]f mediators see themselves as trained professionals trying to help clients engage in discussion of deeply troubling issues they will act differently from those who believe in the role of mediator as

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[86] Dwight Golann *Mediating Legal Disputes: effective strategies for lawyers and mediators* (Little, Brown, Boston, 1996) at 398.

[87] Bernie Mayer "Symposium: The Future of Court ADR: Mediation and Beyond: What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition" (2012) 95 Marq. L. Rev. 859 at 3.

[88] Astor, above n 6, at 225.

[89] Mulcahy, above n 9, at 515.

[90] Astor, above n 6, at 226.

[91] Bogdanoski, above n 72, at 34.

healer of the family and from those whose view of their role is heavily influenced by responsibilities as officers of the court."[92]

Mayer concludes that the attempt to offer complete neutrality is a futile one. Despite this, he argues that, in practice, neutrality is not a meaningless aspiration: [93]

> Clients expect us to be motivated, to act in a fair way, and to be attentive to the legitimate concerns of all parties. Our commitment to trying to do just that is an important foundation of our connection with our client. That we cannot actually act in a way that completely actualizes this commitment does not make the aspiration to do so unimportant.

2.3 Reframing Neutrality

In response to critiques of neutrality, various academics have sought to reframe neutrality as a functional concept. Some of the ways in which neutrality has been reframed are discussed below.

2.3.1 Internal and external neutrality

Rock's reframing of neutrality addresses the criticism regarding the inevitability of bias. He confronts this problem by dividing neutrality into two parts, internal and external. Internal neutrality refers to lack of bias in the mediator's internal thought and emotional processes. This, Rock accepts, is impossible as "the presence of emotions, values and agendas is part of being human."[94] However, Rock argues that external neutrality, the exclusion of the aforementioned factors from the process of mediation itself, *is* possible. He advocates self-awareness as a solution. Self-awareness was also brought up by some of the mediators in Douglas' research. Douglas found that mediators recognise that some personal reactions are inevitable, and consider it to be difficult to always prevent them from filtering into the way in which the mediation is conducted. Self-awareness has been identified as a way to try to

[92] Taylor, above n 37, at 216.

[93] Mayer, above n 87, at 4.

[94] Rock, above n 17, at 349.

overcome this tendency.[95] Through greater internal awareness, the mediator can prevent their internal emotions from being externalised in the form of words and actions (that would potentially hamper self-determination).[96]

To cultivate self-awareness, Rock advocates "mindfulness meditation". The ultimate goal of this meditation is for the mediator to come to the realisation that "a person's thoughts are not the same thing as that person."[97] Rather, the mediator is encouraged to recognise emotions caused by his or her thoughts, enhancing his or her ability to choose "whether or not to act on an emotion, or a thought."[98]

2.3.1.1 Critique

The premise of Rock's argument is questioned by Cobb and Rifkin. They argue that to require mediators to monitor their own unconscious thought processes is unworkable as they are "by definition outside their control".[99] However assuming self-awareness is possible, the issue remains as to how mediators should address their feelings of bias. A very real challenge for mediators in practice is to not allow their acknowledgement of personal bias to result in them overcompensating and thus exacerbating the problem they were attempting to alleviate.[100]

2.3.2 The post-modernist approach

Post-modernist mediation theorists reject binary understandings of neutrality (that a mediator is either completely neutral or not neutral at all) and instead advocate a more nuanced approach. At the start of the millennium Bagshaw trumpeted the following goals for post-modernist mediators:[101]

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95 Douglas, above n 55, at 145.

96 Rock, above n 17, at 349.

97 At 352-3.

98 At 353.

99 Cobb and Rifkin, above n 48, at 43.

100 Mayer, above n 87, at 3.

101 Dale Bagshaw "The Three M's - Mediation, Postmodernism, and the New Millennium" (2001) 18 Conflict Resol. Q. 205 at 217-218.

- Accept that there are many "truths'- that is, there is no overarching truth and there are no universal principles, metatheories, or metanarratives
- Resist expressions of normalizing power in society wherever and whenever possible and acknowledge that the celebration of difference takes precedence over normative goals
- Understand how power relationships both produce and are produced by discourses; know how to challenge dominant discourses and practices (discourse analysis discloses ideas, beliefs, norms, and behaviors, which produces normalizations around race, class, gender, poverty, and sexuality) and do not collude with these discourses and their outcomes for individuals
- Be interested in the lived experience of people and discursive effects on the subjectivities of people, and place emphasis on allowing people to construct their own identity within the mediation
- Develop communication competence in the knowledge that clients supply the interpretive framework that is necessary for determining appropriate intervention
- Be client-centered and use enabling, empowering ways of working, while resisting the imposition of top-down agendas
- Be inclusive, especially ensuring the inclusion of previously excluded voices in decision making, such as those of indigenous people, women, or children
- Value the transformative power of the process of mediation
- Acknowledge tensions and value conflicts associated with recognition of diverse values and difference as part of the negotiating process
- Avoid defining oneself and one's role as "neutral" and emphasize the importance of self-reflexivity in the mediator (requires control of one's professional, personal, and cultural biases in order to understand the standpoint of the other), while valuing the creative use of self
- Allow for a relativity of client needs within a framework of universal human rights

More recently, Bogdanoski also argued for a more nuanced approach to neutrality. This approach is related to Cobb and Rifkin's "equidistance". Under traditional understandings of neutrality, a mediator who intentionally seeks to redistribute power in a mediation would be regarded as departing from neutrality.[102] Bogdanoski's thesis is that neutrality and power are not fixed but instead are situated terms. In other words, they are context specific so should be defined in a more liberal way that takes other variables into account. So, depending upon the circumstances, the mediator's intervention to redistribute power could be regarded as neutral.

[102] Bogdanoski, above n 72, at 27.

Bogdanoski's approach encourages a broad understanding of the concepts of power and neutrality. He describes power as multi-faceted: there are different types that "ebb and flow between the parties", according to subject matter. This description challenges the traditional conception of power as a commodity maintained by one party throughout the mediation.[103] Mayer identified 13 different types of power within the context of a dispute. These include legal prerogative, information power, moral power and personal characteristics.[104] Depending on the subject matter, some typologies of power may be more pertinent than others. For example, the power wrought by a wealthy executive may have little practical bearing in a custody dispute, as opposed to an employment matter.[105] Such typologies encourage the mediator to look beyond binary conceptions of power to focus on the less obvious variables affecting the relationship between the parties in a mediation, using these as the basis as to when and whether it is appropriate to intervene.

Bogdanoski contends that neutrality is flawed under the current system because calculated mediator intervention "to ensure fair outcomes" is frowned upon as a justification for departing from neutrality. Instead, he argues that mediators should be able to treat the participants unequally in order to create a just outcome. Bogdanoski takes this idea from Cobb and Rifkin with their theory of "equidistance" whereby "bias ... is used to create symmetry!"[106] However, Bogdanoski places a caveat that only mediators with "experience" and "considerable practice" are capable of adequately identifying "complex power relations between parties" on which interventions would be based.[107]

Like Bogdanoski, Taylor also eschews binary understandings of neutrality, instead contending that neutrality can be seen as incorporating "shades of meaning" and is therefore "context sensitive."[108] Within the family mediation context a more interventionist approach to mediation may be necessary in order to "have some fairness of process in the room between the participants."[109]

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[103] At 28.

[104] At 29.

[105] At 29.

[106] At 34.

[107] At 34.

[108] Douglas and Field, above n 29, at 181.

[109] Taylor, above n 37, at 221.

Flexible approaches to neutrality have been described as "dangerous" by Douglas and Field on the ground that the lack of any true collective meaning of "neutrality" means that the term is devoid of any "practical assistance" for "the real situations that may transpire in a mediation".[110]

2.4 Abandoning Neutrality as a Fundamental Principle

In response to the perceived flaws of neutrality, some authors argue it should be dispensed with altogether. Some critics of neutrality go further than stating that it is unattainable; they also argue that it creates a dangerous myth that covers a multitude of sins. These sins relate to the operation of power in the mediation, by the mediator and vis-à-vis the parties.

Coben argues that the "Two Towers" of mediation (neutrality and self-determination) have left mediation as "a process routinely characterized by mediator manipulation and deception."[111] Central to Coben's thesis are the contentions that imbalances of power (in the form of repeat corporate players) and a focus on achieving outcomes have resulted in a flawed process.[112] Furthermore, the influence of mediators (whilst cloaked in the shield of neutrality) "undermines justice ... because the weapons of influence are not being used in the name of justice – or for that matter in the name of anything at all, other than settlement".[113] Other writers such as Cobb and Rifkin also call for a dismantling of the neutrality "mythology" to make room for alternative approaches to mediation.

These authors view neutrality as a pervasive myth. Stitzel writes:[114]

> [Neutrality] hides hundreds of strategic judgements that must be made – each of which can practically affect the benefits achieved by any party. It hides the normative judgements that a mediator must make about what are good and bad agreements under the practical circumstances at hand. And it suggests a technical objectivity, an absence of responsibility, a

[110] Douglas and Field, above n 29, at 181.

[111] Coben, above n 18, at 66.

[112] At 69.

[113] At 77.

[114] At 74.

> "good guy" image of the mediator that actually obscures not only issues of power and representation, but the mediators own active influence on the outcomes that may be achieved.

Neutrality allegedly operates as a rhetorical device which conceals the true operation of power in a mediation.[115]

Cobb and Rifkin and others advocate changing or abandoning the neutrality standard. The following section will examine in more detail the justifications for doing so.

2.4.1 Neutrality and justice

Since the 1970s mediation has been at the heart of a debate about justice. Whilst early proponents argued mediation would expand access to justice, others such as Nader and Fiss were concerned it was "privatizing" disputes and would ultimately prove counter-productive.[116] Concerns that mediation cuts against the interests of justice continue to be made today.[117]

Some authors contend that mediator neutrality (lack of bias and treating both parties equally so as to enable party self-determination) can come into conflict with a just or fair result.[118] This is because there is "no guarantee regarding outcome" other than that it is "mutually acceptable to the parties".[119] However, what the parties mutually decide may not be fair or just. Power imbalances, ignorance and even exhaustion, emotional or physical, can lead parties to accept agreements which in the eyes of the law, the mediator, or even the common bystander would be considered unjust. Exon provides the following scenario:[120]

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[115] Astor, above n 6, at 226.

[116] Robert A Baruch Bush and Joseph P Folger "Mediation and Social Justice: Risks and Opportunities" (2012) 27 Ohio St. J. on Disp. Resol. 1 at 1.

[117] At 9.

[118] Susan Nauss Exon "How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators" (2006) J. Disp. Resol. 387 at 388.

[119] Bush and Folger, above n 116, at 10.

[120] Exon, above n 118, at 388.

> Under the law, the mediator knows that both children have a right to share equally in the deceased's estate. Having discussed the values of the personal items being divided, coupled with the remaining money in a mutual fund, the mediator realizes that the division does not even come close to a 50/50 split. In the mediator's opinion, the agreed upon division looks more like an 80/20 division of assets. What could possibly prompt the parties, especially the party on the low end, to agree to such a division? The mediator has been with the parties for most of the day. Yet neither party has divulged any information about individual interests that might help the mediator to understand the final result.

A traditional conception of neutrality requires him or her to accept the result without comment (subject only to being assured that both parties do consent to this outcome). However to most people this agreement would appear prima facie unjust, hence showing the tensions between neutrality and justice. Susskind argues that mediators cannot ignore unfair results and should intervene where an unjust outcome is likely to eventuate thereby compromising their neutrality in the interest of justice.[121]

However, the argument that justice and neutrality at times conflict is based on the underlying belief that justice is objective, but this is not necessarily the case. Standards of justice may differ according to one's life experience. Accordingly, legal norms may have little influence compared to race, gender, religion or socio-economic status in determining one's sense of fairness.[122] So, if justice is subjective then there is a danger the mediator (when departing from neutrality in the interests of justice) could use standards (legal or personal) which are not appropriate for the parties. Rather, those in favour of neutrality argue "the only relevant norms are the ones the parties identify and agree upon."[123] It has further been argued that arguments based on justice are irrelevant as the purpose of neutrality is not justice but resolution or transformation. Conflict is upsetting and destabilising and any resolution may be better than none.[124]

Taking a different approach, others would deny that the above scenario displays a conflict between neutrality and justice. They argue that the likely legal perspective on the appropriate

[121] Bush and Folger, above n 116, at 11.

[122] Coben, above n 18, at 79.

[123] At 79.

[124] At 78.

division of the estate can be communicated to the parties without compromising neutrality as "the parties are free to find a solution that better serves their personal values and concerns".[125] However "the mediator should refuse to finalize an agreement when one party takes undue advantage of the other, or when the agreement is so unfair that it would be a miscarriage of justice, or when the mediator believes it would not receive court approval".[126]

The current trend in mediation favours Susskind's view that mediators have a responsibility with respect to the fairness of mediated outcomes.[127] This is reflected in great attention being given to how mediators can "level the playing field", and the reframing of neutrality, as described earlier.[128] It is the role of the mediator to "watch out for potential substantive unfairness – micro-level injustice – and intervene to prevent it."[129] Bush and Folger contend that further evidence for this development is found in mediator ethical standards and competency tests. Their examples include a test which asked the mediator if they had "[a]ssisted in developing [an] agreement that is balanced, fair, realistic."[130] Mediators have also been asked whether they "aim for clear, practical, legal agreements," and emphasise "a forward-looking, problem-solving approach."[131] Both examples presume the substantive fairness of the agreement to be within the sphere of the mediator's responsibility.[132]

2.4.2 Imbalances of power

Bernard argues that ensuring "fairness, or win-win settlements" should take priority over neutrality as a core value.[133] Inherent in Bernard's argument is the idea that neutrality can sometimes interfere with a fair or just outcome. One of the main reasons this may occur is due to an imbalance of power between the parties.

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[125] At 81.

[126] At 81.

[127] Bush and Folger, above n 116, at 11.

[128] At 12.

[129] At 13-14.

[130] At 13-14.

[131] At 13-14.

[132] At 13-14.

[133] Douglas and Field, above n 29, at 186.

Cobb and Rifkin view mediation as a process of storytelling. Proceeding on this basis, if mediators are unaware of, or unable to deal with, demonstrations of power, a dominant narrative will emerge that marginalises the narrative of the less powerful party.[134] This skew will limit the effectiveness of mediation as a platform where all voices can be heard.[135] A mediator bound by a broad view of neutrality would lack the tools to redress such imbalances, which are likely to lead to unfair outcomes. Such concerns caused McCormick to allege that "a mediator committed to representation of all the interests cannot be preoccupied with neutrality."[136]

Similar themes emerge in criticism of mediator neutrality by feminists and critical legal scholars who contend that the lack of a formal mandate for substantive justice leaves the system open for abuse by those in positions of power, making women and minorities more vulnerable.[137]

Coben argues such concerns have been realised by experienced players who manipulate the system to come to favourable agreements. These commercial or "repeat players" possess sophisticated negotiation skills that the other party often lacks the ability to detect.[138] Thus unjust agreements can result. To prevent this happening, a mediator can seek to "power balance." Moore argues this is a central part of best practice:[139]

> Mediators can work with both weaker and stronger parties to minimize the negative effects of unequal power … [According to some,] the mediator's primary task is to manage the power relationship of the disputants. In unequal power relationships, the mediator may attempt to balance power. "To strike the balance, the mediator provides the necessary power underpinnings to the weaker negotiator – information, advice, friendship – or reduces those of the stronger." … [T]he mediator may undertake moves to assist the weaker party assess and mobilize the power he or she possesses … [Such] moves may include: assisting the weaker party in obtaining, organizing and analyzing data, … educating the party in planning an

[134] Astor, above n 6, at 226.

[135] At 226.

[136] Douglas and Field, above n 29, at 186.

[137] Cobb and Rifkin, above n 48, at 48.

[138] Coben, above n 18, at 77.

[139] Bush and Folger, above n 116, at 16.

> effective negotiation strategy, aiding the party in developing … resources [to continue to negotiate, and] encouraging the party to make realistic concessions … This role of mediator as organizer has been practiced in husband-wife disputes, labor management conflicts, community disputes, large-scale environmental contests, and interracial disputes.

Concerns about imbalances of power were also expressed by mediators in Douglas' research. The mediators who defined mediation in relation to even-handedness were concerned that if both parties were treated the same way, the imbalance of power would remain. The negotiations would therefore not be taking place on a level playing field. An example where inequality may arise involves imbalances of communication. One mediator described trying to create opportunities for the less vocal party to speak as a way to redress the imbalance.[140]

2.4.3 Environmental dispute mediation

Arguments against neutrality have also been made in an environmental context. Susskind argues that neutrality should be departed from in environmental disputes, which instead call in his opinion for a mediator with "clout".[141] His argument is based on the ground that the agreements made in environmental disputes have impacts on "unrepresented or unrepresentable" groups of the community.[142] Joint net gains may not be fully realised and environmental agreements may have long term or spillover effects. He points to the precedent set by such agreements as a reason to depart from neutrality.[143] Susskind's position has been strongly criticised by Stulberg, who contends that any departure from neutrality would be "conceptually and pragmatically incompatible with the goals and purposes of mediation."[144] Stulberg argues neutrality is essential to create a "bond of trust" between the mediator and the parties. Within this bond, confidentiality is encouraged, in order for the mediator to come to

[140] Douglas, above n 55, at 146.

[141] Lawrence Susskind "Environmental Mediation and the Accountability Problem" (1981) 6 Vt. L. Rev. 1 at 35.

[142] At 46.

[143] At 46.

[144] Joseph Stulberg "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981) 6 Vt. L. Rev. 85 at 96.

know the parties' limits and their flexibility, and accordingly to help facilitate resolution of the dispute.[145]

2.4.4 Neutrality and emotions

Douglas and Field contend that in facilitative models of mediation a focus on neutrality can lead to the neglecting of emotional issues in the dispute. This is because neutral mediators who confine themselves to process are unlikely to hone in on the details of the parties' feelings and relationships. This is particularly likely to be the case in mediations overseen by the court, where the process operates more firmly "in the shadow of the law."[146]

2.5 Alternative Principles

The following section looks to some of the alternatives to neutrality that are expounded in the literature. Mayer argues that it is time for the Susskind and Stulberg debate on justice versus neutrality to be laid to rest. "We [mediators] are more than third-party conflict resolvers, and so, the neutrality discussion as a source of identity formation limits us."[147] Mayer argues that mediators are not hired for their neutrality or impartiality. Rather, people choose mediation because they want to engage in "constructive interaction". The assistance they desire from a mediator relates to "help communicating; understanding each other; analyzing a conflict; articulating their concerns; ideas, and arguments in support of their proposals; developing opinions; evaluating options; and finding agreements where agreements are possible."[148] He insists that for mediators to hang "too much of our identity on the commitment to neutrality is problematic because the concept is itself ambiguous."[149]

Therefore, other ways of approaching mediation should be considered.

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[145] At 96.

[146] Douglas and Field, above n 29, at 184.

[147] Mayer, above n 87, at 7.

[148] At 4.

[149] At 5; the ambiguity of neutrality was discussed in Section 1.2.1.

2.5.1 Second generation mediation

Over the last 15 years, new approaches to mediation have arisen which seek to bypass, minimise or reject neutrality. Instead, a greater emphasis is put on "the mediator's engagement with the parties and their connection with important emotional and relationship issues in the mediation setting ...".[150] These forms of mediation have been termed "second generation practice".[151] Cobb argues the strength of such models is in the acknowledgement of the "falsity" of neutrality, enabling a more "theoretically robust" approach to mediation:[152]

> This is a radical departure from what could be called 'first-generation' mediation practice, where the mandate not to impact on the content of the dispute is thought to be essential to preserving the privilege the parties have to define their own problems and build their own solutions. However, once we adopt an interactionist or social constructionist perspective, the mandate to separate content from process dissolves, as mediators recognize the inevitability of their impact on the content of the dispute. This attention to the evolution of the content calls for a 'second-generation' mediation practice in which mediators interact with disputants so as to evolve the conflict stories, reformulate relationships, reframe the past and rebuild the future.

Examples of second generation practices include mediation as storytelling, narrative mediation, transformative mediation and therapeutic jurisprudence. These approaches are explained below.

2.5.1.1 Mediation as storytelling

This model encourages mediator intervention (running counter to traditional conceptions of neutrality) to increase party participation.[153] The intervention occurs in the form of questioning aimed at undermining the parties' original narratives to form a new joint story

[150] Douglas and Field, above n 29, at 187.

[151] At 187.

[152] At 188.

[153] At 188.

that is reflective of both the parties. This joint story forms the platform for a joint decision to be made.[154]

2.5.1.2 Narrative mediation

Narrative mediation has emerged in New Zealand from narrative therapy underpinned by social constructionism theory. Here, the focus is on "identifying the stories or narratives embedded in the parties' conflict, and helping the parties to 're-weave' those narratives in ways that help resolve the conflict."[155] Instead of a focus on neutrality and problem solving, the mediator regularly intervenes as the participants divulge their stories to undermine narratives based on blame. As a result of the mediation a new "shared story" can be created, which the mediator has the power to contribute to.[156]

2.5.1.3 Transformative mediation

Transformative mediation was first pioneered by Bush and Folger.[157] Unlike other forms of mediation, transformative mediation focuses on the "relational dimension" of the conflict, thereby "providing the possibility of transformation of the parties' conflict."[158] The "twin objectives" of the model are "empowerment and recognition contributing to moral growth."[159] The parties are encouraged to decide for themselves how to resolve the conflict, with the mediator helping by questioning which is designed to aid the parties' understanding of each other's perspective.[160]

2.5.1.4 Therapeutic jurisprudence

Therapeutic jurisprudence has traditionally been applied in the criminal sphere, but Douglas and Field argue it is also appropriate to apply it to civil law, in order to provide an alternative

[154] At 188.

[155] Bush and Folger, above n 116, at 21.

[156] Douglas and Field, above n 29, at 189-90.

[157] At 189-90.

[158] At 189-90.

[159] At 189-90.

[160] At 190.

to neutrality in mediation.[161] The purpose is to "look for therapeutic outcomes where there is no conflict with other widely accepted values in the law."[162] Within the therapeutic framework, neutrality becomes unimportant. The mediator is encouraged to be "active, engaged, involved and participatory" in order to "create the most beneficial and emotionally satisfying solution" for the parties and their interests.[163]

2.5.2. Impartiality

As one response to the difficulties posed by neutrality, it has been argued that neutrality and impartiality should be delineated as separate concepts. Whilst the former is perceived as flawed or unattainable, it is argued that the latter is not. Those that separate the two terms state for example that "neutrality refers to the mediator's prior knowledge about or interest in the outcome of disputes, and impartiality to the way in which they conduct the process and treat the parties."[164] In this sense, the focus on impartiality in essence represents the so called "equidistance" understanding of neutrality coined by Cobb and Rifkin.[165]

Kishore argues that impartiality, not neutrality, should be the fundamental requirement of mediators:[166]

> ... it is inconceivable that parties could waive the impartiality requirement without fundamentally altering the nature of the mediation process. Any display of partiality by the mediator would be considered a breach of a basic ethical obligation. Impartiality relates to the retention of the confidence of the parties based on their perception that they are treated fairly by the mediator throughout the process. Impartiality means freedom from favoritism or bias, either in word or in action. It implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.

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[161] At 194.

[162] At 195.

[163] At 195.

[164] Shyam Kishore "The Evolving Concepts of Neutrality and Impartiality in Mediation" (2006) 32 Commw. L. Bull. 221 at 222.

[165] Astor, above n 6, at 227.

[166] Kishore, above n 164, at 223.

Rock argues impartiality is important as it prevents the mediator from taking sides in the dispute, meaning the position of the participants is "neither strengthened nor weakened" by the mediator's presence.[167] Mediator favouritism would also create distrust in the unfavoured party, hindering the likelihood of an outcome being reached. Furthermore, impartiality enables the mediator to have a detached view, which enhances the mediator's ability to reframe arguments and help the participants engage with each other's views.[168]

The idea of requiring impartiality and not neutrality has been subject to a number of criticisms. Stulberg contends that neutrality is essential to inspire confidence in those seeking mediation services, and that impartiality is not enough.[169] Stulberg illustrates this position through the following scenario:

> A landlord brings an eviction action against her tenant for nonpayment of rent. The tenant has refused to pay rent for the past two months. Her defense is that her landlord used white paint when painting her apartment walls rather than the dark blue that the tenant had requested and that, the tenant claims, had been agreed to by the landlord when the parties signed the lease. In most U.S. jurisdictions, the tenant's asserted ground does not constitute a legal basis for nonpayment; a judge would rule in the landlord's favor.

Stulberg then proceeds to outline different outcomes that could arise from the mediation. For example, an agreement could be reached whereby the tenant can paint the rooms at his or her own expense, but will have to provide the paint and opportunity for the landlord to paint the apartment white at a later date. In return the landlord would disband the arrears. However:

> What ... if the mediator did not explore those possibilities and instead said to the parties, whether in joint session or caucus, "Look. Everyone knows the rules. Tenant, there is no legal basis for your refusing to pay rent. Although the landlord can waive her rights, you must be prepared to pay her the money you owe her. Let's see if we can work out a payment system that works for you and is acceptable to the landlord." Why would we be concerned about the mediator acting this way?

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[167] Rock, above n 17, at 355.

[168] At 355.

[169] Joseph B Stulberg "Must a Mediator Be Neutral? You'd Better Believe It!" (2012) 95 Marq. L. Rev. 829 at 836.

Such a scenario, Stulberg argues, would fit comfortably within the realms of impartiality. Impartiality only requires that "the intervener apply the relevant rules and guidelines in an identical manner to all persons similarly situated."[170] Despite this, Stulberg contends that such a scenario would be objectionable. This is because the mediator is not "neutral with respect to what the outcome should be" as he or she is clearly advocating that the strictly legal route should be taken.[171] Impartiality alone may not be a sufficient bulwark against substantive injustice as the "rule" applied impartially by the mediator may be "burdensome, unfair, discriminatory, or on some other basis, ill-founded."[172]

Astor also criticises a focus on impartiality at the expense of neutrality. Vital flaws and questions still remain: "How does a mediator know they are treating both parties equally?"[173] In striving for equal treatment, the mediator nevertheless still relies on his or her own value systems and frames of reference.[174] She writes that "asserting impartiality as a solution merely cloaks the situatedness of the mediator and again conceals the operation of power."[175] The focus on impartiality as distinct from neutrality acknowledges that mediators have a particular "perspective". However Astor argues this is not enough, as "it gives no guidance as to how mediators should handle that perceptivity."[176] She cites the following example "Is it acceptable for the mediator to impose their own opinions on the parties at will, so long as they impose equally on both?"[177]

2.5.3. Retaining neutrality as an aspiration

Astor has mooted the possibility of retaining neutrality as an aspiration. Although conceding neutrality is a flawed concept, Astor argues that in reality critiques of neutrality have had little impact on mediators. This is partly because neutrality has significance beyond the world of mediation:

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[170] At 835.

[171] At 835.

[172] At 836.

[173] Astor, above n 9, at 227.

[174] At 227.

[175] At 227.

[176] At 227.

[177] At 227.

> Mediators are unlikely to cease a practice that is rapidly expanding and, whatever its defects, has many demonstrable benefits. In particular they are unlikely to abandon mediation on the grounds that it relies on an attribute which, after all, is not particular to mediation but is foundational to most dispute-resolution mechanisms in western liberal democracies.

By retaining neutrality as an aspirational concept, its limits would be acknowledged "whilst still viewing it as providing positive direction for mediators."[178] Friedman has argued similarly that while neutrality is unattainable, it is important that it remains recognised as an ideal:[179]

> We often hear that these beliefs are really only 'myths', if so, they are healthy, perhaps indispensable myths. The myths and their supporting propaganda, can coax society to move toward its noblest ideals, to creep inch by inch towards a genuine legality.

However, a number of problems would still remain. For example "it leaves the idea of neutrality as a state of 'point-of-viewlessness' in place."[180] Nor does it assist mediators in how they should strive to achieve this goal. There is the issue that so long as neutrality remains correlated with 'best practice', mediators will be aiming for and measured against something which remains undefined.[181] Mulcahy has further argued that retaining neutrality as an aspiration "encourages us to ignore the suggestion that rather than facilitating fair process and outcome the standard of neutrality could serve to exacerbate existing inequalities between disputants."[182]

2.5.4 Partiality (omnipartiality)

In Western mediation, partiality has been fiercely avoided. There are fears that partiality is "a bringer of arbitrariness, prejudice, discrimination, and discretion."[183] Mulcahy writes "[t]he idea of an ethics of partiality becomes a key to Pandora's box. We fear that to have to address

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[178] At 227.

[179] Mulcahy, above n 9, at 506.

[180] Astor, above n 6, at 227.

[181] At 228.

[182] Mulcahy, above n 9, at 505.

[183] At 521.

such 'anarchy' would be overwhelming."[184] However, as criticisms of neutrality intensify, partiality is increasingly being viewed as a viable alternative.

Whilst an impartial mediator is on "no one's side", insider (omnipartial) mediators "are on everyone's side".[185] Here the focus is on the "connectedness" with each party, which should be the same. In this sense, it is similar to Cobb and Rifkin's "equidistance".[186] "Connectedness" does not refer to the mediator's "impartiality, fairness, objectivity and evenhandedness". Instead, the focus is on:[187]

> [T]he mediator's background and relationship with the parties as being positives and included the extent of prior contact or relationship, prior knowledge about the dispute, the degree of mediator interest in the substantive outcome or the way in which the mediation is conducted and the extent of mediator expertise.

Those in favour of partiality argue that neutrality is an Anglo-American construct, and that a focus on neutrality at the expense of alternative models risks being ethno-centric.[188] In other cultures, mediators are often valued for their connections to the parties. In Aborigine communities, mediators who have a kin relationship with the parties are preferred.[189] However, under a strict view of neutrality this would be considered a conflict of interest and a potential source of bias. Nevertheless, a mediator who is partial (or known to the parties) can bring advantages to the mediation. A known and trusted mediator can instill the parties with a greater sense of confidence in the proceedings.[190] A partial mediator is also less likely to view the mediation as a transaction. This may result in a greater emphasis towards "putting primacy on the long-term preservation of relationships between the disputants and vis-à-vis

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[184] At 521.

[185] Nadja Alexander "Towards a greater global understanding of what mediators do" (2012) Kluwer Mediation Blog <http://kluwermediationblog.com/2012/10/06/towards-a-greater-global-understanding-of-what-mediators-do/>

[186] Geoff Sharp "Biased Is Better and Partiality Is In" (2012) Kluwer Mediation Blog <http://kluwermediationblog.com/2012/10/01/biased-is-better-and-impartiality-is-in/>

[187] Ibid.

[188] Mulcahy, above n 9, at 522.

[189] Christopher Honeyman, Bee Chen Goh and Loretta Kelly "Skill is Not Enough: Seeking Connectedness and Authority in Mediation" (2004) 20 Negotiation J. 489 at 491-492.

[190] At 499.

the community at large."[191] Hence, a partial mediator is likely to provide "authority" and "connectedness".[192] To an extent, such values are already practiced in the West by local priests, rabbis and family members who are called upon to settle disputes.[193] Honeyman, Goh and Kelly further argue the appetite for authoritative and connected mediators can be seen at "the highest levels of disputing".[194] In international disagreements, the chosen mediators often lack any mediation training. They are not chosen for their skills or neutrality but for their authority. Examples include retired politicians, diplomats and military officers who find themselves in the role of mediator.[195]

2.6 Conclusion

In the West neutrality has traditionally been viewed as a vital aspect of mediation. Neutrality reflects wider values and ideas of individual autonomy and freedom. The significance of neutrality to mediation has been reflected in various literature, mediator codes, and guides on best practice. However neutrality is also ambiguous. Academics disagree on how to define it. Boulle, Goldblatt and Green avoid giving a straight definition, and instead refer to "shades of meaning". This confusion is shared by mediators, whom Cobb and Rifkin describe as having a poor vocabulary around neutrality. Australian mediators are focusing on neutrality by considering it in relation to composite principles such as self-determination.

Difficulties also emerge on the basis that neutrality is unattainable. It is argued that human bias is inevitable. Analysis of the various ways in which mediators influence disputes through their control of process indicates that such bias (conscious or unconscious) will find expression in the mediation. Other criticisms strike closer to the ideology of neutrality. It is argued that in the certain scenarios, such as where there are imbalances of power, or where the environment is at stake, neutrality does not equip the mediator with the appropriate tools to achieve a just outcome.

[191] At 498.

[192] At 501.

[193] At 503.

[194] At 504.

[195] At 504.

Amidst these arguments, various alternatives have been mooted. It is argued transformative and narrative models of mediation, and even partiality, offer viable alternatives to neutrality. Others suggest neutrality should be retained as an aspiration. On the whole, this trend can be described as one away from strict understandings of neutrality at the least, and completely away from the concept of neutrality at the most.

3. METHODOLOGY

This chapter explains the mechanics of the research that was undertaken. This thesis has two focuses. First, what do working mediators think about neutrality, and how do their opinions influence their behaviour in mediations? Second, should uniformity be encouraged and is regulation the best means of achieving this? To answer these questions research was undertaken in the form of an online questionnaire.[196]

3.1 The Research Method

A mixed method research design was selected for the questionnaire, incorporating both qualitative and quantitative data. This design permitted both statistical analysis of closed questions and textual analysis of open-ended questions. The qualitative data complement the quantitative data. For example, data from the quantitative question about whether a mediator departed from neutrality (however they define it) is complemented by data from a qualitative question that asked the mediator to state the circumstances (if any) in which he or she would deem it appropriate to depart from neutrality. Thus, in this example, the combination of qualitative and quantitative data provides a fuller understanding of what mediators think about neutrality and how their opinions influence their behaviour in mediations.

The quantitative component of the research comprised closed questions. The questionnaire included two types of closed questions. The first were questions that asked the participants to choose between a selection of specific responses. These questions were asked to mitigate the risk of receiving vague responses or no responses (the difficulty of precisely pinning down mediator neutrality might result in a perception that entirely open-ended questions were too hard to answer). However, to ensure that participants did not feel pressured to provide a definite answer there was always another option. For example, questions that asked for a "Yes" or "No" also included a "Maybe (please specify)" answer. The second type of closed question used Likert scales. Instead of the more common five point Likert scale, a seven point Likert scale was used. Seven points allow more precise feedback. Given the elusiveness of mediator neutrality, it is important to be able to pick up any nuances.

[196] Appendix C sets out the research questions.

The qualitative component of the research comprised data sourced from open-ended questions. These questions attempted to elicit a deeper understanding of the mediator's opinions, thoughts and experiences. The open-ended questions provide context and background to the closed questions.

Demographic information regarding mediation characteristics, qualifications, geographical area of practice, age, gender, ethnicity and iwi affiliations (if any) was also collected.

3.2 Pilot Study

A pilot study was conducted through the University of Otago mediation service. The questionnaire was administered to University of Otago mediator Ruth Chapman and she was asked to provide feedback on the wording of the research questions. Her feedback was positive. She recommended several amendments to the wording of the questions. These recommendations were considered and the wording was subsequently changed to clarify and simplify the questions. After the pilot study the Ngāi Tahu Research Consultation Committee was consulted. The Committee approved the study subject to the condition that data would be collected on ethnicity and iwi affiliations. This was agreed to.

3.3 Ethical Considerations

All participants were assured of full anonymity. Boulle, Goldblatt and Green state that mediation is private, confidential and privileged.[197] It is therefore important to afford the participants full anonymity and to keep data confidential. A cover letter was sent to the participants explaining the nature of the study, anonymity and that participation was voluntary.[198] The amended questionnaire received approval from the University of Otago Ethics Committee.[199]

[197] Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 345.

[198] See Appendix B for the cover letter.

[199] The study was approved on 20 July 2011. See Appendix A for the Ethics Committee approval.

3.4 The Participants

There is no central registry for mediators in New Zealand, but they may belong voluntarily to either or both of two private trade organisations, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and the Association of Dispute Resolvers (LEADR). LEADR electronically mailed the questionnaire to all mediators on its database (approximately 400 mediators). Additionally, the survey was electronically mailed out to approximately 50 AMINZ members whose contact details were advertised on the internet. Of the approximately 450 persons approached, 100 completed part of the questionnaire and 86 fully completed the questionnaire, thus the response rates were approximately 22.2% and 19.1% respectively. The online questionnaire was open to participants for one month. The data of two persons who completed the questionnaire after the deadline of 31 August 2011 were not analysed.

3.5 Procedure

The questionnaire was hosted on a web-based survey platform called Survey Monkey.[200] The link to the online questionnaire was embedded into the cover letter sent out via electronic mail. Study participants were asked to complete the questionnaire online. All responses were stored in an encrypted online account. After the deadline had passed, the data were securely downloaded. Brian Niven from the Department of Mathematics and Statistics at the University of Otago used Predictive Analytics Software[201] to process the raw quantitative data into frequency tables.

3.6 Analysis

The quantitative data was first summarised using frequency tables for each question and then the response categories for each question were verified.[202] Selected hypotheses were then explored using cross tabulations of pairs of questions, with confirmation of useful

[200] See www.surveymonkey.com

[201] PASW Statistics Release 18 (2009) IBM Corporation, Somers, New York, USA; IBM SPSS Statistics Release 19 (2010) IBM Corporation, Somers, New York, USA.

[202] See Appendix D for the frequency tables and cross-tabulations of the quantitative data.

relationships being made using the Fisher's exact probability test.[203] A 5% level was used for statistical significance. For questions allowing multiple responses from each respondent, cross-tabulations were not run as the Fisher's exact test cannot be used where there is no independence of the counts in the table cells.

The qualitative data were analysed informally rather than through use of a specific qualitative analytical method. Peräkylä and Ruusuvuori validate this approach, stating "in research designs where the qualitative text analysis is not at the core of the research but instead is in a subsidiary or complementary role, no more sophisticated text analytical methods may be needed."[204] In this research, the qualitative text analysis complements the quantitative analysis as discussed earlier in this chapter. Therefore an informal textual analysis approach was justified and adopted. A balanced set of qualitative data was selected for each question to give insight into the mediator's thoughts, opinions and behaviours.

[203] Sidney Siegel and N John Castellan Jr *Nonparametric Statistics for the Behavioural Sciences* (2nd ed, McGraw-Hill, Singapore, 1988) at 103.

[204] Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (4th ed, Sage, Thousand Oaks (California) 2011) at 530.

4. RESULTS

4.1 Introduction

This chapter reports the quantitative and qualitative data from the questionnaire. The quantitative data is summarised in frequency tables for each question.[205] Selected hypotheses were explored using cross tabulations of pairs of questions. Fisher's exact probability test was applied to identify statistically significant relationships. The qualitative data was interpreted using an informal textual analysis approach. A balanced set of qualitative data was selected for each question.

4.2 The Participants

The cover letter asked individuals who have practiced mediation, or are practicing mediation, to complete the questionnaire. It is therefore assumed that the respondents are present or former practicing mediators. The questionnaire was fully completed by 86 participants and partly completed by an additional 12 participants. Of those responding in full, 44 were males and 42 were females. Responses were obtained for every province, but the majority of respondents practice in Auckland, Wellington, Canterbury, Otago or Nelson. Of the 86 full participants, 94.1% were aged between 40 and 69. Of the 83 respondents who indicated a time in practice 38.6% had worked as a mediator for between one and five years. All other respondents (61.4%) had worked as a mediator for six years or more. Participants mediated most frequently in disputes involving family, commercial and employment law. At least 40 mediators had a Bachelor of Laws degree with 15 mediators having a Bachelor of Arts degree. Four mediators had a Master of Laws degree and two mediators had a Doctor of Philosophy degree. Ninety-three percent of the respondents identify as NZ European and 7.0% identify as either Māori or an "Other" ethnicity.

[205] Appendix D sets out the frequency tables.

4.3 Mediators' Thoughts on Neutrality

Mediators were asked about the concept or concepts that most closely capture their understanding of neutrality.

They responded with a variety of concepts. Table 1 lists the principal responses; respondents were able to provide multiple responses to this set of questions. The frequency of response was similar across the major categories.

Table 1. Which concept or concepts most closely capture your understanding of mediator neutrality? (tick all that apply)

	Frequency
Impartiality	60
Even-handedness	56
The mediator controlling the process and not having a personal interest in the content or outcome	58
Providing a process that enables party 'self-determination'	69
Other (please specify)	13
Total	256

Mediators thought that the concept of "providing a process that enables party 'self-determination'" most closely captured their understanding of mediator neutrality. However, the concepts of "impartiality", "even-handedness" and "the mediator controlling the process and not having a personal interest in the content or outcome" were also very frequently chosen as capturing the meaning of mediator neutrality. Participants were given the opportunity to suggest other concepts; these included "independence", "multi-partial" and "omnipartiality". Five mediators drew a distinction between neutrality and impartiality. For example, one stated that "real neutrality is impossible – nobody is free from attitudes, assumptions, world-views, etc". Another said:

> We can never be neutral – our own experiences will influence the way we think and behave in mediations – the best we can do is to be acutely aware of this and adapt our behaviours to ensure a fair and transparent process, directed by the parties.

Another commented on the "shortcomings" of the term "neutrality":

> … none of us is ever 'neutral' (i.e. we bring our own cultural/family/experience into a mediation dynamic) – I believe that the 'neutrality' required by mediation is about recognising our own biases and being able to set these aside (or acknowledge them explicitly) to enable us to work with the parties for group self-determination.

4.4 The Importance of Neutrality

Mediators were asked about the importance of adhering to neutrality in general, and about the importance of neutrality specifically with respect to outcome and process.

4.4.1 The overall importance

This question asked mediators about the importance of neutrality (see Table 2).

Table 2. In your opinion, how important is adherence to neutrality for a mediator?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	4	4.1	4.4	4.4
2	1	1.0	1.1	5.6
3	0	0.0	0.0	5.6
4	3	3.1	3.3	8.9
5	7	7.1	7.8	16.7
6	13	13.3	14.4	31.1
7 Very important	62	63.3	68.9	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Mediators generally thought that adherence to neutrality is "very important" for a mediator. Only a small percentage (3.3%) were equivocal about the importance of adherence to neutrality. There are difficulties explaining and applying neutrality, but it is clear that it

remains an important concept for almost all of the mediators surveyed. Only 5.5% of responding mediators believed adherence to neutrality is some level of "unimportant".

4.4.2 Importance with respect to outcome

Mediators were asked how important it is for a mediator to be neutral with respect to outcome (see Table 3).

Table 3. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the outcome?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	2	2.0	2.2	2.2
2	3	3.1	3.3	5.6
3	2	2.0	2.2	7.8
4	1	1.0	1.1	8.9
5	5	5.1	5.6	14.4
6	20	20.4	22.2	36.7
7 Very important	57	58.2	63.3	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

The majority (85.5%) of mediators answering this question thought that it is quite important for a mediator to be neutral with respect to outcome, answering either 6 or 7 ("very important").

4.4.3 Importance with respect to process

Participants were asked how important it is for a mediator to be neutral with respect to process (see Table 4).

Table 4. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the process?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	4	4.1	4.4	4.4
2	5	5.1	5.6	10.0
3	3	3.1	3.3	13.3
4	7	7.1	7.8	21.1
5	7	7.1	7.8	28.9
6	13	13.3	14.4	43.3
7 Very important	51	52.0	56.7	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

The majority (56.7%) of mediators generally thought that it is "very important" for a mediator to be neutral with respect to process. A small percentage (4.4%) of mediators believed that it is "very unimportant" and 7.8% of mediators were equivocal about the importance of a mediator being neutral with respect to process.

4.5 Departures from Neutrality

Mediators were asked about their thoughts on departing from neutrality. First, the participant's willingness to depart was assessed. Then they were asked to consider several hypothetical examples in order to determine if the understanding of mediator neutrality is the same for most mediators.

4.5.1 All mediators in New Zealand

This question asked participants to indicate how often they believe that mediators in New Zealand depart from neutrality (see Table 5).

Table 5. How often do you think mediators in New Zealand depart from neutrality?

	Frequency	Percent of all participants	Cumulative Percent
1 Almost never	16	16.3	16.3
2	20	20.4	36.7
3	21	21.4	58.2
4	22	22.4	80.6
5	11	11.2	91.8
6	4	4.1	95.9
7 Almost always	4	4.1	100.0
Total	98	100.0	

The majority of respondents (58.2%) thought that mediators are unlikely (to some degree) to depart from neutrality. Only 4.1% of respondents thought that mediators "Almost always" depart from neutrality, compared to 16.3% who thought that mediators "Almost never" depart from neutrality.

4.5.2 Personal experience

This question asked mediators if they have ever departed from neutrality (however they define it) when mediating. Out of a total of 98 responses to this question, 49% of mediators reported never having departed from neutrality, as opposed to a total of 51% who said they either have (25.5%) or are unsure whether they have (25.5%) (see Table 6).

Table 6. Have you ever departed from neutrality (however you define it) when mediating?

	Frequency	Percent of all participants
Yes	25	25.5
No	48	49.0
Maybe (please specify)	25	25.5
Total	98	100.0

Mediators who said that they either have or may have departed from neutrality gave a variety of reasons for doing so. Responses were grouped into common themes. One was that it is a

"constant challenge" for a mediator to remain neutral because mediation "is often a very emotional process" and sometimes the mediator "gets sucked into it". One mediator expressed the difficulty of "being 'triggered' by content" that leads to the mediator "becoming judgemental and so compromising my neutrality".

Mediators, especially ones with a legal education, identified tensions between neutrality and "some knowledge of the topic area and what is likely to occur if the dispute is required to go to Court". A mediator added:

> Sometimes as a qualified legal practitioner notwithstanding my Mediator training MBS (Dispute Resolution) LEADR training and AMINZ Associate status I have to remind myself to pull back from a possibly too robust legal analysis.

Knowledge of the dispute's topic area, especially areas of law, was another theme that was cited several times as possibly triggering a departure from neutrality. One mediator said that her or she may have departed from neutrality

> [w]hen explaining to a party what the court would find to be in a child's best interests. This was in a mediation where both parties had counsel present and both parties needed to be challenged in a gentle way about their attitude towards the other and the impact on the children.

The tension between knowledge of a topic area and neutrality was further illuminated by a mediator who said that "there are a bunch of mediators with high level legal backgrounds who give indications or even make decisions in mediation". One mediator said that "when mediating with self-represented litigants, I gave both parties an indication of what would happen after mediation". Another mediator who said he or she may have departed from neutrality explained that "[w]hen working in the legal framework of employment mediation, there are some areas which are 'non negotiable' e.g. payment of wages and holiday pay." A different participant indicated that he or she may have departed from neutrality "[w]hen explaining to a party what the court would find to be in a child's best interests."

Reality testing was cited as another reason why mediators may have departed from neutrality. Some respondents were unsure whether reality testing constituted a departure from neutrality. One said:

> There are times when I have 'reality tested' with a participant to try and get them to see the advantages of the offer on the table - whether this amounts to departing from neutrality I couldn't say.

Another mediator considered reality testing as consistent with neutrality: "I may make comments about the way in which a Court may decide matters based on the information before the mediation – this may be seen to assist one party more than another but it is seen by me as reality checking." This viewpoint was reinforced by another mediator:

> Where I feel one party needs a reality check, I would in a private session indicate why I believe their position may not be sustainable at a hearing to determine the dispute. I do not believe this necessarily departs from neutrality because I would not do this in the presence of the other party unless authorised by both parties to make some general comments about the merits. Sometimes both parties will request an impartial overview be given of how the mediator sees the merits of the dispute.

These viewpoints were not shared by the following mediator who drew a distinction between neutrality and reality testing:

> It depends on your definition of neutrality. This must be distinguished from reality testing. In the latter process mediators often have to confront a party with the difficulties of arguments/positions being raised, however genuinely they are held. Parties must be faced with the true consequences should they not come to an agreement at mediation. Simply facilitating a discussion is not what true mediation is about.

This viewpoint was supported by another mediator:

> I am a reasonably robust mediator, forcing a critical analysis of each party's position and ensuring that weaknesses are exposed. Sometimes I expose those weaknesses myself. However, this is not in my view departing from neutrality. Often both parties' positions

should be criticised. But even if one party's position is criticised, that can be seen as still neutral – they are criticised just because they have a weakness in their position (not because of partiality), and the criticism could just as easily have been on the other party's case. It is just part of an impartial mediation process. In my experience, it is this type of service that most clients want in a mediation, and it enhances the chances of reaching a settlement.

4.5.3 The perceived necessity of departures from neutrality

Out of 86 responses received to a question on the perceived necessity of departing from neutrality, 52.3% of mediators stated a belief that a departure from neutrality is sometimes necessary and 47.7% stated a belief that it is never necessary (see Table 7).

Table 7. Do you believe that a departure from neutrality is sometimes necessary?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	45	45.9	52.3
No	41	41.8	47.7
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

4.5.4 Circumstances justifying departure

Mediators were asked in an open-ended question to describe the circumstances (if any) in which they would deem it appropriate to depart from neutrality. The results showed that mediators interpreted neutrality in various ways. Some interpreted neutrality very stringently, for example: "it is impossible to be neutral, thus I never am". This interpretation was reinforced by another mediator who said: "I do not believe that we can be neutral … I believe that it is essential to maintain omnipartiality at all times." In contrast to these viewpoints, other mediators apparently saw neutrality as attainable and desirable. Responses include: "[i]ntegrity of process to my mind requires neutrality"; "I don't think the mediator should be [anything] other than neutral"; and "neutrality is critical and in my view should not be departed from".

Some mediators adhered strictly to neutrality. Out of 66 mediators who answered this question, 12 said that they would "never" deem it appropriate to depart from neutrality. A further 12 deemed it appropriate to depart from neutrality to address circumstances such as "undue hostile or abusive behaviour"; a "revelation of an illegal act by a party so serious that someone needed protection"; "awareness of child abuse"; and "misleading" or "criminal" conduct.

Some mediators deemed it appropriate to depart from neutrality to advise the parties. For example, "[w]here the parties request … advice or a mediator decision which our legislation allows." Another deemed it appropriate to depart from neutrality "[w]hen a participant is seeking some guidance on whether to accept an offer. When an offer is made that is clearly very low but is about to be accepted by the weaker party." This viewpoint was reinforced by a respondent who deemed it appropriate to depart from neutrality "[w]hen it is clear from my knowledge of the facts as accepted by the parties and of the applicable law, as to how a judge is likely to decide." Another participant deemed it appropriate to depart from neutrality when "requested by a party for an absolutely frank view of what the future looks like." Advice in one case led to assistance: "In the context of a work place dispute I've assisted workers who were unaware of applicable employment law and regulation to strengthen their negotiation." Another mediator also provided assistance in the form of expertise in a certain area: "Where parties have appointed a mediator for their expertise in a certain area and are looking for a steer on that person's views (e.g. in civil or EIP mediations)." One mediator explained that he or she would deem it appropriate to depart from neutrality

> in the private meeting stage, in an instance where opinion is being asked in a confidential setting and giving an honest answer may appear to depart from neutrality. This is also the external factor of neutrality in the sense that pure neutrality is something of a myth as we are all shaped by our experiences of life which in turn form expectations and opinions that shift us from being truly neutral.

Mediators seemed uncertain about how to reconcile reality testing with neutrality. Some mediators thought reality testing constituted a departure from neutrality. One mediator explained that

> [i]n some ways, reality testing is a departure from 'pure' neutrality as I am proving information that might change the participant's position. You could say this was departing from neutrality as I am bringing outside influences in and these influences are coloured by my own biases. In some ways I think it is impossible to be entirely neutral – we can be impartial and not be interested in the outcomes but that to me doesn't equate to neutrality. Our unconscious mind is still working behind the scenes.

Some respondents deemed it appropriate to depart from neutrality when a more "active" or less "passive" role is required. One mediator articulated a belief that "the mediator has a responsibility to be very active in the process by which I mean they need to have a plan for the mediation, work that plan and be prepared to alter their plan during the process." Another mediator expanded on the idea that mediators should have an "active" role by saying that neutrality

> tends to imply a passive role which is not how I think mediation is most effective – some texts distinguish between impartiality (on nobody's side) and omni-partiality (on everybody's side). In that latter sense a mediator can be an active participator and advocate for party's interests – as long as there is no outcome in which the mediator has an interest and the mediator is even-handed about it …

The idea that the mediator has an "active" role in the process was expanded upon. One mediator explained that

> [w]herever necessary, the mediator should be acting to get the information exchange to the point where all the necessary issues are brought out, and if it is necessary to function in a particular (or partisan) way, then that is an unavoidable part of the process. If not, then the mediator is probably not necessary. However, at all times such actions must be seen as an effort toward an outcome that the parties can accept - not an attempt to secure a particular outcome. This modality would be a normal feature of non-represented mediations, but of less importance when lawyers are fronting the action.

4.5.5 Frequency of departure

Mediators who departed from neutrality were asked how often those departures were made (see Table 8).

Table 8. If you have departed from neutrality, how often do you depart from it? (leave blank if you have never departed)

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Almost never	23	23.5	45.1	45.1
2	17	17.3	33.3	78.4
3	2	2.0	3.9	82.4
4	3	3.1	5.9	88.2
5	4	4.1	7.8	96.1
6	1	1.0	2.0	98.0
7 Almost always	1	1.0	2.0	100.0
Subtotal	51	52.0	100.0	
No Answer	47	48.0		
Total	98	100.0		

There were 47 mediators (48%) who did not answer this question, presumably because they have not departed from neutrality. The majority of those answering this question reported that they "Almost never" departed from neutrality (45.1%). Table 6 shows that mediators who have departed from neutrality have not done it often. Of those answering this question, the vast majority (82.4%) supplied an answer below the midline value of "4", in other words, closer to having "Almost never" departed from neutrality than having "Almost always" departed from neutrality.

4.5.6 Justifications for departures

A series of questions explored possible justifications for departures from neutrality. All three questions were answered by 90 mediators.

4.5.6.1 Power imbalance

Most mediators thought that addressing a power imbalance did not justify a departure from neutrality (see Table 9).

Table 9. In your opinion, does addressing a power imbalance justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	33	33.7	36.7	36.7
2	22	22.4	24.4	61.1
3	11	11.2	12.2	73.3
4	9	9.2	10.0	83.3
5	9	9.2	10.0	93.3
6	2	2.0	2.2	95.6
7 Yes, definitely	4	4.1	4.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

The majority (73.3%) of mediators supplied an answer below the midline value of "4", in other words, closer to "Definitely not" believing that a power imbalance justifies a departure from neutrality than to it "Yes, definitely" justifying such a departure.

4.5.6.2 Threat of violence

Mediators had different views on whether a threat of violence justifies a departure from neutrality (see Table 10).

Table 10. In your opinion, does addressing a threat of violence justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	22	22.4	24.4	24.4
2	6	6.1	6.7	31.1
3	5	5.1	5.6	36.7
4	9	9.2	10.0	46.7
5	9	9.2	10.0	56.7
6	8	8.2	8.9	65.6
7 Yes, definitely	31	31.6	34.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Respondents were polarised and had strong views on this issue: 34.4% selected the strongest response (7 on the Likert scale) that it "Yes, definitely" did justify a departure, and 24.4% expressed the correspondingly strongest opposite view of "Definitely not" (1 on the Likert scale). A further 10% of mediators were undecided.

4.5.6.3 Procedural unfairness

Most mediators thought that remedying a procedural unfairness did not justify a departure from neutrality (see Table 11).

Table 11. In your opinion, does remedying a procedural unfairness justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	38	38.8	42.2	42.2
2	18	18.4	20.0	62.2
3	10	10.2	11.1	73.3
4	7	7.1	7.8	81.1
5	10	10.2	11.1	92.2
6	3	3.1	3.3	95.6
7 Yes, definitely	4	4.1	4.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

The majority (73.3%) of mediators supplied an answer below the midline value of "4", in other words, closer to "Definitely not" believing that remedying a procedural unfairness justifies a departure from neutrality than to it "Yes, definitely" justifying such a departure.

4.5.6.4 Departures from neutrality to promote a fair and just outcome

Mediators were asked if they would depart from neutrality if doing so would promote achieving a fair and just outcome (see Table 12).

Table 12. Would you depart from neutrality if you believed that doing so would promote achieving a fair and just outcome?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	11	11.2	12.2
No	45	45.9	50.0
Maybe (please specify)	34	34.7	37.8
Subtotal	90	91.8	100.0
No Answer	8	8.2	
Total	98	100.0	

Of 90 mediators responding, 50% would not depart from neutrality in order to promote achieving a fair and just outcome, 12.2 % would depart and 37.8% of mediators might or might not depart in order to promote achieving a fair and just outcome.

Mediators expressed contrasting views as to whether the mediator's involvement in the process constitutes a departure from neutrality when promoting the achievement of a fair and just outcome. Several mediators said the answer to this question depended on the definition of neutrality:

> This again depends on definition of neutrality. I believe that the mediator has a responsibility to the parties to ensure that any outcome reached is fair and just because if it is then it is likely to be a lasting outcome. Therefore if it looked like the outcome was not fair and just I could spend some time reality testing with the parties in a joint session the likely sustainability of what they were proposing to do. To me that is not a move away from neutrality but is the proper use of mediator involvement in the process.

This viewpoint was shared by one mediator who said: "In terms of process, I adjust the process to meet the specific needs of the parties in the room, this is not a departure from neutrality but it could be that one party has more process needs than the other." Another mediator had a contrasting view in that it is "nonsense to say we are neutral about process. Our job is to [be] bossy about process." This view was shared by a mediator who simply said: "I am never neutral."

Mediators had contrasting views about whether they would depart from neutrality if doing so would promote achieving a fair and just outcome. Generally mediators said it would depend on the circumstances, parties, context and degree of injustice or unfairness. Some mediators said they would depart if the outcome concerns a child, or if no lawyers were present and one party was being unrealistic. Other mediators disagreed and said that it is "up to the parties to achieve the outcome and it is inappropriate for a mediator to foist their view of a fair outcome on the parties." This viewpoint was shared by another mediator who said: "It is not, in my view, for the mediator to determine what is a 'fair and just outcome' that is a judicial function and is not the role of a mediator." However, another mediator was willing to depart from neutrality if doing so would promote achieving a fair and just outcome on the proviso that

"we must not be a Judge or even Counsel for one of the parties – whatever we do must be transparent to both parties." This viewpoint was shared by a mediator who sees

> a fair outcome as desirable and will do what I can to encourage the parties to reach a fair outcome. While I would remain neutral, I have ticked 'maybe' because I may instinctively try to steer the parties towards a fair settlement, or at least one which they regarded as fair.

4.5.7 Manner of departure

Mediators were asked how they would depart from neutrality if they felt a departure from neutrality was justified in certain circumstances. This question was answered by 56 mediators. Most said they would discuss concerns they may have about neutrality with the parties in joint or private sessions. Mediators generally said that if neutrality was compromised then they would end the mediation. This viewpoint was illustrated by a mediator who said he or she would hold "a separate meeting with each party and do some reality checking in relation to the concerns I would have (in respect to neutrality) if those concerns were valid then I would no longer be neutral and I would very likely end the mediation."

The majority of mediators would be open and upfront with the parties if the mediator thought a departure from neutrality were justified. Some mediators showed a willingness to depart from neutrality so long as "the intention to depart and reasons for contemplating it" were named and "with the approval of all parties and their legal advisors in joint sessions." Mediators deemed it necessary to declare intentions and to allow parties the option of continuing with or ending the process.

Respondents indicated that some departures from neutrality are made through questioning. One explained that a departure from neutrality "would most likely be displayed in my psychological approach to a party i.e. the questioning may be subtly different; for example more direct or use of silence … triangular fashion [of] communication may be used." Another mediator expanded on this idea, focusing on leading questions:

> I would be tempted to depart from neutrality if I considered an injustice would be likely to follow from complete impartiality. For example if a woman who had been subjected to

> domestic violence was intimidated by an ex partner and likely to agree to, for example, a relationship property settlement that was heavily in his favour I might ask careful/leading questions to ensure she was weighing up the cost of the dispute against the cost of the settlement, to be sure it was a considered decision on her part and not the result of a process that disadvantaged her.

4.5.8 The perceived advantages or disadvantages of departing

This question asked participants if they see any advantages or disadvantages in departing from neutrality. About eight mediators of the 55 responding said they could not see any advantages or disadvantages to doing so, but most other mediators mentioned advantages and disadvantages.

The most commonly identified disadvantages of departing from neutrality included placing the "fundamental essence" of mediation at risk; defying what the parties would expect; causing loss of trust in the mediator; and possibly affecting the parties' willingness to engage. It was also mentioned that a departure from neutrality could affect the durability of any agreement reached:

> I see disadvantage. To move away from neutrality would require the mediator to have some vested interest in the outcome for one party over the other. That is the process of the court and not for the mediator. It is not what I think that matters, but that each party feels that the process and outcome has been by their hand, and the results are by their agreement. Any departure from neutrality would undermine the integrity of both process and outcome, and possibly result in a party feeling aggrieved and therefore any agreement reached would be at risk of failure.

The view that a departure from neutrality "creates a risk of destabilising the mediation" was shared by several mediators, as were views that it "is not for the mediator to decide the appropriate outcome hence we should remain neutral." Another mediator believed that departing from neutrality could compromise the integrity of the process and the ownership of the outcomes. This would affect the ability of outcomes to work effectively.

The most commonly mentioned advantages of departing from neutrality included having "the rights of the vulnerable or unrepresented person … seen to in the process"; alleviating or controlling power imbalances; equity and fairness. One response stated that a departure from neutrality may allow the parties to see "the wood from the trees" and allow for clarity in communication:

> Sometimes a departure frees up the communication and allows the parties to achieve a mutually beneficial outcome. Mediators will always have their own internal values/bias and past experience to battle with in trying to "maintain" neutrality. It can be extremely challenging therefore and sometime unrealistic to expect the mediator to not deviate albeit without conscious knowledge.

One participant explained that a departure from neutrality could allow for a more robust risk analysis and a more straightforward discussion with parties who either have limited understanding or are unable to grasp certain concepts.

4.6 The Regulation of Mediation

The following questions asked mediators about their opinions on the desirability of regulating mediation, the reasons supporting doing so, and reservations about regulating.

4.6.1 Should New Zealand regulate mediators?

New Zealand does not currently regulate mediators. Survey participants were asked if this should change (see Table 13).

Table 13. New Zealand does not currently regulate mediators. Do you think that this should change?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	30	30.6	34.9
No	33	33.7	38.4
Maybe (please specify)	23	23.5	26.7
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

The answers to this question were fairly evenly balanced. Out of a total of 86 responses, 33 (38.4%) thought that New Zealand should not regulate mediators, 30 (34.9%) said that it should, and 23 (26.7%) were unsure.

The mediators who were unsure as to whether New Zealand should regulate mediators made several comments. They generally acknowledged that AMINZ and LEADR are two private trade organisations that provide accreditation for mediators, and that memberships in either organisation are voluntary. For example, one noted: "There is professional regulation through LEADR and AMINZ. Ideally mediators should be accredited members of one of these organisations if they are mediating in independent cases." Several mediators thought that the current requirements for accreditation through AMINZ and LEADR are sufficient. One wrote:

> I do think that the requirements for accreditation are currently sufficient to ensure that a reasonable standard of professionalism can be expected of NZ mediators. The market will also weed out those mediators who, by their process, aggrieve parties.

A mediator in favour of regulation explained that regulation of competency is preferred over regulation of process: "Regulation would need to be based on competency and ethical standards. Regulation of process would be unacceptable and unworkable." This viewpoint was shared by another mediator who explained that "a self-governing body that would control competence and quality would be desirable."

Several mediators advocated for a form of regulation which would not impede the flexibility of mediation. One mediator proposed compulsory accreditation:

> I think it would be a good thing to have some kind of compulsory accreditation, which is loose enough to enable the variety and flexibility of process and style. I like the National Standards approach in Australia.

Another mediator acknowledged that strict regulation might impede the flexibility of mediation, but favoured some restrictions as to who can call themselves a mediator:

> Guidelines are essential to ensure basic standards but any strict rules run the risk of taking away the flexibility that mediators need to adapt to the varying circumstances. What may be more important is a restriction on who can call themselves a mediator so that we have competent people in the role of mediator.

One hypothesis explored was whether gender influenced whether mediators tended to give different answers on the desirability of regulation. A cross-tabulation was run between the results of the question on gender and the results of the question on regulation. The results are reported in Table 14.

Table 14. Correlation between gender and support for regulation of mediators

			New Zealand does not currently regulate mediators. Do you think that this should change?			Total
			Yes	No	Maybe (please specify)	
Gender	Male	Count	11	23	10	44
		Percent of males	25.0	52.3	22.7	100.0
	Female	Count	19	10	13	42
		Percent of females	45.2	23.8	31.0	100.0
Total		Count	30	33	23	86
		Percent of count	34.9	38.4	26.7	100.0

While some men and some women opposed regulation, and some men and some women supported regulation, women were significantly more likely to support regulation, and this difference was statistically significant (Fisher's exact test p = 0.022). Only 25% of male respondents support regulation in contrast to 45.2% of female respondents. In addition, 52.3% of male respondents do *not* support regulation, compared to only 23.8% of female respondents.

4.6.2 Reasons for supporting regulation

Mediators were asked the reason(s) they support industry regulation (see Table 15).

Table 15. If you support regulation, for what reasons? (tick all that apply)

	Frequency
None, I do not support industry regulation	36
Better standards of practice	40
Safeguards for clients, especially against rogue providers	39
Enhanced professional status for mediation	38
Improved legitimacy for mediators	36
Protections for practitioners	24
Other (please specify)	8
Total	221

Table 15 allowed for multiple responses. Most mediators who supported regulation agreed with all the enumerated justifications. The most favoured reasons for regulation of the industry were "better standards of practice" and "safeguards for clients, especially against rogue providers". The least supported reason was to protect practitioners. The only "Other" response that addressed the question listed certainty for the participant as a justification for industry regulation.

4.6.3 Positive effects of regulation

Participants were asked if regulatory legislation would assist in attaining higher quality and standards, and greater accountability, within the profession (see Table 16).

Table 16. Would a "Mediation Act" assist in attaining increased quality, accountability and higher standards within the mediation profession?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	12	12.2	14.0
No	49	50.0	57.0
Maybe (please specify)	25	25.5	29.1
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

A clear majority (57%) of those answering this question did not think that a "Mediation Act" would assist in these areas, compared to only 14% who thought that it would. The remaining 29.1% were uncertain.

Mediators who said a "Mediation Act" may assist in attaining increased quality, accountability and higher standards within the mediation profession generally said it depended on the "content", "intent" and "liberalness" of such an Act. Mediators expressed concerns that such an Act, in standardising practice, could "inhibit change". One mediator mentioned:

> Knowing the standards required is critical for mediators, and having some sort of punitive measure for non-compliance may be necessary, but whether that comes via a statutory framework or in an industry-standards framework is perhaps irrelevant, for both can provide the checks and balances.

Another respondent thought that mandatory accreditation might lead to quality control: "It would be useful in quality control if in order to call oneself a mediator one had to have a qualification such as having passed a LEADR course." Another thought registration could ensure credibility of mediators: "Some form of Code of Conduct and registration should be necessary to ensure the credibility of the mediators and the process."

As expected, there was a statistically significant relationship (Fisher's exact test $p = 0.001$) between those who thought that a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the mediation profession, and those who favoured regulation (see Table 17).

Table 17. Correlation between perceived positive effects of regulation and respondent support for regulation

		Would a "Mediation Act" assist in attaining increased quality, accountability, and higher standards within the mediation profession?			Total
		Yes	No	Maybe (please specify)	
New Zealand does not currently regulate mediators. Do you think that this should change?	Yes	9	13	8	30
	Percent responding Yes	30.0	43.3	26.7	100.0
	No	2	26	5	33
	Percent responding No	6.1	78.8	15.2	100.0
	Maybe (please specify)	1	10	12	23
	Percent responding Maybe	4.3	43.5	52.2	100.0
	Total	12	49	25	86
	Percent Total response	14.0	57.0	29.1	100.0

Those with a favourable view of the effects of a "Mediation Act" were much more likely to support regulation (these figures are not shown in the table, but 75% of participants in that category were in favour, 8.3% replied "Maybe" and 16.7% were opposed) than were those who did not share the favourable view (only 26.5% of participants in that category were in favour, and 53.1% were opposed). It is interesting that 16.7% of the mediators who thought that a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the mediation profession nevertheless did not support such regulation.[206] It may be that reservations about the effect of regulation outweighed the otherwise positive features of regulation. The next section explores reservations.

[206] And conversely, 26.5% of the respondents who did not think that a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the mediation profession nevertheless supported such regulation.

4.6.4 Reservations about regulation

The results to a question asking mediators for their reservations about regulation are presented in Table 18.

Table 18. What reservations do you have about regulation? (tick all that apply)

	Frequency
I have no reservations	14
It could lead to institutionalism and professionalisation of an alternative process	21
It could lead to greater formalisation and rigidity of practice	52
There is too much diversity of mediation practice to allow for uniformity of regulation	27
It could lead to an additional layer of costs and make mediation unaffordable to more clients	45
There is yet no demonstrated harm to mediation clients to justify regulatory intervention	35
Other (please specify)	9
Total	203

Multiple responses were allowed. The most common reservation identified is that regulation could lead to greater formalisation and rigidity of practice.

4.6.5 Mediators' comments on industry regulation

Mediators made several contrasting comments about industry regulation. Some expressed concern about the unintended consequences of regulation. One unintended consequence raised was the possible right of the parties to "sue the mediator". In light of this, one mediator said that he or she "would like to see mediators protected" but acknowledged that "there is also a need to discipline rogue mediators". Another mediator said:

> Fundamentally under the law people are encouraged to seek their own solutions to disagreements and must accept the consequences. Hence it is in practice very difficult to appeal an ADR decision. Creation of regulations would make it possible for people to say

> afterwards that the process did not quite fit and was therefore illegal. That would be an unintended consequence. If regulation builds in that any fair process and choice of mediator is acceptable, then there is no need to regulate.

Another mediator shared this sentiment and expanded on the consequences of regulation:

> From personal experience in formulating similar regulation, it is clear that regulating process can be divisive, unduly restrictive, and sometimes counter-productive. Unless there is a clear simple and restricted objective (in this case – protection of users by competency standards and ethical guidelines) it is unlikely to be useful. A far better means of assuring performance is to produce non-mandatory guidelines and to support professional bodies who monitor the standards according to their particular principles.

These views were shared by other mediators who said that university, AMINZ, and LEADR qualifications and courses are sufficient in providing basic training to potential mediators.

Other mediators expressed pro-regulation sentiments, noting for example that "anyone can call themselves a mediator, and may have [an] insufficient understanding of the skills required." This view was supported by a mediator who said that currently "there is no legitimate way to prevent 'cowboy' mediators from practising". Another commented that the "intention of industry regulation should be to obtain a level of best practice throughout all models of mediation. It should be there to safeguard people and practitioners."

4.6.6 Mediators' thoughts on the future of mediation

Mediators were asked if they thought that our understanding of mediation will continue to change over time (see Table 19).

Table 19. Do you think that our understanding of mediation, what it means and accomplishes will continue to change?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	66	67.3	76.7
No	5	5.1	5.8
Maybe (please specify)	15	15.3	17.4
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

The majority of mediators (76.7%) thought that our understanding of mediation, what it means and accomplishes will continue to change. They generally acknowledged that, as mediation becomes more prevalent, its value will increase. Mediators stated that mediation is an evolving process and therefore likely to change. Only 5.8% of respondents thought that mediation would not continue to change in this way.

5. ANALYSIS

5.1 Introduction

This chapter analyses the quantitative and qualitative data from the questionnaire in light of the research questions. This thesis focuses on two questions. First, what do actual mediators think about neutrality and how do their opinions influence their behaviour in mediations? Second, should uniformity be encouraged and is regulation the best means to achieving this?

5.2 Mediators' Thoughts on Neutrality

Neutrality has traditionally been one of the core concepts of mediation. Despite being subject to a range of criticism, neutrality remains broadly trumpeted as an integral part of most codes and models of best practice. However, the substantive nature of neutrality is "elusive" and difficult to define.[207] This has been reflected in the international literature. In the United States, Cobb and Rifkin's research found that the way in which mediators defined and practiced neutrality was subject to variations. Similarly, in Australia, Douglas' research found as many as four different takes on neutrality between mediators.

The results of the present survey follow the international pattern that neutrality is elusive. There was a lack of mediator consensus on the nature of neutrality, with at least eight different concepts associated with neutrality. The difficulties that surveyed mediators found in defining neutrality likely create disparities in the way they manifest neutrality in their practices.

5.2.1 Self-determination

The concept that mediators in this research equated most closely with their understanding of neutrality was providing a process that enables party self-determination. Party self-determination has been described as "the other side" of neutrality by Boulle, Goldblatt and

[207] Evan M Rock "Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice" (2005) 6 Cardozo J. Conflict Resol. 347 at 354.

Green.[208] Self-determination means the parties are sovereign when reaching agreements. If the mediator is not neutral, that is to say if the mediator impinges on the substance of the dispute and the subsequent outcome, the parties' self-determination is weakened. The focus on self-determination parallels Douglas' research, which also found a significant focus on this factor. Douglas described the emphasis on self-determination evident in her research as "[t]he most important finding of [her] study".[209] She interpreted it as indicative of mediators reframing neutrality to form a functional definition: [210]

> This finding is important because it points to the development of an alternative conception of neutrality, one that avoids a binary, or dualistic, construction. Instead of looking to the presence or absence of neutrality, it is possible to reformulate the concept as one that makes sense in relation to another relevant concept, that of party self-determination. In this alternative neutrality is abandoned in an absolute sense but its meaning is reframed in relation to that of self-determination.

The other three most popular answers in the present study were: lack of personal interest in the outcome, impartiality and even-handedness gained a similar number of responses. These answers are all similar in that they refer to a lack of bias and therefore support party self-determination.

The absence of a personal interest would probably lessen the likelihood or extent to which the mediator might affect the substance, but it does not go as far as to ensure that the outcome will not be influenced by the mediator for some other reason or in some other way. It reflects a view of neutrality as the absence of personal interests on the part of the mediator which could cause him or her to be biased. This emphasis reflects general Western thinking. A mediator with familiarity with the parties and the subject matter could be viewed in the West as having an interest in the dispute. Neutrality in mediators is coloured by the concept of judicial neutrality in the court system which requires the judge be "a political, economic and social eunuch, and have no interest in the world outside [their] court when [they] come to

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[208] Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 52.

[209] Susan Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 Queensland U. Tech. L. & Just. J. 139 at 149.

[210] At 149.

judgement."[211] Yet in some other cultures mediators who are familiar with the parties and the situation would be preferred for the added gravitas and understanding they bring to the dispute.

5.2.2 Impartiality and even-handedness

Mediators also commonly referred to "impartiality" and "even-handedness" as concepts that closely captured their understanding of mediator neutrality. Astor draws a slight but significant distinction between impartiality and even-handedness on the basis that whilst the former refers to the "mediator's capacity to act impartially to each party", the latter refers to the mediator "act[ing] impartially 'as between' the parties."[212] Others include even-handedness in the definition of impartiality:[213]

> The mediator is obligated during the performance of professional services to maintain a posture of impartiality toward all involved parties. Impartiality means freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties as opposed to a single party in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role in the process of dispute resolution.

In practice, even-handedness could lead to problems in cases where there is an imbalance of power between the parties. Some of the mediators in Cobb and Rifkin's research were aware of such an imbalance, and would at times treat the parties differently in order to create a level playing field. This technique was referred to as "equidistance".[214] However, the New Zealand mediators did not volunteer this as a way of conceiving neutrality.

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[211] Linda Mulcahy "The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?" (2001) 10 Soc. Leg. Stud. 505 at 506.

[212] Susan Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 Queensland U. Tech. L. & Just. J. 139 at 145.

[213] Alison Taylor "Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process" (2007) 14 Conflict Resol. Q. 215 at 218.

[214] Sara Cobb and Janet Rifkin "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 Law Soc. Inq. 35 at 39.

In the mediation literature, impartiality has often been used synonymously with neutrality. At other times, it has been defined separately to neutrality. When neutrality is given an expansive definition, impartiality is typically included as an element of neutrality. Alternatively, some authors who argue neutrality is unattainable nevertheless endorse impartiality as the more viable theoretical foundation for mediation.

Whilst "[t]he mediator controlling the process and not having a personal interest in the content or outcome" reflects lack of bias caused by vested interests, "impartiality" looks at bias from a broader standpoint. It refers to the absence of any bias, including that derived from personal interest and also bias derived from identification with a party based on race, class or personality type.

Impartiality may be endorsed because neutrality is viewed as a flawed concept and impartiality is seen as a more attainable goal. Clearly, this approach maintains a distinction between impartiality from neutrality. In the present research, five mediators used the "Other" response to makes similar points. Comments included, for example, that "real neutrality is impossible – nobody is free from attitudes, assumptions, world-views, etc." However this remark views neutrality as defined by impartiality, and contends that even impartiality is impossible. Another respondent stated:

> We can never be neutral – our own experiences will influence the way we think and behave in mediations – the best we can do is to be acutely aware of this and adapt our behaviours to ensure a fair and transparent process, directed by the parties.

This answer resembles Rock's perspective. Rock argues neutrality (which he defines as impartiality) can be divided into two parts: internal and external neutrality. Whilst control of one's internal thoughts is impossible, he argues that, through self-awareness, the mediator can identify their internal thoughts and emotions and use that knowledge to permit maintaining external neutrality (i.e. behaviour that treats others impartially).[215]

[215] Evan M Rock "Mindfulness Meditation, the cultivation of Awareness, Mediator Neutrality and the possibility of Justice" (2005) 6 Cardozo J. Conflict Resol. 347 at 349.

5.2.3 Partiality

A number of other concepts were mentioned under "Other" as most closely capturing the mediators' understanding of neutrality. Among these were "independence", "multi-partial" and "omnipartiality". The latter two, "multi-partial" and "omnipartiality", represent the converse of impartiality. Whereas "outside mediators" (impartial mediators) are on nobody's side, the "inside mediator" (multi-partial or omnipartial mediators) are on "everybody's side". Those in favour of an omnipartial approach felt that mediator interventions (which would be a violation of pure neutrality) were acceptable so long as they were done in an even-handed way. One responded stated:

> ... some texts distinguish between impartiality (on nobody's side) and omni-partiality (on everybody's side). In that latter sense a mediator can be an active participator and advocate for party's interests – as long as there is no outcome in which the mediator has an interest and the mediator is even-handed about it …

The mediators who referred to these concepts were in the minority. Nevertheless, their views are significant as they reflect an alternative approach to mediation. In 2012 Sharp wrote a blog post entitled "Biased is Better, Partiality is In".[216] The movement away from neutrality and impartiality has also been heralded by Mayer.[217] In Mayer's view, people do not choose mediators for their neutrality; rather they seek "help communicating; understanding each other; analyzing a conflict; articulating their concerns; ideas, and arguments in support of their proposals; developing opinions; evaluating options; and finding agreements where agreements are possible."[218]

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[216] Geoff Sharp "Biased Is Better and Partiality Is In" (2012) Kluwer Mediation Blog <http://kluwermediationblog.com/2012/10/01/biased-is-better-and-impartiality-is-in/>

[217] Bernie Mayer "Symposium: The Future of Court ADR: Mediation and Beyond: What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition" (2012) 95 Marq. L. Rev. 859 at 7.

[218] At 7.

5.2.4 Conclusion

Overall, the results reflect the general ambiguity around the meaning of neutrality. There was no clear concept that mediators in this research unanimously singled out as representing neutrality. Rather, a number of concepts were identified. Of these, self-determination was the most popular, with lack of personal interest in the dispute, impartiality, and even-handedness following fairly closely behind. Despite being different, these concepts are related, in that their aim is generally the prevention of bias in order to enable party self-determination.

5.3 Departures from Neutrality

5.3.1 The importance of remaining neutral

There was a general acceptance by mediators that neutrality is "very important" but the necessity of departures was highly contentious. Whilst 52.3% of responding mediators believed a departure from neutrality was sometimes necessary, 47.7% believed that it was never necessary. Among those who believed that departures are sometimes necessary, the circumstances which they described as justifying a departure differed widely, indicating a lack of agreement among mediators on how neutrality relates into their practice. Some of the mediators' responses indicated a high threshold for departures such as "undue hostile or abusive behaviour"; a "revelation of an illegal act by a party so serious that someone needed protection"; "awareness of child abuse"; and "misleading" or "criminal" conduct. Others revealed a lower threshold. For example, a mediator indicated that a request from one (not both) of the parties would be enough to justify a departure: "[w]hen a participant is seeking some guidance on whether to accept an offer ..." This represents a departure from a strict definition of neutrality (in that they are affecting the substance of the dispute). Not only are some mediators departing from neutrality, they are doing so in a partial and partisan way. Other examples reflecting the low threshold include another mediator who was willing to provide advice to one of the parties if "requested by a party for an absolutely frank view of what the future looks like." Another mediator actively sought to strengthen one of the party's bargaining positions: "In the context of a work place dispute I've assisted workers who were unaware of applicable employment law and regulation to strengthen their negotiation." This confirms Mulcahy's findings in the United Kingdom.

5.3.2 Is neutrality attainable?

Mulcahy conducted a primary in-depth case study of mediators at the Southwark Mediation Centre in London over a period of 18 months. This included shadowing mediators; conducting formal interviews with mediators and housing officers; and observing participants of 38 shuttle mediations.[219] The research found that mediators who used the rhetoric of neutrality nevertheless engaged in partisan behaviour. In the context of a dispute over noise problems, mediators informed the parties that "this was not an individual problem but a systemic one", provided information to help the tenants in their battle against the local council, and were willing to lobby on the tenants' behalf.[220]

These results illustrate the difficulties mediators face in attempting to be neutral. One New Zealand mediator described retaining neutrality as a "constant challenge" because mediation "is often a very emotional process" and sometimes the mediator "gets sucked into it". Another described the difficulty of "being 'triggered' by content" that leads to the mediator "becoming judgmental and so compromising my neutrality".

5.3.3 What constitutes a breach of neutrality?

There was also a high level of confusion as to what exactly constituted a breach of neutrality. This is not surprising considering neutrality itself is such a vague concept. An example of this is the relationship between neutrality and reality testing. The research showed that some mediators believe reality testing is part of neutrality:

> Where I feel one party needs a reality check, I would in a private session indicate why I believe their position may not be sustainable at a hearing to determine the dispute. I do not believe this necessarily departs from neutrality because I would not do this in the presence of the other party unless authorised by both parties to make some general comments about the merits. Sometimes both parties will request an impartial overview be given of how the mediator sees the merits of the dispute.

[219] Linda Mulcahy "The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?" (2001) 10 Soc. Leg. Stud. 505 at 515.

[220] Hilary Astor "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16 Soc. Leg. Stud. 221 at 226.

However, other mediators believed that neutrality and reality testing must be distinguished:

> It depends on your definition of neutrality. This must be distinguished from reality testing. In the latter process mediators often have to confront a party with the difficulties of arguments/positions being raised, however genuinely they are held. Parties must be faced with the true consequences should they not come to an agreement at mediation.

Other respondents were unsure whether reality testing constituted a departure from neutrality. One said:

> There are times when I have 'reality tested' with a participant to try and get them to see the advantages of the offer on the table – whether this amounts to departing from neutrality I couldn't say.

Evidently, mediators are struggling to find where neutrality ends and departure begins. As a result practices are differing, with some mediators taking a more vigorous approach to intervention than others. In Douglas' research the issue of reality testing was also brought up by mediators. The Australian mediators expressed concern that the mediator could be "imposing some other community standard which may or may not be applicable given the nature of the relationship between the parties."[221] In this sense, reality testing comes to the heart of the debate over self-determination. Due to different life experiences, race, gender or socio-economic group the mediators 'reality' might be different to that of the parties. So, questioning aimed at encouraging the parties to see 'reality' from the mediators point of view may amount to arbitrariness as parties are vulnerable towards being swayed by mediator signals.[222]

Mediators with legal backgrounds worried whether mentioning the likely legal outcome if the case went to court constituted a breach of neutrality. One mediator wrote:

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[221] Susan Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 Queensland U. Tech. L. & Just. J. 139 at 148.

[222] Linda Mulcahy "The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?" (2001) 10 Soc. Leg. Stud. 505 at 6 at 512.

> Sometimes as a qualified legal practitioner notwithstanding my Mediator training MBS (Dispute Resolution) LEADR training and AMINZ Associate status I have to remind myself to pull back from a possibly too robust legal analyses.

Another party suggested they had departed from neutrality when

> explaining to a party what the court would find to be in a child's best interests. This was in a mediation where both parties had counsel present and both parties needed to be challenged in a gentle way about their attitude towards the other and the impact on the children.

Both these comments touch upon wider debates occurring in the mediation field. As there is little consensus on the exact meaning of neutrality, what constitutes a breach of neutrality is up for debate. Currie argues that "[t]he best mediators will draw from all available mediation techniques, depending upon the situation"[223], so interventions should not per se be considered to violate neutrality. Rather, they should be considered in light of their context. Focusing on the principle of self-determination, other authors have said that conveying the likely legal outcome does not contravene neutrality as "the parties are free to find a solution that better serves their personal values and concerns".[224] This scholarship suggests mediators can take a more liberal approach to interventions without compromising their professionalism. However, the concerns expressed by the mediators regarding likely legal outcomes indicates New Zealand mediators are choosing a more conservative and cautionary approach. Despite placing a high emphasis on the concept of self-determination in describing neutrality, New Zealand mediators are reluctant to use the principle of self-determination in order to widen their definition of neutrality to encompass some interventions.

5.3.4 The frequency of departures from neutrality

Despite confusion as to what constituted a breach of neutrality, mediators still mostly took the view that departures from neutrality were relatively rare. The majority of respondents (58.2%) thought that mediators are unlikely (to some degree) to depart from neutrality.

[223] Cris Currie "Mediating off the Grid" (2004) Mediate.com <http://www.mediate.com/articles/currieC4.cfm?nl=64>

[224] James R Coben "Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-determination and Neutrality" (2004) 5 Cardozo J. Conflict Resol. 65 at 81.

Furthermore, of those 25.5% of mediators who said they had departed from neutrality the vast majority thought they only did so rarely. Asked on a one to seven scale how frequently they departed from neutrality (with seven being "Almost always") 82.4% supplied an answer below the midline value of "4". This indicates that the mediators with a low threshold for intervention are very much in the minority.

That the majority of mediators require a high threshold to be met before intervening was also evident from responses to questions asking whether mediators thought addressing power imbalances justified a departure from neutrality. The majority (73.3%) of mediators supplied an answer below the midline value of "4", in other words, closer to "Definitely not" believing that a power imbalance justifies a departure from neutrality than to "Yes, definitely" justifying such a departure.

This is interesting in light of the international discussions in this area. The issue of imbalances of power has received significant attention internationally and has sometimes been characterised as a choice of neutrality versus justice, epitomised by the academic discourse between Susskind and Stulberg.[225] Whilst Susskind argues that in certain circumstances neutrality should be departed from, Stulberg has held firm that neutrality is inviolable as a core principle of mediation.[226] Bush and Folger argue the current trend is towards Susskind's view.[227] Among other things, as evidence of this trend Bush and Folger cite mediator ethical standards and competency tests in which the substantive fairness of the agreement is presumed to be within the sphere of the mediator's responsibility.[228] However, the responses of New Zealand mediators show a greater conformity with Stulberg's view of neutrality. That is, New Zealand mediators tended to see neutrality as pivotal to their practice and were unwilling to compromise it in favour of other principles such as justice.

[225] Bernie Mayer "Symposium: The Future of Court ADR: Mediation and Beyond: What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition" (2012) 95 Marq. L. Rev. 859 at 7.

[226] Joseph B Stulberg "Must a Mediator Be Neutral? You'd Better Believe It!" (2012) 95 Marq. L. Rev. 829.

[227] Robert A Baruch Bush and Joseph P Folger "Mediation and Social Justice: Risks and Opportunities" (2012) 27 Ohio St. J. on Disp. Resol. 1 at 11.

[228] At 14.

5.3.5 Disadvantages of departing from neutrality

Stulberg argues that neutrality is essential to create a "bond of trust" between the mediator and the parties. Within this bond, confidentiality is encouraged, in order for the mediator to come to know the parties' limits and their flexibility, and accordingly to help facilitate resolution of the dispute.[229] Loss of trust was also commonly identified by New Zealand mediators as one of the dangers of departing from neutrality. Other concerns included that departures would defy the parties' expectations and possibly affect their willingness to engage. It was also mentioned that a departure from neutrality could affect the durability of any agreement reached:

> I see disadvantage. To move away from neutrality would require the mediator to have some vested interest in the outcome for one party over the other. That is the process of the court and not for the mediator. It is not what I think that matters, but that each party feels that the process and outcome has been by their hand, and the results are by their agreement. Any departure from neutrality would undermine the integrity of both process and outcome, and possibly result in a party feeling aggrieved and therefore any agreement reached would be at risk of failure.

Evidence of a New Zealand approach to neutrality that is more aligned with Stulberg's view that neutrality is essential can also be inferred from responses by New Zealand mediators to the question asking whether addressing a threat of violence justified a departure from neutrality. Although the majority of mediators (34.4%) selected the strongest response (7 on the Likert scale) that it "Yes, definitely" did justify a departure, 24.4% expressed the correspondingly strongest opposite view of "Definitely not" (1 on the scale). A threat of violence represents an extreme situation. The fact that a significant percentage of mediators nevertheless view neutrality as inviolable even in this case shows the importance they place on the concept. In a less intense scenario, such as where there is procedural unfairness, the majority of mediators (74.3%) do not believe a departure is justified. Again, this indicates that most mediators have a high threshold for intervention.

[229] Joseph Stulberg "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981) 6 Vt. L. Rev. 85 at 96.

Mediators who expressed a willingness to depart from neutrality to ensure a fair and just outcome (12.2%) varied in the circumstances they offered that would justify doing so. Some said they would depart if the outcome concerned a child, or if no lawyers were present and one party was being unrealistic. Another mediator was willing to depart if doing so would promote achieving a fair and just outcome on the proviso that "we must not be a Judge or even Counsel for one of the parties – whatever we do must be transparent to both parties." This viewpoint was shared by a mediator who sees

> … a fair outcome as desirable and will do what I can to encourage the parties to reach a fair outcome. While I would remain neutral, I have ticked 'maybe' because I may instinctively try to steer the parties towards a fair settlement, or at least one which they regarded as fair.

So, whilst these mediators were prepared to breach neutrality, they would only do so in an impartial (even-handed) way. This supports a conclusion that they are engaging with criticisms of neutrality (regarding unattainability and lack of justice) and are adopting an approach based on impartiality instead. This contrasts with the earlier examples from mediators who described departing in a partisan way where they had been requested for an opinion by one of the parties and sometimes actively trying to strengthen the position of one of the parties. Evidently, those mediators who are departing from neutrality are doing so based on their own individualised standards and thresholds.

5.3.6 Conclusion

Whilst the debate on neutrality continues in the literature, the majority of New Zealand mediators considered neutrality to be highly significant. However, there was significant disagreement as to whether it was ever acceptable to depart form neutrality. Those who had departed from neutrality or were willing to do so used different thresholds to justify departure. Some mediators cited a request for advice from one of the parties, a low threshold, as sufficient cause. Others used a high threshold, and required a threat of violence. For the majority an imbalance of power was not enough to justify departure. As most mediations are not likely to involve more extreme circumstances than an imbalance of power, it is clear that New Zealand mediators will seldom depart from neutrality. Survey responses confirmed this conclusion. Overall New Zealand mediators are taking a conservative approach to neutrality.

5.4 The Desirability of Regulation

5.4.1 Current legislation

In New Zealand there are over 50 Acts incorporating mediation in some form.[230] Boulle, Goldblatt and Green explain that[231]

> … legislation providing for mediation services include the Residential Tenancies Act 1986, the Te Ture Whenua Maori Act 1993, Maori Land Act 1993, the Employment Relations Act 2000, and the Weathertight Homes Resolution Services Act 2006.

Despite legislation providing for mediation services, there is no overarching Act that regulates mediation or mediators in New Zealand in the same way, for example, that the Lawyers and Conveyancers Act 2006 regulates lawyers. This has implications for consistency. Boulle, Goldblatt and Green explain that "[t]here are a number of individual statutes regulating certain aspects of mediation practice in some areas. There are, however, limited areas of consistency across those statutes."[232] It is left to the two private trade organisations, AMINZ and LEADR, to accredit mediators. Membership is voluntary, and individuals can call themselves mediators without being accredited, or having any experience, training or qualifications.

5.4.2 Practitioner support for regulation

The results of this research showed an almost even split between those mediators who were in favour of, opposed to, or unsure about regulation. There is a clear lack of consensus. Out of a total of 86 responses, 33 (38.4%) thought that New Zealand should not regulate mediators, 30 (34.9%) said that it should, and 23 (26.7%) were unsure. Some mediators thought that the current requirements for accreditation through AMINZ and LEADR are sufficient. Women are more likely than men to support regulation.

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[230] Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 238.

[231] At 238.

[232] At 285.

Almost a third of responding mediators thought that the current situation should change. This could imply dissatisfaction with the current situation, or an appreciation for the benefits of regulation. Some responding mediators acknowledged the possible advantages of a body that oversees mediator competency and quality. Open-ended comments by some mediators advocated for some form of regulation, especially regulation that mandates compulsory accreditation, but at the same time voiced concerns about such regulation impeding the flexibility of mediation.

5.4.3 Advantages and disadvantages of regulation

Boulle, Goldblatt and Green listed potential advantages of regulation. These include:[233]

- Better standards of practice;
- Safeguards for consumers (especially against rogue providers);
- Enhanced professional status for mediation;
- Improved legitimacy for mediators; and
- Some protections for practitioners.

The survey results showed that mediators who support regulation agreed with all of these justifications. The most favoured reasons for regulation of the industry were "better standards of practice" and "safeguards for clients (especially against rogue providers)".

Boulle, Goldblatt and Green also enumerate potential objections to regulation:[234]

- It would lead to the institutionalisation and professionalisation of an alternative process;
- It would lead to greater formalisation and rigidity of practice;
- There is too much diversity of mediation practice to allow for uniformity of regulation; and
- There is as yet no demonstrated harm to mediation consumers to justify regulatory intervention.

[233] At 285.

[234] At 286.

Survey results showed that some participants think that regulation "can be divisive, unduly restrictive, and sometimes counter-productive." The benefits of regulation were also challenged. A clear majority of mediators (57%) did not think a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the mediation profession. An interesting observation in the results is that 16.7% of the mediators who did think that a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the mediation profession nevertheless did not support such regulation. It may be that reservations about the effect of regulation outweighed their perception of otherwise positive features of regulation. Even those supporting regulation expressed some apprehension about legislation because of its unknown "content", "intent" and "liberalness"

5.4.4 The importance of flexibility in mediation

The present research showed that the most common argument against regulation is that "it would lead to greater formalisation and rigidity of practice". The main concern raised was that legislation could "inhibit change" through standardising mediation. From respondents' concerns about the standardisation, formalisation and rigidity of the mediation process it can be deduced that mediators value mediation's flexibility and state of flux. This argument is supported by the finding that a large majority of mediators (76.5%) believe that our understanding of mediation, and what it means and accomplishes, will continue to change. This flexibility and state of flux echoes and supports Spiller who explains that "where mediation was once forensic in everything but outcome, it is now increasingly organic, capable of flexibility and adapting to the needs of the particular parties and their particular problem."[235]

5.4.5 Conclusion

As has been discussed previously, there are significant differences in different mediators' understanding of what constitutes neutrality, a fundamental part of mediation. Regulation could be a method of bringing more uniformity to this area. Nevertheless, the present

[235] Peter Spiller (ed) Dispute Resolution in New Zealand (2nd ed, Oxford University Press, Sydney (NSW), 2007) at 71.

research found that the majority of mediators did not think that a "Mediation Act" would assist in attaining increased quality, accountability and higher standards within the profession. Instead, mediators voiced concerns about such an Act being unduly restrictive. Given the state of flux and flexibility of mediation as well as the underlying complexities in terms of neutrality, it seems unlikely that a "Mediation Act" would be desirable.

However, limited regulation may be the answer. Regulation that does not prescribe what mediation or neutrality is, but instead provides for mandatory accreditation could safeguard parties from rogue providers. Such a limited change would not alter the format or rules for mediation, however, and would not result in the feared formalisation and rigidity. Mandatory accreditation would create greater certainty within the way mediation is practiced as mediators would have a shared set of skills. This is particularly relevant for those mediators who are departing from neutrality.

6. CONCLUSION

This thesis has looked at the issue of neutrality in mediation. Neutrality is frequently referred to as a vital aspect of mediation. The concept of neutrality reflects Western values on freedom to contract and the right of the individual. It also provides legitimacy to a relatively new industry. However, neutrality is also contentious. The definition of neutrality (and its meaning in relation to impartiality) is disputed. Some authors have abandoned traditional definitions altogether and instead refer to "shades of meaning". Criticisms have also been made that mediator neutrality is unattainable and perpetuates a "dangerous mythology". The ideology underpinning neutrality has also been criticised as Western-centric and likely to lead to unjust results where there are imbalances of power. As a result, some authors have attempted to reframe neutrality, giving it a wider "post-modern" definition that accepts that mediator interventions are sometimes inevitable and, depending on the circumstances, should not automatically be considered to breach neutrality. Other authors go further, and moot alternative theoretical structures. Some would retain neutrality, but as an aspiration rather than a binding requirement.

This research first focused on what New Zealand mediators think about neutrality, and how their opinions influence their behaviour in mediations. Whilst the debate on neutrality continues in the literature, the majority of mediators considered neutrality to be highly significant. However there was significant disagreement as to whether it was ever acceptable to depart form neutrality. Those who had departed from neutrality or were willing to do so used different thresholds to justify departure. Some mediators cited a request for advice from one of the parties, a low threshold, as sufficient cause. Others used a high threshold, and required a threat of violence. For the majority an imbalance of power was not enough to justify departure. As most mediations will not involve more extreme circumstances than an imbalance of power, it is clear that New Zealand mediators will seldom depart from neutrality. Survey responses confirmed this conclusion.

A second focus for this research was whether uniformity should be encouraged and if the best means of achieving this would be regulation. There are significant differences in different mediators' understanding of what constitutes neutrality, a fundamental part of mediation. Regulation could be a method of bringing more uniformity to this area. However, the present

research found that the majority of mediators did not think that a “Mediation Act” would assist in attaining increased quality, accountability and higher standards within the profession. Instead, mediators voiced concerns about such an Act being unduly restrictive. The present research showed that the most common argument against regulation is that it would lead to formalisation and rigidity of practice. Even those supporting regulation expressed some apprehension about legislation because of its unknown “content”, “intent” and “liberalness”

Given the state of flux and flexibility of mediation as well as the underlying complexities in terms of neutrality, it seems unlikely that a “Mediation Act” would be desirable. However, limited regulation may be the answer. Regulation that does not prescribe what mediation or neutrality is but instead provides for mandatory accreditation could safeguard parties from rogue providers. Such a limited change would not alter the format or rules for mediation and would not result in the feared formalisation and rigidity.

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APPENDIX A

Approval by the University of Otago Ethics Committee

11/158

Academic Services
Manager, Academic Committees, Mr Gary Witte

20 July 2011

Ms S Mize
Faculty of Law
Division of Humanities

Dear Ms Mize

I am again writing to you concerning your proposal entitled "**A Study on the Neutrality of Mediators**", Ethics Committee reference number **11/158**.

Thank you for the letter from student, Daniel Becker, addressing the Committee's concerns. We are grateful to receive evidence of Maori consultation, and for a revised copy of the questionnaire. We are also grateful for confirmation that an additional application will be submitted if interviews are to be undertaken in the future.

On the basis of this response, I am pleased to confirm that the proposal now has full ethical approval to proceed.

Approval is for up to three years. If this project has not been completed within three years from the date of this letter, re-approval must be requested. If the nature, consent, location, procedures or personnel of your approved application change, please advise me in writing.

Yours sincerely,

Mr Gary Witte
Manager, Academic Committees
Tel: 479 8256
Email: gary.witte@otago.ac.nz

c.c. Professor R M Henaghan Dean Faculty of Law

APPENDIX B

Research Cover Letter

Dear Sir or Madam,

I am a postgraduate student from the Faculty of Law at the University of Otago conducting research on the neutrality of mediators. This research is very important to my thesis as it will allow me to analyse the conflict between the theoretical duty to abide by neutrality and possible practical departures from it.

If you are practising, or have practised, as a mediator, I would appreciate your taking the time to answer a very short online survey giving me your feedback on mediator neutrality. I am interested in hearing from you regardless of whether you always abide by neutrality or depart from it. Answering this survey will take only a few minutes of your time, but those few minutes will be crucial in contributing to the academic dialogue.

This survey is anonymous. If you wish to be involved in a further phone or face-to-face interview, please provide your contact details at the end of the survey. Your responses will not be linked to you even if you provide contact details. You have the option of withdrawing from this research at any time. The University of Otago Human Ethics Committee has reviewed and approved this study.

If you would like to participate, which I would greatly appreciate, please begin the survey below as it will be open until Friday, 9 September.

https://www.surveymonkey.com/s/neutrality

If you have any questions about our study, either now or in the future, please feel free to contact either:-

Daniel Becker
Faculty of Law
daniel.becker@otagoalumni.ac.nz

or

Selene Mize
Faculty of Law
Work: (03) 479 8853
selene.mize@otago.ac.nz

Thank you for your time and interest. It is greatly appreciated.

Yours Sincerely,

Daniel Becker

APPENDIX C

Research Questions

1. Which best describes your approach to mediation?
    - □ Facilitating the mediation (convening and assisting the conversation)
    - □ Managing the mediation (acting as a dealmaker)
    - □ Other (please specify)

2. Which concept or concepts most closely capture your understanding of mediator neutrality? (tick all that apply)
    - □ Impartiality
    - □ Even-handedness
    - □ The mediator controlling the process and not having a personal interest in the content or outcome
    - □ Providing a process that enables party 'self-determination'
    - □ Other (please specify)

3. How often to you think mediators in New Zealand depart from neutrality?
    - □ 7 Almost always
    - □ 6
    - □ 5
    - □ 4
    - □ 3
    - □ 2
    - □ 1 Almost never

4. Have you ever departed from neutrality (however you define it) when mediating?
    - □ Yes
    - □ No
    - □ Maybe (please specify)

5. Briefly describe the circumstances (if any) in which you would deem it appropriate to depart from neutrality.

6. If you have ever departed from neutrality, how often do you depart from it? (leave blank if you have never departed)

- □ 7 Almost always
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Almost never

7. In your opinion, does addressing a power imbalance justify a departure from neutrality?

- □ 7 Yes, definitely
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Definitely not

8. In your opinion, does addressing a threat of violence justify a departure from neutrality?

- □ 7 Yes, definitely
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Definitely not

9. In your opinion, does remedying a procedural unfairness justify a departure from neutrality?

- □ 7 Yes, definitely
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Definitely not

10. If you felt a departure from neutrality was justified in in certain circumstances, briefly explain how you would depart from neutrality.

11. In your opinion, how important is adherence to neutrality for a mediator?

- □ 7 Very important
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Very unimportant

12. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the outcome?

- □ 7 Very important
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Very unimportant

13. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the process?

- □ 7 Very important
- □ 6
- □ 5
- □ 4
- □ 3
- □ 2
- □ 1 Very unimportant

14. Would you depart from neutrality if you believed that doing so would promote achieving a fair and just outcome?

- □ Yes
- □ No
- □ Maybe (please specify)

15. Do you believe that a departure from neutrality is sometimes necessary?

- □ Yes
- □ No

16. Do you see any advantages or disadvantages in departing from neutrality?

17. New Zealand does not currently regulate mediators. Do you think that this should change?

- □ Yes
- □ No
- □ Maybe (please specify)

18. If you support regulation, for what reason? (tick all that apply)

- □ None, I do not support regulation
- □ Better standards of practice
- □ Safeguards for clients, especially against rogue providers
- □ Enhanced professional status for mediation
- □ Improved legitimacy for mediators
- □ Protections for practitioners
- □ Other (please specify)

19. What reservations do you have about regulation? (tick all that apply)

- □ I have no reservations
- □ It could lead to institutionalism and professionalisation of an alternative process
- □ It could lead to greater formalisation and rigidity of practice
- □ There is too much diversity of mediation practice to allow for uniformity of regulation
- □ It could lead to an additional layer of costs and make mediation unaffordable to more clients
- □ There is yet no demonstrated harm to mediation clients to justify regulatory intervention
- □ Other (please specify)

20. Would a "Mediation Act" assist in attaining increased quality, accountability and higher standards within the mediation profession?

- □ Yes
- □ No
- □ Maybe (please specify)

21. Do you have any further comments to make in regards to industry regulation?

22. Do you think that our understanding of mediation, what it means and accomplishes will continue to change?

- □ Yes
- □ No
- □ Maybe (please specify)

23. In what areas of law do you mediate?

- □ Commercial
- □ Community
- □ Corporate
- □ Employment
- □ Environment
- □ Family
- □ Finance
- □ Immigration
- □ Public
- □ Tort
- □ Other (please specify)

24. How long have you been a mediator?

- □ 1 – 5 years
- □ 6 – 10 years
- □ 11 – 15 years
- □ 16 – 20 years
- □ 21 – 25 years
- □ 26 + years

25. What qualification do you possess? (tick all that apply)

- □ BA
- □ BCom
- □ BSc
- □ LLB
- □ LLB/BA
- □ LLB/BCom
- □ LLB/BSc
- □ LLM
- □ PhD
- □ Training course under the auspice of AMINZ
- □ Training course under the auspice of LEADR
- □ Other (please specify)

26. How old are you?

- □ 20 – 29
- □ 30 – 39
- □ 40 – 49
- □ 50 – 59
- □ 60 – 69
- □ 70 +

27. What is your gender?

- □ Male
- □ Female

28. With what ethnicity do you identify?

- □ New Zealand European
- □ Māori
- □ Samoan
- □ Cook Island Māori
- □ Tongan
- □ Niuean
- □ Chinese
- □ Indian
- □ Other (such as Dutch, Japanese, Tokelauan)

29. If you identified as Māori, please list the name or names of your iwi.

30. Where do you practice?

- □ Northland
- □ Auckland
- □ Bay of Plenty
- □ Waikato
- □ Taranaki
- □ Hawkes Bay
- □ Poverty Bay
- □ Manawatu
- □ Wairarapa
- □ Wellington
- □ Nelson
- □ Marlborough
- □ Canterbury
- □ West Coast
- □ Otago
- □ Southland

31. Please write any other comments regarding any part of this survey below.

32. If you are willing to take part in a follow-up interview please leave your name and phone number or email address below.

APPENDIX D

Frequency Tables and Cross-tabulations of Quantitative Data

Table 1. Which concept or concepts most closely capture your understanding of mediator neutrality? (tick all that apply)

	Frequency
Impartiality	60
Even-handedness	56
The mediator controlling the process and not having a personal interest in the content or outcome	58
Providing a process that enables party 'self-determination'	69
Other (please specify)	13
Total	256

Table 2. In your opinion, how important is adherence to neutrality for a mediator?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	4	4.1	4.4	4.4
2	1	1.0	1.1	5.6
3	0	0.0	0.0	5.6
4	3	3.1	3.3	8.9
5	7	7.1	7.8	16.7
6	13	13.3	14.4	31.1
7 Very important	62	63.3	68.9	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 3. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the outcome?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	2	2.0	2.2	2.2
2	3	3.1	3.3	5.6
3	2	2.0	2.2	7.8
4	1	1.0	1.1	8.9
5	5	5.1	5.6	14.4
6	20	20.4	22.2	36.7
7 Very important	57	58.2	63.3	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 4. In your opinion, how important do you believe that it is for a mediator to be neutral with respect to the process?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Very unimportant	4	4.1	4.4	4.4
2	5	5.1	5.6	10.0
3	3	3.1	3.3	13.3
4	7	7.1	7.8	21.1
5	7	7.1	7.8	28.9
6	13	13.3	14.4	43.3
7 Very important	51	52.0	56.7	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 5. How often do you think mediators in New Zealand depart from neutrality?

	Frequency	Percent of all participants	Cumulative Percent
1 Almost never	16	16.3	16.3
2	20	20.4	36.7
3	21	21.4	58.2
4	22	22.4	80.6
5	11	11.2	91.8
6	4	4.1	95.9
7 Almost always	4	4.1	100.0
Total	98	100.0	

Table 6. Have you ever departed from neutrality (however you define it) when mediating?

	Frequency	Percent of all participants
Yes	25	25.5
No	48	49.0
Maybe (please specify)	25	25.5
Total	98	100.0

Table 7. Do you believe that a departure from neutrality is sometimes necessary?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	45	45.9	52.3
No	41	41.8	47.7
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 8. If you have departed from neutrality, how often do you depart from it? (leave blank if you have never departed)

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Almost never	23	23.5	45.1	45.1
2	17	17.3	33.3	78.4
3	2	2.0	3.9	82.4
4	3	3.1	5.9	88.2
5	4	4.1	7.8	96.1
6	1	1.0	2.0	98.0
7 Almost always	1	1.0	2.0	100.0
Subtotal	51	52.0	100.0	
No Answer	47	48.0		
Total	98	100.0		

Table 9. In your opinion, does addressing a power imbalance justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	33	33.7	36.7	36.7
2	22	22.4	24.4	61.1
3	11	11.2	12.2	73.3
4	9	9.2	10.0	83.3
5	9	9.2	10.0	93.3
6	2	2.0	2.2	95.6
7 Yes, definitely	4	4.1	4.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 10. In your opinion, does addressing a threat of violence justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	22	22.4	24.4	24.4
2	6	6.1	6.7	31.1
3	5	5.1	5.6	36.7
4	9	9.2	10.0	46.7
5	9	9.2	10.0	56.7
6	8	8.2	8.9	65.6
7 Yes, definitely	31	31.6	34.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 11. In your opinion, does remedying a procedural unfairness justify a departure from neutrality?

	Frequency	Percent of all participants	Percent of participants answering this question	Cumulative percent
1 Definitely not	38	38.8	42.2	42.2
2	18	18.4	20.0	62.2
3	10	10.2	11.1	73.3
4	7	7.1	7.8	81.1
5	10	10.2	11.1	92.2
6	3	3.1	3.3	95.6
7 Yes, definitely	4	4.1	4.4	100.0
Subtotal	90	91.8	100.0	
No Answer	8	8.2		
Total	98	100.0		

Table 12. Would you depart from neutrality if you believed that doing so would promote achieving a fair and just outcome?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	11	11.2	12.2
No	45	45.9	50.0
Maybe (please specify)	34	34.7	37.8
Subtotal	90	91.8	100.0
No Answer	8	8.2	
Total	98	100.0	

Table 13. New Zealand does not currently regulate mediators. Do you think that this should change?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	30	30.6	34.9
No	33	33.7	38.4
Maybe (please specify)	23	23.5	26.7
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 14. Correlation between gender and support for regulation of mediators[236]

			New Zealand does not currently regulate mediators. Do you think that this should change?			Total
			Yes	No	Maybe (please specify)	
Gender	Male	Count	11	23	10	44
		Percent of males	25.0	52.3	22.7	100.0
	Female	Count	19	10	13	42
		Percent of females	45.2	23.8	31.0	100.0
Total		Count	30	33	23	86
		Percent of count	34.9	38.4	26.7	100.0

Table 15. If you support regulation, for what reasons? (tick all that apply)

	Frequency
None, I do not support industry regulation	36
Better standards of practice	40
Safeguards for clients, especially against rogue providers	39
Enhanced professional status for mediation	38
Improved legitimacy for mediators	36
Protections for practitioners	24
Other (please specify)	8
Total	221

[236] Fisher's exact test p = 0.022

Table 16. Would a "Mediation Act" assist in attaining increased quality, accountability and higher standards within the mediation profession?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	12	12.2	14.0
No	49	50.0	57.0
Maybe (please specify)	25	25.5	29.1
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 17. Correlation between perceived positive effects of regulation and respondent support for regulation[237]

		Would a "Mediation Act" assist in attaining increased quality, accountability, and higher standards within the mediation profession?			Total
		Yes	No	Maybe (please specify)	
New Zealand does not currently regulate mediators. Do you think that this should change?	Yes	9	13	8	30
	Percent responding Yes	30.0	43.3	26.7	100.0
	No	2	26	5	33
	Percent responding No	6.1	78.8	15.2	100.0
	Maybe (please specify)	1	10	12	23
	Percent responding Maybe	4.3	43.5	52.2	100.0
	Total	12	49	25	86
	Percent Total response	14.0	57.0	29.1	100.0

[237] Fisher's exact test p = 0.001

Table 18. What reservations do you have about regulation? (tick all that apply)

	Frequency
I have no reservations	14
It could lead to institutionalism and professionalisation of an alternative process	21
It could lead to greater formalisation and rigidity of practice	52
There is too much diversity of mediation practice to allow for uniformity of regulation	27
It could lead to an additional layer of costs and make mediation unaffordable to more clients	45
There is yet no demonstrated harm to mediation clients to justify regulatory intervention	35
Other (please specify)	9
Total	203

Table 19. Do you think that our understanding of mediation, what it means and accomplishes will continue to change?

	Frequency	Percent of all participants	Percent of participants answering this question
Yes	66	67.3	76.7
No	5	5.1	5.8
Maybe (please specify)	15	15.3	17.4
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 20. In what areas of law do you mediate?

	Responses	
	Frequency	Percent
Commercial	36	16.3
Community	29	13.1
Corporate	20	9.0
Employment	35	15.8
Environment	8	3.6
Family	41	18.6
Finance	5	2.3
Immigration	1	0.5
Public	13	5.9
Tort	15	6.8
Other (please specify)	18	8.1
Total	221	100.0

Table 21. How long have you been a mediator?

	Frequency	Percent of all participants	Percent of participants answering this question
1 - 5 years	32	32.7	38.6
6 - 10 years	18	18.4	21.7
11 - 15 years	12	12.2	14.5
16 - 20 years	16	16.3	19.3
21 - 25 years	5	5.1	6.0
Subtotal	83	84.7	100.0
No Answer	15	15.3	
Total	98	100.0	

Table 22. What qualification do you possess? (tick all that apply)

	Responses	
	Frequency	Percent
BA	15	7.4
BCom	3	1.5
BSc	3	1.5
LLB	32	15.8
LLB/BA	6	3.0
LLB/BCom	2	1.0
LLB/BSc	0	0
LLM	4	2.0
PhD	2	1.0
Training course under the auspice of AMINZ	28	13.9
Training course under the auspice of LEADR	65	32.2
Other (please specify)	42	20.8
Total	202	100.0

Table 23. How old are you?

	Frequency	Percent of all participants	Percent of participants answering this question
20 - 29	1	1.0	1.2
30 - 39	3	3.1	3.5
40 - 49	18	18.4	20.9
50 - 59	32	32.7	37.2
60 - 69	31	31.6	36.0
70	1	1.0	1.2
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 24. What is your gender?

	Frequency	Percent of all participants	Percent of participants answering this question
Male	44	44.9	51.2
Female	42	42.9	48.8
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

Table 25. With what ethnicity do you identify?

	Frequency	Percent of all participants	Percent of participants answering this question
New Zealand European	80	81.6	93.0
Māori[238]	3	3.1	3.5
Other (such as Dutch, Japanese, Tokelauan)	3	3.1	3.5
Subtotal	86	87.8	100.0
No Answer	12	12.2	
Total	98	100.0	

[238] Three respondents identified with Ngāpuhi, Ngāti Awa and Ngāti Porou.

Table 26. Where do you practice?

	Responses	
	Frequency	Percent
Northland	6	3.8
Auckland	32	20.5
Bay of Plenty	9	5.8
Waikato	5	3.2
Taranaki	5	3.2
Hawkes Bay	9	5.8
Poverty Bay	4	2.6
Manawatu	4	2.6
Wairarapa	7	4.5
Wellington	22	14.1
Nelson	10	6.4
Marlborough	8	5.1
Canterbury	15	9.6
West Coast	4	2.6
Otago	12	7.7
Southland	4	2.6
Total	156	100.0