

ATTITUDE AND RESPONSE TO EMOTION IN DISPUTE RESOLUTION: THE EXPERIENCE OF MEDIATORS

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Mediation is widely used in court-connected contexts to deal with disputes. There is growing recognition of the role and impact of emotion in dispute resolution. This article describes the findings of qualitative empirical research from interviews with sixteen mediators from the Victorian Civil and Administrative Tribunal. The research reveals the mediators' attitudes, and strategies for addressing emotional expression in mediation. The findings demonstrate that most mediators in this group encourage or allow emotional expression rather than simply seeking to control it. These findings are discussed in the context of the growing literature in emotional expression as a part of conflict, and the role of mediators and other dispute resolution professionals to address it effectively in their work.

I INTRODUCTION

The wide use of alternative or appropriate dispute resolution ('ADR') in our legal and justice system indicates a shift in focus from litigation to a system that encourages less adversarial dispute resolution.¹ Mediation, conciliation and arbitration are frequently used options in the spectrum of dispute resolution, with the most

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¹ Michael King, Arie Frieberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, 2009) ch 1, 7.

widely used approach being mediation.² A move away from primarily adversarial approaches, to selecting the appropriate option to address the interests, needs and concerns of all disputants shifts the paradigm of dispute resolution.³ As a part of this shift, lawyers and other dispute resolution professionals are required to broaden their skillset beyond adversarial skills to encompass capacities and approaches that are inclusive of a range of perspectives, and address the full spectrum of disputant needs.⁴ From the assessment of a dispute strictly within a legal framework, those involved in dispute resolution arguably now need to observe and respond to the parties' wider concerns, such as the experience of emotion in conflict, and assist them to reach solutions that satisfy these needs.⁵ Mediators and other dispute resolution professionals need to address the emotions and feelings that attend conflict as clients may require this dimension of the dispute to be addressed.⁶ Expression of the values and concerns that underlie strongly felt emotion arguably contribute to successful mediation.⁷ However, court-connected mediation does not generally encourage engagement with wider concerns in mediation.⁸

The institutionalisation of mediation has resulted, in some court-connected programs, in the rise of an evaluative model of mediation that focuses on disputants' rights.⁹ This is in contrast to the widely

² Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 2.

³ See, eg, Robert Mnookin, Scott Peppet and Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Belknap Press, 2000) 167.

⁴ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia, 2008) 223-24.

⁵ Leonard Riskin and Nancy Welsh, 'Is That All There Is? The Problem in Court-orientated Mediation' (2008) 15 *George Mason Law Review* 863.

⁶ Tricia Jones and Andrea Bodtker, 'Mediating with Heart in Mind: Addressing Emotion in Mediation Practice' (2001) 17 *Negotiation Journal* 217.

⁷ Jean Poitras and Susan Raines, *Expert Mediators: Overcoming Mediation Challenges in Workplace, Family and Community Conflicts* (Jason Aronson, 2013) ch 7.

⁸ Riskin and Welsh, above n 5, 864.

⁹ Nancy Welsh, 'The Thinning Vision of Self-determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1, 23. There are a range of ADR evaluative processes, such as expert appraisal and third party neutral evaluation: Sourdin, above n 2,

endorsed facilitative model of mediation where there is an emphasis on party empowerment, collaborative problem solving and recognition of relationship concerns in conflict.¹⁰ In the evaluative model, parties are given advice by the mediator about such issues as the likely court outcomes should the parties proceed to trial, and in this context relationship concerns are often side-lined.¹¹ In the United States, Riskin and Welsh point to the tendency for the problems or issues in mediation in court-connected civil contexts to be constrained to the rights aspects of the dispute because of the involvement of lawyers.¹² This constraint lessens the likelihood that emotional issues will be addressed, as the culture of lawyers means that the rational domain is privileged in dispute resolution. Commentators suggest that the capacities to address emotion effectively are not always taught to those with legal training as their education is more focused on the application of intellectual or technical expertise than emotional sensitivity.¹³

160-63.

¹⁰ Carole Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal' (2003-2004) 4 *Pepperdine Dispute Resolution Journal* 279.

¹¹ Lela Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University Law Review* 937.

¹² The authors argue for a wider construction of the 'problem' in mediations with more input from parties: Riskin and Welsh, above n 5, 875-76.

¹³ Erin Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231, 234. Australian writers have advocated the inclusion of ADR in legal education to promote non-adversarial orientations and emotional intelligence: James Duffy and Rachael Field, 'Why ADR must be Mandatory in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 24 *Australasian Dispute Resolution Journal* 1; Kathy Douglas and Becky Batagol, 'ADR and Non-adversarial Justice as Sites for Understanding Emotion in Dispute Resolution' (2010) 20 *Journal of Judicial Administration* 106. Others writers have advocated ADR as a course to temper the traditional adversarial paradigm of legal education: Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148; Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-adversarial Practice in Law' (2011) 22 *Australasian Dispute Resolution Journal* 49. Commentators have long advocated for the inclusion of ADR in the United States legal curriculum: Frank Sander, 'Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles' (1984) 34 *Journal of Legal Education* 229; Albert Sacks, 'Legal Education and the Changing Role of Lawyers in Dispute Resolution' (1984) 34 *Journal of Legal Education* 237.

In order to understand more about the practice of mediation in a court connected context, and in particular to explore the place of emotion in mediation in a legal setting, the authors conducted research into mediation practice at the Victorian Civil and Administrative Tribunal ('VCAT').¹⁴ This large tribunal caters for a wide range of disputes, including small claims, tenancy, guardianship, domestic building disputes, planning and commercial matters and routinely includes mediation as part of its case management framework.¹⁵ In this article, we consider a community of 16 mediators, the majority legally qualified, and explore their capacity to consider and address the role of emotion in conflict. We provide a qualitative analysis of mediators' reports about their attitude to emotion and their practice interventions relating to emotion during mediation.¹⁶ In our analysis we assess their comfort with emotion and their ability to respond to its expression. The findings of this study support some of the previous research on emotion, in particular the work identifying mediator strategies through simulations,¹⁷ and provide insights into the ways mediators approach the issue of emotion in conflict.

Our research indicates that, in the context of a tribunal setting, mediators are likely to canvass and explore disputant emotion and consider emotional expression. In the light of this focus on emotion, we suggest the integration of theory and practice in this area, and propose that training about emotion in conflict should be revisited and enriched in order to further support the development of dispute

¹⁴ There were a number of mediator practice concerns explored in the study, including procedural justice, the use of humour and the role of lawyers in mediation.

¹⁵ Iain Ross, 'A Centre of Excellence in ADR' (2009) 83 *Law Institute Journal* 34.

¹⁶ The study complements research into lawyer's role in mediation at VCAT from the perspective of lawyers: Joel Gerschman, *Unearthing Lawyers' Role in VCAT Mediation: Do Theory and Practice Converge* (Unpublished Thesis, Monash University, 2002).

¹⁷ Jessica Jameson, Andrea Bodtker and Tim Linker, 'Facilitating Conflict Transformation: Mediator Strategies for Eliciting Emotional Communication in a Workplace Conflict' (2010) 26 *Negotiation Journal* 25. See also self-reports about emotion in mediation practice drawn from surveys of expert mediators in the United States: Poitras and Raines, above n 7.

resolution professionals. We contend that the value attributed by practitioners to emotional expression in mediation supports the evidence of the growing literature on this topic. Our findings suggest that we can extend the shift towards deepening emotional understanding for dispute resolution professionals. To support this shift training needs to offer both an epistemology and practical skills to mediators and others working in conflict to address emotion with greater understanding and competence.

II LITERATURE REVIEW

A *Emotion in Mediation*

Over the past decade, researchers and practitioners in dispute resolution have begun to canvass mediators' understanding of emotion in order to explore its role in effective mediation practice,¹⁸ and as part of comprehensive mediation training.¹⁹ Contemporary mediation practice has begun to shift away from a heritage where the cognitive capacity was privileged and the realm of emotions was viewed as problematic, challenging and difficult - generally it was

¹⁸ See, eg, Clark Freshman, 'Identity, Beliefs, Emotion, and Negotiation Success' in Michael Moffitt and Robert Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005); Tricia Jones, 'Emotional Communication in Conflict: Essence and Impact' in William Eadie and Paul Nelson (eds), *The Language of Conflict and Resolution* (Sage Publications, 2000); Daniel Shapiro, 'Pre-empting Disaster: Pre-mediation Strategies to Deal with Strong Emotions' in Margaret Herrman (ed), *The Blackwell Handbook of Mediation* (Blackwell Publishing, 2006) 309; Patricia Marshall, 'Emotional Competence and the Mediator' (2006) 9 *ADR Bulletin* 1; Michelle Maiese, 'Engaging the Emotions in Conflict Intervention' (2006) 24 *Conflict Resolution Quarterly* 187; Cheryl Picard and Janet Stiltaten, 'Exploring the Significance of Emotion for Mediation Practice' (2013) 31 *Conflict Resolution Quarterly* 31; Kiwan Kim, Nicole Cundiff and Suk Bong Choi, 'The Influence of Emotional Intelligence on Negotiation Outcomes and the Mediating Effect of Rapport: A Structural Equation Modeling Approach' (2014) 32 *Conflict Resolution Quarterly* 49.

¹⁹ See, eg, Peter Reilly, 'Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence' (2005) 21 *Negotiation Journal* 301; Lori Schreier, 'Emotional Intelligence and Mediation Training' (2002) 20 *Conflict Resolution Quarterly* 99.

considered better to 'vent' emotions away rather than engage with them.²⁰ The notion of venting or removing 'toxic' emotions from the 'rational' space of mediation may be contrasted with approaches, models and theories that emphasise the potential of engagement with the emotional aspects of conflict.²¹

Invariably, human emotion is experienced in the situations, elements and impacts of the conflicts that lead to mediation.²² Rather than ignoring emotion, mediation researchers and theorists suggest that mediators find ways to engage with emotion as part of the mediation process.²³ In the field, researchers and practitioners are assessing the complex research and literature in the philosophy and psychology of emotion²⁴ so that mediators may gain a more sophisticated understanding about how to address its presence in their mediation sessions.

The mediation literature has always acknowledged the place of emotion in conflict, but the analysis and interpretation of interventions and strategies to engage with emotion has sometimes appeared simplistic. In 1981, in their seminal work on negotiation, Fisher and Ury recognised emotion only to a limited degree, in the context of mediators separating the 'people' concerns from the 'problem' that forms the basis of negotiation.²⁵ A more sophisticated approach to emotion in negotiation is now growing in the literature

²⁰ See, eg, Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 2003)174-75.

²¹ Nisha Nair, 'Towards Understanding the Role of Emotions in Conflict: A Review and Future Directions' (2008) 19 *International Journal of Conflict Management* 359.

²² Jones and Bodtke, above n 6, 217-18.

²³ Poitras and Raines, above n 7.

²⁴ See, eg, research into the brain now informs some of the literature on emotion and conflict: Richard Birke, 'Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications' (2010) 25 *Ohio St Journal of Dispute Resolution* 477; Emily Beausoleil and Michelle LeBaron, 'What Moves Us: Dance and Neuroscience Implications for Conflict Approaches' (2013) 31(2) *Conflict Resolution Quarterly* 133.

²⁵ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Group, 1981).

of this field. For example, Barry concludes that '[e]motion, indeed, may well be not the missing link in negotiation, but in fact the very essence of it'.²⁶ In mediation, Jones and Bodtker suggest:

that to gain a full understanding of the nature of the conflict (or the relational tensions, interests in the dispute, underlying concerns, opposing positions etc. arising from them) mediators must attend to the emotional triggers that influenced how the disputants recognized and defined the conflict and which emotion scripts [patterns of behavior] they invoked.²⁷

These authors emphasised that mediators need to reappraise their approach to emotion and develop strategies such as identification of emotion, and questioning around emotional issues to engage with this concern.²⁸ Menkel-Meadow has noted that the original concept of separating the people from the problem has been revised.³⁰ Fisher and Shapiro have also now expanded negotiation theory to provide a number of approaches to emotion.³¹

Emotion in mediation has been described as including physiological, cognitive and communicative dimensions.³² Nair suggests that emotion generally involves a sensed or felt response that can be perceived by those experiencing it.³³ The emotion may lead to a reaction, behaviour or response. A cognitive response to emotion involves an appraisal of the felt response. Expressive emotion is the means by which we communicate emotionally: 'the behavioral response to or expression of the cognitively appraised and physiologically "felt" experience'.³⁴ These responses are deeply

²⁶ Bruce Barry, 'Negotiator Affect: The State of the Art (and the Science)' (2008) 17 *Group Decision and Negotiation* 97, 104.

²⁷ Jones and Bodtker, above n 6, 223.

²⁸ Jones and Bodtker, above n 6, 221-23.

³⁰ Carrie Menkel-Meadow, 'Chronicling the Complexification of Negotiation Theory and Practice' (2009) 25 *Negotiation Journal* 415, 416.

³¹ Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin Group, 2005) ch 1.

³² Jessica Katz Jameson, Andrea M Bodtker, Dennis M Porch and William J Jordan, 'Exploring the Role of Emotion in Conflict Transformation' (2009) 27 *Conflict Resolution Quarterly* 168.

³³ Nair, above n 21.

³⁴ Jones and Bodtker, above n 6, 221.

complex, part of our universal human experience, and are also nuanced by our cultural and social backgrounds. Our emotional responses are framed by our value system and our perceptions of right and wrong. For example, Jones and Bodtger suggest that threats to identity³⁵ may invoke shame-based cycles that are difficult to circumvent, yet without circumvention may lead to unresolved shame and anger.³⁶ van Kleef and his co-researchers advise that our sense of power and status may be affected by emotion, thus impacting on the ways we relate to others.³⁷ The way that disputants experience conflict in the moment, and after the event, is influenced by their emotional responses. Emotion follows the experience of conflict, and therefore emotion will always be present in any mediation to address conflict.

Mediators may need to observe and respond to emotion with deeper purpose and understanding. Merely witnessing emotions, or encouraging parties to express their emotion, may not be productive. Retzinger and Scheff argue:

Just venting anger is not only simplistic ‘there we’ve done anger’, but it is also potentially damaging as expression of anger can be humiliating for the other party and may escalate conflict.³⁸

In the field of mediation, commentators are increasingly raising options to deal with emotion in negotiation and mediation practice. Fisher and Shapiro advocate that negotiators develop a greater understanding of the ways that emotions affect the negotiation process.³⁹ Schreier⁴⁰ and Reilly⁴¹ call for training to address this practice concern more effectively.

³⁵ Ibid 222.

³⁶ Ibid 223.

³⁷ Gerben van Kleef, Carsten De Dreu, Davide Pietroni, and Antony Manstead, ‘Power and Emotion in Negotiation: Power Moderates the Interpersonal Effects of Anger and Happiness on Concession Making’ (2006) 36 *European Journal of Social Psychology* 557.

³⁸ Suzanne Retzinger and Thomas Scheff, ‘Emotion, Alienation and Narratives: Resolving Intractable Conflict’ (2000) 18 *Mediation Quarterly* 71, 71.

³⁹ Fisher and Shapiro, above n 30, ch 2.

⁴⁰ Schreier, above n 19.

⁴¹ Reilly, above n 19.

Different models of mediation offer diverse approaches to addressing emotion during mediation.⁴² The facilitative mediation model, anchored in the heritage of principled negotiation and its focus on maximising individual gains by exploring mutual interests, encourages mediators to focus on parties' concerns that include their fears and their hopes, as well as their substantive needs.⁴³ This approach could be described as being based on a transactional or individualist world-view. The facilitative model includes strategies such as using the ground rules of mediation, taking breaks, and discussing issues in private session or caucus, as methods to address emotion.⁴⁴ This model is most frequently taught in Australian mediation training.⁴⁵ Mediators using the 'understanding' model, a model based on the collaborative problem solving approach of the facilitative model, also recognise the importance of emotion and deal with it whilst addressing substantive issues through an associated 'looping' process.⁴⁶ This model particularly identifies the role of lawyers in providing a parallel conversation on rights and risks while their clients engage with these issues.

There are a variety of models that are more theory based than the facilitative model and these models include a focus on emotion. The transformative approach to mediation is based on a relational world-view and aims to foster empathy and recognition between disputants thereby overcoming the crisis in conflict interaction which created the dispute. This model explicitly acknowledges the role of emotion as a means to achieve greater inter-disputant recognition.⁴⁷ The mediator's responsibility to acknowledge and encourage emotional expression is emphasised in transformative mediation training and practice. Folger and Bush articulate 'there are facts in the feelings' as the fifth of ten hallmarks of practice:

⁴² Jameson, Bodtker and Linker, above n 17, 29.

⁴³ Ibid.

⁴⁴ Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, Butterworths, 3rd ed, 2011) 43-45.

⁴⁵ Ibid 46.

⁴⁶ Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation through Understanding* (American Bar Association, 2008).

⁴⁷ Robert Bush and Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, revised ed, 2005).

Therefore, when parties express emotions, the mediator does not just wait until it is over and then go on with issue discussion. Instead, the mediator asks the parties both to describe their feelings and, perhaps more important, to describe the situations and events that gave rise to them.⁴⁸

Bush and Pope emphasise the power of accurate ‘reflection’ as the primary response in transformative mediation practice to acknowledge even strong or so-called ‘negative’ emotion like anger.⁴⁹ The impact of reflecting strong and difficult language and content, without moderation or reframing, is to enable a disputant to expand, explain or amend their own understanding of the conflict situation. This style of intervention also enables the listening disputant to hear the content in another voice. The aim of this model, Bush and Pope suggest is ‘to make what is being said more audible so the parties can understand themselves and each other better’.⁵⁰ Such strategies involve acknowledgement to the speaking party, and the kind of emotion-laden story sharing that may deepen both the speaking party’s understanding of the conflict, and facilitate recognition from the other disputant in the conflict. Thus the significance of validating emotion as a path to strengthening party recognition underpins transformative practice.

Narrative mediation theorists observe that societal discourses affect our emotional reactions to conflict.⁵¹ They perceive that emotional reactions are not inevitable or essential to individuals, but are part of the complex story we construct about our role in society.⁵² Narrative mediators encourage disputants to understand power, and to perceive the way that expectations are constructed through societal

⁴⁸ Joseph Folger and Robert Bush, ‘Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice’ (1996) 13 *Mediation Quarterly* 263, 272.

⁴⁹ Robert Bush and Sally Pope, ‘Changing the Quality of Conflict Interaction: the Principles and Practice of Transformative Mediation’ (2002) 3(1) *Pepperdine Dispute Resolution Law Journal* 67, 88.

⁵⁰ *Ibid* 89.

⁵¹ John Winslade and Gerald Monk, *Narrative Mediation* (Jossey-Bass, 2000) ch 1.

⁵² John Winslade and Gerald Monk, *Practicing Narrative Mediation: Loosening the Grip of Conflict* (Jossey-Bass, 2008) 7.

discourses, to allow disputants to understand the emotional reaction to these discourses.⁵³ This understanding potentially allows the disruption of ‘stories of mutual blame’ and the reconstruction of more harmonious stories amongst parties to conflict.⁵⁴

The ADR option of restorative justice is another approach that deals explicitly with emotion. The need to deal with the emotional concerns of both victims and offenders is one of the hallmarks in restorative justice processes such as conferencing.⁵⁵ There is growing recognition of the emotional benefits of restorative justice conferencing, where victims can recover from the effects of crime or conflict, and offenders may experience a degree of empathy for the other party.⁵⁶ The emotional benefits occur largely through the story sharing process of conferencing where the third party facilitator assists participants to tell the full story of the conflict that brought them to the conference.

As well as the kind of in situ acknowledgement, validation and exploration of emotion-laden narratives during mediation, common to transformative, narrative and restorative practices, there are other strategies to engage with emotion. These include meetings between the parties and the mediators prior to the mediation to specifically address areas of emotion,⁵⁷ and interventions for opening up space for emotional reappraisal such as through the use of ritual, art, and humor.⁵⁸ Jameson, Bodtker and Linker assessed strategies to engage with emotions through observation of mediators in simulations.⁵⁹ The mediators used strategies to grant legitimacy, encourage emotional identification, confront avoidance of emotion, paraphrase emotion, and encourage perspective taking.

⁵³ Ibid.

⁵⁴ Ibid 22-29.

⁵⁵ Bas Van Stokkom, ‘Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy’ (2002) 6 *Theoretical Criminology* 339.

⁵⁶ Nathan Harris, Lode Walgrave and John Braithwaite, ‘Emotional Dynamics in Restorative Conferences’ (2004) 8 *Theoretical Criminology* 191.

⁵⁷ Shapiro, above n 18.

⁵⁸ Maiese, above n 18, 189-90.

⁵⁹ Jameson, Bodtker and Linker, above n 17.

B *Dispute Resolution and Emotion*

In the court-connected context, in civil matters, lawyers acting on behalf of their clients can influence the way that the mediator will practice and in particular influence the discussion of emotional concerns in legal disputes.⁶⁰ Lawyers can sideline the issue of emotion and emphasise their preference for a focus on settlement. They can potentially narrow the issues to those related to the likely outcome of a case, and whether it should be litigated. They will also generally focus on quantitative questions of ‘how much the defendant is prepared to pay and the plaintiff willing to accept to avoid the delay, risks and costs of trial?’⁶¹ This approach limits the emotional dialogue as it privileges rational, rights-based concerns in conflict. Emotional issues, including issues such as the offer of an apology, are generally marginalised and this may result in clients who are disappointed with the experience of mediation.⁶² Commentators increasingly argue that parties in court-connected mediation should be allowed to engage with the process more fully, and have the opportunity to directly discuss their concerns, issues and emotions.⁶³

⁶⁰ Riskin and Welsh, above n 5.

⁶¹ Ibid 866.

⁶² Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009) 242-43. Relis argues that disputants wish to experience more in their mediation than merely a debate over rights. Lawyers steer the mediation away from emotional issues. She also argues that legal education can change the frame of lawyers practice to non-adversarial approaches which better ‘fit’ with the disputants’ emotional needs in court-connected negotiation and mediation: 244.

⁶³ Riskin and Welsh, above n 5, 875-76. See also Alison Finch, ‘Harnessing the Legal and Extralegal Benefits of Mediation: A Case for Allowing Greater Client Participation in Facilitative Mediation’ (2010) 21 *Australasian Dispute Resolution Journal* 155. Lawyers, where appropriate, can facilitate client input if they approach the mediation with the frame of non-adversarial practice: Donna Cooper and Mieke Brandon, ‘Lawyers’ Role in Family Dispute Resolution’ (2011) 22 *Australasian Dispute Resolution Journal* 198. New approaches are emerging in law and mediation to deal with conflict that require a range of legal approaches: David Hoffman, ‘Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR’ (2008) *Journal of Dispute Resolution* 11, 18.

Generally, legal practice and training privilege a rights-based, rational frame over emotions.⁶⁴ Lawyers involved in mediation may underestimate its significance and fail to see the psychological costs of neglecting emotion both for their clients and themselves.⁶⁵ Macfarlane writes:

Along with the other major professions, law has come to increasingly promote a culture of competence centred on technical rationality, in which specialist knowledge—the ability to predict legal outcomes—is prized above all other skills and aptitudes.⁶⁶

As Ryan cogently argues, lawyers do not perceive that emotional responses are relevant to a legal problem.⁶⁷ The legal worldview largely assumes that emotion is untrustworthy.⁶⁸ As the legal culture values the realm of the rational so highly, lawyers cannot be seen to succumb to the ‘whimsical and arbitrary’ emotional reactions that their clients exhibit.⁶⁹ Similarly, King has posited that Australian lawyers need to understand and engage with emotion in legal practice.⁷⁰ In particular, mediation offers the opportunity for clients to express themselves, and therefore mediators need to be willing to help them engage with emotion.⁷¹ As indicated earlier in this article

⁶⁴ Leonard Riskin, ‘Mediation and Lawyers’ (1982) 43 *Ohio State Law Journal* 29.

⁶⁵ Marjorie Silver, ‘Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship’ in Dennis Stolle, David Wexler and Bruce Winick (eds), *Practising Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) 357.

⁶⁶ Macfarlane, above n 4, 101.

⁶⁷ Lynne Henderson, ‘The Dialogue of Heart and Head’ (1988) 10 *Cardozo Law Review* 124.

⁶⁸ Ryan, above n 13, 231. See also Larry Krieger, ‘Human Nature As a Guiding Philosophy for Legal Education and the Profession’ (2008) 47 *Washburn Law Journal* 247.

⁶⁹ *Ibid* 248-60.

⁷⁰ Michael King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’ (2008) 32 *Melbourne University Law Review* 1096, 1122.

⁷¹ Many writers have noted the resistance of the legal profession to emotional concerns due to lawyers’ focus on the adversarial frame: Leonard Riskin, ‘Mindfulness: Foundational Training for Dispute Resolution’ (2004) 54 *Journal of Legal Education* 79; Chiara-Marisa Caputo, ‘Lawyers’ Participation in Mediation’ (2007) 18 *Australasian Dispute Resolution Journal* 84; Anne Ardagh and Guy Cumes, ‘Lawyers and Mediation: Beyond the Adversarial

to explore whether mediators in a tribunal setting engage with emotions, we interviewed mediators at VCAT about the role of emotion in their practice.

III RESEARCH METHODOLOGY

The overall aim of the research discussed in this article was to provide a base level understanding of contemporary attitudes and practice in a particular community of practice to support the literature and research in the field and to stimulate future research. The approach of the research was to explore the mediator stories in response to questions about their engagement with emotion and the strategies that they adopt during the mediation. We analysed these stories to elicit the major themes. We also related these findings to recent literature to identify the ways that emotion is being addressed in the mediation room in a tribunal setting. Mediators' self-reports of their own practice may be criticised, as mediators can describe their own practice in ways that differ from their actual practice,⁷² yet reflections on practice are often the best available source of data about mediation. Obtaining access to the mediation room, via observation or audio or video recording, is usually denied to protect the privacy of the process. Self-reports are also a significant record of mediator deliberations, and may be compared with other empirical sources. For instance, reflections of this type can be linked with other research, such as survey data used to benchmark mediator practice⁷³ and observations of mediators in simulations to identify interventions.⁷⁴ Combining such data and the relevant literature may provide multifaceted understanding of mediation practice.

System' (1998) 9 *Australian Dispute Resolution Journal* 72; Mnookin, above n 3, 166-72.

⁷² Kenneth Kressel, Tiffany Henderson, Warren Reich and Claudia Cohen, 'Multi-Dimension Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

⁷³ Poitras and Raines, above n 7.

⁷⁴ Jameson, Bodtker and Linker, above n 17, 35.

IV DATA ANALYSIS

Table 1 below gives the pseudonyms and summarises basic demographic information of the 16 mediators interviewed in this study.

Table 1: Participant Information

Pseudonym	Mediation experience in years	Gender	Professional Background
Charlotte	12	F	Planning
David	22	M	Law, Social Work
Edward	20	M	Law
Isabel	12	F	Law
Jon	14	M	Law
Nicole	not answered	F	Law
Owen	11	M	Planning
Kate	20	F	Law
Anne	13	F	Law, Economics
Barry	15	M	Law
Melissa	5	F	Planning
Fiona	25	F	Law, Education
Gary	6	M	Engineering
Larry	16	M	Law
Helen	15	F	Law
Patrick	6	M	Architecture, Engineering

* based on researchers' assessment of self-report

In terms of age there were five mediators in the 60 plus category; six mediators in the 50-60 category; four mediators in the 40-50 category and one mediator in the 30-40 category. There were equal numbers of female and male mediators in the sample. The majority of the mediators had a background in law, one was also a social worker and two had backgrounds in economics and education. Three mediators were former planners; one was an engineer and one had a background in architecture and engineering. The findings have been divided according to the major themes that arose through analysis and will now be discussed.

V THEMES IN THE DATA

A *Emotional Expression and its Relationship to the Mediation Outcome*

All the mediators in the study considered that emotion was a significant aspect of the mediation process at VCAT. They articulated differing attitudes to emotional expression in the tribunal setting. We described these attitudes according to whether mediators ‘encouraged’, ‘allowed’ or ‘controlled’ emotional expression in the mediation. The majority of mediators were assessed as willing to ‘encourage’ or ‘allow’, rather than ‘control’.

In their responses, nine of the 16 mediators described emotion as essential to the outcome of the mediation. For instance, Charlotte stated:

Emotion is fundamental to how things work out ... the role of emotion is just so influential as to how mediation proceeds and whether you get an outcome or not.

Edward spoke about encouraging emotional expression because ‘once they’ve let [emotion] go, they’re far more ready to talk ... [it’s] integral to a successful process in a way’. Larry saw the danger in pent up emotion, and stated: ‘[you] can’t have people bottled up because it’ll just crop up later, or they won’t stick to their agreement because they didn’t express their emotions’.

Owen described a situation where he believed his failure to insist on ground rules allowed greater emotional expression and led to resolution:

I had one this week in particular where I think a fella broke all the rules. One of them just yelled at the other, and I just thought, ‘I’m doing this all wrong’. And yet, he engaged and he enjoyed it, and we ended up then sitting down and resolving things, or talking things through.

Melissa described the inevitable intertwining of emotional and substantive issues:

Understandably a lot of people can't detach the emotion of it from the business side of it, you know. Whilst you can listen, you can't do much about it, but if you don't offer to listen, you're not going to progress.

This runs counter to the previously discussed notion traditionally offered by interest-based processes of 'separating the facts and emotions; the problem from the people'. However, interestingly, other mediators in this cohort do seek to separate the two areas, as we describe in the next section.

David articulated emotion in the context of his theoretical understanding of the role of emotion according to restorative justice, transformative and narrative mediation. He reflected on a movement away from interest-based practice. He was the only mediator in this sample to demonstrate a theoretical understanding underpinning his practice. David described his aim in mediation was to allow the disputants to have a 'more rounded conversation'. He saw the potential arising out of conflict conversations and believed it is useful to reach beyond 'two self-interested individuals negotiating an outcome [in] a fairly logical process, to having more of a conversation, which can include emotional content ...'.

Just three of the 16 mediators were concerned to distinguish the substantive issues of the legal dispute from any emotional elements. These mediators described how they sought to limit emotional expression and control it more firmly through ground rules, or by separating the parties. Helen and Larry, who are both lawyers and Patrick, who had a background in architecture and engineering, explicitly described their aim to achieve this distinction. Helen described her process simply as, 'I will put them at ease then separate the emotional component from the issue of the dispute'. Helen also stated that she moved to separate the parties if they begin to attack one another. She saw her role as requiring the diagnosis of what she described as unproductive emotion, 'If the emotional content is not productive, I will call it, and give people dignity and remove them, for example, if they are crying'. This approach differs from the mediators discussed above, who perceived all emotion as

productive, and were less inclined to separate parties even if they shed tears or had an emotional outburst.

Larry saw emotional expression as important, but certainly did not regard it as contributing to the kind of ‘rounded conversation’ that David described. Instead he stated that his aim is to ‘get it [emotion] out and dissipate it and then get rid of it’. He was wary of the impact of encouraging an emotional discourse between parties. ‘If you just think that person A has to express all his junk but if person B hears it all, they’re just going to be so furious ... it’s going to go nowhere’. This approach is characteristic of the notion of ‘venting’ the ‘junk’ in order to address the ‘real issues’ or the substantive elements of the dispute’. Patrick also described a demarcation between facts and feelings; ‘Separate them—emotions and facts—because emotions are there. I try and empathise, try to separate that, and in my view, give them the opportunity to vent that frustration, the anger, the grieving, whatever it is, and you can separate them from the main issue’. He empathised with the expression of emotion, yet once it was expressed, he considered that it needed to be separated from the ‘issue’ or substantive concern.

This distinction between two kinds of mediators: those who saw emotion as fruitful, productive and even essential, for the successful outcome of the mediation, and those who believed emotion should be limited, contained or reduced, was a major difference in this cohort, although the majority fell into the first group. Despite their different ways of addressing emotional concerns, all the mediators in this study were clear that they observed emotional concerns surface in their mediation sessions. Two out of the three mediators who approached emotion as something to separate from the discussion, were lawyers and were perhaps adhering to the focus on rational decision-making that is evident in the legal culture. However many of the lawyer mediators in this study did recognise the importance of emotion in dispute resolution. Notably, although mediators in the study often discussed their training in mediation in the context of reflecting on the model of mediation that they practiced, most often

the facilitative model,⁷⁵ there was little discussion of any education about emotion in their training. This suggests that emotion was not covered in any depth in the training, or if it was taught, the content and pedagogy did not have a lasting impact on the mediators.⁷⁶

B *Mediator Strategies: Allow or Encourage Emotional Expression*

One of the most interesting findings from analysis of the data of the VCAT mediators, was the extent to which these mediators recommended inclusion or support of emotional expression. From our analysis, 11 of the 16 mediators could be classified as either encouraging, or allowing emotional expression. For example, Edward summed up his attitude to emotional expression with the colloquial phrase ‘let it rip’ meaning ‘to allow something to happen forcefully or without interference’;⁷⁷ in this case, emotional expression. As Edward described it, the release of emotion is important: ‘If it happens, I let it rip until they exhaust themselves, unless it becomes destructive’. Others also expressed a high level of comfort with the expression of strong emotion. Barry expressed it as patience with emotional expression, allowing the parties to take the time to communicate about the emotions that matter to them: ‘If they are emotional, you have to let it play out’, he said. Another mediator, Fiona, identified differing levels of emotional expression according to the cultural background of the disputant. She recalled a particular incident where a man she described as ‘of European descent’ was ‘screaming, yelling and carrying on and the lawyer on the other side got very upset, [saying] ‘I’m going to leave if he continues like that’. Fiona said that she assured him, ‘‘but that’s just mannerisms ... just this man’s way of expressing himself’. Once the lawyer accepted that, then it was fine’. In this instance she adjudged the party’s

⁷⁵ For a detailed discussion of the model of mediation most practiced by the participants in this study and the ways that mediators improvised around this model: Kathy Douglas, ‘Mediator Stories of Tribunal Practice: Flexible and Fluid to Meet Parties’ Needs’ (2012) 21 *Journal of Judicial Administration* 237.

⁷⁶ Mediators were not specifically asked about their training so that this issue would emerge from the discussion if they thought it relevant.

⁷⁷ John Ayto (ed), *The Oxford Dictionary of English Idiom* (Oxford University Press, 3rd ed, 2009).

emotional expression as culturally appropriate, and communicated to the concerned lawyer that it was simply a way to express himself – evidently valuing the importance of this expression as part of the mediation. In this approach, she was educating the lawyer in the mediation about the importance of allowing emotion into the discussion.

Isabel also expressed her comfort with emotional expression. She identified a positive impact on the parties' relationships when a flow of emotions was encouraged:

I don't mind emotions flowing thick and fast during a mediation. I don't find mediations ever get out of control, but I don't mind people expressing themselves and really letting it out. After they do that, they actually walk out rather friendly towards each other, because it's often been that lack of ability to say [and] then have clarified exactly what was wrong [that has caused the conflict].

Jon observed that emotional expression has often been neglected in the lead-up to mediation and that the mediator is in the position to allow confined or unconscious feeling to be released and, most importantly, to be witnessed. Thus he chose not to shut people down but instead he validated emotional expression and sought opportunities to promote it:

Acknowledging their emotions is very important ... because that's the very thing that's been overwritten. If people say [to them], 'Get a life, get real!' [That] just shuts people down and they feel that they haven't been heard. They think: nobody has taken any notice of what I'm trying to say so it's not very important.

To overcome this feeling of being 'shut down', Jon recommended that mediators 'allow them some openings and opportunities to express how they're feeling, what's going on for them and if that means an outburst of anger, or an outburst of crying or an outburst of something else, then let them do it'. Melissa, who works on planning cases, also emphasised the need to allow neighbours to express how they feel although she admitted that this may sometimes take place more easily in private session:

You need to sort of just sit there and listen to them talk about their

neighbours and how they feel and let them get it out ... particularly when you're in private session with them, just to give them the chance to get it off their chest.

Owen observed that allowing emotional expression may not seem as though the mediator is being particularly active. He said: 'Even though you feel you're doing nothing, the fact that they have expressed themselves, or expressed the way they're feeling, is important or it makes them feel better'.

This sense that emotion is 'better out than in' offers a suggestion that depending on the attitude of the mediator, mediation may provide a safe place to enable a conversation in which emotion is expressed, recognised and where the fruits of emotional expression may be harvested. These may be matters that seem extraneous to the substantive elements of the dispute, such as neighbourly relationships. Many of these VCAT mediators seemed to recognise that emotional expression releases some of the most significant information for parties. Although operating in a legal context, these mediators saw value in allowing the emotional to be discussed alongside rights based concerns.

C Emotional Expression Aids Party Recognition of the Impact of Conflict

Three of the 16 mediators, who supported emotional expression, specifically described it as a means to allow the parties and the mediator to listen to, and recognise, the impact of the conflict. Edward saw emotional expression as significant so that both sides can acknowledge the impact: 'I think it's important that one side knows what they're up against, and if someone wants to let it all hang out and scream and yell and carry on, let them'. Kate also emphasised that understanding the impact is one of the reasons that emotional expression, and acknowledgement, are significant. She reports: 'It's important to acknowledge the emotion of the parties, to give them the opportunity to say how the matter has affected them'. Jon emphasised the importance of parties seeing the impact of the conflict on each other and also noted that emotional expression

allows mediators to understand what is most significant for the parties. He said that it's:

important for the other side to see the other party's emotions and how things affect them. It's important for us as mediators to see how that person has been affected. Having an understanding of their emotional state and where they're coming from or how they may have been impacted allows us to dig into our tool boxes and help them a bit more.

The notion that parties' recognition of the impact of the conflict assists conflict resolution, is one of the basic precepts in the theory of transformative mediation. Bush and Folger describe it as part of the relational aspect of the human character that they and other theorists see as underlying healthy human social life.⁷⁸ They argue that assisting parties to move from an individualistic perspective to a shared perspective is a significant part of conflict transformation.

D *Interventions to Encourage or Allow Emotional Expression:
Reflection, Paraphrasing and Questions*

Six of the 16 mediators describe interventions that are designed to acknowledge, empathise with, or encourage emotional expression. Fiona outlined a thorough list of interventions in response to a question about this topic. She included examples of reflection of the emotional content. Fiona used a structure of reflection or paraphrasing the party's emotion and concern, using a framework like: 'I can see you were (upset, angry, stressed) about this'. She reported: 'I'll tell them back what they're saying to me, so that they know that they've been heard', thus articulating one of the primary reasons for reflection, paraphrasing or summary of the emotion and substance of a disputant's utterance: to allow the speaking party to feel that their perspective, values, concerns and needs have been heard and acknowledged. She considered that emotional expression is one aspect of a party's efforts to communicate their distress: 'If someone's angry, it's like, "I'm trying to show you how it upset me and how I feel about it"'. She also referred to active listening as a useful strategy.

⁷⁸ Bush and Folger, above n 46, 23-26.

Charlotte described her desire to expose the important emotions underlying other issues. She stated that she would like to get better at trying ‘to understand [underlying issues] earlier on, to the extent that [the parties] are prepared to reveal them to you because the dispute might be about overlooking from a window that’s proposed in a building next door but you can sense that underlying it is some other neighbor[hood] issue, or some relationship issue. It might just be a symptom in a series of events’.

Fiona believed that explicitly inviting people to explore underlying issues earlier in the mediation can be helpful in the process. She described a strategy of explicitly eliciting these hidden concerns by questioning the parties: ‘If there’s something else that might be influencing your relationships, or this situation that might affect the ability for us to work through some solutions to get to an outcome, then I need you to tell me, and whether you tell me privately or whether you want to share that here, we need to get to it’. This is the kind of mediator intervention focused on providing parties with the opportunity to fully explore their conflict.

Kate’s efforts to listen and acknowledge emotion, extends to ensuring that parties listen to each other’s emotional expression. She asks parties for their attention when she feels listening has diminished.

If someone’s not listening, like packing up... or chat, chat, chat, I’ll stop the person who’s talking and say, ‘I just need you to wait while Fred and Jim have a quick discussion because it’s important that Fred and Jim hear what you’re saying’. So the interventions have got to be face-saving wherever possible and sympathetic to both sides.

She thus fostered listening to emotions between the parties as well as listening to them herself.

David’s strategy involved asking direct questions such as ‘How is this affecting you emotionally? What did that leave you feeling? Can you describe that to the other party?’ He also sought to clearly name the emotion that the party is describing, or alluding to in their

conversation, either by encouraging the party to identify the emotion or by naming it himself. He said: 'Interventions, in a sense, are really trying to get them to identify and label an emotion'. He further explains: 'I use [what I call] the *doctor* theory, doctors don't do much for you except label things, but that makes you feel a whole lot better often. [It's the] same with emotions, naming them is a really important part of the process'.

Jon preferred to keep his interventions spontaneous and minimal. He stated that he reflects the emotions sometimes or seeks to acknowledge them in an effort to contain them. He was also careful about ensuring that one party does not attempt to shut down the other party's emotional expression. He saw it as part of ensuring adherence to a ground rule around respectful listening, and he will explain it to the parties: 'Part of the process is that you need to acknowledge and not 'over-talk' the other person and try to minimise what they're actually saying'. Thus many of the mediators used strategies as ways to enable parties to feel heard and acknowledged. This kind of acknowledgement may lead to increased self-understanding, as parties hear their own perspective and emotion reflected back to them.⁷⁹ It may also assist the other party to hear the perspective emotion of their 'opponent' in ways that may deepen their understanding.⁸⁰

E *Interventions to Allow or Control Emotional Expression: Use of the Ground Rules, Guidelines and Stages of the Process*

The major strategy to address emotion stated by many participants was to set clear ground rules or guidelines in the introductory phase of the mediation.⁸¹ The notion of setting ground rules or guidelines is part of the initial stage of the process of facilitative mediation.⁸² It often involves requesting disputants to avoid interrupting each other, behave courteously and to resist name-calling. The use of ground

⁷⁹ Bush and Pope, above n 48, 88-89.

⁸⁰ Ibid.

⁸¹ This was a strategy identified in a United States study of mediators: Poitras and Raines, above n 7.

⁸² Sourdin, above n 2, 219-22.

rules may have developed as part of the mediator exercising a locus of control, as an element of the 'separate the people from the problem' focus inherited from principled mediation. In facilitative mediation, the stages of the process are also usually controlled by the mediator, who indicates, as part of the stages of the process when the disputants should: converse with each other; address the mediator; undertake a private session; or jointly negotiate.⁸³ This framework of stages is another potential element of mediator control. Although the way in which both the structure of mediation, and the guidelines are used to either enhance or restrict opportunities for emotional expression by the disputants will depend on the mediator's sense of the purpose of the process and the utility of emotion.

The mediators who used these strategies sometimes described them as part of a framework to limit or control emotional expression. Five of the 16 mediators reported using ground rules with this intention. For example, Isabel described establishing strong ground rules and then loosening control as the mediation progresses. She stated that the ground rules 'rarely have to be used because ... I can normally anticipate [emotional cases]'. She assessed the parties' level of tension from their body language and provided ground rules to allow the parties to feel comfortable in the mediation setting. Fiona scrupulously sought to ensure even-handedness when enforcing a ground rule, stating that she switched from a terse manner (when enforcing a ground rule) to a more gentle approach. She sought to ensure both parties understood that ground rules would be applied without partiality. Nicole was flexible in setting ground rules and sought to set guidelines which suited the parties' preferences in communication: 'I try to be clear at the beginning about what people are ... prepared to accept and not accept. Then I try to refer back to that as an intervention rather than being too controlling of the emotion itself'. Owen combined strong ground rules and clarity of expression with empathic body language. He also mixed verbal expression with non-verbal communication to provide a mood of empathic command rather than overt control in his mediation sessions: 'I have a loud voice ... I even said to a guy 'I can yell as loudly as you can. I can be as angry as you'. But he liked

⁸³ Ibid 219.

it by and large'. He also said, '[with] crying, you've got to be sympathetic. Show empathy, I think that's the important thing, sometimes you've just got to show them [with] your body language'.

Eight of the participants sought to separate the parties into private sessions (caucus) if their interaction was becoming highly emotional or aggressive.⁸⁴ For example, Barry reported that when someone is becoming 'particularly aggressive or loud, or they are very agitated or angry' he will 'get them into separate rooms'. Gary and Kate also reported aggression as a trigger for separate sessions.

Anne and Nicole saw the purpose of private sessions slightly differently. Anne described her response to distress as offering a break for the parties from the intensity of the experience: 'If people are particularly distressed, I'll put an end to it to give them time out either on their own or with me, [it] depends'. Nicole also preferred to give people the maximum time in joint session rather than retreating to private sessions:

... sometimes it just has to be that someone cries as they're talking and that's fine, or someone yells a bit as they're talking and I think that's fine but there might be a point where someone needs privacy or a bit of space and then, yeah, breaks.

For Nicole, the breaks or private caucus were not a method of 'controlling' emotion, instead she believed that breaks may provide an opportunity for parties to find some privacy or take some reflection time. Thus, mediators use similar strategies with differing motivation or purpose, such as the use of private sessions or caucuses, where some mediators see their use as a way to limit or reduce emotional expression whilst others such as Nicole, will use caucus to enable reflection on emotional issues.

⁸⁴ Private sessions are used to speak privately with parties without the other party present. Private sessions are often used to explore issues, option identification, reality test proposed settlement options (assessing alternatives) and preparing for the negotiation phase: Sourdin, above n 2, 237. This strategy was also identified as commonly used in the United States study of expert mediators: Poitras and Raines, above, n 7.

IV DISCUSSION

One of the important findings in this study was the level of comfort with emotional expression by so many of these mediators who work in a tribunal setting, and have a legal background. This would seem to be in contrast to earlier studies, however the mediators in this study were operating in a tribunal rather than a court. Tribunals are more informal than courts, and VCAT has a long history of providing mediation for disputes.

All of the mediators in this sample acknowledged that emotional concerns impact on mediation, although that understanding appeared to be intuitive. Nearly all mediators failed to describe theories about emotion influencing their practice. In the minority, mediators such as Isabel and Jon did describe beliefs that emotional expression heightens the power of the disputants' communication, and enables understanding of the richness of the conflict narrative. These mediators shared the view that mediation offered a rare opportunity to permit an emotional conflict conversation. These reflections refer to the kind of emotionally enriched dialogue recommended by theorists in restorative practice, as well as transformative and narrative mediation,⁸⁵ although Isabel and Jon did not allude to these theories in their interview responses.

In fact, all but one of these mediators failed to relate their practice to any understanding of the current theoretical exploration of the psychology of emotion in general, or of the specific role of emotion in mediation. In spite of this widespread ignorance of research, theory and practice in the area, the mediators expressed an intuitive belief that addressing emotions was not only important in itself, but had an impact on the progress and outcome of mediation. They suggested that emotional expression might deepen understanding of the impact, and potentially provide the impetus toward resolution or cooperation. Many of these mediators supported the notion that allowing or encouraging emotional expression may permit both the other party, and the mediator to more fully understand, and go on to

⁸⁵ Bush and Folger, above n 46; Winslade and Monk, above n 50.

address, the underlying issues motivating the mediation.

David was the sole mediator in this sample who expressed any knowledge of relevant theory. He articulated his understanding that the development of mediation practice beyond the original interest-based framework towards newer structural understandings based in transformative, restorative, and narrative theory and practice may provide helpful approaches for mediators attending to emotional expression. As mature practice in this nascent field develops, the range of interests, backgrounds and theoretical understanding of individual practitioners will broaden.⁸⁶ At the moment, the dearth of theoretical understanding amongst mediation practitioners prevents the foundations of their practice being explicit, rather it is often grounded in ‘what works’, and constrains mediators to making instinctive responses which may have validity in their own field of practice, but may also indicate the need, in a maturing professional field, for a more sophisticated understanding of this significant area of practice.

Our research identified a number of practice interventions relating to emotion in mediation. The mediators spoke about reflecting and paraphrasing emotion, the kinds of strategies used in most models of mediation, but especially in facilitative and transformative practice. They sought to expose or reveal underlying issues. Some described the role of questioning. Others emphasised the importance of labeling and naming emotions. Jameson, Bodtker and Linker identified similar interventions in their analysis of mediator strategies in mediation simulations.⁸⁷ They describe the acknowledgement of emotion by mediators as ‘granting legitimacy’ when the mediator ‘verbally or nonverbally acknowledges the emotion a disputant is expressing’.⁸⁸ These researchers also discussed emotional identification as a mediator strategy. One widely used strategy in the

⁸⁶ Rachael Field, ‘Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination’ (2011) 22 *Australasian Dispute Resolution Journal* 8; Michael D Lang and Alison Taylor, *The Making of A Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000) 34.

⁸⁷ Jameson, Bodtker and Linker, above n 17, 35.

⁸⁸ *Ibid.*

simulations they assessed was the asking of questions to unpack or identify the emotional concerns of disputants.⁸⁹ Mediators in this study also use questioning and unpacking of emotion as a strategy, although they did not describe perspective taking. Jameson and her co-researchers identified paraphrasing emotion as the most common strategy; a tactic that our mediators described as reflecting, paraphrasing or summarising.⁹⁰

The mediators at VCAT in this study frequently described their use of the structure of the mediation process to attend to emotional expression. Mediators spoke of using the ground rules, offering private caucus, and taking a break, as key strategies to deal with emotion, yet they used these interventions both with subtlety and with differing intentions. Mediators such as Owen, Nicole and Fiona were aware of the impact of mediator voice, manner, non-verbal and verbal communication and impartiality to affect emotional expression. Several of the mediators indicated using careful discernment about how to offer private sessions or caucus, especially around issues like how, and when, to allow tears or anger to be expressed in the public sessions. In another subtle use of the process, mediators like Anne and Nicole saw caucus and private sessions as party-led (to provide reflection and quiet time) rather than process-driven (as an automatic stage of the mediation).⁹¹

These findings raise a number of questions. How can we assess the fruitfulness of emotional expression? Does a mediator's capacity to encourage, allow or control emotional expression depend on their philosophical approach, personality, professional background or their training and skills in enabling emotional expression? How would more understanding and training in emotional capacity assist mediators? What is the purpose of allowing, encouraging or controlling emotional expression? These and other questions would

⁸⁹ Ibid 37.

⁹⁰ Ibid 38.

⁹¹ Sourdin, above n 2, 237-39. As indicated, the private session or caucus is defined as the stage where mediators prepare the disputants to begin negotiation and explore any issues that they have not yet canvassed in joint session: 243.

benefit from more in-depth research, through surveys, interviews, and observation of mediation in practice or in simulation.

VII RECOMMENDATIONS

A *Broaden the Repertoire of Skills and Intervention Choices around Emotional Acknowledgement*

If, as many of these mediators intuitively believe and some researchers and practitioners allege, mediation outcomes are affected by the mediator's ability to engage with emotional aspects of the dispute, then mediators need to increase their capacity and skills to address and engage with the emotional underplay of a dispute.

The mooted relationship between emotional expression and the durability and outcome of mediation would be an important area of future research. Developing a wider spectrum of interventions beyond setting ground rules and ensuring their adherence, and addressing emotions in private sessions, which were the interventions most commonly described by mediators in this group, would be a useful first step. Interventions from restorative justice, narrative and transformative mediation may be used to explicitly explore and acknowledge emotions and provide a framework for mediators to understand the purpose and intent of their interventions around emotion. For example, transformative mediation theorists and practitioners such as Bush and Pope,⁹² describe specific interventions around reflection or paraphrasing emotion and content, as a foundation of mediation practice.

Understanding a broad spectrum of purposeful intervention responses may allow mediators to support parties to explore emotions, as part of the path to conflict management. Writers have begun to emphasise that mediators will often require training and professional development to enable them to focus on emotion in

⁹² Bush and Pope, above n 48, 88-89.

mediation.⁹³ Including emotion as an area of study for mediators in professional and academic courses is a major recommendation from this study.⁹⁴

The importance of adequate preparation is a common theme in contemporary mediation practice. Leary, Pillemer and Wheeler,⁹⁵ and Shapiro and Fisher,⁹⁶ describe pre-session strategies to prepare for the emotion of negotiation. These strategies are intended to prepare negotiators and mediators to develop emotional agility and balance, so that they recognise the utility of emotions, and resist emotional avoidance. As part of professional practice, Schreier⁹⁷ urges mediators to develop emotional self-awareness and self-regulation to help address emotion more skillfully. Mediators will also use preparation strategies with the parties to encourage exploration of the emotional dimensions of the dispute as part of intake sessions with disputants.

B *Encourage Exploration of the Value of Emotional Expression in Mediator Education, Research and Practice*

In this study it was evident that mediators were largely unaware of research and theory in emotion that could support their decision-making about the best approach to emotion in mediation practice. Only one of the mediators in this study (David) articulated any theoretical understanding of the topic of emotion. This may have been due to his background in social work and restorative justice. In

⁹³ Tricia Jones, 'Emotion in Mediation: Implications, Applications, Opportunities, and Challenges' in Margaret Hermann (ed), *The Blackwell Handbook of Mediation* (Blackwell Publishing, 2006) 277, 284. For other writers calling for improved training see above n 19.

⁹⁴ This has begun to happen in Australia in short course training: see, eg, LEADR, 'Working with Emotions in Mediation', <<http://www.leadr.com.au/training/working-with-emotions>>. ADR law teachers include emotion in the debriefing of role plays in their subjects but do not generally include a great deal of theory: Douglas and Batagol, above n 13, 115-16.

⁹⁵ Kimberlyn Leary, Juliana Pillemer and Michael Wheeler, 'Negotiating with Emotion' (2013) *Harvard Business Review* 96.

⁹⁶ Fisher and Shapiro, above n 30.

⁹⁷ Schreier, above, n 19, 101-3.

general, much of the field of mediation has been accused of lacking a strong grounding in theory, possibly due to the dominance of expediency in the application of mediation and other alternative dispute resolution processes in legal and other fields.

Encouraging deeper theoretical understanding of emotion in mediation may be addressed through education and professional development. Recent conferences on negotiation have focused on this topic.⁹⁸ Colloquia and conferences to investigate the role of emotion in mediation and explore the current theory, practice and education in this topic would assist understanding and support practice development. Specific training in emotional theory and practice using the skills and practice articulated in transformative, narrative and restorative practice would be useful as part of mediation training and professional development. We do not advocate that mediators adopt these models but suggest that the various approaches to emotion and conflict articulated in these models should be considered as part of mediator education and reflective practice.

VII CONCLUSIONS

In this research study, the majority of mediators acknowledged the significance of emotion in their mediation sessions. The mediators usually preferred to encourage and allow emotional expression rather than controlling or shutting down party emotion. This was a surprising outcome given the research findings about the lack of emotional expertise in lawyers and other professionals with a strong focus on technical proficiency. Although it is not unsurprising that mediators would be a cohort of legal and dispute resolution

⁹⁸ Mario Patera and Ulrike Gamm, 'Emotions - A Blind Spot in Negotiation Training' in Christopher Honeyman and James Coben (eds), *Venturing Beyond the Classroom* (DRI Press, 2010) 335; Melissa Nelken, Andrea Kupfer Schneider and Jamil Mahuad, 'If I'd Wanted To Teach About Feelings I Wouldn't Have Become a Law Professor' in Christopher Honeyman and James Coben (eds), *Venturing Beyond the Classroom* (DRI Press, 2010) 357.

professionals with a stronger interest in and understanding of the emotional dimension of dispute resolution than much of the literature would anticipate, it is also evidence of the shift in practice that is already occurring: a shift towards more awareness of the emotional dimensions of conflict and their use in the mediation room. Notably, while these findings were positive, the relative naïvete around the theory and purpose of practice around emotional expression suggested that more training is needed.

While the mediators in this study seemed to lack an understanding of why they intervened in the ways that they did, they offered a range of responses and interventions. The research confirms the findings of Jameson, Bodtker and Linker that mediators use strategies that their mediation experience shows are effective when addressing emotional expression.⁹⁹ Although learning in situ is a part of any profession, a clearer theoretical and methodological approach would enable mediators to practice with a clearer understanding of the purpose of their interventions. For this reason, mediator training could usefully include a greater focus on theory, an array of mediation models, and specific practice skills to address emotion. Further research on the impact of emotional expression on conflict transformation and resolution would also assist the shift in paradigm to a more holistic approach to dispute resolution.

In the realm of interpersonal conflict communication, where subjectivity and individual differences are substantial, evidence-based practice is not easily quantified or repeated from one situation to another. These research findings support the accumulating literature suggesting mediators' experience in practice, and in simulation of practice, attests to the significance of attending to emotional expression in mediation. At the very least, these findings lead us to urge the field of dispute resolution practitioners, trainers, researchers and theorists to become more conscious of emotions in mediation, less fearful and tentative in their approach to seek understanding of the impact of emotions, and more thoughtful about education and training. Through education, research and exploration

⁹⁹ Jameson, Bodtker and Linker, above n 17.

we can help mediators to grow wiser and better informed about the reasons for their attitudes to emotional expression, and more skillful in the use of strategies in mediation. This may assist them to become more emotionally adept as mediators, and to achieve improved outcomes in mediation that will better meet party needs.