

Mediator Immunity in Australia *

ROBYN CARROLL †

‘There is a heavy burden of justification on those who claim an immunity or privilege.’¹

1. Introduction

A. The Immunity Debate

The question whether mediators can and should be immune from liability arising out of their mediation practice has largely been addressed in piecemeal fashion through legislation and carefully drafted mediation agreements. Yet doubts persist that matters can be left as they are. In the past decade several key bodies have raised questions about immunity that have not yet been resolved.² Most recently, debate on the issue has been squarely called for by the National Alternative Dispute Resolution Advisory Council (hereinafter NADRAC) in its discussion paper *The Development of Standards for ADR*.³ Encouraged by the open-ended questions posed by these bodies and the urgings of a number of experienced mediators that further debate is needed on this issue in Australia, this article will review the legal and policy arguments for and against mediator immunity. While there have been deliberations by advisory bodies and academic writers in Australia and the United States, until fairly recently there has been little evidence in Australia of public debate on the significant privilege that has been conferred on mediators through statutory immunity provisions.

The term ‘immunity’ is usually used in a legal context to refer specifically to the protection against civil suit afforded to judges, other participants in the judicial system and quasi-judicial officers and bodies. This is common law immunity. In this article the term is used more broadly to include two other situations where

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† Senior Lecturer, Law School, The University of Western Australia.

1 *Giannarelli v Wraith* (1988) 165 CLR 543 at 575 (Wilson J).

2 New South Wales Law Reform Commission (hereinafter NSWLRC), *Alternative Dispute Resolution: Training and Accreditation of Mediators* Discussion Paper 21 (1989); National Alternative Dispute Resolution Advisory Council (hereinafter NADRAC), *Primary Dispute Resolution in Family Law* (Canberra: The Council, 1997) and *The Use of Alternative Dispute Resolution in a Federal Magistracy* (Canberra: The Council, 1999); Australian Law Reform Commission (hereinafter ALRC), *Review of the Adversarial System of Litigation: ADR — Its Role in Federal Dispute Resolution* Issues Paper 25 (1998).

3 NADRAC, *The Development of Standards for ADR* Discussion Paper (Canberra: The Council, 2000).

mediators have protection against civil suit. First, where a statute provides that a mediator is not liable for any civil actions arising out of their conduct as a mediator.⁴ Second, where a mediator's civil liability is excluded or limited contractually by the parties. I will refer to the latter as 'contractual immunity' to distinguish it from common law and statutory immunity. Most of the attention in this paper will be on common law and statutory mediator immunity, which are imposed on the parties, rather than contractual immunity, which is agreed to by the parties.⁵

Common law immunity does not necessarily provide mediators with the protection considered necessary to maintain the attraction and integrity of the mediation process. For this reason, statutory provisions have been enacted to provide heightened and more certain protection. The same can be said for a number of other legal principles that support the mediation process. These principles include confidentiality, privilege and disclosure provisions. Legislating for immunity is part of a general trend that can be observed in the field of alternative dispute resolution (hereinafter ADR).⁶ The scope and operation of these provisions varies between statutes and jurisdictions.

In 1992, two leading writers on ADR in Australia wrote:

Australia has no comprehensive legislation dealing with the related issues of appropriate standards of behaviour for mediators, mediator liability and immunity and mediator training and accreditation. ... [T]he issues are extremely complex and incapable of precise answers applicable to all situations.⁷

There have been many developments in the years since this comment was made. It still remains the case, though, that there are no comprehensive or uniform standards applied to mediators in Australia. While it may be undesirable to impose a unitary standard of training and accreditation on the diverse forms of mediation practice, there are strong arguments to support a unified approach to legal regulation of mediation practice in its diverse forms across Australia. Increasingly, efforts are being made in Australia to achieve an appropriate balance of interests through development of legal principles. For example, the Law Council of Australia has prepared model legislation for court-annexed mediation, which contains provisions relating to immunity, privilege and confidentiality in

4 Statutory provisions conferring immunity sometimes refer to 'exoneration' or 'protection' of mediators.

5 Of course contractual immunity also derives its effectiveness through the law, namely the law of contract where public policy issues also restrict the freedom of the parties to agree to certain terms of immunity.

6 For commentary on this trend see, for example, John Wade, 'Current Trends and Models in Dispute Resolution: Part II' (1998) 9 *ADRJ* 113; Tom Altobelli, 'Mediation in the Nineties: The Promise of the Past' (2000) 4 *Macarthur Law Review* 103.

7 Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (1992) at 241.

mediation of civil court proceedings.⁸ The immunity provisions in this model legislation will be discussed in more detail in part 3.

All mediators are likely to feel more comfortable knowing that they will not be drawn into defending themselves against allegations and possibly litigation brought by parties, and possibly others, dissatisfied with the process or outcome of a mediation. Mediators from other professional backgrounds are only too aware of the high cost of avoiding potential liability suits for both the professional and their clients. Yet civil liability rules might be expected to play an important role in protecting the people for whom the services of professionals and mediators are provided. These rules can protect consumers by setting community standards and providing compensation when loss is suffered through the fault of another. As we examine the arguments for and against mediator immunity, we will recognise the twin concerns to provide some level of protection to mediators from dissatisfied consumers and at the same time to ensure an acceptable degree of accountability of mediators for their practice.

The theoretical and practical issues concerning immunity of mediators cannot be addressed without considering the issue of accountability of mediators and mediation service providers. The greater the immunity conferred on mediators, the more pressing becomes the question of how to ensure that consumers are receiving appropriate and acceptable standards of mediation. Of course immunity only precludes or restricts the availability of civil action. As illustrated by the NADRAC discussion paper *The Development of Standards for ADR*, there are numerous other mechanisms for attaining, maintaining and enforcing acceptable standards of mediator conduct.⁹ On a practical level, it needs to be recognised that even if all forms of immunity were removed, the same issues of standards and accountability would remain. It also needs to be kept in mind that civil action is only available for identifiable breaches of legal obligations. In reality, many instances of alleged misconduct by mediators for which parties or others might seek to have their mediator held accountable would not fall into this category. Clearly issues and concerns about standards and accountability will remain whatever view is taken on immunity.

Mediator immunity raises many issues. What is the impact of removing or restricting the possibility of civil action against mediators? Clearly it impacts upon the parties who are precluded from seeking the usual legal remedies. Does it also impact upon mediator behaviour? More specifically, does it lower the standard of conduct of mediators who operate with legal immunity by reducing their accountability? Pragmatically, the key issues would seem to be whether the benefits of conferring immunity on mediators outweigh the detriments, and whether other safeguards exist that offset the detriments. Assuming mediator immunity is justified, what level of immunity should this be? Should it be absolute,

8 Law Council of Australia, 'Proposed Rules for Court-Annexed Mediation' (Amendment No 4, 11 February 1994).

9 These include accreditation, education and training and qualifications for trainers and educators of ADR practitioners: NADRAC, above n3 at chapters 9-11.

or qualified in some way? There are few answers to these questions. Most of them are addressed in the literature from a theoretical perspective or based on anecdotal evidence, as there is scant empirical data to draw upon.

While this article does not answer all these questions, it does conclude that there has been insufficient justification for the level of immunity currently conferred on many mediators. In part 1 the issues surrounding legal immunity are identified and mediation is defined for the purposes of the discussion. In part 2 the bases of legal liability of mediators are reviewed and in part 3 the forms of immunity and arguments for and against conferring immunity on mediators are examined in detail. Part 4 presents some summary remarks and conclusions.

B. Definition of Mediation

Before questions of the liability and immunity of mediators can be addressed, we need a working definition of mediation so that the role of the mediator is clear. Few of the statutes conferring immunity on mediators define mediation.¹⁰ To provide some consistency of understanding and terminology in the ADR field, in 1997 NADRAC published a set of 'benchmark' definitions, which includes the following definition of 'mediation':

Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.¹¹

The discussion in this article is based on a definition of mediation in these terms. Despite the uniformity of process implicit in the NADRAC definition, there are many variations of the mediation process. Depending on the circumstances in which the mediation takes place, the mediator may be expected to bring to bear their expertise in the area of the dispute being mediated. This will often be the case in what Professor Boulle describes as *evaluative* and *settlement* models of mediation.¹² There will also be variation in the extent to which confidentiality, voluntariness, and a binding outcome are essential to the process. These variables need to be taken into account when attempting to state any general principles. It is a constant challenge to formulate general principles for application to mediation because of the diversity of circumstances in which mediation is used.¹³

It is noteworthy that much of the early debate among United States academics about whether mediators should have immunity occurred at a time when it was not

10 Specific legislative examples of evaluative processes are cited in ALRC, above n2 at 27 note 49.

11 NADRAC, *Alternative Dispute Resolution Definitions* (Canberra: The Council, 1997) at 5.

12 Laurence Boulle, *Mediation: Principles, Process, Practice* (1996) at 28.

13 The immunity debate is not confined to mediation, which along with conciliation is described generally as a facilitative process (see NADRAC, above n11). Also under consideration is what type of immunity, if any, is appropriate for advisory and determinative ADR processes (see NADRAC, above n3 at 88).

clearly understood that, strictly speaking, a mediator's role does not include an advisory function, other than advising on process.¹⁴ It is a matter of ongoing debate whether a mediator can advise parties, for example of whether their proposed settlement would comply with legislation, or is in similar terms to what a court might order, and still be said to be mediating.

2. *Mediator Liability*

A. *Introduction*

The term 'mediator liability' refers to civil action that could successfully be brought in the courts against a mediator. This can be distinguished from criminal liability for conduct in mediation, for example, for an assault on a party, for which immunity is not usually available.¹⁵ It can also be distinguished from conduct of mediators that might be regarded as damaging to parties, third parties and the integrity of the mediation process but which nevertheless falls short of being actionable as a civil wrong.

Although immunity is only relevant to actionable civil wrongs it does not follow that non-actionable conduct is unimportant or does not warrant attention. On the contrary, much of the effort to achieve and maintain high standards of mediator conduct through training and accreditation schemes is aimed at preventing misconduct that would not necessarily be actionable as a civil wrong. Non-actionable misconduct is an area to which legal rules do not extend: it is the province of guidelines and codes of ethical practice.¹⁶

B. *Grounds of Liability*

Civil actions that might be brought against a mediator include actions for breach of contract (including breach of implied conditions)¹⁷, negligence, statutory torts (for example, discrimination and harassment), breach of fiduciary obligation, breach of confidence, defamation, misleading or deceptive conduct, and other statutory consumer protection actions.¹⁸

14 Joseph Stulberg, 'Mediator Immunity' (1986) 2 *Journal of Dispute Resolution* 85; Arthur Chaykin, 'The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation' (1986) 2 *Journal of Dispute Resolution* 47; Note, 'The Sultans of Swap: Defining the Duties and Liabilities of American Mediators' (1986) 99 *Harv LR* 1876.

15 The common law and statutes do not usually confer immunity for criminal conduct, although it is possible for Parliament to do so in statutes.

16 This is not to suggest that there is no connection between legal rules and codes of conduct. The latter might be used as evidence of the standard of conduct that is expected of the practitioner.

17 For example, *Fair Trading Act* 1987 (WA) s40(1): it is an implied warranty in every contract for the supply by a person in the course of a business of services to a consumer that the services will be rendered with due care and skill; see also *Trade Practices Act* 1974 (Cth) s74(1).

18 For a detailed discussion of many of these causes of action see Andrew Lynch, "'Can I Sue My Mediator?'" — Finding the Key to Mediator Liability' (1995) 6 *ADRJ* 113. See generally Boule, above n12 at 247–253. With respect to the action for misleading or deceptive conduct, cases that could be used to argue that mediator services fall within the 'trade and commerce' requirement in the relevant legislation are discussed in the context of solicitor liability by Stephen Corones in 'Solicitors' Liability for Misleading or Deceptive Conduct' (1998) 72 *ALJ* 775 at 777.

There are many types of mediator conduct that might form the basis of a complaint by a disgruntled party. These are likely to raise issues of mediator competency, care and misconduct. Complaints about competency might include, for example, that a mediator failed to attend at an agreed time for mediation, or that mediator incompetence was the ground on which parties terminated a mediation.

Complaints about care might include that a party relied on incorrect professional advice given by a mediator, for example on taxation or other implications of a proposed agreement. A party may complain that the mediator failed to prevent the parties making an illegal agreement, or that a mediator failed to disclose to a party that harm was threatened to them in circumstances where it would be reasonable to expect disclosure to be made.¹⁹

It might also be complained that a mediator made an unauthorised disclosure outside the mediation²⁰ or that a party has wrongfully been denied access to a service. Specific examples given by NADRAC of potential difficulties in family mediations are the escalation of disputes, neglect of outside interests, neglect of physical safety of the parties, and allowing parties to make unfair or unworkable agreements.²¹

Complaints about misconduct might include that a mediator behaved in an unprofessional and overbearing manner or that duress or undue pressure was applied to parties to make an agreement. It might also be alleged that a mediator misled or deceived a party or parties in some material way. Another example would be a claim of sexual harassment of a party during a mediation.

Not all of these complaints would sustain a civil action. Even where it can be shown that an obligation is owed and a breach has occurred (which may be very difficult when the conduct complained of took place during a private session with only the mediator and one party present), it may remain very difficult to prove that prejudice or harm has been caused, in the legal sense of causation, by the mediator.²²

19 A professional liability insurance manager in the United States has reported receiving claims alleging negligence in the mediator's handling of the mediation and drafting of the settlement agreement: see Gracine Hufnagle, 'Mediator Malpractice Liability' (1989) 23 *Mediation Quarterly* 33 at 35. In *Lange v Marshall*, 622 SW2d 237 (Mo Ct App 1981), a lawyer undertook the mediation of a divorce settlement for two friends. After signing the settlement agreement and while it was pending before a judge for approval, the wife had second thoughts and obtained an independent lawyer who eventually litigated a settlement more favourable to her. She sued her first lawyer/mediator for negligence. The jury awarded the wife US\$74000. On appeal the court assumed for the purposes of the appeal that the lawyer/mediator had been negligent in fulfilling his duties. The lawyer argued that it would have been improper for him to advise either of the parties because that would have placed him in the position of an advocate for one of the parties, but this argument was not addressed. The court reversed the award, however, on the ground that there was no evidence of any damage resulting from the negligence.

20 Some statutes impose an obligation on mediators not to disclose what took place in mediation, for example, *Community Justice Centres Act* 1983 (NSW) s29 and *Supreme Court Act* 1935 (WA) s72. Breach of this type of provision could presumably result in censure by the relevant authority under the legislation notwithstanding any immunity provision in the same legislation.

21 NADRAC 1997, above n2 at 9.

22 See Lynch, above n18 at 122.

C. *Relief Most Likely to be Sought*

The types of relief parties are most likely to seek have been described by one commentator as three 'paradigm settings in which considerations of mediator liability conventionally arise'.²³

- (i) *A party or parties or a third party might seek to have the outcome of the mediation altered or rescinded.*

Typically this would be an application to have the mediated agreement set aside. There is limited scope for this as a form of relief in proceedings against a private mediator because the mediator is not a party to any agreement made between the parties as a result of the mediation. Therefore, while it is possible, there are unlikely to be grounds for review of a mediated agreement based on the mediator's conduct on common law contractual principles.

There is potential for alteration or rescission of a mediated agreement under the *Trade Practices Act 1974* (Cth) and state fair trading laws where a mediator has engaged in misleading or deceptive conduct.²⁴ It is difficult, however, to envisage any relief being granted that would be prejudicial to the other party (or parties) to the mediation unless one or more of the other parties to the mediation knowingly engaged in that conduct.

Where mediation takes place in a statutory framework, a party would need to rely on statutory power for a court to review the agreement on the basis of the mediator's conduct. It is not clear that this power exists where the statute under which the mediator is appointed renders any mediation communications confidential and privileged.²⁵

There is greater scope for review of an agreement where mediation takes place as part of a court process. There are cases where a party has appealed successfully to have the outcome of a court ordered process set aside on the basis of apprehended bias or inappropriate conduct by the court officer.²⁶

23 Stulberg, above n14 at 85.

24 For example, *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd* (1991) 27 FCR 86; *Williams v Commonwealth Bank of Australia* (NSW Court of Appeal, Mason P, Priestley JA & Sheppard A-JA, 27 September 1999).

25 For example, *Farm Debt Mediation Act 1994* (NSW): see *State Bank of NSW v Freeman* (NSW Supreme Court, Badgery-Parker J, 31 January 1996). Similar difficulties have been identified with seeking relief under the *Contracts Review Act 1980* (NSW): see, for example, *Commonwealth Bank of Australia v McConnell* (NSW Supreme Court, Rolfe J, 24 July 1997).

26 For example, *Najjar v Haines* (1991) 25 NSWLR 224. In *Ruffles v Chilman* [1997] 17 WAR 1, the Full Court of the Western Australian Supreme Court allowed an appeal and set aside a judgment of the District Court on the ground that the District Court judge had failed to disqualify himself from hearing the matter on the grounds of apprehended bias. The apprehension of bias arose from spoken communications that took place between the judge and the registrar to whom the matter was referred for attempted (but unsuccessful) mediation during the trial.

(ii) *A party might seek to obtain compensation for loss or damage resulting from the mediator's conduct.*

Compensation may be available where a mediator is found liable for negligence, defamation, breach of contract, breach of confidence and possibly breach of fiduciary duty. There are numerous obstacles to bringing an action for damages against a mediator. The principal difficulty will be showing that the mediator's conduct caused the loss or damage.

The compensation that a party who successfully sues their mediator may seek will include damages for wasted expense of mediation and loss resulting from agreeing to a settlement that is less than might have been awarded by a court, including damages for loss of opportunity to obtain a better settlement. Wasted expenses, such as the fee paid to a mediator, are not likely to be difficult to recover.²⁷ In contrast, claims for compensation for non-optimum outcomes and lost opportunity are highly speculative and difficult to calculate. While courts are willing to assess speculative forms of loss, it must still be proved to be loss that would not have resulted but for the mediator's conduct.²⁸ The consensual nature of decision making by the parties in mediation will mean it is usually impossible to discharge this burden.

(iii) *A party might want to see that disciplinary action is taken against a mediator and that professional sanctions, including withdrawal of accreditation, are imposed on the mediator.*

The availability of this relief is limited in practical terms to mediation that takes place in an environment where a mediator is accountable to a supervisory or disciplinary body for their conduct. This may be an employer, government funded agency or professional body. This form of relief is dependent on the existence of clear standards and sanctions, and effective mechanisms to enforce those standards. There is little scope in Australia at present for this relief against a mediator, in their capacity as mediator. It may be available where the mediator is accountable in another professional capacity (for example, as a legal practitioner).

D. The Likelihood of Mediator Liability

In Australia there are no known cases in which a mediator has been successfully sued. Professor Boulle²⁹ suggests that reasons for the scarcity of litigation include:

- (a) the existence of statutory (and, it can be added, contractual) immunities;
- (b) the flexible and confidential nature of mediation, which reduces the risk to mediators;
- (c) the nature of mediation in that mediators are not decision makers, which precludes any feasible scheme of mediator liability;

27 Recovery of fees was suggested by Rogers A-JA, but not sought by the party, as a possible remedy in *Najjar v Haines*, *ibid*, a case involving a claim against a court appointed referee.

28 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

29 Above n12 at 247.

- (d) the fact that in mediation the parties make the final decisions, which renders it difficult to establish a causal link between the mediator's conduct and any loss or damage;³⁰
- (e) the fact that where co-mediation is used there is even less chance that an individual mediator's conduct will have an impact on the outcome of the mediation for the parties; and
- (f) the absence of a recognised standard of conduct, which makes it difficult to establish a breach and to advise on the likelihood of success.

There are numerous disincentives for a person to take legal action against a mediator. To obtain a remedy they would have to institute legal proceedings, which they were no doubt trying to avoid. Proceedings against the mediator will not help to resolve the original dispute. More likely the parties will withdraw and use another mediator. It would take a very determined party to sue their mediator for the costs of an aborted mediation. Despite these factors, it is predicted that proceedings will eventually be brought against mediators by an aggrieved party or third party.³¹

The existence of so many obstacles casts doubt on Professor Boulle's ultimate conclusion that a 'significant form of accountability for mediators is the possibility that legal proceedings might be brought against them'.³² Although the potential for civil liability exists, the many obstacles to a successful action must reduce the impact of that threat.

Even if the many obstacles were removed or overcome, any accountability that might exist through the operation of liability rules would be diminished by the operation of the immunity rules. It is against the backdrop of potential liability and tenuous forms of relief, that we turn now to examine the nature of mediator immunity and the arguments for and against this form of protection for mediators.

3. Mediator Immunity

A. Introduction

As explained in part 1, 'immunity' is given a broad meaning in this article to include common law judicial immunity, statutory immunity and contractual immunity. Although the focus in this part will be on common law and statutory immunity, some introductory comments will be made about contractual immunity to provide a point of comparison. The arguments for and against immunity presented in section G of this part, however, address common law and statutory immunity, not contractual immunity. This reflects the fact that with contractual immunity the parties have agreed to restrict their right of action against the mediator. Common law and statutory immunity does not depend on the consent of the parties.

30 Lynch, above n18 at 122.

31 Above n12 at 247.

32 Ibid.

The legal basis for common law and statutory immunity is thus quite distinct from contractual immunity and rests on very different considerations. In practical terms these forms of immunity are important for mediators who act in situations where it is inappropriate, or there is no opportunity, for parties to enter into a mediation agreement with the mediator. This may be because the parties have no choice in the selection of their mediator or because a written agreement may attract undue formality to the process. It may also be convenient for mediators operating in a statutory framework to operate with immunity without first having to obtain agreement by the parties. These factors are also significant in the debate as to whether parties who use mediation in these circumstances should have legal redress in the event of mediator misconduct.

B. Contractual Immunity

Contractual immunity is conferred when the parties expressly agree that the liability of the mediator is limited or excluded. Typically a mediation agreement entered into between the mediator and the parties will limit or exclude liability for negligence and misleading or deceptive conduct by the mediator in the performance of his or her obligations under the mediation agreement and for any liability arising in relation to the mediation. Some mediation agreements expressly limit or exclude liability for defamation. Where private mediation services are offered by an organisation which does not operate with statutory immunity, the limitation or exclusion usually will expressly apply to that organisation as well as its mediators and other employees.

There are limits to the protection that can be achieved in this way. There is limited scope for excluding liability for misleading or deceptive conduct under the *Trade Practices Act 1974 (Cth)*³³ and equivalent state Fair Trading Acts. These Acts also limit the extent to which a term can be incorporated in a contract that excludes, restricts or modifies the implied warranty that services will be rendered with skill and care.³⁴

A party relying on a clause on contractual principles has the legal burden of proving that the liability is covered by the clause.³⁵ The courts interpret limitation and exclusion clauses narrowly against the party relying on them.³⁶ Although clear words are required to limit or exclude liability for negligence,³⁷ the courts will uphold a clearly expressed term that limits or excludes this form of liability. The courts will not uphold, however, a limitation or exclusion of liability for deliberate breach.³⁸ Fraudulent conduct by a mediator in the conduct of the mediation or in

33 See, for example, *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601; *Clark Equipment Australia Ltd v Covcat Ltd* (1987) 71 ALR 367.

34 *Fair Trading Act 1987 (WA)* ss34, 35; *Trade Practices Act 1974 (Cth)* ss68, 68A.

35 *Tozer Kemsley & Millbourn (A'Asia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384 at 400.

36 *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 649 (Dixon CJ, McTiernan, Webb, Fullagar & Kitto JJ).

37 *Ibid.*

38 *Id* at 652.

any other aspect of his or her relationship with the parties, therefore, cannot be the subject of contractual immunity.

C. *Common Law Judicial Immunity*

Any common law immunity that exists for mediators will be based on the common law immunity conferred on judges and other participants in the judicial system. Statutory immunity is generally conferred as an extension of common law judicial immunity. This section will examine common law judicial immunity and then consider whether the same immunity is available to mediators in section D. We will then turn our attention to statutory immunity for mediators in section E.

There is a long established principle of judicial immunity that applies to judges in the performance of their judicial duties.³⁹ The common law confers absolute immunity upon a judge from any civil action that might otherwise arise from words and actions of the judge within the jurisdiction conferred upon him or her.⁴⁰ No action lies, therefore, against a judge for defamation, negligence, deceit or other tortious conduct. 'No matter that the judge was under some gross error or ignorance, or was activated by envy, hatred and malice, and all uncharitableness, he is not liable to an action.'⁴¹

Absolute immunity enables the person or body who can claim it to avoid trial of a claim made against them. Unlike the defence of qualified privilege available in certain circumstances in defamation actions, the person or body protected by judicial immunity is not required to defend a claim by showing that they acted in good faith and without malice.⁴²

Judicial immunity rests on public policy and applies equally to a judge's conduct during criminal and civil trials, as explained by Hope A-JA in *Yeldham v Rajski*:⁴³

The basis of immunity of judges from civil proceedings in respect of their judicial acts, which has been part of the law for centuries, is based on high policy which has been put in a number of ways but in essence is that the immunity is essential to the independence of judges. It is a policy designed to protect the citizen and not merely to give protection to judges. As it seems to me this policy is equally applicable to criminal proceedings for the acts of judges, in the exercise of their judicial functions, as it is in respect civil proceedings. In the course of the exercise of their functions, judges often, for example, have to decide whether a person is telling the truth or lying and to say so in their judgments. If it were the law that any disgruntled litigant could charge a judge with contempt for being wrong and

39 *Gallo v Dawson (No 2)* (1992) 109 ALR 319.

40 *Carbassi v Vila* (1940) 64 CLR 130. Although immunity is not generally conferred in respect of criminal conduct, qualified judicial immunity is available in so far as criminal proceedings are concerned for substantive administration of justice offences such as perjury, contempt and perverting the course of justice: see *Jamieson v R* (1993) 177 CLR 574 at 582 (Deane & Dawson JJ).

41 *Sirros v Moore* [1975] 1 QB 118 at 132 (Lord Denning MR).

42 *Ibid.*

43 (1989) 18 NSWLR 48.

mala fide in his conclusion, or in arriving at the conclusion without any or any sufficient evidentiary basis, the independence required of judges would be greatly eroded. I can see no basis for distinguishing this situation from the undoubted position in respect of civil proceedings and in my opinion the same position does apply, and acts or statements by judges in the course of exercising their judicial functions do not fall within the law of contempt.⁴⁴

In addition to the policy of preserving the independence of the judiciary, immunity rests on the policy grounds of finality of actions.⁴⁵ It is regarded as 'vital to the efficient and speedy administration of justice'.⁴⁶ Justification for barring civil action by dissatisfied parties is also said to lie in the existence of judicial and administrative review of judicial decisions, the operation of the criminal law where an offence has been committed and the exceptional power of removal by Parliament where circumstances warrant that action.⁴⁷

Common law judicial immunity extends to others engaged in the administration of justice: parties, witnesses, counsel and the jury.⁴⁸ The immunity also applies to 'quasi-judicial' tribunals that exercise functions 'equivalent to those of an established court of justice'.⁴⁹ In cases where immunity is claimed for quasi-judicial proceedings it is essential to establish the 'judicial' function of the tribunal. The overriding consideration is 'whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern'.⁵⁰

Common law judicial immunity has been conferred, for example, on military tribunals,⁵¹ a board of inquiry into police malpractice,⁵² and on proceedings before a solicitors' professional disciplinary tribunal.⁵³

44 *Id* at 69.

45 *Rajski v Powell* (1987) 11 NSWLR 522 at 539 (Priestley J).

46 *Sutcliffe v Thackrah* [1974] 1 All ER 859 at 881 (Lord Salmon).

47 Other policy reasons supporting judicial immunity are discussed in *Rajski v Powell*, above n45 at 535 (Kirby P).

48 *R v Skinner* (1772) 98 ER 529 at 530 (Lord Mansfield); *Jamieson v R*, above n40.

49 *O'Conner v Waldron* [1935] AC 76 at 81 (Lord Atkin); *O'Neill v Mann* (1994) 126 ALR 364 at 382 (Beaumont & Ryan JJ).

50 *Mann v O'Neill* (1997) 145 ALR 682 (Brennan CJ, Dawson, Toohey & Gaudron JJ), quoting Lord Devlin in *Lincoln v Daniels* [1962] 1 QB 237 at 255-256. In *Trapp v Mackie* [1979] 1 All ER 489 at 492 Lord Diplock identified four main factors to be taken into account in determining whether a body fits that description: the authority under which the tribunal acts; the nature of the matter into which the tribunal is to inquire; the procedure it adopts; and the legal consequences of its conclusions.

51 *Dawkins v Lord Rokeby* [1873] LR 8 QB 255.

52 *Bretherton v Kaye & Winneke* [1971] VR 111.

53 See, for example, *Addis v Crocker* [1961] 1 QB 11. Other examples of quasi-judicial immunity are given in *Mann v O'Neill*, above n50 at 685 (Brennan CJ, Dawson, Toohey & Gaudron JJ).

D. Common Law Judicial Immunity for Mediators?

In the absence of statutory or contractual immunity a mediator would have to make a case for common law judicial immunity. The question whether mediators have common law immunity has not been answered directly by the Australian courts. If a case were to arise, one would expect the courts to take into consideration the approach taken to other dispute resolution processes. Some consideration has been given to arbitration, court appointed referees and case evaluators.

In some jurisdictions there has been a lack of certainty about common law immunity for arbitrators.⁵⁴ There has been some wavering in English courts as to whether or not arbitrators have immunity, despite early suggestions that judges and arbitrators are in the same position.⁵⁵ Doubts have also been expressed about the scope of arbitrators' immunity in New Zealand.⁵⁶ The same doubts and uncertainty have not been encountered in the United States, however, and arbitrator immunity is clearly recognised in that jurisdiction. In Australia, by contrast, there has been little case law, with the question being settled in favour of qualified immunity by the *Uniform Commercial Arbitration Acts*.⁵⁷

The policy reasons underlying judicial immunity have been held in Australia to apply to court appointed referees.⁵⁸ In *Najjar v Haines*⁵⁹ the NSW Court of Appeal was required to consider whether a referee appointed under Pt 72 of the *Supreme Court Rules 1970* (NSW) had judicial immunity. The referee failed to disclose his interest in one of the parties to the action in which he acted as referee. His failure to disclose was found to sustain a claim of apprehended bias. Consequently his report to the Court was declared void and the judgment in the original action set aside. The party who successfully claimed apprehended bias and had the judgment set aside sued the referee for costs in respect of his conduct as referee, namely 24 lost hearing days. The preliminary issue for the Court was whether the referee could be joined as a party to the action. This required a determination on whether the referee had judicial immunity.

The Court examined arguments for and against extending judicial immunity to the referee. The role and function of a court appointed referee were compared with arbitrators and others involved in judicial proceedings. The judges concluded that public policy required a grant of judicial immunity. Specific reference was made by Rogers A-JA to section 53C of the *Federal Courts of Australia Act 1976* (Cth) and section 19N of the *Family Law Act 1975* (Cth) which confer judicial immunity on a mediator and an arbitrator carrying out a task under those Acts. Rogers A-JA could see no logical basis why a mediator should be clothed with greater immunity than a referee. Unfortunately, though not surprisingly, the Court did not explore what policy reasons might lie behind the statutory conferral of judicial immunity

54 *Najjar v Haines*, above n26 at 271 (Rogers A-JA).

55 Contrast *Sutcliffe v Thackrah*, above n46 and *Arenson v Casson Beckman Rutley & Co* [1977] AC 405.

56 *Pickens v Templeton* [1994] 2 NZLR 718.

57 For example, *Commercial Arbitration Act 1985* (WA) s51.

58 *Najjar v Haines*, above n26.

59 *Ibid*.

on mediators. As we will see in section E(ii) of this part, an inquiry into the parliamentary debates concerning the two sections cited by Rogers A-JA would not have identified any clearly articulated policy reasons for conferring immunity on mediators.

The High Court has made clear its view that each application to extend judicial immunity needs to be shown to come within an established category of case to which the immunity applies, or that the protection is 'indispensable for the performance of judicial functions'.⁶⁰ As preservation of the independence and integrity of the judicial system lies at the heart of common law immunity, if this form of immunity were available to mediators, it would only be to those fulfilling a role within the court system. The issue then would be whether the role they perform requires this form of protection.

There are clear differences in the role of an arbitrator and a referee on the one hand and a mediator on the other. Many of the arguments given by the court in *Najjar v Haines* that could apply to an arbitrator and that apply to a referee, do not apply to a mediator. The most significant difference lies in the determinative role of a referee, as opposed to non-determinative role of a mediator. As a result, the question whether common law judicial immunity applies to mediators has not squarely been addressed by the Australian courts.

Arguably, the issue whether common law judicial immunity applies is of limited practical importance because of the trend in many Australian jurisdictions to introduce legislation that confers immunity on mediators.⁶¹

Nonetheless, there may be circumstances where this issue is of great concern to mediators who do not have the benefit of statutory immunity and, for whatever reason, have not excluded liability by enforceable agreement.⁶² Should the matter arise it would be useful to refer to the view of Kirby J in *Najjar v Haines* that the lack of a legislative provision is not conclusive that there is no common law judicial immunity.⁶³ In his view, while legislation is useful to define limits of immunity and avoid doubt it is not essential.⁶⁴

It has been held by a Court of Appeal in the United States that court appointed mediators have common law judicial immunity.⁶⁵ In *Wagshal v Foster*⁶⁶ an action was brought by a party against a court appointed case evaluator. In the judgment,

60 *Mann v O'Neill*, above n50 at 686 (Brennan CJ, Dawson, Toohey & Gaudron JJ). For discussion of *Mann v O'Neill* see Carolyn Penfold, 'The Doctor, The Magistrate and Absolute Immunity' (1998) 2 *FJLR* 253.

61 A recent example is the *Court Legislation Amendment Act 2000* (WA) s18, which inserts a new section 70 into the *Supreme Court Act 1935* (WA) that confers immunity on mediators carrying out a mediation under direction.

62 For discussion of these issues in the New Zealand context see Ailsa Duffy, 'ADR: Consequential Civil Liability' (1996) *NZLJ* 271.

63 *Id* at 234.

64 *Ibid*.

65 In *Howard v Drapkin* 271 Cal Rep 893, judicial immunity was held to extend to a psychologist performing dispute resolution services in connection with a lawsuit over custody and visitation rights.

66 28 F 3d 1249 (DC Cir 1994).

however, the court used the terms ‘case evaluator’ and ‘mediator’ interchangeably, with no distinction being made between these two ADR roles.

In his claim against the case evaluator, the plaintiff alleged violation of his rights to due process and jury trial and brought local law claims for defamation, invasion of privacy and intentional infliction of emotional distress. The Court dismissed an appeal against a decision at first instance that the action should be dismissed because the defendant had judicial immunity.

In giving the judgment of the Court of Appeal, Williams J noted that a person claiming the immunity bears the burden of showing that the immunity is justified for the function in question. Drawing on United States Supreme Court decisions⁶⁷ regarding the proper approach to determining quasi-judicial immunity, the Court in *Wagshal* based its decision that court appointed case evaluators and mediators do have quasi-judicial immunity on three factors:

- (1) that the functions of a mediator are comparable to those of a judge, describing the general process of encouraging settlement as ‘a natural, almost concomitant of adjudication’;
- (2) the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and
- (3) the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct (in this case, concerns about bias could be addressed by application to the judge who referred the matter to the case evaluator).⁶⁸

The Court stated:

In certain respects it seems plain that a case evaluator in the Superior Court’s system performs judicial functions. [The case evaluator’s] assigned tasks included identifying factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts. These obviously involve substantial discretion, a key feature of the tasks sheltered by judicial immunity ... Further, viewed as mental activities, the tasks appear precisely the same as those judges perform going about the business of adjudication and case management.⁶⁹

The function attributed to the ‘mediator’ in this case does not sit well with the definition of ‘mediation’ referred to in part 1B of this article and fails to draw the important distinction between the *determinative* (whether or not binding) function of a case evaluator and the *facilitative* role of a mediator. It is submitted that, within the Australian judicial system, it would be much more difficult to ascribe a *judicial* function to a mediator than to a case evaluator. To afford the same immunity to a mediator as a referee, a court would need to find that it is the *settlement function* that court annexed mediation performs, rather than the *nature of the process* that is

67 *Simons v Bellinger* 643 F 2d 774 at 778, citing *Butz v Economou* 438 US 478, 512; 98 S Ct 2894, 2913–2914; 57 L Ed2d 895 (1978).

68 Above n66.

69 *Ibid.*

the major consideration. Accordingly it would be the policy of upholding settlements that would be the paramount consideration underlying mediator immunity.

It is submitted that the better view is that court appointed mediators should not be found to have common law judicial immunity. If, contrary to this view, they were granted immunity on similar policy grounds to a court appointed referee in *Najjar v Haines*, this immunity would still not apply to mediators appointed under other statutory and community schemes. Undoubtedly this is the reason why most statutes providing for the appointment of mediators in these contexts expressly confer some form of immunity.⁷⁰

E. Statutory Immunity for Mediators

The availability of judicial immunity for many quasi-judicial tribunals has been put beyond doubt in numerous statutory provisions.⁷¹ Immunity has been conferred on office-holders who conduct investigatory functions⁷² and upon witnesses before quasi-judicial inquiries.⁷³ As will be seen in the discussion that follows, statutory protection, referred to broadly in this article as statutory immunity, has been conferred on mediators and other third parties involved in ADR. It will be apparent that there is a clear trend in recent times to confer some degree of statutory immunity on mediators and other ADR practitioners. What is unclear is whether the justification is the same for all ADR practitioners.

(i) The Type of Immunity

Legislation conferring immunity or statutory protection on mediators typically takes one of two forms: absolute immunity or qualified immunity.

1. **Absolute Immunity:** Absolute immunity bars civil action without reference to whether or not the subject of the immunity acted in good faith.⁷⁴ There are many statutory provisions where a mediator is expressly granted the same immunity as a judge (usually a judge of the court within which the mediation will take place), with no express requirement that the mediator act in good faith. For example,⁷⁵ section 19M of the *Family Law Act 1975* (Cth), inserted

70 For example, *Agricultural Practices (Disputes Act) 1997* (WA); *Farm Debt Mediation Act 1994* (NSW).

71 For example, *Administrative Appeals Tribunal Act 1975* (Cth) s60; *Social Security Act 1991* (Cth) s1338; *Human Rights and Equal Opportunity Commission Act 1976* (Cth) s48; *Legal Practitioners Act 1893* (WA) s31A.

72 For example, *Royal Commissions Act 1902* (Cth), s7(1).

73 *Id* s7(2).

74 *Rajski v Powell*, above n45 at 539 (Priestley J).

75 Other examples include s60 *Administrative Appeals Tribunal Act 1975* (Cth) which confers on members of the Tribunal the same protection and immunity as a justice of the High Court; s34(5) *Federal Magistrates Act 1999* (Cth) which confers on a mediator to whom a proceeding in the Federal Magistrates Court is referred the same protection and immunity as a Federal Magistrate, and s143(6) of the *Civil and Administrative Tribunal Act 1998* (Vic) which confers on mediators the same protection as a member of the Tribunal, who in turn have the same protection and immunity as a judge of the Supreme Court (s143(1)).

by the *Courts (Mediation and Arbitration) Act 1991* (Cth) provides: 'A family and child mediator or an arbitrator has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.'⁷⁶

Section 53C of the *Federal Court of Australia Act 1976* (Cth), also inserted by the *Courts (Mediation and Arbitration) Act 1991* (Cth) provides: 'A mediator or an arbitrator has, in mediating or arbitrating anything referred under section 53A, the same protection and immunity as a Judge has in performing the functions of a Judge.'

2. Qualified Immunity: Statutory provisions conferring immunity on quasi-judicial bodies and mediators typically grant immunity for acts done in good faith. Where a mediator is appointed by a court the immunity is usually expressed as being the same as for a judge, subject to a good faith qualification. In other circumstances, the statutory provision usually renders a person immune from civil action for any act in good faith as a mediator.

The difference between absolute and qualified immunity is that a person relying on qualified immunity has to go to trial to defend a claim and bears the onus of proving that he or she acted in good faith. An exception to this general rule is where the relevant statute places the onus of showing there was an absence of good faith on the party bringing the claim.⁷⁷

An example of qualified immunity is found in section 12 of the *Mediation Act 1997* (ACT) which provides: 'A registered mediator has, in the performance in good faith of his or her functions as mediator, the same protection and immunity as a judge of the Supreme Court.'

The qualification on the statutory immunity is more specific in the *Commercial Arbitration Act 1985* (WA).⁷⁸ Section 51 of that Act provides: 'An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity.'

In statutes where immunity is conferred on persons who carry out the particular purposes of the Act it is not uncommon to find an express qualification not only that the mediator (and others) act in good faith to qualify for immunity, but that the immunity only extends to acts or omissions which occur in carrying out the purposes of the Act.

76 The immunity conferred by this provision extends to any private mediator who mediates a dispute which could be the subject of proceedings under the *Family Law Act 1975* (Cth) and involves a parent, adoptive parent, child or party to a marriage irrespective of whether the mediator complies with the requirements of the regulations.

77 See, for example, s230 of the *Justices Act 1902* (WA) which confers qualified statutory immunity that excuses the person on whom the immunity is conferred from proving good faith. The section provides that complainants seeking damages against a justice bear the onus of proving malice and if they fail they bear the costs of the complaint.

78 Sections to the same effect can be found in Commercial Arbitration Acts in the other states and territories.

For example, section 27(1) of the *Community Justice Centres Act 1983* (NSW) provides:

No matter or thing done or omitted to be done by:
 (a) the Council or a sub-committee of the Council;
 (b) a member of, or a person acting under the direction of or with the authority of, the Council or any such sub-committee;
 (c) a mediator; or
 (d) the Director, the Deputy Director or a member of the staff of a Community Justice Centre,
 shall, if the matter or thing was done in good faith for the purpose of executing this Act, subject any of them to any action, liability, claim or demand.

A further example is section 74 of the *Retirement Villages Act 1992* (WA) which provides:

No liability attaches to a member of the Tribunal, the Tribunal, a member of a committee convened under a code to hear and mediate disputes within a retirement village, any such committee, the registrar, or any other person for any act or omission by him or her or on his or her part or by the Tribunal or any such committee or on the part of the Tribunal or any such committee that occurred in good faith and in the performance or discharge or purported performance or discharge, of his or her or its functions under this or any other written law.

(ii) *Indications of Parliamentary Intent*

The parliamentary debates on acts that confer immunity reveal very little about the reasons for conferring this protection on mediators and reasons for that immunity to be absolute or qualified. One of the earliest legislative provisions conferring immunity on mediators in Australia was section 27(1) of the *Community Justice Centres (Pilot Project) Act 1980* (NSW). That section exonerated Community Justice Centre staff-members and any other person acting under the Co-ordinating Committee's direction or authority from any liability or claim in respect of anything done or omitted to be done, in good faith, in the course of the work of the Community Justice Centres.

During the debates on the Act no express reference was made to the immunity conferred on mediators. There was no suggestion that the immunity provisions should be deleted or amended in any future legislation in the Law Foundation of NSW's report on the Pilot Project.⁷⁹ In the parliamentary debates on the Community Justice Centres Bills 1983, which established the Community Justice Centres in NSW on a permanent basis, the only reference to immunity was as follows:

Clause 27 is one of the important provisions of the bill in that it will continue the exoneration from liability granted to members of the council, directors, members

⁷⁹ John Schwartzkoff & Jenny Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (1982).

of the staff of the centres and mediators in respect of anything done by them in good faith for the purpose of executing the Act.⁸⁰

The *Community Justice Centres (Pilot Project) Act 1980* (NSW) provision clearly formed a blueprint for the Queensland legislation that established the Dispute Resolution Centres in that state. Section 35(1)(c) of the *Dispute Resolutions Centre Act 1990* (Qld) provides: 'No matter or thing done or omitted to be done by a mediator, if the matter or thing is done in good faith for the purpose of executing this Act, subjects [the mediator] to any action, liability, claim or demand.'

In the parliamentary debates on the *Dispute Resolution Centres Act 1990* (Qld) there was no discussion of section 35 or the basis on which Parliament conferred immunity on mediators operating under the Act.

There is some recognition in the debates of the benefits of protecting the integrity of the mediation process by precluding some forms of review. Both the NSW and the Queensland Acts exclude mediation sessions from the jurisdiction of the Ombudsman. The following comment in the debate on the *Community Justice Centres Bills 1983* (NSW) gives some insight into the way in which mediation is viewed. The concern was expressed that if a mediator is not exempt from review by the Ombudsman,

the mediator feels that looking over his shoulder is someone who will superintend everything that he does and this is a restriction on the possibility of his dealing with the matter according to the flavour that he gets from it, so that he begins to behave in a legalistic manner to protect himself. This in my view takes him out of the concept of a mediator and makes him an arbitrator. Mediation is the whole basis of the success of community justice centres.⁸¹

The debates on the *Courts (Mediation and Arbitration) Act 1991* (Cth) which introduced section 19M of the *Family Law Act 1974* (Cth) do not suggest any concerns about conferring absolute immunity on mediators, despite the fact that many mediators obtaining the benefit of this statutory protection are not directly supervised in the same way as court appointed mediators or mediators operating in centres set up under legislation.

The Proposed Rules for Court Annexed Mediation (hereinafter proposed rules) prepared by the Law Council of Australia⁸² have undoubtedly influenced the recent formulations of statutory immunity and other legal issues affecting mediation and mediators. The immunity regime proposed under these proposed rules distinguishes between court appointed mediators and privately appointed mediators. Court appointed mediators are granted absolute immunity. Clause 3 provides:

80 Frank Walker, NSW, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 October 1983 at 1882.

81 The Hon Sir Adrian Solomons, NSW, Legislative Assembly, *Parliamentary Debates (Hansard)*, 22 November 1983 at 3021-3022.

82 Above n9.

A mediator to whom a proceeding is referred under the Rules has, in the performance of his or her duties in connection with the reference, the same protection, privileges and immunities as a judge of the Court in the performance of his or her duties as a judge.

Private mediators are granted qualified immunity in the following terms in Clause 6:

the mediator is not liable for negligence in respect of any thing done or omitted to be done by the mediator in the capacity of mediator but is liable for fraud in respect of anything done or omitted to be done in that capacity.

The Law Council notes in its commentary to the proposed rules that this provision follows the lead of the Commercial Arbitration Acts, and,

[I]t is designed to avoid an increase in court proceedings for the purpose of gaining the benefit of the legislation and rules applicable to court-annexed mediations, and to ensure that only "Court appointed mediators" be afforded the same immunity as judges and referees appointed by the Court.⁸³

The significant difference between the immunity available to private mediators and court appointed mediators is that private mediators are granted immunity only from actions in negligence. They are not protected against all forms of civil action (including defamation) and fraud. One would expect private mediators to use contractual provisions to expand, to the extent allowed by law, the limited immunity recommended by the proposed rules.

Surprisingly, in view of the discussion paper prepared as background to the introduction of a *Mediation Act 1997* (ACT),⁸⁴ there is no evidence of debate on the Bill as to the reasoning behind section 12, which confers absolute immunity on registered mediators.

In the Second Reading Speech introducing the *Courts Legislation Amendment Bill 1999* (WA), which introduces statutory provisions on confidentiality, privilege and confers absolute immunity on court appointed mediators,⁸⁵ the only reference to these provisions is to describe them as 'non-contentious'.⁸⁶

F. The Scope of Immunity

Aside from any good faith requirement or other limitation on the scope of immunity,⁸⁷ each grant of immunity will be subject to limits expressed or implied in the principle or instrument granting the immunity. In the absence of specific

83 *Id* at 6.

84 Tania Petrogiannis, ACT Attorney-General's Department Discussion Paper *Mediation* (1994): <<http://actag.canberra.edu.au/actag/Reports/other/Rep2/Rep2-2.html>>.

85 Clause 70.

86 Hon N F Moore (Leader of the House), WA, Legislative Council, *Parliamentary Debates (Hansard)*, 10 November 1999 at 2894.

87 For example, where limited to negligence but no other civil actions.

provision, immunity will only be available for acts or omissions arising out of the mediation and not for any prior or subsequent interaction between the mediator and the parties unrelated to the mediation.⁸⁸ It will be a matter of interpretation in each instance how far the immunity was intended to extend. One would expect common law absolute immunity to be confined to conduct of the mediator while performing a 'judicial' function. Statutory immunity typically is confined expressly by the words of the statute to conduct of the mediator while performing the function of mediator, and expressly or impliedly, to conduct within the purpose of the statute.

A further limitation on immunity is that it only protects a mediator against civil action by the parties. As noted in the introduction, immunity does not exclude review or disciplinary action by the court or other body appointing the mediator. In addition, immunity would not usually preclude action being taken by a statutory authority for breach of statutory obligation, for example breach of secrecy or other non-disclosure provisions or statutory duties of care.

G. Arguments For and Against Immunity for Mediators⁸⁹

There are competing policy considerations in deciding whether to confer immunity and deciding the appropriate level of protection, for example, whether immunity should be absolute or qualified. The arguments for and against immunity are a combination of policy and practical factors.

The arguments also reflect the many interests served by mediators and the mediation process. The arguments in support of mediator immunity focus mainly on the public interest of supporting and encouraging the mediation process.⁹⁰ The interests of the mediators can be seen as secondary to, though not inconsistent with, the public interest. The parties' interests are reflected only to the extent that it is in their interest that they or the other party to the mediation be prevented from bringing action against the mediator.

The arguments against mediator immunity also focus on the public interest, but here the emphasis is on the parties as consumers of mediation services. Also reflected in the arguments against immunity is the concern that individual parties have access to legal redress for harmful conduct of mediators. Mediators' interests can be identified in this group of arguments, but largely as the collective interests of mediators as a group of accountable practitioners, rather than as individuals.

88 An unlikely, but illustrative example, would be where a mediator advised a party to use or not to use mediation where this advice was subsequently found to be negligent or misleading. In this event it is possible that even contractual immunity would not protect the mediator.

89 Commentators in the United States disagree on whether court appointed mediators should be granted immunity, and whether there should be absolute or qualified immunity. For a recent overview see Cassandra E Joseph, 'The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity' (1997) 12 *Ohio State Journal on Dispute Resolution* 629 at 631-632.

90 It can be argued that the public interest in this context takes more than one form. There is an interest in the use of mediation as a more appropriate process for dispute resolution of certain types of dispute. There is also an interest in the process as a means to reduce the caseload of the courts.

In assessing the arguments that follow it is essential to bear in mind the variety of circumstances in which mediation takes place. It is also important to evaluate whether removal or qualification of immunity would make any significant difference to the ways mediators conduct their practice.

(i) *Administration of Justice*

Many of the policy arguments that underlie judicial immunity are said to apply to mediators, particularly when mediation forms part of a judicial or quasi-judicial process. As with judges, mediators are required to act impartially and it is argued therefore that immunity is necessary for them to act independently, without fear or favour. Protection from defamation suits aim to promote candour in judicial proceedings⁹¹ and the same objective can be seen to have some application to the mediation process.

Immunity of mediators, it is argued, ensures finality of agreements reached in mediation. Parties are assumed to have freely reached agreement in mediation and the law favours upholding agreements, none the least agreements compromising legal claims. Precluding suits against mediators is said to avoid time consuming and wasteful attempts to reopen mediated matters. It is also seen to be in the parties' best interests given that mediation is used to avoid going to court in the first place. As one commentator has remarked:

As mediation is designed in part to encourage parties to settle their differences without reference to a court and to adopt a cheaper and more informal process, it is undesirable to have a situation where mediators may be taken to court in order that their conduct of a mediation may be challenged by a dissatisfied party.⁹²

Mediation and other non-judicial dispute resolution processes have assumed a significant role in the court process. The ability of these processes to reduce the number of matters proceeding through the courts and to relieving the burden on judges has been a major catalyst for their increased use. The view that court appointed mediators perform a judicial function and that there are benefits to a court system of ADR processes has been confirmed by United States courts and is supported by a number of commentators.⁹³ There is no express reference to mediators fulfilling judicial functions within the Australian courts systems but there is clear evidence of support for processes that assist the courts to perform their functions in the growth of court-annexed mediation.

91 Reference is made to this policy in *O'Neill v Mann*, above n49; *Mann v O'Neill*, above n50 at 715 (Kirby J). As the objective is largely to secure candour by the parties though, rather than by the third party neutral, it is of limited application to the mediator.

92 Simon Lewis, *Newsletter of Queensland Department of Justice Alternative Dispute Resolution Branch*, July 1997 at 16.

93 *Howard v Drapkin*, above n65; *Wagshal v Foster*, above n66; for commentary see Joseph, above n90; J Sue Richardson, 'Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators' (1990) 17 *Florida State University Law Review*.

Although not explicit in the parliamentary debates, it is likely that concerns about the effective administration of justice is the primary policy rationale behind conferring immunity on court appointed mediators. This rationale may extend to court based mediators and mediators in quasi-judicial tribunals, but becomes weaker the further away from the court the mediation takes place.

The counter arguments based on the administration of justice are made indirectly. It is argued that immunity is an exceptional privilege and the nature of mediator activity does not warrant this exceptional treatment.⁹⁴ There are two parts to this argument. First, that all common law judicial immunity is an exceptional privilege that should only be extended in circumstances where it is clearly required in the public interest.⁹⁵ It can be argued that there has been insufficient justification of mediator immunity on policy grounds to justify the statutory immunity that has been conferred, particularly where it is absolute immunity. The second part of the argument is that a mediator does not determine the parties' legal rights and entitlements and therefore they should not have the same broad immunity of judicial officers. NADRAC has recognised the significance of this factor. In its report *Primary Dispute Resolution in Family Law*, the Council noted that the role of mediator is very different to that of a judge and that the arguments applied to judges, tribunal members and arbitrators do not apply to mediators: 'Whatever model of mediation operates, the mediator is not a decision maker whose freedom to make decisions according to law and good conscience needs protection.'⁹⁶

In other words, the policy objectives underlying judicial immunity do not apply, or at least not with the same force, to mediators. Herein lies the paradox of mediator immunity. By definition, a mediator does not sit in judgment of the parties or determine the outcome of the mediation so there should be no need for immunity, and to the extent the mediator does perform quasi-judicial functions, can they be said to be a mediator at all?

(ii) *Integrity of Mediation Process*

The argument that immunity is necessary to maintain the integrity of the mediation process is based largely on the need to ensure confidentiality in mediation. There is a concern that an action against a mediator will require a court to inquire into what happened and what was said during the mediation which in turn will undermine the parties' confidence in the confidential nature of the process. This in turn may prevent the full and open discussions that are such an important feature of mediation.

The counter argument to this is that rules of procedure and evidence can be framed to avoid use of a mediator suit to attack concluded agreements, while allowing for mediator accountability.⁹⁷ On this view, a balance is advocated

94 Perhaps the strongest proponent of this view is Chaykin, above n14.

95 For example, *Mann v O'Neill*, above n50.

96 NADRAC 1997, above n2 at 31.

97 At least one commentator would not confine the argument in this way. Chaykin argues that mediation can flourish without any special immunities. '[The] common law leaves mediators exposed to liability in a very narrow range of circumstances': above n14 at 50.

between integrity of the *process*, and ensuring integrity of *mediators*. Immunity, in conjunction with privilege, may protect the former, but it exposes the latter to criticism for lack of accountability. As will be seen below, it has been suggested in the United States that appropriately framed exceptions to privilege can ensure that the confidentiality of mediation is only disturbed where justice requires, which may include where there are allegations of mediator misconduct.

The private and confidential nature of mediation, and the consequent difficulties with evaluation and scrutiny of mediator conduct,⁹⁸ raises fundamental concerns about the accountability of mediators and ultimately, therefore, the integrity of the process itself.

NADRAC, in its report *The Use of Alternative Dispute Resolution in a Federal Magistracy*,⁹⁹ expressly recognised the need to place some limits on confidentiality or admissibility provisions. The Council accepted that the proposed Federal Magistrates Act should provide immunity for dispute resolution providers similar to that of the court, and that legislation should make admissions during non-judicial dispute resolution processes confidential. It stated, however, that:

[i]t is imperative that a complaints procedure be implemented whereby an aggrieved party can obtain redress against a DR provider for serious misconduct. The legislation will, therefore, need to allow evidence to be produced of matters said or done during a non-judicial DR process for the purpose of making a complaint against a non-judicial DR provider for the serious misconduct. The legislation should limit confidentiality and immunity, recognising the link between them, and provide for a clear avenue of complaints for professional misconduct.¹⁰⁰

The *Federal Magistrates Act 1999* (Cth) does confer immunity on mediators but makes no provision for complaint mechanisms. Sections 28 and 29 allow for Rules of Court and regulations to make provision for primary dispute resolution processes under the Act. Regulations may make provision, among other things, for 'the procedures to be followed by a person conducting a primary dispute resolution process in carrying out that process'¹⁰¹ and 'the kinds of persons who are eligible to conduct particular kinds of dispute resolution processes'.¹⁰² It will be interesting to see whether regulations are developed that are able to meet the twin goals of immunity and accountability.

A further argument made in support of mediator immunity is that mediators should be free to conduct mediations as they think appropriate and should not have to fear being sued for an error of judgment.¹⁰³ Fears of this nature may lead a

98 This comment is particularly pertinent to solo mediation. There is greater scope for review and evaluation in co-mediation.

99 Above n2.

100 *Id* at 13.

101 S29(2)(a).

102 S29(2)(c).

103 Above n7 at 240.

mediator to be overly legalistic in their approach to the conflict between the parties. Mediators have expressed concern that in some areas of practice they are particularly susceptible to actions by disgruntled parties, and immunity is necessary to protect them against unsustainable claims. For example, NADRAC reports that some mediators may be concerned that 'family disputes are highly emotionally charged and participants may be susceptible to misinterpret the words and actions of the mediator'.¹⁰⁴ The Council notes, however, that many professional groups deal with people who are distressed and may misinterpret what is said if great care is not taken and concludes:

It is part of the professional skills of those people to ensure, so far as possible, that the participants understand what transpires in mediation. Mediation is a process which requires the participants to negotiate difficult issues on their own behalf and mediators should attend with care to issues of capacity. Lack of care or skill in these matters should not be obscured by the provision of immunity.¹⁰⁵

Concern has also been expressed that if mediator liability were allowed it might enable third parties who were not present at the mediation to take action.¹⁰⁶ This could affect the approach a mediator takes should issues arise during the mediation which have the capacity to affect a third party.

(iii) Preservation of Mediated Agreements

It is argued in support of immunity that it supports the preservation of mediated agreements. This argument is closely related to the previous arguments, as an important goal of mediation is to assist parties to reach agreement on matters in dispute between them. The argument rests on the premise that mediators are not responsible for the substantive outcome of the mediation. Any agreements reached will have been freely, albeit reluctantly, entered into by the parties. Mediator immunity is seen as a way of preventing parties attacking the mediator's conduct as a backdoor way to unsettle a mediation agreement.

There are a number of ways to respond to this argument. First, immunity precludes an examination of whether the parties did not, in fact, freely enter into an agreement as a result of mediator pressure. Second, the policy underlying privilege of mediation communications should not preclude making an exception where it operates to the detriment, rather than for the intended benefit, of parties. The question to be asked is, in what ways are the goals of mediation and ADR in general furthered by excluding evidence that a mediator exercised improper influence over a party? The courts are well equipped to determine whether an application to overturn a mediated agreement is based on a genuine complaint against the mediator and whether there is any substance to the allegation. Even if a court admitted evidence to that effect it would not dictate the form of relief that would be granted. A compensatory remedy against the mediator might be granted

104 NADRAC, above n2 at 30.

105 NADRAC, above n2 at 31.

106 Above n7 at 241.

rather than an agreement being set aside against an innocent party. We have seen above that the circumstances in which an action against a mediator is likely to succeed will be very few, and even then there will be difficulties proving a causative link between the mediator's conduct and the party's loss.

While there is a legitimate concern to inhibit parties effectively rearguing a dispute that has been settled in mediation, this concern can be addressed by framing the legal rules to protect the agreement rather than the mediator.

(iv) Mediator Neutrality: Process and Substance

The argument is often made that immunity should not be of concern because there is no basis for mediator liability when a mediator acts as a neutral.¹⁰⁷ This argument relies on the mediator exercising a non-determinative role. It is based on the premise that parties choose whether to remain at the mediation and whether to enter into agreements. In theory, a mediator as a neutral cannot influence the outcome of the mediation and therefore there is no basis for mediator liability. Astor and Chinkin have argued that the fact that the mediator is not responsible for the outcome of a mediation is the precise reason why they should not be liable for any actions based on the terms and provisions of any agreement entered into at the mediation.¹⁰⁸ On this basis, it can be argued that mediators should be immune from any civil action arising from the *substantive outcomes* of the mediation (for example, unfavourable bargains or loss of opportunity).

Supporters of mediator immunity do not necessarily reject the notion that mediators should be accountable for conduct relating to the mediation *process* (for example, failing to attend a mediation, behaving in an unprofessional manner towards one or more of the parties). They would draw a distinction between conduct that is process related and the substantive outcome of the mediation. It might be argued that a mediator can only be responsible in a causal sense for the process aspects of mediation, and that immunity is not warranted in this respect. It is likely to be the case, however, that loss resulting from misconduct of the mediator in respect of process will be insignificant in amount or difficult to prove.

The reality though is that immunity rules preclude claims relating to both the process and the substantive outcomes. It is here that the paradox of mediator immunity is apparent once again. Immunity is justified purportedly on the basis that the mediator is neutral to the substantive outcomes of the mediation. Yet the growing use of *evaluative* mediation suggests that parties seek and obtain from their mediator, an appraisal, if not a determination, of the merits of their dispute and likely outcomes of proceeding to trial. In these circumstances there is a real concern by mediators about potential liability and a concomitant desire for immunity. In reply it would be argued that immunity (at least common law or statutory immunity) is unjustified where a mediator does influence the substantive outcome of the mediation.

107 See, for example, Stulberg, above n14.

108 Above n7 at 240–241.

The arguments in support of immunity can also be seen to reflect a concern about potential liability of mediators when a mediated agreement is disputed, for example where there are problems with a mediation agreement. The memorandum of agreement drafted at the mediation may fail to accurately reflect the agreement reached by the parties and the parties may seek to hold the mediator accountable for the costs of resolving any difficulties. There may also be difficulties with enforcement of the agreement. This will pose a particular difficulty for a legally qualified mediator.

Those who argue against immunity do not deny the potential for liability of mediators, especially legally qualified mediators, and the benefits of affording protection against liability. Instead the arguments relate to the method of protecting mediators. As will be seen in section vii below, provision of liability insurance is an alternative way to protect mediators.

(v) *Safeguards through Accountability of Mediators*

Possibly the most fundamental argument against immunity is that it will inevitably (if infrequently) have the effect of denying access by parties to compensation or other remedies to rectify harm. Our legal system relies heavily on individuals enforcing their private rights. There is a collective benefit that accrues to society as a whole when a person who has suffered harm at the hands of another takes legal action against that person, whether to restrain them from future wrongdoing or to obtain compensation for loss caused by their wrongdoing. Immunity from civil action eliminates that avenue of social regulation. If a person suffers loss or damage due to negligence of a decision maker, or defamatory remarks, then that injured party should be compensated unless there are clear policy arguments to the contrary. As pointed out by Rogers A-JA and stated by Kirby J in *Najjar v Haines*,¹⁰⁹ 'the trend of modern authority is to expand the circumstances giving rise to redress, not to contract it or enlarge exemptions.'

Where parties freely choose to use mediation, that choice might be said to reduce the force of this argument. This freedom of choice underlies the law's acceptance of contractual terms that limit or exclude liability. Where mediation is mandatory, an increasingly common trend, removal of the right of civil action is more invidious¹¹⁰ and accordingly stronger justification is required.

It is sometimes argued in support of immunity that immunity itself is not the main obstacle to a successful civil action against a defaulting mediator. There are at least two grounds for this argument. The first, closely related to the argument in section iv, is that the real obstacle to civil action is not immunity, but the fact that the mediator, as process manager, is not causally responsible for the outcome of the mediation.¹¹¹ In this role the mediator's conduct is very unlikely to provide any

109 Above n26 at 273 (Rogers A-JA); at 232–233 (Kirby J), citing by way of example the liability for negligent professional advice.

110 Above n12 at 255.

111 As we have seen above in part 2, the relief the parties seek may not be available because their agreement was made with the other parties to a dispute and not with the mediator. The privity rules will preclude an action in contract against the mediator in this circumstance.

basis to set aside an agreement. The counter arguments that were noted in section equally apply here.

The second ground is that the real obstacle to civil action is the rules relating to confidentiality and privilege to the extent that they preclude evidence of mediator misconduct. For example, in *State Bank of NSW v Freeman*¹¹² the plaintiffs challenged the decision of the NSW Farm Debt Authority pursuant to section 11 of the *Farm Debt Mediation Act 1994*, that a satisfactory mediation had taken place. The Court said of the privilege provision in that Act:

[S]ection 15 would prevent a court from embarking in any practical way upon an examination of what took place in the course of a mediation session; and if that be precluded, any attempt to review the Authority's decision that it was satisfied that a satisfactory mediation had taken place would be hamstrung to the point of impossibility.¹¹³

These arguments in support of immunity appear to regard mediator immunity either as having no effect on the parties or as a necessary incident of protecting party confidentiality.

It is clear though that there are growing concerns about the wide scope of many confidentiality and privilege provisions. It can be argued that confidentiality is intended to protect the parties, not the mediator. The existence of statutory provisions protecting confidentiality and conferring privilege suggest that protection of the parties in this way has been given primacy over any interest they may have in bringing civil action against their mediator.

It might also be argued in support of immunity that civil liability is an inappropriate and ineffective form of redress for the types of complaints likely to be made by parties against their mediator. It can be argued that there are better ways to deal with misconduct by mediators and that attention should be focused on setting and enforcing acceptable standards of conduct through other means.

Further, it is clear that there are other legal principles that can be invoked to provide protection for parties to mediation, for example designated procedures, disclosures requirements and the requirement that mediators hold and maintain appropriate qualifications. These can be seen in a number of statutes that confer immunity on mediators.¹¹⁴ Civil action may be available for mediator conduct where the mediator's immunity is qualified by the terms of the statutory provision conferring the immunity. To overcome the immunity a party usually will need to argue that the mediator has failed to act in 'good faith'. The limited application of this 'qualification' reduces the potential prejudice to parties from removing their ability to bring civil action against mediators.

On the other hand, it would be possible to confer immunity on mediators but still provide access to compensation for an aggrieved party. In a similar context, concerns about immunity of stated officers of the Crown have been overcome by

112 Above n25.

113 Ibid. Further consideration has been given to the effect of s15 on the admissibility of evidence, see, for example, *Gain v Commonwealth Bank* (1997) 42 NSWLR 252.

114 For example, *Mediation Act 1997* (ACT), *Federal Magistrates Act 1999* (Cth) ss11–13.

expressly confirming by statute that the vicarious liability of the Crown is not removed. Concerns of this type were expressed during the debates on the *Retirement Villages Act 1992* (WA) (hereinafter *Retirement Villages Act*). As a result the Bill was amended during its passage to provide that nothing in the section removing the liability of the Commissioner or officers of the Department 'shall relieve the Crown of any liability that it might have for the actions of such persons but for this section'.¹¹⁵ Although this section may not apply to section 74 of the *Retirement Villages Act* which excludes the personal liability of mediators acting within the Act, it is one way to balance the interests of immunity and appropriate redress.

Against immunity, it is argued that it inhibits development of acceptable standards of care for mediators and removes incentives for mediators to achieve or exceed acceptable standards of care.¹¹⁶ In the absence of general and externally imposed and/or supervised standards of care to offset the exclusion of liability rules, concerns have been expressed about consumer protection.¹¹⁷

An indirect argument against immunity is that civil liability has a beneficial impact on behaviour leading to appropriate standards or quality of service.¹¹⁸ The accountability of mediators to consumers for unacceptable standards of conduct has important implications for the public image and credibility of mediation.¹¹⁹

An argument is made justifying statutory immunity on the basis that mediators operating under the relevant statute are under the control of an agency or court, which provides some guarantee of standards, control and accountability.¹²⁰ This quality control mechanism is said to reduce the need for civil actions. For example, community justice centres have statutory protection for their personnel, including mediators, but have a 'rigorous level of training and accountability'.¹²¹ It is obvious that this form of accountability is only effective if the quality control mechanisms exist, are appropriate and are enforced. It will be of little value in the event that there is mediator misconduct which causes harm to the parties and brings the process itself into disrepute.

The argument that voluntary training and supervision ensures sufficient standards of mediator conduct has proved less persuasive with the passage of time. NADRAC has argued on two occasions that notwithstanding the training and accreditation requirements that many mediators obtain, there is a need for clear avenues of complaint about serious misconduct.¹²² Examples of conduct that would fall into this category are bias, sexual harassment and duress.¹²³ It might be

115 *Retirement Villages Act 1992* (WA) s11.

116 Chaykin, above n14 at 77 concludes that '[i]mmunity encourages carelessness by removing the incentive of cautiousness'.

117 NSWLRC, above n2.

118 Above n12 at 247.

119 NSWLRC, above n2.

120 Above n12 at 254.

121 *Id* at 197.

122 NADRAC 1997, above n2.

123 *Id* at 35.

expected also to include gross negligence, reckless or willful neglect and would no doubt include fraudulent conduct. It is not clear whether it is intended to include conduct that would not constitute an actionable civil wrong.

A further argument against immunity is the absence of other forms of review available to dissatisfied parties. One of the most significant differences between the judicial process and the mediation process is that judicial proceedings are subject to review. Parties who are dissatisfied with the outcome of a court's determination may not sue the judge but they can appeal the decision. There is no equivalent process for mediation for the obvious reason that there is no determination to appeal. Further, provision is made for review of complaints against judicial officers in a number of jurisdictions.¹²⁴

Lewis has argued that a process of administrative review would be the most appropriate form of accountability for mediator misconduct.¹²⁵ He suggests an administrative, rather than a court-based remedy, such as provision for the withdrawal of accreditation or the establishment of a disciplinary board. He argues in support of qualified immunity because it only protects a mediator acting in good faith. This commentator clearly favours a regime under which a mediator would not be exposed to civil action for overbearing conduct or upsetting the parties. With this administrative solution, the problem of evidence will not arise, as evidence regarding the subject matter of the mediation session can be given to the administrative review body under a statutory exception to privilege.

If such a review process were adopted a number of issues would need careful consideration. What incentive would there be in the form of outcomes for dissatisfied parties to encourage them to bring proceedings? Alternatively, would there be a need for a disciplinary body to take responsibility for receiving and prosecuting complaints?

Clearly there are a number of measures that could be adopted to achieve a balance between the desire to protect mediators from the trouble and expense of defending legal action by disgruntled parties and the need for accountability for unacceptable mediator conduct. One is to establish an administrative system of review and sanction.¹²⁶ Another is to qualify immunity to acts in good faith by all mediators. Another approach is to set out in legislation the responsibilities of mediators. This measure does not of itself, however, provide any form of redress for parties. It will also increase the length and complexity of multiple pieces of legislation.

In 1994 a discussion paper was prepared to examine the position of mediation services in the ACT with a view to introducing legislation in that jurisdiction to clarify outstanding issues. In that paper it was suggested that:

124 For example, the NSW Judicial Commission. See the *Judicial Officers Act 1986* (NSW), discussed by the Hon Mr Justice M H McLelland, 'Disciplining Australian Judges' (1990) 64 *ALJ* 388.

125 Above n92.

126 The costs associated with putting a review process in place will be a serious concern in many organisations that provide mediation services who already operate on restrictive budgets.

It would be prudent to set some limitations to the immunity as the case law in this area does not offer great guidance. The possible limitations could arise if the mediator:

- Acted in bad faith
- Exhibited bias towards one of the parties
- Communicated incorrect information to one or both of the parties
- Withheld crucial information that could influence the direction of the negotiations, or the parties' decision to enter into a transaction
- Misrepresented his or her qualifications, expertise or abilities or
- Created an atmosphere where one party felt coerced into accepting a proposal.¹²⁷

These proposed limitations refer to behaviour that is considered unacceptable by mediators. They do not, however, equate neatly with legal causes of action and therefore removing immunity may not have the desired remedial effect. Instead it would be preferable to create specific duties, for example, of disclosure of qualifications and conflicting interests by a mediator, and to exclude immunity from operating in respect of those duties. As we will see below, this is what is proposed in the United States.

(vi) *Availability of Mediators*

It is argued in support of immunity that it is necessary to encourage the availability of mediators.¹²⁸ The prospect of civil liability might deter people from becoming mediators and performing a valuable social service. Immunity from liability is seen as a necessary form of legislative encouragement to use mediation and other non-judicial dispute resolution processes.¹²⁹ This consideration was recognised by Kirby J as an important factor in determining whether to recognise a court referee as having judicial immunity in *Najjar v Haines*.¹³⁰

Supporters of immunity have pointed to the fact that some mediators provide their services for little or no financial reward and potential liability may see them withdraw their services. Proponents of this argument do not distinguish between absolute and qualified immunity or indicate what level of protection would provide sufficient encouragement for mediators.

NADRAC in its report *Primary Dispute Resolution in Family Law*, reported that one argument presented during their inquiries was that 'some lawyer mediators do give advice of a limited nature and desire immunity because of this'.¹³¹ While this indicates that immunity may be an incentive to mediate for some mediators, at the same time it raises concerns about the inconsistency in conferring immunity on a lawyer mediator giving advice in a mediation, when they would not have immunity for that advice in their legal practice. NADRAC also

127 Above n84.

128 See generally Stulberg, above n14; D Alan Rudlin & Kelly L Faglioni, 'Mediator Immunity Promotes ADR Access, Keeps Costs Low' (11 April 1994) *NLJ* at 12.

129 Above n12 at 247.

130 Above n26 at 234.

131 NADRAC 1997, above n2 at 30.

reported that informal canvassing of practitioners suggests some doubts about the extent to which mediators value immunity.¹³²

The counter argument on the question of deterrents and disincentives is that there are alternative ways of protecting mediators from the risks and costs associated with providing their services. For example, liability insurance can be provided with indemnity by an employer or agency for any costs incurred in defending a suit against them (presumably limited to acts in good faith) and for any damages awarded as a result of the suit.

(vii) Cost of Suit against Mediators

Closely related to the previous argument is the concern that mediators may be discouraged from offering their services for fear of incurring the costs associated with defending legal suits. Again the counterargument is made that there are ways to protect mediators against costs of litigation.¹³³ It has been suggested that consumer interests would be better served by a scheme of liability insurance and indemnity by agency or mediator employers. For example, the costs of insurance or legal representation could be paid for by the court or other statutory body for whom the mediator's services are provided.¹³⁴ Alternatively, court appointed mediators could have the benefit of government paid representation or indemnification for costs.¹³⁵

It must also be recognised that there are costs for the parties who bring legal action against their mediator. Clearly 'suing the mediator is a complex and expensive way to deal with mediator misconduct',¹³⁶ and for this reason will be an unattractive course of action for many parties.

(viii) Risk of Mediator Suit

For all the reasons identified in this article, there is little risk of a successful civil action against a mediator. Probably of greater concern to mediators is the threat or commencement of actions. In its report *Primary Dispute Resolution in Family Law*, NADRAC stated that it is unlikely that there would be a large number of actions if statutory immunity were removed.¹³⁷ It refers to the Community Justice Centre in NSW which reported that in the 16 years since it was established, including over 18500 mediation sessions and 45000 files, there has not been one threat of action against a mediator.¹³⁸ NADRAC notes, however, that this may be a reflection of the fact that mediators in the community justice centres are protected by statutory immunity.¹³⁹

132 Id at 31.

133 Above n93 at 647.

134 Above n89 at 657, 660.

135 Id at 664; above n93 at 664.

136 NADRAC 1997, above n2 at 30.

137 Id at 31.

138 Ibid.

139 Ibid.

The low incidence of mediator suits can be used to make arguments both for and against immunity. Against immunity it is argued that the risk is so low it does not justify the protection.¹⁴⁰ On the other hand, the argument for immunity is that in practical terms immunity does not diminish the effectiveness of liability rules.

A related argument made by one commentator opposed to immunity is that there should be no statutory protection in the absence of documented evidence of need for immunity.¹⁴¹ Hopefully, responses to the NADRAC *Development of Standards for ADR Discussion Paper* will provide some further information about the perceived need for immunity.

(ix) *Interests of Parties Outside the Mediation*

There is scope for information to be disclosed in mediation that warns of possible harm to third parties to the mediation.¹⁴² There is also scope for agreements to be reached in mediation that are contrary to the interests of third parties and, in some instances, the public interest.¹⁴³ As immunity prevents legal action not only by the parties but also by third parties to the mediation, there is a potential for these third parties to be denied a remedy for harm resulting from non-disclosure of the terms of mediated agreements.

The argument is made by some in support of immunity that the mediator as process manager is not accountable to third parties to the mediation.¹⁴⁴ A further argument is that, to the extent that there are overriding interests of third parties where it is in the public interest to require mediators to make disclosure, this should be provided for by statute with necessary protection to mediators who do so. In other words, in the absence of a statutory obligation to disclose what would most likely otherwise be confidential information, a mediator owes no obligations to third parties to the mediation. On this view, immunity has no impact on third party rights.

An argument against immunity on the ground that it adversely affected third parties would need to establish first that there was a legal basis of liability owed by a mediator to third parties to the mediation. There appears to be little support for this conclusion in the scant case law that exists or in the commentaries.

140 Reference is made to this argument by proponents for mediator accountability: see Center for Dispute Settlement, *National Standards for Court Connected Mediation Programs Draft Report* (1992); New Jersey Supreme Court, *Task Force Report on Complementary Dispute Resolution* (1989) 124 NJLJ 90 at 96; New Jersey Supreme Court, *Final Report on Complementary Dispute Resolution* (1990) at 23–24.

141 Chaykin, above n14.

142 Under s672A of the *Family law Act* 1975 (Cth) mediators have a statutory obligation to notify child welfare authorities if they have reasonable grounds to suspect actual or a risk of child abuse.

143 For examples and discussions, see Lawrence Susskind, 'Environmental Mediation and the Accountability Problem' (1981) 6 *Vermont Law Review* 1.

144 This argument can also be made consistent with arguing against immunity; see, for example, Stulberg, above n14.

(x) *Availability of Immunity to Others*

Proponents of immunity can point to many other examples beyond court officers where civil liability is excluded or a person may be excused from liability that would otherwise exist. These provisions apply where there has been a breach of duty in a strict sense but both reasonable and honest conduct on the part of the defaulter.¹⁴⁵ A significant difference between these forms of statutory exoneration and immunity, however, is that exoneration is only available upon application to a court.

A similar argument by analogy might be made by reference to the contractual protection available to private mediators. As the law allows parties and mediators to exclude many forms of mediator liability by agreement, why should statutory provision not be made for similar exclusions where the parties do not have a contractual relationship? It is argued that in some circumstances there are practical benefits of having the legal obligations and protection of mediators provided for in legislation, rather than leaving them to be 'negotiated' with parties seeking mediation services.¹⁴⁶ This comparison raises the obvious question whether the level of protection provided by statute and contract law should be the same. If not, what justification exists for a higher level of protection sometimes conferred by statute?¹⁴⁷

While there has been a discernible trend in recent years for provisions conferring absolute immunity to be inserted into legislation establishing courts, tribunals and other government agencies,¹⁴⁸ disparities will inevitably remain between mediators with statutory immunity and those without, and in the level of immunity conferred.

One way to increase the consistency of protection available to mediators is to confer statutory immunity on those who satisfy statutory registration requirements. The *Mediation Act* 1997 (ACT) is an example of this. The Western Australian Law Reform Commission (hereinafter WALRC) has recommended that similar legislation be introduced in WA.¹⁴⁹

145 For example, *Trustees Act* 1962 (WA) s75 (where a trustee acted 'honestly and reasonably' and ought fairly to be excused for breach of trust); *Corporations Law* ss1317S, 1318. S180(2) of the *Corporations Law*, the 'business judgment rule', provides for excuse from liability for breach of duty of care rather than providing grounds for exoneration.

146 This is a significant factor in court or tribunal ordered mediation. A similar concern was expressed to the writer about 'excessive formality' when trying to encourage parties to use mediation, by the Director of the Western Australian Aboriginal Alternative Dispute Resolution Service, in May 1999.

147 NADRAC 1997, above n2 at 31–32 notes that unlike s19M of the *Family Law Act*, other immunity provisions apply only where the person to be covered has acted in good faith. The Council indicated that it is attracted to these limitations, but that further research is needed to establish parameters of these provisions and to identify the precise nature of the protection they offer to mediators and participants in mediation.

148 For example, *Administrative Appeals Tribunal Act* 1973 (Cth), amended 1993; *Retail Leases Act* 1994 (NSW), amended 1998; Courts Legislation Amendment Bill 1999 (WA), which conferred protection on mediators carrying out mediation under the direction of the court. For a more general discussion of recent legislation incorporating ADR processes see Tom Altobelli, 'ADR Legislation — Some Recent Developments' (1996) 3 *CDJR* 1.

Arguments against immunity of mediators have also been made by comparison with other third party neutrals. Concerns have also been expressed about inconsistencies in the protection available to people providing similar services to mediators. Some professionals may have, in effect, greater protection when acting as a mediator than in their other professional capacity. For example, barristers and solicitors have immunity only for work that is related to judicial and quasi-judicial proceedings.¹⁵⁰ In its report *Primary Dispute Resolution in Family Law*, NADRAC expressed the view that 'it seems inconsistent then (without some compelling arguments about the nature of mediation) to protect them when they give advice of a minor nature in mediation.'¹⁵¹

There are other professionals who provide services similar to mediators but do not have immunity. One notable example is counsellors. NADRAC has referred to the fact that the work of counsellors may be very similar to that of mediators.¹⁵² Despite the similarity between the activities of counsellors and mediators, for example in family cases, there is a difference in the civil liability of each.

H. Mediator Immunity in the United States

Much of the debate surrounding mediator immunity has been between commentators in the United States. There is a wide variation in the protection provided to mediators in the various state and federal jurisdictions, although common forms of immunity have been incorporated in many statutes.

A Drafting Committee for the American Bar Association Section of Dispute Resolution and the National Conference of Commissioners of Uniform State Laws has been working to produce legislation capable of general application in the form of a Uniform Mediation Act.¹⁵³ The Draft Uniform Act contains provisions that cover confidentiality, privilege and disclosure. There is no proposal for a uniform immunity provision. Although in the Reporter's Working Notes to a previous draft of the Uniform Mediation Act the Drafting Committee acknowledged that there are arguments for and against immunity, they have not taken a position on the general issue of propriety of immunity for mediators.¹⁵⁴

Under the proposed legislation, contractual provisions can be used to expand the protection of confidentiality beyond the statutory code. Whether or not a breach of a mediator's duties of confidentiality is covered by an immunity clause

149 WALRC, *Review of the Criminal and Civil Justice System. Final Report* (September 1999) Recommendation 69 at 350.

150 See, for example, *Giannarelli v Wraith*, above n1, and more recently, *Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209. Even this immunity is likely to come under review again in Australia when a suitable case arises, given the decision of the House of Lords in *Arthur J S Hall & Co (a firm) v Simons & Ors* [2000] 3 All ER 773, that common law immunity is no longer available to advocates against suits for negligence.

151 NADRAC 1997, above n2 at 31.

152 *Ibid.*

153 National Conference of Commissioners on Uniform State Laws, *Draft Uniform Mediation Act* (February 2001): <<http://www.nccusl.org/drafting/projects.htm#ma>>.

154 National Conference of Commissioners on Uniform State Laws, *Draft Uniform Mediation Act* Reporter's Working Notes: <www.upenn.edu/bll/ulc/ulc.htm#umedi> (30 April 2001).

will depend on the scope of the clause. The Drafting Committee identified disclosure as a key principle to be included in the Model Act, that is, the requirement that mediators disclose, if requested, their qualifications to mediate and any possible conflicts of interest. In this way, depending on state laws, a mediator can be held accountable for failing to inform parties about the process that will be used and the standard of service they can expect.

In the United States, state immunity statutes grant either full or qualified immunity to all mediators or to designated matters referred to mediation by the courts.¹⁵⁵ Florida is unique in granting all court appointed mediators full judicial immunity in the same manner and to the same extent as a judge.¹⁵⁶ Most state statutes qualify the immunity granted to mediators to certain practice areas, for example, farm-lender and agricultural mediation, medical malpractice and medical-related mediation, and to actions taken within the scope of their employment.¹⁵⁷ Other states limit liability unless there is bad faith, wilful or wanton misconduct, or similar conduct.¹⁵⁸

The position in the United States at present appears to be similar to Australia with the notable difference that absolute immunity is more likely to be granted by statute to court appointed mediators in Australia.

4. Conclusion

The earliest arguments for statutory mediator immunity in Australia were made in support of community justice centres that relied heavily on the participation of members of the community. More recently, support for mediator immunity has come from bodies involved with the operation of court systems and court based dispute resolution processes. The many arguments made in support of mediator immunity apply differently depending on the context in which the mediator operates. Similarly, the same justification does not apply equally in each mediation context.

Underlying the arguments against mediator immunity is a concern about the potential for lack of accountability by mediators for serious misconduct and resulting harm to parties, and the regard in which the process is held.

The arguments against statutory immunity for mediators rest on two premises. Firstly, the role of a mediator, to be responsible for process and not outcomes, is fundamentally different from the role of making binding decisions that is generally associated with other people on whom immunity is conferred. Other significant differences include the private nature of mediation proceedings and the fact that not all communications between parties and the mediator take place in the presence of both parties. The second premise is that protection is available in other forms for mediators, through insurance and indemnity schemes.

155 Above n89 at 662.

156 This approach is strongly criticised in Richardson, above n93 at 628.

157 *Ibid.*

158 *Id* at 662.

The arguments in favour of some form of immunity, the apparent legislative support evidenced by the existing and growing use of statutory immunity, and the fact that mediators can achieve a limited form of immunity through contractual provisions in any event, suggest that it would not necessarily be productive to advocate the abolition of statutory immunity for mediators. Further, the many obstacles identified in this article to bringing a successful civil action against a mediator mean that our attention should focus on other ways to address concerns about mediator misconduct.

One way to balance the various interests reflected in the arguments for and against mediator immunity is to recognise that, while some form of immunity is defensible, the case for absolute immunity has not been, and cannot be, made out. Accordingly, any grant of statutory immunity should be subject to a 'good faith' or similar qualification.

We have not reached the point, nor ever will, of assuming that mediator training and supervision will eliminate unacceptable mediator conduct. For that reason, to the extent that civil actions are precluded by statutory immunity, alternative mechanisms must be developed. Suggestions as to how this might be done have been touched on in this article, but the possibilities cannot be explored fully here. Importantly, further attention will be required to refining the privilege rules to ensure that evidence of mediator misconduct is not excluded in circumstances where accountability should be the paramount public interest.

This article opens with a quotation from the judgment of Wilson J in *Giannarelli v Wraith*, a case concerning the immunity of barristers. In addition to that remark, Wilson J said in another passage of his judgment that 'it must be acknowledged that the law ought not readily grant privileges or immunities'.¹⁵⁹ Given the growing importance of mediation as a dispute resolution process and the potential for mediator misconduct, careful attention is needed to ensure that the significant privilege conferred by mediator immunity does not harm the very process it is intended to protect.

159 Above n1 at 575.