
Constructions of Impartiality in Mediation

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Impartiality is a core principle of decision-making within Australia's common law system of justice. This article reports on an empirical study of the meaning of impartiality in mediation. The study is set against changes to the National Mediator Accreditation System in 2015, which saw removal of neutrality as an ethical requirement of practice. Prior to the 2015 amendments, mediators were required to demonstrate an understanding of "neutrality and impartiality". The requirement to demonstrate understanding of impartiality was retained in the 2015 revisions. The past requirement that mediators understand both neutrality and impartiality suggests that these two concepts are separate and distinct. Yet while some scholars distinguish between them, others treat them as synonymous. The study reported here sought to further understanding of impartiality by gathering data from practising mediators about what meaning they ascribe to impartiality and how they translate it into their practice. The results challenge existing constructions of impartiality that are framed from a purely legal perspective and suggest multidisciplinary influences consistent with non-adversarial justice approaches.

INTRODUCTION

Impartiality is a core, founding and essential principle of decision-making for western systems of democracy.¹ Hence the impartiality of the judiciary, tribunals and administrative decision-makers is a virtually unquestioned precept of Australia's system of justice.

Mediation is a recognised and institutionalised process of dispute resolution,² and impartiality is a core principle of that process.³ However, decision-making in mediation is markedly different than that found in formal justice processes. While judicial and quasi-judicial decision-makers are charged with the impartial application of law in order to reach a just decision for disputing parties, mediators have no role in reaching a decision.⁴ Moreover, unlike formal processes, mediation is quintessentially a process that aims to achieve non-adversarial justice.⁵ Mediators eschew adversarialism, focusing instead on common ground and common understanding.⁶ Their aim is to facilitate the parties' own decision-making in order to further the parties' self-determination.⁷

This article reports on an empirical study of the meaning of impartiality in mediation. The study consisted of a series of in-depth interviews with mediators from three community-based and government-funded agencies. Participants were asked about their understanding of impartiality and were also asked to complete a free association exercise designed to elicit synonyms for impartiality and bias. The results evidence constructions of impartiality that extend beyond existing legal definitions. Extended

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¹ M King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 2.

² L Boule, *Mediation: Principles, Process, Practice* (Butterworths, 3rd ed, 2011) X.

³ National Mediator Accreditation System (NMAS) 2015, Pt III cl 10(1)(c)(vi) <<http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>>; see also L Boule and R Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis, 2017).

⁴ See the definition of "mediation" under the NMAS 2015, n 3.

⁵ King et al, n 1, 95–135.

⁶ See, eg Boule, n 2, 69–71, 91–97.

⁷ See NMAS 2015, n 3.



constructions incorporate socio-behavioural constructs consistent with the non-adversarial nature of, and multidisciplinary influences upon, the practice of mediation. The results are significant for understanding impartiality as a concept and principle integral to the practice of mediation.

The discussion is in five parts. In the first part, the meaning and significance of impartiality in mediation is placed in the context of changes to the National Mediator Accreditation System (NMAS) in 2015,⁸ and in the context of debate about the meaning of both neutrality and impartiality preceding those changes. The design of the study is described in the second part. Results of the study are reported in part three and discussed in part four. Finally, in part five, implications of the research are examined followed by concluding remarks.

RESEARCH CONTEXT

The NMAS requires that accredited mediators demonstrate an understanding of “impartiality, including the avoidance of conflicts of interest”.⁹ Prior to amendments in 2015, mediators were required to demonstrate an understanding of “neutrality and impartiality”.¹⁰ All reference to neutrality has been removed in these latest amendments. Mediator neutrality has been debated and challenged in the Australian mediation literature for two decades.¹¹ The original requirement that mediators understand both neutrality and impartiality suggests that the two concepts are separate and distinct. Yet while some scholars distinguish between them,¹² others treat them as synonymous.¹³

Neutrality was once a defining feature of mediation. Early definitions of mediation referred to the role of mediators and third-party neutrals.¹⁴ More recent definitions omit a reference to neutrality and refer to an “acceptable” third party or, simply, a third party.¹⁵ A variety of meanings have been attributed to both neutrality and impartiality.¹⁶ According to Astor, and a number of other commentators, impartiality is a commonly accepted synonym for neutrality.¹⁷ This view is reflected in an empirical study conducted by Cobb and Rifkin, in which 14 of the 15 mediators participating consistently equated neutrality with impartiality.¹⁸ Other scholars and practitioners have distinguished these concepts. Moore, for example,

⁸ NMAS 2015, n 3.

⁹ NMAS 2015, n 3, Pt III cl 10(1)(c)(vi).

¹⁰ National Mediator Accreditation System (NMAS) 2008, Practice Standards cl 7(3)(c)(iv).

¹¹ See H Astor, “Rethinking Neutrality: A Theory to Inform Practice – Part 1” (2000) 11 ADRJ 73; H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002); Boule, n 2; R Field, “Mediation and the Art of Power (Im)balancing” (1996) 12 *QUT Law Journal* 264; R Field, “Mediation Ethics in Australia: A Case for Rethinking the Foundational Paradigm” (2012) 19 *James Cook University Law Review* 41, see 66 fn 165 for a list of the author’s papers in relation to neutrality and power imbalances in mediation.

¹² L Cook and C Hale, “The Construction of Ethics in Mediation” (1994) 12(1) *Mediation Quarterly* 55, 63; C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3rd ed, 2003) 53; A Taylor, “Concepts of Neutrality in Family Mediation: Context, Ethics, Influence, and Transformative Process” (1997) 14(3) *Mediation Quarterly* 215, 218.

¹³ Astor, n 11, 76–77; H Astor, “Mediator Neutrality: Making Sense of Theory and Practice” (2007) 16(2) *Social and Legal Studies* 221, 222; Astor and Chinkin, n 11, 150; Boule, n 2, 32–33; Cooks and Hale, n 12, 62; S Cobb and J Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16(1) *Law and Social Inquiry* 35, 41; Field (2012), n 11, 49–55; H Gadlin and E Pino, “Neutrality: A Guide for the Organisational Ombudsperson” (1997) 13(1) *Negotiation Journal* 17, 18; E Rock, “Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice” (2006) 6(2) *Cardozo Journal of Conflict Resolution* 347, 354–355.

¹⁴ See, eg C Moore, *The Mediation Process* (Jossey Bass, 1986) 6; J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey Bass, 1984) 7.

¹⁵ According to the NMAS 2015, n 3, cl 1: “A mediator uses the knowledge, skills and ethical principles referred to in Part III Section 10.1 to assist participants to make their own decisions in relation to disputes, conflicts or differences among them.” See NMAS 2008, n 10, Approval Standards, 4: “The mediator acts as a third party to assist the participants to reach their decision.” See also NMAS 2008, n 10, Practice Standards, 5.

¹⁶ S Douglas, “Constructions of Neutrality in Mediation” (2012) 23 ADRJ 80.

¹⁷ Astor, n 11, 76–77; Astor, n 13, 222; Astor and Chinkin, n 11, 50; Boule, n 2, 73; Cooks and Hale, n 12, 62; Cobb and Rifkin, n 13, 41; Gadlin and Pino, n 13, 18; Rock, n 13, 354–355.

¹⁸ Cobb and Rifkin, n 13, 42.

identified impartiality as the unbiased attitude of the mediator, while neutrality refers to the mediator's equal behaviour towards, and relationship with, the parties.¹⁹ Taylor switched these definitions by identifying neutrality as a lack of real or perceived bias and impartiality as a requirement to do "exactly equal to and for each disputant".²⁰ Somewhat differently, Cooks and Hale identified neutrality as a lack of prior relationship with the parties or vested interest in an outcome, and impartiality as freedom from favouritism or bias in either word or action.²¹

Boulle argued that neutrality can be understood as a multidimensional concept encompassing disinterestedness, independence and impartiality.²² "Disinterestedness" means that the mediator will have no commercial or personal interest in the outcome of mediation. "Independence" means that the mediator will have no prior relationship with the parties or any third party with an interest in the outcome. "Impartiality" means that the mediator will "conduct the process fairly, even-handedly and without bias towards either party".²³ According to Boulle, independence and disinterestedness are not absolute requirements and depend upon context and circumstance. By contrast, Boulle identified impartiality as a defining feature of mediation.²⁴

In an argument for reconstructing neutrality, the author has previously contended that neutrality can be understood as encompassing impartiality.²⁵ In response to critique of neutrality as an impossible absolute requirement, she suggested that neutrality and impartiality are about the limitation rather than the elimination of bias, and argued that varying constructions of neutrality and impartiality address different real or potential manifestations of bias. The author also proposed that neutrality can be understood as: impartiality in a narrow sense, coincident with avoidance of conflicts of interest; impartiality in a wide sense, as between mediator and both parties, and referring to limiting the intrusion of the personal biases of mediators; and even-handedness, or treating the parties equally, understood as impartiality as between the parties.

Field identified neutrality as a multidimensional term that includes impartiality.²⁶ She listed the several meanings associated with neutrality – namely, that the mediator:

- Has no conflict of interest with the parties or the issues to be resolved,
- Is not interested in the outcome of the dispute they are mediating,
- Is not biased towards or against either party,
- Generally lacks detailed prior knowledge of the dispute and/or the parties,
- Is fair and even-handed in their practice of the process,
- Is fair and even-handed in their treatment of the parties,
- Will not make a judgment about the dispute or the parties, and
- Will not make a decision for the parties.²⁷

In the original 2008 version of the NMAS, impartiality was explicitly defined as "freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the

¹⁹ Taylor, n 12, 218.

²⁰ Moore, n 12, 53.

²¹ Cooks and Hale, n 12, 63.

²² Boulle, n 2, 73.

²³ Boulle, n 2, 73.

²⁴ Boulle, n 2, 75; see also Boulle and Field, n 3.

²⁵ Douglas, n 16.

²⁶ Field (2012), n 11, 54. Field challenges the suitability and desirability of neutrality as a foundational ethic of mediation. She bases this challenge on three core arguments. First, that the current market for mediation services in Australia has moved away from reliance on the classic facilitative model of practice, which relies upon neutrality, favouring instead evaluative and settlement models. Secondly, Field relies on the work of Bernard Mayer in *Beyond Neutrality* (Jossey-Bass, 2004) in which the author proposes that mediators have a role in moving beyond neutrality in order to promote justice. Thirdly, that mediators have a role in intervening to address power imbalances between parties in order to promote true self-determination, and that in such circumstances mediators cannot claim neutrality.

²⁷ Field (2012), n 11, 54–55.

appearance of such favouritism or bias”.²⁸ As noted above, mediators are now required to demonstrate understanding of “impartiality, including the avoidance of conflicts of interest” as an ethical requirement of practice.²⁹ Mediators are also required to “conduct the mediation in a fair, equitable and *impartial* way, without favouritism or bias in act or omission” (emphasis added).³⁰ Clause 7 of the NMAS 2015 sets out principles of procedural fairness³¹ and impartiality as standards for practice. It requires, *inter alia*, that mediators avoid or disclose grounds of bias or conflicts of interest to the parties,³² and that:

A mediator must not mediate in cases involving a conflict of interest without the informed consent of the participants, and then only if, in the mediator’s view, the conflict would not impair his or her *impartial* conduct of the process.³³ [emphasis added]

The meaning ascribed to impartiality in both versions of the NMAS is closely associated with the bias rule in adjudication,³⁴ with its focus on the need to avoid conflicts of interest. The range of meaning identified by commentators likewise reflects the bias rule and extends to other principles of procedural justice – namely, not taking sides and treating the parties equally. Commentary does indicate some extension beyond legal constructs – namely, avoiding the intrusion of bias due to the mediator’s personal values, preferences and judgments.³⁵ However, overall the meaning of impartiality in mediation, according to the NMAS and commentators, is predominantly understood according to the established meaning deriving from Australia’s common law, adversarial system of justice.

Review of the literature demonstrates that debate about the meaning of neutrality in mediation has implicated impartiality as either a synonym or as a closely related concept. Given this background, the removal of neutrality from the NMAS raises questions as to the particular meaning and significance of impartiality. What does impartiality mean? How is it different from neutrality? Answers to these questions have been sought from a sample of practicing mediators in the study described below.

RESEARCH DESIGN

The research proceeded from an interpretivist, and specifically social constructionist, perspective.³⁶ The aim of the investigation was theory building rather than theory testing. In other words, it aimed to elicit understanding of the meaning attributed to impartiality rather than to test a given hypothesis. The sample was chosen consistent with this purpose and not as a representative sample. A qualitative design was chosen to collect the data. A grounded theory approach was chosen to analyse the data collected.³⁷ Ethics approval to conduct the research was obtained.³⁸

The sample consisted of three case studies of community-based mediation services. Data was collected using semi-structured interviews.³⁹ Each interview was 50–60 minutes in length; all were

²⁸ NMAS 2008, n 10, Practice Standards cl 5(1).

²⁹ NMAS 2015, n 3, Pt III cl 10(1)(c)(vi).

³⁰ NMAS 2015, n 3, cl 7.1.

³¹ Reflecting the rules of natural justice, viz, the hearing rule, the no evidence rule and the rule against bias.

³² NMAS 2015, n 3, Pt III cl 7.2.

³³ NMAS 2015, n 3, Pt III cl 7.3.

³⁴ *Webb v The Queen* (1994) 181 CLR 41; see also A Field, “The Bias Principle and its Applicability to International Commercial Arbitrations in Australia” (1999) 10 ADRJ 246; Astor, n 13.

³⁵ See Douglas, n 16. Unconscious judicial bias is recognised by Mason J in K Mason, “Unconscious Judicial Prejudice” (2001) 13(8) *Judicial Officers Bulletin* 57. See also results of a recent empirical study of judicial impartiality: S Roach Anleu and K Mack, “Impartiality and Emotion in Judicial Work” (2017) 29(3) *Judicial Officers Bulletin* 21.

³⁶ In which meaning creation is taken to be an essential human undertaking; see M Crotty, *The Foundations of Social Research: Meaning and Perspective in the Research Process* (Allen and Unwin, 1998).

³⁷ See B Glaser and A Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967).

³⁸ Approval was obtained from the Human Research Ethics Committee, University of the Sunshine Coast.

³⁹ Limitations of the sample are considered below.

audio recorded and later transcribed. Participants were asked about their understanding of impartiality and how they translated it into practice. At the end of each interview participants were asked to provide word associations for the concepts of “impartiality” and “bias”. The interview data was subjected to a thematic analysis and coded using open, axial and selective coding.⁴⁰ The case studies were coded separately. Interviews from the first case study were coded as Case Study 1 (CS1) and each of the participants was assigned a letter of the alphabet. Similarly, interviews from the second and third case studies were coded as Case Study 2 (CS2) and Case Study 3 (CS3) respectively and each participant was assigned a letter. There were 19 participants in all: 10 in CS1; four in CS2; and five in CS3.

The demographic information gathered in relation to each case study consisted of:

- Whether the service was government funded and administered, or government funded but privately administered, or privately funded and administered.
- The model of mediation used by the service:
 - whether settlement, facilitative, evaluative, transformative or narrative (as identified by Boulle⁴¹);
 - whether a co-mediation model was used;
 - the time typically given to a mediation session;
 - whether parties were given the opportunity to attend more than one session.
- The substantive areas of practice provided by the service.
- Demographic details of participants as to:
 - gender;
 - age;
 - training in mediation;
 - qualifications and whether in law, social science or other;
 - length of experience in mediation;
 - whether involved in the training of mediators.

These demographic details are summarised in Tables 1 and 2.

TABLE 1. Service Demographics

	Case Study 1	Case Study 2	Case Study 3
Service Type	Government funded and administered	Government funded and privately administered	Government funded and privately administered
Model of Mediation	Facilitative	Facilitative	Facilitative
Session Length	3 hours +	2 hours	2–3 hours
More Than One Session Offered?	Yes	Yes	Yes
Co-Mediation?	Yes	Yes, depending on availability of mediators	Yes, depending on availability of mediators
Substantive Practice Areas	Neighbourhood, family, commercial, workplace, environmental, Indigenous matters and court ordered	Family matters: parenting and property	Family matters: parenting

⁴⁰ A Strauss and J Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Sage, 1990) 62.

⁴¹ Boulle, n 2, 43–48.

TABLE 2. Mediator Demographics

	Case Study 1	Case Study 2	Case Study 3
Gender	3 female; 7 male	3 female; 1 male	3 female; 2 male
Age	33–54 years	43–56 years	32–44 years
Training in Mediation	Compulsory in-house	Varied	Varied
Qualifications	7 with post-secondary	4 with post-secondary	5 with post-secondary
• Social Science	2	4	5
• Law	2		
• Other	3		
Experience in Mediation	2–12 years	6 months–5 years	1–7 years

Sixteen of the 19 mediators sampled reported having post-secondary qualifications. Of those 16, 11 reported qualifications in social science and two in law. All three of the services engaged in mediations involving family matters. These facts have implications for the findings presented below, which demonstrate extension of legal constructions of impartiality to those consistent with therapeutic principles. Other meanings found to be associated with impartiality are consistent with mediation principles per se, or constructed from experience of practice, or practice wisdom. The bias in the sample towards social science graduates could be predicted to produce non-legal constructions. However, the value of the results is not in producing findings that are generalisable to other populations, particularly populations of lawyer mediators, but in generating meanings that contribute to the theoretical understanding of impartiality in mediation. That understanding is properly the product of an investigation that acknowledges the socio-legal development of mediation as a practice and as a profession. The existing bias in the sample serves to highlight the relevance of the socio-behavioural sciences to the practice of mediation and consequently to the theoretical development of key concepts. The research design has enabled construction of impartiality to be elicited from an identifiable population of mediators. Though not generalisable based on representative sampling, the results can be extrapolated to other populations of mediations and mediators to further examine applicability, or fit, in a process of theoretical sampling.⁴²

RESULTS

Results of the study are presented according to the categories of meaning elicited, extracts from interviews (which demonstrate select categories) and results of the free association exercise. Fifteen categories of meaning were found to be associated with the idea of impartiality. These were:

- (1) non-judgmental attitude/approach;
- (2) exclusion of personal values/needs/preferences;
- (3) lack of personal reaction;
- (4) no vested interest;
- (5) neutral as to the interpretation of events;
- (6) lack of bias;
- (7) emotional detachment;
- (8) seeing from the point of view of the “other”;
- (9) no interest in truth claims;
- (10) no prior knowledge of parties;
- (11) self-awareness;
- (12) not taking sides;
- (13) primacy of parties’ interpretations of events;
- (14) mindfulness; and
- (15) professionalism.

⁴² See Glaser and Strauss, n 37.

Three of the above categories clearly reflect the constructions of impartiality found in the literature – namely, no vested interest (4 as numbered above), no prior knowledge of the parties (11) and not taking sides (13). These three categories are further associated with legal rules as to the exclusion of bias, including conflicts of interest. Four categories can be grouped as reflective of the role of the mediator and principles of mediation. Being neutral as to the interpretation of events (5) and evincing no interest in truth claims (9) are consistent with the mediator’s role in assisting parties to reach their own outcomes and as having no determinative role in relation to the dispute. Giving primacy to parties’ interpretations of events (13) is also consistent with the mediator’s role and with the central principle of party self-determination guiding mediation practice. Seeing from the point of view of the “other” (8) is one aim in encouraging communication between parties’ and of moving towards, if not agreement, at least mutual appreciation of the other party’s point of view. As one participant observed, this aim addresses biases that the parties demonstrate on entering the process:

I think for a lot of parties they are certain that their story is complete and unbiased. But they are equally certain that the other person’s story is completely wrong and the first thing they want to do is try and criticise them or correct what they perceive or feel the other party has done. (CS1 B)

Two categories call attention to the problem of the impact of mediators’ personal values, preferences or judgments – namely, exclusion of personal values, needs and preferences (2) and excluding personal reactions (3). This latter category refers to participants’ awareness that unconscious biases may operate and manifest as reactions to parties and their dispute as distinct from considered responses consistent with mediation’s aims and principles. Three categories reference approaches adopted by participants to deal with personal bias – namely, self-awareness, mindfulness and professionalism.

Two final categories extend the constructions of impartiality found in the literature to concepts found in social science/therapeutic literature⁴³ – namely, a non-judgmental attitude or approach (1) and emotional detachment (7). In what follows, a sample of comments from participants about these extended meanings and other categories identified above are extracted from the interview transcripts.

Participants identified being non-judgmental with a range of meanings, including: not judging as right or wrong, or good or bad, either the parties or the dispute; not blaming; and avoiding prejudice. As a category, a non-judgmental attitude or approach was found to have inter-relationship with a number of other categories, including: avoiding or minimising personal reactions (3); remaining neutral as to the interpretation of events (5); and refraining from assessing the parties’ stories according to claims of truth (9).

Comments from participants include:

You can’t judge in the mediation, or allow it to be seen that you are judging people. I guess in your head you might be. (CS1 E)

I guess in reality, I will conduct a mediation and there will be biases for me, and I’m certainly aware of those. What might go through my head is, ‘oh that’s very unfair or very unreasonable on one party or the other, or one side or the other’. However, I don’t think that it’s my role to actually make that judgment in any way. (CS2 C)

You are not there to decide the dispute for them and [you are] continually reminding them of that fact. You are not there to judge, and when they tell you that they have done this or that, you are not going to ‘tut’ and shake your head and say that’s not acceptable ... The other thing is the listening side of things and reflecting back [so] that they understand that they have been heard. The difficulty or challenge is letting them know that they have been heard [when] their assumption is automatically, ‘well if you have heard and understood you can clearly see that I am correct so therefore you must be on my side’. You have to indicate that you have heard, but do that in an unbiased way: ‘I have heard this is what you have said.’ That doesn’t mean that I’ve agreed. (CS1 F)

⁴³ See F Biestek, “The Non-Judgmental Attitude” (1953) 34 *Social Casework* 235.

It might be that one party has said something that I don't agree with and the other party ... I agree with them. But recognise that okay, that doesn't necessarily make that other party wrong – they have a right to those opinions and thoughts. (CS3 A)

Impartiality was also constructed as emotional detachment:

If you allow yourself to go with your bias all the time I think that's very debilitating and exhausting. It brings to mind the classic way of dealing with conflict. You either respond or react. To react is exhausting, non-productive, whereas impartiality is ... you respond, you let it go by. It's probably that you care for yourself more if you can bring in [to the mediation] that mode. (CS1 G)

Detachment was described as important for active listening and providing the parties with the opportunity to "be heard" (CS1 J) in order to reach mutual understanding. Emphasis was given to parties' potential to achieve mutual understanding, rather than to establish the truth of their stories, or to reach agreement:

Mediation about promoting some shared understanding about each other's position. Not necessarily agreement, but I think often if the parties can get to the point where they understand why the other party thinks the way that they do, then whether they agree with them or not entirely is not important. (CS1 B)

It doesn't matter even if after five hours there is no agreement, if I have taken them through all of that and if they have been able to actually say to me, 'well, I'm happy with where we have come, yet I still don't want to write an agreement and I still don't agree with what he or she said', then that's OK. Even if they haven't even agreed and they are still volatile I think that is still progress. The progress is that they have sat there for that amount of time and they have at least tried to talk. (CS1 J)

Participants recognised that their own values might influence a mediation encounter. Communicating these personal values to parties was identified as inappropriate:

You have all this personal stuff, but you're sitting aside from that. You could almost even announce it if it was appropriate but it would never be appropriate to tell someone where you're coming from. (CS3 B)

However, in the context of family mediation (or family dispute resolution), a distinction was drawn between personal values and those contained within the statutory context and relevant to the best interests of children and issues of the safety of family members. Communicating these statutory prescriptions was seen as necessary and a limit to mediators' impartiality:

Impartiality is where we don't have a view, and we do have a view. We have a view that children's needs are paramount and part of that is they need to have a meaningful relationship with both mother and father on the proviso that there are no safety concerns. (CS3 C)

Participants placed considerable emphasis on the value of self-awareness, considered in the literature under the rubric of reflexive or reflective practice, for limiting or even eliminating the intrusion of a personal response, and as a means of monitoring impartiality in practice:

I know that I mediate best when I'm completely and fully aware of myself so I'm not reacting at all. (CS1 A)

It really comes back to the mediator and what they feel themselves and what they sense themselves. I guess to some extent it comes back to self-awareness. To what extent are you being affected and in what way are you affecting what is happening in the mediation? The only person who can answer those questions is the mediator. (CS1 I)

Self-awareness was emphasised both as self-monitoring activity during a mediation session and as part of the process of debriefing afterwards:

I have been trained to tune into my own internal workings. If I am beginning to feel annoyed with someone or wanting a special outcome then that is a trigger for me to begin to say 'what's going on here?' (CS1 C)

Perhaps you can like a person or the way that they behave ... that's something you need to be really aware of ... it is something I always try to be aware of in a mediation because sometimes it can creep up on you a little bit. (CS1 E)

Sometimes you want to focus on one party. 'Look, that person really hooked me. Any sort of dimension, whatever the dimension is, they hooked me and they got to me.' What do I do next time so I don't have that situation again? (CS1 B)

Debriefing is important closure for mediators themselves. There are things that I want to say to the party that I can say to the co-mediator [instead] knowing that [my remarks] are not going to leave the room. (CS1 H)

Mindfulness, as a technique in aid of self-awareness, was referred to by one participant and linked to equal treatment of the parties in terms of the process or procedure of mediation:

Mindfulness is being mindful of how I am sitting, that I am giving an equal amount of eye contact to both clients, that they've both got their water filled, that I'm not on the [white] board too much and making sure that things are okay. So I think mindfulness is being mindful of everything that's happening around you. (CS3 C)

Equal access to information prior to the mediation was identified as important in family dispute resolution where the intake procedures included individual interviews with each parent to access suitability for mediation and to provide information and referral for child development and care issues:

I think neutrality is about – there's no judgment. By the time of the mediation they've both had the same level of information, has been given to them and you've spent about the same amount of time during the mediation with them. That's neutrality. (CS3 C)

Considerable value was attached to co-mediation as an aid to debriefing and as a means of reflecting on issues of neutrality and impartiality as a mediation session progresses:

There are checks and balances in this [facilitative] model. One is that co-mediation helps. I feel that if someone is moving down a vested interest direction, hopefully you have a co-mediator who will stop the process and privately talk about that. (CS1 C)

It's something [co-mediation] I particularly like and I think it actually helps with impartiality. Sometimes even just listening to a co-mediator that may be [operating] in a certain way and it's useful because I wouldn't necessarily have picked upon what they have picked up on. (CS1 E)

There was one [mediation], going back quite some time, I can't remember what I did, but my co-mediator said 'Do you realise you did such and such?' and I had no idea. 'I can't believe it!' Often, you'll pick up when you think [you] should have done that or could have done that better, or it was a bit stupid. I didn't even know I had done it. There you go – that's the idea of the co-mediator model. I think it's really good, in that one person can be working with the parties and the other one can be doing a reflection of what's going on and often pick up some threads. (CS1 G)

That question of impartiality; it's about analysing my performance and that of my co-mediator. Saying 'how did I feel about the two parties, how did I behave and did my behaviour give some sort of obvious advantage to one person or the other?' In isolation, everything that you do could [come] under criticism or analysis. [Over] the whole three- or four-hour mediation, do I feel that I was aware of what was happening for me and at the end of the day all those things that I did, were they balanced? Do I feel as though I treated the parties equitably? (CS1 I)

Monitoring personal reactions was identified as part of a professional attitude towards parties:

I've had a reaction to a client and a very strong internal reaction and I've taken time out and I've gone and sat with a colleague. I said: 'I don't know where it's going but I just want to reach across the table and give them a mouthful.' They asked: 'What are you going to do?' I said: 'I'm just going to take a breath and I'm going to park that aside and I'm going to go back and be professional.' (CS3 B)

Additional responses about the meanings of impartiality and bias were collected according to the free association exercise conducted at the conclusion of each interview. The results of the exercise are presented in Table 3.

TABLE 3. Free Associations

	Impartiality	Bias
CS1 A	Having wisdom	Ignorant
	Balanced	Reactive
	Detached	Opinionated
		Slanted
CS1 B	Fair and equitable	Demonstrating alignment verbally or non-verbally
	Believing that equity is not equality	Self-aware of prejudice – perceived and actual
CS1 C	Even-handed	Having a vested interest
	Balanced	Having a blind spot
	Attentive	
CS1 D	Giving no clue of leaning one way or the other	Partial
	Parties' perceptions	Not letting someone "have a go"
	Fair	Blocking
CS1 E	Even-handed	Taking sides
	Neutral	Being directive
	Non-judgmental	
CS1 F	Neutral	Showing favouritism
	Fair	Preferential/partial
	Reasonable	
	Recognising extent of own bias	
	Taking a mental step back	
	Being open	
CS1 G	Being response-able (responsible)	
	Don't care	Weak
	Soft	Loaded
	Listening	Bigoted
	Professional fence sitting	Showing favouritism
	Not taking sides	Adversarial
CS1 H	Ensuring fair process	Hard
	Neutral	Taking sides
	Not putting own thoughts/views to the parties	Prejudice
CS1 I	Leaving "ownership" of the dispute with the parties	
	Equitable	Inequitable
	Behaviours [exhibiting impartiality]	Subtle
	Give balanced treatment	Conscious v unconscious [bias]
CS1 J	Fair	
	Separating process from the problem	"Owning" the problem
	Directing traffic – the communication	Having a vested interest in an outcome
CS2 A	Not taking sides	Siding with one party
CS2 B	Neutral	Decision-making
	Equal	Judgments
	Without bias	Dilemmas
	Sitting on the fence	Favouritism

TABLE 3. *continued*

	Impartiality	Bias
CS2 C	Non-judgmental	Prejudicial
	Not taking sides	Moralistic
	Being value-free	Judgmental
	Consistent	Taking sides
CS2 D	An ideal	Prejudicial
	Constantly needing to check	Struggle [with personal biases]
	Monitoring	
CS3 A	Not being judgmental	Judgmental
	Not taking sides	Partial
	Not representing either party	Taking sides
	Not being an agent for either party	
CS3 B	Standing aside	Partial
	Third chair	Strong view
	Other view	Limited
	Unbiased	Positioned
	Indifferent	Stuck
CS3 C	No bias	Favouritism
	Equal amount of time given	Unequal
	Both being given the same level of information	
	Being able to step into the role and not being caught in the clients' stories	
	Not favouring one client's story over another	
CS3 D	Not taking sides	Taking sides
	Not making judgments	Overt or covert preference
	Not giving advice	Making judgments
		Telling people what they should or shouldn't do
CS3 E	No favouritism	Personal life
	Fairness and justice	Individual circumstances
	Integrity	Preferences
		Pet peeves
		Siding to one way

These results are evidence that the participants construct impartiality as having a broader meaning than those found in the literature. In Tables 4 and 5 the meanings associated with impartiality and bias, respectively, are re-tabulated according to frequency and four thematic categories. The meanings presented are categorised as mediation-specific (according to the mediation as context or as having particular characteristics), legal, therapeutic, and experiential. "Experiential" indicates where a common, popular meaning was used, unrelated to the other themes or possibly overlapping with one or more (eg parties' perceptions). It is also a category indicative of practice wisdom wherein practitioners found descriptors for their direct experience of impartiality in practice. "Therapeutic" is a descriptor used to indicate concepts from a social science, and includes counselling, psychology or social work perspective.⁴⁴

⁴⁴ These themes were determined from the author's own qualifications and experience in the social sciences, social work, law and mediation.

Response rates are indicated in Tables 4 and 55 by numbers in brackets(eg “not taking sides” was referred to by five (5) respondents). No number is given in brackets where the response was made by only one participant.

TABLE 4. Impartiality

Mediation	Legal	Therapeutic	Experiential
An ideal	Equitable (2)	Detached	Wise
Neutral (4)	Even-handed (3) as to time/ information	Attentive	Showing balanced treatment (3)
Leaving ownership of dispute with parties	Fair (process) (6)	Non-judgmental (4)	Giving no clue of leaning one way or the other
Separating process from the problem	Reasonable	Recognising extent of own bias	Parties' perceptions
Directing traffic – the communication	Without bias (3)	Being open	Taking a mental step back
Being value-free	Not taking sides (5)	Being response-able (responsible)	Don't care
Not giving advice	Not representing either party	Believing that equity is not equality	Soft
No favouritism	Not acting as an agent for either party	Listening [being attentive]	Professional fence sitting (2)
		Not putting own thoughts/ views to the parties	Behaviours [exhibiting partiality]
		Not favouring one story over another	Equal
		Stepping into the role without being caught in the stories	Consistent
			Constantly needing to check/ monitoring
			Integrity
			Standing aside
			Third chair
			Other view
			Indifferent

TABLE 5. Bias

Mediation	Legal	Therapeutic	Experiential
Partial	Having a vested interest	Reactive	Ignorant
Taking sides (4)	Adversarial	Demonstrating alignment verbally or non-verbally	Opinionated
Being directive	Inequitable	Self-aware of prejudice/ perceived and actual	Slanted
Owning the problem	Prejudicial (3)	Conscious v unconscious bias	Having a blind spot
Having a vested interest in outcome	Partial	Judgmental	Not letting someone “have a go”
Dilemmas	Taking sides (2)	Overt or covert preference	Blocking

TABLE 5. *continued*

Mediation	Legal	Therapeutic	Experiential
Favouritism (3) (Favourites)	Unequal	Telling people what they should or shouldn't do	Strong view
			Weak
			Loaded
			Bigoted
			Hard
			Subtle
			Decision-making
			Moralistic
			Struggle [with personal biases]
			Preferential
			Limited
			Positioned
			Stuck
			Personal life
			Individual circumstances
			Pet peeves

DISCUSSION

Participants in the study recognised and articulated the range of meaning associated with impartiality. Constructions of impartiality that are interrelated with other mediation principles and practice were evidenced. A number of participants referenced neutrality. A cluster of ideas presented are consistent with the mediator's role in orchestrating the process – namely, directing traffic (the communication), separating the process from the problem, and leaving ownership of the dispute with the parties. A further two constructs are specific in referencing the limited input of the mediator – namely, value-free and not giving advice. This last construct is consistent with distinguishing the role of the mediator from legal advisor or therapist, and with distinguishing mediation from blended processes including conciliation. A reference to “no favouritism” reflects the NMAS Standards but could be regarded as resonant with legal principle or ordinary meaning. A number of other constructs are reflective of legal principle. Participants identified fairness and equity as associated with impartiality, as well as a lack of bias and even-handedness. Participants also referred to reasonableness, which reflects objective legal tests.

A number of constructs reflect therapeutic theory and practice. These include being attentive, listening, being open, being response-able, not communicating one's own thoughts/views to the parties, not favouring one story above another and recognising the extent of one's own bias. These ideas are consistent with mediation practice in that they reflect the relevant skills base. At the same time they are derivative of interpersonal and counselling skills originating in the social and behavioural sciences. The first four constructs are integral ideas in establishing rapport with clients. Not communicating one's own ideas and being aware of biases are part of a professional stance that is client-centred and acknowledges the potentially negative impact of personal prejudice and uninformed reactions (rather than considered and informed responses).

The constructs of emotional detachment and a non-judgmental attitude were elicited in both the word association exercise and in the interviews. These are recognised therapeutic constructs. Emphasis on emotional detachment in counselling is aimed to avoid problems of transference and counter-transference. Transference occurs where a client sees the counsellor as a trigger for discomfort or distress, rather than the real cause. Counter-transference occurs where the counsellor enters into the apparent

conflict.⁴⁵ More simply, emotional detachment is a precondition of empathy, as distinct from sympathy, which assists in building rapport and a relationship of trust.⁴⁶ Emotional detachment is also helpful in promoting practitioner's self-care, as indicated in the comments from one participant reproduced above. A non-judgmental attitude is a longstanding core principle of counselling and social work.⁴⁷ It is strongly associated with client self-determination, another central principle.⁴⁸ More recently, a non-judgmental attitude and emotional detachment have been associated with, and investigated in relation to, mindfulness.⁴⁹

Mindfulness is one response to the apparent problem of the influence of mediator's personal values, preferences and judgments. One participant in the study made reference to mindfulness in the context of providing the parties with equal treatment or procedural fairness. As a technique, mindfulness includes a focused form of self-awareness. Participants emphasised self-awareness as a necessary precondition of impartiality in relation to both parties and as between them. They did not refer to reflective or reflexive practice as such. Participants did, however, evidence awareness of a need to monitor personal biases and judgments. They also emphasised value in a co-mediation model, and in debriefing and supervision as self-monitoring aids.

Participants indicated that disclosing personal values and perspectives to clients was not appropriate in mediation. However, participants emphasised that for family mediation (family dispute resolution), the statutory context and principles were specifically communicated to parties. In that context, mention was made of giving parties equal access to information. At the same time emphasis was given to opportunities for parties to "be heard" in mediation rather than to be given information. As one participant commented: "The idea is that somehow the voices are equally heard – not necessarily equal time, but equally heard and have equal value in the process of mediation" (CS3 B).

A number of responses given in the word association exercise did not fit neatly into categories associated with mediation, legal or therapeutic principles. For present purposes, it is important to note the creativity demonstrated by participants in constructing impartiality for their practice. Of significance is the fact that participants looked beyond constructions of impartiality found in the literature and in the NMAS, and that their understanding was not limited to legal constructions but made creative use of a combination of socio-legal constructs. The importance of the results lies in drawing attention to these socio-legal constructs and in recognising the potential for this combination to be further developed and influence theory building in mediation.

IMPLICATIONS OF THE RESEARCH

There are a number of implications of the research for the development of theory in mediation and for the contribution of mediation to the broader aims of non-adversarial justice. First, the results demonstrate constructions of meaning of impartiality that are broader than purely legally derived meanings. Importantly for the nexus between theory and practice, these broader constructions are directly relevant to, and constructed within, the context of actual mediation practice. Significantly, these wider constructions are the product of multidisciplinary influences and acknowledge the importance of emotion and values (or ethics) in the practice of mediation, consistent with non-adversarial justice frameworks.

⁴⁵ See R Baker, "Finding the Neutral Position: Patient and Analyst Perspectives" (2000) 48(1) *Journal of the American Psychoanalytic Association* 129.

⁴⁶ Empathy refers to acknowledgement and understanding of another's experience. Sympathy is demonstrated where a person shares the feelings of another, agrees with the other's point of view and/or becomes emotionally absorbed in an aspect of the other's experience: G Egan, *The Skilled Helper: A Problem-Management and Opportunity-Development Approach to Helping* (Thomson Learning Egan, 7th ed, 2002) 114–115; D Della Noce, "Seeing Theory in Practice: An Analysis of Empathy in Mediation" (1999) 15(3) *Negotiation Journal* 271, 271.

⁴⁷ See Biestek, n 43.

⁴⁸ Biestek, n 43; S Freedberg, "Self-Determination: Historical Perspectives and Effects on Current Practice" (1989) 34(1) *Social Work* 33; F Reamer, "The Evolution of Social Work Ethics" (1998) 43(6) *Social Work* 488.

⁴⁹ See S Shapiro et al, "Mechanisms of Mindfulness" (2006) 62(3) *Journal of Clinical Psychology* 373.

Secondly, the results demonstrate constructions of meaning that are consistent with mediation's dispute resolution purpose and core value of self-determination. The role of the mediator in facilitating conflict resolution rather than reaching a decision for the parties is evident in more than one category of meaning elicited. The categories of neutral as to the interpretation of events (5), no interest in "truth" claims (9) and primacy of the parties' interpretation of events (13) signal a construction of justice in mediation that differs from adversarial processes. Justice in mediation is not about determining an objective truth but rather about providing an opportunity for parties to construct a mutually acceptable, or agreeable, truth.

Thirdly, the results substantiate and affirm elements of other non-adversarial justice perspectives. The construction of impartiality as emotional detachment and references to mindfulness, self-awareness and debriefing point to the need to safeguard the emotional and psychological wellbeing of mediators as well as parties, consistent with principles of therapeutic jurisprudence.⁵⁰ Recognition of the relevance of emotions to the dynamic of mediation, in addition to being potential sources of bias, is consistent with therapeutic and restorative justice perspectives.⁵¹ Meaning attributed to impartiality as enabling parties "to be heard"⁵² is consistent with principles of procedural justice.⁵³

Lastly, the results point to an epistemic challenge to a positivist perspective as to the role of impartiality as a precondition of justice. The traditional adversarial framework of Australia's justice system relies upon a rational-analytic and competitive paradigm.⁵⁴ According to that paradigm, the key players who uphold the system – judges and lawyers – are assumed to act according to purely rational motives and processes. Impartiality, according to this paradigm, rests upon an assumption of rational decision-making.⁵⁵ Hence decisions are assumed to be reasoned applications of the law, untainted by emotion or personal values. The purposes of impartiality within this system are to produce measures of certainty and consistency. According to Touchie, these purposes are achieved because decisions based upon an impartial application of law to the facts are replicable, based upon interpersonally valid criteria, and are consistent because the rank ordering of criteria are the same across decision-makers.⁵⁶ Characterisation of impartial decision-making as replicable and valid mirrors the character of positivist research, which enshrines the reliability and validity of an experimental scientific method as the foundation of knowledge. The results of this study point to the value of experience as an alternative and or additional source of knowledge.

Lived experience is a recognised source of knowledge within qualitative enquiry methods.⁵⁷ While this study was specifically designed to capture that lived experience, rather than to achieve an experimental or quantitative analysis, its results are sufficiently significant to challenge the way impartiality is constructed in mediation. Outcomes in mediation are experientially valid because they are based upon lived experience. Outcomes in mediation are unique to the parties. They do not require replication and need not be consistent. Hence impartiality in mediation does not serve the same purpose as it does in judicial or administrative decision-making. Impartiality serves the primary purpose of mediation, which is to facilitate the self-determination of parties⁵⁸ – or in other words, to further their

⁵⁰ See King et al, n 1, 20–40.

⁵¹ See, eg King et al, n 1, 20–71; see also Anleu and Mack, n 35, for the results of a study of judicial impartiality and the role of emotion.

⁵² See S Douglas, "Ethics in Mediation: Centralising Relationships of Trust" (2017) 35(1) *Law in Context* 44, in which "being heard" in a therapeutic sense is argued as an extension of the right to be heard according to principles of procedural fairness, or natural justice.

⁵³ See, eg King et al, n 1.

⁵⁴ See S Kift, "21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law" (2008) *Legal Education Review* 1, 15.

⁵⁵ JCW Touchie, "On the Possibility of Impartiality in Decision-Making" (2001) 1(1) *Macquarie Law Journal* 20, 20.

⁵⁶ Touchie, n 55, 21–22.

⁵⁷ See E Guba and Y Lincoln, "Competing Paradigms in Qualitative Research" in N Denzin and Y Lincoln (eds), *Handbook of Qualitative Research* (Sage, 1994).

⁵⁸ See Douglas, n 52.

own decision-making. This different purpose allows for wider and varied constructions of impartiality provided that they are consistent with mediation's primary purpose. An in-depth consideration of this epistemic challenge is beyond the scope of this article. Yet the results suggest it as an area for further investigation and one with potential ramifications for wider non-adversarial justice processes.

CONCLUDING REMARKS

Given the importance placed upon impartiality as a core principle of decision-making within Australia's justice system, investigation of its meaning within that system is relevant and significant. Non-adversarial justice processes and perspectives have challenged assumptions about the aims and products of traditional approaches within Australia's system. As a core precept of a traditional, rational-analytic approach, impartiality has been constructed according to common law tradition and within a broader understanding of positivist perspectives. The results of this study echo critique generated by non-adversarial perspectives. This is demonstrated by constructions of impartiality from multidisciplinary perspectives, constructions inclusive of emotion and values as components, and a plethora of constructions based upon actual experience in practice. The results thus contribute to the reshaping of justice principles according to non-adversarial perspectives.