Trends in Mediation Legislation: 'All for One and One for All' or 'One at All'?

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Developments reflecting the growing use of mediation to achieve the policy objectives of civil justice system reform and the ADR movement are evident in Australia and abroad. These developments include the increasing number of statutes in which provision has been made for mediation and, in some jurisdictions, the enactment of Mediation Acts. The Law Reform Commission of Western Australia has recently recommended the enactment of a Mediation Act in this State. This article reviews these developments, comments on the recommendations of the Law Reform Commission and highlights the issues that need to be addressed if a Mediation Act is to be enacted.

RECENT developments in Western Australia highlight the growing use of mediation to achieve the policy objectives of the civil justice system reform and ADR[1] movements.[2] In summary, these developments are the increasing number

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1. Although ADR was originally understood to mean 'alternative' dispute resolution, many consider these days that the acronym would be better understood as referring to 'appropriate', 'assisted' or 'additional' dispute resolution. Given the incorporation of 'ADR' into the court system, there is much sense in the latter view. Nowadays the term 'ADR' is generally accepted to refer to all processes other than court-based adjudication and will be used in this way here.
2. For recent examples of reports on civil justice reform, see Lord Woolf *Access to Justice:*

of statutes in which provision is made for mediation,[3] the recent amendments to the Supreme Court Act 1935 (WA) inserting provisions relating to court-annexed mediation,[4] and the recommendation of the Western Australian Law Reform Commission that a Mediation Act be enacted.[5]

This article reviews these developments and examines them in the light of national and overseas trends. The focus is on legislation that seeks to clarify the legal status of mediators and to further the objectives of mediation by protecting the integrity of the process in other ways. The aim is to highlight some of the many issues that will need to be addressed if the recommendation to enact a Mediation Act is followed. Underlying the discussion are more general observations about the clarifying and educative role of legislation in supporting mediation,[6] and the different forms this legislation can take.

There are various ways that dispute resolution processes can be categorised. It seems that for a long time a distinction was drawn between court-based adjudication and everything else. This largely distinguished the court system from commercial arbitration, and from arbitration and conciliation of industrial disputes. More recently, efforts have been made to distinguish between processes based on the role of the third party involved in the process. In 1997, the National Alternative Dispute Resolution Advisory Committee (NADRAC) prepared a set of definitions of ADR

Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London: HMSO, 1996); WALRC *Review of the Criminal and Civil Justice System in Western Australia: Final Report* Project No 92 (Perth, Sep 1999); ALRC *Managing Justice: A Review of the Federal Civil Justice System* Report No 89 (Sydney, Jan 2000). See also H Stacy & M Lavarch (eds) *Beyond the Adversarial System* (Sydney: Federation Press, 1999). For evidence of the growing use of mediation, see ALRC *Review of the Adversarial System of Litigation: ADR – Its Role in Federal Dispute Resolution* Issues Paper No 25 (Sydney, Jun 1998); WALRC 'Court Based or Community Alternative Dispute Resolution and Alternative Forums for Adjudication' in *Review of the Criminal and Civil Justice System in Western Australia: Consultation Drafts* (Perth, Jun 1999) 261-306; and see generally H Astor & CH Chinkin *Dispute Resolution in Australia* (Sydney: Butterworths, 1992); L Boulle *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996).

3. Eg in WA: Adoption Act 1994, Agricultural Practices (Disputes) Act 1995, Commercial Arbitration Act 1985, Commercial Tenancies (Retail Shops) Agreement Act 1985; Family Court Act 1997; Public Sector Management Act 1994; Rail Safety Regulations 1998; Supreme Court Act 1935.
4. Courts Legislation Amendment Act 2000.
5. WALRC *Final Report* supra n 2, 92-95. So far as the author is aware, no instructions have been given for an Act to be drafted. The previous government called for tenders for the development of a framework for ADR in the courts, but no further steps have been taken to implement the Commission's recommendations concerning ADR since the current government came into office in February 2001.
6. Altobelli refers to the importance of ADR legislation in bringing about a cultural change in dispute resolution: see T Altobelli 'Mediation in the Nineties: The Promise of the Future' (2000) 4 Macarthur L Rev 103, 106.

processes in an effort to clarify the terminology used in this area.[7] The broad categories adopted by NADRAC were facilitative, advisory and determinative processes. Mediation is grouped within the facilitative process category, though there remains ongoing debate about the extent to which a mediator can adopt an advisory role and still be regarded as mediating.[8] The NADRAC definition of mediation provides:

> 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.[9]

The policy objectives behind the increased use of mediation include the more effective use of court resources,[10] access to justice[11] and the appropriateness of non-adversarial processes for certain types of dispute.[12] Similar objectives underlie the use of other analogous processes, most notably conciliation. Although concerns have been expressed about the erosion of legal protection resulting from overuse of settlement-focused processes,[13] and that ADR should not be seen as a substitute for trial,[14] there are clear signs that Parliament and the courts see value in diverting matters to mediation from the trial process in courts.[15] While there is growing interest in mediation in criminal matters,[16] the legislation referred to in this article mainly concerns mediation of civil matters.

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7. NADRAC *Alternative Dispute Resolution Definitions* (Canberra, Mar 1997). For earlier efforts in this regard, see NSWLRC *Training and Accreditation of Mediators* Report No 67 (Sydney, Sep 1991) ch 2.
8. For further discussion of definitions of mediation, see infra pp 192-197. Generally see Boulle supra n 2, 3-7.
9. NADRAC supra n 7, 5.
10. Eg DA Ipp 'Reforms to the Adversarial Process in Civil Litigation: Part II' (1995) 69 ALJ 790, 801; Australian and New Zealand Council of Chief Justices 'Position Paper and Declaration of Principle on Court-Annexed Mediation' (Canberra, Mar 1999).
11. Access to Justice Advisory Committee (Cth) *Access to Justice: An Action Plan* (Canberra: National Capital Printing, 1994) ch 11.
12. Eg ALRC *Managing Justice* supra n 2, 86; Boulle supra n 2, 77-82.
13. Eg O Fiss 'Against Settlement' (1984) 93 Yale LJ 1073.
14. See discussion and commentaries referred to in ALRC *Managing Justice* supra n 2, 413-414.
15. Ipp supra n 10; D Williams 'Changing Roles and Skills for Courts, Tribunals and Practitioners' in Stacy & Lavarch supra n 2, 5; *Tickell v Trifleska* (1990) 2 NSWLR 353 Rogers CJ; also cited in S Boyle 'Experiences of Mediation in the Supreme Court' in *Mediation and Pre-Trial Conferences: What Is It All About?* (Perth, May 2000) 2.
16. Eg WALRC *Final Report* supra n 2, 209-216, proposing the introduction of alternative criminal charge resolution.

A recent overview of ADR in Australia by NADRAC reveals the range of areas where mediation is being used.[17] These areas are community dispute resolution, family mediation services, courts and tribunals, statutory agencies, industrial dispute resolution schemes, public policy dispute resolution, commercial ADR and internal organisational ADR.[18] The extent to which these diverse areas are subject to or affected by legislation varies enormously.[19]

A review of ADR practice in Western Australia was conducted by the Law Reform Commission as part of its *Review of the Criminal and Civil Justice System in Western Australia.*[20] The Commission reported no formal use of mediation in the Local Court, some use in the District Court, and extensive and growing use in the Supreme Court.[21] Mediation also takes place within some State boards and tribunals, and within all the other areas referred to by NADRAC.

The Commission's recommendations concerning ADR will be examined in detail in Part VI of this article. Since publication of the Commission's Final Report, and as foreshadowed in that Report,[22] Part 5 of the Courts Legislation Amendment Act 2000 (WA) has amended the Supreme Court Act 1935 (WA) to confer protection on court-appointed and court-approved mediators, and provide for privilege and confidentiality in mediation proceedings. These amendments were based largely on the *Model Rules for Court-Annexed Mediation* prepared by the Law Council of Australia[23] and endorsed by the Standing Committee of Attorneys-General.[24] The Commission noted the need for legislative protection of more general application.[25]

Although State mediation practices and legislation are the central focus of this article, an overall picture of the practice and regulation of mediation in Western Australia, or any other Australian jurisdiction, requires an appreciation of the operation of federal legislation. Accordingly, the mediation legislation referred to will be drawn from both State and Commonwealth jurisdictions. As the Australian

17. NADRAC *A Framework for ADR Standards* (Canberra, Apr 2001).
18. Ibid, 18-23.
19. An indication of the range and variety of legislation is evident from the Commonwealth, State and Territory legislation listed and described briefly in Altobelli supra n 6, 106-122. Although this article looks at the role of legislation in supporting mediation (rather than providing for its use), it is acknowledged that mediation will often be used as a dispute resolution process in circumstances where the direct application of legislation is unnecessary (eg, mediation used internally within organisations).
20. WALRC *Consultation Drafts* supra n 2. Similar reviews have been conducted in other States: eg NSWLRC supra n 7, ch 2; A-G (ACT) *Mediation* Discussion Paper (Canberra, Jan 1994) 25-34.
21. WALRC *Consultation Drafts* supra n 2, 269-273.
22. WALRC *Final Report* supra n 2, 94-95.
23. Law Council of Australia 'Proposed Rules for Court-Annexed Mediation: Amendment No 4' (Canberra, Feb 1994).
24. Courts Legislation Amendment Bill 1999 *Hansard* (LC) 10 Nov 1999, 2894.
25. WALRC *Final Report* supra n 2, 95.

Law Reform Commission reported in *Managing Justice,* the use of ADR, including mediation, is well-established in the federal jurisdiction.[26]

The developments in Western Australia are consistent with trends elsewhere. One commentator has recently identified six trends in the field of mediation. These are institutionalisation, regulation or codification, legalisation, innovation, internationalisation and co-ordination.[27] It is the first three trends, and especially the trend to regulation and codification, that are the most significant for mediation legislation and the developments in Western Australia. Institutionalisation refers to the growth of a community-based process, in which party and community empowerment is a key goal, to the stage where mediation has become an 'institution' in itself. Evidence of this is found in the incorporation of mediation in other institutions, most notably courts, businesses and government agencies. Regulation or codification refers to the increased regulation surrounding mediation.[28] Legalisation refers to the growing body of case-law surrounding the mediation process on questions such as the enforceability of agreements to mediate and confidentiality.[29]

In Part I of this article there is a discussion of mediation legislation in Australia and the United States. In Parts II and III the function and nature of two types of mediation legislation are examined more closely. In Parts IV and V a number of competing principles that are significant to this area of legislation will be considered. In Parts VI and VII the calls for mediation legislation will be reviewed and some conclusions advanced. The question will be addressed whether there is a need for a Mediation Act or other form of legislation in Western Australia, and if so, what that Act should contain. In view of the widespread interest in Australia in the mediation process, the question will be asked whether there is scope for a uniform

26. ALRC *Managing Justice* supra n 2, 412.
27. S Press 'International Trends in Dispute Resolution: A US Perspective' (2000) 3 ADR Bulletin 21. For Australian commentaries on directions and challenges in mediation, see Altobelli supra n 6; L Boulle 'Minding the Gaps: Reflecting on the Story of Australian Mediation' (1999) 11 Bond L Rev 216.
28. Press gives as an example the vast infrastructure that has been created to support the State court mediation program in Florida. Within 12 years, starting with institutionalisation via State legislation, 'there is currently a governing statute, court rules of procedure, a certification scheme for mediators, a code of conduct for mediators, a grievance procedure for complaints against those certified mediators, mediation training program standards and a grievance body for complaints against them, and now continuing mediator education requirements': ibid, 22.
29. This trend is referred to by Altobelli as 'judicialisation'. He briefly surveys a number of recent cases, largely unreported, that verify this trend: supra n 6, 140-142. For further discussion of the growing body of case-law, see C McCarthy 'Can Leopards Change their Spots? Litigation and its Interface with Alternative Dispute Resolution' (2001) 12 ADRJ 35.

Mediation Act in this area: is this a case of 'all for one and one for all', or is there need for 'one at all'?

I AN OVERVIEW OF MEDIATION LEGISLATION

A number of preliminary observations can be made about the increasing volume of legislation providing for mediation. First, while the use of mediation has increased, the law that facilitates, supports and regulates the process is still at a formative stage.[30] Second, there is considerable jurisdictional diversity between the growing number of State and Commonwealth Acts. Third, and related to the first and second observations, the diversity of situations in which the process is used means that the legislation is often developed piecemeal. Fourth, there is a tendency for provision to be made for mediation with insufficient attention to the nature of the dispute and for important process issues to be overlooked.[31]

(i) The different types of mediation legislation

As the aim of this article is to examine the role that legislation[32] plays in supporting and regulating mediation it will be useful to distinguish between the different types of legislation that exist. Three types of legislation will be identified: procedural, regulatory and beneficial.[33] Procedural legislation underscores the institutionalisation trend noted in the Introduction, while the second and third types reflect the regulation or codification trend. One Act can contain all three types, or one or two only.

(a) Procedural legislation

This refers to legislation that specifies mediation as a dispute resolution process.[34] This legislation may require the parties to undertake mediation,[35] or it

30. Recognition that the law is still at a developmental stage can be seen in the fact that the A-G (Cth) called for a report on the use of ADR in the Federal Magistrates Courts from NADRAC prior to the introduction of the Federal Magistrates Act 1999 (Cth): see NADRAC *The Use of Alternative Dispute Resolution in the Federal Magistracy* (Canberra, Mar 1999): <http://www.nadrac.gov.au/aghome/advisory/nadrac/magistracy.html>.
31. C Baylis 'Statutory Mediators and Conciliators: Current Issues in Australia and New Zealand' (Perth: UWA Law School Seminar, 4 Apr 2001).
32. 'Legislation' is used to include Acts, regulations and rules of court.
33. In 1994 the A-G (ACT) issued a Discussion Paper, supra n 20, for public comment. Ultimately the Mediation Act 1997 (ACT) was enacted: see infra pp 178-179. The Discussion Paper refers to the first two categories of legislation identified here.
34. One commentator has identified three common models of statutory mediation processes: see C Baylis 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (1999) 30 VUWLR 279.
35. Eg Agricultural Practice (Disputes) Act 1995 (WA); Farm Debt Mediation Act 1994 (NSW); Retail Leases Act 1994 (NSW).

may empower, but not require,[36] mediation. The powers of the mediator and procedures to be followed may also be prescribed. There are a growing number of Acts in which specific provision is made for mediation, both as an early form of dispute resolution and, to a lesser extent, for dealing with appeals.[37]

The various processes provided for in this type of legislation will not be examined in this article. The focus will be on regulatory and beneficial provisions which operate on the assumption that mediation takes place either voluntarily or as mandated by statute.

(b) Regulatory legislation

This is legislation that regulates the practice of mediation by mediators. Typically this type of legislation establishes standards of competency, including minimum qualifications and an approval process or registration scheme. The legislation will generally confer power on an appointing or accrediting body to confer and revoke accreditation or registration in appropriate circumstances. While it is usual for there to be some process for the appointment of a mediator in the legislation, it is more common for legislation to provide for mediators to be approved than registered.[38]

(c) Beneficial legislation

This is legislation that supports the mediation process by clarifying the rights, obligations and protections of parties to mediation, mediators, and, to a limited extent, third parties to the mediation. Typical provisions include protection of the confidentiality of the process and immunity of mediators from civil action. The term 'beneficial legislation' is given a broad meaning in this article to include legislation that imposes duties on mediators. Where legislation imposes on the mediator a duty of non-disclosure, it reinforces the confidential nature of mediation.[39] Where legislation imposes on the mediator a duty to disclose, it protects other interests that may be affected by the mediation process.[40]

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36. Eg Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA); Residential Tenancies Act 1987 (WA); Community Justice Centres Act 1983 (NSW).
37. Eg Rules of the Supreme Court 1971 (WA) O 65B; Rights in Water and Irrigation Act 1914 (WA) sch 2, cl 5(3).
38. For further examples of regulatory legislation, see E Martin 'Protecting the Legitimacy of Mediation: A Re-evaluation of Two Critical Mediator Standards' (Perth: UWA LLB Honours dissertation, 2001) 13-14.
39. While confidentiality may benefit the mediator by precluding review of what took place in mediation, the general intention behind confidentiality rules is to benefit the parties, not the mediator: see NADRAC supra n 30.
40. Eg to prevent threats to the life or property of any person: Family Law Act 1975 (Cth) s 19K; Family Law Regulations 1984 reg 67; Supreme Court Act 1935 (WA) s 72(2)(c).

Central to these beneficial provisions are rules of confidentiality, privilege and immunity. Confusion can result from the use of these words because they are often used interchangeably. 'Confidentiality' refers to the obligation imposed in certain circumstances on parties and mediators not to disclose to any third party (including in court proceedings) information given in confidence. There are various remedies for unauthorised disclosure of confidential communications. These depend upon the source of the obligation: common law, equity or statute.[41] Remedies include injunctive relief, compensation and the ability to prevent privileged evidence being admitted in a court or other legal proceeding.

Privilege refers to 'a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed'.[42] The rules of privilege involve careful balancing of competing interests.[43] A successful claim of privilege renders evidence of what was said, or of documents exchanged, inadmissible in court. The law of privilege, therefore, has a narrower application to mediation than the law of confidentiality.

The tendency to refer to information exchanged in mediation as 'confidential and privileged' occurs because it is the confidential nature of the information that leads the law to treat it as privileged. On its own, however, each term is capable of referring to different rules.

The word 'privilege' is also used to describe the protection from legal liability afforded to parties and mediators. For example, the law of defamation recognises that statements that might otherwise be defamatory will not be actionable if they are published in circumstances where, for policy reasons, the law confers a qualified or absolute privilege. Some statutes expressly provide protection from proceedings in defamation.[44]

Similarly, the law recognises that there are policy reasons for conferring immunity from civil suit on those involved in judicial proceedings. While it is a privileged status to be immune from suit, it is less confusing if the word 'privilege' is not used in this context. Statutory provisions conferring immunity generally refer to 'protection' of the mediator[45] or 'exoneration from liability'.[46] In this article, provisions that provide protection from liability will be said to 'confer immunity'.

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41. See generally A-G (ACT) *Mediation* supra n 20, 17.
42. *Butterworths Australian Legal Dictionary* (1997).
43. In mediation a court will be aiming to balance the desire to protect the confidentiality of the process against the policy of ensuring that the court has before it the benefit of all available evidence.
44. Eg Mediation Act 1997 (ACT) s 11.
45. Eg Family Law Act 1975 (Cth) s 19M; Mediation Act 1997 (ACT) s 12; Supreme Court Act 1935 (WA) s 70.
46. Community Justice Centres Act 1983 (NSW) s 27; Evidence Act 1958 (Vic) s 21N.

(ii) Examples of regulatory and beneficial mediation legislation

There are innumerable laws that impact on the mediation process and the practice of mediation. For example, the settlement focus of mediation proceedings and the negotiations that take place during mediation mean that many aspects of the law of privilege will apply. In the absence of legislation, only common law privilege will be available. Alternatively, a statutory provision of general application may apply to the mediation process as well as other processes. An example is section 131 of the Evidence Act 1995 (Cth) which provides that evidence is not to be adduced in federal court proceedings of settlement negotiations other than in specified circumstances.

Other laws apply incidentally to mediation – for example, the law of contract, negligence, and Part V of the Trade Practices Act 1974 (Cth). These laws can have a significant impact on the mediation process and the participants.[47] While these and other laws of general application are 'regulatory' or 'beneficial' in one sense, they will not be considered in any detail here because they are not enacted with the specific purpose or regulating or supporting mediation.

What follows in this Part of the article are examples of legislative provisions specifically enacted to clarify the legal rules applicable to the mediation process and the participants in mediation, including the mediator. In (a) are examples of provisions relating to mediation within context specific legislation. In (b) are examples of legislation that relate specifically to mediation and are not confined in their operation to a specific area of law or practice. In (c) is an example of an effort to achieve uniform mediation legislation.

(a) Context specific legislation

There are many examples of statutes that provide for the appointment of mediators and specify the rules that apply to the parties, the mediator and the mediation proceedings within the context of the Act.[48]

An early and comprehensive piece of Australian legislation providing generally for mediation in a specific context is the Community Justice Centres Act 1983 (NSW).

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47. In particular, they may provide remedies for parties who prove breach of contract, negligence, defamation or misleading or deceptive conduct during mediation: see A Lynch 'Can I Sue My Mediator? – Finding the Key to Mediator Liability' (1995) 6 ADRJ 113. See generally Boulle supra n 2, 247–253.

48. 'Context' does not necessarily refer to a single type of dispute (eg, commercial tenancies, or disputes over agricultural practices). Context specific legislation may also confer the power to mediate a range of disputes (eg, neighbourhood disputes).

That Act established the Community Justice Centres Council and the Community Justice Centres of New South Wales. The Act contains both regulatory and beneficial provisions. It provides for the accreditation of mediators used by the Centres. It also ensures the confidentiality of mediation by providing that information created during a mediation session is privileged, requires information disclosed during mediation to be kept secret except in specified circumstances, and provides exoneration from liability to mediators and other staff at the Centres.[49]

The Evidence Act 1958 (Vic) is another example of context specific legislation. The Act contains provisions that apply to mediation within dispute resolution centres.[50] These provisions are beneficial in nature, as they clarify the legal position of a person who is a gazetted mediator or who works for a dispute settlement centre. Each is bound to maintain confidentiality in accordance with the Act.[51] Admissions made during a conference with a mediator in connection with a dispute settlement centre are not admissible in any court or legal proceeding, except with the consent of all persons who were present at the conference.[52] The Act exonerates a mediator, or a member or employee or person working with or for a dispute resolution service, from liability for any matter or thing done in good faith for the purpose of a conference with a mediator.[53]

The most elaborate context specific legislation in Australia is the Family Law Act 1975 (Cth). That Act was amended by the Family Law Reform Act 1995 (Cth), introducing a new Part 3 of the Act relating to Primary Dispute Resolution.[54] This Part recognises the importance of separating couples using non-adversarial and informal processes to reach agreements on parenting and property issues. Pursuant to section 19P of the Act, Part 5 of the Family Law Regulations 1984 lays down a regulatory framework for the provision of primary dispute resolution by community and private mediators.[55]

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49. Similar legislation, modeled on the NSW Act, exists in Queensland, namely the Dispute Resolution Centres Act 1990 (Qld).
50. Ss 21K–N. A 'dispute settlement centre' is defined as 'an organisation declared by Order of the Governor in Council to be a dispute settlement centre': s 21K. These provisions were introduced following a report on ADR to the Victorian Attorney-General in 1990: see A-G's Working Party *Report on ADR* (Melbourne, 1990). For further discussion of the report and the confidentiality provision, see G Dann 'Confidentiality After Unsuccessful Court-Ordered mediation: Exemplary or Illusory?' (1997) 3 Commercial Dispute Resolution Journal 212, 213.
51. S 21M.
52. S 21L.
53. S 21N.
54. 'Primary dispute resolution' processes provided for in the Act include counselling, mediation and arbitration: Family Law Act 1975 (Cth) s 14E.
55. Matters under the Act are mediated by approved community organisations (which are funded by the Commonwealth government), State and Territory-based community mediation

Provisions relating to mediation are contained in the Family Law Act 1975, the Family Law Regulations and the Family Court Rules 1984. Mediation within the Family Court is provided for in the Act and the Rules. The Regulations set out the requirements that community and private mediators must satisfy to be 'approved' for the purposes of the Act.[56] The Act does not create a registration scheme or prohibit mediation by a person other than an approved mediator, but the immunity conferred by the Act does not apply to non-approved mediators.

The Act contains two significant beneficial provisions. Section 19M provides that a family mediator has, in performing the functions of such a mediator, the same protection and immunity as a judge of the Family Court. Section 19N provides that evidence of anything said, or admissions made, at a mediation conducted by a mediator approved under the Act is not admissible in any court or in any proceedings where evidence is admissible.

Other provisions that aim to protect the parties to mediation and the integrity of the process are contained in the Regulations. These illustrate the broad meaning given to 'beneficial' in Part I(i)(c) of this article. Regulation 63 prescribes information that must be given to the parties at least one day before a mediation is commenced, including information about the process, the mediator's role, the operation of sections 19N and 19M, and the mediator's duties of confidentiality and disclosure under the Act and regulations.[57] Regulation 64 imposes obligations on community and private mediators to ensure that mediation is conducted in a way that suits the needs of the parties, is terminated if requested by a party or judged by the mediator to be appropriate, and to refrain from providing legal advice.

Other obligations imposed on approved mediators are to avoid conflicts of interest,[58] and not to disclose any communication or admission made in the course of mediation except in prescribed circumstances.[59] These circumstances include where it is considered necessary to protect a child, to prevent or lessen a serious or imminent threat to the life or health of a person, or prevent the likely commission of an offence involving violence or a threat of violence to a person, or intentional damage to property of a person or a threat of damage to property.

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services and private ADR practitioners. Mediation services are also provided by the Family Courts of Australia and in WA and by legal aid commissions. Approved community organisations in WA are Centrecare and Relationships Australia. Community mediation services operating, in WA, are the Aboriginal ADR Service, the Bunbury Community Mediation Service, the Citizens Advice Bureau and the Gosnells Community Mediation Service.

56. Regs 60–61.
57. In the case of a community mediator, the mediator's oath under s 19K of the Act; and in the case of a private mediator, the mediator's obligation under reg 67.
58. Reg 65.
59. S 19K and reg 67.

The increased use of court-annexed mediation has led to the introduction of many context specific provisions.[60] There are numerous examples where provision is made for 'approved' mediators to mediate matters before the courts.[61] Beneficial provisions conferring immunity and privilege are set out in the Act that provides for the use of mediation.[62] Regulatory provisions relating to qualifications, approval or selection of mediators, and their supervision and removal, where they exist, are typically found in court rules or other forms of subsidiary provision, rather than in the Act.[63]

There are also many examples of context specific legislation that apply to a specified category of dispute or matter requiring resolution.[64]

(b) Mediation specific legislation

This refers to legislation that applies to mediation procedures and practice in a range of contexts and is not confined in its operation to mediation under a specific Act. It may apply to all or only some aspects of mediation law.[65]

An example of an Act having general application is the Mediation Act 1997 (ACT). This Act contains both regulatory and beneficial provisions. The Act provides for the registration of mediators who, once registered, are able to invoke the provisions relating to admissibility of evidence,[66] protection from defamation[67] and immunity from civil suit.[68] Mediators are also bound not to disclose information obtained in a mediation session other than in prescribed circumstances.[69]

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60. Eg Rules of the Supreme Court 1971 (WA) O 29; District Court Consolidated Rules O 5. For a discussion of mediation in the Supreme Court, see Boyle supra n 15. Regarding the District Court Pre-Trial Conference Process, see G Kingsley 'Experiences of Mediation in the District Court' in *Mediation and Pre-Trial Conferences* supra n 15.
61. Eg Supreme Court Act 1935 (WA) s 69 defines 'mediator' to include 'a person approved by the Chief Justice to be a mediator under the Rules of Court'.
62. Eg the Federal Court of Australia Act 1976 (Cth) s 53B provides that evidence of anything said or any admission made at a mediation referred under the Act is not admissible in any court. S 53C of the same Act confers the same protection and immunity on a mediator as a judge has in performing the functions of a judge.
63. Eg Supreme Court Act 1935 (WA) s 69.
64. See supra n 3.
65. An example of legislation applying to only one aspect of mediation law, and even then, only as part of the more general area of negotiated settlements, is the Evidence Act 1995 (Cth) s 131: see infra p 196.
66. Mediation Act 1997 (ACT) s 9.
67. Ibid, s 11.
68. Ibid, s 12.
69. Alternative Dispute Resolution Act 2001 (Tas) s 10. Given the absolute immunity conferred by s 12, there would not appear to be any form of redress to parties who complain of unauthorised disclosure by a mediator, other than through informal channels to seek cancellation of the mediator's registration.

Registration is granted under the Act to mediators who satisfy an 'approved agency' that they have the necessary requirements for approval, including achievement of the standards of competency prescribed under section 5 of the Act.

The Act does not prohibit the practice of mediation by unregistered mediators, nor does it define mediation. Any person practising as an unregistered mediator would need to rely on context specific legislation or the common law if legal proceedings were brought against them by the parties, or if they were called to give evidence about what took place in a mediation.

The Tasmanian Parliament recently enacted the Alternative Dispute Resolution Act 2001 (Tas). This Act provides for mediation and neutral evaluation of matters arising before the court. 'Court' includes the Supreme Court, lower courts and tribunals prescribed by the regulations.[70] A court may refer civil matters to either of these processes where it considers this appropriate, and whether or not the parties to the proceedings consent to the referral.[71] The mediator or evaluator may be drawn from a list compiled under the Act but need not be.[72] The Act provides for the Chief Justice and the Chief Magistrate to compile lists of suitable mediators and evaluators, and to amend, revoke and review such lists.[73] The Act provides that mediation and evaluation sessions are privileged,[74] that mediators and evaluators who act in good faith are immune from liability,[75] and for disclosure of information in certain circumstances.[76] Surprisingly, immunity is not confined to mediators or evaluators selected from the list compiled under the Act.[77]

The movement towards mediation specific legislation has occurred in the United States where a number of States have enacted legislation applicable to mediation and mediators. One of the most comprehensive is the Mediation Chapter of the Californian Evidence Code.[78] Another example is the Minnesota Civil Mediation Act.

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70. Ibid, s 3(1).
71. Ibid, s 5(1). Note though that section 6 provides that a party to a mediation session or neutral session may withdraw from the session at any time.
72. Ibid, s 5(2).
73. Ibid, s 9.
74. Ibid, s 10.
75. Ibid, s 12.
76. Ibid, s 11.
77. The section confers statutory immunity on mediators and evaluators who are selected by the parties but who need not have satisfied any test of suitability by the court. This raises obvious questions about standard-setting and the ability of the court to ensure that appropriate standards of practice are maintained.
78. See ss 1115-1128.

(c) Uniform mediation legislation

Another form of legislation that can apply either to context specific or mediation specific legislation is uniform legislation.[79] Uniformity is used here to mean that the same law is enacted in each State and Territory.

In the United States, an ambitious project was undertaken by an interlocking committee of the American Bar Association and the National Conference of Commissioners on Uniform State Laws to create a Uniform Mediation Act. The Drafting Committees released their first draft for comment in June 1999. Further drafts were prepared following public comment.[80] The final draft was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in August 2001.

The Drafting Committee argued that uniform mediation laws would be of general benefit for a number of reasons. First, uniformity makes it predictable that what is or is not admissible in one jurisdiction will be treated in the same way in another jurisdiction. Second, uniformity is important in cross-jurisdictional mediation. With the increase in on-line mediation this is an issue of growing importance. Third, without uniform laws, a person signing a mediation agreement will not know where a future mediation will take place and therefore what privilege the law will provide. Finally, it is suggested, uniformity contributes to simplicity.[81]

The primary focus of the Act is a privilege that ensures confidentiality in legal proceedings. The objective is for the 250 privilege statutes that presently exist in the States to be repealed and the model provisions adopted.[82] The Act, therefore, aims for uniformity in only one aspect of beneficial legislation. Other beneficial rules relating to confidentiality (eg, disclosure in circumstances other than legal proceedings) and immunity will continue to be dealt with by State laws. The Act does not attempt to introduce uniform provisions relating to mediator qualifications, authorisation of mandatory mediation or standards for mediators. These will continue to be regulated by State laws.

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79. Examples of legislation that aim at uniformity, but which are only similar and not identical, are the various Commercial Arbitration Acts in Australia: Commercial Arbitration Act 1986 (ACT); Commercial Arbitration Act 1984 (NSW); Commercial Arbitration Act 1985 (NT); Commercial Arbitration Act 1990 (Qld); Commercial Arbitration Act 1986 (SA); Commercial Arbitration Act 1986 (Tas); Commercial Arbitration Act 1984 (Vic); Commercial Arbitration Act 1985 (WA). See generally Astor & Chinkin supra n 2, 117-118.
80. Details of the drafts are available at <http://www.pon.harvard.edu/guests/uma/>.
81. 'Uniform Mediation Act Draft' Pt 2: Prefatory Note (4 May 2001).
82. Ibid.

II A CLOSER LOOK AT REGULATORY LEGISLATION

There has been ongoing debate about whether mediation should be regulated, in what manner, and by whom. The competing desire to protect consumers, on the one hand, and to avoid over-regulation of mediation, on the other, has been the subject of a number of reports in Australia and overseas.[83]

In 1989, the New South Wales Law Reform Commission released a Discussion Paper to encourage debate on the need for training and accreditation of mediators. After reviewing the need for consumer protection and arguments for and against the regulation of mediators, the Commission concluded that the risks to clients did not warrant government intervention.[84]

A little over a decade later NADRAC issued a Discussion Paper[85] seeking public comment on standards for the provision of ADR, on minimum qualifications for ADR practitioners, including the need for registration and accreditation of ADR practitioners or organisations, and appropriate professional disciplinary mechanisms. Following an extensive consultation process, NADRAC published its final report, *A Framework for ADR Standards,* in April 2001. It is clear from the material presented in the Discussion Paper that there is a well-established body of ethical codes of conduct and mediator standards in use throughout Australia and overseas.[86] These codes and standards play an important part in the institutionalisation and legitimisation of mediation.

The Report argues that the need for, and the nature of, accreditation should be assessed on a sector by sector basis,[87] rather than by the application of uniform standards to ADR processes. NADRAC recommends the development of standards for ADR based on a framework described in the Report and that all ADR service providers be required to adopt and comply with appropriate codes of practice. Essentially, the Council advocates self-regulation by service providers and suggests

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83. In Australia: see eg NSWLRC supra n 7; NSWLRC *ADR Training and Accreditation of Mediators* Discussion Paper No 21 (Sydney, May 1989); A-G (ACT) supra n 20; NADRAC *Primary Dispute Resolution in Family Law: A Report to the A-G on Part 5 of the Family Law Regulations* (Canberra, 1997); NADRAC supra n 17. For international developments, see NADRAC supra n 17, 45-47; C Reeve 'The Quandary of Setting Standards for Mediators: Where are We Headed?' (1998) 23 Queen's LJ 441.
84. NSWLRC ibid, 'Executive Summary'. The Commission recognised that, 'The greatest danger is from abuse by inept, overbearing or unscrupulous mediators': para 4.20.
85. NADRAC *The Developments of Standards for ADR* Discussion Paper (Canberra, Mar 2000).
86. Ibid. Appendix 1 to the Discussion Paper contains excerpts from some ADR standards and guidelines. For a selection of Australian ADR standards, see NADRAC supra n 17, 43 (Table A).
87. NADRAC ibid, 83, Recommendation 12.

various ways for dealing with complaints. This does not exclude the potential for creating an industry-wide accrediting body,[88] but there should be varying levels and indicators of competency recognised by any such body.

Further evidence of a preference in Australia for achieving and maintaining good mediation practices by setting context specific standards linked to practitioner qualifications and training is provided by the Issues Paper prepared by Professor Hilary Astor for the Australian Institute of Judicial Administration,[89] and a recent Consultation Paper prepared by the Commonwealth Attorney-General's Department.[90]

There is no recommendation in the NADRAC *Frameworks* Report for the enactment of regulatory legislation, uniform or otherwise.[91] Clearly there is scope for any State to enact mediation specific legislation that adopts the standards framework that NADRAC advocates. Context sensitive standards will naturally lead to more complexity in registration or approval systems and enforcement of the registration provisions.

If the decision is made to regulate the practice of mediation, Parliament can choose whether to *prohibit* mediation by persons not recognised by the legislation (eg, by registration or accreditation procedures) or simply to *exclude from the beneficial provisions of the legislation* persons who are not recognised by the legislation. As we have seen, the latter is the usual approach in Australia.[92] While this may be preferable to prohibition because it does not preclude parties choosing to use mediators who do not meet particular legislative requirements, clearly it increases the scope for mediators to operate under different beneficial rules. We will turn now to look at these rules in more detail.

III A CLOSER LOOK AT BENEFICIAL LEGISLATION

The common law does not always provide mediators and parties to mediation with the degree of support needed to maintain the attractiveness and integrity of

88. As recommended by NADRAC ibid, 90, Recommendation 19.
89. AIJA *Quality in Court-Connected Mediation Programs* Issues Paper (Melbourne, 2001). This paper identifies many issues associated with the quality of court-connected mediation and provides a basis for further research.
90. A-G (Cth) *Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family Law Act 1975* Consultation Paper (Canberra, 2001). This paper proposes the development of a 'Quality Framework' comprised of standards of practice of service delivery and processes for continuous improvement of all primary dispute resolution services under the Family Law Act 1975. If adopted, some amendments to the Act and Regulations will be necessary.
91. Supra n 17. In any event, the terms of reference of the Council would only support a recommendation of this kind to the Commonwealth Parliament.
92. Eg Family Law Regulations 1984 (Cth); Mediation Act 1997 (ACT).

the mediation process. Important functions of legislation have been to broaden the scope of the beneficial provisions and to increase certainty about the rules to be applied.

Some difficulty has been encountered in shaping the statutory principles to ensure that other important interests are not overridden. For example, while confidentiality is regarded as essential to the mediation process, over-protection of confidentiality can conflict with the need to disclose what took place in mediation to prevent the process being used for the purpose of 'sterilising' evidence that would otherwise be admissible in court,[93] to protect third parties from harm,[94] and to allow some form of review of the mediator's conduct. Increasingly attention is being paid in legislation to balancing these competing considerations.[95] Each of the areas where there have been calls for greater legal certainty[96] will be reviewed briefly in what follows.

(i) Confidentiality

Confidentiality is generally regarded as fundamental to the mediation process because it encourages full and frank discussion of matters in dispute between the parties. Confidentiality issues can arise during the mediation ('internal confidentiality') or after the mediation ('external confidentiality').

Failure by the mediator to maintain internal confidentiality is likely to undermine the parties' trust in him or her and may result in termination of the mediation. Problems in respect of external confidentiality can arise in three circumstances:[97]

1. where one of the parties wants to refer to what transpired in the mediation in court or elsewhere outside the mediation;
2. where a third party, including a court or tribunal, seeks disclosure by a mediator or by a party, or attempts to access mediation documents; or,
3. where the mediator wants to disclose on a voluntary basis.

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93. This concern is reflected in the judgment of Rolfe J in *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (unreported NSW Sup Ct 18 March 1992) 9. For further discussion of the confidentiality issues arising out of the *AWA* case, see Dann supra n 50, 217-219.
94. This explains the exceptions to statutory provisions rendering evidence of mediation sessions inadmissible (eg Supreme Court Act 1935 (WA) s 71), and prohibiting disclosure of information disclosed in mediation by mediators (eg ibid, s 72).
95. The extent to which an exception should be made to confidentiality in the interests of third parties, amongst others, has been a matter of some controversy. The arguments for and against confidentiality are outlined in A-G (ACT) *Mediation* supra n 20, 52-55. See also ALRC *Review of the Adversarial System of Litigation* supra n 2, 119-120. For further discussion of the circumstances in which exceptions need to be considered, see NADRAC supra n 30, 13.
96. Eg ALRC ibid, ch 6.
97. Boulle supra n 2, 282.

Although in some situations parties may be willing to participate in a process where neither the sessions nor the outcome of mediation are treated as confidential,[98] in most circumstances the parties will want to know that what is said during mediation will be confidential, and will not be made public or used to their detriment in later court proceedings or other adjudicatory processes. While general law principles afford some level of protection, these principles are not entirely effective to prevent evidence of mediation communications being discoverable or compellable as evidence.[99]

An effective way to protect the information disclosed during a mediation session is to make provision in legislation for the circumstances in which it may be disclosed. Some examples where disclosure is permissible or compellable by legislation have already been given in Part I of this article. While the judicialisation trend is obvious in this area, with a growing body of case-law relating to confidentiality, many uncertainties about the application of the general law and legislation remain.[100]

(ii) Privilege

Mediation often takes place in a continuum of dispute resolution processes. In many instances mediation is used as a process to negotiate settlement of legal disputes. In these circumstances the policy underlying the law of privilege applies with equal force to the mediation process. Common law privilege attaching to 'without prejudice' communications is potentially available to the parties in most mediations.[101] Legal professional privilege extends to documents and other communications that come into existence for the purpose of either legal proceedings or obtaining legal advice and can be claimed by the parties.[102] There is, however, no common law privilege for mediators and there is no authority for extending the 'without prejudice' privilege to mediators who assist negotiations between the parties.[103] This means that without statutory privilege mediators can become compellable witnesses if subpoenaed.

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98. Eg mediations conducted in Community Justice Centres do not require the parties to maintain confidentiality.
99. Astor & Chinkin explain that 'even where there is a contractual provision for confidentiality there remains a risk that it would be held to be void as contrary to public policy on the basis that it constitutes an agreement to withhold evidence from a court': supra n 2, 235.
100. For discussion, see F Crosbie 'Prospects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests' (1995) 2 Commercial Dispute Resolution Journal 51; Dann supra n 50; L Harman 'Confidentiality in Mediation' in G Raftesath & S Thaler (eds) *Cases for Mediation* (Sydney: Law Book Co, 1999); McCarthy supra n 29.
101. Boulle supra n 2, 283.
102. Ibid, 286.
103. Ibid. Professor Boulle suggests, however, that the policies underlying common law and legal professional privilege could be extended to mediators.

We have seen in Part I examples of legislation which provide that communications made as part of the mediation process are privileged.[104] Privilege benefits the parties because any concessions made during mediation will not prejudice their position in a trial. This benefit is only available if the mediator, in addition to the party making the concession, can claim privilege.

When a mediator as well as the parties can claim privilege there are additional benefits. First, the confidentiality, and therefore the integrity, of the process is maintained. Second, privilege has an indirect benefit for the mediator of excluding evidence that may be necessary to bring a successful liability action against him or her. In this way, statutory privilege can have a similar effect to immunity.[105] It is suggested that there should be exceptions in the legislation to allow evidence of a mediator's conduct to be admissible in some circumstances.

The Reporter's Working Notes on mediation privilege in the Uniform Mediation Act (US) provide a valuable insight into a number of issues. These include clarifying who holds the privilege, who can raise and waive it, and the proceedings in which privilege applies. The Drafting Committee also took the view that it was unnecessary to cover all aspects of confidentiality, stating that:

> A statute is required only to assure that aspect of confidentiality that relates to evidence compelled in a judicial and administrative proceeding. The parties can rely on the mediator's assurance of confidentiality in terms of mediator disclosures outside the proceedings, as the mediator would be liable for breach of such an assurance.[106]

(iii) Disclosure

Disclosure refers to disclosure by the parties during the mediation and disclosure by the mediator during and after the mediation. Disclosure of information by the parties is important as it ensures that each party makes informed decisions. Legislation can create procedural steps and obligations to make disclosure.[107] In the absence of statutory or contractual requirements or court procedures it will be difficult for a party to ensure that there has been full disclosure. There is scope, however, for a party to obtain relief if the non-disclosure is conduct for which

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104 Eg Supreme Court Act 1935 (WA) s 71(4), which makes it clear that a mediator can claim the privilege. S 71(4) is reproduced in Table 1 infra pp 196-197.

105. Discussed further at infra pp 186-188.

106. Reporter's Working Notes (4 May 2001) 3. The final draft simply provides: 'Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State' (s 8).

107. Eg Agricultural Practices (Disputes) Act 1995 (WA) sch 1, cl 4.

statutory remedies[108] or procedural sanctions[109] are available.

There are also important disclosures that parties might expect a mediator to make. In private mediation these will relate to the mediator's qualifications and competency to mediate a particular matter, and any conflicts or potential conflicts of interest that may actually or potentially impact on the mediator's neutrality. The Uniform Mediation Act (US) includes a provision requiring disclosure of any conflicts of interest and, at the request of the parties, of a mediator's qualifications.[110]

In Australia the disclosure requirements for mediators have been dealt with largely though codes of conduct and statements of ethical duties.[111] Where there is a breach of a disclosure requirement, one would expect in appropriate circumstances that legal remedies would be available. This may not be the case, however, where the mediator is acting with contractual or statutory immunity.

(iv) Immunity from suit

There is general support for conferring immunity from suit on mediators operating in statutory contexts and in court-annexed mediation. Where a mediator acts without statutory immunity, he or she needs to rely on contractual terms to protect against civil liability. However, even with a carefully drawn contract, it is not possible for a mediator to achieve as full protection as can be conferred by Parliament.[112] Therefore it is an obvious advantage for a mediator to operate with statutory immunity.

Various arguments have been made in support of statutory immunity. These include that it is necessary for the administration of justice that mediators can act without fear of being sued, and that review of the mediation would undermine confidentiality and therefore the integrity of the process. It has been argued that immunity preserves mediated agreements and that mediators are neutral, and therefore that the parties can have no complaint against the mediator regarding the substantive outcome. It has also been argued that potential liability would inhibit people from undertaking the role of mediator and that there are other means than civil suits for achieving mediator accountability.[113]

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108. For an example of a successful claim for relief under the Trade Practices Act 1974 (Cth): see *Williams v Commonwealth Bank of Australia* (unreported, NSW CA, 27 Sep 1999).
109. For discussion of possible sanctions, see Boyle supra n 15; G Dearlove 'Court-Ordered ADR: Sanctions for the Recalcitrant Lawyer and Party' (2000) 11 ADRJ 12.
110. See final draft of the Act supra n 80, s 9. For other disclosure requirements in various mediator standards, see Martin supra n 38, 46-47.
111. See eg supra n 86.
112. R Carroll 'Mediator Immunity in Australia' (2001) 23 Syd LR 185, 194-195.
113. For a detailed discussion of the arguments for and against mediator immunity, see Carroll ibid.

Concerns have been expressed, however, about the implications of throwing a blanket of immunity around the mediator.[114] There have been several calls for an exception to be created to the rules excluding evidence of mediation communications to allow complaints of mediator misconduct to be heard. The ACT Attorney-General's Departmental Discussion Paper on mediation recognised the arguments in support of setting some limitation on the immunity conferred on mediators and suggested possible limitations including acting in bad faith, exhibiting bias towards one of the parties, communicating incorrect information to one or both of the parties, misrepresenting qualifications, expertise or abilities, and creating an atmosphere where one party felt coerced into accepting a proposal.[115]

To give effect to this limitation, the Discussion Paper recognised that it would be necessary for limits also to be placed on the confidentiality of mediation sessions. If a party to the mediation cannot adduce evidence of the mediator's actions or words it will be impossible to prove liability by the mediator. It was therefore proposed in the Discussion Paper that provision be made for evidence to be admissible of a mediator's 'lack of skill or unacceptable behaviour'.[116] It was also noted that it might be necessary for the mediator to adduce evidence of what was said or done during the mediation session to prove that his or her mistake was an honest one, and that this would need to be recognised in the legislation.[117] Notwithstanding these suggestions, the Mediation Act 1997 (ACT) does not provide either for exceptions to mediator immunity or for the admissibility of evidence on the issue of mediator misconduct.

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114. NSWLRC *Training and Accreditation* supra n 7, para 4.20, observes:
> The qualities which can make mediation attractive are precisely those which give rise to concern about the behaviour and the protection of clients. Privacy and confidentiality of proceedings make it likely that evidence of abuse of process may be suppressed. The procedural safeguards and application of substantive law in the formal judicial system are discarded for informal mechanisms....These concerns will be more pressing if the immunity which already exists for some practitioners is extended to others without corresponding mechanisms for protecting the interests of clients denied legal redress.

In the US, see CE Joseph 'The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity' (1997) 12 Ohio St U Journ on Disp Resol 629; JS Richardson 'Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators' (1990) 17 Florida St U L Rev.

115. A-G (ACT) *Mediation* supra n 20, 58.

116. Ibid.

117. Ibid. It was suggested in the Discussion Paper that a provision along the following lines could be adopted to resolve any 'secondary disputes' arising between the mediator and the parties as a result of the mediation: 'Subsections [ ] and [ ] shall not prevent the use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute': Administrative Dispute Resolution Act 1990 (US) s 584(I).

NADRAC has made similar calls for an exception to confidentiality on this ground, initially in its *Report on Family Law Regulations (Part V),*[118] and since then in its *Report on the Use of ADR in a Federal Magistracy*[119] and in *A Framework for ADR Standards.*[120]

The US Draft Uniform Mediation Act provides an express exception to the mediation privilege. Section 6(a) states:

> There is no privilege against disclosure under section 4 for a mediation communication that is ... (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.[121]

The rationale behind this exception is that:

> Disclosures may be necessary to make procedures for grievances against mediators function effectively, and as a matter of fundamental fairness to permit the mediator to defend against such a claim.[122]

The Drafting Committee notes that permitting complaints supports the view taken in many jurisdictions in the United States that, in the absence of licensing and accreditation by the state, private actions serve an 'adequate regulatory function and sift out incompetent or unethical providers through liability and the rejection of service'.[123]

The availability of immunity to mediators in Australia is one of many factors that precludes accountability of mediators through private actions.[124] Immunity, statutory or otherwise, places a heavy obligation on those who provide mediation services to ensure their quality. In particular, as NADRAC has stated, bodies operating under legislation that mandates the use of mediation 'need to give special attention to the need for mechanisms and procedures to ensure the ongoing quality' of mediation.[125]

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118. NADRAC supra n 83, 32.
119. NADRAC supra n 30, 13, 21.
120. NADRAC's ongoing concern about the need for there to be workable mechanisms to ensure accountability of mediators is reflected in its call in *A Framework for ADR* for a review of the law to provide recommendations on how to provide means by which consumers of ADR services can seek remedies for serious misconduct: supra n 17, 79, Recommendation 11.
121. S 6(a)(6) contains a similar exception concerning complaints against a party, non-party participant or representative of a party, based on conduct occurring during a mediation.
122. Reporter's Working Notes supra n 106, 26.
123. Ibid, 26-27.
124. For other factors, see Carroll supra n 112, 192-193; Boulle supra n 2, 247.
125. NADRAC supra n 17, 78, Recommendation 10.

(v) Enforceability of agreements to mediate and mediated agreements

Issues have arisen about the enforceability of agreements to mediate.[126] While courts have shown that they are willing to enforce a clause in which parties agree to participate in mediation before they use the court process,[127] there is potential for an agreement to mediate being struck down if the process it prescribes is not sufficiently certain.[128] The question has been raised whether legislation should cover the enforcement of ADR clauses.[129] Although canvassed as an issue in the ACT Discussion Paper, no provision was included in the resulting Act. While there are continuing calls for clarity in this area,[130] it would seem appropriate to allow this area of law to continue to be developed on case-law principles. There has already been clear recognition in the cases of the benefits of the mediation process, that mediation clauses are capable of being enforced, and that enforcement of the process does not force the parties to reach agreement.[131]

Where mediation takes place in conjunction with court proceedings or as a statutory procedure, this issue will not arise. The enforceability of the process will be determined by whether the process is entered into voluntarily or is mandatory.

The issue may also arise whether an agreement reached by mediation is enforceable. Where agreements are reached in private mediation, parties need to rely on contract law for enforcement.[132] Under the community justice model of mediation the legislation expressly provides that agreements reached by mediation are not enforceable.[133] This does not affect any rights or remedies that a party has relating to a dispute distinct from the Act under which the mediation takes place.[134]

In contrast to the community justice setting, where the mediation achieves settlement of a dispute in which legal proceedings are on foot, it will be of paramount

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126. See generally R Angyal 'Enforceability of Agreements to Mediate' in Raftesath & Thaler supra n 100, 1.
127. Eg *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194.
128. Eg *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.
129. A-G (ACT) *Mediation* supra n 20, 89; ALRC Issues Paper supra n 2, 118.
130. NADRAC supra n 17, Recommendation 11.
131. *Hooper Bailie* supra n 127; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.
132. This can be reinforced by legislation. The Minnesota Civil Mediation Act ch 572.35, for example, states that the effect of a mediated settlement shall be determined by contract law principles, provided certain requirements have been met.
133. Eg Community Justice Centres Act 1983 (NSW) s 23(3), which provides: 'Notwithstanding any rule of law or equity, any agreement reached at, or drawn up pursuant to, a mediation session is not enforceable in any court, tribunal or body.'
134. Ibid s 23(4).

importance to the parties to know that the agreement they reach in mediation will be enforceable. Agreements reached during court-annexed or statutory mediation usually will be made enforceable by being reported or certified by the mediator or by consent orders made by the court.[135]

Another issue concerning enforceability of mediated agreements is the ability of one or both of the parties to set the agreement aside. They may seek to do so either on the basis of conduct by the other party or by the mediator. In addition to the issues surrounding confidentiality, the difficulty will arise of reconciling the conflicting policies of upholding settlement agreements and providing relief from agreements on grounds that would apply to any other agreement. Where mediation takes place in a statutory context doubts have been expressed about the ability of the courts, in the absence of an express statutory power, to review the outcome of the mediation.[136] On the other hand, the courts have been prepared to grant relief where an agreement was entered into after one party had misled or deceived the other.[137]

It may be appropriate in context specific legislation to provide for the circumstances, if any, in which the outcome of a mediation can be reviewed. But other than that, there does not appear to be a need for special rules to be applied to mediation agreements. From a practical perspective, the obstacle to obtaining relief from unfair or improper agreements lies not in the substantive law so much as in the rules of privilege and immunity.

The Uniform Mediation Act (US) provides an exception to privilege in limited circumstances that preserves specific contract defences. The aim is to preserve the integrity of the mediation process by admitting, for limited purposes, evidence based on mediation communications which otherwise would be unavailable.[138] Examples of where the exception would apply are where a party raised the defence of duress by the mediator in a proceeding to enforce the mediation,[139] and where a party made a false statement that was relied upon by the other party to settle their claim.[140]

There are obvious benefits in clarifying the circumstances in which evidence is admissible for the purpose of reviewing a mediation agreement. While there is an

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135. For further discussion, see S Emmett 'Enforcement of Agreements Reached as a Result of Mediation' in Raftesath & Thaler supra n 100, 15.
136. Eg *State Bank of NSW v Freeman* (unreported) NSW CA 31 Jan 1996, 17; *Gain v Cth Bank* (1997) 42 NSWLR 252, Cole JA 262.
137. *Williams v Cth Bank* (unreported) NSW CA 27 Sep 1999.
138. Uniform Mediation Act (US) s 7(b)(2).
139. This example is based on the Texan case, *Randle v Mid-Gulf Inc* (unreported No 14-95-01292, 1996 WL 447954): see Reporter's Working Notes supra n 106, 27.
140. Example given in Reporter's Working Notes, ibid.

understandable reluctance to allow parties to 'unwind' an agreement entered into at mediation, it will not enhance the integrity of the mediation process to allow the rules of privilege to be used to prevent review on legitimate grounds.

IV COMPETING PRINCIPLES IN REGULATORY AND BENEFICIAL MEDIATION LEGISLATION

Not surprisingly, efforts to regulate a dynamic and developing process like mediation bring to light competing principles. In the discussion of regulatory legislation in Part II the tension between the need to balance consumer protection with concerns about over-regulating a developing and diverse practice was identified. In Part III a similar tension was noted. This was the competing desire to protect the integrity of the process by upholding confidentiality while ensuring appropriate levels of mediator accountability. The practical implications of these tensions for legislation have been considered in a number of reports referred to in this article. There is a fine balance to be reached between the desire to protect the integrity of the process, by providing legal protection to the parties to the mediation and the mediator, and to avoid bringing the integrity of the process itself into question by making the mediator insufficiently accountable. It is suggested that further attention is needed to ensure that neither confidentiality nor immunity is conferred in terms so absolute that mediators are not held accountable for serious misconduct.

There are many forms of accountability – court proceedings being only one. Ideally mediation practice will be guided by standards acceptable to consumers and mediators alike that are adopted rather than imposed. NADRAC's most recent report, *A Framework for ADR*, identifies two further principles that need to be balanced in any attempt to impose standards or regulate ADR in Australia. These are the diversity principle and the consistency principle.[141] It is suggested that these principles are important not only to regulation and regulatory legislation but also to beneficial mediation legislation. Balancing all of these principles poses a challenge at the policy formulation level. Balancing diversity and consistency raises questions in particular about the efficacy of uniform legislation.

141. NADRAC supra n 17 'Introduction to Report'. In the context of ADR standards, the diversity principle recognises that there are many contexts in which ADR is practised. The consistency principle recognises the need to promote some consistency in the practice of ADR by identifying essential standards for all ADR service providers.

V A CLOSER LOOK AT THE CONSISTENCY AND DIVERSITY PRINCIPLES

(i) The diversity principle

As mediation is a flexible and adaptable process, unhampered by the many procedural and evidential rules that apply to court proceedings, it needs to be sensitive to diversity 'of institutional settings and other contexts, of processes, objectives and personnel'.[142] Concerns about the need to cater for diversity among participants in mediation led to a Discussion Paper being prepared by NADRAC in 1997 entitled *Issues of Fairness and Justice in Alternative Dispute Resolution.*[143] This resulted in the publication of a guide, *A Fair Say: Managing Differences in Mediation and Conciliation,*[144] that aims to ensure inclusive mediation practices for people who represent minority groups based on ethnicity, disability, sexuality and language.

The need for sensitivity to diversity applies equally to regulation and legislation. Concerns about over-regulation of family mediation practices with resulting lack of diversity among family mediators prompted another term of reference to NADRAC, leading to the *Report on Part V of the Family Law Regulations.*[145] Concerns have also been expressed about the adverse impact of standardisation of processes and practices on Aboriginal ADR processes.[146] It has been argued that cultural and social issues are unlikely to be adequately taken into account by uniform standards on matters such as ethical practice, training and accreditation, and confidentiality.

There are also dangers in enacting legislation that is unduly prescriptive about what constitutes mediation. If mediation is too narrowly defined so as to exclude any advisory role by the mediator, or if the expectation of mediator neutrality is too high, this may inhibit the growth of mediation in areas of dispute resolution where it has a great deal to offer.[147]

The introduction of mediation specific laws, by virtue of their general application, poses obvious difficulties for the diversity principle. In turn, this poses difficulties for uniform legislation. There are concerns that 'uniformity' will stifle the growth and development of a process whose hallmarks are innovation and creativity. One commentator on the Uniform Mediation Act (US) has, for this reason, expressed

142. NSWLRC supra n 83, 41.
143. Canberra, 1997.
144. Canberra, 1999.
145. NADRAC supra n 83.
146. H Bishop 'Influences Impacting on Aboriginal ADR Processes in the Context of Social and Cultural Perspectives': submission to NADRAC (Perth, 2000).
147. For detailed examination and argument on these issues, see Martin supra n 38.

doubts about the ability to create an Act that governs all types of mediation. Speaking of her experience as director of an ADR program for the State court system of Florida, she writes:

> Over time, I have become convinced that there is less and less that is uniform about this process. Even in a place like Florida, which has a lot of regulation, we have recognised the differences even within the single domain of the courts, where we have different procedural rules, training and qualifications for county court, family, dependency and circuit mediators.[148]

While this is an argument against uniformity, it does not necessarily deny the benefits of 'model' legislation' that can be adapted and applied to diverse but similar mediation contexts to achieve higher levels of consistency than at present. Further comments will be made in Part VII about the relative merits of diversity, consistency and uniformity in legislation in the Australian context.

(ii) The consistency principle

As it is a basic premise of law-making that like cases be treated alike, it is reasonable to expect consistency in the way that mediation is dealt with in legislation. In an emerging field like mediation it takes time to settle on the appropriate legal rules and apply them consistently. A closer examination of mediation and other ADR legislation reveals that there are a number of ways in which consistency issues arise. These issues are categorised and discussed below under the headings 'definition consistency' and 'rule consistency'.

(a) Definition consistency

There are numerous difficulties surrounding the definition of mediation. As Boulle points out, mediation is not easy to define.[149] Differences will inevitably result depending on whether mediation is defined *conceptually* (high in normative content) or *descriptively* (based on what happens in practice).[150] As mediation is often not defined in the legislation that provides for its use, variations will occur depending on whether a conceptual or practical definition is adopted and applied in the statute in point.[151]

148. Press supra n 27, 23.
149. Boulle supra n 2, 3. On some of the difficulties with definitions, see supra n 1.
150. Ibid, 4-5.
151. Mediation in not defined in any of the WA Acts cited in supra n 3. Some legislative examples of where mediation or the mediation process is defined are set out in ALRC *Review of the Adversarial System* supra n 2, 25.

There are various models of mediation that challenge NADRAC's conceptual definition of mediation set out earlier.[152] That definition of mediation precludes any advisory role by the mediator. Arguably, the NADRAC definition of mediation does not encompass 'evaluative mediation', a model of mediation commonly used in settling legal disputes.[153] In evaluative mediation:

> The mediator guides and advises the parties on the basis of his or her expertise with a view to their reaching a settlement which accords with their legal rights and obligations, industry norms or other objective social standards.[154]

The non-advisory role of the mediator is also the key difference between the NADRAC definition of mediation and conciliation.[155] Yet in some circumstances where legislation provides for mediation the process would more closely fit the definition of conciliation.[156] Mediation is defined in the Uniform Mediation Act (US) as follows:

> 'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.[157]

The Reporter's Working Notes indicate that the emphasis on negotiation in this definition is designed to exclude adjudicative processes such as arbitration and fact-finding, as well as counselling. The Notes explain that the word 'facilitates' is to emphasise that, in contrast to an arbitrator, a mediator has no authority to issue a decision. 'Facilitation' is not intended to express a preference with regard to approaches to mediation, which the Drafters recognise will vary widely. The Act

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152. Supra p 169. NADRAC noted that there is an ongoing debate about its current definition of mediation and indicated that it will revisit the definition at some future time: supra n 17, 8. Since then, NADRAC has called for comment: 'Do We Need a Common Language for ADR?' <http://www.nadrac.gov.au/aghome/advisory/nadrac/Definitions_Discussion.htm>.
153. The ALRC noted that, in practice, many court-annexed mediation schemes resemble an evaluative model: ALRC *Review of the Adversarial System* supra n 2, 26.
154. L Boulle *Mediation: Skills and Techniques* (Sydney: Butterworths, 2001) 15. Other models of mediation described by Boulle are settlement, facilitative and therapeutic mediation: ibid 14-15.
155. Conciliation is defined by NADRAC supra n 7, 7 as:
    > A process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.
156. Baylis supra n 31, 13 referring to the Agricultural Practices (Disputes) Act 1993 (WA).
157. Mediation Act drafts supra n 80, cl 2(1).

expressly excludes from its operation labour law processes, peer mediation and judicial conferences.[158] No distinction is made in the Act between mediation and conciliation, although the definition is sufficiently wide to cover both processes as they are defined by NADRAC.

There are arguments for and against wide and narrow definitions of mediation[159] and it is important that these be considered. While at one level the question of what constitutes mediation is fundamental to our understanding of the process, from a consistency viewpoint it is important that, whatever our understanding, like processes are defined in like ways. One task for drafters of any future Mediation Act will be to decide whether mediation should be defined in the Act, and if so, what definition would be appropriate. If a wide definition like that in the Uniform Mediation Act (US) is adopted, care will be needed to ensure that the provisions of the Act are consistent with any existing legislation that provides for other processes, like conciliation, that might be covered by the definition.

(b) Rule consistency

This aspect of consistency relates to the substantive rules applicable to the parties, the mediator and others affected in some way by the mediation process. There are numerous ways that rule inconsistency can arise: there may be different rules relating to the same process in different Acts; there may be inconsistency in the rules applied to other ADR processes; and there may be different rules applied between jurisdictions. Examples of each are given in what follows.

❖ Consistency between mediation processes

The issue here is how much diversity in the rules and processes is desirable where provision is made for mediation in different statutory contexts. There are, of course, variations in legislation that are deliberate and explicable by policy and procedures relevant to the specific context in which legislation operates. The comments that follow aim to highlight areas where there is inconsistency for no expressed or obvious reason.

The lack of co-ordination and consistency in ADR legislation has been commented on before. In 1997, Altobelli reviewed ADR legislation in New South Wales and reported a number of substantive differences in the rules applied to the mediation process in new legislation.[160] Based on a subsequent review of legislation

158. Ibid, cl 3(b).

159. For a detailed consideration of definitions and supporting arguments, see Martin supra n 38, ch 5.

160. T Altobelli 'New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 ADRJ 200. On the issue of consistency, see Baylis supra n 31.

Table 1: Admissibility of evidence – some different statutory provisions

Statute	Provisions
Evidence Act 1995 (Cth), section 131	(1) Evidence is not to be adduced of: (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute. (2) Subsection (1) does not apply if: (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or (h) the communication or document is relevant to determining liability for costs; or (i) making the communication, or preparing the document, affects a right of a person; or (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

Mediation Act 1997 (ACT), section 9	Evidence of- (a) a communication made in a mediation session; or (b) a document, whether delivered or not, prepared- (i) for the purposes of; (ii) in the course of; or (iii) pursuant to a decision taken or undertaking given in a mediation session, is not admissible in any proceedings except in accordance with section 131 of the Evidence Act 1995 (Cth).
Evidence Act 1958 (Vic), section 21	Evidence of anything said or of any admission or agreement made at, or of any document prepared for the purpose of, a conference with a mediator in connection with a dispute settlement centre is not admissible in any court or legal proceeding, except with the consent of all persons who were present at that conference.
Supreme Court Act 1935 (WA), section 71	(1) Subject to subsection (3), evidence of – (a) anything said or done; (b) any communication, whether oral or in writing; or (c) any admission made, in the course or or for the purposes of an attempt to settle a proceeding by mediation under direction is to be taken to be in confidence and is not admissible in any proceeding before any court, tribunal or body. (2) Subject to subsection (3) – (a) any document prepared in the course of or for the purposes of an attempt to settle a proceeding by mediation under direction; (b) any copy of such a document; or (c) evidence of any such document, is to be taken to be subject to a duty of confidence and is not admissible in any proceedings before any court, tribunal or body. (3) Subsections (1) and (2) do not affect the admissibility of any evidence or document in proceedings if – (a) the parties to the mediation consent to the admission of the evidence or document in the proceedings; (b) there is a dispute in the proceedings as to whether or not the parties to the mediation entered into a binding agreement settling all or any of their differences and the evidence or document is relevant to that issue; (c) the proceedings relate to a costs application and, under the Rules of Court, the evidence or document is admissible for the purposes of determining any question of costs; or (d) the proceedings relate to any act or omission in connection with which a disclosure has been made under section 72(2)(c). (4) A mediator cannot be compelled to give evidence of anything referred to in subsection (1) or (2) or to produce a document or a copy of a document referred to in subsection (2) except- (a) in proceedings referred to in subsection (3)(d); or (b) in proceedings relating to a costs application where there is a dispute as to a fact stated or a conclusion reached in a mediator's report prepared under the Rules of Court on the failure of a party to cooperate in the mediation and the evidence or document is relevant to that issue.

he maintains that the argument for co-ordination is even stronger now than in 1997.[161] While this is true, there has been a discernible move to address obvious 'gaps' and adopt beneficial legislative provisions more uniformly.[162]

Examples of inconsistency can still be found in privilege, disclosure and immunity[163] provisions. Arguably, the greatest need for legislative consistency is with respect to privilege. Overall there is a discernible trend to render mediation communications and documents used in mediation inadmissible, subject to specified exceptions. It is with regard to the exceptions that there is the most inconsistency. The provisions relating to admissibility of evidence in Table 1 illustrate this point.

There are also variations in the wording of the provisions that determine the scope and application of the privilege: what constitutes a 'mediation communication', when a 'mediation session' commences and ends, and in what proceedings the evidence is inadmissible.

❖ Consistency between ADR processes

The introduction of a Mediation Act in Western Australia would necessitate a review of other legislation containing regulatory or beneficial provisions relating to mediation and other ADR processes. An obvious example is the Commercial Arbitration Act 1985 (WA). Section 27(1) provides that:

> Parties to an arbitration agreement –
>
> (a) may seek settlement of a dispute between them by mediation, conciliation or similar means ... whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

Section 51 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.

These provisions raise two obvious questions. First, does an arbitrator conducting mediation under section 27(1) have the protection conferred on him or her in the capacity of arbitrator by section 51 of the Act? A literal reading of section 51 would suggest not. Second, if a Mediation Act were introduced, would it be the

161. Altobelli supra n 6, 146.
162. With respect to mediator immunity, see Administrative Appeals Tribunal Act 1975 (Cth), amended in 1993; Retail Leases Act 1994 (NSW), amended in 1998.
163. For discussion and critique of absolute immunity and inconsistencies in the law in this respect, see Carroll supra n 112.

intention that immunity along the lines of provisions operating under other Acts, for example the Mediation Act 1997 (ACT), be conferred on the arbitrator when mediating? If so, the anomalous result would be to confer greater protection on mediators than arbitrators.[164]

If other ADR processes are introduced by legislation (eg, case appraisal in the courts), as they have been in other States, consideration will need to be given to the appropriate regulatory and beneficial provisions applicable to them.[165]

❖ Consistency between jurisdictions

Obvious difficulties arise when different jurisdictions apply different laws and regulations to the practice of mediation in a particular dispute. Practitioners operating on a national basis, and national users such as insurers, are faced with differing provisions and court decisions in different jurisdictions. 'These legal differences can create prospective inconsistencies over the rights and obligations of parties and providers in ADR'.[166] Consequently, NADRAC has recommended:

> That Commonwealth, State and Territory governments undertake a review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes.
>
> That this review provide recommendations on how to:
>
> (a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and
> (b) provide means by which consumers of ADR services can seek remedies for serious misconduct.[167]

The need for rule consistency has become even more imperative in view of on-line mediation. Concern about cross-jurisdictional mediation is one factor underlying the Uniform Mediation Act in the United States. In January 2001, NADRAC published a paper discussing on-line ADR which aims to scope and prioritise the issues associated with it.[168]

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164. Not surprisingly there have already been calls for arbitrators to be granted fuller immunity by statute: see R Hunt 'The Uniform Commercial Arbitration Acts: Time For a Change? Part 1' (1999) 17 The Arbitrator 208, where he argues that the uniform Commercial Arbitration Acts should be amended to provide the more complete immunity afforded by s 74 of the Arbitration Act 1996 (UK).
165. Eg Courts Legislation Amendment Act 1995 (Qld), which introduced court-ordered mediation, and case appraisal in civil cases in the Supreme Court, District Court and Magistrates Court.
166. NADRAC supra n 17, 78.
167. NADRAC supra n 17, 79, Recommendation 11.
168. NADRAC *On-Line ADR* Background Paper (Canberra, 2001). The paper is concerned with resolution of disputes on-line rather than resolution of on-line disputes.

VI CALLS FOR A MEDIATION ACT IN WESTERN AUSTRALIA

(i) Background

In Western Australia mediators are presently subject to general law principles and any applicable context specific legislation. As a result, there are some areas of mediation practice that operate outside any regulatory or beneficial legislation. Nonetheless, many mediators belong to professional associations or organisations that require their members to adhere to codes of ethics and other voluntary standards, and limited forms of protection can be achieved by contractual agreement.

One consequence of the present patchwork of laws is inconsistency in the rules that apply to mediation proceedings between different areas of mediation practice in this State. For example, a mediator conducting (a) a mediation between a separated couple under the Family Law Act 1975 (Cth), (b) a private mediation between a separated de facto couple prior to court proceedings being commenced, and (c) a mediation between a separated de facto couple after the commencement of proceedings under direction of the Supreme Court, is subject to different legal rules in each case with respect to privilege, confidentiality and immunity from suit. While there is considerable similarity between the protection available to an approved family mediator under the Family Law Act 1975 (Cth) and an approved mediator under the Supreme Court Act 1935 (WA), there is no equivalent protection to the same mediator in situation (b), above.

Similarly, the same mediator working with parties involved in a neighbourhood or other community dispute will be in a different legal position compared to when he or she mediates under directions in the Supreme Court or as an approved family mediator. More particularly, a mediator in a community mediation centre in Western Australia does not operate with the same certainty as to their legal status as their counterpart in, for example, New South Wales, Victoria or Queensland.

A report by a Ministry of Justice Working Party in 1995 developed a model of 'best practice' for pilot Community Justice Centres and recommended that they be established in regional and metropolitan areas. The Working Party set out in the Report its views on a range of matters, including the standards of practice to be adopted, accreditation of mediators, pre-mediation contracts and the need for legislative protection.[169] The pilot did not proceed, and no further steps were taken to introduce legislation or establish new centres.

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169. Ministry of Justice Working Party *A Model of Best Practice for the Delivery of Mediation Services in Western Australia* (Perth, Aug 1995). Further details of the report are set out in WALRC *Consultation Drafts* supra n 2, 274.

Concerns have been expressed by the Aboriginal ADR Service about difficulties with confidentiality in resolving disputes involving Aboriginal and Torres Strait Islander communities and the uncertain legal status of their mediators.[170] While community mediation centres can limit their liability through written terms in contracts made between the centre and the participants in mediation, in some instances (in particular in disputes involving Aboriginal people in remote communities) it is considered inappropriate to enter a formal agreement in this way. Consequently, mediators act in some cases without even the level of protection that a contractual term can provide.[171]

While the calls for a Mediation Act in Western Australia have not attracted a lot of attention outside the ADR community, [172] it is clear that concerns do exist about the need to protect the confidentiality of the process and the potential exposure of mediators to legal action. [173]

(ii) The WALRC recommendations

Although the Law Reform Commission's Consultation Draft[174] did not propose legislation to regulate mediators, it did call for clarification in relation to liability of mediators and privilege.[175] Concern was expressed particularly about the unclear legal status of the Mediation Registrars in the Supreme Court.[176]

The Commission addressed many of the Consultation Draft proposals in its Final Report and made additional recommendations. As the terms of reference related to the court system, most of the recommendations focused on ADR in court proceedings. There are, however, important recommendations concerning community mediation.[177] Of the recommendations in the Final Report relating to ADR, five are directly relevant to the key recommendation that a Mediation Act should be enacted.

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170. H Bishop *WADRA Newsletter* (Dec 2000) 2.
171. Information provided during an interview by the author with H Bishop, Manager of the Aboriginal ADR Service (Perth, 7 Nov 2001).
172. The WA Dispute Resolution Association (WADRA), an association of ADR organisations in WA, has made representations to the State A-G about the importance of implementing the WALRC recommendations: *WADRA Newsletter* (Sep 2001) 10.
173. WALRC *Consultation Drafts* supra n 2.
174. Ibid.
175. Ibid, 292, Proposal 15.
176. Ibid, 292.
177. In Recommendation 46, the WALRC supra n 2, 85 stated that:
> There should be an appropriate level of community mediation services in Western Australia. Infrastructure, co-ordination, operation, information support services, mediators, the training of staff and volunteers, and promotion of services will need to be provided for if community mediation services are to be successful.
>
> While legislation is not essential to meet these needs, it could play an important role in supporting community mediation services in this State.

The relevant recommendations, re-ordered for the purposes of discussion, are as follows:

> **1. Recommendation 69**
>
> A Mediation Act should be enacted which encourages mediation and includes provisions based on the Evidence Act 1995 (Cth) which:
> (1) ensure the confidentiality of mediation conferences; and
> (2) provide ADR neutrals privilege from being required to give evidence of what transpires during the course of ADR.
>
> **2. Recommendation 70**
>
> If there are to be exceptions to the provisions conferring confidentiality on ADR conferences and privilege to neutrals, these should be clearly identified in the Act.
>
> **3. Recommendation 62**
>
> The Mediation Act should establish a process for regulating ADR including registration of approved neutrals for the purposes of court-approved ADR. The Act should also provide a means for parties and others to apply to have a neutral registered.
>
> **4. Recommendation 63**
>
> The Act should impose an obligation on anyone conducting court-ordered ADR to ensure that parties undertaking ADR are acquainted with their legal rights.
>
> **5. Recommendation 64**
>
> The Act should enshrine the desirability of parties who undertake ADR being aware of their legal rights.

(iii) Comments on the WALRC recommendations

While the Commission refers throughout its report to ADR, there is no recommendation for legislation that envisages the use of any process other than mediation. Although there are references to numerous processes, including conciliation, facilitation, early neutral evaluation, expert appraisal and arbitration, the term 'ADR' appears to be used synonymously with mediation throughout much of the Report.[178] It may be that further legislation would be needed in order for other processes, such as case appraisal or early neutral evaluation, to be introduced into the courts.

The term 'mediation' may be intended to refer generally to processes in which a third party neutral facilitates the parties' decision-making. In this case, a Mediation

178. Eg the Report states: 'The key distinguishing characteristic of ADR is that, in theory at least, after the parties meet with a neutral third party ... to discuss the case, they come to a resolution upon which the parties agree': para 11.1. While this description fits the definition of mediation, conciliation and facilitation, it does not apply to the others.

Act could be drafted broadly to apply to conciliation by using, for example, the definition of mediation in the Uniform Mediation Act (US).

It is apparent that the recommendations do not reflect any serious attempt to balance the competing principles referred to in Parts IV and V. Understandably, in the context of criminal and civil justice system reform, the recommendations focus on ways of preserving the integrity of the justice system. However, although mediation is closely connected with the justice system in many circumstances, it is essential for the development of mediation and the integrity of the process that legislative reform in this area reflects an understanding of the need to balance the competing principles applicable to mediation.

(a) Recommendations 69 and 70

These recommendations have strong and widespread support in the mediation and law reform communities. What needs to be made clear is to which mediations the Act will apply. Is it intended to 'codify' the confidentiality provisions or would there continue to be separate provisions in context specific legislation? In that case, if a provision were to be based on the Evidence Act 1995 (Cth), it would have to be consistent with the section 71 of the Supreme Court Act 1935 (WA). If the Act were intended to apply only to community justice mediations, it would be preferable to provide for confidentiality within legislation that specifically provided for that area of mediation service. Alternatively, the Victorian example could be followed and provision for confidentiality made in the Evidence Act 1906 (WA).

These recommendations relate only to confidentiality and privilege. Clearly these are the most pressing concerns, and certainty in these areas would benefit the development of mediation. The extent to which immunity should be conferred on mediators is another matter that requires consideration. While the Mediation Act 1997 (ACT) provides one example of legislation of this kind in Australia,[179] further consideration needs to be given to appropriate exceptions to privilege and immunity to balance protection with accountability concerns.

(b) Recommendation 62

This recommendation apparently envisages a scheme under which registered and approved mediators would be available to the courts on a more widespread basis than at present. The general nature of the regulatory process ('including registration of approved neutrals for the purposes of court-ordered ADR')[180] also

179. At least one commentator has called for the introduction of similar legislation in New Zealand: see C Powell 'Mediation Legislation: Will We Follow Australia?' (1999) NZLJ 21.
180. WALRC *Final Report* supra n 2, 92.

suggests an intention that the Mediation Act would apply to all mediation in this State, including court-ordered mediation. Experience with the Supreme Court of Western Australia indicates, however, that as long as mediation is provided free of charge and is organised by the court, parties and their lawyers are unlikely to make use of approved non-court mediators.

Any proposal to establish a process for registering mediators needs to give careful consideration to the purpose of registration and the extent to which registration is intended to provide for regulation of this field of practice. Questions that need to be addressed are: What standards of practice would apply? What sanctions would there be for breach? What would be the legal responsibility of the statutory body responsible for registration?

(c) Recommendation 63

This recommendation is indicative of the 'legalisation' trend. It also reveals a lack of confidence in mediation as a real 'alternative' to litigation. Although the Commission distinguishes between litigation as a rights-based process and mediation as an interest-based process,[181] this recommendation is in danger of suggesting that a rights-based process should still be functioning during court-based mediation. Although the recommendation reflects a legitimate concern for parties to have the benefit of legal advice, this concern should not be addressed by requiring the mediator to play an impossible dual role as neutral and legal advisor. Recommendation 59, which provides that where one or more of the parties to a dispute is not legally represented the process may be interrupted to allow for the parties to obtain further information including legal advice, makes good sense and reflects common mediation practice.[182] Matters like this relating to the practice of mediation, however, need not be prescribed by legislation: at most they are an appropriate matter for regulations.

Another problem with Recommendation 63 is that it is not clear with which legal rights it envisages the neutral would be obliged to acquaint the parties. Would it be confined to the substantive aspects (ie, merits) of their dispute? What about legal issues surrounding mediation, confidentiality, admissibility, the effect of non-disclosure or misleading conduct? And what would be the legal consequences of the neutral breaching this obligation? If the neutral has statutory immunity, presumably none. If he or she did not have immunity, it is unlikely that anyone other than a lawyer, or an expert in the substantive area of the dispute and mediation law, would be prepared to conduct the mediation.

181. Ibid, 83.
182. Eg Boulle supra n 154, 226.

(d) Recommendation 64

This recommendation is consistent with the philosophy and practice of mediation, and it could do no harm to state as a general principle the desirability that the parties to any dispute resolution process be aware of their rights. At the same time, the legislation should first reflect that in many situations the parties may do better to use a process that allows them to determine for themselves the outcome of their dispute.

VII THE WAY FORWARD

The Commission's recommendations recognise the potential for mediation-specific legislation in Western Australia. It is suggested that there are good reasons to introduce such legislation in this State.[183] These reasons include further State endorsement of mediation as a significant dispute resolution process, the educative function of legislation and the consistency that can be achieved through legislation. This article has shown that there are many issues surrounding such legislation and that competing principles of consumer protection and self-regulation, confidentiality and accountability, and diversity and consistency, pose challenges for the legislator. The article has also raised the question whether this is an area where uniform law is appropriate. Before turning to this last question, some general comments will be made about the issues that should be addressed in any Western Australian initiative.

First, it needs to be clear as to which areas of mediation practice the legislation would apply and how broadly mediation would be defined. The Commission's recommendations do not extend to mediation within Western Australia other than in the courts and community mediation centres. If mediation-specific legislation is introduced it should aim to support the practice of mediation wherever it takes place in Western Australia, including in boards, tribunals[184] and private mediations. This will lead to a greater degree of consistency in the law. Where diversity is required, in terms of process and procedure, regulation and beneficial provisions, this can be achieved in context specific legislation.

Second, the types of provision the legislation would contain need to be made clear. The Commission's recommendations refer to confidentiality, privilege and

183. Of even greater importance to the development of community-based mediation in WA, however, is the need to ensure the availability of wider infrastructure and financial support for the process.

184. The WALRC recommended the creation of a WA Civil and Administrative Tribunal (WACAT), adding that 'The procedure of WACAT should rely heavily on conciliation, mediation and the facilitation of settlement of matters prior to hearing': *Final Report* supra n 2, 296, Recommendation 380.

appropriate exceptions. They also envisage a process for regulating mediation practice including registration of approved neutrals. Other beneficial provisions that might be considered for inclusion concern disclosure, immunity and enforceability of agreements. The broader the application of the legislation, the more difficult it becomes to apply one provision to various contexts. While some aspects of disclosure (eg, mediator disclosure to the parties) may be suited to a general rule, this is not true of disclosure to third parties. Closer consideration needs to be given to the value of consistency in this respect. The same applies to enforceability of mediation agreements.

While there may be arguments in support of providing statutory immunity to mediators, the rationale for doing so is quite different from the rationale for protecting confidentiality by conferring privilege on mediators. Any provision for immunity needs to be balanced by effective accountability mechanisms, such as qualification and practice standards, and amenability to complaints procedures.

Third, it needs to be decided what form the legislation will take. It could be by mediation specific legislation, in the form of a Mediation Act or, if the legislation were to be confined to beneficial provisions, by amendments to the Evidence Act 1906 (WA) in similar fashion to amendments to the Evidence Act 1958 (Vic). If the legislation were intended to have narrower application it might be appropriate to include it in context specific legislation, for example a Community Mediation Centres Act.

If regulatory provisions are enacted, consideration will need to be given to the regulatory function taken on by the State, including how standards of practice will be regulated. Investigation into this would be assisted by examining the registration scheme used in the ACT and other situations where regulatory provisions are in place, for example in court-annexed mediation. It will also be advisable to monitor progress made towards self-regulation in the wake of NADRAC's *Frameworks* report, as this will have implications for regulation schemes.

The spectre of cross-jurisdictional uniform legislation raises similar issues. First, to what areas of mediation practice would uniform legislation apply? There would be immense difficulty co-ordinating the legislation in all Australian jurisdictions if it were to apply to all or a broad range of contexts. In any event, in the light of the diversity principle, it is difficult to see good reason or support for uniform cross-context legislation other than on a very limited basis.

Second, to what aspects of mediation law would uniformity be appropriate? Clearly there are benefits in cross-jurisdictional consistency and certainly there is scope for more consistency between regulatory and beneficial provisions in all Australian jurisdictions. The most pressing case for uniformity, as recognised in the United States, is in regard to the law of privilege as applied to mediation. There is potential to achieve uniformity by adopting section 131 of the Evidence Act 1995 (Cth) or similar. In practical terms, however, this is unlikely in the absence of any move to adopt a uniform law of evidence in Australia.

The absence of any practical imperative or political will to enact uniform mediation laws, or, more particularly, a uniform provision on admissibility of evidence, need not detract from developing 'model' laws that provide an educative and drafting tool. There are a number of other reasons why 'model' provisions, rather than enacted uniform provisions, may suffice. By contrast with the United States, the volume of legislation in Australia is small.[185] Also, the inconsistency in Australian legislation, while pronounced, is far less than in the United States. Much of the legislation in Australia has been drafted with the benefit of United States experience so some of the technical difficulties (eg, with respect to confidentiality and privilege) have been avoided.

Another important reason why model legislation may suffice is that in key areas in which mediation is used in Australia, uniformity already exists. In family law there are statutory provisions concerning admissibility of evidence, disclosure and immunity that apply nationally by virtue of Commonwealth legislation.[186] In this area of practice there are national advisory bodies that have input at a policy level.[187] In addition, the institutionalisation of mediation within courts has been accompanied by co-ordination of policies on procedure, practice and legislation.[188]

Mediation laws need to be developed to achieve rational and workable rules that balance the twin principles of consistency and diversity. While there is merit in seeking consistency through laws that might be seen as 'all for one and one for all' uniformity should not be regarded as an end in itself. There is merit in having 'one at all', but further work is needed to refine the form it takes.

185. Writing in 2000, Altobelli suggested that there were approximately 104 statutory instruments across Australia referring to mediation or mediation-like processes: supra n 6, 122.

186. It must be recognised, however, that there are aspects of family activities that Commonwealth law does not apply to, most notably in the area of de facto relationships. In this area there is not the same level of rule consistency between States and territories.

187. These include NADRAC, the Family Law Council, the Family Services Council and the Family Law Section of the Law Council of Australia.

188. Eg Law Council of Australia supra n 23, endorsed by the A-G's Standing Committee.