‘Playing devil’s advocate’:

Reality testing in the context of mediation in Australia

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RMIT University, Melbourne Australia

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MEDIATOR STANDARDS BOARD

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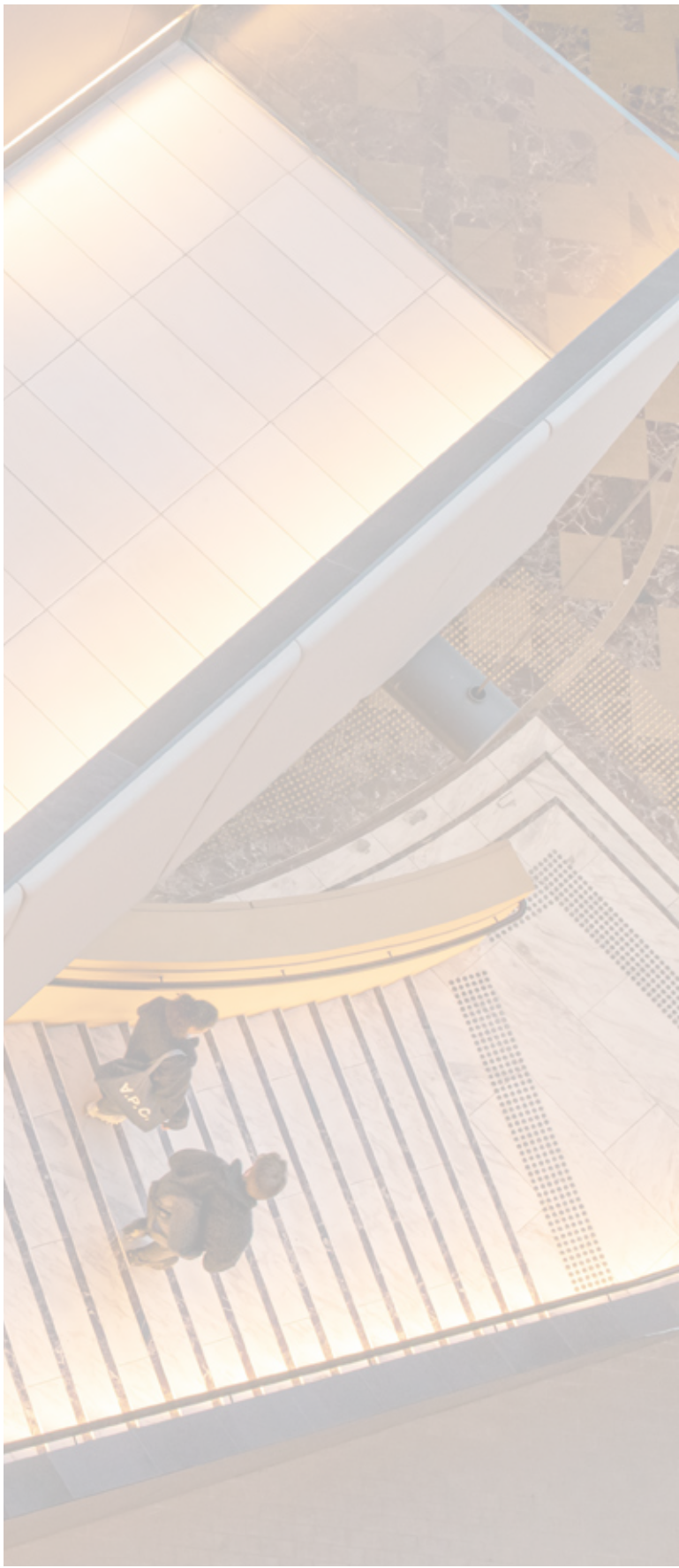
‘Playing devil’s advocate’: Reality testing in the context of mediation in Australia



Acknowledgement of Country

We acknowledge the people of the Woi wurrung and Boon wurrung language groups of the eastern Kulin Nation, and the Ngarigo people, on whose unceded lands we have worked on this project. We respectfully acknowledge their Ancestors and Elders, past and present. We also acknowledge the Traditional Custodians and their Ancestors of the lands and waters across Australia where we have conducted other parts of our research.

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Academic Institutions

The researchers appreciate the support provided by RMIT University and La Trobe University for this project. The researchers were engaged by La Trobe University at the start of the project and moved to RMIT University in 2022. The project was transferred to RMIT University in July 2022.

Research Participants

Above all, we acknowledge the mediators and conciliators who have contributed to this project, by taking the time to complete the online survey and to participate in focus groups. NMAS accredited mediators have varying levels of knowledge and experience, and we have ensured that our analysis does not preference any particular type of participant response. All submitted information has contributed to this report and to its findings, conclusions, and recommendations.

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REPORT TITLE AND WRITING STYLE

Writing style

We have chosen a personal style of writing in this Report, to make the document more readily accessible to all potential readers, including researchers at all levels of knowledge and experience, mediators at all levels of knowledge and experience, trainers, policy-makers, and any other interested readers.

Title of the report

The expression, ‘devil’s advocate’, or ‘playing devil’s advocate’, appears numerous times in online survey responses, and in focus group discussions, as a summary of how responders see their role when they use reality testing.[1] It also encapsulates our conclusion that the use of reality testing is a double-edged sword, in that, sometimes simultaneously, it can have both positive and negative effects on the disputants, on the process, and on the role of the mediator, or, as a small number of responders note, ‘Sometimes it works, sometimes it doesn’t.’[2]

1 See ID numbers: 114, 186, 228, 374 (survey question Q12); 15, 190, 228, 278 (survey question UQ2); 118 (survey question UQ7); 225, 238 (survey question UQ9).
2 See ID numbers: 46, 219 (survey question UQ7).

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EXECUTIVE SUMMARY

About the Project

Project contributions to the field

This research project, funded by the Mediator Standards Board (MSB), makes major contributions to what is known about mediation, to what is known about the use of reality testing in the context of mediation (and of conciliation), and to what is known about the practice of mediation (and conciliation) more generally. Through its innovative use of reflexive thematic analysis, it also makes a major contribution to the future design and conduct of research in this field.

The information collected during this project clarifies that there is no consensus among mediators/conciliators about the nature of reality testing, although most see it as a key contributor to achieving a mediated/conciliated agreement, or as an important means of enhancing disputant engagement in the mediation/conciliation process. Responders use reality testing for various purposes throughout the mediation/conciliation process (though not when the disputants appear not to have the capacity or interest); and its use is observed to have both positive and negative effects on the disputants, on the final outcomes, and on the role of the mediator/conciliator in any given mediation/conciliation.

The information from survey responders and focus group attendees has provided valuable insights into how mediators/conciliators perceive their role, and into the precarious balance they seek to maintain between their ethical responsibilities and their use of reality testing techniques. We have also gained valuable information about disputant self-determination, and the range of in-mediation/conciliation events that can affect how, and sometimes if, it is protected.

Background

It is clear from the relevant literature that there is no consensus on the meaning of “reality testing” in the context of mediation, or on the nature of reality testing interventions, when or how they are used, or on which methods, approaches and techniques could be said to typify “reality testing”. Even the Australian National Mediator Accreditation System (NMAS), which gives a regulatory context to the project, lacks clear guidance about reality testing, including its meaning, or use by mediators, or how a mediator might choose to use it in the context of, say, participant self-determination.

This Project has sought to increase what is known about mediation and to improve its practice by gaining information and expertise that will assist in developing a theoretical, practical, and training framework for reality testing in the context of mediation, and in developing ethical guidelines around its practice.

Research

Taking an exploratory, inclusive, and mixed methods approach, this research has focused on ascertaining the ideas, views, perceptions, and observations of professional mediators and conciliators about their use of "reality testing". Both quantitative data and qualitative information have been collected from responses to an online survey, a pre-focus group online survey and from discussions in online focus groups. Quantitative data has been subjected to limited statistical analysis, and qualitative information to extensive thematic analysis. A key feature of the research approach is the minimising of researcher influence and of our pre-emptive expectations and knowledge.

Outline of the Report

Part 1 of the Report introduces the project, its context, and the research approaches and methodology adopted. It also introduces reflexive thematic analysis, the method we chose for analysing the qualitative information submitted in the survey responses and during focus group discussions.

Part 2 reviews the relevant literature, and the history of reality testing in mediation. It also explores the possible provenance of reality testing through a review of its development in psychoanalysis and psychotherapy, and a brief overview of current neuroscientific research into consciousness, expectations, and perception.

Part 3 analyses the quantitative data collected from the online survey and in association with online focus groups. It confirms the number of survey and focus group responders and demographic information about them, as well as information about their mediation/conciliation experience and practice. Part 3 includes confirmation that most responders practise as mediators, with fewer practising as both mediators and conciliators. A small number of conciliators also responded to the survey.

Part 4 analyses the project's key research information: the responses collected from the online survey and from the online focus groups. These include how survey responders conceive of reality testing and its contributions; how and when they use it (and choose not to use it); the factors that influence their choice to use reality testing; and effects they have observed its use has on the process of mediation/conciliation, and on the participants, including the mediator/conciliator.

Part 5 draws conclusions from the analyses in Parts 2, 3, and 4, and includes 19 recommendations that focus on four key areas: the NMAS; the practice of reality testing; training, education, and support; and future research.

The Report concludes with three Appendices: Appendix A Bibliography; Appendix B Advisory Group; and Appendix C Online survey instrument.

Recommendations

See on the next page recommendations relating to training, education, and support, as well as recommendations relating to future research.

1. In relation to the NMAS, we recommend

- That the NMAS be amended to expand the scope of reality testing to include its use at any stage of the mediation process.
- That the NMAS be amended to recognise that reality testing is relevant to knowledge, to skills, and to ethical principles.
- That the NMAS be reviewed to ensure consistency in its references to professional debriefing and professional supervision (Part II Approval Standards, 3.5(b); Part III Practice Standards, 8.8).
- That the NMAS references to debriefing/ supervision be expanded to describe its importance.
- That the MSB develop and issue written guidelines about the use of reality testing that supplement the NMAS, and include coverage of the limitations on the role of the mediator as well as the complex ethical issues that are inherent to the use of reality testing.
- That the NMAS be amended to include an explanation of self-determination and to describe its scope and relevance in the context of mediation.
- That the MSB develop and issue a written commentary on self-determination which supplements the NMAS and includes coverage of:
  - The role of the disputants in any mediation;
  - Limitations on the role of the mediator during the use of reality testing; and
  - The ethical issues inherent to the practice of self-determination.

2. In relation to the practice of reality testing, we recommend

- That the MSB's written guidelines about reality testing (see above) include clarification of what constitutes reality testing done "well", and what is not acceptable in reality testing.
- That mediators/conciliators be encouraged to become more self-aware in relation to their use of reality testing:
  - To be more aware of what they are doing and why they are doing it;
  - To be more observant of the effects it might be having on their role as mediator/ conciliator; and
  - To be more observant of any effects it might be having on the disputants' informed decision-making and self-determination.

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3. In relation to training, education, and support, we recommend

- That all future mediator training courses include an instruction module that encompasses the theory and practice of reality testing, including:
  - The origins of reality testing and relevant theoretical concepts such as those identified in the literature review in Part 1 of this Report;
  - Demonstrations/practical examples, as well as roleplays with a focus on reality testing;
  - How and when the use of reality testing might be appropriate, as well as recognising when it is not, and strategies for dealing with negative responses to its use; and
  - The ethical implications of the use of reality testing, both for the disputants and for the role of the mediator.
- That trainee mediator assessment and assessment for NMAS accreditation include assessment of reality testing skills.
- That all future mediator training courses include components that teach some skills for self-reflection.
- That continuing professional development (CPD) include events that cover the above issues in ways that are designed for both new and experienced mediators/ conciliators.
- That the NMAS be amended to include the claiming of CPD credits for the provision of professional supervision/debriefing/ mentoring as well as for accessing such services.

4. In relation to future research, we recommend

- That the design of future research projects incorporates specific features aimed at improving mediator/conciliators' engagement with research including through earlier recruitment, engaging them in designing the project and encouraging greater participation and commitment.
- That future research explore the proportion of NMAS accredited mediators from diverse backgrounds, including from First Nations and migrant population groups.
- That future research investigate the use of reality testing among FDRPs, enabling comparative analysis of information from that study with information from this one.
- That researchers investigate the relationships (if any) between the use of reality testing and:
  - The achievement of agreements/ settlements;
  - Disputant compliance with the terms of agreements/settlements, as well as the workability and durability of those agreements/settlements; and
  - Improvements in the disputants' engagement in the mediation/conciliation process;
- That researchers investigate reality testing approaches and techniques most likely to obtain the above benefits.
- That researchers work with other stakeholders to devise innovative and inclusive methods for investigating the perspectives of disputants and legal advisors on the use of reality testing, and its effects on them, on how they perceive the role of the mediator/conciliator, and its effects on the process itself.

Throughout the Report we have included additional suggestions for future research.

CONTENTS

PART 1. REALITY TESTING IN MEDIATION – INTRODUCTORY MATTERS

> This research will assist in developing ethical guidelines around the practice of reality testing in mediation, thereby improving the quality of mediation practice

Chapter One – The reality testing project

Project overview

Part 1 of this Report is introductory and includes a brief description of the research project and its aims, as well as its contribution to what is known about mediation and to the practice of mediation. It also outlines the research approach, methodology, and methods that have been adopted for this project, and concludes with a brief overview of the remaining Parts of this Report. A review of the relevant literature is included in Part 2, placing the research project in its context, and exploring reality testing as a theoretical concept and as a practical intervention used by professional mediators.

The regulatory context of reality testing

The literature confirms there are diverse interpretations of the concept of reality testing, and of its application as a mediator intervention – including how and when it is used, specific reality testing techniques, and what its use may achieve in any mediation. In the Australian National Mediator Accreditation System (NMAS), reality testing is a mediator skill, mentioned only in association with the development of terms of agreement, where it is to be used 'in light of participants' interests, issues, underlying needs and long-term viability.'[3] The lack of any additional information about reality testing, including the meaning NMAS gives to the term, or how a mediator might choose to use it in the context of, say, participant self-determination, is a clear indicator that clarification of these issues would be an important contribution to mediation generally, and to its practice.

Research question and project aims

This research, funded by the Mediator Standards Board (MSB), explores how reality testing is practised in mediation, and seeks to gain knowledge that will assist in developing a framework for reality testing as it is practised in mediation. It will also assist in developing ethical guidelines around the practice of reality testing in mediation, thereby improving the quality of mediation practice.

3 National Mediator Accreditation System (2015), *Part III Practice Standards*, 10(b) (viii).

> This project has been designed to fill identified knowledge gaps, in part, by exploring how professional mediators describe "reality testing"

It was anticipated that information from study participants would be divergent in its depictions of interpretations, techniques, and the observed effects of reality testing as a mediator intervention.

Project Aims

1. *To explore the use of reality testing in mediation practice in Australia*
2. *To develop an approach to teaching of reality testing*

It was anticipated that data collected during the research project would provide guidance about the predominant purpose that mediators have when choosing to use reality testing; provide some indication of the breadth of its practical scope and the effects it has on parties, outcomes and the role of the mediator; as well as clarify some of the implications the use of reality testing has for the concept of self-determination, which is seen to be fundamental to mediation practice.

Knowledge gaps this project aims to fill

It is clear from the literature[4] that there is no consensus on what "reality testing" means in the context of mediation, nor is there consensus on the nature of reality testing interventions, when or how they are used, nor on which methods, approaches and techniques could be said to typify "reality testing". This Project has been designed to fill identified knowledge gaps, in part, by exploring how professional mediators describe "reality testing", when and how they use it as an intervention, and any effects they have observed their use of reality testing has within a mediation setting.

The next section outlines this project's research approach, methodology, and methods.

Research approach

Since at least 1978, there have been many empirical studies of mediation whose purpose has been (i) to increase understanding and knowledge about mediation,[5] and about the role of mediators, and/or (ii) to improve the practice of mediation[6]. The collaborative contributions of professionals with mediation practice experience and skills (i.e., practising mediators) with professionals who have research experience and skills (i.e., researchers) in studies of mediation could be expected to be a significant contribution to better understanding of theory, processes and practice.

4 See Part 2, below.

5 Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

6 Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Jones 1989; Kressel 2012; Kressel 2013; McDermott, E. P., and R. Obar, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

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(a) Mixed methods approach

Prior to commencing the research, we established an Advisory Group to lend their voice and expertise to the research project, as well as to protect researcher objectivity and ensure an inclusive approach to the project. The Advisory Group consisted of experts in the field, including researchers and practitioners from diverse practice backgrounds and regulatory and funding body representations. The role of the Advisory Group was to review and advise upon the proposed methodology, methods, and approaches to data collection; to engage in discussion of preliminary research findings; and to provide commentary on the final report.

The fundamental approach in this research project is exploratory and inclusive, with a focus on ascertaining the ideas, views, perceptions, and observations of professional mediators about their use of "reality testing". No pre-emptive ideas, views or preferences have been incorporated into the data collection instruments, and the analysis tools derive directly from the collected data and information.[7] Although the literature review was completed well before the data collection commenced,[8] it was not made publicly available – to minimise the potential for research participants' assessments of the researchers' own views and preferences.

The project relies on a mixed methods approach, including theoretical (literature review) and empirical (online survey and focus groups) research activities. Both quantitative data and qualitative information have been collected, with the former subjected to limited statistical analysis, and the latter to thematic analysis. Where possible, and to a very limited extent, statistical data is presented to highlight findings from qualitative information. The data collection and analysis are informed by two key factors: the preliminary literature review, which was completed before the data collection was designed and distributed, and the researchers' own experience, both as mediators and as researchers.

Within the mediation sector in Australia, and overseas, there are disparate views about models of mediation practice (or styles and approaches), and it has been said that these views are held sufficiently strongly to be seen as having a divisive effect.[9] There remain unresolved questions about the interventions and techniques that typify any one model, as well as which might be the most "effective" model. Researchers who are established in the field are likely to be perceived as preferring one model, or style, or approach, and the data/information provided by participants in their research studies may be influenced by those perceptions – as might any mediator's initial choice to participate in a particular study. Such perceptions are likely to influence participant expectations about the nature of the information that specific researcher/s might prefer to receive.

In other words, participants might perceive what they think are the researcher's preferences and choose to provide what they think are acceptable responses to survey and interview questions. Adopting such an approach to decisions about participation might also be seen to protect the participant's own reputation.

The fundamental approach in this research project is exploratory and inclusive, with a focus on ascertaining the ideas, views, perceptions, and observations of professional mediators about their use of "reality testing"

7 Throughout the project, and in this Report, we have used the following label convention: all quantitative information that we collect is referred to as "data", and all qualitative information that has been submitted to us is referred to as "information"; on the one hand, this differentiates the two types of information, while, on the other, it demonstrates our respect and value of the ideas and perspectives submitted to us by study participants.

8 The literature review is included in Part 2 of this Report.

9 McDermott, E. P., 'Discovering the Importance of Mediator style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

CONTENTS

These responses are recognised as falling within "the social desirability effect" and are common to most fields of research that study human behaviour.[10] They can also be affected by the perceived sensitivity of the information being sought: for example, the information's relevance to a person's sense of professional identity is likely to influence their choice of response (including choosing not to provide a response at all). In addition, participant contributions may be influenced by the researcher's perceived status in the field (the so-called deference effect - also widely recognised and reported).[11]

In this study, we have sought to minimise researcher bias and the influence of participants' perception of researchers' preferences by adopting four strategies: 1) focusing on the views of study participants; 2) avoiding any mention of, or allusion to, models/styles/approaches of practice; 3) not including our own descriptions, explanations, and definitions of key terms (such as "reality testing" or "outcomes"); and 4) using an open-ended question design that encourages participants to think about and express their own views, interpretations, and observations. In addition, the survey and focus group questions have been designed as an opportunity for participants to provide their own views in their own words.[12]

In acknowledgment of the project participants' many views and interpretations of what might be considered "key terms", we have not imposed any single view and so have not included a glossary in this Report. Where we think that explanations of terms contributes to understanding of the Report, we have included these in the text, or in footnotes.

Not including clarification of key terms has added complexity to the data analysis. It became clear that, from time to time, we needed to ascertain whether understanding responders' interpretations of key terms was key to understanding and analysing their comments. Generally, within the study, such interpretations can be readily clarified when the context of the full response is considered.

In this study, we have sought to minimise researcher bias and the influence of participants' perception of researchers' preferences by adopting four strategies:

1. Focusing on the views of study participants;
2. Avoiding any mention of, or allusion to, models/styles/approaches of practice;
3. Not including our own descriptions, explanations, and definitions of key terms
4. Using an open-ended question design that encourages participants to think about and express their own views.

For example, in relation to "power imbalances", one response includes '… power imbalances such as a lack of information and understanding on the implications of not resolving conflicts',[13] while another includes 'where the power imbalance or the capacity of the parties might lead to the person with the advantage',[14] and another includes '… a party suffering under a power imbalance or impairment which cannot be managed appropriately during the mediation session.'[15] These appear to present different interpretations of "power" and of "power imbalance" (eg, informational power, and capacity power), and it was important for analysis purposes to take those interpretations into account. In these examples, and most others, despite the apparently divergent interpretations of "power" and "power imbalance", the intent of each response was clear without the need for additional terminological analysis.[16]

10 See below.

11 There is extensive research on these issues; for example, see Brenner, P. S., and J. D. Lamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is and Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489; Chavalarias, D., and J. P. A. Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205; Krumpel, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859; van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40.

12 It is quite difficult to avoid participant reactions to what they perceive to be sensitive questions in a survey; this issue is considered further in Chapter Five, Part 4 of this Report.

13 ID number 329.

14 ID number 30.

15 ID number 244.

16 The lack of consensus around key terminologies in the survey responses and in the mediation literature is considered elsewhere in this Report.

(b) Researchers as practitioners

The researchers' own experience of mediation and of research have informed interpretive choices within this project; however, they have not dictated those choices. Our dual research/experience background has given us the flexibility to accommodate broad interpretations of survey responses and incorporate them into our analysis.

(c) Participants or responders?

Within the mediation sector, some common terms include "participant" (a person who attends mediation) and "respondent" (a person who is the subject of, say, a complaint). In empirical research, the people who agree to participate by providing various data and information are routinely known as "participants". To avoid confusion, throughout this Report, we have used the word "responder" whenever we refer to people who have submitted completed online surveys.

(d) Parties/disputants

Throughout this Report, we have used the words "parties" and "disputants" interchangeably. The two words refer to the protagonists in a conflict or dispute who are participating in a mediation/conciliation process. In the mediation literature the word "parties" is the most common for describing those people; however, there is not always clear differentiation between legal advisors and their clients when all are in attendance at the mediation/conciliation. In the interests of clarity, when we want to refer specifically to the legal advisors, we use that term.

Ethics approval

Having designed data collection instruments, ethics approval was sought from the La Trobe University Human Ethics Committee for conduct of the research. Ethics approval was received on the 21st of September 2021 with modifications to focus group arrangements approved on the 30th of March 2022.[17] The project was transferred to RMIT University in July 2022 after data collection had been completed. Regardless, ethics approval was sought and received from RMIT University via the Business and Law College Human Ethics Advisory Network (BLCHEAN) on the 23rd of November 2022.

Our dual research/experience background has given us the flexibility to accommodate broad interpretations of survey responses and incorporate them into our analysis

[17] Ethics approval granted on the 21st of September 2021 by La Trobe University Human Ethics, Low Risk Committee with reference HEC21302. Ethics modification approval dated 30 March 2022. Approval received from RMIT University, Business and Law College Human Ethics Advisory Network (BLCHEAN) on the 23rd of November 2022.

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Chapter Two – Methodology and methods

Methodology

Throughout this Report, any reference to "methodology" encompasses the strategy we adopted to achieve our overarching purpose (to contribute to understanding about the use of reality testing in the context of mediation) and includes the scope of the data we collected as well as its sources. Accepting that there has been limited study of reality testing in mediation and limited relevant empirical data, we were keen that our key sources for research data be mediators themselves, and that we place almost no limits on the information they could submit within the study. We assumed that professional mediators would be most appropriate for providing information about their own ideas, perceptions, and observations about the practicalities of reality testing. In this project, our chosen "methods" (ie, the data collection instruments and procedures) were selected and designed with the intent of maximising both the participation and engagement of mediators, and the richness of their input.

a) Collecting information

As noted above, there is enormous scope for mediation research to be informed by the perspectives, views, interpretations, and experiences of professional mediators, and for us, as researchers, to be mindful of how our own pre-existing knowledge and assumptions can influence the research design and data analysis.

Our preference was to collect information from a broad sample of professional mediators, reflecting their own ideas, views, interpretations, and experiences, and, to that end, we designed a mixed methods approach to engage professional mediators as active participants in an online survey and in online focus groups. We used an open-ended question format, seeking the mediators' own views and perceptions avoiding any potential interference from our own pre-existing ideas, preferences, or interpretations of key concepts. We anticipated that such an approach would minimise perceptions of judgement on our part, as well as emphasising the value we placed on the participants' ideas. We knew this would create a large collection of rich data, and that its analysis would rely on adopting an approach suitable for such an uncategorised, and uncoded dataset.

b) Reflexive thematic analysis

We selected thematic analysis as the methodology for analysing the qualitative information collected as part of this project. Thematic analysis is similar to other analysis methods in that it enables the identification and analysis of patterns in a body of qualitative information; however, it does so without the data having to align with the researchers' pre-determined ideas, interpretations, and preferences.[18]

18 Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022).

Our view was that thematic analysis provided the best approach to respecting and valuing all the information that study participants included

Although the collected data is categorised, or coded, this activity is conducted according to the information (or patterns) contained within the data itself, and any subsequent analysis and interpretation derives from that categorisation (or pattern identification). Our view was that thematic analysis provided the best approach to respecting and valuing all the information that study participants included in their online survey responses, and during focus group discussions.

In this project, thematic analysis was conducted manually which was very time-consuming; however, it enhanced the key benefits of thematic analysis which include that the researchers become very familiar with the data; analytic themes derive from the participants' own input; and the result is a rich detailed dataset that retains the many facets of its original complexity.[19] Ultimately, thematic analysis can be seen as a self-determinative form of data analysis because it is informed by the participants' own expressed views, opinions, interpretations, and experiences.

In this project, thematic analysis of the collected data was undertaken according to the accepted six phases of this approach: 'Phase 1: Familiaris[ation] … with the dataset; Phase 2: Coding (identifying 'explicit or surface meaning'[20] and 'conceptual or implicit meaning'[21]); Phase 3: Generating initial themes; Phase 4: Developing and reviewing themes; Phase 5: Refining, defining and naming themes; Phase 6: Writing up (including 'vivid data extracts').'[22] At the same time, we were aware of the flexibility inherent to this approach: the patterns, and categories, were endlessly 'organic and recursive' – apparently changing and adjusting – according to how we are viewing and interpreting the participants' survey responses (ie, our dataset).[23] We found ourselves fulfilling observations made by other researchers: as they become more familiar with their data, analysists become more aware of its various inherent patterns, categories, and themes.[24]

It has been said that one disadvantage of thematic analysis is that this same flexibility can lead to a lack of consistency and coherence in the way themes are identified and developed.[25] To minimise this risk, we undertook regular and rigorous reviews of the data, its patterns, and its themes and subthemes. Towards the end of the analysis process, the complete dataset was re-analysed. Not only did this confirm the earlier patterns and categories, it also revealed overarching themes and subthemes common to the whole dataset that had not been previously detected, leading to development of the thematic framework that supports the structure of this Report.

In thematic analysis, there is a danger that researcher views, opinions and preferences influence which patterns and categories are identified, and it can be difficult for researchers to recognise and inhibit such inclinations.[26] In the approach known as reflexive thematic analysis, the researchers are expected to remain aware of their own ideas, perceptions, preferences, assumptions, and even their prejudices, all of which are likely to inform the analysis; however, researchers are also expected to be aware of, and to take steps to minimise any potential negative influence, or bias, deriving from those same views.

19 Nowell, L. S., J. M. Norris, D. E. White, and N. J. Moules, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1.
20 Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022), 35.
21 Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022), 35.
22 Braun, V., and V. Clarke, *Thematic Analysis – A Practical Guide* (Sage Publishing, UK, 2022), 35 – 36; see also Scharp, K. M., and M. L. Sanders, 'What is a Theme? Teaching Thematic Analysis in Qualitative Communication Research Methods' (2019) 33(2) *Communication Teacher* 117, 118.
23 Braun, V., and V. Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589, 593.
24 Braun, V., and V. Clarke, 'Reflecting on Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589.
25 Nowell, L. S., J. M. Norris, D. E. White, and N. J. Moules, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1.
26 Braun, V., and V. Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589.

For us, the most practicable means of addressing this concern was to ensure that our regular meetings included discussion of the data and its analysis, as well as of our own personal views.

To a large extent, our practical experience as mediators made it easier to analyse the data. We were able to recognise common information about the practice of mediation which could be identified as key data patterns for analysis purposes. For example, recognising industry-specific terms, or jargon, helped us identify patterns and categories around when responders use reality testing (eg, 'the negotiation stage'[27]), and around responders' observations of changes in disputant behaviour (eg, parties taking a 'positional' approach[28]). Although this familiarity facilitated the thematic analysis, we took care that it did not push us into imposing our own preferences on the data, or into categorising the data in ways that suited our pre-conceived expectations (ie, confirmation bias).

Grounded theory has been linked to thematic analysis, and requires a pre-existing researcher perspective that is actively seeking a theory to explain the data. Thematic analysis in its own right does not need to be directed at any theory formation.[29] This project has sought only to explore mediator perspectives and views about the use of reality testing; it has not sought to develop a relevant theory.

(c) Reality testing and ethical issues

According to the mediation literature, the use of reality testing and its techniques is likely to raise various ethical issues for the mediator, and for the parties.[30] For example, when a mediator chooses to help parties explore the ramifications of not reaching an agreement, when might that activity lead to perceptions that the mediator is more biased towards one party than to the other? When a mediator is helping parties check and test the proposed details of an agreement, when might that activity interfere with the parties' right to self-determination? Although we agreed that these are important issues for NMAS accredited mediators, we also recognised that including specific questions about these issues would be likely to "alert" participants to our own preferences, and might also affect how they chose to answer other survey questions or whether they chose to participate in the survey.

We elected to conduct a separate analysis of survey responses, checking for mention of ethical issues

We decided that, on balance, the inclusion of questions about ethical issues risked the integrity of the research data, and chose not to include any such specific questions in the online survey. Instead, we elected to conduct a separate analysis of survey responses, checking for mention of ethical issues. For example, if a response includes reference to the importance of maintaining mediator impartiality, we have included that response in our analysis of ethical issues (eg, 'I am very wary not to come across as anything but impartial';[31] 'Trust in the mediator as an unbiased facilitator';[32] 'It strengthens my role as not taking sides'[33]). Similarly, if a response refers to party self-determination, or to factors commonly associated with self-determination, we have included that response in our analysis of ethical issues (eg, 'It assists informed decision making';[34] '…[an opportunity for the parties] to craft their own solutions';[35] 'Ultimately, it is about informed empowerment'[36]).

27 ID numbers: 59, 60, 84, 114, 163, 220, 278.
28 ID numbers: 15, 20, 25, 52, 213, 303, 371, 374.
29 Braun, V., and V. Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.
30 See below, Part 2 Review of literature and provenance.
31 ID number 137.
32 ID number 249.
33 ID number 275.
34 ID number 147.
35 ID number 265.
36 ID number 306.

CONTENTS

An analysis of ethical issues is included in a separate section within Part 5 of this Report.

Having established that we would obtain the richest dataset by using a mixed methods approach designed to enable reflexive thematic analysis, we needed to design data collection methods that would engage professional mediators in our study. The next section describes the methods used for data collection and for data analysis.

(d) Mediator participation

For many years, mediation researchers have been reporting low participation rates of practising mediators in empirical studies of mediation.[37] Although many reasons have been postulated for this, they are best summarised as involving issues of respect and trust: respect both for the mediators' reputations and their work,[38] as well as for their ideas and for the complexities inherent to their mediator role;[39] and trust in the researchers and what they are doing.[40]

As the study was to explore the use of reality testing in mediation in Australia, we were keen to maximise participatory engagement by professional mediators, enabling their ideas, experiences, and observations to make a significant contribution to understanding and knowledge about mediation and about the role of the mediator. This required the design of a study seen to be trustworthy and credible, and to which professional mediators would willingly contribute, and having an Advisory Group helped with this. This section explains the decisions we made about the design of our data collection methods, taking into account what is known about mediator participation in research, and what is known about the use of online survey instruments for data collection.

The data collection methods include a self-administered online survey and a sequence of semi-structured online focus group discussions. In designing the data collection methods and instruments used in this study, we have sought to maximise both the collection of valuable information and the participation of mediators, in particular by minimising factors known to influence non-participation choices. In our design choices, we have sought to demonstrate our respect for mediator ideas, and to minimise any social desirability or deference effects.[41] We wanted participants to be comfortable telling us what they think, not what they thought we wanted to hear.

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[37] Goldberg, S. J., 'The Secrets of Successful Mediators' (2005) 21(3) *Negotiation Journal* 365; McLaughlin, M. E., R. G. Lim, and P. Carnevale, 'Professional Mediators' Judgments of Mediation Tactics: Multidimensional Scaling and Cluster Analyses' (1991) 76(3) *Journal of Applied Psychology* 104; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, Australia, October 2012).

[38] Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., Mediation in the Supreme and County Courts of Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>.

[39] Wall, J. A., Jr., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestion' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

[40] For example, see Firchow, P., *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War* (Cambridge University Press, UK, and USA, 2018); Iphofen, R., and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

[41] Very briefly, the social desirability effect occurs when people choose to provide a response that they think the researchers prefer – and which will make the participant "look" good; and the deference effect occurs when people believe the researcher/s have greater status than them and so give responses to reflect that deference to status. Just as people who know each other might feel pressured to participate, so might people feel a social pressure not to be seen not participating. Social desirability bias might also influence the responses that people submit.

Methods

(a) Sample population, and recruitment

The sample population for the study is identified as being all NMAS accredited mediators in Australia. On Friday 26 November 2021, all NMAS accredited mediators received a personalised email from the MSB, which included information about the project and the online survey, as well as an invitation to participate. On Monday 13 December 2021, the same NMAS accredited mediators received email reminders about the online survey, and, during April 2022, also received similar personalised emails from the MSB inviting them to register for and participate in the online focus groups.

Although generalisability of the study data may have increased with larger numbers of participants, the study results are not dependent on sample size. Regardless of how many people have chosen to participate, the information they have provided increases what is known about reality testing in mediation and contributes to improving the practice of mediation. Although it was anticipated that a small sample size would reduce extrapolation of the results to devising a prevalent view of reality testing, it was not expected to affect the validity of the views, opinions, and observations that were expressed by project participants.

> Online survey formats are a widely used research methodology: they save time and effort by providing flexibility in design and ease of access

The MSB Register of Nationally Accredited Mediators provided a self-contained and limited sample population of professional mediators, all of whom had some form of internet access through which they could be contacted personally.[42]

(b) Use of surveys

i. Online format

Online survey formats are a widely used research methodology, especially in empirical research:[43] they save time and effort by providing flexibility in design and ease of access (for researcher/designer, and for participants); and their associated costs are relatively low.[44] On the other hand, they are not recognised as reliable methods for data collection, in particular because notoriously low response rates are associated with their use,[45] and those response rates have apparently continued to decline in recent years.[46]

We investigated the problem of low response rates for online surveys, and considered the practicability of incorporating ameliorating options into our own survey design. With a range of modifications to the survey instrument and its administration, we chose to proceed with an online survey as our main data collection method. The modifications were based on recommendations from the research literature and included: clearly identifying a representative sample population (ie, NMAS accredited mediators); using personalised email invitations to participate (ie, via the MSB Register); using language suitable for both a research and non-research audience; and ensuring that the title of the survey, and the wording of the survey questions were designed to be appropriate to the potential participants. This has also been called the "Tailored Design Method".[47] We also designed the online survey to be self-administered; participants could choose to complete the survey in their own time and at their own pace.

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42 The MSB register is available on <https://msb.org.au/mediators>.

43 Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

44 Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688.

45 Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; af Wahlberg and Poom 2015; Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33; Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

46 afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.

47 Dillman, D. A., J. D. Smyth, and L. M. Christian, *Internet, Phone, Mail and Mixed-Mode Surveys: The Tailored Design Method* (4th Edition, John Wiley & Sons, USA, 2014).

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Table 1.1, below, lists the strategies recommended in the literature, for increasing response rates, and the relevant strategies that we adopted.

Strategies reported to improve response rates	Modifications to study's online survey
Surveys should include:[48] • Personalised invitation to participate; • Authoritative email subject line; • Informative email; • Relevant hyperlink only at the end of the email; • Culturally flexible language (not overly "research-ese"); and • Disclosure of the researcher identity, and any organisational involvement	All of these have been incorporated into the survey design
Keep survey short, with clear statement of purpose[49]	The survey has been kept as short as possible; the purpose of the survey has been explained briefly and in plain English in the Participant Information and Consent Sheet, and in the invitation email.
Seek qualitative information from participants[50]	The survey questions have been designed to collect a mix of quantitative and qualitative information, with a strong focus on qualitative information.
Include reminder emails[51]	Personalised reminder emails were distributed once during the survey period, (3 days before the survey closed).
Include protection of confidentiality and capacity for anonymous responses[52]	Strategies have been incorporated into the survey with the intent of protecting confidentiality, and enabling participants to submit anonymous responses: • REDCap's own confidentiality protections have been enacted, ensuring that neither personal details nor identifying information is collected/retained; • The design ensures that no access- and response-tracking capacities will be enabled; • REDCap will allocate an automated identification number each time the survey is accessed. The researchers anticipate that confidentiality protections will alleviate mediator concerns about the ramifications of their participation.
Where the sample population is known, in particular to each other, they are more likely to respond.[53]	There are professional and social links among mediators that are based on common areas of practice, as well as on geographic location.[54]
Dissemination of survey results and findings, gives some justification to participants of the risks they may have taken in choosing to participate.[55]	Part of the project information was that redacted and collated results and findings have been made publicly available.

Table 1.1: Modifications to study design to encourage participation.

48 Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.
49 af Wahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.
50 Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.
51 Aerney-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riobolos, 'Participation and Factors Associated with Late or Nonresponse to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.
52 Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.
53 afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.
54 In addition, during the data collection period of the project, there were several anecdotal reports of mediators talking to each other about their participation in the online survey and/or the online focus groups.
55 O'Mathúna, D., *The Dual Imperative in Disaster Research, Ethics* in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

ii. Quantitative data and qualitative information

As a mixed methods study, this project has relied on the collection of both quantitative data and qualitative information. Within the online survey, and prior to any analysis, the survey responses were separated into quantitative data and qualitative information sets.[56] Survey questions 1–11 & 14 comprise the quantitative data, and the remaining questions comprise the qualitative information. Data collected from the pre-focus group surveys was also separated into quantitative and qualitative information sets prior to analysis.

iii. Response rate

In any empirical study, the number of potential participants who do choose to participate (ie, the response rate) is seen as a key indicator of a study's effectiveness, and can influence interpretations of the data's reliability. It has been noted that researchers tend to report response rates only when they are high, and that very few researchers incorporate into their research design any capacity to report on response rates.[57] We were keen to be able to calculate and to report our participation response rate and designed our study accordingly, as per Table 1.[58]

It has been reported that most online surveys are completed within the first couple of days after receipt of the invitation to participate (and of reminders),[59] and that responses reduce markedly after that time.[60] This suggests that keeping the survey available for an extended period is unlikely to increase response rates and is unnecessary, and, for this reason, the online survey was accessible only for three weeks.[61]

The number of potential participants who do choose to participate is seen as a key indicator of a study's effectiveness, and can influence interpretations of the data's reliability

Although periodic reminder emails have been reported to improve response rates, it has also been reported that response rates decrease markedly between reminders.[62] The survey was available only for three weeks, and, in the absence of sufficient information on the issue of reminder emails, potential participants received a single reminder email which was distributed three days before the survey closed.

It was impracticable to track people who submitted more than one response; however, the nature of the information being sought made it unnecessary – all submitted ideas would be included in the analysis regardless of how many each responder submitted.

Response rates can be affected by many factors including the reliability of internet connection, the responder having not noticed the question, or the responder purposely choosing not to answer the question. The latter choice may also be influenced by many factors, including not feeling knowledgeable enough, concern about being judged, concern that views are not in keeping with expectations.[63]

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56 A quick guide to the survey questions is provided in each of Parts 3 and 4; a copy of the complete survey instrument is provided at Appendix B.

57 Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

58 Part 3 of this Report includes analysis of response rates for he online survey and for the online focus groups; it also includes analysis of attrition rates for both.

59 Aerney-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riobolos, 'Participation and Factors Associated with Late or Nonresponse to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; Granello, D. H., and J. E. Wheaton, 'Online Data Collection: Strategies for Research' (2004) 82(4) *Journal of Counselling and Development* 387.

60 Aerney-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riobolos, 'Participation and Factors Associated with Late or Nonresponse to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688.

61 Part 3 of this Report includes a temporal analysis of survey responses.

62 Aerney-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riobolos, 'Participation and Factors Associated with Late or Nonresponse to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688.

63 See above, page 3.

iv. Non-response effects

Although it is widely accepted that survey nonresponses (ie, additional potential data held by people who choose not to participate) can affect, or skew, survey data and its analysis, some research shows this is not the case.[64] On the other hand, it has also been acknowledged that, if there is a large non-response component, it may affect the final data analysis.[65] We have assessed that, in the context of mediation research, the non-response rate in this survey is unlikely to have skewed the data, and we have not included any analysis of this issue.

v. Survey design – terminology and mediation "jargon"

The design of the survey was purposeful in not explaining how various terms within the questions were intended to be interpreted. This approach was intended to give latitude to responders in applying their own interpretations. For example, the key term in this project, "reality testing", has not been interpreted anywhere in the data collection materials – part of the project's intent is to ascertain how mediators/conciliators themselves interpret what it means. Similarly, guidance has not been provided for the use in the survey of terms such as "outcomes", "role of the mediator", "government or publicly funded", and "fairness".

Some responses were not easily classified. For example, where the word "plans" occurs in a survey response, it may not necessarily refer to settlement plans – during a mediation, disputants can have many plans that affect how they communicate with the mediator and with each other during the mediation, as well as plans about which aspects of the dispute they will discuss; hence, in the absence of clarifying words such as "agreement/settlement", where a response mentions plans, it is not interpreted as being restricted to agreement/settlement plans.

Similarly, the word "consequences" does not always refer only to the consequences of not reaching an agreement. For example, there may be consequences within the mediation process of people holding a fixed position or perspective (eg, they cannot hold discussions beyond that position/perspective) – such responses are classified into "agreement/settlement" only where the response includes specific reference to the consequences of not achieving an agreement (otherwise, such responses are treated more broadly and classified in other subthemes).

Many responses to each question include reference to factors other than those which the question has sought. For example, in response to, say, UQ8 (responders' observations of reality testing's effects on final outcomes), some responses address effects on participants rather than on outcomes; and, in, say, UQ7 (responders' observations of effects on parties), some responses address effects on outcomes not on participants.

64 afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.
65 Steel, D., *Perspectives on Sample Surveys* (Knibbs Lecture, Statistical Society of Australia, November 2021).

Throughout the survey there are responses that provide information without answering the relevant survey question. Most occur in response to UQ9 *("What effects have you observed that "reality testing" has on your role as a mediator?"*): '… reality testing can be extremely effective in re-focusing on interests …';[66] 'Confirm understanding parties have of the agreement';[67] 'It is a powerful tool to bring about compromise'.[68] Furthermore, although commentary about observed effects on outcomes is not directly relevant to a question about observed effects on the role of the mediator (UQ9), this commentary is analysed separately in overall discussion of the observed effects of reality testing.

vi. Online survey platform

The project design includes two opportunities for participants to submit responses to online surveys. The first survey was the key data collection method (ie, the online survey) and the second was a short online survey for registrants to complete before attending any of the online focus groups (pre-focus group survey). Both surveys were hosted by the online REDCap platform, the preferred online data collection platform for La Trobe University, where we both worked during the data collection period. REDCap securely retains collected data, and it is accessible only through our login details. REDCap also provides quantitative data analysis, and we used this automated service for the analysis of Parts 1 and 2 of the online survey.

> We developed five core questions for six focus groups, and separate sets of questions for three groups (lawyers who represent their clients in mediation, mediators who do not use reality testing, and mediation trainers)

(c) Online focus groups

In March 2022, NMAS accredited mediators were sent an email invitation for participation in online focus groups as part of the research project. There were nine focus groups, differentiated according to recognised areas of mediation practice, and including one group for people who do not use reality testing, one group for lawyers who represent clients in mediation or conciliation, and one group for mediation trainers. The focus groups were scheduled to take place during May 2022. Using the same email listing as for the online survey, the MSB ensured the invitation was emailed to the same original 4022 recipients.

Prior to commencement of the focus groups, we developed a set of five core questions to be asked of six of the focus groups, addressing the use of reality testing in their specific field of practice; the most and least effective techniques (and their ideas on why certain techniques were/not effective); and the use of reality testing in multi-party processes.

Separate sets of questions were developed for the three focus groups (lawyers who represent their clients in mediation, mediators who do not use reality testing, and mediation trainers) as it would not be appropriate for people who do not use reality testing to consider issues related to its use. For example, lawyer representatives could not be expected to answer questions about the mediator's own experiences and perceptions.

66 ID number 52.
67 ID number 74.
68 ID number 228.

> Questions for mediation trainers were focused on the value of reality testing and its inclusion in training courses.

Questions for mediation trainers were focused on the value of reality testing and its inclusion in training courses. All questions were open-ended, with the intent of promoting discussion among participants and minimising our input.

All questions were open-ended, with the intent of promoting discussion among participants and minimising our input.

We anticipated that the use of a standard list of questions would produce data with points of commonality, facilitating analysis. Although the online focus groups were designed to follow a semi-structured format based on the standard questions, we incorporated sufficient flexibility to respond to participant input where it seemed appropriate for the focus group and/or beneficial for our project.

What we did

(a) Data collection and information generation

This research project has a mixed methods approach which includes four activities for collecting data and information:[69]

- Review of mediation literature on reality testing, drawing on a range of empirical and theoretical studies:
  - Data = descriptions and perceptions of reality testing in mediation, including descriptions of its purpose and of reality testing skills and techniques;
- Self-administered online survey of practitioner mediators/conciliators in two parts:
  - Survey Part 1: quantitative demographic data about participants and their mediation practice
    - Data = tick-box responses to questions about demography and mediation experience[70]
  - Survey Part 2: qualitative information about reality testing, its use, and its observed effects:
    - Information = terms responders use to describe reality testing, the ways in which they describe its use, and any effects they have observed to occur because of their use of reality testing techniques;[71]
- Semi-structured discussions within online focus groups (using a set of open-ended questions developed beforehand): participants from specific areas of practice self-selected into practice groups; two additional focus groups for people who do not use "reality testing", and for mediation trainers:
  - The focus group format and questions were designed to augment the information from the online survey; information obtained during focus group discussions has not been subjected to stand alone analysis;
  - Each focus group was recorded to assist in analysis, and, at the start of each focus group, all participants were informed this would be happening; researchers made comprehensive notes of information shared during focus groups; no transcripts were made of any focus group discussions.[72]

[69] Throughout this Report, we refer to quantitative information as "data" and qualitative information as "information".

[70] Tick-box questions were included in the survey to collect basic information about participant demographics and mediation practice; it was anticipated that commencing the survey with such a simple data collection method would ease participants into the more complex qualitative questions in the second part of the survey.

[71] Open-ended survey questions were included in the second part of the online survey to enable participants to contribute their own ideas in their own words; it was also anticipated that an open-ended unguided question format would demonstrate our respect for participant views.

[72] The focus group recordings have been accessed infrequently – to double-check on specific information for data analysis.

(b) Data and information analysis

- Limited statistical analysis has been applied to the quantitative data collected in the online survey.[73]
- Thematic analysis is applied to all qualitative information from the online survey and from the focus groups.[74]
  - Self-contained analysis of online survey responses, identifying key themes and subthemes
    - Focus group information included to augment survey data
  - Comparative analysis of data from surveys, focus groups, and literature, identifying:
    - Commonalities
    - Differences
  - Additional thematic analysis of relevant ethical issues identified in online survey and focus group information; identified ethical issues include those relating to the role of the mediator (eg, impartiality, trustworthiness), and to the parties' self-determination.

(c) Reporting of results and findings

The results and findings in this Report are included in each of Parts 3 and 4, which are set out according to the contents of the online survey.

Conclusion

This project has been designed to fill existing gaps, at least in part, in what is known about reality testing in mediation, and to overcome some of the obstacles known to affect empirical studies.

One limitation in this study is that it was not designed to explore additional contextual influences on mediator perceptions of reality testing; on mediator choices about how reality testing is used (including specific techniques and their contextual application); and on how context might influence mediator perceptions of the effects of reality testing. Consequently, the following questions remain unanswered:

- Is the use of reality testing influenced by context (eg, is reality testing used more frequently in some contexts than in others)?
- Are there contextually dependent interpretations of reality testing (eg, is reality testing likely to be more outcome-focused in, say, commercial mediation than in community-based mediation)?
- How might context influence a mediator's choice of reality testing style and technique (eg, are certain reality testing techniques more prevalent in certain areas of practice than in others)?

Parts 3 and 4 of this Report include the results and findings of analysis of all data and information collected from online surveys and online focus groups. Part 3. reports on the analysis and findings of the quantitative survey and focus group data. Part 4. reports on the analysis and findings of the qualitative survey data, incorporating data from focus group discussions. Part 5. summarises the Report's conclusions, including its contributions to what is known about mediation and about its practice.

The next part of the Report is Part 2 Reality testing in mediation – Literature and provenance review.

This project has been designed to fill existing gaps, at least in part, in what is known about reality testing in mediation, and to overcome some of the obstacles known to affect empirical studies

[73] Part 3 of this Report includes that analysis and its findings.
[74] Part 4 of this Report includes that analysis and its findings.

CONTENTS

PART 2. REALITY TESTING IN MEDIATION – LITERATURE AND PROVENANCE REVIEW

Part 2 of the Report includes three chapters: a review of the relevant literature on "reality testing", an exploration of the possible provenance of reality testing in mediation, and a concluding chapter. The literature review has a primary focus on mediation literature and includes publications from Australia and from overseas. The second chapter briefly explores historical works on mediation, as well as key works in the fields of psychology, psychoanalysis, psychotherapy, and neuroscience. The two reviews provide useful insights into the history of what is meant by "reality testing"; how and when it is used in mediation; the mediator interventions and techniques that are said to typify its use; reality testing's limitations; and the ethical concerns associated with its use.

Ultimately, Part 2 finds that there is limited consensus, clarity or consistency about interpretations of reality testing in mediation, including about the relevant "reality" being tested at any time, and how or why it requires testing by the mediator. Part 2 concludes by exploring an expanded scope for reality testing in mediation, identifying knowledge gaps in this area, and making suggestions for further study and future empirical research.

Chapter One – Reality testing in the mediation literature

Introduction

The purpose of this review is to inform the broader research project by providing a summary of what has been written about reality testing in mediation and confirming existing knowledge gaps. It includes selected mediation publications from 1978 until the present, enabling consideration of the views of commentators and of researchers. According to the literature, there is no consensus on interpretations of the concept itself, or on its contributions to the mediation process. The review presents the various views without entering any debate, seeking to identify both the current standing of those debates, and the knowledge gaps relevant to this research project.[75]

[75] Many of the unresolved issues are considered in detail as part of the analysis of qualitative information collected during this project, which clearly reveal the range of views that practitioners hold about reality testing (see Part 4., below).

> The review presents the various views without entering any debate, seeking to identify both the current standing of those debates, and the knowledge gaps relevant to this research project

The literature

An extensive selection of publications is included in this review, drawing on more than 40 years of key theoretical and empirical research from Australia, the United States of America (USA), the United Kingdom (UK), Europe, and Asia.[76] With a small number of exceptions, the selection of publications has been limited to those in which the term "reality testing" or "reality checking" appears.[77] The selected publications focus on a range of mediation contexts including family, commercial, court-connected, workplace/industrial relations, and community-based settings. It was anticipated that including influential historic works would reveal developments in approaches to and techniques for reality testing.

In the literature, the terms "reality testing" and "reality checking" appear to be used interchangeably, and, in this review, where "reality testing" is used, it encompasses both terms.

Provenance in the literature

The selected literature does not give clear provenance for the concept of reality testing in mediation theory and practice. Reality testing techniques are mentioned in the oldest of the selected mediation publications where the authors associate them with achieving settlement (ie, to ensure the process is 'effective in producing settlement.').[78] In the most recent publications, there continues to be a strong link between reality testing and gaining agreement,[79] and, as is discussed below, most commentators describe reality testing as a mechanism for evaluating or assessing events and information within the mediation process, often with the intent of helping the parties reach agreement.

The possible provenance of reality testing in mediation is explored in more detail in the next chapter.[80]

Review – key findings

In summary, this literature review has found that:

a) There is a lack of conceptual clarity about reality testing in mediation, as well as about how and when it is used.

b) There is some consensus that a key purpose of "reality testing" in a mediation setting is to achieve a workable and mutually beneficial settlement.

c) There is limited consensus on:

(i) Additional purposes for reality testing;

(ii) The mediator techniques typical of reality testing, and

(iii) The acceptability of facilitative mediators using reality testing techniques.

d) Before 2000, commentators appeared to focus more on the purpose and techniques of reality testing.

e) Since 2000, there appears to have been an increased focus on ethical issues arising from the use of reality testing, including how its use affects the role of the mediator and the role of the parties. It is unclear what has prompted this shift in focus.

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[76] The publications have three sources: from a data base of empirical studies of mediation (all of which are publicly available), from a targeted search of a university library database (using the search term "reality testing in mediation"); and from a search of materials retained by one of the researchers. A full list of the publications is available below (see Appendix A, Bibliography).

[77] The terms do not appear in the following documents; however, the documents do refer to techniques and skills which other commentators have included as characteristic of reality testing/checking: Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Wade, J., 'Strategic Interventions Used by Mediators, Facilitators and C(1994) November 1994 *ADRJ* 292.

[78] Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209, 218.

[79] For example, see Cooper, D., and D. Keenan, 'A Model to Use when Representing Clients in Conciliation Conference in the Queensland Anti-Discrimination Commission' (2018) 29 *ADRJ* 126; Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181; Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

[80] See below, Chapter Two.

Although reality testing has been included specifically in a small number of the empirical studies of mediation,[81] it remains a largely uninvestigated mediator practice. This review has also found that, although small numbers of mediators have been interviewed about their use of reality testing, it is not common for researchers to seek input from the broader mediator population about their experience and use of reality testing.

Historic developments

A group of influential Australian commentators on mediation and DR commenced publishing in the 1980s and 1990s, and either expressed views on reality testing or described techniques that have become accepted reality testing techniques.[82] Publications from this group have made important contributions to the sector, and, for many years, most had a role in the training and education of mediators, who themselves became commentators and trainers. It is reasonable to accept that their views on reality testing would have been influential on the development of mediation practice, at least in Australia.[83]

Regarding the term, "reality testing", historical commentators have a range of views on what is the nature of that "reality". It can be the real world beyond the mediation that is perceived by others (and not necessarily by one or more of the disputants in a mediation);[84] it can be the consequences and ramifications of devising certain terms of agreement;[85] it can be the practical world external to the mediation;[86] and it can be the unacceptability of an agreement that is 'unconscionable' (eg, the agreement has been achieved through the manipulation or exploitation of one disputant).[87] Historical commentators have also referred to a version of "reality" in which the terms of agreement become more acceptable because they have taken into account both disputants' concerns.[88]

Although the historic focus of reality testing has centred around the content of the final mediated agreement, over time there has been an increased focus on explicit details in that agreement. For example, whereas earlier works describe reality testing of the details of the final agreement in generalised terms ('the way that it will operate in practice and … the details of [its] implementation …'),[89] by the mid-2000s, the focus of reality testing is more specific: '… the legal, factual, financial and personal realities of their situations …';[90] and, even more recently, reality testing has been described as assisting the disputants in assessing '… the merits of their cases, ideas, arguments, and proposals; eliciting or proposing standards, criteria, principles or frameworks …' against which to measure possible agreements.[91]

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81 Noone, M.-A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528; Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7>; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

82 Astor, H., and C. Chinkin, *Dispute Resolution in Australia* (Butterworths, Australia, 1992); Boulle, L., *Mediation: Principles, Process, Practice* (Butterworths, Australia, 1996); Carter, M., *CJCs Achieving Their Goal* in J. Mugford (ed), *Alternative Dispute Resolution*, AIC Seminar Proceedings no 15 (Australian Institute of Criminology, Canberra, 1986); Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Law Book Company, Australia, 1995); Tillett, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991); Wade, J., 'Strategic Interventions used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292.

83 Some historic mediation commentators have used the term 'objective standards' [Astor, H., and C. M. Chinkin, Dispute Resolution in Australia (Butterworths, Australia, 1992), 95] in association with the stage of mediation during which an agreement is finalised; however, other commentators use the term (or 'objective criteria') in the context of negotiation, [Boulle, L., *Mediation Principles Process Practice* (Butterworths, Australia, 1996), 51] while Standards Australia has used the term in relation to resolving disputes more generally [Standards Australia, Australian Standard AS 4608-1999: Guide to the Prevention, Handling and Resolution of Disputes (1999)]. The process of principled [Fisher, R., W. Ury, and B. Patton, *Getting to Yes – Negotiating an Agreement Without Giving In* (2nd Edition, Century Business, USA, 1991)], or interest-based [Boulle, L., Mediation Principles Process Practice (Butterworths, Australia, 1996)], or integrated negotiation [Davis, A., 'When Webb Met Follett: Negotiation Theory and the Race to the Moon' (2015) 31(3) *Negotiation Journal* 267, referring to C. Metcalf and L. Urwick (eds), Dynamic Administration: The Collected Papers of Mary Parker Follett (Harper and Brothers, USA, 1941)], is often associated with objective criteria, or objective standards, which are used to assist the negotiators in 'reaching a solution based on principle, not pressure,' [Fisher, R., W. Ury, and B. Patton, Getting to Yes – Negotiating Agreement Without Giving In (2nd edition, Century Business, USA, 1991), 86.] or to ensure that the negotiations 'occur independently of the subjective wills of the parties.'[Boulle, L., Mediation Principles Process Practice (Butterworths, Australia, 1996), 51]. The term does not have a clear association with reality testing in mediation, with the latter appearing to have a more complex range of characteristics and purposes (see below, 4. What is reality testing in mediation?).

84 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991).

85 Boulle, L., *Mediation: Principles, Process, Practice* (Butterworths, Australia, 1996).

86 Astor, H., and C. Chinkin, *Dispute Resolution in Australia* (Butterworths, Australia, 1992); Boulle, L., *Mediation: Principles, Process, Practice* (Butterworths, Australia, 1996).

87 Carter M., *CJCs Achieving Their Goal* in J. Mugford (ed), *Alternative Dispute Resolution*, AIC Seminar Proceedings no 15 (Australian Institute of Criminology, Canberra, 1986), 91.

88 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Law Book Company, Australia, 1995); Wade, J., 'Strategic Interventions used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292.

89 Astor, H., and C. Chinkin, *Dispute Resolution in Australia* (Butterworths, Australia, 191), 102.

90 Boulle, L., *Mediation: Principles, Process, Practice* (2nd Edition, LexisNexis Butterworths, Australia, 2005), 220.

91 Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition, John Wiley & Sons, USA, 2014), 40.

Such more detailed descriptions of the potential focus of reality testing have been said to raise ethical questions about the role and authority of the mediator, and these are considered in more detail below, as well as elsewhere in this Report.[92] As was noted during the mid-2000s, the mediator who uses reality testing techniques to explore what are quite complex issues, does assume the disputants' capacity to '… think cogently and realistically …'[93] – or that the mediator herself or himself can opt to 'giv[e] the benefit of their own experience' to assist the parties' deliberations.[94]

In descriptions of the role of the mediator, the term, "agent of reality", appears consistently from at least 1986.[95] The use of this term can appear to depict the mediator as an authoritative agent, or an active representative, of "reality", perhaps giving a sense of the mediator as a person who can intervene on behalf of, or present "reality".

What is reality testing in mediation?

It is not common for the literature to include a clear description or definition of "reality testing" as a mediator intervention. Some examples are given below):

> [reality testing means that] mediators challenge parties to face the legal, factual, financial and personal realities of their situations, to reflect more systematically and practically on a position, behaviour or attitude, and to think beyond the present situation to likely future consequences … reality testing can relate to factors peculiar to the dispute, such as lack of evidence or time pressures, or to objective realities of the broader environment, such as the costs of litigation or the dangers posed by outside parties.[96]

> The purpose of reality testing is generally to reflect alternative viewpoints and facts to a party so that he or she will have a more well-informed perspective of his or her position or proposed solution.[97]

92 See Part 4 of this Report, where ethical issues are explored within the qualitative data analysis.
93 Boulle, L., *Mediation: Principles, Process, Practice* (2nd Edition, LexisNexis Butterworths, Australia, 2005), 220.
94 Cooper, D., and R. Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent" Practitioner' (2008) 8(1) *QUT Law Review* 158, 159.
95 For example, see Carter, M., CJCs [Community Justice Centres] – *Achieving their Goal*, in J. Mugford (ed), *Alternative Dispute Resolution, AIC Proceedings No 15* (Australian Institute of Criminology, Canberra, Australia, 1986), 91; Boulle, L., Mediation: Principles, Process, Practice (Butterworths, Australia, 1996), 136; Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition, John Wiley & Sons, USA, 2014), 25-26.
96 Boulle, L., *Mediation: Principles, Process, Practice* (2nd Edition, LexisNexis Butterworths, Australia, 2005), 220.
97 Chua, E., Hui Han, 'Moving Beyond the "Facilitative" and "Evaluative" Divide' (2013) *Asian Journal on Mediation* 36, 46.

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> Reality testing … involves the mediator putting a series of questions to the parties in order to test the veracity of options generated to resolve the dispute…[98]
>
> … reality testing can recontextualise options, alternatives and possible outcomes. It can assist parties to understand enough to make a "smart" decision by encouraging alternatives and options to be tested.[99]

a) Reality testing and the achievement of agreement/settlement

Most of the selected literature describes reality testing in terms of the mediator leading or facilitating some form of evaluation or assessment of proposals for resolution or settlement.[100] This implies that the mediator ascertains a relevant and suitable "reality" benchmark (eg, specific terms of agreement or a range of options for settlement) against which the parties' various ideas/suggestions can be "tested".

As is shown in the second of the above descriptions, reality testing tends to be described in terms of what it is intended to achieve (or its intended purpose) in mediation. It might be a mediator intervention wherein the "test" is intended to help parties conceive of and accept a specific "reality" (eg, the strength of their case, or the acceptability of a settlement proposal), with a view to helping them achieve an agreement or settlement.

Commentators have also considered the role of lawyers in mediation, who conduct reality testing with their clients (again, focusing on the final agreement: "testing" what might be realistic alternatives to settlement, the 'workability' of settlement proposals, or whether the proposals 'meet the interests of their clients').[101] It has also been proposed that using reality testing with lawyers in mediation can help them consider specific issues or double-check their own advice to their clients.[102]

b) What is "reality"?

In the context of reality testing, the word, "reality", can refer to the prospects of one side's case in court;[103] [104] or to considerations of the party's own position as well as the other party's;[105] it might refer to how realistic are one party's demands in light of the other party's[106] demands; or it might refer to the acceptability of a specific proposal for resolution.[107] It might also refer broadly to the various available alternatives should there be no agreement within the mediation or conciliation.[108]

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98 Noone, M. A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) Monash University Law Review 528, 548.

99 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020), 288.

100 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36; Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181; Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018); Parkinson, P., J. Cashmore, and J. Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44(1) *Family Law Quarterly* 1; Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Rundle, O., 'A Spectrum of Contributions that Lawyers can Make to Mediation' (2009) 20 *ADRJ* 220; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7>; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>; Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263; Wade, J., 'Strategic Interventions used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292.

101 Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Rundle, O., 'A Spectrum of Contributions that Lawyers can Make to Mediation' (2009) 20 *ADRJ* 220, 226, 225.

102 Sefton, C., '*No Square Pegs in Round Holes: What Mediators Want Lawyers to do in Mediation and How They Get It*' (2011) 22 *ADRJ* 22.

103 ADRAC, *Connecting the Dots: Final Report on Conciliation* (ADRAC, Australia, 2021); Cohn, L. P., 'Mediation: A Fair and Efficient Alternative to Trial' (1996) October 1996 *DuPage County Bar Brief*; De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103; Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights form Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273; Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Rundle, O., 'A Spectrum of Contributions that Lawyers can Make to Mediation' (2009) 20 *ADRJ* 220; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation.* Paper 7, available on <http://www.civiljustice.info/med/7>; Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

104 Although the ADRAC Report refers specifically to conciliation, it appears not to have differentiated between mediation and conciliation in its considerations of reality testing, and its use of the term is accepted as being relevant to this literature review.

105 ADRAC, *Connecting the Dots: Final Report on Conciliation* (ADRAC, Australia, 2021); Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995).

106 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); Wade, J., 'Strategic Interventions used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292.

107 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Wade, J., 'Strategic Interventions used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292.

108 ADRAC, *Connecting the Dots: Final Report on Conciliation* (ADRAC, Australia, 2021); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

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Inherent to the concept of reality testing is the issue of whose "reality" is the benchmark for the testing, and there are at least three to be considered in any given mediation

Inherent to the concept of reality testing is the issue of whose "reality" is the benchmark for the testing, and there are at least three to be considered in any given mediation: each of the disputants' reality, as well as the mediator's. This issue is considered in more detail below.[109]

Although some commentators claim that reality testing increases the likelihood of agreement being reached,[110] as well as its durability (although it is not clear how this latter claim has been ascertained),[111] the obverse has also been claimed in findings from an empirical study: that 'settlement was not related to whether the mediator assisted the parties in evaluating the merits of the case (such as by reality testing or asking questions).'[112]

c) Reality testing as risk assessment

For some commentators, reality testing is presented as a form of "risk assessment" for the parties (in particular, in terms of the risks – and costs – associated with non-settlement),[113] as well as a means of managing – or lowering – party expectations, so the prospect of resolution becomes more likely.[114] It could be said that the risk assessment is the "test" component of reality testing.

d) Additional purposes for reality testing

Commentators include a range of extra benefits that, they claim, can be achieved through the use of reality testing, including:

- To help parties:
  - Assess the benefits of attending the mediation process;[115]
  - '[R]eframe' - in which "reframe" refers to the party changing a 'negative perception of a solution or facts to a positive one'.[116]
  - Consider their own 'behaviour or attitude';[117]
  - Consider the 'fairness' of one person making many more concessions than the other;[118]
- To manage the parties' interactions;[119]
- To address issues such as lying to the mediator, or 'to themselves';[120]
- To consider the prospect of the case being heard by a specific judge;[121] and
- To provide an opportunity for unrepresented disputants to check possible solutions.[122]

109 For example, see below, 6. Ethical Issues.

110 Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

111 Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181; Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>.

112 Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641, 679.

113 De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Parkinson, P., J. Cashmore, and J. Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44(1) *Family Law Quarterly* 1; Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation.* Paper 7, available on <http://www.civiljustice.info/med/7>; Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

114 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995).

115 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995).

116 Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 654.

117 Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011), 274.

118 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995), 157.

119 Haavisto, V., *Developing Family Mediation in Finland: The Change Process and Practical Outcomes,* in Nylund, A., K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open Publishing, 2018).

120 Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181, 186.

121 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919.

122 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

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It has been suggested that reality testing is a mechanism for protecting the "justice" aspects of mediation.[123] For example, the findings of the empirical study mentioned earlier suggest that, for its study participants, reality testing is a means of ensuring that procedural and/or substantive justice is achieved, and that it is achieved cost effectively and in a 'self-determined manner.'[124] [125]

The phrases, 'playing devil's advocate'[126] and 'sowing doubt'[127] are used as alternative terms for "reality testing", perhaps reflecting a view of the mediator as reality tester.

Reality testing: Techniques

In this section, reality testing techniques include a mediator's choice to use a specific part of the mediation process for reality testing purposes (eg, private meetings) and a mediator's choice of things they might do or say. Continuing the above differentiation between "reality" and "testing", it could be said that the mediator techniques referred to in the literature and in this section are the active "testing" components of reality testing interventions, although this differentiation is not explored in the literature.

> It has been suggested that using such directive techniques may make the mediator's interventions and ideas less acceptable and may even be 'counterproductive'

a) Private sessions/meetings

Many commentators refer to private meetings/sessions as the appropriate setting for reality testing,[128] although only two explain why this might be appropriate: to prevent a disputant from losing face,[129] and 'to give mediators greater latitude'.[130] Two empirical studies go further, reporting that reality testing is a purpose of private meetings/sessions,[131] with a third specifying reality testing as being one of the 'four main objectives' of private sessions.[132]

b) Who reality tests – mediators and lawyers

Most of the literature refers to reality testing as a mediator intervention; however, as mentioned in the previous Part 2, there is acknowledgement that lawyers in mediation reality test their clients' perceptions and expectations, and their proposals for settlement.[133] [134] Two of the publications include mention of the mediator reality testing the lawyers' own perceptions.[135]

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123 Noone, M. A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528; Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

124 Noone, M. A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528, 550.

125 For consideration of the nexus between reality testing and self-determination, see below at *Ethical Issues*.

126 De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103, 124.

127 Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263, 327.

128 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); Cooper, D., and D. Keenan, 'A Model to Use when Representing Clients in Conciliation Conference in the Queensland Anti-Discrimination Commission' (2018) 29 *ADRJ* 126; Field, R., 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22 *ADRJ* 8; Noone, M.-A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7>; Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

129 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995).

130 Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011), 124.

131 Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7>; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>. Both studies surveyed mediators and the surveys included a question in which reality testing was an option for choosing to hold private session.

132 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020), 284.

133 Berman-Robinson, C., and H. Shurven, 'ADR Process Design: Considerations for ADR Practitioners and Party Advisers' (2016) 27 *ADRJ* 140; Cooper, D., and D. Keenan, 'A Model to use when Representing Clients in Conciliation Conference in the Queensland Anti-Discrimination Commission' (2018) 29 *ADRJ* 126; Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758; Rundle, O., 'A Spectrum of Contributions that Lawyers can Make to Mediation' (2009) 20 *ADRJ* 220.

134 Douglas and Batagol also refer to lawyers in mediation conducting 'holistic reality testing' (p 791) though it is not clear what this means.

135 Sefton, C., *'No Square Pegs in Round Holes: What Mediators Want Lawyers to do in Mediation and How They Get It'* (2011) 22 *ADRJ* 22; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

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c) Mediator techniques

Seventeen of the selected publications include mention of specific reality testing techniques. These techniques include asking questions;[136] proposing hypothetical ideas or solutions;[137] providing information;[138] and providing an opinion or advice.[139]

A small number of the publications include sample questions for use in reality testing, such as: 'What is the likely court outcome?',[140] 'What is the cost of taking the matter to court?',[141] 'Can you … tell me now what the option of "going to court" involves – for example, time span, documentation, time lost, meetings, expense, chances of getting an "umpire's decision"?'[142] 'How do you think your concerns will differ in two years' time from what is a pressing consideration for you today?'[143] 'Do you think X will accept that offer? Would you accept it if you were X?'[144]

Although it is accepted that the mediator's use of 'highly suggestive rhetorical question[s]' can help convince parties to change their views of their situation or of proposed solutions, it has been suggested that using such directive techniques may make the mediator's interventions and ideas less acceptable and may even be 'counterproductive'.[145]

Ethical issues

According to the selected literature, there are three key ethical issues associated with the use of reality testing:

a) The association of reality testing (in various forms) with one or other model or style of practice;

b) How reality testing might affect the parties (including self-determination and autonomy); and

c) How reality testing might affect the role of the mediator (including perceptions of impartiality).

136 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273; Noone, M.-A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528; Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018); Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Sefton, C., *'No Square Pegs in Round Holes: What Mediators want Lawyers to do in Mediation and How They Get It'* (2011) 22 *ADRJ* 22; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation.* Paper 7, available on <http://www.civiljustice.info/med/7>; Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020); Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263; Wade, J., 'Strategic Interventions Used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

137 Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995); McDermott, E. P., and R. Obar, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

138 Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Field, R., 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22 *ADRJ* 8; Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273; Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263.

139 De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103.

140 Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation.* Paper 7, available on <http://www.civiljustice.info/med/7>, 44.

141 Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme* 2002 (2004) *Mediation.* Paper 7, available on <http://www.civiljustice.info/med/7>, 44.

142 Wade, J., 'Strategic Interventions Used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292, 296.

143 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995), 178.

144 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995), 150.

145 Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263, 299.

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a) Reality testing and models of practice

While the earliest of the publications included in this review does not include a specific explanation of the term, it does present reality testing as being conducted by an 'activist or aggressive' mediator[146] who is 'trying to make one or both of the parties face reality',[147] and thus ensure that the process achieves a settlement. While it is unclear what the researchers meant by the phrase, "face reality", by linking it to an "aggressive mediator" they hint at the tension that emerges elsewhere in the literature in association with the use of reality testing and certain models, or styles, of practice. Among those who mention models of practice in association with the use of reality testing,[148] descriptions tend generally to associate evaluative models with the mediator using more directive reality testing techniques (eg, evaluating a party's case for them rather than helping the party make their own evaluation[149]), and tend generally to associate facilitative models with the mediator using techniques designed to help the parties make their own informed decisions (eg, asking questions that help a party assess the strength of their own case[150]).

While it has been suggested that reality testing is an accepted part of the role of a facilitative mediator,[151] facilitative mediators are not expected to offer opinions or give advice and it is assumed that this approach is maintained during the use of reality testing. More evaluative practitioners have self-reported that they do give advice to disputants during the mediation process,[152] and that they are concerned that this practice could lead to them being sued.[153] One commentator differentiates the approaches to reality testing by mentioning a 'facilitative mediator playing devil's advocate [and] an evaluative [mediator] using reality testing' (although without clarification of the two approaches, it is unclear how they are to be differentiated).[154]

While it has been suggested that reality testing is an accepted part of the role of a facilitative mediator, facilitative mediators are not expected to offer opinions or give advice

When the terms evaluative and facilitative are used in the literature in association with reality testing, differentiations between the two approaches are not always clearly made.[155]

b) Reality testing and the role of the parties

Although the selected literature includes only limited consideration of how reality testing might affect the parties in mediation (and there appears to be very little research that relies on information that has been collected from parties), one in particular notes the potential 'competition' between the parties' self-determination and the mediator's use of reality testing.[156] Where such competition exists, it poses an ethical dilemma for any mediator.

146 Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209, 218.

147 Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209, 240.

148 Boulle, L., *Mediation Principles, Process, Practice* (LexisNexis Butterworths, Australia, 2011); Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36; De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103; Ervasti, K., *Past, Present and Future of Mediation in Nordic Countries,* in Nylund, A., K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open Publishing, 2018); Kennedy Institute of Workplace Mediation Research Group (KIWMRG), *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); McDermott, E. P., and R. Obar, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

149 Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

150 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

151 Berman-Robinson, C., and H. Shurven, 'ADR Process Design: Considerations for ADR Practitioners and Party Advisers' (2016) 27 *ADRJ* 140; Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018).

152 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

153 National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act (as amended, 2003)* [USA], Commentary.

154 De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103, 125.

155 There is a lack of consensus in the general mediation literature about the accepted characteristics of each model of practice, and about the mediator techniques that typify them.

156 Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018), 8.

> Mediators are likely to face ethical dilemmas when the use of reality testing is perceived to affect the roles of the mediator and of the non-mediator participants

Mediators are likely to face ethical dilemmas when the use of reality testing is perceived to affect the roles of the mediator and of the non-mediator participants. For example, when parties feel the mediator is using reality testing techniques to pressure them, or they perceive that the use of reality testing has affected the mediator's impartiality, they are likely to change their approach to the mediator, to each other, and to the mediation process.

Perhaps in recognition of the above ethical concerns about reality testing, It has been suggested that, where mediators use reality testing, they do so in ways that 'respect[…] the principle of self-determination',[157] and do so with the consent of the parties.[158] It has been said that restricting the use of reality testing techniques to private sessions/meetings (where the other disputant is not present) may enhance a disputant's capacity for informed decision-making, improve their capacity to create self-determined outcomes,[159] and increase their own sense of autonomy.[160]

c) Reality testing and the role of the mediator

According to the selected literature, when using reality testing techniques, the role of the mediator appears to be to ensure that the parties are making informed decisions and are proposing, or accepting, workable options for settlement that best meet their interests. However, commentators and researchers are aware of the potential pitfalls in the use of reality testing, and the ways in which reality testing techniques may undermine the perceived role of the mediator.

Some reported negative aspects of reality testing techniques include that disputants may feel 'badgered or coerced',[161] even pressured, by the mediator.[162] Using reality testing to try and change parties' expectations has even been described as a form of mediator 'aggressiveness'.[163] In terms of the mediator's perceived impartiality or neutrality, it has been suggested that reality testing necessarily involves some evaluative behaviour because merely by asking the questions, the mediator implies that, in their own judgement, the disputant's position, or proposals, are not realistic.[164]

One complex empirical study of mediators raises questions about the persona of the mediator during reality testing.[165] Although mediators are perceived to be impartial or neutral, some reality testing techniques have them taking on something of the persona of an adversary who challenges the party's viewpoint, perceptions, and preferences.

It has been suggested that this behaviour is a type of deception, protected both by the confidentiality of the private sessions, and by the durability of the public image of mediators, or what is called 'the acceptable cast of typical mediator conduct.'[166]

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157 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020), 291.
158 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).
159 Field, R., 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22 *ADRJ* 8.
160 Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36.
161 Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273.
162 Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; McDermott, E. P., and R. Obar, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.
163 American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf>, 16.
164 Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36.
165 De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103.
166 De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013), 203.

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Another aspect of reality testing that might be problematic is the influence of the mediator's preferences in terms of "reality", and in terms of "acceptable" settlements. For example, it has been noted that "facing reality" might be limited by the type of reality that is preferred by the mediator[167] - which could be quite different from the realities experienced by one or both parties. In addition, it has been suggested that, when they are reality testing possible solutions, even the most subtle mediators may be pushing the parties towards the mediator's own preferences.[168]

It has been suggested that a mediator's 'experience … and skills'[169] may influence both how they practice reality testing, and whether their use of reality testing increases the quality of mediated outcomes. The two suggestions appear to be untested, and the literature is similarly unclear about the skills that are required in reality testing, and whether and how they might be taught and maintained.

Many of the problematic aspects of reality testing might be lessened if mediators make clear to the parties what they are doing,[170] that they seek the parties' permission, and that they are clearly sensitive to the parties' responses to what they are doing.[171]

It is possible that a mediator's choice to use reality testing techniques may be influenced by their professional background as well as by the context and setting of the mediation; however, these issues are not canvassed in the selected literature.

Emotion, negotiation, and reality testing

It has been suggested that the positive reputation of reality testing relies on the assumption that the disputants are rational in how they interpret the mediator's reality testing techniques (including her/his questioning styles), and, after due consideration, make 'lucid and balanced decisions'[172] that derive from the mediator's interventions. However, the whole mediation process can be fraught with a range of changing emotions, perhaps interfering with the parties' capacity for rational, lucid, and balanced decision-making.

In recent years, it has become accepted that emotion plays a key role in the process of negotiation, in the behavioural choices that people make, in the proposals people put forward for resolution, and in the proposals they choose to accept.[173] There is increased interest in the roles of emotion, emotional well-being, and emotional intelligence in mediation – both for the mediator and for the disputants.[174]

167 Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36.
168 Douglas, S., 'Constructions of Neutrality in Mediation' (2012) 23 *ADRJ* 80.
169 Noone, M.A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528, 549.
170 Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995).
171 Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).
172 Boulle, L., and R. Field, 'Re-Appraising Mediation's Value of Self-Determination' (2020) 30 *ADRJ* 96, 96.
173 Lewicki, R., D. M. Saunders, and B. Barry, *Negotiation* (7th Edition, McGraw Hill, USA, 2015).
174 For example, see Boyle, A., 'Self-Determination, Empowerment and Empathy in Mediation: Rehumanising Mediation's Effectiveness' (2020) 15 *Newcastle Law Review* 35; Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181; Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263.

There is scope for a mediator to use reality testing to examine the "reality" of a disputant's emotional response to what is happening in the mediation. This form of reality testing may raise more complex ethical issues for mediators if it is perceived to challenge the personal underpinning of behaviour choices, where it might become a matter for psychology rather than for dispute resolution.

Conclusions

In summary, the mediation literature shows that mediator use of reality testing techniques has an extensive, and ongoing history in Australia and overseas from at least 1978. According to the literature, reality testing tends to be described in terms of its purpose, and can be focused on any, or on any combination of the following:

- The consequences or ramifications of not reaching a mediated agreement;
- The acceptability of specific terms of agreement;
- The prospects of success in court;
- The parties' differing perceptions of the dispute itself;
- The parties' differing perceptions of their respective positions;
- The parties' expectations of the process and demands of each other;
- The parties' interactions with, and behaviour towards, each other; and
- Unrepresented parties' understanding of their situation and prospects.

Reality testing techniques are said to include the mediator asking questions, posing hypotheticals, providing information, and providing opinions and/or advice. When a mediator uses reality testing, the achievement of an agreement is said to become more likely, and the agreement is likely to be more durable. Although it is generally expected that the mediator will facilitate or lead reality testing, lawyer representatives in a mediation can assist with reality testing of their own clients, or themselves become the subject of the mediator's reality testing techniques. To be effective, reality testing assumes the parties' capacity for rational thinking and decision-making. A variety of ethical issues have been raised about the use of reality testing, in particular, how its use may affect the parties' self-determination and autonomy, and perceptions of the role of the mediator. Finally, there have been limited empirical investigations of the claims made on behalf of reality testing techniques.

A variety of ethical issues have been raised about the use of reality testing, in particular, how its use may affect the parties' self-determination and autonomy, and perceptions of the role of the mediator

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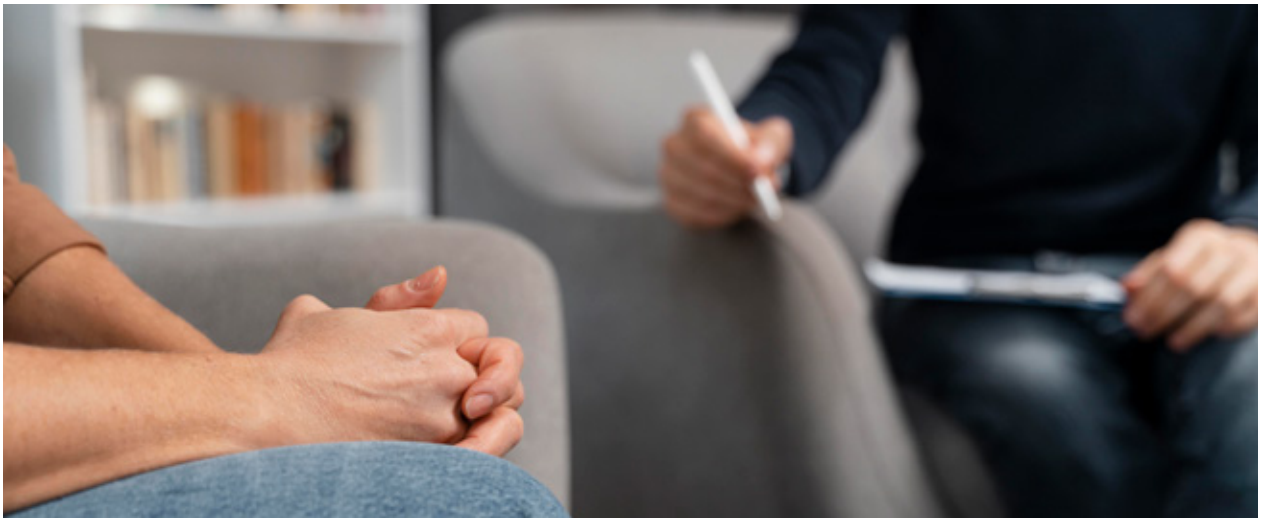

Chapter Two – Exploring the provenance of reality testing in mediation

The concept of reality testing in mediation does not have a clear derivation or provenance. This chapter explores its possible provenance through reviews of historical mediation publications, and of what is known in the fields of psychology, psychanalysis, and psychotherapy. The chapter concludes with a summary of current knowledge about brain activity in relation to consciousness, expectations, and perceptions.

Part 2. concludes with a summary of knowledge gaps, a proposal for expanding the current scope of reality testing in mediation, and suggestions for future empirical research.

Reality testing in mediation – a brief history

At least in the earlier years of ADR, DR, and mediation, the USA dominated the field, and it is likely that reality testing techniques used by mediators in that country influenced the uptake of similar techniques in other countries, including Australia.

Historic documents associated with the respected website, *Beyond Intractability*, suggest that the concept of reality testing arose in association with international and cross border dispute resolution. The following explanation of "reality testing" is included in an online Glossary of terms from 1998:

> 'In deciding which conflict management strategy is most promising, parties must make assumptions about their own power, their opponent's power, and the likely outcomes of different options. It is easy to make inaccurate assessments of any of these factors, however. Often an outside party can help review the accuracy of these assumptions and help parties revise them appropriately when they are invalid.'[175]

A separate though associated historic document (also from 1998) includes the following explanation of 'Reality Testing'[176]:

> 'Often negotiations break down because one (or more) of the parties think that they have an alternative that is better than the one they will obtain through negotiation … they think they have a better BATNA … Often, however, this BATNA is more an illusion than reality.

[175] Part of an online Glossary (1998), attributed to the then Conflict Resolution Consortium 167 which was founded at the University of Colorado in 1988 and closed in 2020; the entry on "reality testing" is within a section sub-titled 'Combination Treatment Strategies' and is available on <http://www.intractableconflict.org/www_colorado_edu_conflict/peace/!treating_core.htm#3ptyint>.

[176] Among online training materials for 'International Online Training Program on Intractable Conflict' (1998), attributed to the then Conflict Resolution Consortium, founded at the University of Colorado in 1988 and closed in 2020; this entry on "reality testing" is available on <www.intractableconflict.org/www_colorado_edu_conflict/peace/treatment/realtest.htm>.

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> Before finalizing an agreement, or breaking off negotiations, it is wise to test the validity of one's BATNA … Helping parties assess their BATNAs is one task a mediator often performs. Often meeting alone (in a caucus) with one side at a time, the mediator will explore each party's image of their alternative approaches for dealing with their problem. The mediator will help the party estimate the likely costs and benefits of each approach and will give an alternative opinion – or suggest the party seek further advice (such as a lawyer) if their assessment of costs or benefits of a strategy seem unrealistic.'[177]

The website for *Beyond Intractability* itself includes a more recent essay providing clarification of what is meant by reality testing, when it can be used, and specific examples of reality testing questions.[178] The essay proposes that reality testing be used to help people 'adjust perceptions that do not conform to the realities of the situation,'[179] or, in situations where a person has an unrealistic view of their BATNA on which basis they are refusing to reach a settlement (in the latter situation, the reality testing is described in terms of being educative). In such cases, either the mediator or the other party can 'educate the reluctant party through reality testing.'[180]

A paper published in the USA in 1996 includes the observation:

> 'This [attorney preference for a 'more proactive mediator style'] may be due to the fact that the ability of a mediator to evaluate the lawsuit provides a reality test for participants who are unsure about the value of the case or are unwilling to listen to the reasoning of the other side or even their own attorney.'[181]

> "Historic literature proposes that reality testing be used to help people 'adjust perceptions that do not conform to the realities of the situation."

Although three of the above explanations appear to interpret "reality testing" as a technique for exploring inaccurate perceptions of how the dispute might be resolved (ie, the ramifications of differing settlement options, and/or their BATNA, and/or cost-benefit analysis of various options), the third includes a broader scope of any "perceptions" needing adjustment. It is not difficult to see how, over time, the use of reality testing techniques has expanded into other areas of disputant inaccuracy and/or misapprehension, such as the disputants' views of the dispute, and their communications and relationship with each other.

Influences from the legal sector

In legal contexts, the term "reality check" tends to be in more frequent usage than is "reality test"; however, there appears to be little substantive difference between interpretations of the two. For example, one example of "reality checking" in a legal context sought to compare two alternative retirement accommodation options, by assessing their cost benefits: the comparative costs of purchasing a smaller home (such as an apartment) or of buying into a gated retirement community.[182]

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177 Among online training materials for 'International Online Training Program on Intractable Conflict' (1998), attributed to the then Conflict Resolution Consortium, founded at the University of Colorado in 1988 and closed in 2020; this entry on "reality testing" is available on <www.intractableconflict.org/www_colorado_edu_conflict/peace/treatment/realtest.htm>.

178 Spangler, B., Reality Testing, in G. Burgess and H. Burgess (eds) *Beyond Intractability* (Conflict Information Consortium, USA, 2003), available on <https://www.beyondintractability.org/essay/reality-testing>.

179 Spangler, B., Reality Testing, in G. Burgess and H. Burgess (eds) *Beyond Intractability* (Conflict Information Consortium, USA, 2003), available on <https://www.beyondintractability.org/essay/reality-testing>; the essay is a single page.

180 Spangler, B., Reality Testing, in G. Burgess and H. Burgess (eds) *Beyond Intractability* (Conflict Information Consortium, USA, 2003), available on <https://www.beyondintractability.org/essay/reality-testing>; the essay is a single page.

181 Cohn, L. P., 'Mediation: A Fair and Efficient Alternative to Trial' (1996) Du Page County Bar Association Brief, Centre for the Analysis of *Alternative Dispute Resolution* Systems (CAADRS), 3/6; the paper is available on <https://www.aboutrsi.org/files/MedFairEfficient.pdf>.

182 McCullagh, R., 'Retirement Villages: A reality check' (2018) 41 Law Society Journal 88.

Although the provenance of "reality testing" in mediation is unclear, the concept itself is well-known in the fields of psychoanalysis and psychotherapy

The Law Society of New South Wales, in its assessment requirements for legal practitioners seeking to represent clients in dispute resolution processes (such as mediation) includes a criterion listed as 'reality checking settlement options/offers',[183] as a General Core Skill (though without any further description).

Anecdotal discussions with legal practitioners suggest that reality checking is applied predominantly to help clients compare the reality of a court's possible findings with their own expectations of that same court.

Reality testing: a psychoanalytic technique in a mediation setting?

Although the provenance of "reality testing" in mediation is unclear, the concept itself is well-known in the fields of psychoanalysis and psychotherapy. A review of the mediation and other literature suggests that the concept derives from theories of psychoanalysis and psychotherapy, as well as from the techniques of "reality checking" in the legal sector. For example, Tillet refers to the difference between 'fantasy' or 'imagination' and 'reality',[184] or 'the world as perceived by others';[185] several historic mediation commentators describe the mediator as an 'agent of reality'.[186] Although the concept of reality testing appears regularly in the mediation literature, it is uncommon for descriptions of its meaning to extend beyond a general reference to the mediator ensuring that disputing parties have a "realistic" view of their chances in court, and/or that the disputing parties devise terms of agreement that are "realistic" – or practicable and feasible. This section considers two potential provenances of "reality testing": from psychoanalysis and psychotherapy, as well as from the legal sector.

Psychoanalysis and psychotherapy

Sigmund Freud[187] introduced the concept of reality testing in the context of his analysis of people's experiences of their own internal thoughts and perceptions, and how those related to the external world.[188] [189] Freud's relevant key concepts were a 'pleasure principle' and a 'reality principle'.[190] In particular, the latter related to the situation where a person '… form[s] a conception of the real circumstances in the external world … even if it happen[s] to be disagreeable … and adjusting [their] personal preferences accordingly.'[191] For Freud, reality testing itself occurred when a person compared (or tested) their internal ideas and perceptions with the external reality around them: 'Our day-dreams often include our plans for the future, but in a more normal adult they are subjected to reality-testing and abandoned or modified if they conflict with reality.'[192]

Despite changing views of Freud's ideas and theories, the concept of reality testing continued to be developed during the twentieth century and remains a feature of psychotherapy.[193]

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183 Law Society of NSW, Specialist Accreditation Scheme: 2020 Dispute Resolution Assessment Requirements (Law Society of NSW, 2020), 7.
184 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), 91.
185 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), 81.
186 Carter, M., P 91; see also Boulle 1996 P 136; Moore, C., P 25 – 26.
187 Although Freud's ideas and theories have fallen out of favour, due to their being either unprovable or contradicted by empirical studies, many of his key concepts have become part of our language.
188 Steiner, R. (ed), *Unconscious Phantasy* (Karnac Books, UK, 2003); for most non-German speakers, Freud's publications are necessarily accessible only through translations.
189 In the context of English analysis of Freud's works, the material has necessarily been subjected to the interpretations of translators.
190 Steiner, R. (ed), *Unconscious Phantasy* (Karnac Books, UK, 2003), 70.
191 Steiner, R. (ed), *Unconscious Phantasy* (Karnac Books, UK, 2003), 68.
192 Steiner, R. (ed), *Unconscious Phantasy* (Karnac Books, UK, 2003), 214.
193 There are many publications providing an overview of Freud's interpretation of reality testing; for example, see Bocock, R., Sigmund Freud (Routledge, UK, 2002); Hurvich, M., 'On the Concept of Reality Testing' (1970) 51 *International Journal of Psychoanalysis* 299.

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In Hurvich's interpretation, reality testing relates to distinguishing between 'what is subjective and what is objective'[194] and the capacity for reality testing relies on a person having a 'detailed and sophisticated' understanding of external reality.[195] More recently, it has been acknowledged that, even in its field of origin, the concept of reality testing remains 'indeterminate and confused',[196] and that each person lives within multiple realities created by our social lives and influenced by 'language, family … cultur[e] … traditions, and beliefs,' and also by group behaviours and norms.[197] It has also been suggested that, while reality testing is a very rational process, focused on specific goals, 'testing reality' is less restricted and includes 'experimental thinking and behavior'.[198]

The development of so-called "reality therapy" in the 1960s had at its core the key principle of 'personal responsibility':[199] '… regardless of what he has done, how he feels, where he comes from, his size, shape, mental ability, physical condition, or heredity, the young offender suffers from a universal malady: he is unwilling to take responsibility for his behavior';[200] or: people can 'exert self-control over their own behavior.'[201]

A patient's capacity to differentiate their internal thoughts and behaviour preferences from the external reality of here-and-now remains key to psychotherapeutic methods such as rational emotive behaviour therapy, cognitive behavioural therapy and reality therapy.

A patient's capacity to differentiate their internal thoughts and behaviour preferences from the external reality of here-and-now remains key to psychotherapeutic methods such as rational emotive behaviour therapy, cognitive behavioural therapy and reality therapy.[202] These approaches aim to educate patients in habitual self-examination of their thoughts, expectations, behaviours, and needs, using reality testing as a common therapeutic technique for achieving behaviour change.[203] In such approaches, the focus is on the here-and-now, not the past, and on making an active choice for behaviour change in order to achieve one's own life goals.[204]

194 Hurvich, M., 'On the Concept of Reality Testing' (1970) 51 *International Journal of Psychoanalysis* 299, 300.
195 Hurvich, M., 'On the Concept of Reality Testing' (1970) 51 *International Journal of Psychoanalysis* 299, 307.
196 Billow, R. M., 'Reality Testing and Testing Reality in Group Treatment Part I: Reality and Reality Testing' (2016) 66 *International Journal of Group Psychotherapy* 361, 362.
197 Billow, R. M., 'Reality Testing and Testing Reality in Group Treatment Part I: Reality and Reality Testing' (2016) 66 *International Journal of Group Psychotherapy* 361, 362.
198 Billow, R. M., 'Reality Testing and Testing Reality in Group Treatment Part I: Reality and Reality Testing' (2016) 66 *International Journal of Group Psychotherapy* 361, 379.
199 Glasser, W., 'Reality Therapy: A Realistic Approach to the Young Offender' (1964) 10 *Crime and Delinquency* 135, 136.
200 Glasser, W., 'Reality Therapy: A Realistic Approach to the Young Offender' (1964) 10 *Crime and Delinquency* 135, 136.
201 Howatt, W. A., 'The Evolution of Reality Therapy to Choice Theory' (2001) 21(1) *International Journal of Reality Therapy* 7, 7-8.
202 For example, see Glasser, W., Reality Therapy: A New Approach to Psychiatry (Harper & Row, USA, 1965); Glasser, W., *Choice Theory: A New Psychology of Personal Freedom* (Harper 195 Collins, USA, 1998).
203 Goldfried, M. R., 'Toward the Delineation of Therapeutic Change Principles' (1980) 35 *American Psychologist* 991. Glasser, W., Reality Therapy: A New Approach to Psychiatry (Harper & Row, USA, 1965);
204 Glasser, W., Reality Therapy: A New Approach to Psychiatry (Harper & Row, USA, 1965);

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Reality is accepted as being about social needs and social relationships; there is rejection of the overpowering importance of "mental health" and problems are seen to be more socially based; emphasis is placed on an individual having the freedom and responsibility to make their own choices: 'people are in control of their conscious behavior.'[205] These ideas incorporate key ideas relevant to self-determination and would be familiar to mediators.

Psychologists, William Glasser and Abraham Maslow, were key figures in so-called "humanist psychology" where addressing the reality of current behaviour is said to take precedence over analysis of the past.[206] In his 1991 mediation publication, Tillet refers specifically to William Glasser and his reality theory, linking it to reality testing in mediation.[207] In a section on 'Perceptions and cognition', there is reference to ' … "reality" or … the world as perceived by others',[208] and there are references to a set of basic individual needs that were identified by Glasser (ie, 'survival, love, freedom, power, and fun',[209] which Tillet encapsulates as 'biological, emotional, and social [needs].'), as well as to Maslow's hierarchy of needs.[210] Tillet notes that, for Glasser, understanding the needs that underly a person's behaviour is 'the key to [their] motivation' and, hence, to helping them change that behaviour.[211] These concepts continue to influence mediation literature.[212] In an echo of Freud, Tillet also refers to 'fantasy [when] the individual retreats into a world of imagination to avoid unpleasant reality', and '… the individual loses the ability to distinguish clearly between fantasy and reality, between the world as acted out in the imagination and the drama occurring in the real world.'[213]

It is not hard to see how these concepts were adopted from psychotherapy and adapted for the mediation context.

It is not hard to see how these concepts were adopted from psychotherapy and adapted for the mediation context.

Consciousness, expectations, and perception: current knowledge

The concepts of so-called "reality" and "non-reality", which are fundamental to approaches to reality testing, exist in people's conscious awareness, their social awareness, and their self-awareness, and those states influence people's levels of conscious awareness (or consciousness), their expectations, and their perceptions. Modern research into brain activity shows the strong connections between consciousness, expectations, and perception.[214]

205 Howatt, W. A., 'The Evolution of Reality Therapy to Choice Theory' (2001) 21(1) *International Journal of Reality Therapy* 7, 10.
206 For a general overview of humanist psychology, see <https://www.apa.org/pubs/journals/features/hum-43-40.pdf>.
207 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991).
208 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), both direct quotes are from P 81.
209 Howatt, W. A., 'The Evolution of Reality Therapy to Choice Theory' (2001) 21(1) *International Journal of Reality Therapy* 7, 10, citing W. Glasser, *Control Theory in the Proactive Reality Therapy Case Studies* (Harper & Row, USA, 1989).
210 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), 80.
211 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), 80.
212 For example, see Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020), 555.
213 Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991), 95.
214 For example, see J. E. LeDoux, M. Michel, and H. Lau, 'A Little History Goes a Long Way Toward Understanding Why We Study Consciousness the Way We Do Today' (2020) 117(13) *Proceedings of the National Academy of Sciences* (PNAS) 6976; A. K. Seth, 'Consciousness: The Last 50 Years (and the Next)' (2018) 2 *Brain and Neuroscience Advances* 1.

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In recent years, advances in neuro-imaging and other technologies have enabled close examination of brain activity and 'the neural mechanisms underlying … states of consciousness'.[215] It is now well-recognised that consciousness arises from 'connection[s] between the properties of subjective experience and the operations of the densely complex neural circuits' in the brain.[216] There are two types of consciousness: being in a state of consciousness at all, and being conscious of 'this and that'.[217] A conscious perception is tied to the perception being something to be reported on, or something that influences other internal processes such as memory, and levels of attention.[218]

It has long been accepted that our perceptions and interpretations of the world around us develop from our interpretations of what we have seen or observed in some way.[219] However, there is now abundant empirical evidence showing that 'predictive perception' is the norm.[220] Studies show that first we predict what we will see (or hear or feel), then, based on what we do actually see, our sensory system conveys signals to our brain about any discrepancies between the prediction and the actuality. Further, our predictions about what we will observe have complex derivations, including our own goals, desires, and expectations, as well our mood, and our social knowledge gained from and about other people. For example, studies have shown that, if a person is in a good mood, they will focus more on, say, happy faces, if in a bad mood, they will focus on unhappy faces, and, if feeling anxious, on fearful faces. In addition, a person's predictive perceptions can be influenced by learned stereotyping, group-based knowledge, and by 'social experience', including what is already known about a speaker influencing interpretations of what they say.[221]

Through predictive perception, we see a "reality" or a "non-reality" that equates with our prior knowledge, our goals, and our desires, and on which our expectations are based

For example, if prior experience has been that a person quite often speaks sarcastically, subsequent experiences with that person predict a sarcastic exchange.

It has also been reported that these same factors influence our self-awareness, and judgements that we make. The brain predicts certain perceptions based on its own collected history, and, because the sensory experience is expected to confirm those predictions, only discrepancies are signalled. Above all, for a mediation context, our brain prefers to maintain its self-perceptions and predictions (eg, about, say, trustworthiness or about appearance), despite strong counterevidence.

Through predictive perception, we see a "reality" or a "non-reality" that equates with our prior knowledge (including prior knowledge of the other person), our goals, and our desires, and on which our expectations are based. This predictive perception influences our interpretation of what is happening, and is difficult to countermand, in particular if it involves our perception of ourselves.

Further cross-disciplinary research in this area is needed; however, in the meantime, there might be some benefit in revising mediator skills and techniques, so they align more with what is known about consciousness, expectations and perceptions.

215 A. K. Seth, 'Consciousness: The Last 50 Years (and the Next)' (2018) 2 *Brain and Neuroscience Advances* 1, 1.
216 A. K. Seth, 'Consciousness: The Last 50 Years (and the Next)' (2018) 2 *Brain and Neuroscience Advances* 1, 1.
217 A. K. Seth, 'Consciousness: The Last 50 Years (and the Next)' (2018) 2 *Brain and Neuroscience Advances* 1, 3.
218 A. K. Seth, 'Consciousness: The Last 50 Years (and the Next)' (2018) 2 *Brain and Neuroscience Advances* 1, 3.
219 M. Otten, A. K. Seth, and Y. Pinto, 'A Social Bayesian Brain: How Social Knowledge Can Shape Visual Perception' (2017) 112 *Brain and Cognition* 69, 70.
220 M. Otten, A. K. Seth, and Y. Pinto, 'A Social Bayesian Brain: How Social Knowledge Can Shape Visual Perception' (2017) 112 *Brain and Cognition* 69, 70.
221 M. Otten, A. K. Seth, and Y. Pinto, 'A Social Bayesian Brain: How Social Knowledge Can Shape Visual Perception' (2017) 112 *Brain and Cognition* 69, 80.

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Chapter Three – Conclusions

Broadening the scope of reality testing in mediation

The above literature review suggests that, when reality testing is used in mediation, the focus is primarily on the achievement of an agreement, or settlement, whether by assessing the workability/acceptability of the terms of the agreement, or by exploring the potential ramifications/consequences should no agreement be reached. This focus aligns with the primary effectiveness measure of mediation which has been called 'simple effectiveness': whether an agreement is reached.[222] When mediation's effectiveness is measured by a "settlement rate", it seems reasonable to assume that individual mediators apply the same measure of their own effectiveness. Such an approach can be expected to narrow the scope of the mediator's range of interventions and techniques, so they, too, focus primarily on simple effectiveness. On the other hand, if the focus of the mediation (and of the mediator) is on so-called 'complex effectiveness' – the achievement of any number of additional factors such as party satisfaction (including perceptions of fairness), party compliance with the agreement, the specificity of the terms of agreement, and any improvement in the parties' communications or relationship with each other[223] – the nature of mediator interventions and their scope is likely to be broader. Options for broadening the scope of reality testing are considered below.[224]

It is clear from the literature that some commentators (and practitioners) consider that there is broader scope for the use of reality testing than direct relevance to the achieving of a final agreement. For example, some see it as a means of achieving additional aims, including improving the disputants' interactions with each other, increasing the durability of agreements, and assisting the informed participation of unrepresented disputants. Even when used in relation to achieving a final agreement, the way in which reality testing works on the disputants to achieve that purpose in unclear and requires further investigation.

An additional way in which the use of reality testing may be beneficial is associated with empowering disputants and so increasing their active input to the mediation process.

222 Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 *Newcastle Law Review* 148, 150.
223 Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 *Newcastle Law Review* 148, 151.
224 See below, Chapter Three – Conclusions.

Research in the area of complaints handling has shown that complainants are more likely to be satisfied with a complaints-handling process if they believe that they have been respected, valued, and heard – and their concerns have been acknowledged; if they are dealing with an appropriately authoritative person; and if the process is clearly aimed at their own needs (rather than at, say, resolving the complaint or disposing of it in some way).[225] These factors imply additional concerns such as the process itself taking a respectful amount of time and being seen to be "fair". When mediators seek to improve disputants' participation and ultimate satisfaction with the mediation, that is likely to affect how reality testing is practised, as well as the techniques that a mediator might choose to use.

Knowledge gaps and future research

The selected literature included in this review shows that, for many years, there has been considerable discussion about reality testing in mediation and its various purposes and benefits, suggesting that reality testing is used widely by mediators – despite the underlying misgivings that might exist about the process, its techniques, and any effects its use might have. The scope of discussion has been restricted by the lack of relevant empirical investigations, including of the ethical problems inherent to reality testing. In particular, there is very little input from mediators themselves about their understanding of reality testing, their use of its techniques and their observations of the effects those techniques might have on the other mediation participants and on the mediation process. The dearth of input from practitioners is a notable gap that necessarily limits what is known about the practice of reality testing and factors that influence its use.

When mediators seek to improve disputants' participation and ultimate satisfaction with the mediation, that is likely to affect how reality testing is practised

A key knowledge gap that is apparent throughout the literature concerns conceptual clarity about "reality testing" itself. In the absence of conceptual clarity, assumptions are made (by researchers, by readers, and by practitioners) about what is meant by "reality testing" as well as about how and why it works (if it "works" at all). Such assumptions influence not only how readers interpret research; they also influence how practice develops.

Conceptual clarity about reality testing is likely to hinge on there being a clear differentiation between the "reality" that the mediator chooses in any given situation (eg, a form of benchmark to be achieved or understood), and the mediator's choice of techniques, or "tests", that are intended to help the parties achieve that reality, or at least understand its importance. Conceptual differentiation between the two is rarely made in the literature. It is likely there would be differences in how the mediation proceeds, and in perceptions of the mediator, if mediators were to approach reality testing with more active consideration of, say, which "reality" they are choosing as a benchmark (and why they are choosing that one), and which techniques (or tests) are most appropriate for that specific "reality".

[225] Extensive research in this area can be accessed through the Society of Consumer Affairs Professionals (https://www.socap.org.au/); see also T. Sourdin, *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

For example, if a mediator decides that the "reality" benchmark is to achieve better in-mediation communication between the parties, the mediator can then choose techniques (or tests) aimed at achieving that; or, if a mediator decides that the "reality" benchmark is to have some common knowledge or understanding about the dispute, the mediator can choose techniques aimed at achieving that. It is possible that the nature of the "reality" and the selected techniques might influence whether the reality testing occurs in joint or in private session. The issue of conceptual clarity is considered further elsewhere in this Report.[226]

> Further theoretical and empirical studies could explore the potential for broadening reality testing's scope in mediation

Further knowledge gaps are apparent in the application of reality testing techniques, and future research could be designed to explore:

- How mediators perceive the pros and cons of reality testing;
- How disputants perceive the mediator's use of reality testing;
- Which mediator techniques typify reality testing (regardless of models of practice);
- Reality testing's contributions to:
  - Achieving agreements/settlement;
  - Improving disputant communications and/or relationships;
  - Increasing the durability of agreements/settlements; and
  - Assisting unrepresented disputants;
- Developing appropriate strategies for teaching the concept and techniques of reality testing, as well as for ensuring their maintenance.

Finally, while researchers test the benefits of reality testing, further theoretical and empirical studies could explore the potential for broadening its scope in mediation, including its capacity both to improve disputant participation and to contribute to disputant satisfaction.

226 See below, Part 4.

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PART 3. REALITY TESTING IN MEDIATION – QUANTITATIVE ANALYSIS AND FINDINGS

Chapter One – Introduction and overview

Part 3 of the Report comprises five chapters which report the analysis and findings of quantitative data collected from the online survey, and from the online focus groups, as well as an analysis of the participation and attrition rates.

Reporting methods

a) Purpose of quantitative data

Collecting quantitative demographic data about the survey responders is said to contribute to the contextual validity of qualitative information.[227] In this project, there are two sets of quantitative data: within the online survey, and as part of the information about the online focus groups. In the online survey, the quantitative information sought information about responder demographics and practice as a mediator and was intended to enable assessment of responders' representativeness as NMAS-accredited mediators, as well as their capacity to provide the relevant information (ie, levels of knowledge and experience). The online survey was designed to seek quantitative data (in the form of 12 tick-box questions) before seeking qualitative information, anticipating that the simple tick-box format would introduce responders to the nature of the project and would increase their motivation to contribute.

In relation to the focus groups, quantitative data includes the numbers of registrants and attendees (again for response and attrition rates), as well as a pre-focus group survey to be completed by each registrant immediately prior to commencement of the relevant focus group. This survey includes two tick-box questions about responders' practice as mediators, and one qualitative question.

b) Combining analysis results and discussion

Traditionally, research is described in ways intended to emphasise the "objectivity" of data and to ensure that the researchers' and their interpretations are clearly separated from the raw information.[228]

227 Steel, D., *Perspectives on Sample Surveys* (Knibb's Lecture, Statistical Society of Australia, November 2021).
228 Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022).

Because this project relies on a thematic analysis of qualitative information, it is influenced by interrelated factors including us, the researchers, the MSB (the funders), by the Project Advisory group (as experts), and by the participants themselves (at least some of whom apparently spoke to each other about the project.[229] In addition, data from the online survey and focus groups suggest that the key themes appearing throughout are interrelated and interwoven. In acknowledgement of these various interrelations, we decide that it is appropriate to present our analysis in a similarly integrated format, as is recommended by experts in thematic analysis.[230]

c) Survey question UQ3 (quantitative data)

The responses to one survey question are not included in this quantitative analysis, despite being quantitative in nature. The survey question sought information about the factors that influence responders' choice to use reality testing in any given mediation. Since the information is qualitative and makes no contribution to responder demographics or responder experience as mediators, it is included in Part 4. of this Report.

d) Response rate

In reporting on the survey, the rate of completed and submitted surveys as well as the rate of response to each survey question is presented. In both the online survey and pre-focus group online surveys, responders have the choice about which questions to answer and what information to include in those answers. The rate at which responders agreed to participate, their actual participation, and their choice of which questions to answer is presented below.

> Overall, 377 completed surveys were submitted - around 10% of NMAS accredited mediators

Key findings

The key findings from the quantitative data are presented in four categories: a) Participation; b) Reality testing; c) Mediation practice; and d) Population demographics. The findings from each category are summarised below.

a) Participation, or overall response, rate

Overall, 377 completed surveys (9.3% of 4022 distributed email invitations) were submitted to us through REDCap.[231]

In terms of the online focus groups, an overall participation rate cannot be calculated because the number of focus groups was limited, as were the number of available places in each focus group. It can be noted that most of the focus groups had been fully subscribed within two days of the MSB's distribution of the invitation email; however, none of the focus groups was fully attended.

b) Reality testing

i. The vast majority of online survey responders report that they have used reality testing in their mediation/conciliation practice; only 12 responders report that they have not.

ii. A large majority of responders (80%) report that reality testing was included in the mediation training course that they attended; a fifth of responders report either that the training did not include reality testing (8.4%) or that they cannot recall whether it did (11.5%); no responders report not having attended a mediation training course.

[229] Some participants mentioned to us that they have spoken with others about the project – including some who had sought colleagues' advice about ensuring registration for the focus groups.

[230] Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022).

[231] REDCap includes an automated count of completed surveys; however, the REDCap platform was unable to differentiate the two survey streams (people who do/not use reality testing) and this is likely to have affected its calculation of completed surveys.

CONTENTS

c) Mediation practice

i. Study participants appear to be mediators with various levels of experience, who tend to work in either private practice or in public, or government funded, programs. This data confirms the participants' capacity to provide a wide range of information about the use of reality testing in the context of mediation/conciliation.

ii. There are discernible trends in whether women or men tend to practice in one or the other sector. Slightly more female than male mediators report working in public, or government funded, programs, while more than half of those who report working in private practice are men. Only about a third of responders report working in both sectors, and in that group, the male mediators outnumber female mediators by 2:1.

iii. More responders identify as both mediators and conciliators (63, 16.8%) than identify as conciliators only (17, 4.5%). Because conciliators tend to work more in public, or government funded programs, it is likely that these figures affect the reporting of private and public practice.

iv. Data from the online focus groups show that more than three times as many responders have legal training than have any other form of professional training (in fact, more have legal training than all the others combined). These data must be treated cautiously because the response numbers are quite low.

d) Population demographics

i. Survey data suggests that:

a. The mediation sector in Australia has a relatively evenly balanced population of male and female practitioners; and

b. The population of NMAS accredited mediators includes a proportion of practitioners from non-Anglo migrant population groups; and a smaller number of First Nations/Indigenous mediators.

Original question	Short title
I agree to participate in the survey	Q1
Do you refer to yourself as [mediator, conciliator, both]?	Q2
Do you identify as: Female, Male, Non-binary, prefer not to say	Q3
Do you identify as a member of the following population group: Aboriginal and Torres Strait Islander/ Indigenous/First Nations?	Q4
Do you identify as a member of a migrant group?	Q5
If "yes" [to Q5], please specify	Q6
How long have you been mediating/conciliating	Q7
In total, how many matters have you mediated?	Q8
Do you mediate/conciliate in a government or publicly funded program or service?	Q9
Do you practice privately?	Q10
When you attended mediation training, did the course include specific information about "reality testing"?	Q11
Have you ever used "reality testing" in your mediations/conciliations?	Q14[232]

Table 2.1 Survey questions that sought quantitative information

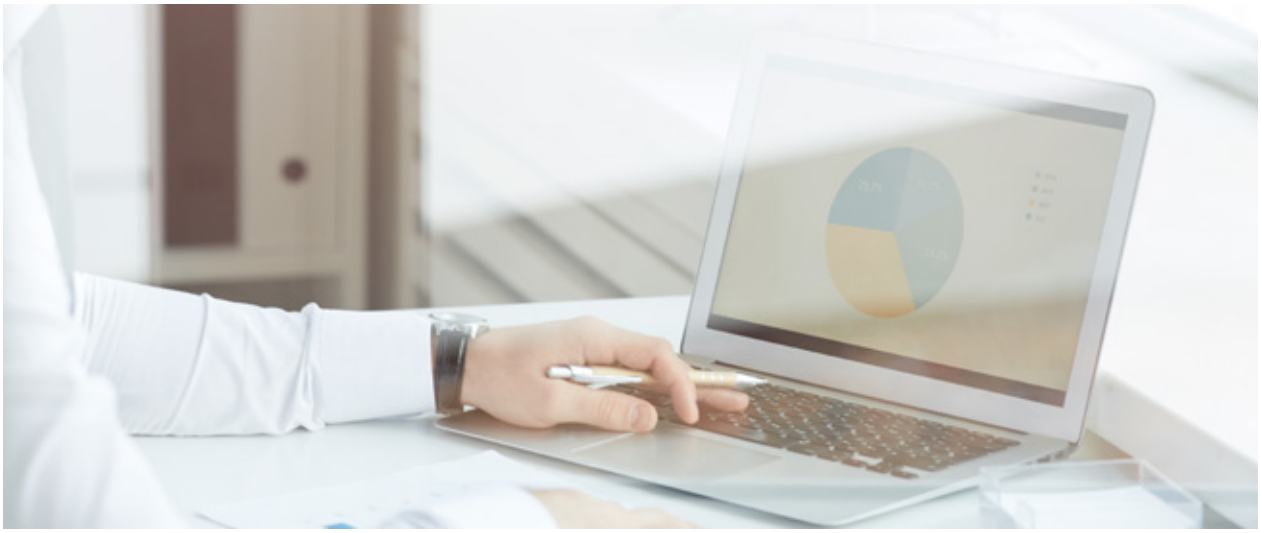
[After Q14, responses were automatically diverted into separate streams in which there were questions for those who answered "yes" to Q14 and for those who answered "no"]

[232] Questions Q12 and Q13 sought qualitative information about reality testing and their analysis is included in Part 4 of this Report.

Quick guide to quantitative survey questions

The next two chapters in this Part of the Report analyse the quantitative data collected from the online survey and from the online focus groups.

CONTENTS



Chapter Two – Quantitative online survey data

The online survey took the form of a self-administered questionnaire available during three weeks in late November and early December 2021.[233] The survey was accessible via a hyperlink included in an email invitation which was distributed by the MSB to all NMAS accredited mediators. The survey includes four parts: a screening section of three questions which is accessible by all participants; a group of 14 questions seeking largely quantitative data from all participants; a third section of four questions accessible only by those responders who do not use reality testing; and a fourth section of between six and nine questions that are accessible only by those responders who do use reality testing. Participants who do not use reality testing were asked to complete 18 questions, and participants who do use reality testing were asked to complete between 20 and 22 questions.[234] The third and fourth sections of the survey focused on the collection of qualitative information and are analysed in Part 4. of this Report.

In the online survey, the questions were purposely not numbered; however, this Report uses a simple numerical system enabling quick references to the relevant questions:[235]

> The completion and response rate can be an indicator of interest in the research topic as well as of the accessibility of the survey design

Participation

The participation rate for any empirical research is an indicator of the reliability of collected data in that it establishes a basis for claiming the representativeness of the collected data.[236] The completion and response rate (ie, the number of survey questions that participants choose to answer) can be an indicator of interest in the research topic, as well as of the accessibility of the survey design, including the level of its intellectual demands. We anticipated a drop-off in response rates (ie, participant attrition) during the final section of the survey in which participants were asked to consider some of the complex issues that can accompany the use of reality testing in the context of mediation.

233 A complete version of the survey instrument is available at Appendix B, as is a complete set of the questions that were used to guide discussion in the online focus groups.

234 For people who do use reality testing, the varying number of questions is due to two optional questions associated with identifying factors that influence a mediator's choice to use reality testing.

235 The survey was designed to break into divergent streams after a question about the use of reality testing, and it was noted that, if question numbers were to be included, they might confuse responders (eg, those who answered "yes" to the divergent question would not have a consistent chronological numbering system for their remaining questions); it was also clear that, not including question numbers would avoid repeated question numbers and ensuing confusion in the survey software's reporting on the questions in the separated streams. Noting that the survey includes less than 30 questions, we decided that we could add question numbers during the data analysis.

236 Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

Three screening questions opened the online survey, providing benchmark data for calculating how many NMAS accredited mediators accepted the invitation to participate in the study, as well as calculating participant attrition rates.

A total of 377 participants consented to participate in the online survey (Q1) and confirmed that they were at least 18 years old.[237] Potential participants who answered "no" to either question could no longer progress with participation and were automatically denied access to further survey questions. A third screening question concerned participants' self-identification as mediators and/or conciliators. Because our survey was funded by the MSB and sought input from NMAS accredited mediators, anyone who self-identified as being neither a mediator nor a conciliator was automatically denied access to the remaining survey questions. Data from all three screening questions shows that everyone consented to participation, and to being at least 18 years old, and no-one self-identified as not being a mediator and/or conciliator.

Overall, 377 surveys (9.3% of 4022 distributed email invitations) were submitted through REDCap.[238] At almost 10% of the sample population, this is an acceptable figure, and suggests that mediators were interested in contributing to the research project, and, perhaps, that they were interested in the research topic.[239] However, there is a clearly discernible decline in response rates between the first and final survey questions: only 283 of the surveys (of a possible 366) include a response to the final survey question.[240] This data is analysed in more detail below.[241]

Overall, 377 surveys were submitted through REDCap. At almost 10% of the sample population, this is an acceptable figure, and suggests that mediators were interested in contributing to the research project

In terms of the online focus groups, almost all registration places were filled by the end of the second day of registrations. Many of the focus groups would have been oversubscribed had there not been an automated "shut-off" point of 10 registrants for each.[242] Ultimately, however, not all registrants attended their chosen focus group.

These data suggest mediators may have initial enthusiastic commitment to research participation which is not carried through to actual participation. It is almost impossible to provide a definitive explanation for the attrition rates. Possible reasons include internet unreliability; research topic boredom; unwillingness to respond to qualitative survey questions that explore complex issues; reluctance to report on their own experience; and having last minute unexpected commitments.[243]

Response rate

Not all the 377 submitted surveys include responses to the full set of accessible survey questions.[244] Data on the number of responses submitted for each question shows that, apart from the initial consent question, the highest number of responses to any question is 374 (in response to the second question).

[237] The human research ethics approval had required participants be adults.

[238] REDCap includes an automated count of completed surveys; however, the REDCap platform was unable to differentiate the two survey streams (people who do/not use reality testing) and this is likely to have affected its calculation of completed surveys.

[239] Final figures are affected by an unexpected additional dispersal of the invitation email: the researchers were unable to prevent an ADR organisation from forwarding the email invitation to its approximately 500 members. Although it is likely that the people who received the latter email had already received the original email invitation, it is impossible to know the number of survey responses submitted only in response to the forwarded email invitation.

[240] Although 377 completed surveys were submitted, 12 were submitted by responders who do not use reality testing; they could not access the survey questions designed for responders who do use reality testing; when those 12 "non-users" are excluded from the possible number of responses, that latter total is 366 rather than 377.

[241] See below, Chapter Four – Participation and attrition rates.

[242] We received some requests for expanding the numbers of focus group places; we were also told by people who were unable to register due to focus groups have been filled.

[243] The response and attrition rates are analysed in more detail below; see Chapter Three – Response and attrition rates.

[244] Issues relating to the study participants' participation and attrition rates are considered in more detail in Chapter Four, below.

CONTENTS

Although most questions do receive more than 300 responses, many receive less than 300, particularly among the qualitative questions accessible only by responders who use reality testing. It is possible that responders selected which questions they would answer, although it cannot be discounted that some responders may have had difficulties with the survey being online. It is also possible that some responders did not click the "submit" button at the end of each page, resulting in some data not being saved for collection.[245]

Reality testing

This section includes data from two survey questions that sought information about responders' use of reality testing, and information about whether responders' mediation training included reality testing. Quantitative data from survey responses that relates directly to the use of reality testing is key to this project.

i. The vast majority of responders (96% of 299 responses to this question) report that they have used reality testing in their mediation/conciliation practice; 12 responders report that they have not.[246]

ii. The majority of responders (80%) report that reality testing was included in the mediation training course that they attended; a fifth of responders report either that the training did not include reality testing (8.4%) or that they cannot recall whether it did (11.5%); no responders report not having attended a mediation training course.

a) Use of reality testing

(Q14: Have you ever used "reality testing" in your mediations/conciliations?)

This question sought from responders a confirmation (or not) that they have used reality testing in their practice. This is a key question in this survey, being an indicator of the incidence of reality testing as a mediation technique.

The results suggest it is quite widespread, at least among the responders to this survey, with only 12 responders reporting they have never used reality testing techniques.

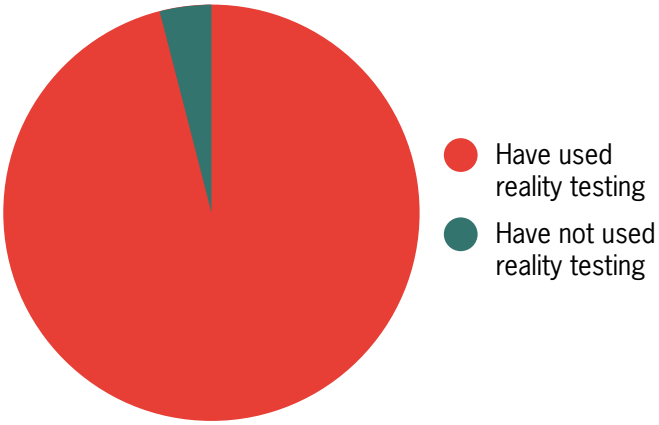


Figure 3.1 Question Q14 ('Have you ever used "reality testing" in your mediations/conciliations?'); although the "yes" responses are dominant, the "no" responses represent an interesting and unexpected outlier.

The results of this question automatically triggered access to separate survey streams for those who answered "no" and those who answered "yes". The two streams sought additional information about the use of reality testing, with a focus on qualitative information. Their analysis is available in Part 4. of this Report.

[245] It is also possible that a few people submitted more than one survey attempt. For example, having proceeded part way through the survey and then found a "problem", people may have left that version of the survey and commenced a new survey.

[246] ID numbers: 4, 58, 105, 129, 167, 179, 189, 206, 242, 281, 285, 368.

b) Reality testing in mediation training

(Q11: When you attended mediation training, did the course include specific information about "reality testing"?)

This question sought information about mediation the training responders had attended at some stage in the past. It was anticipated that responses would provide data to inform comparative analysis of qualitative information from other questions about the use of reality testing. It was also anticipated that responses would inform development of discussion points for a focus group of mediation trainers.

There is a total of 320 responses to this question, of which 256 (80% of 320) report that the mediation training they attended did include coverage of reality testing. On the other hand, 27 (8.4%) report that the training did not include coverage of reality testing, and 37 (11.6% of 320) report that they do not recall whether the training included reality testing.

NMAS allows for accreditation based on experience rather than training, and an optional answer was included in this question ("I have not attended a mediator training course"). No responder selected this option, suggesting that all responders have attended mediation training at some time.

Mediation practice

This section includes data collected from responses to several online survey questions relating to whether the responder is a mediator or conciliator (or both); the responder's mediation experience (in number of years in practice, and number of matters mediated); and whether the responder practices in the private or public sectors (or both). Although the data show a predominance of highly experienced practitioners, there is a sufficient mix of experience to inform the proposed analyses.

It was also anticipated that responses would inform development of discussion points for a focus group of mediation trainers

Summary of results

i. Most responders report being highly experienced mediators; however, there is a sufficient mix of experience to inform the data analysis.

ii. Most responders report being mediators.

iii. Almost half the responders report having been mediators for more than 10 years.

iv. Half the responders report having mediated more than 200 matters;[247] and the next highest proportion of responders report having mediated between 0 and 20 matters. This confirms research from other fields that survey participants tend to be either highly experienced or to have very limited experience.

v. Public and private practice:

a. There appear to be two significant populations of NMAS accredited mediators: those who work in public, or government funded programs, and those who work in private practice. More responders report working in public, or government funded programs than report working in private practice.[248]

247 The relevant survey question included a limited number of response options with the highest possible number of matters mediated being "more than 200".

248 It should be noted that these data are likely to include a small number of conciliators and, according to ADRAC, conciliators practice predominantly in the public arena.

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Mediator or conciliator

This question asked responders to self-identify as a mediator, or as a conciliator, or as both. The purpose of the question was to ensure that only mediators or conciliators participated in the survey. A total of 374 responses were received. Of those, 294 (78.5%) self-identified as a mediator, 17 (4.5%) self-identified as a conciliator, and 63 (16.8%) self-identified as both a mediator and a conciliator.

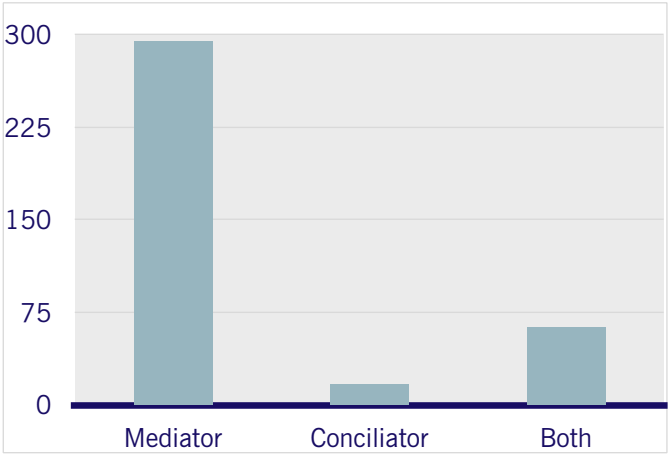

Figure 3.2 Question Q2 ('Do you refer to yourself as a mediator, a conciliator, or both?').

Although it is to be expected that the majority of responders would self-identify as mediators (the invitation email was distributed only to people with NMAS accreditation), it is interesting to note that a proportion of responders have self-identified as both mediators and conciliators. This confirms recently published information from conciliators who report also practising as mediators.[249]

It is also interesting to note that a small number of responders (17) have self-identified only as conciliators. It has been reported elsewhere that, for some conciliators, NMAS accreditation is a requirement of their engagement as conciliators despite NMAS having been developed specifically for mediators, and despite the same conciliators reporting that NMAS has only limited relevance to their conciliation practice.[250]

i. Years of practice and numbers of matters - Q7 and Q8

These two questions were intended to establish a benchmark of mediation experience that could be used to confirm responders' capacity to provide the required information in the second part of the survey.

Responders were asked to estimate the number of years they had been mediating/conciliating (Q7) and to estimate the number of matters they had mediated (Q8). There was a total of 368 responses to each of these two questions.

For Q7, almost half (177, 48.1% of 368 responses) of the responders report having been in practice for more than ten years. The other three categories (0 – 2 years, 2 – 5 years, and 6 – 10 years) were each selected by similar numbers of responders – 57, 71, and 63 respectively, with the largest number selecting 2 – 5 years (71 responses).

249 Australian Dispute Resolution Advisory Council, *Conciliation: Connecting the Dots – Final Conciliation Report* (ADRAC, Australia, 2021).
250 Australian Dispute Resolution Advisory Council, *Conciliation: Connecting the Dots – Final Conciliation Report* (ADRAC, Australia, 2021).

> In terms of mediation experience, at least half the responders have significant experience, and only a small proportion have limited experience

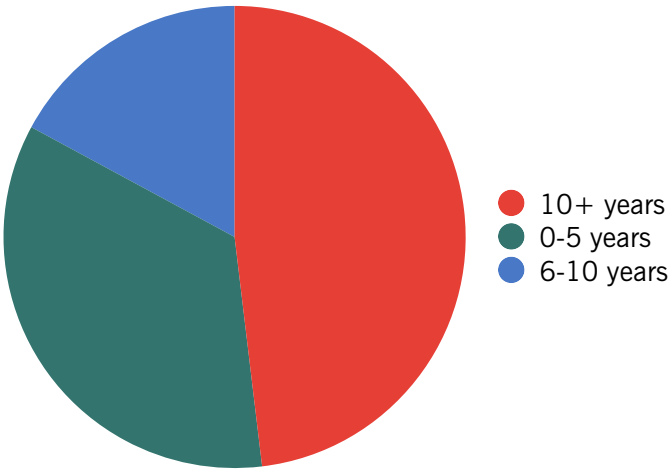

Figure 3.3 Question Q7 ('How long have you been mediating/conciliating?'); to demonstrate proportion of participants with limited years in practice, 0 – 5 years includes 0 – 2 years (57), and 2 – 5 years (71)

For Q8, exactly half (50.0%) of the responders report having mediated more than 200 disputes. The other four categories show: 62 responses (16.8%) report having mediated 0 – 20 matters; 46 responses (12.5%) having mediated 21 – 50 matters; 40 responses (10.9%) having mediated 51 – 100 matters; and 36 responses (9.8%) having mediated 101 – 200 matters.

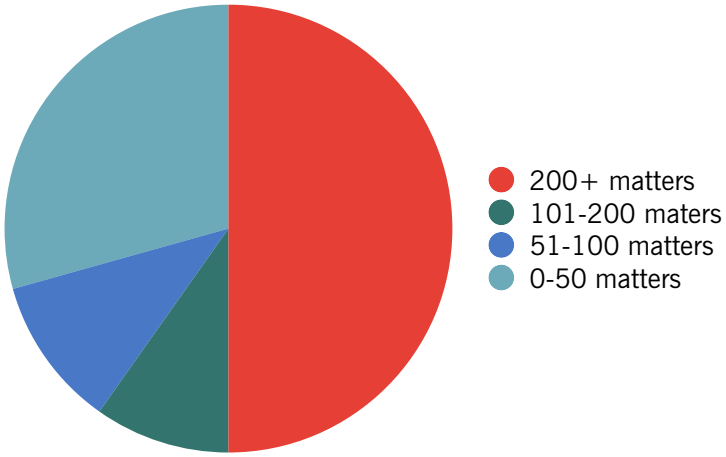

Figure 3.4 Question Q8 ('In total, how many matters have you mediated?'); to demonstrate proportion of responders with limited practical experience, 0 – 50 matters includes 0 – 20 (62) and 21 – 50 (46).

In comparing the number of responses to these two questions, half the responders report having mediated for more than 10 years, and half report having mediated more than 200 matters. The least frequently selected option for the number of years mediating is 0 – 2 years (57, 15.5%), while the least frequently selected number of matters mediated is 101 – 200 matters (36, 9.8%). It is not to be expected that the number of years mediating will equate with the number of matters mediated. It is likely that, the longer people are practising, the more mediations they will be asked to conduct (assuming that reputational experience influences mediation referrals) and the more mediations they will conduct per year.

In terms of mediation experience, at least half the responders have significant experience, and only a small proportion have limited experience.

ii. Government or private practice

ii. Government or private practice - Q9 and Q10

These two questions are paired, and seek from responders, respectively, whether they practice in government or publicly funded programs and services, and whether they practice privately. A total of 368 responders submitted answers to each of these questions. We anticipated that the response would provide information about the proportion of practitioners who are working in each of the private and public sectors. In the particular context of NMAS, those who work in the public sector may experience some tension between the requirements of the program in which they work and the requirements of NMAS. For example, a recent review of conciliation in Australia found that, despite requiring their conciliators to have NMAS accreditation, some programs place practical requirements on their conciliators that could be seen to contradict the requirements of NMAS.[251] Information about mediators in private practice is of particular value because mediation research rarely explores private sector practice.

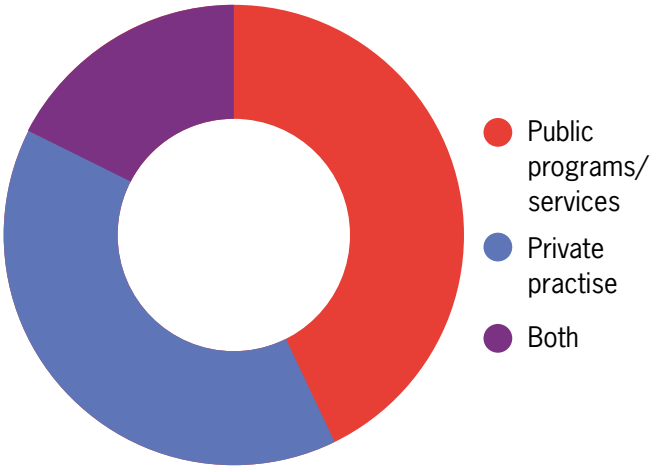

Figure 3.5 Questions Q9 ('Do you mediate/ conciliate in a government or publicly funded program or service?') and Q10 ('Do you practice privately?'), showing also the proportion of responders who answered "Yes" to both questions.

A total of 237 responders answered "yes" to Q9 (public), and a total of 221 answered "yes" to Q10 (private). These figures appear to suggest

that more responders practice publicly than privately. While it is not possible to know the reliability of these responses, 96 responders answered "yes" to both questions, indicating they practice in both sectors (see below).

For Q9, 131 responders (35.5% of 368) chose to answer "no" (that they do not practice in publicly funded programs and services) and for Q10, 221 (60.0% of 368) chose to answer "no" (that they do not practice privately). These figures suggest that, among those who answered these questions, more responders report not practising privately than report not practising in publicly funded services and programs. In other words, more responders report working in publicly funded programs and services than practice privately.

The preponderance of "public practitioners" has ramifications for interpretations of other data collected in this survey, in particular the qualitative information about how and when reality testing is used, and its observed effects on the parties, on the outcomes, and on the role of the mediator.

In addition, analysis shows that a total of 96 responders answered "Yes" to each of Q 9 and Q10. In other words, 96 (26% of 368) responders report working in both the private and public sectors including 22 (30.0% 67) who self-identify as members of a migrant population group. Although the latter numbers are quite small, they suggest that migrant population group members may tend to practice more in both sectors than do non-migrant population groups. The small number of responses in this grouping prevents in-depth analysis and warrants further investigation.[252]

251 ADRAC, *Conciliation: Connecting the Dots, Conciliation Report* (ADRAC, November 2021).
252 Analysis of the specific migrant population groups cannot produce meaningful data because the numbers for each group are so small.

Ten (10) responders answered "No" to both questions, indicating that they do not practice in either the private or the public sector.[253] These are surprising figures and raise the question, in which other sectors might mediators or conciliators be practising?

Possible explanations include:

- Some could have been trained but not yet able to conduct mediation in any sector; this status is noted by three responders who report not using reality testing;
- Some could have retired from mediation practice, and so do not conduct mediations in either sector; for example, three of the responders to the private/public question indicate elsewhere in the survey that they have been in practice for more than ten years, and have conducted more than 200 mediations – which might suggest being at retirement age;[254]
- It is possible that one or both of the questions was written in a way that was difficult for some responders to understand.

Responder demographics

This section reports on data collected from responses to several of the online survey questions relating to responders' self-identification of sex; of belonging to a First Nations/ Indigenous population group; and of belonging to a migrant population group. The purpose of the questions was to gain some insight into the demographics of the population of NMAS accredited mediators, who are anecdotally often perceived as being predominantly white Anglo-European and female.

Summary of data:

i. Sex: There is a relatively even proportion of female and male responders (with a small female majority).

ii. First Nations/Indigenous and migrant population groups: 7 responders have self-identified as members of First Nations/ Indigenous population groups, and 67 have self-identified as members of a migrant population group.

Responder sex (Q3: 'Do you identify as: Female, Male, Non-binary, prefer not to say')

This question sought basic demographic information about the sex of responders, and it was anticipated it would provide insight into the mediation sector. Of the 368 responses to this question, 190 (51.6%) have identified as female, 175 (47.6%) have identified as male, 1 (0.3%) has identified as non-binary, and 2 (0.5%) preferred not to say (9 submitted surveys do not include a response to this question).

253 ID numbers: 28, 50, 140, 152, 172, 200, 237, 242, 273, 281.
254 ID numbers: 50, 140, 200.

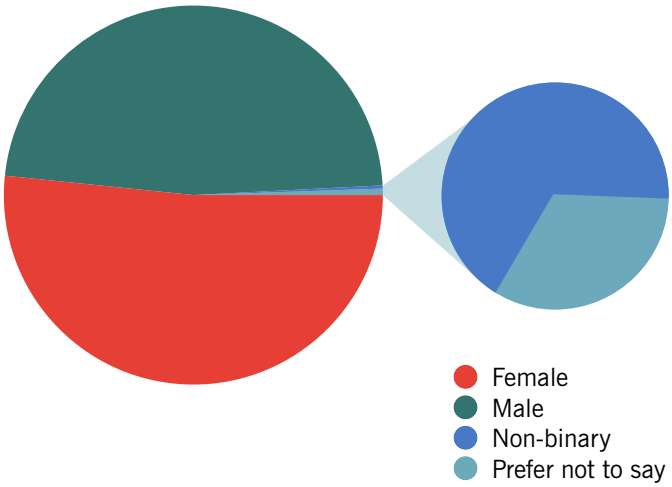

Figure 3.6 Question Q3 ('Do you identify as : Female, Male, Non-Binary, prefer not to say?').

This data shows a similar number of female and male survey responders, with females being in a small majority of 15. Although the data cannot be extrapolated to the broader mediator/conciliator population, it is interesting to see that despite anecdotal reports about mediation being a "feminine" approach to dispute resolution, there is not a preponderance of female responders to this survey.

Aboriginal and Torres Strait Islander/First Nations/Indigenous population groups (Q4: 'Do you identify as a member of the following population group: Aboriginal and Torres Strait Islander/Indigenous/First Nations?')

This question used self-identification as a means of ascertaining participation in the study by Aboriginal and Torres Strait Island/Indigenous/First Nations people. The question was included to demonstrate our interest in these people's participation in the survey and to gain some sense of their levels of NMAS accreditation; however, we did not actively invite their participation apart from the invitation email distributed by the MSB. We anticipated gaining some insight into their interpretation of the concept of reality testing, and into their use of its techniques.

A total of 368 responders answered this question, of whom seven self-identified as being members of the population group. It is not clear how many First Nations/Indigenous dispute resolution practitioners are NMAS accredited, and therefore we cannot calculate whether the quite small number of positive responses to this question is representative of a similarly small rate of NMAS accreditation among Indigenous practitioners. It may also reflect their reluctance to participate in the survey.

It is not appropriate to conduct in-depth analysis of such small numbers of self-identifying First Nations/Indigenous responders. The area of First Nations/Indigenous peace-making, peace-building, and peace-keeping is far more extensive than these figures suggest, and warrants further inclusive research.[255]

Migrant population groups (Q5: 'Do you identify as a member of a migrant group?'; Q6: 'If "yes" [to Q5], please specify')

These two questions were paired in the survey – if responders answered "Yes" to Q5, Q6 asked them to specify the migrant population group with which they identify. Q6 did not have a list of possible migrant population groups from which to choose; we expected responders to identify a broader range of migrant population groups than might be obtained from a tick-box list.

The area of First Nations/Indigenous peace-making, peace-building, and peace-keeping is far more extensive than these figures suggest, and warrants further inclusive research

[255] See, Federal Court of Australia: Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid Work You Mob Are Doing – Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia* (Report to the National *Alternative Dispute Resolution* Advisory Council, 2009).

As with the previous question, this relied on self-identification as a means of ascertaining participation in the study by people from various migrant population groups; and it was included to demonstrate our interest in their participation in the survey, and to gain some sense of numbers with NMAS accreditation. We also anticipated gaining some insight into their interpretation and use of reality testing.

A total of 368 responders included an answer to the first of the paired questions (Q5), of whom 67 (18.2%) self-identified as members of a migrant population group.

In the second of the paired questions, responders provided a range of descriptions which have been collated as follows:

- Non-Anglo Europe: 14 responses (descriptors include European, Norwegian, and Nordic, "Greek/Cypriot", Irish, Dutch, Italian, Portuguese, Serbian, and Croatian)
- Indian sub-continent, including Sri Lanka: 7 responses (descriptors include Indian Punjabi, Indian Tamil, Hindu, "Bi-racial English and Indian", and "Indian appearance born in the Middle East")
- Middle East/Central Asia: 6 responses (descriptors include Palestinian, Lebanon, Egypt, and "Assyrian/Iranian")
- UK, Great Britain: 6 responses (descriptors include UK, England, Northern Irish, Scottish, and British)
- South Africa: 4 responses
- New Zealand: 3 responses (including one descriptor: "NZ/Māori/Chinese")
- Asia/SE Asia: 3 responses (descriptors include Chinese, Malaysian)
- USA: 2 responses
- A selection of individual responses: "African", "Jewish/SE Asian/Middle Eastern"; "Mauritius/Rodrigues"; "South American – Colombia", "Maltese"; "Pacific Islander"; "Black"; "overseas born, non-Australian parents"; and an "Aussie", a migrant worker in Japan.

Of particular interest, in the context of NMAS, is the greater number of responders who self-identify with Non-Anglo migrant population groups (at least 30 of the 67 responders) (including Non-Anglo European, Indian sub-continent, Middle East/Central Asia, Asia/SE Asia) compared with 11 responders who self-identify with Anglo migrant population groups (UK, Great Britain, New Zealand, USA).[256] The former population group is larger again if the individual non-country-specific responses are included. This indicates the cultural diversity among NMAS accredited mediators.

If this survey's proportion of responders (18.2%) from migrant population groups were to be extrapolated to the broader population of NMAS accredited mediators, up to 800 might be included. This also warrants further investigation.

> Of particular interest, in the context of NMAS, is the greater number of responders who self-identify with Non-Anglo migrant population groups

[256] South Africa has not been included in the count of Non-Anglo/Anglo migrant population groups because it is unclear if it is considered to be part of what is sometimes called the "Anglosphere".

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Chapter Three – Quantitative focus group data

This is a brief chapter that reports on quantitative data collected in association with the online focus groups. The next chapter, Chapter Four, provides a separate analysis of the unexpected decline in focus group attendance.

Although the online focus groups provided valuable qualitative information about the use of reality testing in the context of both mediation and conciliation, they have also provided valuable quantitative data. This chapter analyses the latter.

Focus groups of mediator/conciliator practitioners were always part of our project design and were included in the human research ethics approval received for the project from La Trobe University. In the then changeable environment of the Pandemic, and unpredictable restrictions on travel, we made a decision to conduct the focus groups online and sought a modification of approved ethical guidelines. The focus groups were intended to be semi-structured discussions among attendees, and, in an online environment, this could be achieved only by limiting the number of attendees at each focus group. No information was distributed about the project's inclusion of focus groups until an invitation email was distributed by the MSB on 3 May 2022.

Ultimately, we decided to organise one focus group for each of six practice areas: Family/FDR; Community-based mediators/conciliators; Tribunal members, solicitors, and barristers as mediators/conciliators; Workplace mediators/conciliators; Commercial/Construction/Business; and Statutory programs and services. We included three additional focus groups for: Lawyer representatives in mediation; Mediation/conciliation trainers; and Mediators/conciliators who do not use reality testing. To maximise the range of views available in the focus groups, we ensured that each participant could attend only one focus group selected by them.

We decided that ten attendees in each of nine focus groups would be a manageable number that could provide us with a broad range of information while enabling them to have discussions with each other. At the most, the focus groups would have a total of 90 attendees. Email invitations to register and participate were distributed by the MSB to the same group of NMAS accredited mediators as had received the email invitation about the online survey. The same group of people having been invited to participate in both research activities, our assumption was that the people who registered for the focus groups already knew about the project and the online survey – and had probably participated in the latter.

Participants who sought to attend an online focus group were required to register through an online portal for only one focus group, after which we sent them a hyper-link for that focus group, and a hyper-link to a short online survey to be completed before the focus group was due to commence.

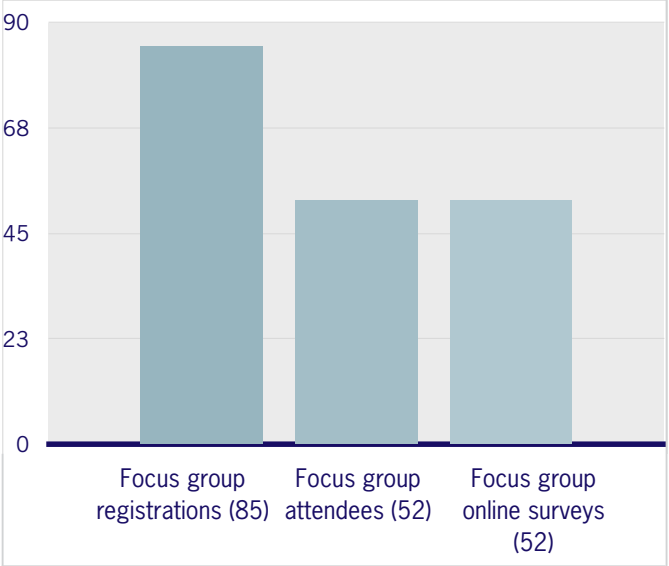

Figure 3.7 proportion of focus group registrations and attendees, including number of submitted pre-focus group online surveys.

The numbers of submitted pre-focus group online surveys is too small for reliable analysis. Two survey questions were designed to collect quantitative data about the responders' professional background, and the areas in which they practice mediation or conciliation. In both questions, a range of options were listed from which responders could select as many as were relevant for them. The surveys show that, of the 52, a large majority (37) report having professional training/education in law. This is more than all the other reported professional training combined. Due to responders being asked to select all options that applied to them, the total number of selected options in response to this question(73) far exceeds the number of submitted surveys indicating the diversity of professional training and backgrounds of mediator/conciliators. It is possible that the diversity could also influence the use of reality testing in mediation, a topic warranting further study.

In terms of the areas in which responders practice, seven areas of practice were selected by more than twice as many responders as were the remaining 10.

> The focus group attendees were predominantly trained/ educated in law, and worked in the areas of workplace/ employment (including the Fair Work Commission); small business; family/FDR; court-connected matters; commercial disputes (including finance); building and construction; and in the community-based sector

The seven selected areas of practice were: Workplace/Employment (including Fair Work Commission); Small business; Family/FDR; Court-connected; Commercial (including finance); Building and construction; and Community-based. The ten areas in which fewer responders reported practising were: Interpersonal; Consumer complaints; Agriculture/farming (including Farm Debt); Discrimination; Education; Transport (including motor vehicle accidents); Medical (including health complaints and medical negligence); Environment; International; and None of the above. As with the previous question, because responders were invited to select all options that applied to them, the number of options selected in response to this question (251) far exceeds the number of submitted surveys.

While emphasising the small number of submitted surveys, it is possible to note that the focus group attendees were predominantly trained/educated in law, and worked in the areas of workplace/employment (including the Fair Work Commission); small business; family/FDR; court-connected matters; commercial disputes (including fiancé); building and construction; and in the community-based sector.

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Chapter Four – Participation and attrition rates

Assessing participation, and attrition rates contributes to understanding of the research process and can lead to improvements in its design. In this chapter, we analyse the data relating to the numbers of people who accepted our invitation to participate in the study (in the online survey and/or the online focus groups), the number of responses to each question in the online survey, and the number of registrants who attended the focus groups. We refer to the former as the participation rate, and use the term "attrition rate" to describe any measured decrease, or "drop-off", in either; the number who actually turned up and participated in the focus group they registered for.

> Assessing participation, and attrition rates contributes to understanding of the research process and can lead to improvements in its design

The purpose of this chapter is to contribute to approaches and methodologies in mediation research, in particular in empirical studies that rely on the input of mediators when investigating the role of the mediator.

Key findings

This chapter's findings suggest that, although participants were initially enthusiastic about contributing to the study, not everyone appeared to remain engaged for the duration of either the online survey or up to the date scheduled for the focus groups.

i. Online Survey: A total of 377 surveys were submitted through the REDCap portal, giving a participation or response rate of almost 10% (9.3% of the 4022 email invitations that were distributed through the MSB database of NMAS accredited practitioners).[257]

a. Only the first survey question includes a response from all 377 participants;

b. There are varying numbers of responses to the remaining survey questions, with the lowest being 283 responses (82 non-responses) to UQ9;[258] [259]

c. Although there is no clearly discernible trend, a drop-off in responses is noticeable in relation to questions seeking qualitative information and that are slightly more complex and reflective.

[257] The researchers were unable to prevent the additional distribution of the invitation email to the membership of an ADR organisation; although it is impossible to know whether this occurred and if it did, how many additional practitioners chose to participate based only on the second email, it is unlikely that potential responders who received the second email had not already received the original invitation email.

[258] The 12 survey responders who claim not to use reality testing and who could not access one set of questions have been factored into these figures.

[259] There is clear differentiation in response rates in the responses to UQ3 (factors that influence the choice to use reality testing); however, the variations are highly likely to reflect the nature of each responder's practice, and the relevance to them of each listed factor of influence. For example, one listed influence factor was 'Interests of the children" and would be relevant only to FDR Practitioners.

ii. Online focus groups: A total of 85 people (out of 100 available places) registered to attend the nine scheduled focus groups; seven of the nine focus groups were fully subscribed, and one was 90% subscribed;

a. A total of 52 people actually attended the focus groups;

b. None of the fully subscribed focus groups had full attendance;

c. Three of the fully subscribed focus groups had 70%+ attendance numbers;[260]

d. Four of the fully subscribed focus groups had only 50% attendance numbers;[261]

e. A total of 32 registrants did not attend;

f. Only six registrants sent apologies for not attending.

As we received emails from interested mediators/conciliators after the close of registrations, we are aware that more people could have registered for the focus groups if there had not been a limit on numbers.

Online survey – declining response rate

This section analyses the rate at which participants' responses to questions declines in the online survey. The analysis includes comparisons between the questions which sought quantitative information, between the questions which sought qualitative information, and between both sets of questions.

The subsequent section analyses response rates as per registrations and attendances at the online focus groups. Figures 5, 6, and 7 (below) included tabulated survey participation and response numbers.

The variation in the numbers of responses to survey questions may also have been affected by participants' experience with technology during their completion of the survey – this issue is considered in more detail below, which

> Participants may have made choices about which questions to answer and which not

explores data trends and possible ramifications for mediator participation in research. There are many possible reasons for the survey response attrition, one of which is that participants may have made choices about which questions to answer and which not.

The survey had three parts: Part 1 (questions Q1 – Q3), Part 2 (questions Q4 – Q10), and Part 3 (questions Q11 – UQ9, including questions NUQ1 – NUQ4). Having completed the final question in each Part, the responder would click on the "Submit" button and open the next Part of the survey.

Below are our observations of changes in response numbers across Parts Two and Three of the online survey.

a) In Part 3, Question Q14 (*'Have you ever used "reality testing" in your mediations/ conciliations?'*) appears to be a differentiation point: after Q14, the number of responses to any of the survey questions does not exceed 295 out of a possible 365; up to and including question Q14, the number of responses to each question consistently exceed 300, with the first ten questions having more than 360 responses each;

b) All questions in Part 2 of the survey seek quantitative information, eliciting 368 responses, and 9 non-responses each; on the other hand, the first four questions in Part 3 (questions Q11, Q12, Q13, Q14) seek a mix of quantitative and qualitative information and the difference in the numbers of responses is immediately apparent: questions Q11 and Q14 both seek quantitative data (ie, "Yes/No") and elicit 320 and 311 responses respectively, while questions Q12 and Q13 seek qualitative information and show a slight decline in responses (313 and 308 respectively).

260 Focus groups for: Community-based mediators/conciliators; Tribunal members, solicitors, and barristers as mediators; and Mediation/conciliation trainers.
261 Focus groups for: Family/FDR; Workplace mediators/conciliators; Mediators/conciliators working in Commercial/Construction/Business; Mediators/conciliators in Statutory programs and services.

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c) The response attrition rate is most clearly observable in Part 3, when the survey questions are intended for people who have reported using reality testing in their practice and are seeking only qualitative information (ie, UQ1 – UQ2, and UQ6 – UQ9).

d) The number of responses shows a staged decline in this latter part of the survey, culminating in the final question (UQ9) having the survey's lowest number of responses (283).

As shown in Figure 3.8, below, there is a notable decline in responses in the section of the survey that seeks qualitative answers (ie, when the tick-box questions end). The final tick-box question which includes ten separate tick-box sub-questions (UQ3 "Below are the factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?"), has varying response rates from a maximum of 290 to a minimum of 272. Allowing that 290 responders at least read and considered the content of UQ3, responses to UQ6 ("When do you not use reality testing") are already lower (288 responses and 89 nil responses), this suggests that more responders answered UQ3 than any of UQs 6, 7, 8, and 9. The response rates continue to decline through the final three questions (UQs 7, 8, and 9).

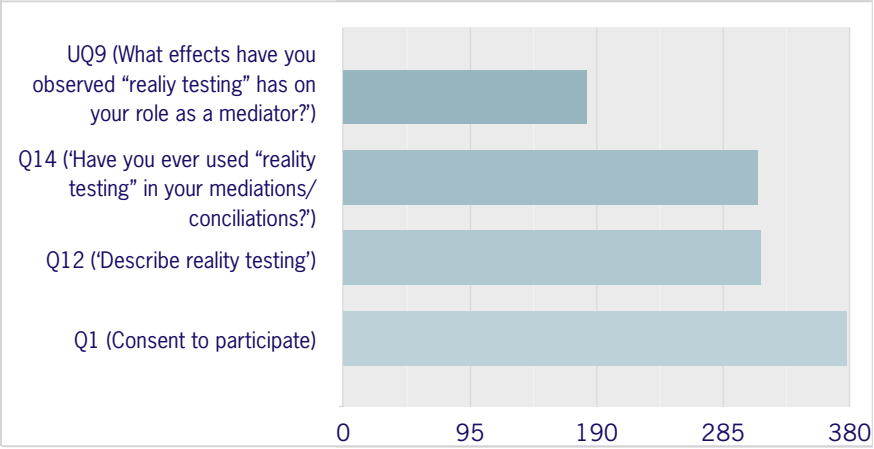

Figure 3.8 showing proportion of decline in response rate using representative questions Q1, Q12 Q14, and UQ9. Questions Q1, Q12, and Q14 were accessible to all participants and UQ9 was accessible to all bar the 12 who do not use reality testing.

A different perspective on the declining response rate is created by analysing the REDCap records showing the numbers of surveys that were submitted at the end of Parts 2 and 3. In addition to recording the numbers of completed surveys, REDCap also records the numbers of surveys that were "not completed" and those for which there are no submitted records (ie, a survey was commenced under an automatically generated ID number, but no responses were submitted under that ID number. These REDCap records show that, at the end of Part 2 of the online survey (final question was Q10 ['Do you identify with a migrant population group?']), the number of surveys with no responses is seven, and the number of surveys with some but not all responses (ie, "not completed") is 2. At the conclusion of Part 3 of the survey, the number of surveys with no responses is 56, and the number of "not completed" surveys is 27. These figures appear to confirm that, as the survey questions became more complex, the numbers of responders declined.

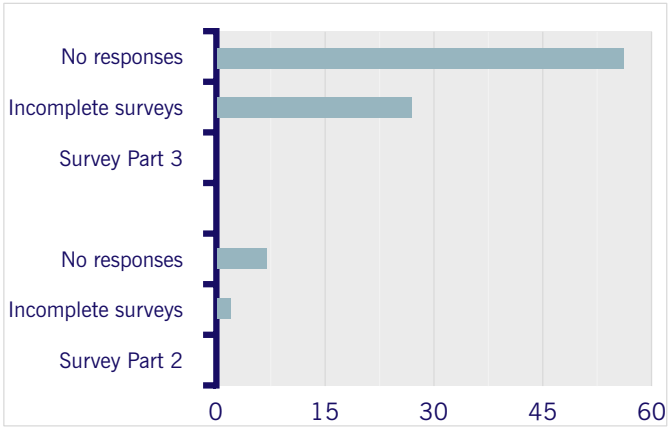

Figure 3.9 comparing two datasets from survey Part 2 and Part 3 (the surveys with either no responses at all or only partial responses).

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Possible influence of survey design

In its initial draft form, the survey was too long to be a single undertaking for any participant,[262] and we decided to divide it into three parts: Part 1 was intended to include screening questions for any of which a negative response would exclude the responder from the remainder of the survey; Part 2 sought quantitative demographic information; and Part 3 focused on reality testing, seeking a mix of qualitative and quantitative information. During Part 3, responders were automatically separated into those who use reality testing and those who do not.

When a responder had completed the final question in either Part 1 (Q3) or Part 2 (Q10), a pop-up "Submit" button appeared and once clicked, moved the responder automatically to Part 2 or to Part 3. There is a decline in response numbers between the final question in Part 1 and the first question in Part 2, (questions Q3 [374 responses] and Q4 [368 responses] respectively), and between the final question in Part 2 and the first question in Part 3 (questions Q10 [368 responses] and Q11 [321 responses] respectively). However, the latter decline is significantly greater than the former, by a factor of almost 8.

Although there may have been some effect from responders not clicking the "Submit" button and so not gaining access to the next Part of the survey, this does not fully explain the difference in response numbers between Parts 2 (Q10) and 3 (Q11), nor the declining response numbers throughout Part 3.

Question 11 ('When you attended mediation training, did the course include specific information about "reality testing"?')

This survey question is analysed separately because it has the highest number of non-responses among the questions seeking quantitative information. A total of 321 participants responded to this question (56 did not). A third of those who did not include a response are among the participants with the most mediation experience (ie, 10+ years in practice and 200+ matters mediated/conciliated), and well over a third (22) are among the those with least experience: 0–2, and 2–5 years. Among the latter, 15 have conducted up to 50 matters.

What cannot be accurately ascertained is the number of non-responders to this question who have not attended any mediation training. Although one of the optional answers was 'I have not attended a mediator training course', this is the only option in the survey to which no responses were received.

NMAS requires attendance at a mediation course (and success in any associated skills assessment) as a pre-requisite for initial accreditation, and in the context of the MSB's funding of this project, it is reasonable to assume that very few, if any, NMAS accredited responders would report being untrained.

32.1% of non-responses to Q11 came from people identifying as having had more than ten years in mediation practice. This is a significant number of non-responses from a single population group. While it cannot be known why this cluster of people chose not to respond to Q11, some possible reasons can be posited: they preferred not to expose either that they had not attended mediation training, or that they did not recall what that training included; they may also not have wanted to provide an answer suggesting that their training did not include information about reality testing. It is also possible that at least some non-responders simply missed the question, although it was the opening question of Part 3 of the survey and would be less likely to be missed than, say the final question in Part 3.

262 The REDCap consultant also recommended partitioning the survey so participants could more readily track their own progress.

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Survey question	Total responses	Total non-responses
Q1 (consent to participate	377	0
Q2 (18+ years of age)	374	3
Q3 (mediator/conciliator/both)	374	3
Q4 (years in practice)	368	9
Q5 (matters mediated)	368	9
Q6 (Govt/public practice)	368	9
Q7 (private practice)	368	9
Q8 (sex)	368	9
Q9 (ATSI)	368	9
Q10 (migrant)	368	9
Q10 a (migrant specify)	64 of 67	3 of 67
Q11 (RT in training)	320	57
Q12 (describe RT)	313	64
Q13 (RT contribution to process)	308	69
Q14 (use of RT)	311	66
NUQ1 (Why not use RT)	11 of 12	1
NUQ2 (RT affects role of mediator)	11 of 12	1
NUQ3 (RT affects parties)	11 of 12	1
NUQ4 (affects decision making)	11 of 12	1
UQ1 (when use RT)	295 of 365	70
UQ2 (how use RT)	291 of 365	74
UQ3 (see below for separate analysis)		
UQ6 (when not use RT)	288	77
UQ7 (RT effects on parties)	285	80
UQ8 (RT effects on outcomes)	284	81
UQ9 (RT effects on role of mediator)	283	82

Table 3.2 tabulated response rate for questions Q1 – Q14, questions NUQ1 – NUQ4, questions UQ1 – UQ2, and questions UQ6 – UQ9.

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Response rate: survey questions UQ3, UQ4, and UQ5

The ten options provided within question UQ3 (factors that influence choices to use reality testing) are not included in the analysis of response rates because people's response choices are highly likely to be dependent on the context in which they mediate/conciliate. For example, a mediator/conciliator who does not work as an FDRP is unlikely to provide any response for '(f) Interests of the children' because it is a fundamental requirement of FDRPs to take the children's interests into account.[263]

The response rates for questions UQ4 and UQ5 are not included in the analysis of response rate because they were intended to be applicable only to those participants who wished to provide additional information.

The highest number of responses to any of the ten options in UQ3 is 290 for option '(b) The nature of the dispute'. This suggests that only 290 people chose to provide any responses at all to question UQ3, and that, out of 365 people who had access to this part of the survey, 75 chose not to provide a response to the question about factors that influence their choice to use reality testing.

There is no discernible pattern in response rates for question UQ3. This suggests that responders may have read the question in its entirety before deciding whether to include any response at all, and, if so, which "factors" to include in their response.

Survey question	Total responses	Total non-responses
UQ3 (factors influencing choice to use RT)		
(a) Context/setting	289 of 365	76
(b) Nature of dispute	290 of 365	75
(c) Presence of legal advisors	287 of 365	88
(d) Parties' capacity/expectations	289 of 365	76
(e) Safety concerns	287 of 365	88
(f) Interests of children	272 of 365	93
(g) Public/private setting	281 of 365	84
(h) Fairness (eg, power imbalance, disadvantage)	287 of 365	78
(i) Need to reach settlement	287 of 365	78
(j) Ensure statutory/industry compliance	286 of 376	79
UQ4 (if none of table, what influences your choice)	128	238
UQ5 (any other influential factors)	199	167

Table 3.3 tabulated response rate for questions UQ3 – UQ5.

263 While the number of responses to this option could suggest that 272 FDRPs participated in this study, it is an unreliable figure because we do not know how many non-FDRPs chose to respond to this option.

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Survey question	Total responses	Non-responses
Q11 (RT in training) [quantitative]	320	57
Q12 (describe RT) [qualitative]	313	64
Q13 (RT contribution to process) [qualitative]	308	69
Q14 (use of RT) [quantitative]	311	66
UQ1 (when use RT) [qualitative]	295 of 365	70
UQ2 (how use RT) [qualitative]	291 of 365	74
UQ3 (factors influencing choice to use RT - see below for separate analysis) [quantitative]	290 of 365	75
UQ6 (when not use RT) [qualitative]	288	77
UQ7 (RT effects on parties) [qualitative]	285	80
UQ8 (RT effects on outcomes) [qualitative]	284	81
UQ9 (RT effects on role of mediator) [qualitative]	283	82

Table 3.4 tabulated responses showing decline in numbers of responses by nature of information being sought (ie, quantitative and qualitative) and by progress through Part 3 in the survey instrument.

The seven survey questions posed to people who use reality testing show a declining number of responses from 295 responses to question UQ1 to 283 responses to question UQ9. There can be many explanations for this staged decline including responders growing disinterest in the topic of reality testing and in responding to questions about it; their sense that they had already provided sufficient information (eg, see responses in the form of "See above", or similar); or their growing dissatisfaction with the relatively complex information being sought.

It is interesting that the questions with the lowest response rate are the final three which asked responders to give consideration to what they had actually observed in their mediations, as well as to demonstrate awareness of how their role might affect the mediation process.

Focus groups: Registration and attendance rates

Online focus groups were conducted as part of this research project. As semi-structured discussions among mediators/conciliators, they were intended to be a source of information about the use of reality testing that would augment the information gained form the online surveys. As noted earlier,[264] the focus groups were designed to maximise the participation of practitioners from a wide range of practice areas, to enable semi-structured, or guided, discussion among attendees, and to be manageable (from the researchers' point of view).

Nine focus groups were created, and a total of 85 people registered to attend, with a maximum allowable of ten in each group. Each focus group was recorded (using the Zoom recording facility) and, at the beginning of each, all attendees were reminded of the recording.[265]

The MSB distributed an invitation email to each of the same 4022 NMAS accredited mediators to whom the original online survey invitation had been sent. We decided that creating a long lead-in time between the invitation and the actual events might lead to a decline in interest, so the invitation email was sent on 3 May, one week before the first scheduled group. We held up to four focus groups each week with the final group held on the afternoon of 30 May.

The online registration platform, Eventbrite, maintained automated records showing the number and dates of registrations for each group, and the numbers and dates on which people accessed the registration portal. This gave us a unique dataset from which we could estimate the level of interest in the focus groups, as well as obtaining comparative figures for registrations and attendance. Figure 3.9, below, shows for each focus group the number of registrations, the number of attendees, the number of apologies from non-attendees, and the total number of portal visits.

The figures in column 3 suggest enthusiasm about the Focus Groups that was well beyond our expectations.[267] It also shows the levels of interest that each group generated, with Family/FDR appearing to be the most popular, and people who do not use reality testing being the least popular.[268] Column 1 shows the number of registrants for each focus group, while Column 3 shows that, ultimately, many ended up not attending.

Focus Group	Registrations	Attendees	Portal views[266]
Family/FDR [10 May, 9am]	10	5	281
Lawyer representatives [10 May, 4pm]	9	7	146
Community-based [13 May, 9am]	10	8	170
Tribunal member-, solicitor-, and barrister-mediators [13 May, 4pm]	10	7	221
Mediation/conciliation trainers [26 May, 9am]	10	9 (1 apology)	119
Workplace mediators/conciliators [27 May, 9am]	10	5	185
Commercial/construction/business [27 May, 4pm]	10	5	142
Mediators/conciliators who do NOT use reality testing [30 May, 9am]	6	2 (3 apologies)	94
Mediators/conciliators who work in statutory programs/services [30 May, 4pm]	10	5 (2 apologies)	116

Figure 3.9 showing registration, attendance, and online portal "visits" for each focus group.')

264 See above, Chapter Three – Quantitative focus group data.
265 See Chapter Three, above, for more detail on the focus groups.
266 The number of times each portal was viewed has been automatically generated by Eventbrite.
267 This enthusiasm was also conveyed personally to us through emails.
268 We had included this focus group to ensure the people who do not use reality testing had an opportunity to contribute their views, apart from the online survey.

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There can be many reasons for non-attendance including urgent business to attend to, illness, unexpected difficulties (eg, child minding), and so on

We notified a number of people who had been unable to register that we would let them know if a vacancy occurred; however, the majority of non-attendees did not provide notice that they would be unable to attend, and vacant places could not be filled.

There can be many reasons for non-attendance including urgent business to attend to, illness, unexpected difficulties (eg, child minding), and so on; also, some people may simply have forgotten. A small number of people contacted us saying they were having difficulty accessing the Zoom link; however, in all cases where they sought assistance, they were able to attend.[269] Amendments were made to the Zoom link and to Eventbrite's automated reminder system during the week beginning 23 May (before the final five focus groups); however, there continued to be similar drop-off rates after the amendments were made.

The record of visits to (or "views of") the Eventbrite portal provide valuable insight into the periods of highest interest, as is shown in Figure 9, below. This graph covers a period of only four days from the day on which the original invitation email was distributed. Subsequent days are not shown, and do not reveal any change in visit numbers. On Day 2 (4 May), 604 people visited the registration portal which is the highest number of visits for any single day. The email was distributed in the afternoon, and it is likely that many people did not read it until the next day.

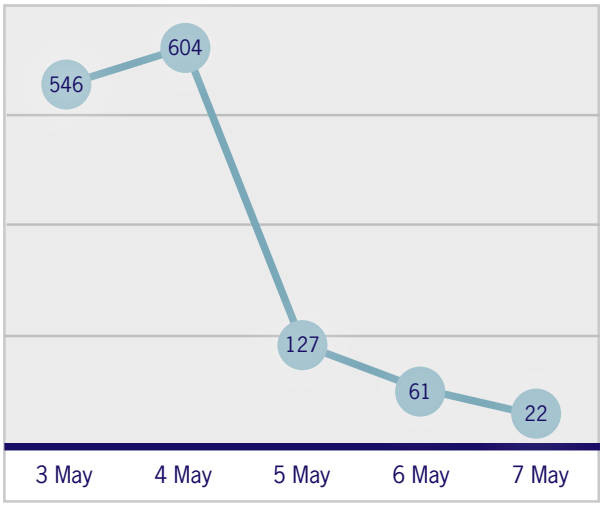

Figure 3.10 graph showing sharp decline in focus group interest between Day 1 (email distribution) and Day 3 (the second day after email distribution).

In summary, there were the following numbers of portal visits:

- **Week 1** (Tuesday 3 – Monday 9 May): 1404 views of all Focus Group portals; the vast majority of views were on 3 May [546 views] and 4 May [604 views]; by 5 May, the number of views dropped markedly to 127 ('representing only 21% of the 604 views on 4 May).
- **Week 2** (Tuesday 10 – Monday 16 May): a total of 116 views of all Focus Group portals.
- **Week 3** (Tuesday 17 – Monday 23 May): a total of 43 views of all Focus Group portals.[270]
- **Week 4** (Tuesday 24 – Monday 30 May): a total of 10 views of all Focus Group portals.

269 Amendments made to the EventBrite notification protocols did not appear to affect attendance rates.

270 On Monday 23 May, there were 23 views of three Focus Group portals (3 of the Community-Based portal; 14 of the Workplace portal; 6 of the Statutory programs/services portal; the Workplace Focus Group was held on the afternoon of the following Friday, perhaps suggesting that, on Monday 23 May, that Group's registrants were checking their week's commitments).

Online survey – submitted responses by date

The REDCap records for the online survey include the time and date on which Parts 1, 2, and 3 were submitted for each survey. These records show a distinct pattern that accords with the distribution of the original invitation email, and the distribution of a subsequent reminder email. The original email was distributed on Friday 26 November 2021, and the reminder email was distributed on Monday 13 December (the latter only four days before the survey closed).

On the day of the email distribution, 84 people submitted completed surveys. Over the following weekend (27 and 28 November), a further 15 people submitted their surveys, and, on Monday 29 November, another 21 surveys were submitted. Over the following 13 days (30 November – 12 December) 50 surveys were submitted, with none submitted over the weekend of 11 and 12 December.

On Monday 13 December, the MSB distributed a reminder email to the same 4022 NMAS accredited mediators, and, on that day, a further 68 surveys were submitted. A total of 49 surveys were submitted in the remining four days before access to the survey ended on Friday 17 December.

The two figures to the right, Figures 3.11 and 3.12 show the dramatic decline in survey responses after both the original invitation and the remainder email. They also show that the decline is sharper after the reminder email.

The figures from both the online survey and the focus groups show a link between invitation and reminder emails for the online survey, and between the invitation email and registrations for the online focus groups. This confirms research findings from other fields: research participants are most likely to accept an invitation to participate in a study very soon after receiving the invitation ('in the first day or two … [or] almost immediately'[271]), and the levels of interest drop off markedly within a relatively short period.[272]

As the below online survey figures show, a resurgence in responses can be expected following some form of reminder.[273]

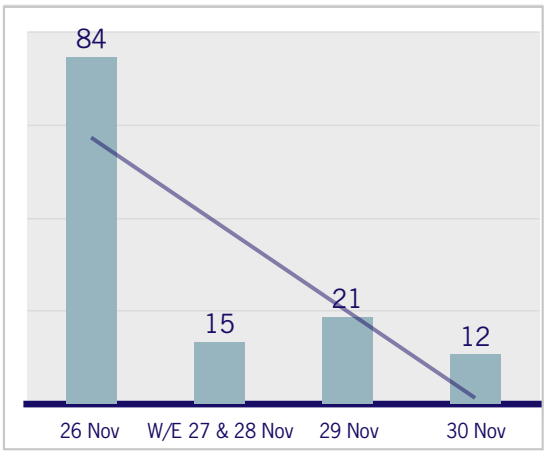

Figure 3.11 showing decline in survey submission during first five days of availability.

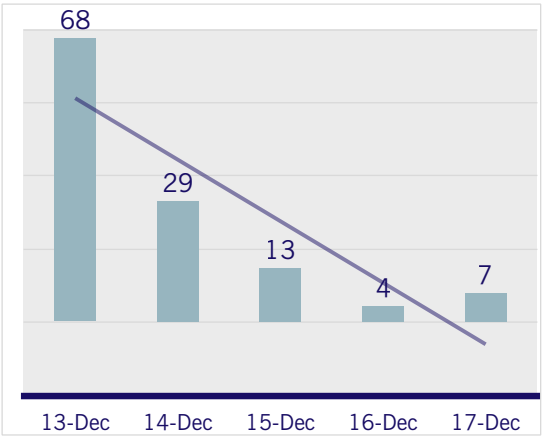

Figure 3.12 showing decline in survey submissions during five days after reminder email.

Within this project, we are fortunate that mediators and conciliators with an extensive range of experience and knowledge and from all spheres of practice have chosen to participate and to provide rich and detailed information about their ideas, perceptions, and observations about reality testing as a concept and as a practical tool of mediation. Future researchers may wish to design simpler data collection methods and instruments, or they may choose to warn participants about both the complexity of the research issues and the importance of their input.

271 Dillman, D. A., J. D. Smyth, and L. M. Christian, *Internet, Phone, Mail, and Mixed-Mode Surveys: The Tailored Design Method* (4th Edition, John Wiley & Sons, USA, 2014), 25.
272 Dillman, D. A., J. D. Smyth, and L. M. Christian, *Internet, Phone, Mail, and Mixed-Mode Surveys: The Tailored Design Method* (4th Edition, John Wiley & Sons, USA, 2014).
273 Sammut, R., O. Griscti, and I. J. Norman, 'Strategies to Improve Response Rates to Web Surveys: A Literature Review' (2021) 123 *International Journal of Nursing Studies* 1.

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Chapter Five – Conclusions

The analysis of quantitative data obtained from the online survey and the online focus groups suggests that professional mediators/conciliators from many areas of practice and with varying levels of experience are willing to participate in mediation research, making contributions based on their own ideas, perceptions, experiences, and observations.

However, future research activities might benefit from incorporating specific study design features aimed at improving mediator/conciliators’ engagement with the research. There may be advantages if researchers were to enlist mediator/conciliator participation much earlier, so mediators/conciliators and researchers work together to design the project, encouraging greater and more committed input from the practitioners themselves. Being involved in collaborative research projects would give mediators/conciliators some insight into how research works and enable them to contribute to investigations of the role of the mediator/conciliator, including of their effectiveness, and ongoing improvement in mediation practice.

There may be advantages if researchers were to enlist mediator/conciliator participation much earlier so mediators/conciliators and researchers work together to design the project, encouraging greater and more committed input from the practitioners themselves

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PART 4. REALITY TESTING IN MEDIATION – QUALITATIVE ANALYSIS AND FINDINGS

Chapter One – Introduction

Part 4 of the report includes our thematic analysis and findings from the qualitative information from the online survey and from the online focus groups, and the latter's pre-focus group surveys.[274] There are five chapters that explore the information we have received from professional mediators and conciliators in survey responses and focus group discussions, including descriptions of reality testing, its use, and its effects.

The survey design employed a mixed method approach to collect quantitative and qualitative information and the findings from the quantitative analysis of the survey have been reported in Part 3. The survey includes open-ended questions enabling participants to actively contribute to the research with freedom to share their own views and perceptions about reality testing. The questions were designed to avoid suggestions of our own views, and our intent was to collect the richest possible information representing a wide diversity of views from across the mediation sector.

We also collected information during discussions with nine online focus groups which were conducted during May 2022.[275] Prior to focus group meetings, registered attendees were required to complete a pre-focus group online survey containing four questions covering their mediation/conciliation practice; fields of practice; professional training/education (other than mediation); and a final question asking them to describe reality testing. The latter was included to preempt discussion of such descriptions within the focus groups, where some participants' views might influence others.

As noted in Part 3 of this Report, the number of responders to each qualitative question in the online survey differs from the total number of survey responders because not everyone included an answer to every survey question.

274 Throughout the Report, we refer to the main online survey as "the online survey" and to the focus group survey as "the pre-focus group survey.

275 The focus groups are described in detail in Part 1 of this report.

Responders consistently mention, or refer to, three factors: a focus on agreement or settlement; a focus on disputants, mediators and process: enhancing the participation and engagement of the disputants, enhancing the role of the mediator, and/or on progressing the mediation process; and a combination of both (or a dual focus)

Alternative terms for "reality testing"

A small number of responses to the online survey claim not to use the term "reality testing". One example of an alternate term is, 'reality check';[276] in response to UQ1 (when responders use reality testing), one responder claims not to use the term "reality testing" 'as it sounds a bit jargonish for community/neighbourhood mediations'.[277] While noting responders' stated terminological preferences, for the purposes of this analysis, the researchers have ensured that all information is treated as a form of reality testing and is included in the analysis.

Summary of key findings

There are four key findings from our thematic analysis of the online survey responses and focus group discussions. According to study participants:

1. The use of reality testing can increase the likelihood of achieving an agreement/settlement by:

    a. Clarifying details and practicalities of agreement terms;

    b. Exploring consequences of not achieving agreement/settlement; and

    c. Exploring alternatives.

2. The use of reality testing can improve the parties' engagement and contributions, by helping them:

    a. Accommodate others' views;

    b. Shift their thinking, and/or expectations, and/or perspectives;

    c. Participate more constructively;

    d. Be more cooperative; and

    e. Be more self-determinative.

3. Many responders are sensitive to the influence of mediator/conciliator skills, techniques, demeanour, and awareness on:

    a. When reality testing is used (including during the mediation process, in response to specific disputes, and in response to specific events);

    b. How reality testing is used (including its purpose, and choice of specific techniques); and

    c. Reality testing's effects on the outcomes, the parties, and the process.

4. The strongest influence on practitioners' choices to use reality testing at any given time is the capacity and expectations of the disputants; similarly, the disputants' capacity and willingness are key influential factors when mediators/conciliators choose *not* to use reality testing. This is followed very closely by fairness including when mediators/conciliators observe power imbalances.

Analytical themes and subthemes

Throughout the information provided in responses to all the online survey questions, responders consistently mention, or refer to, three factors: a focus on agreement or settlement; a focus on disputants, mediators and process: enhancing the participation and engagement of the disputants, enhancing the role of the mediator, and/or on progressing the mediation process; and a combination of both (or a dual focus). We have isolated these three and treated them as the analytical themes for providing an overarching analysis of the information that survey responders have submitted.

[276] ID number 257.
[277] ID number 265.

Most of the responses to each survey question have included other factors that are of specific relevance to that question, and we have treated these as subthemes. Examples of subthemes include: in the context of when mediators/conciliators use reality testing (question UQ1), responses have tended to be couched in terms of differential stages in the mediation process; the parties' behaviour; impasses and sticking points; specific types of disputes; and power imbalances. In the context of how they use reality testing (question UQ2), most responses have focused on specific techniques such as mediator questioning styles. In the context of choosing not to use reality testing (question UQ6), responses have focused on factors relevant to: the parties (eg, their capacity, willingness, and safety); the process (whether progress is being made without reality testing); the mediator (whether the use of reality testing might impinge on the integrity of the mediator's role); and the presence of advisors. Each cluster of subthemes is examined in more detail as part of the analysis of each survey question.

Overall incidence of analytical themes

It is clear from all submitted responses to all survey questions that the majority of mediators/conciliators use reality testing to explore the possibility of an agreement or settlement, although the numbers are not markedly higher than those who use the intervention with a view to enhancing either the participation and engagement of the disputants or the role of the mediator/conciliator.

Figure 4.1, to the right, shows the proportion of responses that include reference to each of the three analytical themes as a percentage of the total number of responses to all ten relevant survey questions,[278] providing a stark indication of the dominance of the two main views among the online survey responders.

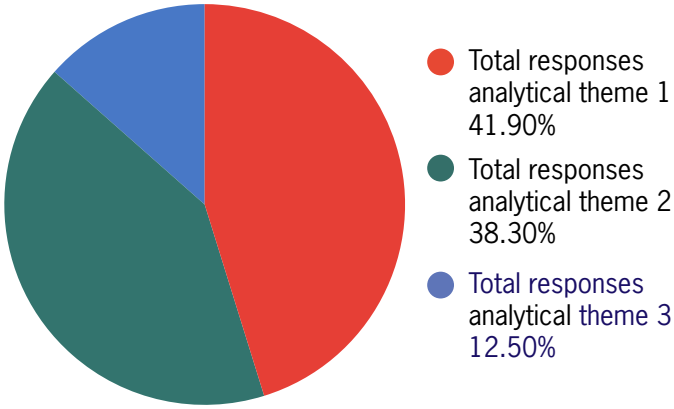

Figure 4.1 shows proportion of total survey responses focusing primarily on analytical theme 1 (focus on agreement/settlement), analytical theme 2 (focus on disputants, mediator, and/or process), or on analytical theme 3 (dual focus); percentages are based on our thematic analysis.

The analysis also suggests that practitioners tend to focus more on the agreement/settlement when they are considering any of the following: the observed effects of reality testing on outcomes; how they choose to use reality testing; how they describe reality testing; and the contributions that reality testing makes to the mediation/conciliation process. On the other hand, responders are most cognisant of the parties, the mediator, and/or the process when they are considering when to use, and when not to use, reality testing. Responders consider defining characteristics of reality testing to be both exploring a possible agreement/settlement, and enhancing disputants' participation and engagement in the process.

> Responders are most cognisant of the parties, the mediator, and/or the process when they are considering when to use, and when not to use, reality testing

[278] The ten relevant survey questions are: Q12, Q13, UQ1, UQ2, UQ4, UQ5, UQ6, UQ7, UQ8, UQ9.

Data limitations

Throughout Part 4 of the report, we provide some basic quantitative data for each survey question, such as the number of responses that were submitted for each question ("Response data"). We also provide limited proportional data where this contributes directly to understanding the qualitative information (eg, about the incidence of analytical themes and subthemes among responses to each survey question[279]). This proportional data arises from our thematic analysis and because thematic analysis is a subjective method, associated numerical data cannot be interpreted as statistical data: the proportional data is intended to be indicative only.

There are some responses to each survey question that do not include information relevant to the question, and so cannot be included in the analysis. Most occur in response to UQ9 (*'What effects have you observed that "reality Testing" has on your role as a mediator?'*), and examples include '… reality testing can be extremely effective in re-focusing on interests …';[280] 'Confirm understanding parties have of the agreement';[281] 'It is a powerful tool to bring about compromise'.[282] Although such responses cannot contribute to analysis of the specific survey questions, they have contributed to the overall analysis.[283]

In the context of thematic analysis, we anticipated that information provided in responses to question Q12 (*'Describe reality testing'*),[284] in particular, would be key to identifying the analytical themes. We were also aware that the scope of the survey questions would require responders to shift their focus from, say, the practicalities of reality testing in questions UQ1, UQ2, and UQ3[285] to more a reflective stance in questions UQ7, UQ8, and UQ9,[286] and that the format shift from tick-box questions in Parts 1 and 2 of the survey to the more complex open-ended questions in Part 3 might challenge some participants.

The remaining chapters in this section report on the practicalities of reality testing, as revealed in our thematic analysis of responses to the online survey: what is reality testing and what does it contribute to the mediation process (Chapter Two); using reality testing, including when it is used, how it is used, and when is it not used (Chapter Three); and the effects of reality testing – on the parties, on the outcomes, and on the role of the mediator (Chapter Four). A separate Chapter analyses the survey responses and focus group discussions from study participants who do not use reality testing in their practice.

279 Explanations of key analysis themes is provided in the next subsection.
280 ID number 52.
281 ID number 74.
282 ID number 228.
283 Throughout the survey responses there are eight in which the only response is "As above", or "See above": ID numbers: 25, 45, 69, 101 (X2), 118, 248, 282.
284 '*Describe reality testing*'.
285 Respectively, *'During those mediation/conciliation processes, when did you tend to use "reality testing"?"; 'During those mediations/conciliations, how did you use "reality testing" – eg, what did you say and/or do?'; 'Below are the factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?'*
286 Respectively, *'What effects have you observed "reality testing" has on the parties?'; 'What effects have you observed "reality testing" has on the final outcomes of a mediation?'; 'What effects have you observed "reality testing" has on your role as a mediator?'*

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Quick guide to qualitative survey question

Original question	Short form
Describe reality testing	Q12
In your view, what does "reality testing" contribute to the mediation process?	Q13
Reality testing non-user: Explain why you have chosen not to use reality testing	NUQ1
Reality testing non-user: In your own view, in what ways might "reality testing" affect the role of the mediator	NUQ2
Reality testing non-user: In your own view, how might the use of "reality testing" affect the parties?	NUQ3
Reality testing non-user: In your own view, how might the use of "reality testing" affect the parties' decision-making?	NUQ4
Reality testing user: Think about some cases in which you considered the use of "reality testing" techniques to be important. (a) During those mediation/conciliation processes, when did you tend to use "reality testing"?	UQ1
(b) During those mediations/conciliations, how did you use "reality testing" – eg, what did you say and/or do?	UQ2
Reality testing user: Below are the factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?	UQ3
In the survey, UQ3 includes ten individual factors whose importance responders were asked to rate. In the below analysis, each of the ten factors is given a numerical identifier:	
Context/setting UQ3a	UQ3a
Nature of the dispute	UQ3b
Presence of legal advisors	UQ3c
The parties (eg, capacity and expectations)	UQ3d
Safety concerns	UQ3e
Interests of the children	UQ3f
Whether mediation is occurring in a public or private setting	UQ3g
Fairness (including addressing what you see to be power imbalances or disadvantages)	UQ3h
The need to reach a settlement	UQ3i
The need to ensure terms of agreement comply with legislative or industry standards	UQ3j
Reality testing user: If you take into account none if the listed factors, please specify what influences your choice to use "reality testing"	UQ4
Reality testing user: What other factors have you considered when choosing to use "reality testing" techniques?	UQ5
Reality testing user: In which situations would you choose not to use "reality testing"?	UQ6
Reality testing user: The final three questions are an opportunity for you to provide your own observations of the effects of "reality testing". (a) What effects have you observed "reality testing" has on the parties?	UQ7
(b) What effects have you observed "reality testing" has on the final outcomes of a mediation?	UQ8
(c) What effects have you observed "reality testing" has on your role as a mediator?	UQ9

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Chapter Two – What is reality testing? What does it contribute to mediation/ conciliation?

Survey question Q12 'Thinking about your own knowledge and experience of mediation/ conciliation, how would you describe "reality testing"?'

Survey question Q13 'In your view, what does "reality testing" contribute to the mediation/ conciliation process?'

These two questions were included in the survey both to gain some understanding of how mediators perceive reality testing and its possible contributions to any mediation, as well as to help identify key themes for our analysis of all qualitative survey information. This Chapter analyses information submitted in responses to both survey questions.

Key findings

- Reality testing is described mostly in terms relating to agreement/settlement but also, and to a lesser extent, in relation to parties' participation, the process, and the role of the mediator.
- Reality testing's contributions to the mediation/conciliation process is conceived mostly in terms relating to agreement/ settlement.

Our analysis takes into account the 52 responses to the pre-focus group online survey.[287]

Describing reality testing - Thematic analysis

In this section, we identify the analytical themes; demonstrate their proportional incidence in responses to question Q12; explore the descriptive terms that responses include in relation to those themes; and consider subthemes that are specific to this survey question.

The responders' descriptions of reality testing vary; however, most include a focus on agreement/settlement; on the parties, on the mediator and/or on the process, or on combinations of any of those. In addition, some responses highlight the purpose of reality testing; some identify the target of the reality testing; some describe the intended effect of reality testing; and some describe factors relevant to the effectiveness of reality testing and concerns about its use.

[287] Two of the 52 pre-focus group surveys contain insufficient information to be usable: ID numbers: FOG05S30, FOG05S33.

Our analysis of responses to question Q12 reveals three recurring factors whose repeated occurrence suggests that responders saw them as integral to reality testing. We compared their incidence across the responses to all survey questions, finding that they recur repeatedly throughout. We are confident in identifying them as the three analytical themes for our analysis.

The three analytical themes are:

1. A focus on agreement/settlement;

2. A focus on the parties, the mediator, and/or process; and

3. A focus on both of the above (ie, a dual focus).

Proportional incidence of analytical themes

Analytical theme 1 – Focus on agreement/settlement

Most responses include descriptions of reality testing with a focus on agreement/settlement in a dispute resolution process. For them reality testing is described in terms of exploring the possibility of an agreement/settlement and ensuring the terms of any such agreement are workable, practical and able to be implemented. Some responses have also included consideration of possible consequences if no agreement is reached, and possible alternatives to proposed options. Figure 4.2, to the right, shows that the majority of responses to question Q12 have focused solely on exploring the potential for an agreement/settlement (including consideration of alternatives and consequences); around one quarter have focused solely on the parties/mediators/process, and just over 10% have a dual focus. The remaining responses have focused on various other factors.

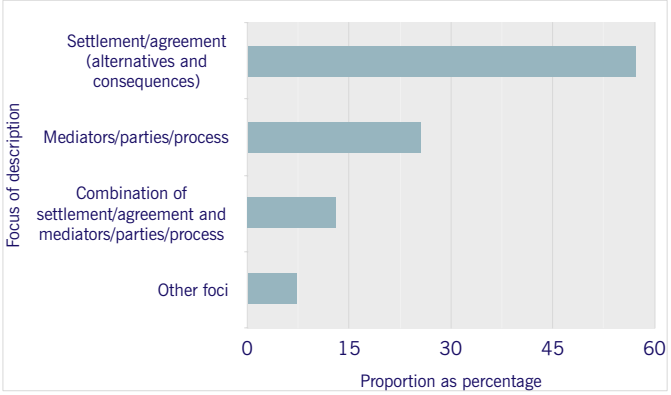

Figure 4.2 showing proportions of responses to Q12 with a focus on each of three analytical themes: agreement/settlement; the parties/mediator/process; or a combination of both.

There are also subtle variations in each of the three analytical themes. For example, as shown in Figure 4.3, below, within the group of responses focused solely on agreement/settlement, far more mention exploring the detailed terms and practicalities of terms/options than mention the possible consequences of not reaching an agreement and the alternatives to proposed options. A smaller proportion mention both. Among the responses to this question, only three include any mention of factors related to self-determination (such as informed decision-making).

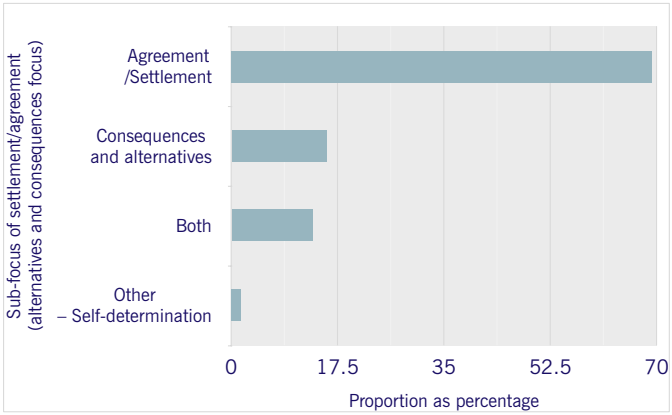

Figure 4.3 showing proportional breakdown of responses that focus on achieving an agreement/settlement.

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Analytical theme 2 – Focus on the parties, mediator, and/or process

Among responses focused on parties and mediators, the vast majority have a clear focus on the parties, while the mediator and the process are the focus of far fewer responses (see Figure 4.4, below).

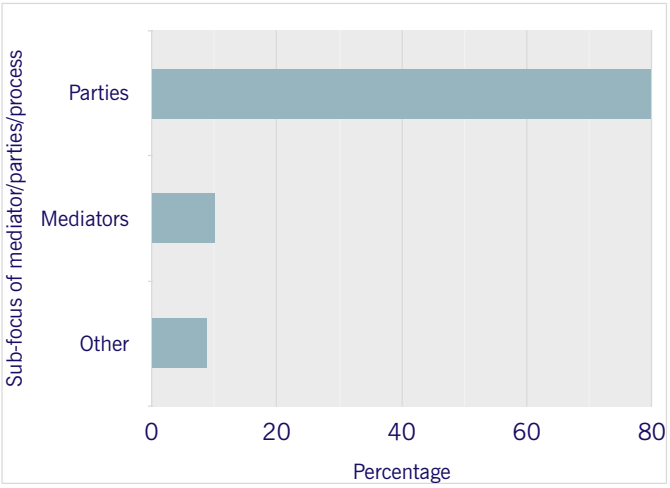

Figure 4.4 showing proportional breakdown of responses that focus on the parties/mediator/process.

Generally, when responses include a focus on the parties, they suggest also having a purpose of enhancing their participation and/or engagement in the process.

Analytical theme 3 – Dual focus

Among the responses with a dual focus, most include mention of the parties; a smaller proportion include mention of the agreement/settlement; and even fewer include mention of the mediator. As is shown in Figure 4.5, to the right, this cluster of responses is relatively small.

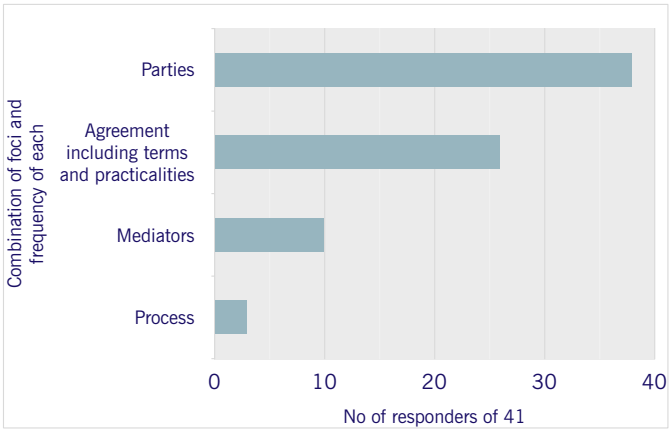

Figure 4.5 showing proportional breakdown of responses with a dual focus.

Reality testing – descriptive terms

Focus on agreement/settlement

The responses that focus on agreement/settlement describe details and practicalities of proposed terms of agreement including exploring the consequences of not achieving agreement/settlement, and alternative agreement options. Some responders focus on the relevance of reality testing to ensuring the agreement/plans/proposals are realistic,[288] manageable,[289] workable,[290] and able to be implemented.[291] Others describe reality testing as a way of checking that the plan/proposal/agreement is free of ambiguity,[292] that it will be effective,[293] and that it will satisfy both parties' best interests.[294] Below are some examples of these responses:

> Assisting the parties to consider the reality of their situation at various stages especially in terms of the proposals and agreements to ensure that they can actually be implemented in the real world following the mediation.[295]
>
> Reality testing is the opportunity for you as a mediator… to determine whether a proposal is actually realistic to the party/parties. It may also be an opportunity to test their beliefs/opinions or thoughts of something.[296]

288 ID numbers: 1, 45, 20, 75, 84, 133, 147, 195, 201, 205, 238, 248, 253, 288, 294, 323, 325, 377.
289 ID number 1.
290 ID numbers: 205, 77, 101, 170, 205, 240, 293, 313, 341, 352.
291 ID numbers: 12, 20, 45, 74, 75, 121.
292 ID number 32.
293 ID numbers: 47, 203.
294 ID numbers: 308, 313, 311, 117.
295 ID number 20.
296 ID number 221.

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> I use reality testing to facilitate parties to assess the viability of options posed in the negotiation phase.[297]
>
> [I]f agreement reached is realistic and parties able to deliver on its contents; if timeframes for implementation of the agreement is realistic.[298]
>
> Reality testing to me is applying any agreement proposal to expected future scenarios to examine the effectiveness. What is learned by the Party can then be used to improve the suitability of the proposed agreement content.[299]
>
> Checking with clients if they have considered the implementation of any agreement in sufficient detail to make it clear, realistic, and achievable; with contingencies in place for changes that could come up.[300]
>
> Open questions to parties designed to allow them to assess how realistic each party's understanding of the facts is, and how workable/appropriate/legal are any options/ proposals that may have identified.[301]
>
> Parties often want a lot more than they are going to get, so getting them to ground themselves in reality is beneficial to ensure they are realistic about the outcome they reach.[302]
>
> Checking parties understand the benefit or consequences of any possible resolution.[303]

Some responses describe reality testing as a means of exploring the consequences of proposed options and comparing them to the consequences of not reaching an agreement at the mediation/conciliation.[304] Others describe it as way of comparing various aspects of a party's situation to the possible ramifications for them if the matter does not resolve in the mediation or conciliation.[305] One responder's description encompasses many aspects of reality testing:

'Parties often want a lot more than they are going to get, so getting them to ground themselves in reality is beneficial to ensure they are realistic about the outcome they reach'

> Creating the space for parties to assess their best and worst alternatives to a negotiated agreement, assisting parties to reflect on information in order to make informed decisions, helping parties to explore risks and benefits of each possible pathway, assisting parties to shift perspectives to develop realistic options, creating space for parties to explore how and whether options and offers will work in practice, helping entrenched parties to explore the problem more broadly.[306]

Some descriptions have a focus on aspects of reality testing that relate to the consequences of not reaching an agreement including reference to any potential outcome of litigation in courts, where courts can be both a setting in which the parties have no control, and a source of potential decisions against which the acceptability of proposed outcomes can be measured.[307]

> Explaining to each participant separately that litigation is full of risk, and that even though they may consider their position to be 'bullet proof', in reality, very few people's cases make it through litigation unscathed.[308]
>
> Reality testing is the process of having the party consider how realistic the scenario put forward by him is and whether it is likely to be accepted by a court.[309]

297 ID number 25.
298 ID number 45.
299 ID number 47.
300 ID number 75.
301 ID number 101.
302 ID number 223.
303 ID number 309.
304 ID numbers: 17, 42, 87,197, 19, 202, 219, 220, 234, 260, 261, 274, 309, 317, 328, 329, 363.
305 ID numbers: 11, 35, 72, 121, 131, 147, 148, 191, 266, 274, 329, 334, 353.
306 ID number 147.
307 ID numbers: 11, 95, 127, 145, 195, 253, 294, 306.
308 ID number 19.
309 ID number 253.

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> Asking the parties / lawyers to identify the alternatives to resolving the matter at mediation. Asking the parties/ lawyers the likelihood of certain things occurring: acceptance of an option; how an option might work, the likelihood of a Court's approach to something. If required, identifying my concerns.[310]

Several responses describe reality testing as an intervention that can inform the parties about relevant law or legislative requirements,[311] and that can ensure proposed options satisfy those requirements:

> [It's] preparing parties for outcomes not on what they want but based on approaches, legislation, policy terms, evidence and what's fair in all the circumstances.[312]
>
> The ability of parties to appreciate the BATNA, WATNA and PATNA and make an informed decision based on any applicable legislation, case law or make a commercial decision so they can move on with their lives and put this behind them.[313]
>
> … ensuring that they are fully aware of the context they will be making their proposals, including awareness of what the law offers them, doesn't offer them, what support is available to them.[314]

> Some responders describe reality testing as an 'intervention' to be used at a particular stage of the mediation/conciliation process, and aimed at a particular goal

Focus on the process

In their descriptions of reality testing, a very small proportion of responses include a focus on the mediation/conciliation process. For example, a description can focus on reality testing as part of the process;[315] as a way of looking at the process itself;[316] or as a means for the mediator/ conciliator to 'help expectations of … process … to align to likelihood'[317] (ie, that a party's expectations of the process will be met).

Analytical theme 2 includes the potential for a focus on the parties and on the mediator; however, in responses to question Q12, there are specific subthemes that reveal a focus on aspects of both, and they are incorporated into the exploration below.

Subthemes

Although most responses to this survey question clearly incorporate the above analytical themes, some also include subthemes that, for some responders, appear to characterise reality testing: reality testing as a mediator/conciliator intervention, technique, tool; as a discrete process in its own right; and as a component of private and/or joint sessions.

a) Reality testing: mediator/conciliator intervention, technique, tool, skill

Some responders describe reality testing as an 'intervention' to be used at a particular stage of the mediation/conciliation process, and aimed at a particular goal.[318] For example, one response makes clear that it is an intervention, and for specific purposes:

> Intervention by the mediator in private session to challenge assumptions or attitudes of parties and their advisers to the position they have adopted in the mediation.[319]

310 ID number 11.
311 ID numbers: 134, 234, 370.
312 ID number 134.
313 ID number 370.
314 ID number 39.
315 ID number 173.
316 ID number 40.
317 ID number 97.
318 ID number 61: 'Intervention by the mediator in private session to challenge assumptions or attitudes of parties and their advisers to the position they have adopted in the mediation'.
319 ID number 61.

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In most responses, the intervention is directed at the parties and, to a lesser extent, at the parties' legal representatives.[320] Others see it as a specific tool,[321] or a skill:[322]

> Without actually using the words 'reality' or 'testing', a facilitative tool to engage parties with checking a thought, idea, or option against its actuality, potential outcome, or likelihood in being sustainable.[323]

Some responses describe reality testing in terms of mediator approaches and techniques:

> Looking at the situation, remaining impartial, asking each party separately what they are hoping to achieve out of the process of mediation, discussions with them on common ground, identifying things that can be agreed on and working out a solution and the consequences of mediation not working.[324]
>
> Asking parties how they will deal with issues within their matter… that may impede their ability to 'win' or be successful at a determinative process.[325]

b) Reality testing as a discrete process in its own right

Some responders describe reality testing in terms of it being a discrete process in its own right:[326]

> Reality testing is the process …;[327] A practical process …;[328] A process designed to assist the party to be more aware of the risks of not settling …;[329] The process of checking …;[330] A process to illuminate …[331]
>
> A process to challenge …;[332] The process by which participants are asked …;[333] A process whereby the mediator …;[334] A process by which you challenge …;[335] Reality testing is the process …[336]

Other responders do not refer to reality testing as a discrete process or intervention, but as a component, or step, within the larger mediation/ conciliation process.[337]

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320 ID number 11: 'Asking the parties /lawyers'; ID number 22: 'If the parties have lawyers in the mediation, then I will ask them how long the matter [will] take to get before a judge and what would be the estimate of the legal costs. That's a bit of reality testing that I would do' and 'In one mediation the wife did not appreciate that she was entitled to part of the husband's superannuation. The way I tested it was too asked the husband had he received legal advice on his wife's entitlement to contribution. He said yes and that she would be entitled. I called a private session and the wife said she would go and get immediate legal advice. That was a reality test in one respect.'

321 ID number 45: 'an assessment tool/skill'; ID number 57: 'An invaluable tool'; ID number 187: 'As a very useful tool'; ID number 225: 'Very important tool'; ID number: 245: 'A tool which the mediator uses …'

322 ID number 45.

323 ID number 184.

324 ID number 219.

325 ID number 361.

326 ID number 31: 'A process to illuminate alternate options/ views/positions'; ID number 36: 'A process to challenge the perceptions of a party about their conflict/s'; ID number 92: 'The process by which participants are asked to consider a range of self-identified possible outcomes and encouraged to consider them if they were to eventuate'; ID number 213: 'A process whereby the mediator encourages the parties in and one on one private session with each party to consider whether their solutions or position on their matter is actually going to work in reality and of so how they propose it will work given their situation'; ID number 214: 'A process by which you challenge and realign assumptions and expectations'. Also ID numbers: 253, 306, 336, 344.

327 ID number 253.

328 ID number 306.

329 ID number 336.

330 ID number 344.

331 ID number 31.

332 ID number 36.

333 ID number 40.

334 ID number 213.

335 ID number 214.

336 ID number 253.

337 ID number 59: 'A vital part of the mediation process so far as considering options for negotiation'.

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The different ways in which responders have described reality testing may have implications for how they see their role in reality testing. For example, if reality testing is a process, or procedure, it suggests that the mediator/conciliator is taking a methodical, step-by-step approach to their role. Whereas, if reality testing is a tool, it may be like a device that is selected and used to achieve a specific purpose. On the other hand, when reality testing is a "skill", it is more like something that has been learnt, practised, and honed for contextual use. Finally, reality testing as an intervention suggests the mediator/conciliator is taking quite an active role and intervening, or interposing between the parties. However, these various terms are very widely used by mediators and conciliators (and researchers) and interpretations of their use cannot be fully developed without further research.

c) Reality testing in private and/or joint sessions

Reality testing as a tool, intervention, process, or skill can be used at various parts of the mediation/conciliation process, although responses suggest its use tends to be restricted to private sessions, to a lesser extent it can be used in joint sessions, and, according to a smaller number of responses, it can be used during any stage/part of the process including in pre-mediation.[338] Participants spoke about:

> Intervention by the mediator in private session.[339]
>
> Guiding a participant, especially in private session.[340]
>
> In private session, discussing any settlement offers or suggestions.[341]

> If reality testing is a tool, it may be like a device that is selected and used to achieve a specific purpose

> This is something I use in private sessions.[342]
>
> Reality testing is an essential part of the private sessions when preparing to return to the joint session.[343]
>
> Asking questions which invite participants in private session to consider if what they are proposing as an option will be acceptable to the other considering what they heard in joint session.[344]
>
> … use reality testing in joint and/or in private session.[345]
>
> Reality testing occurs at the pre-mediation preparation stage.[346]

Among the responses that refer to reality testing being used in the private sessions, some made specific reference to confidentiality.[347] This apparent emphasis on the confidentiality of the private sessions as a setting for reality testing (mediation as a process already enjoys high confidentiality protections) raises important issues about how the mediator uses these confidential discussions to help move the parties towards achieving an agreement/settlement. Specific issues around how practitioners use reality testing are considered in more detail in the context of survey question UQ2.[348]

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338 ID number 274: 'Reality testing is about a mediator assisting a client/ clients think through the consequences of any particular position or way of proceeding within the mediation context – pre-mediation and at mediation'. ID number 176: 'Reality testing occurs at the pre-mediation preparation stage and during the mediation using breakout'.

339 ID number 61

340 ID number 266.

341 ID number 271.

342 ID number 311.

343 ID number 362.

344 ID number 93.

345 ID number 50.

346 ID number 176.

347 ID number 130: 'A confidential private conversation with each party that gives the mediator the opportunity to ask parties questions about what is happening for them in the mediation, ask them about whether they think progress in moving towards a resolution of the dispute has been made and if not why not, ask them whether there is anything that they might be able or need to say to the other party that would help resolve the dispute, ask them about the options they have for agreeing to a settlement of the dispute, if they offer options ask about what each option would mean for them and whether it is something that they can live with as a resolution, explain to them that it is not the mediators role to put these matters on the table when the mediation between the parties resumes but if they think it will help resolve the dispute they will have the opportunity to propose options for resolution in the next phase of the mediation'; see also ID number 183.

348 See Chapter Three, below.

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Reality testing – purpose, "reality", and roles

This sub-section explores the responses to question Q12 whose focus on the purpose of reality testing, on the mediator/conciliator's authority, on the concept of "reality" itself, and on the roles of the mediator/conciliator and the parties.

Reality testing – form and intent

In responses to question Q12, reality testing is often described in terms of having a particular purpose and being relative to a particular subject matter, including outcomes and facts; the parties' own positions, decisions, perceptions, perspectives, facts, or expectations; and, for some, helping the parties to change those, including 'shift perspectives'.[349] Generally, responses focus on enhancing the parties' engagement in and contributions to the process, in particular, assisting them to accommodate views other than their own, to participate constructively, and to be cooperative. A small number of responses mention reality testing in terms of factors often associated with self-determination (eg, 'make a fully informed decision'[350]).

Reality testing as described by responders takes on a particular form and is intended to generate a particular response or reaction in parties. In relation to form, responders used words such as checking,[351] testing,[352] assisting,[353] helping,[354] challenging,[355] assessing,[356] encouraging,[357] and in relation to response or reaction, responders spoke about moving parties toward something. The forms of reality testing described by responders include softer or more forceful interventions with one response speaking of encouraging, guiding and challenging as two sides of a coin:

> Depends on the context but reality testing is essentially about subtly encouraging/ challenging a party to think through and articulate the repercussions of their position or proposal in practice. A second step is in guiding them in identifying any barriers and thinking through how they would address those barriers in practice. On the other side of the coin, reality testing also involves challenging a party to think about their position/proposal from the other party's point of view from the perspective of how realistic it is (or not) that the other party will agree, compromise, counter propose or reject the first party's position/proposal.[358]

> The forms of reality testing described by responders are likened to two sides of a coin: subtly encouraging and guiding, as well as challenging how realistic they are being

[349] ID number 145; see also ID numbers: 3, 120, 325, 351.
[350] ID number 31.
[351] ID number 24; 'In terms of resolution it is ensuring the pathway is clear by checking each step …'; ID number 62: 'checking … the parties' views/positions'; ID number 75: 'checking with clients …'; ID number 80: 'Checking whether a party's expressed views make sense …'; ID number 94: 'Checking with disputants their view'; ID number 117: 'Checking with the parties'; ID number 117: 'Checking in to see …'; ID number 135: 'Checking the parties' understanding'; ID number 141: 'Checking with each party …'.

[352] ID number 7: 'Testing the position of the party. How they reached their belief'.
[353] ID number 20: 'Assisting the parties to consider the reality of their situation at various stages'; ID number 30: 'Assisting participants to assess how their decisions might unfold in practice…'; ID number 40: 'It is about assisting, challenging and guiding …'; ID number 48: '… assisting them to evaluate the likelihood of proposals and offers …'; ID number 147: '… assisting parties to reflect in information … to shift their perspectives to develop realistic options'; ID number 177: 'Assisting parties to put aside their chosen position, see the other parties side and hear their experience …'; ID number 203: 'Assisting the participants to consider options …'; also ID number 227, 234, 244, 274, 270, 312, 321, 328

[354] ID number 17: 'helping to expand the parties' imagination in solution-seeking'; ID number 27: 'helping participants to test their thinking'; ID number 76: 'Helping clients to describe how specific proposals might play out in day to day life'; ID number 87: 'helping the parties to consider the real world implications and consequences of their proposals and options. Helping the parties to structure and build in contingencies where needed'; ID number 97: 'helping expectations of outcome, process, investment (emotional material etc) to align to likelihood'; ID number 132: 'Helping the participant to consider/appreciate the relative feasibility of a their 'option''; ID number 133: 'Helping parties consider their position/communication/offers/options in a way consistent with probable (realistic) expected outcomes'; ID number 140: 'helping them to understand what might happen if a certain course of action(s) is taken'; ID number 371: 'Helping a party, or the parties together, to test the logic and/or groundedness of a statement/position/thought to their story …'; ID number 374: 'helping parties to understand their and the other side's positions and as appropriate chances of success'.

[355] See below.
[356] ID number 23, 30, 45, 74, 98, 101, 208, 238, 323, 335, 343, 363, 376.
[357] ID number 35, 40, 83, 92, 96, 143, 146, 176, 195, 213,255, 267, 273, 288, 317, 332, 345, 356.
[358] ID number 83.

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While this responder speaks about three forms: encouraging, guiding, and challenging, challenging appears to be a more forceful intervention. To challenge is to "question" or to "contest", but could also be the gentler, "test". Responses that include "challenging" in their description of reality testing speak about challenging parties to reflect;[359] challenging expectations;[360] challenging and guiding 'thought processes';[361] challenging views and positions;[362] challenging beliefs;[363] and challenging a party to consider the workability of ideas and suggestions.[364] One responder's description shows how forceful challenging can be:

> … challenging opposing views to question a position and instigate some doubt in a firmly held position in order to clarify or prove the existence of variants to a party's position, to open the parties to negotiation.[365]

Other responders speak about 'challenging [the party] to see the issue from the other party's perspective',[366] 'challenging the parties' perception of the strength of their case',[367] and challenging each party's understanding of the reality of their position.[368]

The descriptions demonstrate the way in which mediators/conciliators see their role as well as the influences they can have on parties. This speaks to the power of the mediator/conciliator in the process. This goes to the purpose of reality testing; the intended end result.

For example, responses speak about intervening:

> … to move them from their positions to their interests.[369]
>
> … making parties aware.[370]
>
> [to] … realign [parties'] assumptions.[371]
>
> … [as an] attempt to change parties' perceptions by suggesting fresh assessments.[372]

359 ID number 1.
360 ID numbers: 3, 72, 214.
361 ID number 40.
362 ID number 62.
363 ID number 190.
364 ID number 73.
365 ID number 91.
366 ID number 190.
367 ID number: 239.
368 ID number 301.
369 ID number 117.
370 ID number 159.
371 ID number 214.
372 ID number 285.

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Some responders mention a specific focus on changing a party's "mind" or "mindset", and others speak about creating doubt in the parties' minds

Some responses imply the mediator/conciliator's purpose in using reality testing through mentions of the parties' situation;[373] their capacity to continue the process;[374] the legal advice they have received;[375] past actions (including whether things could have been handled differently in the past);[376] their 'emotional regulation in the moment';[377] and how their proposals affect others.[378] In one example, the mediator/conciliator uses reality testing with the intent of 'break[ing] through to participants who have become recalcitrant'.[379] Reality testing is also described as being a discussion between the mediator/conciliator and a party on whether the other party can do what is being asked, or how a proposed arrangement will work;[380] a discussion about the party's position, view, belief; and a discussion seeking to correct misconceptions,[381] to identify common ground,[382] to explore a party's body language,[383] and to test a party's perception of facts or positions.[384]

In summary, responses to question Q12 suggest that there are many forms of reality testing with different intents.

The intent is likely to be contextually derived, and may be reliant on the mediator/conciliator's assessment of both progress within the mediation/conciliation, and of the parties' responsiveness to the mediator/conciliator's interventions, and to the process. Approaches to reality testing range from gentler through to more forceful interventions. The levels of forcefulness may have ramifications for the facilitative model of mediation set out in the NMAS.

Reality testing – "reality"

Many of the descriptions of reality testing are expressed explicitly in terms of the mediator/conciliator seeking to change or adjust intangible concepts such as the parties' thoughts, perceptions, beliefs, assumptions, attitudes, positions, ideas, capacity, expectations, understandings, views of self and others, and reality (as they understand it).[385] Some responders mention a specific focus on changing a party's "mind" or "mindset",[386] and others speak about creating doubt in the parties' minds, expanding their imaginations, shifting their views,[387] testing efficacy and reasonability in real life of thoughts and beliefs proposed[388], and 'introducing objectivity into parties' narratives'.[389] One responder describes reality testing in ways that accommodate several intangibles:

> A skill used by a M/C [mediator/conciliator] to allow a party to change what they think about a proposition/offer/prospect of success at trial or *any held belief* so that it changes the parties' thoughts about that proposition etc.[390] (researcher emphasis)

373 ID number 20.
374 ID number 220.
375 ID number 22.
376 ID number 24.
377 ID number 39.
378 ID number 39.
379 ID number 187.
380 ID number 195.
381 ID number 202.
382 ID number 219.
383 ID number 220.
384 ID number 353.
385 For example, see ID numbers: 3, 17, 36, 40, 43, 46, 61, 62, 72, 81, 97, 120, 147, 186, 190, 194, 214, 217, 221, 239, 250, 297, 312, 326, 351, 356.
386 ID number 40: 'turning a party's mind to', or ID number 257: 'encouraging a resolution mindset'.
387 ID numbers: 3, 147, 325, 351.
388 ID number 43
389 ID number 195,
390 ID number 120.

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> Reality testing is also described in terms of getting parties to 'ground themselves in reality'; testing the 'groundedness of a statement/ position/thought'

Some responders do refer to "reality" or being "realistic" (or equivalents) in their descriptions of reality testing, including references to checking whether parties have realistic expectations;[391] realistic understanding of facts;[392] realistic points of view;[393] and realistic positions.[394] Others refer to checking whether it is realistic to expect other parties to agree to a proposal;[395] or to checking what is realistically possible.[396] Separate responses describe helping parties to reflect more realistically;[397] to have a realistic view of a problem, or of an outcome; or to just have more realistic views generally.[398] There is also mention of having a realistic idea of court proceedings and outcomes.[399] At a more general level, reality testing is also described in terms of getting parties to 'ground themselves in reality';[400] testing the 'groundedness of a statement/position/thought';[401] and 'testing the reality of thoughts, ideas and opinions of oneself or of another'.[402]

The wording of such descriptions suggests that the reality requiring some form of change or adjustment is seen to be that of parties and their current thinking (or position), while the mediator/ conciliator brings a different reality to bear on the situation – on the whole, arising from the mediator/conciliator's own perceptions and experience. The ways in which that latter reality is applied can vary. For example, it can include initiating a re-exploration of the party's present or future circumstances;[403] or examining a likely court decision based on previously decided cases (many responses refer to precedent court/tribunal decisions); or re-checking relevant legislative provisions.

Reality testing – roles

The descriptions also show that reality testing usually involves only two people in a private session: the mediator/conciliator and one disputant themselves, a suggestion that is confirmed in responses to question UQ1 (see Chapter Three, below). The mediator/conciliator initiates the reality testing "session", and the party is expected to accept and participate in this exploration/examination of their "reality". Some responses describe reality testing only in terms of the parties examining their situation and without describing the mediator/ conciliator's active role. For example:

> A process whereby the mediator encourages the parties in a one-on-one private session with each party to consider whether their solutions or position on their matter is actually going to work in reality and if so, how they propose it will work given their situation.[404]

On the other hand, some responses do not identify the role played by the parties in the reality testing, focusing instead on the mediator as the active player: the mediator is 'Shifting/ challenging expectations'; the mediator is guiding 'A process to challenge the perceptions of a party about their conflict/s'; the mediator is 'Checking and challenging the parties' views/ positions', or is 'Gently challenging parties' expectations and beliefs'.[405]

391 ID number 104.
392 ID number 101.
393 ID numbers: 139, 83, 173.
394 ID numbers: 161, 83.
395 ID numbers: 83, 139.
396 ID number 84.
397 ID number 189.
398 ID number 208.
399 ID number 294.
400 ID number 223.
401 ID number 371.
402 ID number 194.
403 ID number 306: '… ask a series of questions of the participants to enable them to truly reflect on the 'real life' and factual outcomes of their present situation, the proposals they wish to put to the other side, or proposals they wish to put to the other side. Reality testing addresses the lived or to be lived details of choices. It considers BATNA's, MLATNA's and court process. It asks the participants to consider their situation in total.'
404 ID number 213.
405 ID numbers: 3, 36, 62, 72 in order.

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One description of the active mediator role includes several types of reality testing:

> Challenging opposing views to question a held position and instigate some doubt in a firmly held position of a party, in order to clarify, and in some instances, prove the existence of variants to a party's position, to open the parties sufficiently to negotiation.[406]

Mediator authority

The descriptions provide some insight into how mediators/conciliators see their role as well as the influence they can have on parties – their inherent power and authority within the process. This authority is highly likely to influence whether reality testing achieves its intended purpose, and it is likely that many responders are aware of this influence. For example, many responders describe reality testing in ways that suggest the mediator/conciliator has a very active and influential role in changing the parties' stance, and so achieving reality testing's purpose:

> … to move them from their position to their interests.[407]
>
> … making parties aware.[408]
>
> … [to] … realign [parties'] assumptions.[409]
>
> … [as an] attempt to change parties' perceptions by suggesting fresh assessments.[410]

A small number of responses give key active roles to the parties, if the reality testing is to be effective. For them, reality testing can 'be compromised by poor quality preparation by parties who have not considered alternative possibilities'.[411] This places emphasis on the parties coming up with substantive matters for discussion about "reality", rather than the mediator.

There is a tendency in the responses to question Q12 for those who talk about encouraging, assisting, and supporting to be focused more on the parties' roles in reality testing, and those who talk about challenging to be less focused on the parties, and more on conceptual factors that might warrant the challenges.

The variety in the descriptions of reality testing suggest there would be some benefit in there being clearer articulation of the scope of reality testing in the context of mediation and conciliation

The variety in the descriptions of reality testing suggest there would be some benefit in there being clearer articulation of the scope of reality testing in the context of mediation and conciliation, and in the context of the NMAS. It is unclear how many responders have considered the parties' awareness of the mediator/conciliator activities or purpose when reality testing, and, in the context of self-determination, it might be beneficial if such awareness were to be encouraged, including an awareness of the differing perceptions of reality that are inherent to use of the intervention.

The mediator/conciliator as reality tester

As already noted above, some of the descriptions of reality testing have a primary focus on the mediator/conciliator's role as an active reality tester. Within the descriptions, the mediator/conciliator instigates the reality testing during the mediation/conciliation process, and the reality testing role can be limited, or it can be more extensive, perhaps depending on the preferences and approach of the mediator/conciliator. Some responders see the use of reality testing as an opportunity for the mediator/conciliator to take an active role testing, encouraging or otherwise determining a relevant version of reality.[412]

406 ID number 91.
407 ID number 117.
408 ID number 159.
409 ID number 214.
410 ID number 285.
411 ID number 9.
412 ID numbers: 221, 356.

A term that appears in responses to Q12, and that recurs in responses to other survey questions, is that of the mediator acting as a 'devil's advocate' when reality testing,[413] although none explain their use of the term (eg, in what way is the mediator/conciliator advocating on behalf of a, perhaps, problematic idea; what is it that the mediator/conciliator says or does that warrants this specific description?). Other responses describe a mediator/conciliator role that appears to have a higher level of intervention (and may be a reference specifically to conciliators) in which they make determinations about the reality of a party's proposal:

> … opportunity for you as a mediator … to determine whether or not a proposal is actually realistic to the party/parties. It may also be an opportunity to test their beliefs/ opinions or thoughts of something.[414]

Some responses are quite open about the mediator/conciliator themselves needing to be satisfied that all realistic possibilities in terms of outcomes have been considered:

> Making sure that both myself and the part(ies) have correctly considered an issue and the possible outcomes perhaps not considered.[415]

> Reality testing is important both for mediators and also for the party himself/ herself to see the other side or another perspective in a realistic point of view.[416]

There are also descriptions that depict practitioners who are even more interventionist: putting forward their own ideas about opportunities and benefits, and becoming "more pressing" in their intent (to achieve an agreement/settlement):

> Becoming more active as a mediator in the process; helping to expand the parties' imagination in solution-seeking; putting to the parties - nearly always in side sessions - potential consequences of not achieving a resolution, and potential opportunities and benefits of options they themselves have not generated; exploring BATNAs; in short, being more pressing in the search for a resolution when the parties themselves fall short.[417]

The responses include references to the mediator/conciliator using reality testing in ways that are intended to ensure that an agreement is "sustainable",[418] and taking an active role to assist in the evaluation of proposed outcomes:

> A third-party Mediator pointing out the possible best and worst outcomes to a party and the effect of each on them both financially and emotionally.[419]

According to the responses to survey question Q12, a mediator/conciliator's use of reality testing can also have the specific intent of preparing the parties for the next stage in the mediation/conciliation process,[420] and also be an opportunity for the mediator/conciliator to ascertain the parties' goals and their achievability:

> Ascertaining the goals of the parties and checking that they are achievable. This can only occur if the mediator has read all the material and is familiar with the legal concepts and the range of damages.[421]

'Reality testing is important both for mediators and also for the party himself/herself to see the other side or another perspective in a realistic point of view'

413 In responses to Q12, ID numbers: 186, 228.
414 ID number 221.
415 ID number 211.
416 ID number 173.
417 ID number 17.
418 ID numbers: 33, 84, 184, 313, 315, 362.
419 ID number 204
420 ID number 220.
421 ID number 330.

CONTENTS

One response mentions the mediator becoming more active when reality testing, being an active participant in the process who describes consequences and 'opportunities'[422]. As noted above, the language used by responders to describe reality testing can give more attention to the mediator's role than to the role of the parties, and while some responders describe encouraging, assisting and supporting, others describe challenging and pressing.

Some responses do speak about factors that, *in their view*, make reality testing effective, and these include the mediator/conciliator's impartiality,[423] the mediator/conciliator's credibility in relation to questioning,[424] and the mediator/conciliator's familiarity with the substantive material and the law.[425]

Describing reality testing in pre-focus group online survey

The descriptions of reality testing provided by responders to the pre-focus group online survey confirm findings from the main online survey.[426] In the pre-focus group survey, reality testing is described as an intervention,[427] a technique,[428] a tool,[429] and a process.[430] Responses include a range of words to describe what they do including *helping* parties;[431] *challenging* agreements or parties;[432] *adjusting* parties' assumptions and perceptions;[433] *testing* parties or proposals or the reality of proposals;[434] questioning, clarifying, encouraging;[435] as well as trialling and checking proposals.[436] Some descriptions of reality testing are theoretical:

> Deconstruction and reconstruction of: (a) perceptions to verifiable facts; (b) expectations to appropriate and achievable outcomes; (c) entrenched opinions to reasonably supportable propositions.[437]
>
> It is part of the human condition that we see things through the prism of our own interests, ambitions, goals and values … The purpose of reality testing is to get people to understand this basic truth of human behaviour, to accept that others (including the Judge) may honestly see things differently, and to factor in that risk to the decision-making process.[438]
>
> The ability to propose contradictions in the perceptual framework of the other.[439]

422 ID number 17.
423 ID number 219: 'Looking at the situation, remaining impartial, asking each party separately what they are hoping to achieve out of the process of mediation, discussions with them common ground, identifying things that can be agreed on and working out a solution if things fail and the consequences of mediation not working and trying to collaborate solutions based on compromise in conflict'; ID number 104: 'Making sure the parties have set realistic expectations going into a conciliation. If there are outcomes that seem unlikely to be achieved, the Conciliator can ask questions in a private session which will help the party properly consider possible outcomes themselves, while the Conciliator still remains impartial'; ID number 138: 'Essential components so long as it doesn't compromise the capacity of the mediator to remain impartial'; ID number 369: 'Remaining impartial, enquiring about how a proposal/view would work in reality'.
424 ID number 9.
425 ID number 320.
426 We have assumed that most, if not all, of the people who attended the focus groups had already completed the project's main online survey; one purpose of the pre-focus group online survey was to subtly remind attendees of the main focus of the focus groups (on the whole, each focus group attendee completed the pre-focus group survey on the same day as the relevant focus group.
427 ID number FOG05S06.
428 ID numbers: FOG05S04, FOG05S09, FOG05S12, FOG05S49.
429 ID number FOG05S23.
430 ID numbers: FOG05S10, FOG05S11, FOG05S12, FOG05S19, FOG05S31, FOG05S32, FOG05S37
431 ID numbers: FOG05S01, FOG05S35, FOG05S38.
432 ID numbers: FOG05S24, FOG05S43.
433 ID numbers: FOG05S03, FOG05S04, FOG05S14,
434 ID numbers: FOG05S05, FOG05S13, FOG06S17, FOG05S50.
435 ID numbers: FOG05S19, FOG05S26.
436 ID number FOG05S18, FOG05S25, FOG05S36, FOG05S40.
437 ID number FOG05S47.
438 ID number FOG05S20.
439 ID number FOG05S02.

CONTENTS

The responses with more focus on mediators include reference to the ability of the mediator to propose contradiction in parties' perceptual frameworks

Responses include a focus on the parties and on the role of the mediator, ranging from descriptions of a less active to a more active role. The responses with more focus on mediators include reference to the ability of the mediator to propose contradiction in parties' perceptual frameworks,[440] the 'ability to shift a person's fixed mindset to a more contextually appropriate state',[441] and to:

> Adjust perceptions. Challenge rigid thought processes, and techniques. WATNA. Acting as devil's advocate. Encourage empathic intelligence.[442]
>
> Challeng[e] the agreements made by the parties of a mediation to ensure the final outcome is mutual and effective.[443]

In relation to the "reality" being tested, some descriptions refer to helping parties to:

> Self-reflect on their thoughts, feelings and actions in order to reframe them from a different perspective, outside of their own narrative. Bringing in how it will be perceived by others, the merit, consequences, and possible outcomes of staying one's own course.[444]

Most responses to the pre-focus group survey focus on achieving an agreement/settlement, including the agreement/settlement itself, or proposed terms of agreement, or the practicalities of certain proposals, or the consequences of not reaching an agreement.

For example:

> A process of ensuring the potential outcome is achievable and deliverable by one and/ or all parties to the conflict.[445]
>
> The process of discussing with parties the realities of their situation at this stage of the conflict: what is ahead of them if they win/lose, what it may cost them personally, emotionally, financially to not resolve, what could be gained by resolution, how their goals might be realised.[446]
>
> Assisting parties to appreciate the risks of not reaching a negotiated settlement.[447]

Reality testing's contributions to mediation/conciliation - Thematic analysis

Survey question Q13 'In your view, what does "reality testing" contribute to the mediation/ conciliation process?'

The responses to this question describe reality testing's contributions in terms of the three analytical themes: agreement/settlement; the parties, the mediator/conciliator and/or the process; and both. As shown in Figure 4.6, the majority of responders focus on agreement/ settlement, including consideration of alternatives and the consequences of not reaching an agreement although there are more responses focusing on the agreement/settlement than on the alternatives and consequences. Of those who focus on parties, mediators/conciliators and the process, more include a focus on the parties, followed by a focus on the mediator, and then on the process.

440 ID number FOG05S02.
441 ID number FOG05S29.
442 ID number FOG05S04.
443 ID number FOG05S24.
444 ID number FOG05S19.
445 ID number FOG05S32.
446 ID number FOG05S31.
447 ID number FOG05S26.

CONTENTS

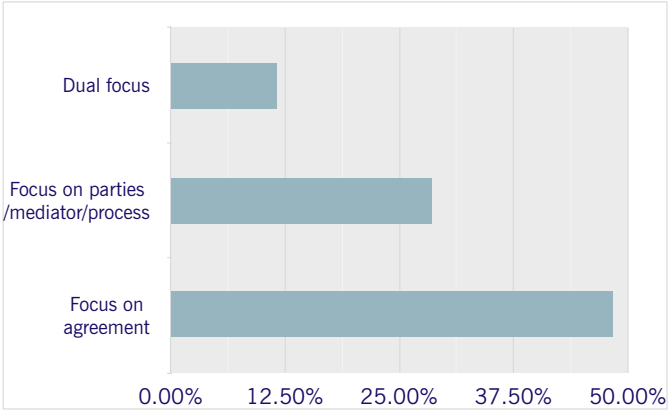

Figure 4.6 shows the proportion of responses to question Q13 that include a focus on each of the analytical themes.

Analytical theme 1 – Focus on agreement/settlement

Responses with a focus on agreement/ settlement include increasing 'the potential that an outcome will in fact be carried out'. Reality testing's contributions include that it 'grounds decision making and leads to a greater number of potential solutions that are acceptable to both/all parties',[448] and that 'it can … go a long way in getting them to reach agreement'.[449] Furthermore, 'it can have a significant impact on the mediation/conciliation process, usually at the negotiation and agreement steps after private sessions'.[450]

Some responses also focus on the quality of the agreement, suggesting that reality testing's contribution is to ensure the agreement is practical, workable, and durable:[451]

> [Reality Testing] assists parties to come up with solutions that are not perfect but are workable and durable.
>
> Reality testing OPTIONS/COMMITMENTS enables participants to be clearer about what exactly is being proposed/agreed, what would be needed to make it work, what pitfalls or obstacles they may run into - and thus to make wiser, more durable agreements.[452]
>
> 'Supports the practicality and durability of agreements. Assists clients to address potential pitfalls before they occur. Helps clients to avoid, or better navigate, future conflict.[453]
>
> Practical application and workability of sought or proposed outcome/resolution.[454]
>
> It helps the clients make sustainable and workable agreements that are practical and have considered lots of factors.[455]

The consequences of decisions made and consideration of alternatives available to the parties are also seen as contributions to the process. For example:

> Increases the potential that an outcome will in fact be carried out as the party has thought about alternatives and considered the upside and potential downside of each before settling on an outcome.[456]
>
> Alternatively (very occasionally) reality testing may cause the party to decide that they would be better off pursuing the matter through a determinative process …[457]
>
> It is critical that parties appreciate the consequences of failing to settle their differences.[458]

> Some responses also focus on the quality of the agreement, suggesting that reality testing's contribution is to ensure the agreement is practical, workable, and durable

448 ID number 55.
449 ID number 150.
450 ID number 329
451 ID number 164.
452 ID number 278; see also, ID numbers: 87, 147.
453 ID number 75.
454 ID number 287.
455 ID number 288.
456 ID number 12.
457 ID number 52.
458 ID number 146.

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Others who focus on the agreement also speak about the need for any decision on a final outcome to be the parties' and to be an informed decision, noting that reality testing helps to achieve that:

> Encouraging participants to reflect on their matter and to come up with their own solutions to the problem.[459]
>
> It goes towards informed consent in that it provides the client breathing space and time to zoom out and look at the broader implications of any proposal.[460]
>
> Getting parties to think about their options puts them in a better position to be able to negotiate and make an informed decision.[461]
>
> Allows the parties to decide for themselves about the feasibility of various potential outcomes and avoids making unrealistic commitments that might impact on their capacity to adhere to their agreement.[462]

Reality testing can 'remind [parties] that this is the time when the power and control to craft or accept a nuanced resolution with the overwhelming advantage of certainty lies in their hands'.[463] These responses highlight the responders' perception of the contribution reality testing can make to informed decision-making, and they focus on parties as decision makers in the process.

The next subsection focuses on those responses specifically referring to the parties in terms of reality testing's contributions to the mediation/conciliation process.

Analytical theme 2 – Focus on parties and the mediator/conciliator

Some responses see a contribution to the process when reality testing is able to assist the parties in their participation and their contributions.

> Reality testing can 'remind [parties] that this is the time when the power and control to craft or accept a nuanced resolution with the overwhelming advantage of certainty lies in their hands'

For example, reality testing 'puts parties in a better position to be able to negotiate',[464] 'gives participants the opportunity to reflect',[465] helps 'keep the focus of the parties on the facts and reality',[466] 'prompts parties to think analytically'[467] 'forces parties to consider the other view'[468] and encourages parties to 'participate thoroughly'.[469] Some responses include more detail than others:

> It can broaden a participant's perspective of what's possible, encourage them to see the situation from other party's perspective and explore the likelihood of their ideas working in the context of the relationship and/or the future.[470]
>
> Awareness, reflection, re-consideration, awakening and many other evolving processes that a party may go through once reality testing is done on him/her by the mediators.[471]

While the latter response focuses on reality testing's contribution in relation to the parties, it also highlights the mediator as an active player, 'doing reality testing on parties'. Reality testing is seen by some as contributing to the mediator/conciliator fulfilling their role in the process:

> It is also a chance for mediators to reflect on the experiences of others who have experienced a range of choices and outcomes.[472]

459 ID number 136.
460 ID number 295.
461 ID number 2.
462 ID number 60.
463 ID number 306.
464 ID number 2.
465 ID number 21.
466 ID number 4.
467 ID number 5.
468 ID number 9.
469 ID number 35.
470 ID number 203.
471 ID number 173.
472 ID number: 30.

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> Absolutely, particularly when as a neutral observer of a dispute you can identify a disconnect between expectations and reality.[473]
>
> …it is a vital part of how a mediator can assist parties…[474]
>
> Part of my role as a conciliator is to take reasonable steps to ensure parties make considered and informed decisions. Reality testing is an important suite of tools to do this.[475]

Some responses, accepting the mediator's role in the dynamic of reality testing, also highlight the need for the mediator to be cautious not to provide an opinion or to force their views on parties:

> It is very important as it is a way of providing input in a not directive manner, it asks participants to think realistically about what they want or what their expectations are, without providing an opinion.[476]
>
> [It contributes] provided that it does not become the context for the mediator/ conciliator to force their views into the process.[477]

> Some responses, accepting the mediator's role in the dynamic of reality testing, also highlight the need for the mediator to be cautious not to provide an opinion or to force their views on parties

These ethical issues that can be seen to accompany a mediator's use of reality testing are considered in more detail elsewhere in this Report.[478]

Analytical theme 2 – Focus on the process

Reality testing's contribution to the process is also described in terms of keeping the process moving by 'curtail[ing] ambit claims and speed[ing] the process along', and keeping the process 'well grounded'.[479] One response points to the fact that what reality testing can mean and contribute will depend on the 'framework of mediation deployed'.[480] Others mention the ways in which reality testing is an 'aid to impasse-breaking';[481] or can allow 'a bigger picture approach';[482] or can ensure participants 'avoid the process remaining at a surface level discussion of thoughts, observations or positions';[483] and can 'balance a power imbalance'.[484] Reality testing is also viewed as, on the one hand, 'the most vital stage of the process',[485] and, on the other, a technique that can assist parties to 'understand the process'.[486]

Regardless of how reality testing might be described, and the various nuances of each responders' own description, there is no denying the importance of understanding its appropriate and timely use, knowledge of its value to the mediation/conciliation process, and awareness of the ethical issues that are inherent in its use.

473 ID number 97.
474 ID number 274.
475 ID number 334.
476 ID number 201.
477 ID number 101.
478 For example, see Chapter Four, below.
479 ID number 275.
480 ID number 210; unfortunately, the description does not explain what the "framework of mediation" might include.
481 ID number 17; see also ID number 130: 'unblocking the process'.
482 ID number 57.
483 ID number 371.
484 ID number 220.
485 ID number 220.
486 ID number 176.

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Chapter Three – Using reality testing

As a result of their responses to survey question Q14, responders were divided into those who use reality testing and those who do not, with each group having access only to that group's remaining survey questions and not to the other group's questions. This chapter focuses on the responses from those who do use reality testing, including the practicalities of reality testing, such as when and how practitioners use it, as well as when they do not; and the factors that influence their choice about using reality testing. The analysis includes all information obtained in responses to four of the survey questions which were among the nine accessible only to participants who answered "Yes" to Q14 (*'Have you ever used "reality testing" in your mediations/conciliations?'*) and were designed to obtain information from practitioners with practical experience in the use of reality testing.

An additional "practicality" was revealed during the online focus groups: what happens when either or both disputants react negatively to the use of reality testing; in other words, how do practitioners handle what some called "party push-back"? This issue is explored in the final section of this chapter.

Practitioner choices about when they use reality testing - Thematic analysis

Survey question UQ1: When is reality testing used ('Think about some cases in which you considered the use of "reality testing" techniques to be important. (a) During those mediation/conciliation processes, when did you tend to use "reality testing"?')

This was the first survey question to be completed only by responders who do use reality testing, and we anticipated that information from responses to it would provide insight into practitioner choices about the circumstances under which they use the intervention. The wording of the question purposely did not include any guidance about the word "when" and responders were free to use their own interpretation of what it might mean.

Key findings

- Most responses to this question interpret "when" as a reference to stages in the meditation/process;
- Of that majority, most use reality testing in private sessions only, or in option generation/negotiation stages.

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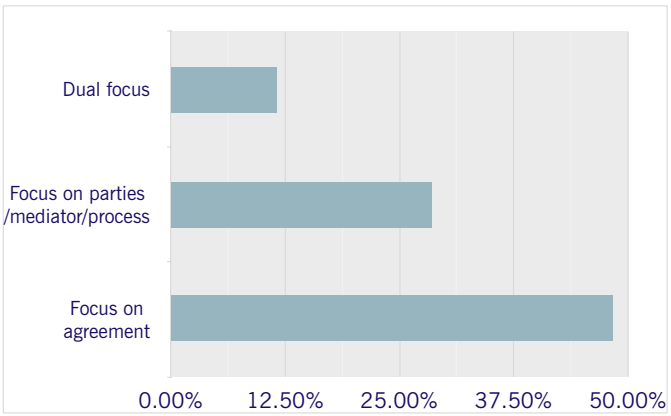
During analysis of information submitted in responses to survey question UQ1, it became clear that, in addition to the overarching three analytical themes (focus on agreement/settlement; focus on parties, mediators, and process; and a combination of the first two), there are also five subthemes. This analysis reports first on the three analytical themes, and secondly on the subthemes.

UQ1 – Analytical themes



UQ1 – Stages in process

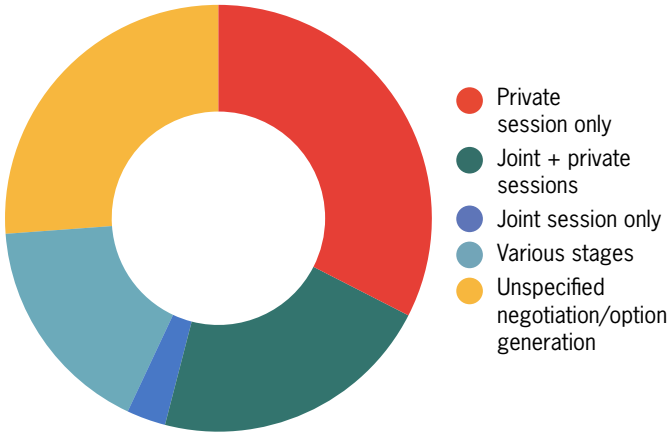


Figure 4.7 shows two aspects of responses to question UQ1: the proportion with a focus on each of the three analytical themes; and, of the 59.3% equating "when" with a stage in the mediation/conciliation process, the proportion that have specified those stages.

Figure 4.7, gives proportional representations of the occurrence of the analytical themes in the responses, and of the responses whose interpretation of "when" has related to specific stages in the mediation/conciliation process.

Responses to this question suggest that when practitioners are considering the appropriate timing for their use of reality testing, their focus is primarily on specific stages in the mediation/conciliation process or on the parties' behaviour, with a view to either increasing the chances of reaching an agreement, or of improving the parties' participation and engagement in the process.

In many of the responses to this survey question, it is not always clear if mention of, say, '… drafting the final agreement'[487] is a reference to finalising the agreement, or to a specific stage in the mediation (ie, "Agreement making"), and, sometimes, such differentiation is difficult. The three analytical themes are discussed below.

Analytical theme 1 – Focus on agreement/settlement (and/or alternatives and ramifications if no agreement)

In general terms, responders report using reality testing as part of exploring the possibility of reaching an agreement. This includes its use to explore agreement options when an agreement is to be finalised; to check alternatives and ramifications if no agreement is reached; and to check the apparent unlikelihood of an agreement being reached.

Some responses mention their use of reality testing occurs in direct association with finalising an agreement or settlement. For example, 'Reality testing comes once the first draft of an agreement proposal is written';[488] 'In open conference discussion with both/all parties formulating agreement clauses';[489] 'When we reach a point of writing the agreed strategies for resolution';[490] 'When finalising the wording of the proposed agreement';[491] and '[When they are] drafting the final agreement.'[492]

487 ID number 346.
488 ID number 32.
489 ID number 47.
490 ID number 268.
491 ID number 280.
492 ID number 346.

CONTENTS

Other responses mention their use of reality testing occurs in association with a need to check alternatives and ramifications in case no agreement is reached. For example: 'Getting parties to think about what their next steps might be if their matter didn't settle at conciliation';[493] 'Test the party with what would be the consequences of not coming to an agreement';[494] 'To check that they believe their offer has a realistic possibility through other forums';[495] 'A reality test around what else the party might do to achieve their goals';[496] 'I raise questions about what happens if the technical report of their expert has flaws, and some or most of it is not accepted by the judge?';[497] and 'I have a BATNA slide I use.'[498]

Responders also consider situations where there is little or no prospect of achieving an agreement. For example, '[I use reality testing] in the absence of an agreement breakthrough';[499] 'Normally when I find it's hard to get an agreement';[500] 'the reality testing is an opportunity to expand on the road ahead if an agreed settlement was not achieved';[501] and 'When the parties were not connecting and their expectations of each other were very far apart.'[502]

Analytical theme 2 – Focus on parties

Some responses demonstrate a clear party-focus when describing the mediator's use of reality testing in private sessions; for example, 'when the parties go into private session',[503] or when 'the parties break from mediation and move into a private session.'[504]

One response describes the private sessions as providing the opportunity for the mediator to 'test the party …' Some others give consideration to the possible effects reality testing might have on the role of the mediator.[505]

A number of responses have mentioned using reality testing when there is an 'impasse',[506] or a 'sticking point',[507] or parties are 'stuck',[508] or 'entrenched',[509] or mediation itself 'stalls'.[510] We have interpreted these as being focused on the parties. For example: 'When disputants appear to be intractable';[511] 'When I felt the parties were getting bogged down in positions';[512] 'As soon as a party wants to dig into their preferred position and path';[513] 'When parties reach a "stalemate" point';[514] and 'Where the parties are fixed and not being able to see the forest for the immediate tree they are dealing with.'[515]

A number of responses have mentioned using reality testing when there is an 'impasse', or a 'sticking point',or parties are 'stuck',or 'entrenched', or mediation itself 'stalls'

493 ID number 2.
494 ID number 238.
495 ID number 294.
496 ID number 328.
497 ID number 331.
498 ID number 374.
499 ID number 17.
500 ID number 18.
501 ID number 158.
502 ID number 201.
503 ID number 170.
504 ID number 266.
505 ID numbers: 315, 341.
506 ID numbers: 161, 198, 239, 334, 373.
507 ID numbers 19.
508 ID numbers: 191, 299, 323.
509 ID number 228.
510 ID number 261.
511 ID number 85.
512 ID number 127.
513 ID number 224.
514 ID number 249.
515 ID number 350.

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Among the responses that mention using reality testing within clearly differentiated stages of the mediation process, the majority refer only to private sessions or caucuses

Subthemes

Based on the information provided by responders, we have identified a number of subthemes including the use of reality testing at specific stages in the mediation process; use of reality testing in response to disputant behaviour; use in specific types of disputes and/or types of mediation; and use when specific events occur within the mediation (eg, when "designing" an agreement, when checking the "reality" of information, and so on).

As noted above, many responses to this survey question include a focus on the agreement/settlement. Many responders have also interpreted the word "when" to be a reference to specific stages in the mediation/conciliation process, including the stage in the process when the possible terms of an agreement/settlement are being finalised. We have sought to differentiate the two groups according to the language used by responders. Where a responder has referred to the finalisation of an agreement/settlement without reference to any specific process stage, we have included the response in the above analysis of analytical themes and have not included it in this discussion of subthemes.[516] Where a responder has referred to the finalisation of the terms of an agreement/settlement being part of a specific process stage, we have included that response in the below analysis of issues that are specific to this survey question.

Analysis of responses to this question, show that a key consideration for responders is that their interpretations of "when" can include any, or any combination, of the following factors which we have identified as subthemes:

I. Reality testing is used during differentiated stages in the mediation process

II. Reality testing is used in response to parties' behaviour

III. Reality testing is used in response to impasses/sticking points

IV. Reality testing is used in response to specific types of dispute, and/or

V. Reality testing is used in response to power imbalances/fairness

The following analysis is reported according to these five subthemes, presented in descending order according to their occurrence.

I. Reality testing is used during differentiated stages of the mediation process

a. During Private Sessions/Caucuses only (where "private session" or "caucus" or similar specific terms are used)

Among the responses that mention using reality testing within clearly differentiated stages of the mediation process, the majority refer only to private sessions or caucuses.[517] For example, 'During private sessions';[518] 'In private sessions, once the parties and their lawyers had exchanged their viewpoints and possibly articulated their interests';[519] 'Strictly during the private session for each side, the one that follows the completed exploration of the issues';[520] 'In private session following opening joint session';[521] 'Usually it is, in my experience, most effective in a private session';[522] 'In private sessions, and as often as the situation requires';[523] and 'In private session only; it cannot be used when both parties are in the room as mediator would look like she was on one person's side'.[524]

[516] A total of 236 responses are included in the subthemes: 175 relate to stages in the mediation process; 43 are responsive to the parties; and 18 relate to the type of dispute.
[517] ID numbers: 2, 7, 10, 13, 14, 29, 31, 39, 45, 46, 48, 49, 55, 61, 62, 72, 73, 83, 87, 93, 117, 120, 128, 132, 133, 134, 140, 141, 142, 149, 159, 164, 168, 170, 172, 183, 184, 185, 186, 195, 197, 202, 204, 217, 225, 228, 238, 243, 244, 245, 250, 255, 257, 260, 266, 271, 272, 290, 294, 297, 298, 302, 305, 306, 309, 312, 317, 326, 328, 329, 331, 341, 351, 361, 363, 372, 377.
[518] ID number 2.
[519] ID number 49.
[520] ID number 132.
[521] ID number 164.
[522] ID number 195.
[523] ID number 271.
[524] ID number 341.

CONTENTS

b. During various, multiple stages of the process (excluding those in d, below)

Many responses include mention of reality testing being used in multiple stages in the mediation process (in descending order of occurrence): during all process stages;[525] during pre-mediation;[526] during the 'negotiation stage', or when disputants are considering options;[527] during the private sessions;[528] during the stages when an agreement is drafted or finalised;[529] during the "exploration" stage, or unspecified later stages;[530] and during the mediator's 'opening remarks'.[531]

One response describes using reality testing during an (unspecified) stage of the process when the disputants decide that no agreement will be reached.[532] One response specifies using reality testing 'between mediation session' (in FDR).[533] One response notes that the mediator's 'timing, tone, language, and technique' change according to the 'context'.[534]

c. During both Private and Joint Sessions (where such terms are specifically used)533

Fifty responders make clear that they are willing to use reality testing in both private and joint sessions, including 'when options were being generated.'[535]

For example:

> More in the private session phase and sometimes required as well in the negotiation phase when options are put across and reality testing is necessary for them to see the proposals in a clearer picture or angle.[537]
>
> In two areas: at the commencement of the mediation where I explain the Tribunal process and the legal issues to be considered; and then in private sessions with the parties just before the final session.[538]
>
> During private session and when we come back in the room together and are working on a way forward.[539]

d. During Joint session only (where terms such as "joint session" or "exploration" are used)

Some responders specify that they use reality testing only in the joint session of the mediation process;[540] however, it appears to be always in association with the generation of options.

525 ID numbers: 51, 66, 77, 111, 122, 126, 139, 146, 148, 177, 187, 194, 208, 224, 234, 270, 274, 282, 286, 323.

526 ID numbers: 60, 76, 82, 169, 176, 177, 203, 223, 227.

527 ID numbers: 60, 273, 279, 315, 327, 343, 371.

528 ID numbers: 139, 169, 176, 203, 227, 286, 371.

529 ID numbers: 68, 82, 212, 223, 279, 315; in these responses, the drafting/finalising of an agreement is described as a stage in the mediation process, not as a specific reality testing activity.

530 ID numbers: 68, 70, 220, 261, 283.

531 ID number 187.

532 ID number 68.

533 ID number 176.

534 ID number 234.

535 For the purposes of this analysis, the term 'in negotiation stage' [ID 84] (and equivalent terms) are interpreted as being during a Joint Session; we are aware that, for some mediators, negotiations are conducted using a "shuttle" approach during which the parties are in separate rooms. Responses did not make clear to which approach they were referring, so we have applied the NMAS standard.

536 ID number 86.

537 ID number 173.

538 ID number 311.

539 ID number 362.

540 We have assumed that responders use mediation/conciliation process that is conducted largely according to NMAS, with the majority of the process stages being "joint" and limited private, or caucus, sessions.

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For example:

> Reality testing whenever a participant offers a solution to an issue.[541]
>
> In open conference discussion with both/all parties formulating agreement clause, [reality testing] should be explored.[542]
>
> I tend to use reality testing during exploration, if options fall out at this stage, and if appropriate.[543]
>
> When evaluating options and mutually exploring options.[544]
>
> In the exploration/option generation phase.[545]
>
> Generally in the exploration and option generation stage.[546]
>
> I have used reality testing in most mediations; if a commitment is made by either party to do something then it is important that they can actually do it; not to erodes trust and can damage cooperation between parents.[547]
>
> When parties were thinking about options and proposals or when parties put forward options or proposals.[548]
>
> After identifying and agreeing on the nature of the conflict and discussing options, or after one party has made an offer to the other party.[549]
>
> Mostly in private session, and in the consideration of options.[550]

A small number of responses state specifically that they use reality testing *before commencing the negotiation stage*. For example, 'Typically, I use reality testing … BEFORE moving to option generation';[551] '[In the] private session before negotiation';[552] and 'After the Exploration stage and before the Negotiation stage.'[553] One response is very specific about the sequence of events that include reality testing: reality testing is used only in private sessions, and only after the party has finished exploring 'the issues', 'before or as they are coming up with the things they want to ask for and offer the other party.'[554]

Three responses specify *not using RT until after the option generation stage*. For example, 'Reality testing typically used post option generation stage';[555] 'Usually between the option generating and negotiating stages';[556] and 'I tend to use reality testing once options have been generated.'[557]

541 ID number 26.
542 ID number 47.
543 ID number 59.
544 ID number 89.
545 ID number 102.
546 ID number 293.
547 ID number 310.
548 ID number 313.
549 ID number 327.
550 ID number 372.
551 ID number 52.
552 ID number 184.
553 ID number 220.
554 ID number 39.
555 ID number 74.
556 ID number 165.
557 ID number 170.

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II. Reality testing is used in response to parties' behaviour and situation (and the response is expressed in terms of the parties themselves)[558]

In this category, responses are included because they have expressed their decision to use reality testing in terms of the parties, rather than in, say, process terms. For example, although the parties getting 'bogged down' is about reaching an impasse,[559] the responder has described the situation in terms of the parties, not in terms of the impasse. Some of the responses included here are also included elsewhere (see ID number 131).

The responses in this category encompass ten separate features of the parties that appear to have motivated the use of reality testing:

- Being stuck, or at an impasse;[560]
- Not considering/being aware of other points of view:[561]
  - Examples include: 'Being "bloody minded"';[562] 'The views of both parties can be shared';[563] 'a party is closed minded';[564] 'Where parties believe their view is correct and find it hard to consider other points of view';[565] 'When one party was insisting he would not consider the other party's request';[566] and 'When parties are focused on their own interests/needs and not considering the other party's in any way.'[567]
- Reality testing as an intervention to de-escalate high emotions:[568]
  - Examples include anxiety and other high emotional states;[569] decision-making affected by emotions;[570] and underlying emotional issues.[571]
- Being uninformed/making assumptions:[572]
  - Examples include: 'ignore one or more important elements (such as legal costs)';[573] 'did not understand the law … and make assumptions about the outcome';[574] 'legal advice seemed to underestimate risk'.[575]
- Being unrealistic:[576]
  - This includes being unrealistic about the dispute,[577] about the outcome,[578] having an unrealistic view of the other party,[579] and having an unrealistic 'approach'.[580]
- Capacity to participate and contribute:[581]
  - Examples include: 'If a party is not a strong negotiator';[582] 'When individuals tend to lack the insight and ability to distinguish their feelings and emotions';[583] 'Participant/s are having difficulty mentalising and getting past issues'.[584]
- Power imbalances:[585]
  - Examples are explicit and include: 'To help balance power'.[586]
- Parties who are unrepresented.[587]
- Issues around truth and good faith:[588]

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558 43 responses are included in this subtheme.
559 ID number 127.
560 ID numbers: 127, 131, 147, 199, 228, 233, 249, 299, 317, 318, 323, 334, 350.
561 ID numbers: 61, 85, 103, 162, 233, 239, 291, 318, 325, 328, 369.
562 ID number 61.
563 ID number 291.
564 ID number 318.
565 ID number 325.
566 ID number 328.
567 ID number 369.
568 ID numbers: 44, 61, 95, 97, 112, 118, 162, 241, 294, 299, 324.
569 ID numbers: 95, 112, 118, 241, 294,
570 ID numbers: 44, 324.
571 ID number 299.
572 ID numbers: 80, 82, 85, 90, 103, 191, 239, 303, 329.
573 ID number 85.
574 ID number 90.
575 ID number 239.
576 ID numbers: 85, 90, 131, 181, 336, 353, 376.
577 ID number 85.
578 ID number 90.
579 ID number 181.
580 ID number 336.
581 ID numbers: 47, 90, 162, 257.
582 ID number 47.
583 ID number 162.
584 ID number 257.
585 ID numbers: 47, 97, 329.
586 ID number 47.
587 ID numbers: 168, 180.
588 ID numbers: 322, 239.

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- Examples include: 'When parties did not appear to be mediating in good faith';[589] 'When (usually) one party may be presenting inaccurate or questionable truth, I use reality testing.'[590]

- Parties not following legal advice.[591]

III. Reality testing is used in response to the type of dispute (ie, where responder has specified types of disputes in which they use reality testing techniques)

Some responders describe using reality testing when they are mediating specific types of disputes, such as: franchising disputes;[592] neighbourhood and fencing disputes;[593] Family Law disputes (ie, FDR), including property, children, and schooling issues;[594] business, commercial, finance, and credit disputes;[595] water ingress disputes;[596] leases;[597] employment and workplace disputes, including redundancies.[598] One responder mentioned using reality testing 'on several occasions [during the mediation], depending on how complex the dispute or how many different aspects there were' to it.[599]

IV. Reality testing is used in response to fairness and/or power imbalance

Some responses mention using reality testing in the context of issues related to power and to fairness. For some it is an antidote to perceived power imbalances. For example, reality testing is used:

> To help balance power, [the parties'] priorities should be understood and tested in private conference as well as before the final joint negotiation.[600]

> [In] situations where there is a power imbalance such as lack of information and understanding of the implications of not resolving conflicts.[601]

Some (2) refer to the use of reality testing in response to more generalised issues of perceived party power and dominance, and in this case, it is used:

> In commercial disputes where resources and power create an imbalance between parties.[602]

> Where I have walked in and there has been little hope of reaching an agreement as one party appears to be the stronger, dominant party, and letting them know that, if they do not agree, the next steps are going to be very expensive, and they will then not have choices of their settlements.[603]

In addition, two responses mention using reality testing in response to the mediator/conciliator's perceptions of fairness:

> [I use reality testing] when parties are making offers that do appear to be fair or reasonable.[604]

> [I use reality testing] when the request or point of view expressed by one party may not be seen as fair and reasonable in the real world.[605]

Some responses to question UQ1 include mention of "what if"" questions (eg, 'What if this happened …'[606]), and this style of question is considered in more detail in the next section (*UQ2 'During those mediations/conciliations, how did you use "reality testing" – eg, what did you say and/or do?'*).

589 ID number 239.
590 ID number 322.
591 ID number 239.
592 ID number 13.
593 ID numbers: 13, 254.
594 ID numbers: 15, 43, 59, 103, 123, 182, 188, 204, 229, 275, 308.
595 Id numbers: 41, 59, 97, 182, 308.
596 ID number 254.
597 ID number 254.
598 ID numbers: 254, 308, 316.
599 ID Number 83.
600 ID number 47.
601 ID number 329.
602 ID number 97.
603 ID number 219.
604 ID number 353.
605 ID number 324.
606 ID number 147.

CONTENTS

Practitioner choices about how they use reality testing - Thematic analysis

Survey question UQ2: [Following on from UQ1] 'During those mediations/conciliations, how did you use "reality testing" – eg, what did you say and/or do?'

We anticipated that including this question in the survey would provide insight into what practitioners say and do when they are using reality testing techniques. We were interested in whether the responses would reveal common styles and methods, more individualistic approaches, or a combination of both.

Key findings

- Most responses have interpreted "how" as a reference to specific mediator/conciliator techniques and questioning styles;
- Of that majority, most describe using an open-ended, or less directive questioning style.

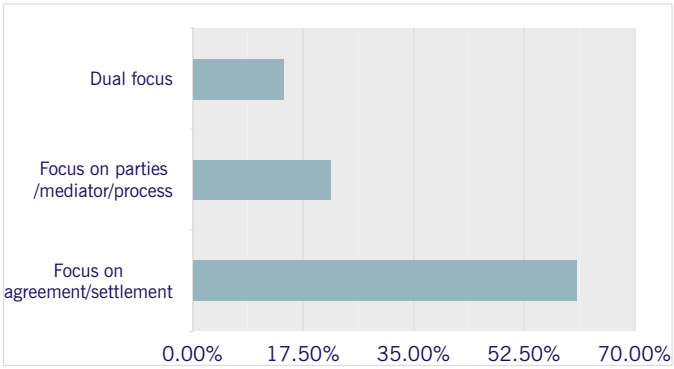
A dominant subtheme that emerges in responses to UQ2 relates to responder interpretations of the word "how". Although the responses include a range of interpretations of "how", including "for what purpose", most have interpreted "how" as being a reference to specific techniques (eg, asking questions, or making suggestions), and we have accepted that these comprise a subtheme which is explored later in this section. This analysis reports first on the three analytical themes, and secondly on the reported reality testing techniques.

In responses where the focus is largely on giving examples of techniques, it can be difficult to differentiate between, say, a focus on the parties and an example of a reality testing technique. For example: '[I say] "Maybe think this through. How does it look to the other person?" I use open questions to try to shift or adjust positions on issues.'[607] We have accepted the responder's purpose ('to try to shift or adjust positions') as having a key focus on the parties. On the other hand, we have assessed '[I] asked questions; sought clarification' as being more about the role of the mediator than about the parties.'[608] Below is an example of a response that includes a focus on the parties and on the mediator:

> Asking open and closed pointed questions of each party about the basis of their position. Often is framed as a request, as mediator, to understand the "facts". Never as the mediator seeking to evaluate the facts.[609]

Figure 4.8, below, depicts proportional representations of the occurrence of the analytical themes in the responses, and of the responses whose interpretation of "how" has related to specific mediator/conciliator questioning styles and techniques.

UQ2 – Analytical themes



UQ2 – Question styles & statements

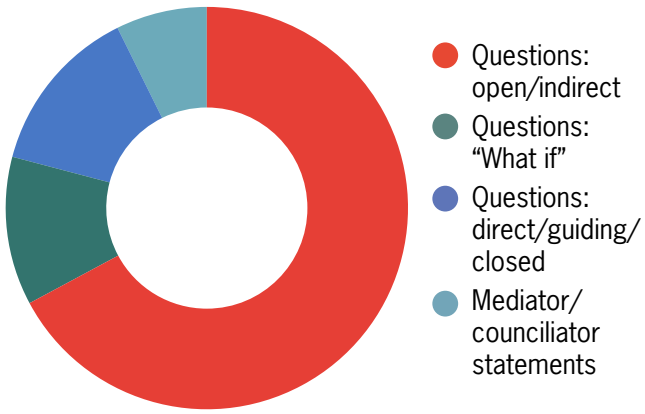


Figure 4.8 shows two aspects of responses to question UQ1: the proportion with a focus on each of the three analytical themes; and, of the 66.3% equating "how" with specific questioning styles, the proportion that have included examples of each style.

607 ID number 351.
608 ID number 56.
609 ID number 356.

A total of 280 responses include reference to factors relevant to the three analytical themes, and, of those, more than twice as many responses include a focus on exploring the terms of an agreement/settlement than include a focus on enhancing the participation/engagement of the disputants.

- A total of 60.8% include a focus on agreement/settlement (including consequences of not achieving a settlement);[610] and
- A total of 21.9% include a focus on parties, mediator and/or process including enhancing the participation/engagement of parties; or enhancing role of mediator.[611]

Analytical theme 1 – Focus on agreement/settlement (including on consequences and alternatives if no agreement reached)

Overall, more than 60% of responses to this question focus on exploring the terms of an agreement/settlement, apparently interpreting "how" as meaning "to what purpose".

Although most have specifically mentioned that finalisation,[612] a smaller number have referred to exploring the ramifications if no agreement is reached,[613] with an even smaller number referring to using reality testing for both purposes.[614]

Analytical theme 2 – Focus on parties, mediator, and/or process

We have assessed far fewer responses as having a primary focus on the parties, the mediator, and/or the process. As has been noted above, it was often difficult to differentiate between the descriptions of specific reality testing techniques and whether those techniques were focused on improving the parties' engagement and contributions or on demonstrating the mediator's skill.

610 These are similar proportions to those found in the responses to Q12. Of 313 responses to 598 Q12, 169 (53.9% of 313) focused on outcomes/ramifications of not reaching agreement; 86 (27.4% of 313) focused on factors other than outcomes/ramifications of no agreement; and 48 (15.3% of 313) focused on both.

611 ID numbers: 7, 18, 50, 55, 56, 61, 62, 84, 99, 115, 122, 136, 161, 194, 195, 199, 201, 202, 209, 210, 217, 224, 227, 231, 250, 251, 253, 254, 255, 270, 273, 275, 290, 291, 296, 301, 307, 312, 317, 321, 322, 324, 325, 326, 335, 336, 339, 342, 351, 363, 373, 377.

612 ID numbers 1, 16, 20, 23, 26, 27, 29, 30, 32, 33, 34, 35, 42, 44, 46, 57, 59, 60, 64, 65, 69, 74, 75, 76, 77, 82, 83, 86, 87, 89, 93, 94, 97, 103, 108, 109, 111, 112, 113, 117, 121, 123, 131, 133, 135, 137, 140, 141, 148, 157, 163, 165, 172, 181, 182, 183, 184, 186, 188, 190, 200, 212, 213, 221, 229, 233, 241, 243, 248, 249, 252, 256, 259, 260, 265, 266, 268, 277, 278, 279, 280, 283, 287, 288, 293, 294, 295, 298, 299, 306, 310, 313, 327, 337, 343, 345, 346, 347, 350, 362, 371, 376.

613 ID numbers 11, 12, 14, 15, 40, 41, 49, 51, 90, 114, 126, 127, 138, 142, 146, 150, 153, 158, 159, 164, 168, 180, 187, 191, 204, 208, 214, 219, 239, 244, 257, 274, 286, 305, 309, 318, 328, 329, 330, 331, 333.

614 ID numbers 2, 17, 24, 31, 45, 52, 85, 91, 92, 95, 132, 134, 143, 144, 145, 154, 169, 178, 203, 205, 218, 238, 289, 314, 315, 341, 374.

CONTENTS

One response has been assessed as including a focus on the process itself: 'I adjust what I say according to the situation [within the mediation]'

i. Focus on parties

On the whole, the responses with a primary focus on parties have included either an example of a specific reality testing technique that is clearly directed to the parties, or they have included both a description of one or more specific reality testing techniques, and briefly explained or suggested their intent. For example:

> What else could you do? How do you think the other party might respond to that?[615]
>
> I would tend to ask "what if" questions or "have you considered" questions, such as "If this happened, what do you think you would do?"[616]
>
> Asked the party to consider their experience and practical expectations.[617]
>
> Ask the persons their thoughts, based on what factors, what have they considered [what else] should be considered.[618]
>
> Asked open questions to probe the basis of the party's assumptions and attitudes towards the other party and settlement in general. For instance, "What makes you say that?" or "What will happen if you don't get [expected result]?"[619]
>
> Any number of a range of questions designed to elicit a response from the party (which, in turn, encourages them to think differently in order to be able to answer the question).[620]

ii. Focus on mediator

The responses included here are quite clear in their primary focus. For example, 'I pose the questions and hypotheticals';[621] 'The skill and challenge is not in what to ask but in how it is asked';[622] 'I offered an alternative viewpoint or perspective that may be equally valid';[623] 'I removed emotion and used empathy';[624] 'At all times remain impartial … draw on my experience whether in a legal or past mediator environment in similar scenarios';[625] 'I am flexible … and I adjust what I say and how I say it accordingly [ie, according to the situation]';[626] and 'I will be brutal'.[627]

iii. Focus on parties + mediator

Only a very small number of responses is included here, and they include clear references to the parties and to the mediator, best exemplified by: 'Ask open and closed pointed questions of each party about the basis of their position; never as the mediator seeking to evaluate the facts.'[628]

iv. Focus on process

One response has been assessed as including a focus on the process itself: 'I adjust what I say according to the situation [within the mediation].' [629]

613 ID number 136.
614 ID number 296.
615 ID number 55.
616 ID number 254.
617 ID number 72.
618 ID number 326.
619 ID number 36.
620 ID number 66.
621 ID number 80.
622 ID number 118.
623 ID number 245.
624 ID number 271.
625 ID number 5.
626 ID number 356.
627 ID number 271.

CONTENTS

Analytical theme 3 – Dual focus

Generally, responses with a dual focus include factors relevant to analytical theme 1 and to analytical theme 2. They include references to exploring an agreement, as well as to changing or adjusting the parties' thinking. For example, Allowed the party to consider WATNAS and BATNAS; Allowed the party to ponder [the effects of] continued litigation on all aspects of her life';[630] 'Explore interests and positions and options … BATNA, WATNA, MLATNA';[631] 'I asked questions about how a decision maker may view their side of the dispute';[632] and 'If you were in their shoes and this solution was put to you, how would you respond?'.[633]

Subthemes

In addition to those responses that have interpreted "how" as meaning "for what purpose", many have seen "how" as a reference to specific techniques (eg, asking questions, or making suggestions), as is suggested in the question's clarification. Half the responses to this question include specific techniques and examples of what practitioners say and/or do when they are using reality testing. This section explores those responses.

The majority of responders have included examples of what they say. In their responses, they include examples of questioning styles, including indirect and open-ended questions,[634] and more direct and closed questions; examples of statements that mediators/conciliators make; and a smaller number include examples of mediator/conciliator opinions and assessments.

I. Style of questions

This section describes various styles of questioning used by mediators/conciliators in reality testing. The various styles identified in information provided include open-ended, close-ended, direct/indirect, probing, and even 'dumb and curious' questions.[635]

> Responders include examples of questioning styles, including indirect and open-ended questions, and more direct and closed questions

Some would also use 'reframing' style of questioning, maintain a compassionate tone as well as acknowledge and respect feelings. The most frequently described questioning styles are discussed below citing relevant examples.

a) Indirect/open-ended questions

Generally, this style of questioning is relatively conversational, and does not include a suggested answer but opens up discussion. The questions may invite the speaker to expand on what they might have said earlier. In the context of reality testing, it could be said that this style of questioning is inviting the person who answers to consider different aspects of their perceptions, or additional facets of an offer or proposal they intend to make. It is asking the speaker to see how their thinking might change if they were to take a slightly different perspective.

Some questions have a focus on what finalising an agreement may look like: 'If the other party accepted your option around this point, how do you see it working next week, in three months, or maybe next year?; if something unexpected occurred, what do think would be the best strategy?';[636] 'Ask parties to discuss their best and worse outcomes, and what do they need, what can they offer to achieve their preferred future; ask what would that look like to them?';[637] 'I asked them to explain to me how their preferred route would work, what would give them confidence, why it made sense as a way of achieving their interests';[638] and 'How would that work?'[639]

630 ID number 120.
631 ID number 220.
632 ID number 302.
633 ID number 303.
634 We have use the responders own words, the terms "direct" and "indirect", to describe questioning styles.
635 ID number 115.
636 ID number 94.
637 ID number 143.
638 ID number 224.
639 ID number 341.

CONTENTS

Other questions aim to help the participants consider points of view other than their own: 'Let's consider how this request might be received by the other party. If you were in their shoes and this solution was put to you, how would you respond?'[640] Other questions aim to help participants build their perspective on the dispute: 'If you say [X], how is this so when you have maintained it was [Y]?'[641] Or help them to see how the dispute is affecting other people: 'You mentioned that you're a senior at your pay level. Do you think that others might look to you as a role model, and, if so, how do think this behaviour might impact them?'[642]

The various ways in which these questions are used gives some insight into how practitioners interpret reality testing and what it can achieve – the examples provided above suggest that it is being used to achieve more than the exploration of agreements.

b) "What if" questions

So-called "What if" questions are those used, at least by mediators and conciliators, to challenge disputant perceptions, as well as any proposals or offers they are suggesting, and do so by raising hypothetical situations or scenarios about which the disputants can speculate. Examples of "what if" questions include: 'What if the other side says 'No' to that?';[643] 'What if … couldn't do that for you?';[644] 'What if things don't go well for you in court".[645] The responses throughout the survey suggest that "What if" questions are often used as part of reality testing.[646]

When referring to specific reality testing techniques, 34 responses to question UQ2 refer specifically to using "What if" questions (eg, '[I] ask what if questions';[647] 'Invite speculation about what would happen if …'[648]).[649] Many also include specific examples of their own, such as: 'What if the other party says no?';[650] 'What if you are unable to secure finance?';[651] 'What if your mum is not available at the time you are committing her to?';[652] 'How do you think X is going to respond to that proposal? What if they say no?';[653] 'What happens to your other relationships with co-workers/neighbours if that solution happens?';[654] 'What if you aren't successful on this point?'[655]

640 ID number 303.
641 ID number 290.
642 ID number 185.
643 ID numbers: 218, 334, 341.
644 ID number 347.
645 ID number 164.
646 The specific technique is mentioned in responses to questions UQ1, UQ2, UQ4, UQ7, and UQ9.
647 UQ2, ID numbers: 200, 296.
648 UQ1, ID number 101.
649 ID numbers: 11, 26, 31, 32, 45, 50, 52, 70, 77, 82, 84, 116, 147, 164, 165, 173, 200, 204, 209, 218, 265, 280, 291, 294, 295, 296, 314, 317, 341, 347, 361, 371, 373.
650 ID number 11.
651 ID number 26.
652 ID number 82.
653 ID number 218.
654 ID number 314.
655 ID number 361.

CONTENTS

> The mediator/conciliator poses questions that encourage disputants to consider different angles to their positions/perceptions/ proposals/offers

c) Direct/closed questions

In general, this style of questioning is designed to guide the person who answers so their focus is narrowed onto a specific topic or area of discussion. In the context of reality testing, it could be said that this style of questioning is aimed at getting the speaker to consider specific ideas that they have not yet taken into account. In many cases, the responses include examples that suggest the practitioner is using the question to guide the disputants to think about something quite specific, or to think in a certain way. For example, 'Is the court really likely to treat this issue in that way?';[656] 'Have you thought about the possibility you are wrong, or the advice you are given is wrong?';[657] 'Asking directive questions – how do you think this plan will work; do you feel it can at least be trialled?';[658] 'Are you interested in what the (experts) say about this?';[659] 'Are you sure you can borrow that much money?';[660] 'Have you thought of these things as a possible resolution, which I have seen other parties adopt?';[661] and 'Do you think that you are going to win every one of your points, and they will lose all theirs?'[662]

Some responses make clear that the mediator/ conciliator is using this questioning style to convince the disputants of the benefits in finalising an agreement: 'Outline benefit of positive thinking and forward vision – no rift with the other party, bridging the gaps, highlighting their case's merits or lack of,[663] credibility or lack of'; 'Wouldn't it be better to be certain by compromising today rather than risking the outcome in court?'[664]

d) Questions including mediator/conciliator statements and opinions

Whereas in the above questioning styles, the mediator/conciliator poses questions that encourage disputants to consider different angles to their positions/perceptions/ proposals/offers, in this category of reality testing, the mediator/conciliator is using a reality testing technique that makes those different angles very clear in either a statement or a rhetorical question: the practitioner is being fairly clear that they have concerns about what is happening. Generally, the mediator/conciliator appears to couch their statement/question in terms of the law, or judges/commissioners, or even the disputants' own lawyers. For example:

> So, [X], I want you to know that right now, based on what you have said, if a judge was asked to make a call, it's likely that the [outcome] might be [XXXX].[665]
>
> I'd say: "Do you realise that, if you don't settle, then …".[666]
>
> I explained that the reality is that costs increase as litigation progresses, and parties who do not succeed are often ordered to pay costs and courts apply the law.[667]
>
> Reference to how a Commission Member/ Judge might consider the matter … Costs of taking the matter further and limited chance of recouping.[668]

656 ID number 11.
657 ID number 61.
658 ID number 1.
659 ID number 77.
660 ID number 86.
661 ID number 17.
662 ID number 204.
663 ID number 145.
664 ID number 204.
665 ID number 138.
666 ID number 146.
667 ID number 153.
668 ID number 168.

CONTENTS

> By challenging the legal advisor [:] "Are you so confident X will do better at trial than what the other party is offering that you would be prepared to forgo your fees if the result at trial was worse?[669]
>
> Do you mind if I share some of my experience in these kinds of cases and how the court/court experts tend to see things and your lawyer can check what I'm saying with you?[670]

The two responses below show the mediator/conciliator taking a stronger line in expressing their concerns:

> I will tell them on the available information what I think the outcome might be, but with the obvious disclaimer that anything can happen when a matter goes to hearing.[671]
>
> Regarding [topic], the legislation states … Can you advise if you have done this?[672]

II. Purpose of questions

The two main purposes described by responders are the parties accommodating each other's or different viewpoints and ensuring self-determination.

A small number of responses to question UQ2, describe situations in which reality testing is used to help the parties take into account viewpoints other than their own. Most describe using this approach to help the parties take each other's perspective into account:[673] 'to assist the party in seeing the other person's perspective';[674] 'test their fundamental beliefs about the other party or encourage them to accept that the point of the other party is understandable';[675] 'assist the participant to consider what the other participant has said';[676] 'consider how this request might be received by the other party';[677] and

There are also responses that apply reality testing through the perspective of people who are not present in the mediation, including children

'Walk in the other person's shoes'.[678] One responder reports using this technique in a slightly different way, by checking on the value gained for the parties in being able to talk with each other: 'Has talking with [the other party] been useful for you?'[679]

There are also responses that apply reality testing through the perspective of people who are not present in the mediation, including children.[680] In a less direct way, checking disputant assumptions could be seen to be a form of accommodating other perspectives (eg, 'See if we can highlight some of [the] assumptions and if they reflect how you each see the situation'[681]).

In the context of describing how the responder uses reality testing (ie, what they say and/or do), three responses include reference to factors related to self-determination: '… but you need to make up your own mind';[682] '… utilising parties' own content to facilitate the conversation';[683] or getting 'permission' from the parties before using reality testing.[684]

669 ID number 239.
670 ID number 205.
671 ID number 142.
672 ID number 370.
673 ID number 211, 234, 297, 302, 303, 323, 372, 373.
674 ID number 223,
675 ID number 297.
676 ID number 302.
677 ID number 303; see also 323.
678 ID number 372; see also 373.
679 ID number 234.
680 For example, see ID numbers 10 and 43.
681 ID number 316.
682 ID number 5.
683 ID number 209.
684 ID number 50.

CONTENTS

Factors influencing practitioner reality testing choices

Survey question UQ3 ('Below are the factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?')

From responses to this question, we hoped to gain information about the various factors that practitioners consider when they are making a choice about whether to use reality testing, in particular the most influential factors. Survey questions UQ4 and UQ5 provide opportunities for responders to add to their information.

Key findings

- When rating the importance of various factors' influence on the mediator/ conciliator's choice to use reality testing, four factors were rated as important by more than 90% of responses:
  - The parties (eg, capacity and willingness);
  - Fairness (eg, perceptions of power imbalances and disadvantages);
  - The need for the terms of agreement to comply with industry or legislative standards; and
  - Safety concerns.
- The responses to questions UQ4 and UQ5 echo question UQ3's key findings.

Response data and analysis

This section focuses on the information provided in responses to question UQ3. Although this question was designed to obtain quantitative information, it is included in this section of the report because the responses inform our analysis of reality testing and its use. Responses to UQ4 and UQ5, which immediately follow question UQ3 and seek additional information, are included.

The format of question UQ3 includes ten factors from which responders could select as many as they wished; there was no requirement to select a certain minimum number, or even to select any at all. In addition, each factor had a rating scale (a total of five ratings, descending from "extremely important" to "Not at all important") by which responders could rate that factor's level of importance for them (ie, how much that option influences their choice to use reality testing).

In the analysis below, we have clustered the ratings as follows: "Extremely important" and "Very important" are combined into a "Most important" rating; "Somewhat important" and "Slightly important" are combined into a "Less important" rating; and "Not at all important" stands alone.

Most influential factors

The purpose of question UQ3 was to ascertain which factors responders were most likely to take into account when choosing whether to use reality testing, and this was ascertained by calculating responder choices, including those with most and least support. Calculating which factors are seen to be the most, and least, important influences is based on two data measures: the importance rating responders gave to each factor, as well as the total number of responders who chose to give each factor a high importance rating.

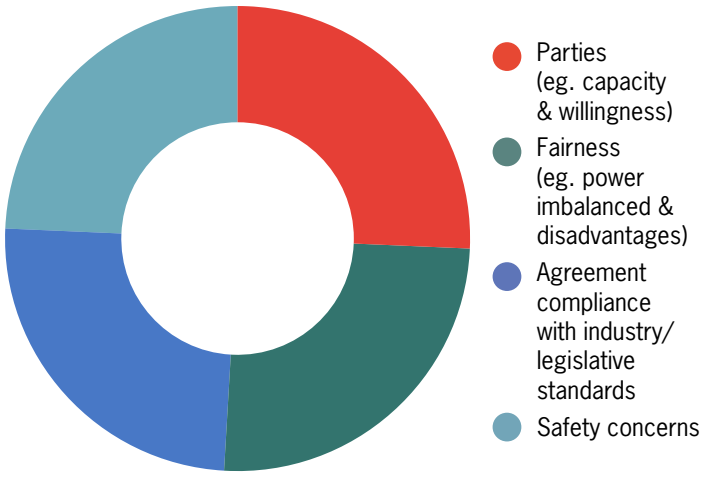


Figure 4.9 shows the four influential factors from UQ3 that were rated as important in more than 90% of responses to this question.

CONTENTS

Influential factor (total selections)	1. Most imp	2, Less imp	3. Not at all imp
Context/setting (289)	213	63	13
Nature of the dispute (290)	186	70	34
Parties (eg, capacity, expectations) (289)	249	33	7
Presence of legal advisors (287)	78	124	85
Safety concerns (287)	180	87	20
Interests of the children (272)	210	24	38
Whether mediation is occurring in a public or private setting (281)	98	90	93
Fairness (including addressing what you see to be power imbalances or disadvantages) (287)	236	41	10
The need to reach a settlement (287)	106	133	48
The need to ensure terms of agreement comply with legislative or industry standards (286)	195	77	14

Table 4.1 survey question UQ3, showing totals of each factor's importance rating: most important, less important, and not at all important influence ratings.

As shown in Figure 4.9, and in Table 4.1, more than 90% of responses to question UQ3 have given positive importance ratings to four of the listed factors: the parties (eg, capacity and expectations); fairness (including addressing what is seen to be power imbalances or disadvantages); the need to ensure terms of agreement comply with legislative or industry standards; and safety concerns.

The two factors with the highest number of "not at all important" ratings are: 'whether mediation is occurring in a public or private setting' (93 responses),[685] and 'the presence of legal advisors' (85 responses). In other words, these two appear to be the least influential on practitioners' choices to use reality testing.

These figures suggest that, when choosing to use reality testing, most practitioners are influenced by the parties' capacity and expectations, and by issues of fairness.

Many practitioners are also influenced by the context or setting of the mediation/conciliation, the need to ensure that any terms of agreement comply with legislative or industry standards, and safety concerns. The two factors which practitioners are least likely to be influenced by appear to be 'Whether the mediation is occurring in a public or private setting' and 'The presence of legal advisors.'

The following two sections report thematic analysis of questions UQ4 and UQ5.

Other influential factors

Survey question UQ4 'If you take into account none of the listed factors, please specify what influences your choice to use "reality testing".'

Responders were not required to answer this survey question, and it was designed to provide an opportunity for people to add to their responses to UQ3. Therefore, we have not analysed the response rate.

[685] Comparative analysis of questions Q9, Q10 and UQ3 show that, of the 96 responders that work in both the public and private sectors, 47 rate this factor as being an important influence on their choice to use reality testing (ie, highest importance rating [21] and lesser importance rating[26]), while 29 rate it as not at all important.

Of the 128 responses, 70 do not provide information relevant to an analysis of other factors that influence the choice to use reality testing. The 70 include responses classified as not applicable (ie, where the response states "N/A" or equivalent); those who report using reality testing in every mediation and therefore having no need for assessment of influences; and those responses that do not include information relevant to the question (many of these describe why reality testing is an important intervention and/or what it achieves).

Focus on parties

Of the 58 responses that provide information relevant to the analysis,[686] most include a clear focus on the parties. For example, 'In a facilitative process where the participants are self-determined in their decision making [reality testing] is not so important as they can get legal advice and need to make wise decisions';[687] 'The parties' insight into the dispute and potential reactions/positions';[688] 'Power in particular needs to be tested and brought out, as parties will often not understand how power can impact on a mediation'.[689]

Focus on agreement/settlement

Some responses have a clear focus on exploring the terms of an agreement/settlement. For example, 'Timing: impasse remaining after all other interactions have failed to deliver a resolution';[690] 'Quality and appropriateness of any agreement';[691] and 'Money, time and emotional energy that parties could expend if matter not resolved.'[692]

> Some responses focus on the need to finalise the agreement/settlement and on the parties; on the role of the mediator and on the parties; and on the nature of the dispute and on the parties

Focus on the nature/context of dispute

The nature and/or context of the dispute is included in fewer responses. For example, 'Reality testing is particularly helpful when it focuses on business rather than legal issues';[693] 'The context of the dispute. Whether it needs to be tested: is it simple or complex?';[694] 'If it is only $ then that [ie, use of reality testing] will be limited, but if more than $, highly influential.'[695]

Focus on mediator

Few responses focus on the mediator and/or their role. For example, 'I don't want to use my influence or power over a party, particularly if they are showing signs of disempowerment';[696] 'In conciliation […] the conciliator often has substantive knowledge and may assist towards later stages of the mediation with information';[697] and 'My ability to see the elephants coming in respect of their unique situation and all the elements.'[698]

Dual focus

Some responses focus on the need to finalise the agreement/settlement and on the parties;[699] on the role of the mediator and on the parties;[700] and on the nature of the dispute and on the parties.[701]

686 ID numbers: 14, 16, 17, 18, 21. 23, 25, 27, 33, 39, 42, 45, 47, 50, 57, 62, 80, 83, 86, 99, 101, 102, 109, 113, 115, 135, 137, 139, 141, 157, 169, 172, 185, 198, 200, 210, 212, 219, 221, 229, 234, 248, 254, 280, 288, 290, 299, 302, 309, 314, 322, 328, 331, 332, 336, 346, 347, 351.
687 ID number 50.
688 ID number 62.
689 ID number 139.
690 ID number 17.
691 ID number 47.
692 ID number 331.
693 ID number 18.
694 ID number 25.
695 ID number 212.
696 ID number 39.
697 ID number 50.
698 ID number 234.
699 ID numbers: 288, 322, 331, 346.
700 ID numbers: 234, 221, 50.
701 ID numbers: 14, 25.

CONTENTS

Focus on factors relevant to self-determination

Only two of the responses refer to factors often associated with self-determination. 'It [reality testing] allows parties to be fully informed when making a decision';[702] and 'In a facilitative process where the participants are self-determined in their decision making [reality testing] is not so important as they can get legal advice and need to make their own wise decisions.'[703]

Additional influences

Survey question UQ5 'What other factors have you considered when choosing to use "reality testing" techniques?'

There is a total of 143 responses without information relevant to this survey question, that is, they did not include any factor relevant to when they would choose to use reality testing.

Focus on parties

A majority of responses are clearly focused on the parties. For example, 'Power imbalances, family violence, impact on children';[704] 'Culture, religion, gender, and belief/value/ethical tolerances';[705] 'How will the parties react to being challenged on their options';[706] and 'The personality of each party.

> Some other responses focused on exploring terms of an agreement/ settlement. For example, 'Can this option be done or met?'

Their temperament and also how agitated and emotional they are.'[707]

Focus on role of the mediator

Some responses are focused on the mediator's role. For example, 'You must be careful that [the parties] will not feel threatened if they think you are challenging their position';[708] and 'I am somewhat concerned about introducing my own judgement into the process, but on the whole I'd rather take that chance than see the parties leave with problems they haven't considered.'[709]

Focus on agreement/settlement

Some other responses are focused on exploring terms of an agreement/settlement. For example, 'Can this option be done or met?';[710] and 'If I think the absence of reality testing will mean an agreement will not be sustainable or applicable.'[711]

Focus on context/nature of dispute

Few responses are focused on the context and/or nature of the dispute. For example, 'The dispute';[712] and '[If there is an] intervention order situation';[713]

Dual focus

Some responses have a dual focus. Examples are set out below:

> I consider the likely future interactions of the participants. I consider what is of risk for them and the likelihood of them having an alternative means of resolving the situation.[714]
>
> The financial position of the party and whether they can continue to fund the cost of litigation. The ability of a litigant in person to conduct their case in the future. Whether the person is living with mental illness.[715]

702 ID number 2.
703 ID number 50.
704 ID number 113.
705 ID number 145.
706 ID number 165.
707 ID number 351.
708 ID number 137.
709 ID number 296.
710 ID number 135.
711 ID number 267.
712 ID number 16.
713 ID number 23.
714 ID number 32.
715 ID number 153.

CONTENTS

> Cooperation or otherwise of the parties. How close they are to agreeing. Power within the parties.[716]
>
> Timing. The emotional space of the parties. How long have we been mediating for?[717]
>
> Limits and scope of the process relative to where the parties say or perceive themselves to be at – relative to where I perceive them to be at – relative to where the macro system requires them to be at.[718]

Focus on legal issues and legal advisors

A number of responses include a focus on legal issues and the parties' legal advisors. For example, 'The quality of the legal advice';[719] 'Whether I think the advice that's being provided is accurate';[720] 'Parties' knowledge or perception of the legal implications (and confusion/ ignorance of same) of positions adopted';[721] '[The presence of] litigious legal advisors';[722] 'Whether a person's lawyer is doing a lot of reality testing for the person. In that case, it can be left to the lawyer';[723] 'Whether the parties are legally represented';[724] 'The level of experience of legal advisors';[725] 'Rapport with counsel. Working alongside counsel to ensure that reality testing does not diminish counsel's standing with the parties, and to ensure counsel is comfortable with the reality testing before it takes place';[726] and 'Does the party have an understanding of the legal points?'[727]

Practitioner choices not to use reality testing - thematic analysis

Survey question UQ6 'In which situations would you choose not to use "reality testing"?'

This question was included to gain some insight into mediator decision-making, and, in contrast with question UQ3, seeking some clarification around the circumstances in which they would choose not to use reality testing.

Key finding

In any decision not to use reality testing, the majority of responses cite factors relevant to the parties as being most influential. These factors include the parties' mental health, capacity, and willingness for reality testing; safety issues, including bullying, coercion, and violence; and where the use of reality testing may cause harm.

Reality testing in all mediations

Throughout the survey, a number of responders report using reality testing in all mediations, and that, for them, there are no grounds for either its use or non-use.

716 ID number 163.
717 ID number 221.
718 ID number 234.
719 ID number 11.
720 ID number 19.
721 ID number 98.
722 ID number 183.
723 ID number 205.
724 ID number 212.
725 ID number 330.
726 ID number 353.
727 ID number 361.

CONTENTS

UQ6 seeks information from responders about the situations in which they do not use reality testing techniques, and the information in its responses can be seen as an indication of the total number of survey responders who report always using reality testing, or who cannot think of a situation in which they would not use it. Accordingly, it seems that at least 70 (18.5%) of 377 survey responders use reality testing techniques as a routine part of every mediation/conciliation. It is not possible to extrapolate this figure to the broader population of mediators/conciliators.

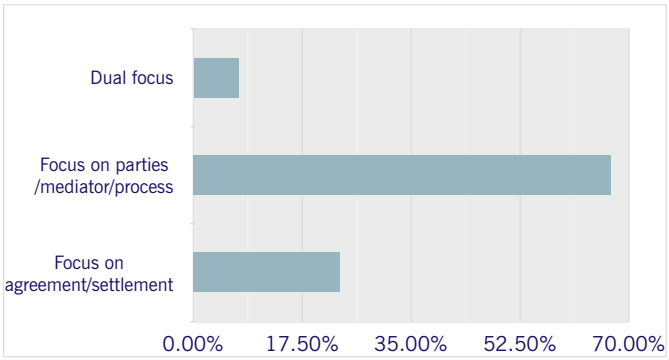
Five responses to this question appear to have interpreted the word "situations" as including specific stages in the mediation/conciliation process.[728] Of the five, four report not using reality testing in "joint sessions", and one reports not using reality testing in the opening stages of the process and during the 'issues identification phase.'[729]

Three analytical themes

Of the 288 responses to this question, 220 (76.3% of 288 responses) include some focus on the three analytical themes, with more than two thirds of those including a focus on the parties (on analytical theme 2). With such a clear tendency towards analytical theme 2 in the responses, we have chosen to include detailed analysis of responses to this question in terms of analytical themes 1 and 3 only.[730] It is important to note that UQ9 is the only survey question with a lower proportion of responses that include a focus on analytical theme 1 a focus on agreement/settlement.

Figure 4.10, below, depicts proportional representations of the occurrence of the analytical themes in the responses, and of the responses in which four factors are most likely to influence their choice not to use reality testing: factors relevant to the parties, factors relevant to the process; factors relevant to the role of the mediator; and factors relevant to the presence of advisors.

UQ6 – Analytical themes



UQ6 – Influence on choice not to use

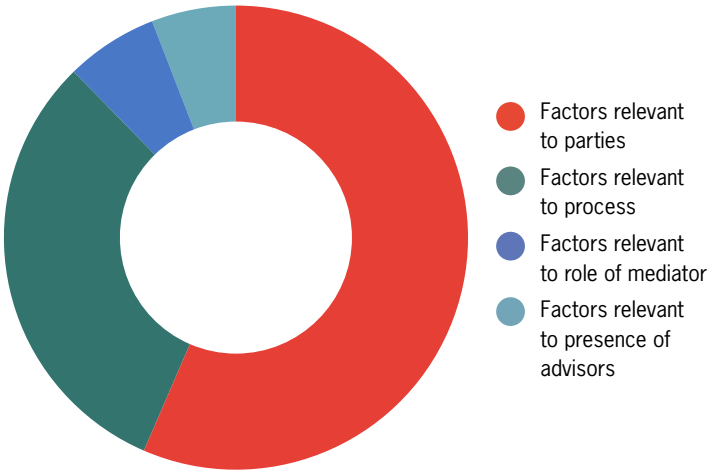


Figure 4.10 depicts proportional representations of responses to UQ6 with a focus on each of the analytical themes; and of responses in which four factors are identified as important influences on the mediator/conciliator choice not to use reality testing.

728 ID numbers: 9, 39, 62, 64, 161.
729 ID number 64.
730 Very few responses linked the non-use of reality testing to any specific stage in the mediation process. For example, one claimed not to use reality testing during joint sessions (ID number 39), and one claimed not to use reality testing during opening statements, or 'issues identification' (ID number 64).

CONTENTS

Analytical theme 1 – Focus on agreement/settlement

In general, responses that include a focus on agreement/settlement refer to the unlikelihood of reaching an agreement, or to the parties readily progressing towards an agreement. Examples include:

- If legislation does not support settlement on particular issues.[731]
- Where the parties or a party is obviously not engaging or being genuine in the process to try to reach a solution.[732]
- Where parties generally on the same page and striving for resolution within agreed frameworks.[733]
- Short, sharp, quick agreements on outcome.[734]
- The parties are open to options and have a positive attitude to resolution.[735]
- If the client is not open to an objective approach and criteria to resolution and must have their outcome at all costs.[736]
- Often it is not necessary as it is clear both parties are fully aware of the consequences of not resolving the claim at mediation.[737]

Analytical theme 3 – Dual focus

Responses with a dual focus tend to mention factors that are explored below within the subthemes identified for this question, as well as the factors identified above as part of analytical theme 1.

For example:

> When a party is unrepresented and emotionally vulnerable as it may further their vulnerability and do harm; when a party is motivated to proceed for an ulterior motive - such as to hurt or damage the other party in which case, at the appropriate time I will call it out - and that I suppose is a form or reality testing as well; when a party is so far out of touch with reality that all it will do is likely lose them - then the art of gentle persuasion is needed, often by appealing to their unrealistic self-view of their "dominant" role in the dispute - as the "better" person or having the "ultimate ability" to end this if they want; when it is not needed - it being clear that both parties are ready, willing and able to resolve the matter, and it is just a matter of negotiation - usually when parties are well represented, well prepared and are evidently realistic.[738]

And:

> Where the parties are coming to an agreement and I regard their decision-making to be sound.[739]

The subthemes that are specific to this question include detailed information about responders' focus on the parties and on the mediator.

> In general, responses that include a focus on agreement/settlement refer to the unlikelihood of reaching an agreement, or to the parties readily progressing towards an agreement

731 ID number 29.
732 ID number 41.
733 ID number 98.
734 ID number 178.
735 ID number 183.
736 ID number 289.
737 ID number 318.
738 ID number 204.
739 ID number 283.

CONTENTS

Subthemes

We have identified five subthemes in the responses to question UQ6, and they are listed below in descending order of incidence. It is clear that, when considering not to use reality testing, more than twice as many responses include reference to factors relevant to the parties (114 responses) than to the process (63 responses) or to the mediator (13 responses), suggesting that, when choosing not to use reality testing in any given mediation, responders tend to give more consideration to the parties than to anything else.

A smaller number of responses include generally positive references to the influence of advisors,[740] (eg, 'The party's legal representative may perform the role of reality testing').[741] Two responses mention the negative influence of legal advisors, including 'When the legal advisors will not allow me to use reality testing'.[742] [743]

I. Factors relevant to parties

When considering situations in which they would not use reality testing, many responders include mention of the disputants' mental health, capacity, and willingness to accept reality testing.

For example:

> Capacity of both parties to understand the concept and the likelihood of them following it.[744]
>
> Capacity and capability of party.[745]
>
> When parties are not motivated at all to consider any options to change the situation they perceive themselves to be in.[746]
>
> Potentially if parties had serious mental health issues.[747]
>
> If there are very clear signs of someone really struggling with their mental health.[748]
>
> Concerns around intellectual capacity.[749]
>
> When a party is too emotional to continue.[750]
>
> If a person is already overwhelmed and I am certain it will not help achieve a resolution.[751]
>
> When parties are emotional, under duress, lack the ability to undertake an analysis that flows from reality testing.[752]
>
> If I feel the parties do not have the capacity to benefit from this step.[753]
>
> Cases where either party is not willing to participate.[754]
>
> When the parties have shut down and are no longer willing to participate.[755]

740 ID numbers: 11, 19, 133, 183, 205, 208, 211, 212, 229, 315, 327, 330.
741 ID number 183; see also ID numbers: 19, 205, 208, 315, 327.
742 ID number 229.
743 ID numbers: 133, 229.
744 ID number 1.
745 ID number 31.
746 ID number 65.
747 ID number 81.
748 ID number 91.
749 ID number 138.
750 ID number 161.
751 ID number 180.
752 ID number 231.
753 ID number 293.
754 ID number 299.
755 ID number 324.

Responders also include mention of safety issues, including bullying and violence. For example: 'Safety concerns, trauma';[756] 'I always consider client and my own safety before using reality testing';[757] 'If there are threats of violence reported during conciliation';[758] 'Violence, or threats, or danger, or coercive control situations';[759] 'Violence: physical, emotional, financial';[760] 'If I thought that reality testing was going to increase the risk of safety to a party or myself then perhaps this may not be used';[761] and 'It is NOT appropriate to reality test someone's perception of them feeling unsafe, bullied, or at risk of violence.'[762]

A small number of responders also refer to situations where the use of reality testing might be detrimental, or harmful, to the parties. For example, 'If it [reality testing] had the potential to harm or endanger anyone';[763] and 'I am cautious when a party demonstrates a particular sensitiveness or alertness (and negative reaction) to questions that may challenge their view/position.'[764]

None of the responses that claim to consider disputant's mental health, capacity, and willingness, describes how the mediator/conciliator arrives at that assessment.

Responders also include mention of safety issues, including bullying and violence

II. Factors relevant to the process

Generally, responses included here refer to a mediator assessment that there is sufficient positive progress without needing reality testing. For example:

> When parties are close to an agreement.[765]
>
> When both parties are really working on the agreement.[766]
>
> When the parties are in agreement on something, I might not try to convince them that it is unrealistic.[767]
>
> Clients reality testing themselves, as can occur between people inclined to collaborate'; [768] 'When the parties are converging.[769]
>
> You don't want to bring up court if parties have already in principle reached agreement.[770]
>
> Where there seems to be an amicable flow occurring and progress is being made.[771]
>
> I might not want to undermine an agreement.[772]
>
> Where parties move towards resolution with minimal pressure.[773]
>
> When someone might use [reality testing] as an excuse to back out of an agreement point when in reality the proposal is very workable.[774]

756 ID number 21.
757 ID number 82.
758 ID number 91.
759 ID number 112.
760 ID number 188.
761 ID number 313.
762 ID number 323.
763 ID number 282.
764 ID number 356.
765 ID number 5.
766 ID number 23.
767 ID number 34.
768 ID number 77.
769 ID number 157.
770 ID number 219.
771 ID number 257.
772 ID number 296.
773 ID number 334.
774 ID number 337.

CONTENTS

On the other hand, a small number of responders note that reality testing has no purpose if there is little or no likelihood that an agreement will be reached. For example:

> When the parties, or one of them, are not focused on any change in the status quo as they see it;[775]
>
> Where the parties have agreed not to agree;[776]
>
> If agreement is not reached;[777] and
>
> Where the mediation or conciliation is simply a gate through which the parties must pass on the way to litigation, when litigation (or arbitration) is the preferred outcome of both/all parties.[778]

Or in situations where the mediator has to either suspend or terminate the mediation.[779]

III. Factors relevant to the mediator

These include responses that mention ways in which the use of reality testing might impinge on perceptions of the mediator's role, including effects on impartiality/neutrality/bias;[780] perceptions of the mediator as 'interventionist',[781] as giving 'legal advice',[782] or being motivated by their own 'concern, not theirs [ie, the parties']'.[783] Five responses include specific mention of concern that the use of reality testing not interfere with the level of rapport between the mediator and the parties,[784] and that there needs to be a level of rapport before reality testing can be used.[785]

Five responses include specific mention of concern that the use of reality testing not interfere with the level of rapport between the mediator and the parties

Although the vast majority of responses to this question include factors that we have categorised among the five subthemes, a small number refer to other factors that influence their choice not to use reality testing.

775 ID number 12.
776 ID number 32.
777 ID number 75.
778 ID number 55.
779 ID numbers 32 and 69 respectively.
780 For example, see ID numbers: 24, 81, 97, 103, 126.
781 ID number 17.
782 ID number 19.
783 ID number 296.
784 ID numbers: 2, 221, 297.
785 ID numbers: 353, 371.

CONTENTS

a) The influence of perceptions of power

A small number of responses to question UQ6 specify that responders do not/will not use reality testing when there are power differentials, or power imbalances,[786] between the parties.[787] Generally, they include no clarification of how they interpret "power imbalance" Examples include:

> If power imbalance is high, or if manipulation is at play, then reality testing may be used in private sessions only – reality testing may reinforce power imbalance.[788]
>
> Where both parties have received extensive financial/legal advice and are both operating from a position of similar power.[789]
>
> If a matter was highly emotional, or there was a strong power imbalance, I may not use reality testing in joint session until I was sure I had rapport.[790]

On the other hand, one response specifies that reality testing is not used where the mediator/conciliator perceives that there is no power imbalance: where the parties are 'operating from a position of similar power'.[791]

b) The influence of rapport and trust

Few responses specifically mention issues around trust and rapport.[792] Three are concerned about situations where the use of reality testing might break the rapport that has already developed;[793] two are concerned about using reality testing before rapport has been developed;[794] and one expresses concern about using reality testing in situations where the parties have low trust and confidence in the process.[795]

c) Self-determination

Seven responses include specific mention of concepts related to self-determination.[796]

The concepts include ensuring equal opportunity for participation (eg, by ensuring reality testing techniques are used with each party);[797] seeking the parties' consent to use reality testing (and not using if they do not consent);[798] ensuring parties' views are paramount (ie, not mediator's);[799] ensuring parties make their own assessments of the strengths/weaknesses of their situations;[800] ensuring parties are able to make fully informed decisions.[801]

> If power imbalance is high, or if manipulation is at play, then reality testing may be used in private sessions only – reality testing may reinforce power imbalance

786 ID number: 238.
787 ID numbers: 1, 30, 114, 115, 145, 182, 238, 244, 301, 323, 347, 371.
788 ID number 182.
789 ID number 266.
790 ID number 371.
791 ID number: 266.
792 ID numbers: 2, 36, 221, 297, 353, 371.
793 ID numbers: 2, 221, 297.
794 ID numbers 353, 371.
795 ID number 36.
796 ID numbers: 17, 73, 74, 137, 296, 315, 329.
797 ID numbers: 73; 137.
798 ID numbers: 17, 74.
799 ID number: 296.
800 ID number 315.
801 ID number 329.

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Chapter Four – Observed effects of reality testing, on the parties, on the outcomes, and on the role of the mediator

Survey question UQ7 What effects have you observed "reality testing" has on the parties?[802]

Survey question UQ8 What effects have you observed "reality testing" has on the final outcomes of a mediation?

Survey question UQ9 What effects have you observed "reality testing" has on your role as a mediator?

This chapter includes information provided by survey participants about what they have observed as being the effects of reality testing on the parties, on outcomes, and on the role of the mediator.

The three questions invited survey responders to reflect on reality testing and three key aspects of its influence, or effect, based on their own practice.

We anticipated gaining that information, as well as some insight into practitioners' capacity for reflective practice, whether that be a reflection on others (ie, the parties), on the process (ie, outcomes), or self-reflection (ie, reflection on the role of the mediator/conciliator).

Key findings

- **UQ7** (Observed effects on the parties): positive observed effects relate to the parties' confidence, participation/engagement, and openness to different points of view; other observed effects relate to the parties' negative response to reality testing, sometimes called "pushback".
- **UQ8** (Observed effects on final outcomes): positive effects tended to focus on the likelihood of reaching an agreement, as well as its workability and durability; negative effects focus on reality testing preventing the achievement of an agreement.
- **UQ9** (Observed effects on the role of the mediator): self-reflective responses focused on ethical effects (eg, awareness of trust and impartiality); professional effects (eg, improved skills and confidence); and personal effects (eg, satisfaction).

802 In the online survey, the word "parties" was used as a reference to non-mediator participants 790 in any mediation; in this analysis we continue to use "disputants" (as explained earlier) and "parties/disputants" when referring specifically to the survey itself.

Observed effects - Thematic analysis

The thematic analysis is presented below, with a separate section for each of the three relevant survey questions.

Reflection on others: observed effects on parties

In response to question UQ7, the descriptions of the observed of reality testing do focus on the parties (analytical theme 1), and, to a slightly lesser extent, on achieving an agreement/ settlement (analytical theme 2.).

Positive effects	Negative effects
Reassess positions/plans	Demoralise
Improve participation/ engagement	Discomfort
Accommodate other views	Defensive
Increase confidence	Anger/pushback

Figure 4.11 shows summary of responses to question UQ7 ('What effects have you observed "reality testing" has on the parties?')

The ability to reflect on how reality testing might affect the parties is important not only as an indicator of the mediator/conciliator's responsive capacities, but also in terms of the mediator/conciliator's alertness to issues that might affect procedural fairness and justice.

The ability to reflect on how reality testing might affect the parties is important not only as an indicator of the mediator/ conciliator's responsive capacities, but also in terms of the mediator/conciliator's alertness to issues that might affect procedural fairness and justice

Overall, the responses to this question include mention of a range of effects, including enabling the parties to: reassess their positions and plans;[803] accommodate other views;[804] better understand alternatives to an agreement, and the consequences of not reaching an agreement;[805] better understand the terms and practicalities of their agreement/settlement;[806] better participate;[807] and exercise self-determination: 'I think it alerts the parties to the significance of their own voice.'[808]

[803] For example, ID number 130: 'The parties will often have clarified for themselves their position on aspects of the dispute, or they may have completely changed their position'; see also 1, 2, 7, 8, 10, 12, 13, 14, 18, 19, 24, 31, 34, 36, 42, 44, 45, 47, 52, 60, 64, 68, 69, 70, 72, 74, 76, 84, 85, 86, 87, 90, 92, 103, 116, 117, 121, 122, 128, 132, 135, 136, 138, 139, 140, 142, 143, 145, 146, 158, 163, 164, 165, 168, 169, 173, 177, 178, 181, 186, 191, 194, 198, 200, 202, 204, 209, 211, 212, 221, 223, 224, 225, 229, 245, 250, 271, 272, 278, 279, 283, 290, 291, 293, 299, 305, 309, 313, 314, 315, 318, 321, 324, 332, 334, 343, 345, 351, 353, 359, 361, 363, 370, 376.

[804] For example, ID number 341: 'Makes party consider what it is like in the other party's shoes and what they want'; see also 21, 29, 31, 35, 48, 56, 59, 73, 82, 93, 94, 101, 112, 115, 134, 165, 184, 188, 203, 228, 231, 243, 244, 248, 249, 252, 268, 275, 295, 298, 302, 311, 325, 326, 335, 342, 350, 356, 374

[805] For example, see ID number 99: 'I feel reality testing ensures parties are certain of implications or are given an opportunity to see the future reality of outcomes'; see also 26, 27, 30, 33, 49, 98, 127, 131, 134, 144, 147, 153, 154, 157, 159, 168, 183, 185, 205, 208, 214, 219, 233, 238, 239, 307, 311, 322, 331, 333, 374.

[806] For example, ID number 218: 'When used well, reality testing can help the parties see the issues within their own positions/options. With this reflection, they begin to amend their proposals to something more workable'; see also 15, 23, 43, 64, 75, 82, 111, 123, 141, 172, 182, 196, 256, 265, 273, 277, 280, 287, 295, 323, 327, 337, 339, 347, 362.

[807] For example, ID number 107: 'In some cases, it appears to give some parties the freedom to negotiate outside the parameters of the legal advice received and you see their own personal best efforts at negotiating a settlement'; see also, 25, 32, 39, 65, 241, 266, 270, 350.

[808] ID number 39.

CONTENTS

One key aspect of the responses to this question is their being expressed in terms of positive and negative effects on the parties. Some positive effects that responses describe include boosting confidence;[809] giving voice (that is, being alerted to the significance of having their own voice heard);[810] enabling and empowering;[811] enabling choice;[812] taking agency for agreement or promoting self-determination;[813] and ensuring informed decision-making.[814] There is also reference to expanding knowledge;[815] feeling supported;[816] feeling relief;[817] promoting understanding generally,[818] and in relation to others' views;[819] promoting a sense of the parties' own obligations,[820] and their own position/ circumstances;[821] to clarify options/proposed agreement;[822] and to understand risks.[823] One responder describes the effects as:

> It assists parties to understand their issues at a much deeper, less superficial level and hence gain more insight into understanding of what is involved in their dispute and resultant decision-making.[824]

> Reality testing's observed effects on parties also include shifting thinking, positions and emotions; creating awareness or realisation (eg, 'a light bulb moment')

And another responder:

> I observe that good reality testing, using probing questions, can completely change a party's outlook on a dispute.[825]

Other positive reflections relate to the interactions between the parties within the mediation/conciliation. For example, responders describe the effects of reality testing as strengthening the relationship between parties,[826] or as leading parties to consider relationships.[827] It can also produce empathy in parties:

> Reality Testing brings to the surface understandings that may have not been realised without exploration of others unique differences and perspectives. The technique brings about empathy and mutual understanding and an opportunity to move through positions.[828]

Reality testing's observed effects on parties also include shifting thinking, positions and emotions; creating awareness or realisation (eg, 'a light bulb moment'[829]), promoting objectiveness in the parties,[830] and prompting reflection on self, others and other matters.[831]

809 ID number 64
810 ID number 39: 'I think it alerts the parties to the significance of their own voice';
811 ID numbers 2, 91, 294, 306.
812 ID number 109, 278.
813 ID number 32, 87.
814 ID Number 144, 147, 306, 329.
815 ID Numbers 45, 98, 154.
816 ID Numbers 64, 75.
817 ID Numbers 65, 97, 116.
818 ID Number 128, 335, 371, 335.
819 ID Number 249, 342, 374.
820 ID Number 310.
821 ID Number 231.
822 ID Number 182, 147, 295.
823 ID Number 134.
824 ID Number 209.
825 ID Number 361.
826 ID Number 295.
827 ID Number 183.
828 ID Number 335. Also ID Numbers 21, 56, 184.
829 ID number 42.
830 ID Number 178: 'reminds parties to move from an emotional response to an objective consideration'.
831 ID Numbers 1, 15, 21,84, 93, 137, 141, 142, 144, 147, 159, 168, 169, 173, 178, 218, 295, 297, 315, 297,

CONTENTS

In relation to the latter, some responders made the following observations:

> Generally, the most powerful weapon in ADR. Parties are able to reflect on their preconceptions and at least be encouraged to question if the outcome they believe they are entitled to is the likely outcome for them.[832]
>
> I have observed parties to have reflected more and even broken down their barrier or soften their hard position after reality testing them.[833]
>
> It can be a wakeup call and assist a party to recognise the limitations of their case and the risks of taking a matter further. It can assist a party to reflect on their current state of mind and of being more objective. It can assist a party to have more insight into their behaviour and the behaviour of the other party.[834]
>
> If done well it can help shift parties' thinking and help them to feel less emotional about having to make difficult decisions.[835]

One response describes an effect in a more forceful, almost reprimanding way: 'It should shake their complacency'.[836] Other responses describe reality testing as 'keeping parties on track';[837] leading to acceptance;[838] as well as taking responsibility,[839] and being accountable for decision-making.[840]

Responders also speak about the observed negative effects that reality testing can have on the parties.[841] Reality testing can have a demoralising effect on the parties; it can cause them discomfort;[842] it can lead to fear and disempowerment;[843] it can unsettle parties;[844] and lead to fatigue,[845] distress,[846] anxiety[847] and anger:

> I have observed it to cause distress in some cases, such as a separated parent eventually realising that his/her preferred outcome is relatively unlikely to be achieved. It is often met with anger - frequently anger with the mediator/conciliator, as being the nearest person against whom to express a sense that life is unfair. There can be an element of 'shooting the messenger' - figuratively, ideally![848]

One response describes an effect in a more forceful, almost reprimanding way: 'It should shake their complacency'.Other responses describe reality testing as 'keeping parties on track, leading to acceptance'

832 ID Number 297.
833 ID Number 159.
834 ID Number 168.
835 ID Number 169.
836 ID Number 224.
837 ID Number 150.
838 'Of more than one option' (ID Number 31);
839 ID Number 177.
840 ID Number 283.
841 ID Number 295.
842 ID Number 188. The discomfort eventually leads to a positive outcome when 'a light goes on and ego lessens' (ID Number 188).
843 ID Number 39. For this responder, it can also have a positive outcome.
844 ID Number 66. For this responder, the whole purpose of reality testing is to unsettle, so may not be seen as negative: 'Depending on how effective it has been delivered. The aim is to unsettle, so if there is little response it probably means: try something different'.
845 ID Number 74: For this responder, although parties become fatigued, reality testing can also clarify 'goals and needs, obligation'.
846 ID Number 180. This responder also recognised the positive effect it can have: 'It can cause further distress and anger. It can provide 'light bulb' moments for a party.' See also 195.
847 ID Number 202: 'It changes a party's [perspective], it creates doubt, it can lead to them exploring other options, it can sometimes cause anxiety, it can lead to broader thinking and re-examination of the issues.'
848 ID Number 195.

CONTENTS

Reality testing can also lead to a party becoming defensive or resistant,[849] and entrenched in their positions,[850] or it can lead to a perception of bias on the part of the mediator/conciliator:

> It can vary. Care needs to be taken not to appear biased or as applying excessive pressure. Parties can become defensive in response to reality testing. In some cases, reality testing has no effect at all. Ideally, reality testing leads to parties giving further consideration to offers and the opportunity for compromise.[851]

Those responders who have observed negative effects also focus on the importance of carefully engaging in reality testing to avoid any negative effect, in particular, the perception of bias, as noted in the above quote and below:

> It can make people defensive and determined to argue their point, they may think that you are against them and in favour of the other person - if your words are not careful. When carefully done, it allows parties to consider matters…[852]
>
> It can be very damaging when it is wrong or motivated by bias.[853]

One negative effect (ie, perception of mediator bias) has raised serious concern for one respondent, whose prevention mechanism is to use reality testing in pre-mediation sessions.

> Reality testing is effective but carries the risk of participants claiming that the testing wasn't realistic, e.g. A mediator may inflate the costs of going to court/tribunal, which convinces a participant to settle. That participant could research the actual costs (after the fact), find they were inflated by the mediator, and potentially regret settling and/or put in a complaint against the mediator. To counter this, I think participants should be reality tested prior to the mediation, to give them time to research/get legal/other advice so that's they are informed…[854]

Most responders, however, describe positive observed effects on the parties. To the extent that the reality testing does not include the mediator/conciliator pressuring the parties to act one way or the other, and enables genuine informed decision-making and promotes self-determination, it would appear to be ethical and effective.

The described negative effects of anxiety, distress, fear, disempowerment, fatigue, and discomfort suggest specific skills that could be included in mediator/conciliator training and education.

849 ID Numbers 205, 334
850 ID Numbers 305, 342.
851 ID Number 334.
852 ID Number 205.
853 ID Number 61.
854 ID Number 377.

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Reflecting on the process: the observed effects on outcomes

In response to question UQ8, responders describe what they observe to be the effects reality testing has on the outcomes of mediation/conciliation processes. The question naturally focuses on outcomes, and it is no surprise that most responses do as well. Well over two thirds of the responses have that focus (analytical theme 1), leaving only small proportions with any focus on the parties or on the mediator/conciliator (analytical theme 2).

Positive effects	Negative effects
Agreement more likely	Agreement less likely
Agreement more durable	
Agreement more workable	

Figure 4.12 shows a summary of responses to question UQ7 ('What effects have you observed "reality Testing" has on the final outcomes of a mediation?')

A small number of responders point out that reality testing does not always lead to agreement/settlement and its use may actually prevent an agreement being reached.[855] These responses may be interpreted as being negative, but cannot be exclusively categorised as such (it may be a benefit if an unacceptable agreement is avoided), and interpretation of outcomes can vary.

> Some responders have interpreted the term "outcomes" as referring to an agreement, while others consider the narrowing of issues to be outcomes

Other responders have said:

> The effect that I have observed that the agreement is better considered. It may bring about further discussion which can be awkward after a very long mediation. It also brings the risk of the parties not agreeing because they have considered the proposal in greater depth.[856]
>
> Sometimes success, other times, it did not help.[857]
>
> The outcome may not happen at the first mediation session, but I don't see this as a bad thing necessarily.[858]
>
> Sometimes it works, sometimes it does not.[859]

Some responders have interpreted the term "outcomes" as referring to an agreement, while others consider the narrowing of issues to be outcomes.[860] An example of a broader interpretation of "outcome" appears in this response:

> More grounded negotiations, better listening during negotiations, deeper agreement on settlement parameters, higher chance the settlement will last, improved chance for decent ongoing communication between parties.[861]

855 ID Number 113, 332. This was also observed in relation to the negative effect on parties already discussed above.
856 ID Number 32.
857 ID Number 332.
858 ID Number 113.
859 ID Number 219.
860 ID Numbers 7, 103.
861 ID Number 10.

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Some responders reflect on the accepted connection between the use of reality testing and the reaching of agreements/settlements in mediation/conciliation. The examples below suggest that it might be useful to revisit the almost axiomatic view that the use of reality testing always, or necessarily, increases the chances of achieving an agreement/settlement:

> In my experience it is not the reason a settlement is achieved or not. It may contribute to an overall successful process but in my experience, it hasn't been the "why" it settled.[862]
>
> Hard to say. As a smaller part of a wider process, it is difficult to determine what effect reality testing has on the final outcome.[863]
>
> Hard to say, in that I have no control data - what would the outcome have been if I had done NO reality testing? That doesn't happen. One thing I can say is that some mediations have led to no agreement being reached, for good reasons, after a good discussion of the Alternatives. That is, one or both parties have made what appears (from discussion) to be a wise and self-determined choice that happens to be to pursue their Alternatives. I consider this a successful mediation. (Incidentally, I take issue with the "need to reach a settlement" factor above - for the same reason - mediators should NEVER presume that there is a "need to reach agreement".)[864]
>
> I don't remember reality testing preventing agreements from happening or making agreements worse. I think it tends to cause agreements to be adjusted sensibly if adjusted at all.[865]
>
> More holistic settlement in some cases. But hard to say as it's a combination of techniques and factors in each dispute and mediation.[866]

Most responders, however, do describe that achieving agreements is an effect of using reality testing.[867] In addition, responders describe a further effect that the use of reality testing has on agreements: they suggest that agreements are easier to implement, durable, and workable:

> Makes the mediated outcome more realistic and hence more viable and likely to be long lasting.[868]
>
> It appears that outcomes have a more sustainable future as the parties have had a better opportunity to hear from each other at a level beyond the superficial.[869]
>
> Reality testing in my experience has led to more enduring and comprehensive outcomes.[870]

Future research could examine any potential relationship between the use of reality testing and the durability/sustainability of finalised agreements.

Responders also speak about reality testing leading to greater satisfaction with outcomes, although, again, there is no supporting research for this:

> Possibly increased satisfaction and understanding[871]

> Some responders reflect on the accepted connection between the use of reality testing and the reaching of agreements/settlements in mediation/conciliation

862 ID Number 180,
863 ID Number 72.
864 ID Number 278. 'The 'need to reach an agreement' is included as one of the options in the list of factors considered before reality testing in the research survey.
865 ID Number 296.
866 ID Number 374.
867 For example, ID Numbers 1, 2, 7, 9, 21, 41, 42, 80 97,107, 114, 128. 126, 133,161, 163, 164, 169, 187, 213, 225, 231, 249, 336, 361, 377.
868 ID Number 83.
869 ID Number 371.
870 ID Number 323.
871 ID Number 74, 133, 200, 203, 225.

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According to the responders, when they use reality testing, they have observed effects such as: the parties being much more confident about the outcome;[872] the parties perceiving the outcomes as good outcomes;[873] the parties accepting that the outcomes are of good quality [and options [874]];[875] that all possibilities have been considered and they are making informed decisions;[876] that outcomes are fairer;[877] and that they have been given genuine choice of whether they come to a resolution.[878] Responses also suggest that the parties may perceive that the 'process was rigorous' leading to better chances of implementation.[879]

While the question was specific in asking about the observed effect on outcomes, the responses also include descriptions relevant to the effects on the parties, including cooperation between the parties which can lead to a practical agreement;[880] shift in thinking, positions, perspectives and understanding,[881] accommodating of others' views,[882] satisfaction, and better managing of parties' expectations.[883]

The responses to the answers on the effect of reality testing of outcomes suggest the need for more research into any connections between the use of reality testing and the range of outcomes mentioned in the responses.

Self-reflection – observed effects on the role of the mediator

In question UQ9, responders were asked what effects they have observed reality testing has on their role as mediators in expectation of self-reflective responses. It is not surprising that the responses to this question include fewer with focus on achieving an agreement/ settlement (analytical theme 1.) than any other question in the survey; however, it is also the question with the lowest number of responses. Most responses to this question include a focus on the parties and on the mediator (analytical theme 2.).

There can be any of several explanations for the low number of responses including the perceived complexity of the question. There is also a possible influence of fatigue as it is the last of the survey questions. It is possible that, in a survey with a single topic focus, many people may have wondered how often they would be asked for what could be seen as the same information. Other possibilities include not having seen a final question, or simply not knowing how to answer and taking the option of not trying to do so.

872 ID Number 322.
873 ID Number 15, 301.
874 ID Number 52.
875 ID Number 20, 75, 188.
876 ID Numbers 27, 134, 177, 278.
877 ID Number 36, 279, 330.
878 ID Number 39: 'When done well, parties feel they have had a genuine choice whether to proceed with a possible outcome, or do more research into their options i.e., reached a more informed position, rather than feeling coerced'. Also 134, 177.
879 ID Number 12, 25.
880 ID Number 280.
881 ID Numbers 62, 66, 91, 257 297, 312.
882 ID Number 254,
883 ID Numbers 48, 201, 303, 312, 376

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In relation to this latter possibility, among the responses a significant number do not provide relevant information. For example:

> It's a tool I use a lot.[884]
>
> It very often leads to the resolution of the dispute in this forum without recourse to further litigation. The parties are often surprised this was not outlined earlier.[885]
>
> With respect, that's a silly question, but reality testing is a tool and an effective one at that. I always use it in my role as a mediator.[886]

There are almost a third of the responses to this question that do not include description of observed effects on the role of the mediator. These responses include descriptions of effects on the parties; on the agreement; and on the process itself; as well as specific reality testing techniques. A number of responses attest to the value of reality testing without describing any effects.

In itself, the relatively low number of self-reflective responses may suggest a less than optimal level of self-reflective practice among mediators/conciliators, despite NMAS specifications about 'peer-based reflection'.[887]

Figure 4.13 shows a summary of responses to question UQ9 ('What effects have you observed "reality testing" has on your role as the mediator?')

Ethical effects	Professional effects	Personal effects
Can increast trust	Confidence	Satisfaction
Self-aware of objectivity	Add value	Enjoyment
Self-aware of impartiality	Educative	
Can be more directive	Developmental	

Figure 4.13 showing a summary of responses to question UQ9 ('What effects have you observed "reality testing" has on your role as a mediator?')

In summary, the responses to this question mention three types of effects: ethical effects (eg, effects on impartiality and trust); professional effects (eg, educational role, and increased sense of professional achievement); and personal effects (eg, increased personal satisfaction and confidence). In addition, several responses acknowledge that their role changes when they are using reality testing (though without specifying the changes).

Ethical effects

The effect of reality testing on the mediator's ethical responsibilities has been raised in many responses to this question. These include reflections on the ways in which reality testing helps to generate trust between the mediator/conciliator and parties, and the need for the mediator to be aware of this, and not jeopardise trust through their use of reality testing:

> Increased trust from participants in impartiality of role.[888]
>
> If the right language isn't used, distrustful parties might get a sense that I'm trying to sway them or favour the other party … explain[ing] why I am reality testing their statement helps them understand the purpose of the reality testing.[889]
>
> It makes me aware of the need to engender trust in me as a mediator and in the process overall.[890]
>
> Must take care not to be seen by parties as losing objectivity so as to retain their trust. Important to emphasize that I am doing the same to the other parties.[891]
>
> It has made me a lot more self-aware in terms of balancing the need to challenge parties' assumptions and expectations with the need to maintain the parties' trust in my impartiality.[892]

884 ID number 7.
885 ID number 159.
886 ID number 187.
887 NMAS 2015, Part II Approval Standards, Accreditation renewal requirements, 3.5(875 b) Reflecting on practice; see also NMAS 2015, Part III Practice Standards, Ethical conduct and professional relations, 8.5.
888 ID Number 14.
889 ID Number 25.
890 ID Number 36.
891 ID Number 48.
892 ID Number 72. See also 84, 101, 128, 130, 180, 204, 249, 353, 374.

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> Reality testing has required me to use a high degree of care and listening skills in order to gauge the level of trust a party has that I am autonomous and independent and to avoid saying or doing anything that undermines that trust. I have reminded the party that I am autonomous and independent and that I have not formed any view about their case. I have found that during reality testing my role as mediator is at risk of being misunderstood and must in an educative way be affirmed. If parties are represented by lawyers my role in reality testing includes reminding the party to seek advice from their lawyer as I am not their adviser. I have found that that reality testing has enabled me to manage difficult challenges presented by a party.[893]

According to some responses, concerns about trust lead a mediator/conciliator to conduct reality testing in private sessions. For example:

> Sometimes, though rarely, I feel I may be compromising my neutral position which would lose the trust of the other party if they feel I am somehow "assisting" or "guiding" one party, and this is why I generally reality test in private session which I conduct quite late in the mediation having made notes of points that may need revisiting with reality testing. After private sessions, I do not introduce any of the discussion to the parties. My initial question on return to joint discussion is "do either of you have anything from the first part of the session that you would like to revisit, or is there anything else you would like to introduce to the agenda at this point? Often, the parties just "tuck the reality testing in their sleeve" to be used at a later point in negotiations.[894]

The risk reality testing poses to the mediator/ conciliator's impartiality is also noted, including the potential flow-on effects on the fairness of the process and on procedural justice.

> The risk reality testing poses to the mediator/ conciliator's impartiality is also noted, including the potential flow-on effects on the fairness of the process and on procedural justice

> It can be testing, as you need to be careful in asking the questions that get a party to see the flaws in their argument, without being judgemental, or condescending. It needs to be their own 'light bulb' moment through gentle prodding, not a harsh confronting of reality.[895]

> Reality testing require significant discipline as a mediator. If managed poorly - the wrong words or questions can significantly influence the direction of the negotiation. So I must remain neutral and curious in the reality testing rather than stepping into expert assessment. I see and hear a lot of cases of 'judges and ex-judges or legal practitioners' who see reality testing as the opportunity to insert their legal authority or experience. That in my opinion isn't reality testing but more advisory. The trick is to frame the questions as a curiosity - what if, if am curious, what happens if.[896]

> It is important to reality test in a way that does not appear to either client as doubting a person's ability/intent. I invite questions from each party about a proposal in an effort to appear non-biased and non-judgmental.[897]

893 ID Number 153.
894 ID Number 266.
895 ID Number 154.
896 ID Number 323.
897 ID Number 310,

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For some responders who work in legislative-based ADR programs, the risk to trust is minimal as they have obligations under relevant legislation to ensure agreement/settlement complies with relevant legislative provisions:

> I see appropriate use of reality testing as an important part of my role as a conciliator. This is because part of my role is to take reasonable steps to ensure parties make informed and considered decisions about potential resolution of a matter. I also have a role in addressing power imbalances and promoting understanding of the law.[898]
>
> It allows me to be a bit directive in getting the parties to refocus on realistic possibilities and how they might actually work in practise - it fits comfortably for me in the facilitation aspect of the process and allows me to maintain a solid child focus - reality testing how their plans would work for their children who have to live them on a daily basis.[899]
>
> I've started reality testing more in my role as a conciliator than I did as a mediator. I feel more confident in my reality testing as I have got to learn the legislation in my current role and the implications of different outcomes for parties.[900]

In relation to their professional status, responders also say that reality testing allows facilitative mediators to take on a more directive approach

Professional effects

Responders have mentioned that reality testing can be satisfying for the mediator as a professional because a change can be seen in parties or parties can make progress or reach agreement:

> … this process is extremely satisfying because it creates a light bulb moment.[901]
>
> It provides me with a sense of satisfaction in feeling that I have added value in my facilitation by assisting them to consider the reality of their current situation (when used to shift positions) or the implementability of their agreement (when used to reality test agreements as they are being formed).[902]

In relation to their professional status, responders also say that reality testing allows facilitative mediators to take on a more directive approach, and can be seen as an opportunity for the mediator to change tack:

> In some cases, I find that although I aim to be purely facilitative in my practice, reality testing as mediator can influence parties with regard to their position and their willingness to negotiate. Arguably in a facilitative session this may mean my role changes from being purely facilitative towards a more directive role.[903]
>
> Sometimes reality testing with a party makes you aware that you are coming close to crossing the dividing line between being a facilitative mediator to being an evaluative mediator. That's not necessarily a bad thing, but it helps you to remember that, as a mediator, ultimately your role is to facilitate the discussion and assist the parties to determine whether they settle the dispute or not, rather than being an active player in the dispute with an active ambition of making sure the parties settle.[904]

898 ID Number 334.
899 ID Number 1.
900 ID Number 2.
901 ID Number 376. See also 372.
902 ID Number 20. Also, ID Numbers 23, 29, 45, 82 168, 188, 250, 275, 293, 303, 321, 346, 347, 352, 371, 376.
903 ID Number 356.
904 ID Number 244.

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Some responders reflect on their role as educators. One says it 'allows me to educate participants on how they got where they did in the dispute and where they can go.'[905]

The difficulty with reality testing was also visible in the responses. Some responders speak about the challenge it poses:

> It can be tricky to understand how to test someone's reality – when it is so different to your own. Sometimes need to try a few different approaches before you find the right language or rationale to help someone to see things differently.[906]
>
> As a mediator, using reality testing can bring you very close to the line regarding impartiality and neutrality. By testing what has been said by a party, we're almost being drawn into the content by testing against our own set of values or beliefs on what is realistic or practical.[907]
>
> Little impact, as I do not take on reality of one or the other party; my reality testing is based on inquiring about views of parties, rather than about my views on situation. sometimes need to endure periods of escalated behaviour, but usually not directed personally at mediator or if directed at mediator can be refocused on issues.[908]
>
> Although I couch reality testing most often in probing questions about 'what happens if ...' I find parties view me as an expert, so I must be very clear that I must be impartial and they cannot take my questions or observations as advice.[909]

Despite most responses demonstrating an awareness of the effects of reality testing on their role, a small number of responses downplay any such effects,[910] with a few claiming that it has no effect at all.[911]

These responses suggest a lack of awareness and of self-reflective practice among some mediators/conciliators – as noted earlier in this section.

Personal effects

The impact on personal life is also discussed, including being more aware of risks, more controlled, better with understanding people, creating workable ideas, flexibility, and the opportunity to engage in self-reality testing.[912]

A number of responses include mention of the personal satisfaction they gain from their use of reality testing. For example:

> I like the way that phase of mediation tends to slow the negotiations down so that the parties listen more effectively to each other and work more collaboratively.[913]
>
> I find the reality testing an interesting part of the process for me.[914]
>
> My main aim is to assist parties to communicate effectively. Even if the matter does not resolve, most of them will go on to be better communicators and this is a win for me.[915]
>
> I love it! … I see parties making better, more informed decisions.[916]
>
> A better sense of satisfaction that I have been a help in the way the parties are approaching their dispute.[917]

> Some responders reflect on their role as educators. One says it 'allows me to educate participants on how they got where they did in the dispute and where they can go'

905 ID Number 377.
906 ID Number 27.
907 ID Number 218
908 ID Number 342.
909 ID Number 361.
910 ID numbers: 35, 120, 127, 149, 158, 297, 307, 326, 336.
911 ID numbers 35, 127, 149, 158, 297, 307, 336.
912 ID Number 353.
913 ID number 30.
914 ID number 111.
915 ID number 177.
916 ID number 183.
917 ID number 371.

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While responses demonstrate high levels of awareness about the ethical challenges associated with any use of reality testing, it is still viewed as a very important tool, technique or process which makes significant contributions to the mediation/conciliation process, in particular increasing the possibility of reaching an agreement/settlement.

The effects of reality testing – focus group information

In focus group conversations, participants described the effect of reality testing in relation to process, parties, and mediators. They described how reality testing helps parties to talk to each other in the process and to find the root cause of the problem, including what they would like to achieve and what is “doable”. Attendees also described how it helps set expectations, separate emotions, and rationality, change perceptions and refocus parties.

Some attendees spoke about reality testing helping to achieve an agreement, how it has a big impact on settlement rates, and enables the testing of the consequences of not reaching an agreement. It was also noted that reality testing helps the mediator/conciliator to understand the dispute and the parties and to get to the real causes of conflict.

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Chapter Five – Conciliators

This section draws out information provided by the seventeen responders who identify solely as conciliators in their response to question Q2 (*'Do you refer to yourself as [mediator, conciliator, both]?'*).[918] Of those who answered questions Q11 and Q14, all seventeen attended training that included mention of reality testing, and all use reality testing in their conciliations.

In terms of the three analytical themes and their appearance in conciliator responses across all survey questions, a majority include a focus on the agreement/settlement,[919] and a high number also include focus on the parties[920] – a similar result to that reported earlier in Part 4 in relation to all survey responses.[921]

Key findings

- The number of conciliator responses is very small (17);[922]
- The responses do not differ markedly from the overall survey responses;
- The seventeen conciliators do have slightly different importance ratings for the factors that influence their choice to use reality testing

Below is a summary analysis, presented separately for each of survey questions UQ1, UQ2, UQ3, UQ6, UQ7, UQ8, and UQ9.

Question UQ1 ('During those mediation/ conciliation processes, when did you tend to use "reality testing"?')

A total of nine of the conciliator responses have interpreted "when" to be a reference to a stage in the conciliation process,[923] with six of those specifying the private sessions;[924] two specifying both private and joint sessions;[925] and one specifying the joint session.[926] Five of the conciliator responses have interpreted "when" as meaning in response to certain party behaviour,[927] or to other factors within the conciliation (eg, checking the ramifications if there is no agreement,[928] or checking on relevant legislative compliance and 'when facts are indisputable'[929]).

[918] ID numbers: 40, 44, 53, 91, 104, 128, 133, 134, 137, 158, 159, 178, 202, 226, 334, 365, 370.
[919] UQ1 = ID numbers: 158, 178, 202; UQ2 = ID numbers: 91, 133, 134, 158, 159, 178, 334, 370; UQ6 = ID numbers: 178, 334; UQ7 = ID numbers: 133, 137, 158, 159; UQ8 = ID numbers: 128, 133, 134, 137, 158, 159, 178, 202, 334,; UQ9 = ID numbers: 44, 159, 178, 334.
[920] UQ1 = ID numbers: 44, 202; UQ2 = ID numbers: 133, 137,; UQ6 = ID numbers: 44, 91, 128, 202, 370; UQ7 = ID numbers: 44, 91, 134, 159, 178, 202; UQ8 = ID numbers: 44, 91, 134, 137, 178, 370; UQ9 = ID numbers: 44, 133, 134.
[921] Across survey questions UQ1 – UQ9, 30 conciliator responses include focus on agreement/settlement, and 24 include focus on the parties.
[922] This Chapter includes only those Q2 responses hat specify "conciliator"; although a number of survey responses to question Q2 report being both mediators and conciliators, survey questions do not provide any opportunities for such practitioners to clarify whether their responses relate to either or both roles, making it almost impossible to differentiate them.
[923] ID numbers: 44, 91, 128, 133, 134, 137, 159, 178, 202.
[924] ID numbers: 44, 128, 133, 134, 159, 202.
[925] ID numbers: 91, 137.
[926] ID number 178.
[927] ID numbers: 44, 91, 202.
[928] ID number 158.
[929] ID number 370.

> The factors which were rated by conciliators as most important were 'Nature of the dispute' and 'Fairness (including addressing what you see to be power imbalances or disadvantages')

Question UQ2 ('During those mediations/ conciliations, how did you use "reality testing" – eg, what did you say and/or do?')

In terms of conciliator questioning techniques, three of the conciliator responses refer to indirect/open questioning;[930] two refer to direct/closed questioning;[931] and one refers to a combination of both.[932] Four conciliator responses refer to the conciliators making statements about applicable law and anticipated determinations/decisions,[933] while three also mention similar conciliator statements which are described as being accompanied by discussions with the parties.[934]

Question UQ3 ('Below are the factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?')[935]

The factors which were rated as most important were 'Nature of the dispute'[936] and 'Fairness (including addressing what you see to be power imbalances or disadvantages'),[937] each of which received high importance ratings in 12 responses. The next most important ratings were for 'The parties (eg, capacity and expectations)' which received eleven high importance ratings.[938]

'The need to ensure terms of agreement comply with legislative or industry standards',[939] and 'Context/setting',[940] each received 10 high importance ratings.

Two factors received relatively high numbers of "not at all important" ratings: 'The presence of legal advisors' which was rated as "not at all important" in seven responses,[941] and 'Whether mediation is occurring in a public or private setting', which was rated as "not at all important" in five responses.[942]

The above numbers are very small; however, the focus of "most important" ratings differs from the overall numbers for this survey question. For example, in the overall survey responses to this question, the parties (capacity and expectations) received the highest number of "most important ratings" at 246, followed by 'Fairness' at 236. The overall numbers are similar to the conciliator ratings for 'The presence of legal advisors' and 'Whether mediation is occurring in a public or private setting'.

930 ID numbers: 44, 91, 137.
931 ID numbers: 158, 370.
932 ID number 334.
933 ID numbers: 40, 128, 159, 202.
934 ID numbers: 133, 134, 178.
935 Four conciliators did not include responses to this question.
936 ID numbers: 44, 91, 128, 133, 134, 137, 158, 159, 178, 202, 334, 370.
937 ID numbers: 40, 44, 91, 128, 133, 134, 137, 159, 178, 202, 334, 370.
938 ID numbers: 40, 44, 128, 133, 134, 137, 158, 159, 178, 202, 334.
939 ID numbers: 40, 91, 128, 133, 134, 137, 159, 178, 202, 370.
940 ID numbers: 40, 44, 91, 128, 133, 134, 137, 202, 334, 370.
941 ID numbers: 40, 44, 91, 133, 134, 137, 158.
942 ID numbers: 40, 133, 134, 137, 178.

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Question UQ6 ('In which situations would you choose not to use "reality testing"?')

As with the overall responses to this question, the conciliator responses have tended to focus primarily on the parties, including their willingness (or not),[943] their safety,[944] and their mental health and capacity.[945] Two responses report not using reality testing for specific types of disputes,[946] and two report non-use when there is good progress without it.[947]

Question UQ7 ('What effects have you observed "reality testing" has on the parties?')

Seven of the conciliator responses include reference to the use of reality testing having the effect of changing, or broadening or making more creative,[948] the parties' thinking, and two refer to it helping parties to accommodate views other than their own.[949] There is one response each that raises ethical issues relevant to the conciliator (eg, the dangers of perceived bias, and 'excessive pressure'[950]), and factors associated with self-determination.[951]

> Responses raise ethical issues relevant to the conciliator (eg, the dangers of perceived bias, and 'excessive pressure'), and factors associated with self-determination

Three conciliator responses mention potentially negative responses to the use of "reality testing" (eg, 'it can sometimes cause anxiety'[952])[953].

Question UQ8 ('What effects have you observed "reality testing" has on the final outcomes of a mediation?')

Six conciliator responses to this question include information that is not directly relevant.[954] The remaining seven responses include references to increasing the chances of achieving an agreement, including a better, or more durable, agreement;[955] and one refers to reality testing bringing about an increase in party satisfaction.[956] Two responses being unsure that reality testing, in itself, has any effect on achieving an agreement.[957]

Question UQ9 ('What effects have you observed "reality testing" has on your role as a mediator?')

Five conciliator responses to this question include information that is not directly relevant.[958] Of the remaining eight, three raise ethical issues (eg, 'I am very wary not to come across as anything but impartial'[959]);[960] one reports that reality testing increases trust,[961] and one that its use increases the conciliator's understanding of the parties and of their situations.[962] One response includes reference to reality testing's positive effects on the conciliator's professional development.[963] One conciliator reports that reality testing has no observed effects on their role.[964]

943 ID numbers: 133, 202, 370.
944 ID numbers: 44, 91.
945 ID numbers: 91, 128.
946 ID numbers: 40 ('bullying and other trauma-based matters'), 159 ('if case presented was not arguable').
957 ID numbers: 178, 334.
948 ID numbers: 91, 128, 134, 137, 159, 178, 202, 334.
949 ID numbers: 44, 134.
950 ID number 334.
951 ID number 91.
952 ID number 202.
953 ID numbers: 158, 202, 334.
954 ID numbers: 44, 91, 134, 137, 159, 370.
955 ID numbers: 128, 133, 178, 202, 334.
956 ID number 133.
957 ID numbers: 158, 334.
958 ID numbers: 44, 133, 134, 159, 370.
959 ID number 137.
960 ID numbers: 137, 178, 334.
961 ID number 128.
962 ID number 202.
963 ID number 91.
964 ID number 158.

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Chapter Six – Practitioners who do not use reality testing

Survey question Q14 'Have you ever used "reality testing" in your mediations/ conciliations?'

The purpose of this question was to differentiate the practitioners who do use reality testing from those who do not. As noted elsewhere in this report, those who selected "Yes" gained access to one set of questions, and those who selected "No" gained access to a different set of questions. We anticipated that, not only would this help us focus our analysis of information from people experienced in the use of reality testing, it would also provide some insight into the views of those who do not use the intervention.

Survey question NUQ1 'Explain why you have chosen not to use "reality testing"?'

Survey question NUQ2 'In your own view, in what ways might reality testing affect the role of the mediator?'

Survey question NUQ3 'In your own view, how might the use of "reality testing" affect the parties?'

Survey question NUQ4 'In your own view, how might the use of "reality testing" affect the parties' decision-making?'

The above four questions were included in the survey to gain some insight into non-users' perceptions of, and ideas about reality testing. We hoped that data from users and non-users of reality testing would enable some comparative analysis.

Response data

Twelve responders selected "No" to Q14, and this analysis focuses on those. They are the only study participants who had access to the above four questions.

Of the twelve responders, one included no responses to any of the subsequent questions,[965] and one appears to have misread Q14 because their responses to survey questions NUQ1 – NUQ4 include descriptions of how they use reality testing.[966] For example, in response to question NUQ1, "I use it to explore issues in more depth and confirm the participants' understanding of the issues. To check to see what an agreement might look like to them. To test alternatives.'[967] Three non-users have not provided responses to any of NUQ2, NUQ3, and NUQ4.[968]

965 ID number 4.
966 ID number 242.
967 All responses from ID 242: NUQ2, 'There may be some behavioural issues from the participant which may affect the mediator'; NUQ3, 'When done well, it helps parties consider how they might reach an agreement. It may increase confidence'; NUQ4, 'The participant might think that the mediator is steering them in some direction, when the party is positional about the direction they want to go in.'
968 ID numbers: 4, 129, 167.

CONTENTS

Of the twelve non-users of reality testing, eleven describe themselves as being mediators, and one as being both a mediator and a conciliator;[969] six report working in private practice,[970] two in government or publicly funded programs,[971] two in both sectors,[972] and two in neither.[973]

In relation to whether their mediation training included reality testing, five report that it did,[974] and five report that it did not,[975] two report not being able to recall.[976] When compared with those responders who report being unsure, or not knowing, about reality testing, four report that their training did not include the topic,[977] and one cannot recall.[978] These figures are far too small to draw any conclusions.

Of the twelve original non-users who accessed this cluster of questions, several have been excluded from the analysis of at least one question. In response to question NUQ1, three report having no mediation experience.[979] Two responders report not knowing answers to any of the four questions,[980] and a further three do not know answers to question NUQ1,[981] NUQ2,[982] and NUQ3.[983] In response to NUQ3, one responder reiterates that they do not use reality testing.[984] With the answers that are not relevant to the question asked, few responses remain to be analysed.[985]

It is clear that we overestimated non-users' participation in this part of the online survey, as well as their capacity to provide the information we were seeking.

In relation to whether their mediation training included reality testing, five report that it did, and five report that it did not, two report not being able to recall

For example, in the responses to NUQ1 (why not use reality testing), eight responders are unable to answer the question: the responses of four state that they have no mediation experience,[986] and three state that they did not know an answer, or were unsure.[987]

Analysis of responses

We have decided that the number of usable responses for each of the four questions is far too small to warrant any analysis. We have presented the usable responses in full, in association with each of the survey questions. Only two responders have submitted information for all four of the questions. This might be an indication that the responders have little or no experience of mediation and/or do not know about the concept of reality testing. The very small number who know about it and do not use it appear to have some misgivings about its efficacy.

969 ID number 242.
970 ID numbers: 4, 58, 105, 129, 179, 206.
971 ID numbers: 167, 189.
972 ID numbers: 285, 368.
973 ID numbers: 242, 281; ID number 242 reports having conducted between 51 and 100 matters, while ID numberv281 states clearly in NUQ1 that they have no mediation experience.
974 ID numbers: 4, 167, 189, 242, 281.
975 ID numbers: 105, 129, 179, 206, 368.
976 ID numbers 58, 285.
977 ID numbers: 105, 129, 206, 368.
978 ID number 58.
979 ID numbers: 167, 189, 281.
980 ID numbers: 105, 206.
981 ID number 129.
982 ID number 58.
983 ID number 368.
984 ID number 105.
985 In NUQ1, there are three usable responses: ID numbers: 179, 285, 368; in NUQ2, there are five usable responses: ID numbers: 179, 189, 281, 285, 368; in NUQ3, there are five usable responses: ID numbers: 58, 179, 189, 281, 285; and in NUQ4, there are six usable responses: ID numbers: 58, 179, 189, 281, 285, 368.
986 ID numbers 58, 167, 189, 281.
987 ID numbers: 105, 129, 206, 368.

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On the effect of reality testing on the mediator/conciliator (NUQ2), responses are:

> A party may overestimate the likelihood of success.[988]
>
> Have to be careful not to lose trust of party(s) by appearing to favour a position.[989]
>
> It might throw up some unexpected barriers to achieving an agreed/shared outcome.[990]
>
> To maintain impartiality to the situation.[991]
>
> It can't.[992]

In relation to the effect of reality testing on parties (NUQ3), responders said:

> May change the result.[993]
>
> Can cause adjustments of expectations.[994]
>
> It might make them reflect on the situation more than they had in the past, particularly if the mediator pushed them to face reality and to see the situation from the other party's perspective.[995]
>
> It may give them clarity to how the situation can be solved, or it may compound the issue if neither party were willing to see the alternative solution.[996]
>
> Allows parties to distinguish what is real from what is not.[997]

On the effect on the parties' decision-making (NUQ4), responders said:

> May affect both parties once they have considered the decision. May change their assessment of a situation.[998]
>
> Can show flaws and weaknesses in a party's position.[999]
>
> It might slow down as it might move from a maybe to an actual and be scary, or it could assist as it might make the solution clearer for them.[1000]
>
> To give them a different viewpoint may encourage them to see the situation in a different light – in a positive way.[1001]
>
> Parties have ample time to prepare, and to work out what various settlement alternatives may lead to. Is this reality testing?[1002]
>
> Parties might well arrive at decisions based on false evidence.[1003]

We do appreciate the effort made by the twelve people who selected "No" to survey question Q14 (use of reality testing) and submitted responses to the four questions that were included for them. Thank you for contributing your thoughtful ideas to this project.

988 ID number 179.
989 ID number 285.
990 ID number 189.
991 ID number 281.
992 ID number 368.
993 ID number 179.
994 ID number 285.
995 ID number 189.
996 ID number 281.
997 ID number 58.
998 ID number 179.
999 ID number 285.
1000 ID number 189.
1001 ID number 281.
1002 ID number 368.
1003 ID number 58.

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PART 5. REALITY TESTING IN MEDIATION – CONCLUSIONS AND RECOMMENDATIONS

Chapter One – Introduction

Part 5 of the Report outlines the findings from Parts 2, 3, and 4, draws conclusions from them, and makes recommendations relevant to the inclusion of reality testing in the NMAS; the practice of reality testing; the inclusion of reality testing in future mediator training courses; and future research. Consideration is also given to key ethical issues arising from the use of reality testing, including how its use might affect both the parties' right to self-determination, and the role of the mediator.

Reflecting the overall structure of the Report, set out below are sections on each of Parts 2, 3, and 4, which include brief overviews of relevant data and information, summaries of key findings, and conclusions. Part Five of the Report concludes with our collated recommendations in Chapter Five.

Brief overview of the project

The regulatory context within which reality testing is practised by mediators/conciliators in Australia is the National Mediator Accreditation System (NMAS) which includes reality testing as one of nine mediator skills.[1004] According to NMAS, mediators' use of reality testing is confined to 'proposed outcomes in light of participants' interests, issues, underlying needs and long-term viability.'[1005]

This description of reality testing limits its use to the final stages of mediation when parties are identifying outcomes, or the terms of a potential agreement. The mediation literature suggests there are broader, and more complex, views of reality testing, and that there are many interpretations of its use and of its effectiveness. In light of this apparent divergence, this research set out to explore how reality testing is understood and used in the Australian mediation landscape, relying primarily on information obtained from an extensive review of the literature and from accredited mediators and conciliators.

Part 1 of this Report describes the context and background of the research, as well as our choice of methodology and approach, and the methods for collecting and analysing the data and information. In summary, we used a mixed methods approach, collecting quantitative data and qualitative information from the literature as well as from NMAS accredited mediators and conciliators, the latter through online surveys and focus groups. To encourage the provision of participants' own ideas and interpretations, and to avoid the influence of our own views, we did not include any definitions or descriptions of key terms or of models of mediation practice. We did not predetermine any analytical themes, and, applying thematic analysis, we identified patterns (or themes and subthemes) in the survey responses.

[1004] NMAS, Practice Standards, 10.1(b) Skills.
[1005] NMAS, Practice Standards, 10.1(b) Skills (viii), 13.

Recruitment to participate in the research was through the Mediator Standards Board (MSB) who sent an email to each NMAS accredited mediator, inviting them to participate in the project. As the funders of the project, the MSB does not have access to information about who did/did not consent to participate in the research. Part 3 of this Report includes analysis of response and attrition rates for the online survey and the focus groups.

Part 1 includes coverage of the limitations to the research. These include aspects of reality testing not covered in the project, such as possible contextual influences on mediator perceptions of reality testing and on their choice to use it in any given mediation. Despite these and other limitations,[1006] the project has raised important issues relating to reality testing, and made valuable findings which are described elsewhere in this Report,[1007] and are summarised below.

Although the project was designed to explore the use of reality testing by NMAS accredited mediators, we anticipated that some conciliators would also participate – which they did.[1008] In recognition of this, throughout the Report, we refer to "mediation/conciliation" and "mediator/conciliator" except where a clear differentiation is warranted.

The next Chapter includes conclusions and recommendations arising from the data and information analysis in Parts 2, 3, and 4 of this Report, and is structured accordingly.

Despite these and other limitations, the project has raised important issues relating to reality testing, and made valuable findings

[1006] See below, Chapter Five – Future research.
[1007] See each of Parts 2, 3, and 4, above.
[1008] In separate research conducted by the Australian Dispute Resolution Advisory Council (ADRAC), conciliators reported that, in the absence of conciliator standards, they obtain NMAS accreditation as a prerequisite for appointment as conciliators; see: ADRAC, *Connecting the Dots: Final Report on Conciliation* (ADRAC, Australia, 2021).

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Chapter Two – Data and thematic analysis: findings and conclusions

Literature and provenance review

Part 2 of this Report includes a review of the mediation literature to clarify general perceptions of reality testing and of its use in the context of mediation. Part 2 also includes a review of the provenance of reality testing.

Findings

The literature review reveals a lack of conceptual clarity about reality testing (also referred to as 'reality checking'), which is confirmed in subsequent analysis of information from our surveys and focus groups. The literature is not consistent in its descriptions of how and when reality testing is used; however, there appears to be some consensus about its contribution to achieving lasting, workable and fair agreements/settlements – despite the rarity of this having been investigated in empirical studies. Although the mediation literature reveals a broad and relatively generalised focus on the purposes of reality testing and its techniques, there is only limited consideration of its specific use and influence in the context of the facilitative model of mediation that is described in NMAS.

A small number of publications acknowledge the complex ethical issues arising from the use of reality testing, in particular its potential to affect the role of the mediator, to affect the process itself, and to affect the parties' decision-making and self-determination.

The literature review in Part 2 also explores the history of reality testing in dispute/conflict resolution and the influence that history appears to have had on reality testing in Australian mediation practice, including the legal sector's influence on the practice of reality "checking" which predominantly relates to making comparisons between court outcomes and mediation outcomes.

Part 2 includes a review of the use of reality testing in psychoanalysis and psychotherapy, and its likely influence on the use of reality testing in mediation. The review also explores current neuroscientific knowledge about consciousness, expectations and perceptions. Both these latter reviews suggest there are complex psychological and neurological influences on how we perceive and understand "reality" (including in the context of conflicts and disputes), and that these are likely to affect the mediator's choice to use reality testing, as well as the parties' responses to it.

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Conclusions

From the literature and provenance review we conclude that there remain gaps in knowledge about reality testing, including the lack of conceptual clarity, the lack of information about reality testing's use and its techniques, as well as how and why it works. In addition, we conclude that there is a lack of clarity about what "reality" refers to, and how/why it needs to be tested by a mediator. The small number of publications that explore how reality testing affects the role of the mediator and other ethical concerns suggests these issues also need further investigation.

The literature and provenance review suggests that the use of reality testing might improve interactions within mediations and assist informed participation. It may also have the effect of empowering parties in the process. Part 2 concludes by recommending that a broader scope be acknowledged for reality testing in mediation, that accommodates more purposes than exploring and achieving agreements and settlements.

Quantitative data analysis

Part 3 of this Report analyses quantitative data collected from the online survey and from the online pre-focus groups survey. The analysis includes the overall response rate from online survey and focus groups, and responses to questions about participant demographics; their mediation/conciliation experience; whether they practice in private and/or publicly funded programs; their mediation training; and whether they use reality testing in their practice.

> We conclude that there is a lack of clarity about what "reality" refers to, and how/why it needs to be tested by a mediator

The quantitative data was intended to confirm both that participants were representative of the population of NMAS accredited mediators, and had the capacity (knowledge and experience) to provide qualitative information about the use of reality testing in the context of mediation.

Findings

The number of mediators/conciliators who responded to the survey was 377 representing about 10% of the sample population. An attrition rate became noticeable as the survey questions became more complex and required participants to reflect on and describe their mediation/conciliation experiences. This attrition rate meant that not all 377 responders have provided replies to every survey question.

An overwhelming majority of responders report using reality testing in their practice, and all report having attended a mediation training course but not all of those courses included any reference to reality testing (and many responders could not recall if the course did include such references).

The survey data shows that the vast majority of responders report working as mediators, while fewer work both as mediators and conciliators, and an even smaller number of responders report working only as conciliators.

The survey data also show a relatively even mix of male and female responders, with around 20% of responders self-identifying as being from non-Anglo migrant population groups, and a smaller proportion of First Nations/Indigenous mediators. Research data and information was obtained from people with a mix of experience: around half the responders report having more than ten years' experience working as mediators/conciliators, and a similar proportion having conducted more than 200 mediations/conciliations. On the other hand, around a third of participants report having less than five years' experience and a similar proportion report having conducted less than 50 mediations/conciliations. This confirmed that information was being provided by responders from across the spectrum of mediation experience.

Most responders report working either in private practice or in public, or government funded, programs, with more women reporting that they work in those latter programs, and more men reporting that they work in private practice. Around a third of responders report working in both sectors – most of whom identify as male.

The online focus groups were designed to accommodate much smaller numbers of attendees, and included more responders with legal training than any other professional training (more report having legal training than all the other professional groups combined). In addition, a significant number of those who registered for the focus groups did not attend them.

Conclusions

We conclude that the survey responders are representative of the broader population of NMAS accredited mediators, and that they have the knowledge and experience to describe a range of views about, and approaches to their use of reality testing. In particular, we conclude that many mediators/conciliators are willing to participate in mediation research and to contribute their own ideas, perceptions, experiences, and observations. Such contributions are valuable for understanding the field and for improving what is known about mediation and its practice.

In particular, we conclude that many mediators/conciliators are willing to participate in mediation research and to contribute their own ideas, perceptions, experiences, and observations

Qualitative information analysis

Part 4 of the Report analyses the qualitative information obtained from the online surveys and from the online focus groups through the application of thematic analysis. The qualitative information relates specifically to reality testing, including details about how and when it is used, reality testing techniques and the effects reality testing can have on the parties, on the outcomes, and on the role of the mediator/conciliator.

Findings

Within the survey responses are three recurring and overarching themes: that when responders describe reality testing and their use of it, they do so with a focus on agreement or settlement; with a focus on disputants, mediators, and/or the mediation process, including to enhance the participation and engagement of the disputants, to enhance the role of the mediator, and/or to progress the mediation process; and, less often, with a focus on both (a dual focus). Throughout the survey, similar numbers of responses can be categorised into theme one (focus on agreement/settlement), and into theme two (focus on disputants, mediator, and/or process).

In addition, the responses show that the use of reality testing has two purposes that are associated with the themes: exploring agreements/settlements, and enhancing the disputants’ participation and engagement in the mediation/conciliation process. It is clear from the responses that the parties tend to be the target of reality testing techniques, and that responders are convinced that their use of reality testing leads to the achievement of workable and durable/sustainable agreements. As in the literature, a number of responders express concerns about its use.

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Describing reality testing

The responses include various descriptions of reality testing (eg, an intervention, a technique, a tool or a skill, and also as a process in its own right). They describe it being used in private or joint sessions, usually with a clear purpose, and with the mediator assuming a quite active role. The descriptions focus on various “realities” that are being tested including those which are more intangible (such as the disputants’ thoughts, beliefs, and assumptions), or more tangible (such as the practicalities of proposed terms of agreement, or the likely outcomes in a court hearing). The descriptions also highlight, both directly and indirectly, the authority of the mediator, such as when the mediator/conciliator is using reality testing to move the parties from their positions or to change their views.

Responders also note that, when reality testing is done well, it is perceived to increase the level of rapport and trust between the mediator/conciliator and the disputants; it can increase confidence in the mediator/conciliator and in the process; it can increase the mediator/conciliator’s own self-confidence and professional satisfaction; and it provides an opportunity for the mediator/conciliator to contribute their substantive experience and knowledge.

When reality testing is used

According to the survey responses, the disputants’ capacity and expectations is the most influential factor on a mediator/conciliator’s choice to use reality testing. The second most influential factor is fairness, including when mediators perceive what the survey itself described as power imbalances or disadvantages. The factors that responders report as being least influential on their choice to use reality testing are the public or private setting of the mediation/conciliation, and the attendance of legal advisors. Interestingly, the disputants’ capacities and expectations also have by far the most influence on responders’ choices *not* to use reality testing in any given mediation/conciliation.

Although most responders describe using reality testing predominantly in private sessions, and towards the latter stages of the mediation/conciliation process, for others, reality testing is used at various stages of the mediation process, including during pre-mediation sessions. Reality testing is also used during the exploration of proposed agreements, specifically to check the workability, achievability, and acceptability of its proposed terms. Where no agreement/settlement can be reached, reality testing is used to explore alternative outcomes, including consideration of possible outcomes if the matter were to proceed to a court or tribunal hearing.

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For some responders, doing reality testing "well" includes careful planning and execution of appropriate techniques at the appropriate stage/s of the process

Reality testing can also be used by responders when certain events occur during the process. For example, in response to disputants' behaviour, including high emotions or being unrealistic; when there is an impasse, or a power imbalance; when a disputant is perceived not to have the capacity to participate or is unrepresented; and when there are issues relating to truth, good faith, and fairness. Some responses also describe using reality testing in specific types of disputes.

How reality testing is used

In relation to how reality testing is used, responders describe various questioning styles, in particular, open-ended/indirect, "what if", and direct/closed questions. In some instances, mediator/conciliator statements and opinions are included as a form of reality testing. Some responders are of the view that, if reality testing is to be effective, it has to be done well. Some responders note possible ethical ramifications if it is not done well. For some responders, doing reality testing "well" includes careful planning and execution of appropriate techniques at the appropriate stage/s of the process.

Some responses note that the use of reality testing can elicit a negative response in disputants. Some describe their experience of "push-back" from disputants; of reality testing preventing the achievement of an agreement/settlement; and of reality testing negatively affecting perceptions of the mediator's impartiality.

Although many responses mention the importance of doing reality testing "well", very few explain what that means. Increased clarity about what is meant by "done well" would be necessary if coverage of reality testing is to be incorporated into mediator training courses.[1009]

Conclusions

The descriptions of reality testing show that it has many interpretations in the context of mediation/conciliation, that it takes many forms, and is initiated by a range of mediator/conciliator intents and purposes, perhaps relying as much on the personal preferences of the mediator/conciliator as on any other factor.

The use of reality testing can have a range of positive and negative effects including on the agreement/settlement, on the disputants, and on perceptions of the role of the mediator/conciliator. The survey responses and focus group discussions reveal many different approaches to reality testing with both the gentle and more forceful techniques having differing effects on the role of the mediator/conciliator – this is similar to observations made in the literature. The described and implied levels of forcefulness may overstep the limitations of the facilitative model of mediation set out in the NMAS, raising important ethical issues. There would be some benefit in having clearer articulation of reality testing and its scope in the context of mediation and conciliation, and in the context of the NMAS. There would also be benefit in clarifying the limits on the role of the mediator when using reality testing.

Reality testing: untested views

Many responders report that the use of reality testing increases the likelihood of achieving an agreement/settlement; and that it increases the likelihood that the agreement/settlement will be workable and durable, or sustainable. There is very little empirical research to support these claims.

[1009] See below, Chapter Four – Training, education, and support.

A small number of responders report that the use of reality testing contributes to the disputants making informed decisions during the mediation/conciliation. Again, this is untested by research, and it is unclear how such effects might be influenced by a mediator/conciliator who uses a more forceful approach.

Reality testing is also seen by some responders as helping the mediator/conciliator to fulfil their role in the process, to contribute their own expertise and knowledge, and provides an opportunity for them to intervene. Many of the responses suggest there are mediators/conciliators with limited appreciation of the complex ethical issues that arise around the use of reality testing, including its effect on the disputants and on the role of the mediator/conciliator.

It is also clear that mediators/conciliators would benefit from improved knowledge about the value reality testing adds to any mediation/conciliation

The information provided in survey responses and in focus groups makes clear that the majority use reality testing in most of their mediations/conciliations, and it is thought to make important contributions to the process. It is also clear that mediators/conciliators would benefit from improved knowledge about the value reality testing adds to any mediation/conciliation; about when the use of reality testing is and is not appropriate; about specific reality testing approaches and techniques; and about the ethical issues raised by its use.

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Chapter Three – Implications for NMAS

This section discusses the implications of research findings for the regulation of mediation in Australia under the National Mediator Accreditation System (NMAS).[1010] The NMAS is overseen and implemented by the Mediator Standards Board (MSB) as the responsible body for 'the on-going development and maintenance' of the NMAS. The NMAS consists of two sets of standards, the Approval Standards and the Practice Standards. The former applies to those seeking initial accreditation or re-accreditation under the NMAS and provides details regarding training, assessment and the personal qualities and experience of a person seeking accreditation or reaccreditation as a mediator under the NMAS. The Practice Standards detail minimum practice and competency requirements and set out information about the mediation process and the role of the mediator within it.

Originally implemented in January 2008, a revised version of the NMAS was released in 2015, and the whole system was under review during this project.

The role of the mediator, and ethical principles

The NMAS describes the various attributes of a mediation process that is recognisably facilitative mediation. The defining characteristic of the NMAS mediation process is that it 'promotes the self-determination of participants',[1011] and the mediator's role is to support that, as well as to 'assist' disputants to 'make their own decisions in relation to disputes',[1012] and to 'support' them in 'reach[ing] and [mak[ing] their own decisions.'[1013] More specifically, the NMAS accredited mediator 'uses the knowledge, skills and ethical principles referred to in Part III Section 10.1' for this purpose.[1014] These descriptions suggest that the mediator's role is explicitly limited by the self-determination of the disputants.

The same Section 2.2 of the NMAS emphasises that the mediator supports the disputants in communicating with each other; exchanging information; seeking understanding; identifying interests, issues, needs; generating options; negotiating; and reaching and making their own decisions. The NMAS is explicit in excluding from the mediator's role any evaluation, advice giving, or determining in relation to the dispute. The Practice Standards recognise that accredited mediators can use 'a blended process such as advisory or evaluative mediation or conciliation', on the proviso that this is done 'in a manner that maintains and respects the principle of self-determination'.[1015]

[1010] See Mediator Standards Board, About the MSB, available on <https://msb.org.au/about-msb>.
[1011] NMAS, Part III Practice Standards, 2.2, 9.
[1012] NMAS, Part III, Practice Standards, 2.1, 9.
[1013] NMAS, Part III, Practice Standards, 2.2 (f), 9.
[1014] NMAS, Part III, Practice Standards, 2.1, 9.
[1015] NMAS, Part III Practice Standards, 10.3, 14.

> Some responders see reality testing as an opportunity for the mediator to become more interventionist

In the context of this research project, the consideration is whether the NMAS provisions regarding the role of mediator sufficiently consider the use and effects of reality testing. The term 'reality testing' appears only once in the NMAS where it is included as one of nine "skills" that accredited mediators 'must have':[1016] 'reality testing proposed outcomes in light of participants' interests, issues, underlying needs and long-term viability.'[1017] There is no other reference to reality testing, nor any description or explanation of what it is or how it might affect the mediation process and those participating in it. It is clear in the information provided to us in the online survey and online focus groups that the scope of reality testing is much broader than NMAS would suggest, and that its use may, in some cases, overstep the mediator's role in terms of the disputants' self-determination.

Some responders in this research are conscious of how reality testing can affect the role of the mediator, making references throughout the survey to the need for the mediator to remain impartial when using reality testing; not to be directive; not to force their own views on the disputants; no to be too interventionist; not be motivated by their own concerns; and not to give legal advice. On the other hand, the approaches to reality testing described in the responses suggest that at least some mediators are more forceful and interventionist than is envisaged by the NMAS Practice Standards.

Some responders see reality testing as an opportunity for the mediator to become more interventionist – 'opportunity for you as mediator … to determine whether or not a proposal is actually realistic to the party' or to 'become more active'[1018] – or *more* 'directive'.[1019] The analysis of responses from conciliators shows that those responders do not overstep the non-directive role of a conciliator, suggesting they are aware of the risks in using reality testing.[1020]

It is important to note that while some responders do focus on ethical implications for the role of the mediator, others are of the view that the use of reality testing has no effect on the mediator's role (survey question UQ9).[1021] This apparent lack of reflection on their own role and on events within the mediation/conciliation raises the important professional issue of mediators reflecting on and developing their practice, or the practice of 'debriefing' referred to in the NMAS: 'a mediator should, where possible, engage in professional debriefing'.[1022] A concern is raised in relation to responders who do not self-reflect and so are unaware of the potential ramifications of their actions.

The NMAS gives a very limited scope to reality testing, specifying that it be used only in association with clarifying any proposed outcomes. It is clear from the literature, and from survey and focus group input that the technique is used more broadly, and apparently effectively, in the context of mediation. The NMAS' single reference to reality testing provides limited practical guidance for its use, no information about its potential negative effects, and no guidance on the ethical issues raised by its use. Were the NMAS to include this information, it would provide valuable guidance for mediators, for disputants, and for mediation trainers.

There is also scope for the NMAS to expand its reference to professional debriefing, and the need for mediators to be much more self-aware, a practice which is becoming commonplace in many professions.

[1016] NMAS, Part III Practice Standards, 10.1, 13.
[1017] NMAS, Part III Practice Standards, 10.1(b) (viii), 13.
[1018] ID number 221 and ID number 17 respectively.
[1019] See ID numbers: 1, 64, 356.
[1020] See Part 4, Chapter Five – Conciliators.
[1021] ID numbers: 35, 127, 149, 158, 297, 307, 336.
[1022] NMAS, Part III Practice Standards, 8.8, 12.

Self-determination

This project did not explicitly seek information about self-determination in the context of using reality testing. Our view was that, if we mentioned it, there was a likelihood that responders would believe that we required it, and so skew their responses accordingly. However, in our thematic analysis, we have noted its infrequent occurrence.

As noted above, self-determination is presented in the NMAS as a defining characteristic of mediation, and its protection as a defining characteristic of the role of the mediator. Unfortunately, the concept is not clearly explained anywhere in the Standards, although its meaning might be deduced from the requirement that the disputants 'reach and make their own decisions.'[1023] The implication is that the disputants come to the decision themselves, and the mediator does not do so on their behalf. The exercise of self-determination during mediation should not have a narrow application only to decisions on a final agreement – it can be exercised at any time during the process when decisions are to be made. Put another way, while using various techniques, skills, and tools, and abiding by ethical principles, a NMAS accredited mediator must support disputants in making their own decisions *throughout the mediation/conciliation process.* Despite many of the survey responses and focus group discussions confirm this broad view of decisionmaking, its scope is not made clear in the NMAS.

Despite its obvious importance in the NMAS, self-determination in relation to reality testing appears rarely in the survey and focus group information. Of all the responses to all survey questions, only 15 include reference to factors commonly associated with self-determination, such as the disputants' informed consent and informed decisionmaking;[1024] the mediator treating the disputants equally;[1025] the mediator enabling and empowering the disputants;[1026] the mediator checking they are not imposing their own preferences;[1027] the mediator allowing the disputants themselves to assess their situation;[1028] enabling the disputants to perceive 'the significance of their own voice;'[1029] ensuring the disputants are responsible for the outcomes;[1030] and ensuring 'participants are self-determined in their decision making.'[1031]

It is clear that at least some of the survey responses describe reality testing approaches and practices that are likely to inhibit the disputants' self-determination, and it is possible that the negative effects (such as "pushback") described in some responses are linked to disputant perceptions of lack of self-determination. Unfortunately, the nature of the information we collected does not enable analysis of this potential link.

One interpretation of the NMAS is that a mediator who impinges on the disputants' decisionmaking, or self-determination, is not acting in accordance with the Standards and could be said to be acting unethically. While there are minimal references to self-determination in survey and focus group responses, the significance of the non-references should not be underestimated – they could indicate reduced awareness of ways in which the mediator/conciliator's use of reality testing might affect disputants' decisionmaking and self-determination – perhaps leading the mediator/conciliator to inadvertently act unethically.

It would be beneficial if the MSB were to provide some guidance about the significance of self-determination including an explanation of what it means, and to alert mediators to the potential for their use of reality testing to become unethical. Such information will be useful for mediators, disputants, legal advisors, and mediation trainers.

Despite its obvious importance in the NMAS, self-determination in relation to reality testing appears rarely in the survey and focus group information

[1023] NMAS, Part III Practice Standards, 2.2(f), 9.
[1024] ID numbers: 2, 50 (survey question UQ4); 17, 74, 329 (survey question UQ6).
[1025] ID numbers: 73, 137 (survey question UQ6).
[1026] ID numbers: 2, 91, 294, 306 (survey question UQ7).
[1027] ID number 296 (survey question UQ6).
[1028] ID number 315 (survey question UQ6).
[1029] ID number 39 (survey question UQ7).
[1030] ID number 209 (survey question Q13).
[1031] ID number 50 (survey question UQ4).

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Chapter Four – Training, education, support, and future research

Training and education

Mediator training is a cornerstone of best practice mediation, and the quality of Australia's trainers is recognised both here and overseas. It is clear from the literature and from the survey and focus group responses that many mediators/conciliators view the use of reality testing as a key skill whose use would benefit from a higher profile in initial mediation training courses, and in ongoing professional development courses.

Although most survey participants report that their mediation training included reality testing, some report either that it did not, or that they cannot recall. While the online survey did not include any specific opportunities for responses about the content or format of possible reality testing training. the focus groups did.

During focus group discussions about training, the majority suggested that mediator training would benefit from including more information about reality testing, and opportunities to practice relevant skills.

Participants in one focus group discussed situations in which the mediation can become volatile when the mediator's use of reality testing was not well-received. Several survey responders describe similar problematic situations where negative reactions to reality testing have reduced the disputants' levels of engagement or decreased the mediator's credibility.[1032] Others mention the use of reality testing apparently reducing the likelihood of reaching an agreement.[1033] Despite reports about the problematic effects of "party pushback", there was no mention in the survey responses or in the focus groups of training/education that includes skills and techniques for recognising and dealing with such situations, or of strategies that would enable the mediation to continue, or would at least enable the mediation to be terminated constructively. This appears to be an unmet professional need that could be acknowledged by the MSB and addressed in mediator training courses and CPD events.

[1032] Although descriptions of negative responses occur throughout the survey, see responses to UQ6, in particular ID numbers: 39, 66, 74, 180, 188, 202, 205, 295, 334, 377.
[1033] ID numbers: 32, 219, 332 (UQ8).

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In their discussions, focus group participants referred to both the theory and practice of reality testing including, in some cases, knowledge about the psychology behind reality testing. Focus group attendees suggested aspects of reality testing that could be included in both theoretical and practical training. For example, developing practical guidelines that include how and when the use of reality testing might be appropriate, as well as recognising when it is not; basic skills and techniques; how to recognise disputants' "readiness" for reality testing as well as their responses to its use; and knowing when to not use reality testing at all, or when to stop using it. In relation to training tools and techniques, suggestions included the use of videos, demonstrations, and roleplays in association with discussion about the purpose, use and effects of reality testing.

Support

Within the responses to the online survey and during focus group discussions, situations were described that had clearly been difficult for the mediator/conciliator and, in some cases, continues to cause some levels of concern and even distress. It became clear to us that, although there are appropriate services available, mediators/conciliators are not making use of professional support services, including professional debriefing and supervision, and that this is likely to be affecting their professional development as well as their ongoing capacity to conduct mediations.

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It is possible that mediators/conciliators do not feel comfortable accessing such services and that some action could be taken to "normalise" seeking such support. Although the NMAS does include the option for claiming CPD credit for accessing 'professional supervision',[1034] it might be useful to enable CPD credit to also be claimed for providing professional supervision. The MSB could take steps to promote the importance of professional supervision/debriefing, and work with RMABs to actively encourage mediator use of such services.

In addition, the NMAS could be amended to create consistency between the Approval Standards (where the term 'professional supervision' is used), and the Practice Standards (where the term 'professional debriefing' is used).

[1034] NMAS, Part II Approval Standards, 3.5(b), 6.

Future research

The variety of interpretations of the concept of "reality testing', including how it is described, when it might be used during mediation/ conciliation, the many techniques and skills described in the online survey and in the focus groups, and the strong beliefs expressed about the apparent effects of reality testing suggest that there are important knowledge gaps in this area relating to both theory and practice. Support for further research in this area is highly likely to increase what is known about mediation and to improve its practice. There is great benefit in ensuring such research undertakings are conducted by teams of researchers, and that they include professional mediators and conciliators whose practical expertise and experience can contribute to designing the project, including the data collection and analysis methods, and can also assist with conducting the research.

A key limitation of this project is that data and information was collected only from practitioners (mediators and conciliators) who have NMAS accreditation, and was not collected from practitioners who are not NMAS accredited and have, say, separate accreditation as FDRPs. This presents a valuable future research opportunity for a similar project to be undertaken with a focus on FDRP accredited practitioners, and which includes scope for comparative analysis of the data from this project.

A second limitation in having mediators and conciliators as the only source of empirical information is that data and information was not collected from disputants. There is no doubt that such input would be a valuable contribution to what is known about reality testing in the context of mediation/ conciliation. Researchers have acknowledged the difficulties in enlisting the active participation of this groups in mediation research, and it may be beneficial to seek their views on how those difficulties might be overcome.

The MSB has an opportunity to improve what is known about the practice of reality testing in the context of mediation, as per the above recommendations. Future empirical research could investigate a range of issues that are set out in the recommendations.

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Chapter Five – Recommendations

We have developed four clusters of recommendations, based on the findings and conclusions that are described above. The recommendations are intended to improve the practice of reality testing in the context of mediation, through flow-on effects from amendments to the NMAS; to the inclusion of reality testing in mediator training, education, and support; and from future research. The recommendations set out below are designed to be interrelated on the understanding that amendments and adjustments in one area are likely to have implications for other areas. For example, when amendments are made to the NMAS, and the MSB issues supplementary information and guidelines, mediator training courses are likely to require adjustment to accommodate those amendments, and RMAB accreditation and re-accreditation requirements are also likely to require associated amendments. The wording of the recommendations allows for such cross-referencing.

1. In relation to the NMAS, we recommend

- That the NMAS be amended to expand the scope of reality testing to include its use at any stage of the mediation process.
- That the NMAS be amended to recognise that that reality testing is relevant to knowledge, to skills, and to ethical principles.
- That the NMAS be reviewed to ensure consistency in its references to professional debriefing and professional supervision (Part II Approval Standards, 3.5(b); Part III Practice Standards, 8.8).
- That the NMAS references to debriefing/supervision be expanded to describe its importance.
- That the MSB develop, and issue written guidelines about the use of reality testing that supplement the NMAS, and include coverage of the limitations on the role of the mediator as well as the complex ethical issues that are inherent to the use of reality testing.
- That the NMAS be amended to include an explanation of self-determination and to describe its scope and relevance in the context of mediation.
- That the MSB develop and issue a written commentary on self-determination which supplements the NMAS and includes coverage of:
  - The role of the disputants in any mediation;
  - Limitations on the role of the mediator during the use of reality testing; and
  - The ethical issues inherent to the practice of reality testing.

See also the recommendations in relation to training, education, and support.

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2. In relation to the practice of reality testing, we recommend

- That the MSB's written gudelines about reality testing (see above) include clarification of what constitutes reality testing done "well", and what is not acceptable in reality testing.
- That mediators/conciliators be encouraged to become more self-aware in relation to their use of reality testing:
  - To be more aware of what they are doing and why they are doing it;
  - To be more observant of the effects it might be having on their role as mediator/conciliator; and
  - To be more observant of any effects it might be having on the disputants' informed decision-making and self-determination.

See also the recommendations in relation to future research.

> In relation to training, education, and support, we recommend: That all future mediator training courses include an instruction module that encompasses the theory and practice of reality testing

3. In relation to training, education, and support, we recommend

- That all future mediator training courses include an instruction module that encompasses the theory and practice of reality testing, including:
  - The origins of reality testing and relevant theoretical concepts such as those identified in the literature review in Part 1 of this Report;
  - Demonstrations/practical examples, as well as roleplays with a focus on reality testing;
  - How and when the use of reality testing might be appropriate, as well as recognising when it is not, and strategies for dealing with negative responses to its use; and
  - The ethical implications of the use of reality testing, both for the disputants and for the role of the mediator.
- That trainee mediator assessment and assessment for NMAS accreditation include assessment of reality testing skills.
- That all future mediator training courses include components that teach some skills for self-reflection.
- That continuing professional development (CPD) include events that cover the above issues in ways that are designed for both new and experienced mediators/conciliators.
- That the NMAS be amended to include the claiming of CPD credits for the provision of professional supervision/debriefing/mentoring as well as for accessing such services.

4. In relation to future research, we recommend

- That the design of future research projects incorporates specific features aimed at improving mediator/conciliators’ engagement with research including through earlier recruitment, engaging them in designing the project and encouraging greater participation and commitment.
- That future research explore the proportion of NMAS accredited mediators from diverse backgrounds, including from First Nations and migrant population groups.
- That future research investigate the use of reality testing among FDRPs, enabling comparative analysis of information from that study with information from this research.
- That researchers investigate the relationships (if any) between the use of reality testing and:
  - The achievement of agreements/ settlements;
  - Disputant compliance with the terms pf agreements/settlements, as well as the workability and durability of those agreements/settlements;
  - Improvements in the disputants’ engagement in the mediation/conciliation process; and
  - The reality testing approaches and techniques most likely to obtain the above benefits.
- That researchers work with other stakeholders to devise innovative and inclusive methods for investigating the perspectives of disputants and legal advisors on the use of reality testing, and its effects on them, on how they perceive the role of the mediator/conciliator, and its effects on the process itself.

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APPENDIX A – BIBLIOGRAPHY

Journal articles

Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688

af Wahlberg and Poom 2015; Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33

Akin Ojelabi, L., 'Community Legal Centres' Views on ADR as a Means of Improving Access to Justice - Part I' (2011) 22 *ADRJ* 111

—, and T. Sourdin, 'Using a Values-Based Approach in Mediation' (2011) 22 *ADRJ* 258

Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218

Alfini, J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919

Baruch Bush, R. A., and J. P. Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27(1) *Ohio State Journal on Dispute Resolution* 1

Berman-Robinson, C., and H. Shurven, 'ADR Process Design: Considerations for ADR Practitioners and Party Advisers' (2016) 27 *ADRJ* 140

Billow, R. M., 'Reality Testing and Testing Reality in Group Treatment Part I: Reality and Reality Testing' (2016) 66 International Journal of Group Psychotherapy 361

Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354

Boulle, L., and R. Field, 'Re-Appraising Mediation's Value of Self-Determination' (2020) 30 *ADRJ* 96

Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 Newcastle Law Review 148

—, 'Self-Determination, Empowerment and Empathy in Mediation: Rehumanising Mediation's Effectiveness' (2020) 15 *Newcastle Law Review* 35

Brandon, M., and L. Kochanski, 'FDR Using a Multigenerational Approach: The Role of Grandparents - Entitlement or Privilege?' (2011) 22 *ADRJ* 159

Braun, V., and V. Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589

—, and V. Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

Brenner, P. S., and J. D. Lamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is and Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489

Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) *Fall 1990 Human Communication Research* 104

Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues 2*

Chavalarias, D., and J. P. A. Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205

CONTENTS

APPENDIX A – BIBLIOGRAPHY

Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367

Chua, E., 'Moving Beyond the "Facilitative" and "Evaluative" Divide: Considering Techniques That Can Further the Goals of Mediation' (2013) *Asian Journal on Mediation* 36

Cohn, L. P., 'Mediation: A Fair and Efficient Alternative to Trial' (1996) October 1996 *DuPage County Bar Brief*

Cooper, D., and R. Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an "Independent" Practitioner' (2008) 8(1) *QUT Law Review* 158

—, and D. Keenan, 'A Model to Use when Representing Clients in Conciliation Conference in the Queensland Anti-Discrimination Commission' (2018) 29 *ADRJ* 126

Davis, A., 'When Webb Met Follett: Negotiation Theory and the Race to the Moon' (2015) 31(3) *Negotiation Journa*l 267

De Girolamo, D., 'A View from Within: Reconceptualising Mediator Interactions' (2012) 30(2) *Windsor Yearbook of Access to Justice* 103

Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396

Devinatz, V. G., 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 *Employee Responsibilities and Rights Journal* 181

Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22

Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758

Douglas, S., 'Constructions of Neutrality in Mediation' (2012) 23 *ADRJ* 80

Field, R., 'Judicial Mediation, the Judicial Process and Ch III of The Constitution' (2011) 22 *ADRJ* 72

—, 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22 *ADRJ* 8

Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389

Glasser, W., 'Reality Therapy: A realistic Approach to the Young Offender' (1964) 10 Crime and delinquency 135

Goldfried, M. R., 'Toward the Delineation of Therapeutic Change Principles' (1980) 35 American Psychologist 991

Goldberg, S. B., 'The Secrets of Successful Mediators' (2005) 21(3) *Negotiation Journal* 365

—, and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149

Granello, D. H., and J. E. Wheaton, 'Online Data Collection: Strategies for Research' (2004) 82(4) *Journal of Counselling and Development* 387.

Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273

CONTENTS

APPENDIX A – BIBLIOGRAPHY

Howatt, W. A., The Evolution of Reality Therapy to Choice Theory' (2001) 21(1) *International Journal of Reality Therapy* 7

Hurvich, M., 'On the Concept of Reality Testing' (1970) 51 *International Journal of Psychoanalysis* 299

Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209

Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135

—, 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709

Krumpel, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025

LeDoux, J. E., M. Michel, and H. Lau, 'A Little History Goes a Long Way Towards Understanding Why We Study Consciousness the Way We Do Today' (2020) 117(13) Proceedings of the National Academy of Sciences (PNAS) 6976

McCullagh, R., 'Retirement Villages: A reality check' (2018) 41 *Law Society Journal* 88

McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340

—, and R. Obar, '"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75

McLaughlin, M. E., R. G. Lim, and P. Carnevale, 'Professional Mediators' Judgments of Mediation Tactics: Multidimensional Scaling and Cluster Analyses' (1991) 76(3) *Journal of Applied Psychology* 104

Noone, M.-A., and L. Akin Ojelabi, 'Ensuring Access to Justice in Mediation Within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528

—, 'Insights from Australian Mediators about Mediation and Access to Justice' (2014) 25 *ADRJ* 212

Nowell, L. S., J. M. Norris, D. E. White, and N. J. Moules, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1

Otten, M., A. K. Seth, and Y. Pinto, 'A Social Bayesian Brain: How Social Knowledge Can Shape Visual Perception' (2017) 112 Brain and Conception 69

Parkinson, P., J. Cashmore, and J. Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44(1) *Family Law Quarterly* 1

Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101

Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94

Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33

Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7

CONTENTS

APPENDIX A – BIBLIOGRAPHY

Rundle, O., 'A Spectrum of Contributions that Lawyers can Make to Mediation' (2009) 20 *ADRJ* 220

Sammut, R., O. Griscti, and I. J. Norman, 'Strategies to Improve Response Rates to web Surveys: A Literature Review' (2021) 123 *International Journal of Nursing Studies* 1

Scharp, K. M., and M. L. Sanders, 'What is a Theme? Teaching Thematic Analysis in Qualitative Communication Research Methods' (2019) 33(2) *Communication Teacher* 117

Sefton, C., 'No Square Pegs in Round Holes: What Mediators Want Lawyers to do in Mediation and How They Get It' (2011) 22 *ADRJ* 22

Seth, A. K., 'Consciousness: The Last Fifty Years (and the Next)' (2018) 2 Brain and Neuroscience Advances 1

Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55

Sourdin, T., Exploring Pre-Action Requirements: *Resolving Disputes Outside Courts* (ACJI, Monash University, Australia, October 2012).

—, and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7>

—, and N. Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) *ADRJ* 142 [no mention]

Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *Ohio State Journal on Dispute Resolution* 263

Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859

van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40

Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557

Wade, J., 'Strategic Interventions Used by Mediators, Facilitators and Conciliators' (1994) November 1994 *ADRJ* 292

Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

—, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3

—, and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestion' (2012) 5(4) *Negotiation and Conflict Management Research* 401

Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641

Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1

CONTENTS

APPENDIX A – BIBLIOGRAPHY

Books

Astor, H., and C. Chinkin, *Dispute Resolution* in Australia (Butterworths, Australia, 1992)

Bocock, R., Sigmund Freud (Routledge, UK, 2002)

Boulle, L., *Mediation: Principles, Process, Practice* (Butterworths, Australia, 1996)

—, *Mediation: Principles, Process, Practice* (2nd Edition, LexisNexis Butterworths, Australia, 2005)

—, *Mediation Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011)

Braun, V., and V. Clarke, *Thematic Analysis: A Practical Guide* (Sage Publishing, UK, 2022).

Bryman, A., Social Research Methods (5th Edition, Oxford University Press, UK, 2016)

Charlton, R., and M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (The Law Book Company, Australia, 1995)

De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013)

Dillman, D. A., J. D. Smyth, and L. M. Christian, *Internet, Phone, Mail and Mixed-Mode Surveys: The Tailored Design Method* (4th Edition, John Wiley & Sons, USA, 2014)

Ervasti, K., *Past, Present and Future of Mediation in Nordic Countries*, in Nylund, A., K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open Publishing, 2018)

Firchow, P., *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War.* (Cambridge University Press, UK, and USA, 2018)

Fisher, R., W. Ury, and B. Patton, Getting to Yes – Negotiating an Agreement Without Giving In (2nd Edition, Century Business, USA, 1991)

Haavisto, V., *Developing Family Mediation in Finland: The Change Process and Practical Outcomes*, in Nylund, A., K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open Publishing, 2018)

Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989)

Iphofen, R., and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)'

Jones, T. S., 'A Taxonomy of Effective Mediator Strategies and Tactics for Nonlabor – Management Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989)

Lewicki, R., D. M. Saunders, and B. Barry, *Negotiation* (7th Edition, McGraw Hill, USA, 2015)

Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition, John Wiley & Sons, USA, 2014)

Noone, M. A., L. Akin Ojelabi, and L. Buchanan, *Ethics and Justice in Mediation* (Law Book Company, Australia, 2018)

Nylund, A., K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open Publishing, 2018)

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APPENDIX A – BIBLIOGRAPHY

O'Mathúna, D., *The Dual Imperative in Disaster Research Ethics* in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018

Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020)

Spangle, B., *Reality Testing*, in G. Burgess and H. Burgess (eds), *Beyond Intractability* (Conflict Information Consortium, USA, 2003)

Steiner, R. (ed), *Unconscious Phantasy* (Karnac Books, UK, 2003)

Tillet, G., *Resolving Conflict: A Practical Approach* (Sydney University Press, Australia, 1991)

Reports, discussion papers, and issues papers

ADRAC, *Connecting the Dots: Final Report on Conciliation* (ADRAC, Australia, 2021)

American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf>

Federal Court of Australia: Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid Work You Mob Are Doing – Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia* (Report to the National Alternative Dispute Resolution Advisory Council, 2009)

Kennedy Institute of Workplace Mediation Research Group (KIWMRG), *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016)

NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution* (Commonwealth of Australia, Discussion Paper, 1997)

NADRAC, *The Development of Standards for ADR* (Commonwealth of Australia, Discussion Paper, 2000)

Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>

Conference presentations

Carter, M., CJCs [Community Justice Centres] – *Achieving their Goal*, in J. Mugford (ed), *Alternative Dispute Resolution, AIC Proceedings No 15* (Australian Institute of Criminology, Canberra, Australia, 1986)

Steel, D., *Perspectives on Sample Surveys* (Knibbs Lecture, Statistical Society of Australia, November 2021).

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APPENDIX A – BIBLIOGRAPHY

Legislation, standards, and regulations

Law Society of NSW, Specialist Accreditation Scheme: 2020 Dispute Resolution Assessment Requirements (Law Society of NSW, 2020)

National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act (as amended, 2003)* [USA]

National Mediator Accreditation System, Australia, 2015, available on: <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation- system.pdf>

Standards Australia, Australian Standard AS 4608-1999: Guide to the Prevention, Handling and Resolution of Disputes (1999)

Websites and other media

Online Glossary, Conflict Resolution Consortium (1998): <http://www.intractableconflict.org/www_colorado_edu_conflict/peace/!treating_core.htm#3ptyint>

International Online Training Program on Intractable Conflict (1998): <http://www.intractableconflict.org/www_colorado_edu_conflict/peace/treatment/realtest.htm>

American Psychological Association: <https://www.apa.org/pubs/journals/features/hum-43-40.pdf>

Society of Consumer Affairs Professionals: <https://socap.org.au>

Mediator Standards Board (MSB): <https://msb.org.au>

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APPENDIX B – PROJECT ADVISORY GROUP MEMBERS

Dr Andrew Bickerdike

Dr Bickerdike is CEO of Relationships Australia Victoria. He has trained and practised individual, couple and family therapy, and family dispute resolution for over 20 years. Andrew is a member of the Australian Dispute Resolution Advisory Council, a former director of the Mediation Standards Board and has served as a part-time Commissioner of the Australian Law Reform Commission review of the family law system. He has initiated many significant research projects examining the efficacy of family services, including mediation services, in the naturalistic setting.

Ms Lynn Buchanan

Until recently Lynn Buchanan was an NMAS accredited mediator and mediation trainer. Her experience as a mediator and conciliator includes neighbourhood disputes, personal relationships, will disputes, community groups, health services, mental health and equal opportunity. She has worked for the Mental Health Complaints Commissioner, Domestic Building Dispute Resolution Victoria, Dispute Settlement Centre of Victoria, the Health Services Commissioner and the Commissioner for Equal Opportunity. Lynn co-authored *Ethics and Justice in Mediation* (Thomson Reuters, 2018). She has also had over 20 years' experience as a freelance researcher, writer and editor, working to improve the community's understanding of the law and legal processes.

Peter Callaghan SC

Peter practices as a Mediator and Expert Determiner. He has sat for a number of years first on the Administrative Decisions Tribunal (Deputy President) and until mid-2021 on the Civil & Administrative Tribunal (Principal Member). Peter regularly gives educational and training presentations for the Institute of Arbitrators and Mediators Australia, the NSW Bar Association and other bodies. In 2007, Peter published a paper on the role of lawyers in mediation ('Roles and Responsibilities of Lawyers in Mediation' (2007) 26 *The Arbitrator & Mediator* 39).

Dr Peter Condliffe

Dr Peter Condliffe, BSW, LLM, Grad Dip (Ed), Grad Dip (Arb). Barrister and Specialist Mediator and Facilitator: Advanced Mediator with the Victorian Bar and Accredited Family Dispute Resolution Practitioner. Peter practices as a Barrister and mediator with a background in developing educational, human rights and community-based programmes. He has also been employed as an academic, teacher, human rights educator/lawyer, manager and community worker. His multi-disciplinary practice centres on conflict management interventions including mediation, facilitation, investigation, restorative justice conferences, complaints management and conflict coaching. Peter is one of Australia's most experienced conflict management teachers and practitioners. He presently teaches in several Universities and other organizations. He has written a leading text titled "Conflict Management: A Practical Guide" (Lexis Nexis, 2019, 6th Ed.) as well as over 50 articles and monographs. He is a Director or the Mediator Standards Boards and COTA (Vic)

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APPENDIX B – PROJECT ADVISORY GROUP MEMBERS

Dr Susan Douglas

Sue is retired legal academic. As a socio-legal scholar, she has published empirical and critical studies in dispute management, with a focus on mediation. She is a consultant editor for the *Australasian Dispute Resolution Journal* (ADJR). She has contributed as a Design Committee Member of the Australian National Mediation Conference in 2019 and 2021.

Ms Jodie Grant

Jodie Grant is Director, Shifting Sands. Building upon Social Work foundations, Jodie is a highly skilled and knowledgeable, accredited and registered Family Dispute Resolution Practitioner (FDRP) and Nationally Accredited Mediator. Commencing work in the Family Law field 20 years ago, Jodie has maintained clinical practice along education and training roles, leading and supporting professional best practice. Jodie also works as a coach, assessor, seasonal teacher, FDR clinical supervisor/Reflective Practice Supervisor, and Restorative Engagement Facilitator/Direct Personal Response Facilitator.

Professor Mary Anne Noone

Mary Anne Noone is a Professor Emerita, School of Law, La Trobe University. The thread drawing together her research, teaching, professional and community service activities is a passion for improving access to justice. Throughout her career, Mary Anne was involved in dispute resolution. She taught dispute resolution to law students, was an accredited mediator and a part-time member of Social Security Appeals Tribunal for 12 years. Mary Anne co-authored *Ethics and Justice in Mediation* (2018), Australian Clinical Legal Education (2017), and a history of the Australian legal aid system, Lawyers in Conflict (2006).

Dr Andrew Rakowski

Andrew is a nationally accredited mediator (Australia). As an experienced mediator and conciliator, Andrew mediates a range of disputes and is on the panel of mediators/conciliators of various dispute resolution agencies and organisations.

Professor Tania Sourdin

Tania is the Dean of the University of Newcastle Law and Justice School. Tania has a background as a litigation lawyer and mediator, has a PhD in commercial dispute resolution and is the author of more than 140 publications, that include books articles and papers. She has researched, published and presented widely on a range of topics including ADR, justice innovation, justice issues, mediation, conflict resolution, collaborative law, artificial intelligence, technology and organisational change. Tania sits on a number of Boards, is a Fellow of the Australian Academy of Law and is a visiting academic at Oxford University from October 2022.

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APPENDIX C – ONLINE SURVEY INSTRUMENT AND FOCUS GROUP DISCUSSION QUESTIONS

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Project Title: Reality Testing in Mediation

The research is being carried out by the following researchers:

Role Name Organisation
Chief Investigator Lola Akin Ojelabi La Trobe Law School

Senior Research Assistant Dr Alysoun Boyle La Trobe Law School

Research funder Mediators Standards Board
'In kind' support by La Trobe University.

1. What is the study about?
You are invited to participate in study of reality testing in mediation.

The project is exploring knowledge and practice of reality testing among mediators and conciliators. Mediator literature suggests there are diverse and disparate understandings about the nature and purpose of reality testing, as well as about how it is practised (ie, the techniques and skills associated with reality testing). This project aims to explore how reality testing is practiced in mediation and to gain knowledge that will assist in developing a framework for reality testing as practised in mediation. It will also assist in developing ethical guidelines around its practice in mediation, thereby improving the quality of mediation practice.

Your contact details were obtained from the Mediator Standards Board. An invitation email is being sent to all accredited mediators by the Mediator Standards Board. In addition, delegates at the National Mediation Conference 2021 will receive invitations to participate in the study and some professional networks maintained by the Mediator Standards Boards and Recognised Mediator Accreditation Bodies have consented to send invitations to their members.

2. Do I have to participate?
Being part of this study is voluntary. If you want to be part of the study we ask that you read the information below carefully.

You can read the information below and decide at the end if you do not want to participate. If you decide not to participate this would not affect your relationship with La Trobe University or any other listed organisation.

3. Who is being asked to participate?
You have been asked to participate because :
• you are a dispute resolution practitioner practising as a mediator or conciliator.
• Over 18 years

4. What will I be asked to do?
If you decide take part in this study, we will ask you to engage in one or more of the following activities:

1. You will be asked to complete the online survey linked to the end of this Information Statement.
2. In Part A of the survey, Question 1 asks that you confirm that you are at least 18 years of age. Questions 2 – 11 seek information about you as a mediator/conciliator and about your practice of mediation/conciliation. In Part B, Questions 12 – 16 seek information about your understanding about and practice of reality testing.
3. Data collected will be analysed using a predominantly narrative thematic approach. There will be comparative analysis of responses.
4. You will not be asked to provide any personal identifiers or details as part of your participation in the survey. Your involvement will be limited to completion and submission of the online survey.

5. What are the benefits?
The benefit of you taking part in this study is that you will be contributing to the development of the field of dispute resolution and improving the quality of mediation practice. A personal benefit can be derived from the opportunity to reflect on your professional practice as you answer the survey questions. This reflection, which is a practice encouraged by the field, will improve your own practice of mediation. As dispute resolution is a societal need, the expected benefit to society in general is improved dispute resolution processes and practices.

6. What are the risks?
With any study there are (1) risks we know about, (2) risks we don’t know about, and (3) risks we don’t expect. If you experience something that you aren’t sure about, please contact us immediately so we can discuss the best way to manage your concerns.

Name/Organisation	Position	Telephone	Email
Dr Lola Akin Ojelabi	Associate Professor	(03) 9479 1253	o.akinojelabi@latrobe.edu.au
Dr Alysoun Boyle	Senior Research Assistant	0414405304	a.boyle@latrobe.edu.au

APPENDIX C – ONLINE SURVEY INSTRUMENT

We do not foresee any risks associated with this study.

7. What will happen to information about me?
By clicking on the 'I agree, start questionnaire' button, this tells us you want to take part in the study.

We will collect information about you in ways that will not reveal who you are.

We will store information about you in ways that will not reveal who you are.

We will publish information about you in ways that you will not be identified in any type of publication from this study.

We will keep your information for 5 years after the project is completed. During that time, the data may be used for related research. After this time we will destroy all of your data.

The storage, transfer and destruction of your data will be undertaken in accordance with the Research Data Management Policy https://policies.latrobe.edu.au/document/view.php?id=106/.

No personal information is collected in this study.

8. Will I hear about the results of the study?
We will let you know about the results of the study as soon as it is completed. The projected completion date is June 2022. Participants will be invited to workshops disseminating research findings and a report will be provided to the Mediator Standards Board. The decision to make the report accessible to the public is for the Mediator Standards Board.

9. What if I change my mind?
If you no longer want to complete the questionnaire, simply close the web browser. If you change your mind after clicking on the 'Submit' button, we cannot withdraw your responses because we cannot link who you are with your questionnaire responses.

Your decision to withdraw at any point will not affect your relationship with La Trobe University or any other organisation listed.

10. Who can I contact for questions or want more information?
If you would like to speak to us, please use the contact details below:

Name/Organisation	Position	Telephone	Email
Dr Lola Akin Ojelabi	Associate Professor	(03) 9479 1253	o.akinojelabi@latrobe.edu.au
Dr Alysoun Boyle	Senior Research Assistant	0414405304	a.boyle@latrobe.edu.au

11. What if I have a complaint?
If you have a complaint about any part of this study, please contact:

Ethics Reference Number	Position	Telephone	Email
HEC21302	Senior Research Ethics Officer	+61 3 9479 1443	humanethics@latrobe.edu.au

1) I agree to participate in the survey
- ◯ Yes
- ◯ No

2) I am 18 years or over
- ◯ Yes
- ◯ No

3) Do you refer to yourself as:
- ◯ Mediator
- ◯ Conciliator
- ◯ Both
- ◯ Neither

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Reality Testing Survey

Please complete the survey below.

Thank you!

Welcome to the survey on "reality testing"	
How long have you been mediating/conciliating?	◯ 0 - 2 years ◯ 2 - 5 years ◯ 6 - 10 years ◯ more than 10 years
In total, how many matters have you mediated?	◯ 0 - 20 ◯ 21 - 50 ◯ 51 - 100 ◯ 101 - 200 ◯ More than 200
In which fields do you mediate/conciliate?	☐ Agriculture and farming (including Farm Debt) ☐ Building and construction ☐ Commercial ☐ Community-based ☐ Consumer complaints ☐ Court-connected ☐ Discrimination ☐ Education ☐ Environment ☐ Family ☐ FDR ☐ Health/medical (including health complaints and medical negligence) ☐ International ☐ Interpersonal ☐ Small business ☐ Transport and motor vehicle accidents ☐ Workplace/employment (including Fair Work Commission) ☐ Other
Please specify	_____
Do you mediate/conciliate in a government or publicly funded program or service?	◯ Yes ◯ No
Do you practice privately?	◯ Yes ◯ No
What is your professional training/education in addition to mediation/conciliation?	☐ Engineer ☐ Human resources ☐ IT ☐ Legal practitioner ☐ Manager ☐ Psychologist ☐ Scientist ☐ Social worker ☐ Other

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Please specify	_____
Do you identify as:	◯ Female ◯ Male ◯ Non-binary sex ◯ Prefer not to say
Do you identify as a member of the following population group: Aboriginal and Torres Strait Islander/Indigenous/First Nations?	◯ Yes ◯ No
Do you identify as a member of a migrant population group ?	◯ Yes ◯ No
If "Yes", please specify	_____

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Reality Testing - experience

Please complete the survey below.

Thank you!

When you attended mediator training, did the course include specific information about "reality testing"?	◯ Yes ◯ No ◯ I don't recall ◯ I have not attended a mediator training course
Thinking about your own knowledge and experience of mediation/conciliation, how would you describe "reality testing"?	_____
In your view, what does "reality testing" contribute to the mediation/conciliation process?	_____
Have you ever used "reality testing" in your mediations/conciliations?	◯ Yes ◯ No
Explain why you have chosen not to use "reality testing".	_____
In your own view, in what ways might "reality testing" affect the role of the mediator?	_____
In your own view, how might the use of "reality testing" affect the parties?	_____
In your own view, how might the use of "reality testing" affect the parties' decision making?	_____
Think about some cases in which you considered the use of "reality testing" techniques to be important. (a) During those mediation/conciliation processes, when did you tend to use "reality testing"?	_____
(b) During those mediations/conciliations, how did you use "reality testing" - ie, what did you say and/or do?	_____

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Below are factors that are often taken into account when choosing to use "reality testing". Thinking about your own practice, how important is each of them for you?

	Not at all important	Slightly important	Somewhat important	Very important	Extremely important
Context/setting	○	○	○	○	○
Nature of the dispute	○	○	○	○	○
Presence of legal advisors	○	○	○	○	○
The parties (eg, capacity; expectations)	○	○	○	○	○
Safety concerns	○	○	○	○	○
Interests of the children	○	○	○	○	○
Whether mediation is occurring in a public or private setting	○	○	○	○	○
Fairness (including addressing what you see to be power imbalances or disadvantages)	○	○	○	○	○
The need to reach a settlement	○	○	○	○	○
The need to ensure terms of agreement comply with legislative or industry standards	○	○	○	○	○

If you take into account none of the listed factors, please specify what influences your choice to use "reality testing"

_____

What other factors have you considered when choosing to use "reality testing" techniques?

_____

In which situations would you choose not to use "reality testing"?

_____

The final three questions are an opportunity for you to provide your own observations of the effects of "reality testing".

_____

(a) What effects have you observed that "reality testing" has on the parties?

(b) What effects have you observed that "reality testing" has on the final outcomes of a mediation?

_____

(c) What effects have you observed "reality testing" has on you role as a mediator?

_____

APPENDIX C – FOCUS GROUP QUESTIONS

Focus Groups – general – 90 minutes per group

Questions/discussion points

1. Introductions (confirm name of Focus Group; seek self-introductions all round – including if people know each other and/or work together; comments on time constraints, format, etc; process of withdrawal)
    a. Overview of Reality Testing Research Project
        i. We know from the project's literature review and from the online survey that there is not consensus about what reality testing is, or about how it is used
    b. Overview of Focus Groups component of Project, including how they have been designed to provide opportunities for insights into use of reality testing across different fields of practice and different settings/contexts
    c. Some initial/preliminary results/information from the online survey
2. What do you think sets this field apart from other fields of practice?
3. Do you work in more than one field of practice? If so, it might be helpful to consciously restrict your answers to this Focus Group's field.
4. Thinking about this Focus Group's field of practice, how do you think your own use of reality testing techniques affects the mediation/conciliation process?
5. Which of your reality testing techniques do you think is the most effective?
    a. Why do you think it works so well?
    b. How do you know it works so well?
6. Which of your reality testing techniques is not so effective?
    a. Why do you think it doesn't work so well?
    b. How do you know?
7. Thinking about multi-party processes you have conducted, how do think reality testing works when there are several parties, or groups, in a mediation/conciliation?
    a. How might reality testing techniques differ in such situations?
8. Closing observation about the potential for reality testing to affect the parties' self-determination (throughout the process as well as during the finalisation of any terms of agreement), and for it to affect how the mediator's role might be perceived.
9. In closing:
    a. Thank you for your contributions to this project through your participation in this Focus Group;
    b. A reminder that this has been recorded; however, when analysing the data, no identifiers will be retained; and
    c. If you have any additional ideas, please feel free to email them to us.

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