Court-connected mediation programmes: implications for courts and the legal profession

Olivia Rundle*

There is a difference between the possibilities and practice of court-connected mediation. Mediation has broad potential, even when it is connected with a court or tribunal. Subject to legislative or policy restrictions, courts may promote interest-based, rights-based or transformative mediation processes. Mediating parties may be offered opportunities to: explore their personal interests and preferences regarding process and outcomes, participate directly, and interact cooperatively. In practice, these opportunities are not necessarily extended to disputants in court-connected mediation. Contributing factors include: the connection with the formal justice system, programme design, mediators’ practices and lawyers’ approaches to the process. This paper discusses some of the ways that these factors contribute to the ‘missed opportunity’ evident in court-connected mediation. Implications for courts and the legal profession are considered, arguing that a greater realisation of the benefits of mediation is both desirable and achievable in the court-connected context.

1. Introduction

This paper uses the example of court-connected mediation to argue that if non-adversarial practice is to be embraced within the civil justice system, then proponents must provide more than a mere opportunity for participants to engage in mediation. Clarity of purpose, monitoring of fairness and proactive promotion of mediation’s potential is also required.

This paper asserts that there is broad potential for benefits of mediation such as responsiveness, self-determination and cooperation¹ to be realised, even where the process occurs within the civil justice system. However, in practice a narrow range of opportunities tend to be realised in the court-connected setting. Here, evidence of the gap between the potential opportunities of court-connected mediation and the limited realisation of those opportunities in practice is drawn primarily from research in the Supreme Court of Tasmania,² with reference to other empirical findings. Particular attention is paid to programme characteristics and lawyers’ perspectives and practices to explain the unrealised potential in court-connected mediation.

It is recommended that programme providers clarify the purpose, scope and process of court-connected mediation, pay attention to their obligation to provide a fair process and enhance participants’ choices within mediation programmes. Furthermore, it is recommended that broader education and training be encouraged within the legal profession, to improve lawyers’ capacity to support the expansion of opportunities realised in court-connected mediation.

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* Dr Olivia Rundle is a lecturer in law at the University of Tasmania. Her career experience includes working as a legal practitioner, graduate research assistant, postgraduate research candidate, tutor and lecturer, family dispute resolution practitioner and mediator. She is the author (together with Associate Professor Samantha Hardy) of the forthcoming Mediation for Lawyers (CCH, 2010). The author was awarded her doctorate in 2010. Her PhD thesis is titled: How court-connection and lawyers’ perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania. The thesis forms the foundation for this paper.

¹ Boulle identifies these as underlying values of mediation: Laurence Boulle, Mediation: Principles, Process, Practice (2nd ed, 2005) 60-68.

² The Supreme Court of Tasmania research is reported comprehensively in Olivia Rundle, How court-connection and lawyers’ perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania (University of Tasmania, PhD Thesis, 2010).
Special considerations when mediation is court-connected

When mediation occurs within the formal justice system, tensions arise between the primarily adversary legal process and the principles of mediation. This is sometimes referred to as the dilemma of court-connection and includes tensions between: 3

- adversarial verses non-adversarial approaches;
- transparency verses privacy;
- application of the law verses responsiveness to the individual; and
- professional control verses self-determination.

There are competing messages within court-connected mediation as to whether or not an adversarial or non-adversarial approach is appropriate. The parties are engaged in a parallel adversarial litigation process, and despite its confidentiality, what occurs at mediation will affect the course of the litigation.

The formal legal system promotes fairness between parties by being open, transparent and closely monitored by courts. This enables the quality of decisions to be investigated and therefore assured. Court-connected mediation, being private and largely protected from scrutiny, is therefore an anomaly within the formal legal system. Court-connected mediation falls between the formal legal process and informal negotiations between lawyers, which are not open to scrutiny. This raises the question of the degree of scrutiny and management that is required of a court in regard to mediation programmes conducted under its sanction. The principle of procedural fairness is shared by mediation and the formal justice system. 4 It is assured in different ways, namely through transparency in court and standards of mediator conduct in mediation. Court-sanctioned mediation is part of a system that delivers justice, not just settlement, and therefore there is an obligation on courts to promote fairness within their mediation processes. 5 This requires more involvement than simply referring matters to mediation in the absence of quality control measures. 6 There is an obligation upon courts who refer matters to mediation to have systems in place to assure parties about the quality and fairness of the process to which they are being referred. 7 This does not necessarily mean opening up the mediation process to the scrutiny applied to open court processes. Quality control may be achieved by applying and advertising standards of mediation practice and welcoming complaint about breach of those standards, together with mechanisms to monitor participants’ experiences of fairness. 8

Another dilemma in court-connected mediation is the extent to which it is proper to direct the mediation conversation to the legal issues between the parties, in the interests of discharging the court’s duty to apply the law to disputes. Again, court-connected mediation sits between the formal trial process and lawyer negotiation. At trial, only the legal issues are relevant and the court must apply the law strictly. In the negotiation context, non-legal factors such as financial constraints,

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5 Welsh (2001), above n4, 837.


7 McAadoo and Welsh (2004-2005), above n6, 427.

power issues or the emotional costs of the formal legal process may be highly influential in the decision-making process. The question in court-connected mediation is whether parties should be forced to comply with the legally available outcomes or whether they are free to depart from them when their individual needs are better served through an individualised outcome. Given that mediation is a negotiated outcome, and the procedural and evidentiary rules of court do not apply, it is impractical and inappropriate to measure mediated outcomes against unknown court outcomes. It is appropriate, however, that all mediating parties are fully apprised of their legal rights and responsibilities in regard to the dispute prior to reaching an agreement. When the court sanctions a consensual decision-making process, and refers litigating parties to that process compulsorily, there ought to be some emphasis placed upon the law as it applies to that dispute.

The final aspect of the dilemma of court-connection is the roles to be played by lawyers and their clients in court-connected mediation. In court-room processes, lawyers typically speak on their clients’ behalf and there is a general preference that parties be legally represented.9 Lawyers also regularly resolve disputes on behalf of their clients in lawyer negotiations.10 In contrast, mediation provides an opportunity for participants to resolve their own disputes by participating directly in the process, with the support of a mediator and perhaps a lawyer. If the benefits of direct participation are not understood, traditional models of legal representation may be applied to the mediation context.11

Another special consideration in court-connected mediation is whether there are limitations prescribed by legislation or policy governing a programme. Court-connected mediation programmes often operate in the context of broad and generic legislative definitions of mediation, which do not restrict the potential scope of practice.12 For example, the definition in the Alternative Dispute Resolution Act 2001 (Tas) applies to the Supreme Court of Tasmania’s mediation programme:

‘mediation’, which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.13

This definition is broad and potentially inclusive of any of the practice models of mediation, including interest-based, rights-based or transformative processes.14 When such definitions apply, the scope of mediation is not restricted to a particular practice model.

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9 Self-representation has been treated as being problematic and requiring management by courts, demonstrating a preference for lawyers to conduct litigation processes (Australian Institute of Judicial Administration, ‘Litigants in Person Management Plans: Issues for Courts and Tribunals’ (AIJA Inc., 2001); Australian Institute of Judicial Administration, ‘Forum on Self-represented Litigants’ (AIJA and Federal Court of Australia, 2004). The rules of evidence require that only legally relevant matters are discussed during court proceedings (Evidence Act 1995 (Cth) Chapter 3 and equivalent provisions in state and territory Evidence Acts).


12 See for example: Alternative Dispute Resolution Act 2001 (Tas) s3(2); District Court Act 1973 (NSW) s163(1); Supreme Court Act 1970 (NSW) s110(1); Mediation Act 1997 (ACT) s3(1).

13 Alternative Dispute Resolution Act 2001 (Tas) s3(2).

In summary, the dilemma of court-connection produces tensions between mediation characteristics and features of other legal processes. These tensions mean that parties may approach court-connected mediation in a guarded, adversarial manner, courts have some obligation towards the fairness of mediation, legal issues will have some prominence and a traditional legal representative model of participation may be adopted. However, none of these possibilities exclude other mediation features or approaches. Unless the legislative or policy of a particular programme limits mediation practice, mediation is not restricted by court-connection itself.

2. The potential breadth of court-connected mediation

In light of the special considerations when mediation is court-connected, the extent to which the broad potential of mediation may be promoted within court-connected programmes is brought into question. Here, three core features of mediation and their applicability within the court-connected context are considered. The mediation field is broad and encompasses a range of models and purposes for which mediation may be used by individuals and institutions. Within the diversity of processes that occur under the ‘mediation’ banner, the core features of responsiveness, self-determination and cooperation may be promoted, to some degree.

Responsiveness is about the tailoring of the mediation process and outcomes to meet the needs and preferences of the individuals involved. Individual preferences may include preferences in relation to process (the way the mediation is conducted) and content (what is discussed). The emphasis on process control varies between styles of mediation. For example, in a transformative mediation the process itself would be the initial matter to be negotiated between the participants. By contrast, in a facilitative mediation the mediator may be charged with primary control over the process. Nonetheless, where a participant expresses a preference for a particular process characteristic, a mediator would be expected to respond to that preference, thereby shaping the process according to the participants’ needs. In regards to content, there is always a choice about whether or not to agree to discuss a particular matter during the process. Sometimes mediation may involve a wide ranging discussion of legal, interpersonal, emotional, social and reputational interests. On other occasions mediation may be more specifically focused on the legal issues between the participants. The defining feature of mediation is that there is an opportunity for the participants to determine the content of their mediation. If they choose a limited scope, then that is consistent with mediation’s core feature of responsiveness.

When mediation occurs within the context of litigation, there is an inevitable emphasis on the law and legal rights, which are the primary focus of courts. The legal issues have been defined, there is some proximity to trial, most litigants have received legal advice and participants are likely to have strong ideas about the law. Notwithstanding these factors, court-connected mediation is not precluded from offering an opportunity to participants to define the scope of the mediation conversation. There is potential for a wide range of issues beyond strict legal entitlements to be discussed.

The second core feature of mediation is the opportunity for self-determination. This can be achieved through the extension of opportunities to participate directly in the process and to determine how the dispute will be resolved. Research findings have identified consistently that

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15 See references in above n14.
16 Boulle (2005), above n1, 60-68.
17 Alexander (2008), above n14.
20 The Practice Standards, above n4, Standard 2; Boulle (2005), above n1, 65.
disputants value an opportunity to participate directly in mediation.\(^{21}\) In mediation, if self-determination is to be promoted, participants should be given an opportunity and support to participate directly in the process. Some may choose to have another person (such as a lawyer) speak on their behalf, but provided that they have been given a choice, such a decision is consistent with the principle of self-determination.

In court-connected mediation, the opportunity to participate directly is affected by the dynamics of lawyer-client relationships. Uncontrolled direct participation by clients in mediation is a departure from the ‘usual’ practice within court processes. Without an understanding of the potential benefits of direct participation, it is possible that many lawyers would discourage free participation by their clients and instead adhere to the representative model of legal service.\(^{22}\) Subject to the influence of lawyers over their clients’ choices, court-connected mediation may promote self-determination.

Another aspect of self-determination is that mediated outcomes are agreed between the parties. Provided that agreement is free from duress and well-informed, outcomes can be said to be truly self-determined. Self-determination is promoted when the participants understand the legal issues relevant to their dispute.\(^{23}\) The context of litigation makes it likely that participants will make informed decisions, supported by legal advice provided by their lawyer.

The third core feature of mediation is cooperation. Mediation cannot force participants to behave in a cooperative manner. What mediation does provide is an opportunity to cooperate, with the support of the mediator. The achievement of cooperation in mediation ultimately depends upon the willingness and ability of the parties to behave cooperatively.\(^{24}\) Although court-connected mediation has the potential to encourage cooperation, because of the tension between adversarial and cooperative structures of decision-making, there are mixed messages presented to participants about the appropriate approach to the mediation process. When participants in court-connected mediation are compelled to attend, it may be difficult to encourage them to approach the process in a cooperative manner as they are less likely to be committed to the potential benefits of mediation. Nevertheless, court-connected mediation provides an opportunity to cooperate.

### 3. The limited practice of court-connected mediation

It has been observed that, in the context of widely defined purpose and process, a range of practices occurs in court-connected mediation settings.\(^{25}\) However, despite the broad opportunities available in court-connected mediation, there is a tendency for court-connected mediation practice to be

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\(^{22}\) Olivia Rundle, ‘Barking Dogs: Lawyer attitudes toward direct disputant participation in court-connected mediation of general civil cases’ (2008) 8(1) *QUT Law and Justice Journal* 77.


\(^{24}\) Menkel-Meadow (1984), above n10, 760.

limited. In court-connected mediation, disputants may participate less than in other mediation contexts and may not interact with one another, the mediator often leads discussion about the merits of the legal case and outcomes usually reflect the remedies available at trial. Some concern has emerged that many forms of dispute resolution have become corrupted by the persistence of adversarial values. In the court-connected context, mediation appears to have been adapted to suit the formal justice system, through the imposition of rules, mandatory processes, professional representation and formalisation. The priority of the goal of resolving litigated disputes efficiently has resulted in a narrow, settlement-focused practice in many court-connected mediation programmes.

For example, an investigation conducted in the Supreme Court of Tasmania found that the court-connected mediation programme:

- provided a structured opportunity for settlement discussions to take place earlier in the litigation process than might otherwise have occurred;
- encouraged more frequent and earlier negotiations between lawyers, either within mediation or outside of it;
- was subject to concerns about fairness within the process;
- usually had a narrow legal focus;
- was usually conducted by lawyers, with clients playing a minimal role; and
- was shaped by lawyers’ narrow expectations about the nature of mediation.

Lawyers and mediators reported that the style of mediation practised at the Supreme Court of Tasmania in most cases promoted positional bargaining about strict legal entitlements, through adversarial legal argument combined with distributive bargaining towards compromise. The picture painted was of a lawyer-driven, adversarial process.

The findings of the research in the Supreme Court of Tasmania that there is a limited legal focus and adoption of adversarial practices were consistent with observations about the style of court-connected mediation in other jurisdictions, including the Supreme and County Courts of Victoria, Toronto mandatory mediation programme, Ohio courts and Metropolis County Superior Court.

The narrow focus of court-connected mediation is problematic when it is considered that many disputants value an opportunity to discuss a broader range of issues than the narrow legal considerations. It ought not to be assumed that litigants are only interested in resolving the legal issues between themselves and the other party.

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30 Rundle (2010), above n2.
31 These findings are detailed in Chapters 4 and 5 of Rundle (2010), above n2.
32 In depth interviews were conducted by the author with four of the six mediators who practised in the Court’s programme until 2006. The two mediators who were not interviewed had conducted a negligible number of mediations. Forty-two lawyers were interviewed for the purposes of the research, representing approximately 29% of practitioners working in the Supreme Court’s civil jurisdiction at the time. All interviews were conducted between April 2006 and May 2007. Further detail of research design is contained in Chapter 3 of Rundle (2010), above n2.
33 Sourdin (2009), above n21; Relis (2009), above n21; Wissler (2002), above n21; Burns (2000), above n29.
The facilitative mediation practice in Saskatchewan, where a broader range of issues is typically discussed, contrasts with the reported ‘usual’ practice in the Supreme Court of Tasmania, demonstrating that the limitation of mediation within court-connected programmes is not inevitable.\textsuperscript{35} Further support for this assertion is the reports by some mediators within the Tasmanian Supreme Court programme that they do on occasion adopt a facilitative, non-legally focused style of mediation, particularly in disputes about estates or de facto financial matters.\textsuperscript{36} Notwithstanding tendencies towards a law-focused, distributive bargaining style, it is by no means the only style of mediation that can be practised in court-connected contexts. There are choices to be made about how mediation will be conducted and what will be discussed.

4. Limiting forces in court-connected mediation practice

The apparent lost potential within court-connected mediation is influenced by the ways in which the dilemma of court-connection is resolved, by individual programme characteristics, mediators’ and lawyers’ practices.

The dilemma arising from the context of litigation impacts upon the practice of court-connected mediation; it encourages an almost exclusive focus on legal issues and discourages direct disputant participation. The legal issues and evidence that is relevant to those issues are the exclusive focus of the formal litigation process. Therefore, unless there is an explicit expectation that mediation will take a broad focus and provide an opportunity for the parties to participate actively in the process, court-connected mediation is likely to mirror the legalistic, narrow focus of a court. Furthermore, the litigation context also encourages a competitive or at least protective approach, particularly where participants have not voluntarily elected to participate in the mediation process. In formal legal processes, a lawyer in charge model is typically adopted and this appears to be transposed into many court-connected mediation contexts.

Programme characteristics often include a broad legislative and policy framework, which may be intended to provide a range of opportunities through mediation. However, unless there is an explicit statement that court-connected mediation is intended to offer a range of opportunities that are not available in other court-connected processes, those opportunities are unlikely to be realised. Instead, fallback to ‘usual’ litigation practice appears to be a common response. When intended process characteristics are not advertised, the potential of court-connected mediation is far from clear. This means that more than a provision of possibility is required if courts are serious about encouraging a full range of mediation opportunities through court-connected mediation. Participants in court-connected mediation may benefit from education and direction about how they might achieve their own aims through mediation.

The way that mediators perform their role is highly influential in shaping court-connected mediation. In order for the potential of mediation to be realised, mediators must pursue its possibilities in a proactive way, through pointed inquiry and education, thereby facilitating participants’ choices. In the Supreme Court of Tasmania, the mediators demonstrated compliance with the preferences of lawyers in relation to process and content in mediation.\textsuperscript{37} They left many decisions, such as the degree of direct participation by clients, the issues that would be raised and the way that the mediation process would proceed, to the lawyers to decide in consultation with their clients. On its face, this demonstrates the flexibility of the mediation process and adaptation to participants’ preferences. However, where lawyers do not appreciate the potential for mediation, unquestioned

\textsuperscript{35} Macfarlane and Keet (2005), above n21.
\textsuperscript{36} Rundle (2010), above n2, Chapter 4.
\textsuperscript{37} The mediator interview data is reported in Chapter 4 of Rundle (2010), above n2.
compliance with their preferences narrows the scope and nature of court-connected mediation. Mediators demonstrated a reluctance to interfere in lawyers' management of their clients' cases and protection of their clients' legal interests. This indicates that lawyers' perspectives may be more usefully broadened outside individual mediation sessions, where mediators face a dilemma in challenging lawyers' management of a litigation process.

Additionally, the ability for mediators to take a proactive approach to the mediation process, the roles of participants and content, was stifled by the absence of guidelines for the Court's mediation programme. There was uncertainty about what approaches were appropriate within the programme, as there were no guidelines for the process or behaviour within the process.

The investigation in the Supreme Court of Tasmania demonstrated that lawyers' practices and perspectives have a significant impact on the nature of court-connected mediation. Many lawyers have adopted approaches and practices that mirror traditional adversarial representation. Many lawyers perceived that trial experience was a significant factor that equipped lawyers to participate in mediation effectively.

The presence of lawyers in court-connected mediation has been noted to correlate strongly with the limited scope of court-connected mediation practice. The findings in the Supreme Court of Tasmania indicated that lawyers determined the scope of discussions and narrowed their clients' expectations prior to the mediation process. Lawyers have a tendency to view their clients' problems through a narrow legal lens, which is problematic because empirical evidence has shown that clients would prefer that a broader approach was adopted to their problems. The narrowing of clients' expectations is particularly problematic in the context that the Court and its mediators appear to have intended that a broader range of opportunities be available, or at least have not explicitly limited the scope of the court-connected mediation programme. A key finding of the research in the Supreme Court of Tasmania was that it was lawyers, rather than the court or mediators, who most contributed to the limited scope of court-connected mediation practice.

5. Recommendations to expand the opportunities realised in court-connected mediation

Some courts may implement a mediation programme intending only to provide an early and structured opportunity to settle litigation. If the aim of a court-connected mediation programme is to resolve institutional problems of delay rather than to embrace mediation ideology, that intention should be made clear to potential participants. Although there are trends towards a preference for a narrow legal scope and minimisation of disputant participation, there were diverse views expressed by the lawyers interviewed in connection with the Supreme Court of Tasmania's programme. This emphasised the need to clarify expectations, even if the intention is that mediation practice be limited to legal issues and that there be limited opportunities for direct

38 The programme is described in detail in Chapter 4 of Rundle (2010), above n2.
39 Rundle (2010), above n2, Chapter 5.
41 Rundle (2010), above n2, Chapter 5.
43 Rundle (2010), above n2, Chapter 4.
44 Rundle (2010), above n2, Chapter 6.
46 Rundle (2010), above n2, Chapter 5.
disputant participation. Courts maintaining a limited purpose for court-connected mediation must also implement measures to ensure fairness, in keeping with general obligations to provide due process and equal protection before the law.\textsuperscript{47}

In the absence of such a limited and exclusive aim, the opportunities that may be promoted through court-connected mediation remain broad and untapped. Some recommendations are made here about the ways in which court-connected mediation programme providers and the legal profession may support the realisation of the broader potential of mediation. A greater realisation of the benefits of mediation is both desirable and achievable in the court-connected context. This is a means of offering litigants an opportunity to resolve their differences in a holistic way, without being restricted by legal notions of relevance and ‘one size fits all’ procedure.

5.1. Court-connected mediation programme providers

There should be clarity about the purpose, scope and processes to be practised in individual mediation programmes. Issues that should be clear include: the overriding purposes of the programme, the relevance of legal and non-legal issues, the process styles that may be practised, the opportunities for disputants to participate and mediator or lawyer responsibilities (if any) to consider whether proposed outcomes reflect the law. Vehicles for clarifying these matters include the publication of guidelines for mediation practice and descriptions of the process types that may be offered within the programme.

Competitive behaviour and unfairness in process may be addressed by clarifying the obligations of participants and improving quality control. Both general guidelines and tailored Agreements to Mediate are means of clarifying obligations of mediators, lawyers and parties. Quality control measures may include gathering feedback from participants about their experiences of the programme and the establishment of complaints handling mechanisms.

The finding in the Supreme Court of Tasmania that lawyers actively modify their clients’ expectations about the scope of mediation demonstrates a need for mediators to inquire directly with disputants about their goals and process preferences. This is just one means of enhancing disputants’ choices in court-connected mediation. Other processes that would enhance informed choices include pre-mediation meetings, advertisement of differences in style between mediators and guidelines about the nature of mediation within the programme.

5.2. The legal profession

It is recommended that lawyers’ knowledge of the breadth of the mediation field be expanded to enable them to better understand the potential benefits of mediation. Lawyers have a professional obligation to provide advice to their clients about the appropriate processes to respond to their circumstances. Unless lawyers have an accurate and comprehensive understanding of the breadth of the modern mediation field, it would be difficult for them to discharge this duty. There is also scope for improved awareness of the potential benefits of direct disputant participation, so that these

benefits can be considered and weighed against perceived risks.\textsuperscript{48} Opportunities may be provided for a sharing of knowledge within the legal profession, so that the different approaches could be shared. Because mediation is private, lawyers have a limited ability to observe one another’s practice as they can in a court room.

There appears to be scope to build broader range of dispute resolution skills within the legal profession. It is also recommended that a range of mediation representation skills be promoted to equip lawyers to achieve the benefits of mediation with their clients. Some lawyers may need new skills of dispute diagnosis, including listening for a broader range of their clients’ interests. Skills in interest based negotiation would also better equip lawyers for a range of negotiation and mediation practices. Lawyers need mediation specific skills and knowledge, including an understanding of the mediator’s obligations, how to work with clients rather than for them and how to negotiate in the presence of clients and a mediator. For many lawyers, a new model of legal practice is required, so that they can pursue their clients’ interests appropriately.\textsuperscript{49}

6. Conclusion

Court-connected mediation has the potential to extend opportunities for participants to deal with their conflict in a way that responds to their individual preferences, promotes their own determination of the dispute and is a cooperative experience. The limited practice of court-connected mediation demonstrates that there is a lost opportunity in court-connected mediation.

The experience of mediation practice at the Supreme Court of Tasmania, which is mirrored in some other court-connected programmes, demonstrates that a broad legislative and policy framework does not necessarily result in the achievement of mediation’s full opportunities. There are factors that influence court-connected mediation towards a narrow legal focus, priority of the lawyers’ role and competitive approaches. To counter-act these influences, it is recommended that courts be clear about the purpose, scope and process of their mediation programmes, attend to quality control to monitor fairness and enhance the choices that litigants may make in court-connected mediation. It is also recommended that knowledge and skills within the legal profession about the potential benefits of mediation and how to actively pursue those benefits be enhanced.

\textsuperscript{48} Rundle (2008), above n22.

\textsuperscript{49} Macfarlane (2008), above n11.