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Doley, Rebekah M.

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# Working in ADR with disputants on the Autism Spectrum

Rebekah M Doley\*

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*Working effectively in the field of Alternative Dispute Resolution exposes the practitioner to a range of mental health concerns potentially impacting disputants. An under-explored area is the impact for disputants with Autism Spectrum Disorder (ASD) on the mediation process. For these individuals challenges in executive functioning, social behavior, and non-verbal communication are often evident from childhood through to adulthood. It is a hypothesis that gaps in skill development impact on the conflict style favoured by the individual with ASD which, in turn, will impact on an approach to dispute resolution. This article is concerned with the role of the mediator in working with a disputant who has ASD, focusing on the cluster of symptoms that were previously known as Asperger's Syndrome. The potential impact of ASD on the mediation process is considered, along with strategies by which mediators might seek to support these individuals to effectively engage in successful dispute resolution.*

## <DIV>INTRODUCTION

The latest prevalent data suggests approximately 1% of the population has a diagnosis of Autism Spectrum Disorder (ASD).<sup>1</sup> Symptomatically, individuals with ASD can demonstrate improvements in functioning arising from learning and compensation strategies. This article is concerned with the role of the mediator in working with a disputant who has ASD, focusing on the cluster of symptoms that used to be referred to as Asperger's Syndrome (AS).<sup>2</sup>

Prior to the latest revision of the standard diagnostic criteria, AS was a disorder recognised in its own right. In the current nomenclature, AS is considered to be a milder form of ASD. The key difference between ASD and AS is that people with AS have average or higher-than-average verbal abilities and an intellectual capacity within the normal range. This means that people with AS often remain undiagnosed, despite experiencing the social and psychological challenges that are associated with the disorder. This article will begin by considering the challenges posed by AS traits to the fundamental principles underpinning the facilitative model of mediation. Following that, strategies available to a mediator within a facilitative model that will assist the dispute resolution process for an AS and neuro-typical dyad will be discussed.

## <DIV>MEDIATION IN AUSTRALIA

The last 50 years have seen an explosion in the application of mediation to almost every arena of interpersonal dispute in our lives.<sup>3</sup> Professional mediation in Australia has developed from the

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\*BA(Hons) Grad Dip Psy Prac MSc(Inv Psy) MPsych(Clin) MJur (Law) PhD, Clinical & Forensic Psychologist, Co-Director – Centre for Forensic and Interpersonal Risk Management, School of Psychology, Bond University.

<sup>1</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (APS, 5th ed, 2013).

<sup>2</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders – TR* (APS, 4th ed, 2000).[The American Psychiatric Association's Website says the fourth edition was published in 1994. Are you referencing a reprint?]

<sup>3</sup> B Mayer, "Mediation: 50 Years of Creative Conflict" (2013) 51 *Family Court Review* 34.

<sup>4</sup> R Field, "Mediation Ethics in Australia: A Case for Rethinking the Foundational Paradigm" (2012) 19 *James Cook U L Rev* 41.

platform of the facilitative model of mediation. The mediator's role is to assist the parties towards a resolution that embodies the principles of self-determination and mutual agreement. In this paradigm, mediation is presented to the parties as "a democratic, cost-effective, party-centered, empowering, interests-based and principled option for resolving their dispute".<sup>4</sup>

Facilitative mediation is premised on the notion that each party is capable and willing to engage in the dispute resolution process in "good faith". Mediators conduct an intake process that ensures both parties have a clear understanding of the mediation process. The roles of each party at the mediation are described, the goals and terms of mediation discussed, and confidentiality is explained. In preparing participants, mediators are effectively ensuring both parties have provided informed consent and are agreed about the process to be undertaken.<sup>5</sup>

This stage of the process also permits mediators an opportunity to screen participants and the matter under consideration for suitability for mediation. Imbalances in power are a frequent issue in mediation, and perhaps particularly in family mediation settings where a history of intimate relationship dysfunction is brought to the negotiating table. Current practice guidelines stipulate that where power imbalances, safety, control and/or intimidation issues are present, mediators must take steps to "manage the mediation process accordingly"? [Where does the quotation end?].<sup>6</sup>

The high conflict individual tends to lack insight into their own behaviour and the impact of their actions on others.<sup>78</sup> They reject negative feedback and prefer instead to externalise blame. Potentially they may not meet the fundamental mediation requirement of attending with a genuine intent to resolve the dispute in a fair and just way. Individuals exhibiting ASD behavioural patterns may not present with a diagnosis and, accordingly, mediators are not necessarily in a position to "screen out" for such traits. Strategies for mediators to assist the AS party to engage in a meaningful way in the mediation process are required to meet the ethical and professional standards of mediation. In the ensuing discussion, a picture of the social, cognitive and behavioural challenges faced by individuals with ASD is provided. Following, considerations for mediators working with these individuals will be offered, including strategies to enhance the facilitative mediation process for individuals with AS.

## <DIV>ASD

A diagnosis of ASD requires persistent impairment in reciprocal social communication and social interaction, and restricted repetitive patterns of behavior, interests or activities. These symptoms must be present from early childhood and impact on daily functioning across a variety of life domains.<sup>9</sup> While some behaviours can be seen as arising from social learning or cultural considerations (ie., talking over others), typically a cluster of symptoms commonly associated with adults with ASD has been cited in the literature. In this section key components of this cluster of symptoms will be explored to provide a picture of areas of difficulty in which individuals with an ASD (ie., AS) commonly present. It is important to note, however, that the diagnostic criteria for ASD has changed over the last three decades in particular, and accordingly our knowledge base is limited to understanding those symptoms considered diagnostic of ASD *at the time* the research was conducted.

Key aspects of functioning that typically pose difficulties for individuals with ASD generally include Theory of Mind, executive functioning, language, non-verbal communication and social behavior. In broad terms, what is generally accepted is that use of language often improves over time

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<sup>5</sup> L Boule and N Alexander, *Mediation: Skills and Techniques* (LexisNexis Butt, 2nd ed, 2012).

<sup>6</sup> Queensland Law Society, *Australian National Mediator Standards: Practice Standards* (1 July 2015) 8 <[http://www.qls.com.au/For the community/Dispute\\_resolution\\_services/Mediation/National\\_mediator\\_standards](http://www.qls.com.au/For_the_community/Dispute_resolution_services/Mediation/National_mediator_standards)>.[Is this what you mean?]

<sup>7</sup> V Gilbert, "What Therapists Don't Tell You About Divorcing a High-Conflict Personality" *Huffington Post*, 21 April 2013 <[http://www.huffingtonpost.com/virginia-gilbert-mft/what-therapists-dont-tell\\_b\\_2622776.html](http://www.huffingtonpost.com/virginia-gilbert-mft/what-therapists-dont-tell_b_2622776.html)>.

<sup>8</sup> D McLean, "Strategies and Methods in Mediation and Communication with High Conflict People" (2013). High conflict behaviours. Paper 1. <http://www.civiljustice.info/highconflict/1>

<sup>9</sup> American Psychiatric Association, n 1.

in individuals with ASD, however, challenges in executive functioning, social behavior, and non-verbal communication are often evident from childhood through to adulthood. These gaps in skill development are hypothesized to impact on the conflict style favoured by the AS individual which, in turn, will impact on his or her approach to dispute resolution.

### **<DIV>THEORY OF MIND**

Theory of Mind relates to one's understanding of the beliefs, desires, intentions, and thoughts of one's self and others. Rather than referring to a single construct, theory of mind encapsulates the ability to understand one's own internal world, and the experience of another, and then to use this perception to make sense of the world. This attribute is what enables an individual to understand and predict behaviour.

Our understanding of Theory of Mind primarily relies on research conducted with pre-school aged children, where growth in this area is particularly evident from around three years of age.<sup>10</sup> With increasing maturity comes the ability to distinguish the literal from other interpretations, thus an awareness of and appreciation for irony, sarcasm, "white lies", and metaphors manifests in school aged children as they progress in their mental development. Howlin, Baron-Cohen, and Hadwin further identified deception, empathy, self-consciousness, and the use of persuasion as being dependent on Theory of Mind understanding.<sup>11</sup>

Individuals with AS often struggle with these aspects of communication and may not realise if another person's behaviours are intentional or unintentional. This challenge often leads others to believe that the individual with AS does not show empathy or understand them, which can create barriers in social situations. Individuals with AS experience difficulties in recognising and processing the feelings and motivations of others – the nuances of social connection appear to bypass them. Struggles in this aspect of functioning can impact an individual's ability to participate fully in the process of understanding the interests and issues of the other party in mediation. In addition, the individual may have trouble expressing their own concerns, needs, and interests, as well as evaluating and reality testing alternatives generated in mediation.

### **<DIV>EXECUTIVE FUNCTIONING**

Executive functioning includes skills such as organising, planning, sustaining attention, and inhibiting inappropriate responses. Deficits are evident in impulse control, perseverance, restricted sustained attention, and a desire for routine and sameness. Some individuals pay attention to minor details, but fail to see how these details fit into a bigger picture. Others have difficulty with complex thinking that requires holding more than one train of thought simultaneously. Individuals with AS may have difficulty maintaining their attention, or organising their thoughts and actions. This inhibits mental flexibility and self-monitoring, two essential skills in option generation and the ability to predict the likely future consequences of our own and other's behavioural choices.

### **<DIV>LANGUAGE**

The spectrum of ASD symptoms can range from no language at all to relatively mild deficits (eg, in individuals with AS). For many people with ASD, language issues are focused more on the use of language than on significant delays in skills.<sup>12</sup> The social use of language is less recognised in individuals with AS – language has a more pragmatic and functional focus rather than as a tool for sharing experiences and emotions. This results in behaviours such as talking over others and interrupting. The very literal interpretation of language can cause ASD individuals to appear socially naïve or tactless in conversation. These patterns create misunderstanding and uncertainty in

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<sup>10</sup> S Edelston, *Understanding Autism: Theory of Mind* (Autism Research Institute, 2015) <[http://www.autism.com/understanding\\_theoryofmind](http://www.autism.com/understanding_theoryofmind)>; [I was unable to locate this document. Is it a report or a book or website?] J Lantz, "Theory of Mind in Autism: Development Implications and Intervention" (2002) 7 *The Reporter* 18.

<sup>11</sup> P Howlin, S Baron-Cohen and J Hadwin, *Teaching Children with Autism to Mind-Read: A Practical Guide* (John Wiley & Sons, 1999).

<sup>12</sup> T Attwood, *The Complete Guide to Asperger's Syndrome* (Jessica Kingsley Publishing, 2007).

interactions that impact both the individual with ASD as well as others involved in the interchange. Moreover, in a mediation context, the individual with AS may find it challenging to provide the other party with the uninterrupted space and time to allow full expression of their concerns and issues during the initial statements as well as the discussion and exploration phases of the process.

#### **<DIV>NON-VERBAL COMMUNICATION**

Deficits in this area of functioning may be more pronounced in individuals with ASD and milder in individuals with AS. Often individuals with ASD are described as “wooden” or “odd”<sup>13</sup> as they may evidence reduced range in speech intonation, facial expressions, body orientation, and limited eye contact.<sup>14</sup> The social demands involved in sustained interpersonal interaction, such as in a mediation, may test the individual with AS. The mediation process requires the parties to provide perspective to their matter through open and frank disclosure in a managed context. For the person with AS this prolonged interchange of views, accompanied by the heightened emotion often brought into a mediation setting, may exacerbate the shortfalls they typically experience in the area of non-verbal communication.

#### **<DIV>SOCIAL BEHAVIOUR**

Typically, individuals with ASD evidence deficits in social reciprocity behaviours.<sup>15</sup> Social behaviours such as sharing emotional experiences with others, initiating social interaction can be exhausting for an individual with ASD. Such pronounced deficits are less evident in individuals with higher functioning (ie, AS), but these people will still likely experience intense anxiety, particularly in novel situations, when determining the appropriate social response.<sup>16</sup> In mediation, the individual with AS may struggle to provide the mediator and, ultimately, the other party with information about how the problem is perceived from their perspective. The process of defining the issues and agreeing on a mutual agenda may be impeded by the individual with AS’s challenges to cope with the social rules governing such interactions.

#### **<DIV>CONFLICT STYLES IN INDIVIDUALS WITH ASD**

There has been no empirical research examining conflict styles in AS individuals. The limitations in executive functioning, Theory of Mind and general communication skills can lead to an individual with ASD resorting to emotional blackmail and intractable adherence to their own point of view to manage conflict.<sup>17</sup> Other behaviours evident may include an inability to see the other’s point of view, limited persuasive skills, a propensity for rigidity and confrontation, rather than negotiation, reluctance to change a decision or admit mistakes, a tendency to punish rather than praise, to avoid demands, and an aversion to being interrupted with a compulsion to strive for completion.<sup>18</sup> The inherent characteristics of the AS individual have been found to lead to a pattern of avoidance from high conflict situations.<sup>19</sup> The effect of this ineffective arguing strategy on their neurotypical partner is increased rates of depression and emotional withdrawal, leading to reduced relationship satisfaction for both parties.<sup>20</sup>

#### **<DIV>SUMMARY**

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<sup>13</sup> Attwood, n 11.

<sup>14</sup> American Psychiatric Association, n 1.

<sup>15</sup> G Gillberg, “Asperger Syndrome and High Functioning Autism: Shared Deficits or Different Disorders?” (2001) 5 *Journal of Development and Learning Disorders* 81.

<sup>16</sup> A Gillott and PJ Standen, “Levels of Anxiety and Sources of Stress in Adults with Autism” (2007) 11 *Journal of Intellectual Disabilities* 359.

<sup>17</sup> Attwood, n 11.

<sup>18</sup> Attwood, n 11.

<sup>19</sup> E McNeil, Conflict Resolution and Relationship Satisfaction in Individuals with an Autism-Spectrum Disorder and Their Neurotypical Partner (Masters Thesis (Psychology), Bond University, 2014).

<sup>20</sup> McNeil, n 18.

The presence of such deficits in functioning will impact the ability of the individual to fully engage with and participate in facilitative mediation. In particular, AS individuals are likely to experience difficulties in expressing emotions, understanding the perspective and emotional context of the other party, and predicting the likely outcome associated with various alternatives generated during the negotiation. In addition, the AS individual may have trouble with maintaining sustained attention, impulse control, and not interrupting during the mediation process. Further, their style of avoidant behaviour in conflict, coupled with a tendency to persevere and rigidly maintain their perspective poses unique challenges for the AS individual in mediation as well as other parties involved in the negotiation. The mediator will be tested to manage these behaviours and to assist the AS individual to uncover their concerns, needs, interests and priorities, while maintaining a respect for the other party's engagement in the same.

### **<DIV>ADDITIONAL CHALLENGES TO FACILITATIVE MEDIATION WITH AS INDIVIDUALS**

Couples that attend mediation are frequently in high-conflict. Under Queensland law divorcing couples are required to attend mediation if they have been married less than 12 months, unless exceptional circumstances apply.<sup>21</sup> While there is no evidence to suggest that compulsory mediation achieves less successful outcomes than might voluntary participation in the process, clearly it adds to the complexity of the situation for all parties.

In addition to experiencing the social, cognitive and emotional deficits commonly associated with ASD, these individuals are also at increased risk for co-morbid disorders including depression, anxiety and attention-deficit/hyperactivity disorder.<sup>22</sup> Stewart et al, notes that due to the difficulties people with ASD experience in expressing emotion, depression is commonly undiagnosed in this population. The combination of ASD functioning deficits mixed with the potential for undiagnosed (and therefore untreated) co-morbid disorder highlights the unique barriers an individual with AS may face when entering into mediation.<sup>23</sup>

An additional layer of complexity for the mediator, particularly in family dispute resolution, arises from the impact of this pattern of deficits on the relationship between the AS party and the neurotypical individual involved in the dispute. Specifically, one of the negative consequences of the limitations in socialisation and communication evidenced by AS individuals is restrictions in their ability to form and maintain intimate relationships. Intimacy is recognised as an essential component of the human condition and no less so for individuals with AS, despite the apparent challenges they face in achieving this state.<sup>24</sup> While there has been limited research examining the nature of AS-neurotypical relationships, some conclusions can be drawn from studies exploring relationship satisfaction, adult attachment style, and parenting satisfaction in such couples.

Lack of empathy, emotional connectivity, limited emotional validation typical of these relationships is associated with a conglomeration of difficulties experienced by both the AS and neurotypical partner.<sup>25</sup> Partners of AS individuals frequently report feeling isolated, lonely, and frustrated. Communication, provision of adequate emotional support by the AS partner, and inflexibility in beliefs and behaviours are at the heart of the conflicts typically experienced by these couples.<sup>26</sup> By the time the relationship ends, the neurotypical partner may be suffering from low self-esteem, depression and/or anxiety, or other symptoms of poor physical and mental functioning arising

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<sup>21</sup> D Cooper, "Lawyers Behaving Badly in Mediations: Lessons for Legal Educators" (2014) 25 ADRJ 204.

<sup>22</sup> P Howlin, *Autism: Preparing for Adulthood* (Routledge, 1997); G Joshi et al, "Psychiatric Comorbidities and Functioning in a Clinically Referred Population of Adults with Autism Spectrum Disorders: A Comparative Study" (2012) 43 *Journal of Autism and Developmental Disorders* 1314.

<sup>23</sup> ME Stewart et al, "Presentation of Depression in Autism and Asperger's Syndrome: A Review" (2006) 10 *Autism* 103.

<sup>24</sup> J Newport and M Newport, *Autism-Asperger's and Sexuality: Puberty and Beyond* (Future Horizons, 2002); M Stokes and A Kaur, "High Functioning Autism and Sexuality: A Parental Perspective" (2005) 9 *Autism* 266.

<sup>25</sup> M Aston, *Affective Deprivation Disorder* <<http://www.maxineaston.co.uk/cassandra/AfDD.shtml>>.

<sup>26</sup> JS Bostock-Ling, SR Cumming and A Bundy, "Life Satisfaction of Neurotypical Women in Intimate Relationship with an Asperger's Syndrome Partner: A Systematic Review of the Literature" (2012) 3 *Relationships Research* 95.

from living in a high-conflict and emotionally deprived environment. The effects of these mood disturbances can impact on their ability to participate in mediation and may also be evident in a power imbalance in the dyad whereby the individual with AS is seemingly less impacted and, therefore, more in control of the situation.

Consequently, the mediator is confronted by the challenge of facilitating an individual who inherently avoids conflict, who struggles to understand and tolerate differing viewpoints from their own, while evidencing ineptitudes in communication and socialisation that limit their ability to persuade others to their viewpoint. In not addressing these issues, the mediator risks maintaining a power imbalance that reduces the likelihood of successful dispute resolution or sustainable solutions to the matters presented.

### **<DIV>STRATEGIES FOR MEDIATORS**

In mediation, the achievement of party self-determination is associated with respect for party autonomy and for party empowerment.<sup>27</sup> There are special considerations for working with high conflict in therapy (ie, Shaw)<sup>28</sup> and one aspect to consider is whether mediation will assist the AS individual. In emotionally charged situations the demands of facilitative mediation for both parties to accept the termination of the relationship and focus on renegotiation of roles and responsibilities can be emotionally draining.<sup>29</sup> Ethically, if the AS individual is likely not to benefit from engaging in the mediation, the professional has a responsibility to refer the parties to alternative forms of dispute resolution, such as the legal domain.

That mediation generally is effective has been noted in meta-analyses of recent research in the area (eg, Kelly).<sup>30</sup> Mediation produces successful settlement in 50 to 85% of cases and facilitative mediation, in particular, has been associated with higher quality divorce agreements than, for example, legal negotiations.<sup>31</sup> This trend extends to subsequent compliance rates with mediated agreements as well as satisfaction with the process, with most support in research evident for the effectiveness and sustainability of mediated outcomes over litigated settlements. There are methodological issues with such research, for instance screening out for very high conflict, violence, and unwillingness to settle impacts on the nature of the sample. In addition, much of the research in the field has relied on self-selected samples, varying measures of outcome, and limited procedural information by which to compare mediation approaches and associated outcomes.<sup>32</sup> Nevertheless, recent research has found a consistency across samples, methodologies, and measures in the effectiveness of mediation in producing durable outcomes even for complex, highly emotional disputes.<sup>33</sup> While AS has not been considered in the literature specifically in the context of mediation, to conclude the current discussion several recommendations will be proposed for the interested Alternative Dispute Resolution (ADR) practitioner to consider.

### **<DIV>RECOMMENDATIONS FOR ADR PRACTITIONERS**

#### **<subdiv>Utilise strengths in logical and systematic thinking**

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<sup>27</sup> Field, n 4, 55.

<sup>28</sup> E Shaw, "Ethics and the Practice of Couple and Family Therapy" (February 2011) *In Psych*, <<http://www.psychology.org.au/publications/inpsych/2011/feb/shaw/>>.

<sup>29</sup> LA Shaw, "Divorce Mediation Outcome Research: A Meta-Analysis" (2010) 27 *Conflict Resolution Quarterly* 447.

<sup>30</sup> JB Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 *Conflict Resolution Quarterly* 3.

<sup>31</sup> R Baitar et al, "Toward High Quality Divorce Agreements: The Influence of Facilitative Professionals" (2012) 4 *Negotiation Journal* 453.

<sup>32</sup> JB Kelly, "A Decade of Divorce Mediation Research" (1996) 34 *Family and Conciliation Courts Rev* 373.

<sup>33</sup> Kelly, "Family Mediation Research: Is There Empirical Support for the Field?", n 29.

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In terms of specific strategies for working with AS individuals, the field of psychotherapy has yet to establish definitive approaches for effective counseling for people with AS.<sup>34</sup> Strategies proposed focus on utilising the relative strengths AS individuals reveal in logical and systematic thinking. The individual with AS may benefit from more direct guidance on how to manage the social communication aspects of mediation. Attwood recommends a range of modalities for therapists to employ with individuals with AS, including emphasising using written information as explicit guides, as people with AS tend to find text more accessible and more readily processed. Highlighting ways of behaving that are more likely to achieve their goals may provide the individual with AS with the necessary rationale to identify, understand and express their emotions. This process is most conducive to being undertaken at the pre-mediation phase and reiterated in private caucus as necessary.<sup>35</sup>

### **<subdiv>Managing differing cognitive and emotional processing times**

The mediator has limited opportunity to assess the individual's capacity for empathy and reflection prior to commencing mediation. Issues with emotional and cognitive processing are not, of course, exclusive to those with ASD. The person with AS, however, may need more time than might usually be anticipated to manage emotions and marshal their thoughts during mediation. Regular checking in with both parties will assist the experienced ADR practitioner to gauge each party's reaction to the process as it unfolds, but the AS disputant may need help formulating practical strategies for managing breakdowns in communication and being willing to slow the mediation process down should the person with AS require additional processing time are likely to be helpful forms of support.

### **<subdiv>Making the implicit, explicit**

The person with AS will benefit from clear boundaries and directly stated expectations, and so the mediator may need to make explicit those aspects of facilitative dispute resolution that are typically left implied. This is best stated in pre-mediation and reiterated in private caucus.

The mediator will also need to bring exceptional skills in managing the process and directing the parties through the relevant steps of the model. Dealing with power issues, unrealistic expectations, one party dominating and controlling the process, and losing impartiality are issues that can arise in exceptional circumstances for mediators generally,<sup>36</sup> but which are highly likely to be present in mediations with AS individuals. Finally, there are aspects of the mediation process that are common to effecting a meaningful outcome for the parties and these features should also be considered by the professional in working with an individual with AS.

### **<subdiv>Mediator characteristics**

There is evidence that mediators influence the content and outcomes of disputes they mediate.<sup>37</sup> Shaw notes the inherent influence of our own experience of relationships and our values in working with couples therapeutically. Mediators are focused on maximising the participant's decision-making, with mediation essentially being a conduit to self-determination for the parties. An understanding of the importance of neutrality is an essential mediator competency.<sup>38</sup> Boule argues that "neutrality" is about the mediator's sense of disinterest in the dispute and its outcome and "impartiality" the even-handedness, objectivity and fairness exhibited towards the parties during the mediation process. Procedural fairness in mediation requires the professional to support the parties' informed consent to any agreement, ensure each has an opportunity to be heard, and facilitate balanced negotiations while ensuring each party has access to relevant advice or information.<sup>39</sup> In addition to procedural fairness,

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<sup>34</sup> N Hodge, "Counseling People Labeled with Asperger Syndrome" in C Feltham and I Horton (eds), *The SAGE Handbook of Counseling and Psychotherapy* (Sage, 2012) 554–558 .

<sup>35</sup> T Attwood, "Cognitive Behavior Therapy for Children and Adults with Asperger's Syndrome" (2004) 21 *Behaviour Change* 147.

<sup>36</sup> Boule and Alexander, n 5.

<sup>37</sup> Field, n 4.

<sup>38</sup> Shaw, n 28.

<sup>39</sup> L Boule, *Mediation: Principles, Process and Practice* (Butterworths, 1996).

the extent to which a mediator ensures the parties' control of content and outcome, and the effectiveness of the mediator's strategies to enhance the parties' self-determination, ensures substantive fairness in the process.<sup>40</sup> Maintaining neutrality in the process and un-investment in the outcome is essential to achieving these aims.

### **<subdiv>Consider the most appropriate mediation model**

The strategies commonly recommended to the neurotypical party for dealing with high conflict individuals are counter to the philosophy of facilitative mediation. A pattern of seeming irrationality and no-win atmosphere results in the neurotypical partner experiencing trauma and hopelessness of effecting meaningful change. The high avoidance pattern displayed by the AS partner in managing conflict results in a history of non-resolution of issues or, alternatively, apparent mutually agreed solutions to prior conflicts not being followed through by the AS partner this leads the neurotypical individual to feel discouraged at the prospect of effecting real change for future negotiations. Moreover, to manage the impact of this scenario, the neurotypical partner is often advised to minimise contact and resist the urge to defend or explain themselves in communication with the AS individual.<sup>41</sup> To protect themselves from further control and manipulation the neurotypical partner may seek to avoid revealing their emotions and to stick to the facts when dealing with the AS individual. They may also be advised not to admit fault as the AS individual may seek to exploit that knowledge to strengthen their sense of righteousness in the conflict. These strategies are inconsistent with the aim of consensus for a successful mediation to result.<sup>42</sup>

Nevertheless, the facilitative model of mediation practice has been demonstrated to correlate with higher quality divorce agreements. Baitar et al, notes key features of successful mediation approaches include helping disputants focus on interests and exchange information and adhering to a structured process. Essential personal qualities of the mediator are found to be empathy, acceptance and authenticity, along with perceived impartiality by the parties.<sup>43</sup> Bowling and Hoffman argue for mediators to view the mediation interaction systemically, with a clear understanding of what they themselves bring to and take away from the conflict. The authors highlight the integrated nature of successful mediation, whereby a positive model is presented to the parties and the subtleties of a well-directed process work to align parties in a more positive direction.<sup>44</sup>

### **<DIV>CONCLUSION**

The facilitative model remains central to the Australian dispute resolution context although, as the field develops, other approaches are also flourishing.<sup>45</sup> In the facilitative model the mediator assumes an impartial role as an "outsider" rather than adopting a partisan position as an "insider" to the dispute. Field states that "the ethical requirement of mediator neutrality provides the benefit of, at least theoretically, ensuring that any outcome reached is one that is self-determined by the parties".<sup>46</sup> As mediators, our conflict is in maintaining an un-invested position while not permitting the existing power imbalance to play out in a mediated concern. Working with disputants with less typical ways of thinking and social communication challenges our skills as mediators. We may be required to present ourselves differently to meet the requirements of people with AS.

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<sup>40</sup> S Douglas, "Neutrality, Self-Determination, Fairness and Differing Models of Mediation" (2012) 19 *James Cook U L Rev* 19.

<sup>41</sup> V Gilbert, "Not Everyone Should Try to Consciously Co-Parent", *Huffington Post*, 4 August 2014, <[http://www.huffingtonpost.com/virginia-gilbert-mft/not-everyone-should-try-t\\_b\\_5101613.html](http://www.huffingtonpost.com/virginia-gilbert-mft/not-everyone-should-try-t_b_5101613.html)>.

<sup>42</sup> M Brandon and L Robertson, *Conflict and Dispute Resolution: A Guide for Practice* (Oxford University Press, 2007) 65.

<sup>43</sup> Baitar et al, n 30.

<sup>44</sup> D Bowling and D Hoffman, "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation" (2000) 16 *Negotiation Journal* 5.

<sup>45</sup> D Spencer and S Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 3rd ed, 2014).

<sup>46</sup> Spencer and Hardy, n 44, 42.