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Do we need a mediation Act? Part 1

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The institutionalisation of ADR

Do we need a mediation Act? Part 1

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Editor's note: This is the first part of a two-part article discussing arguments for and against the introduction of a mediation Act for New Zealand. Part 1 looks at the objectives of mediation legislation, examples from other jurisdictions, what mediation legislation already exists in New Zealand and the context of and trends in mediation in New Zealand. Part 2 canvasses the risks and benefits of potential legislation and explores the competing principles central to the debate, concluding with an opinion on alternatives and the best way forward.

Introduction

Do we need mediation legislation in New Zealand? This is a good topical question – but not an easy one. At first blush there would appear to be a simple answer. If we want mediation to flourish, surely a law that facilitates, supports and regulates a dispute resolution process which has grown in use exponentially in the last decade could only consolidate further growth?

However, a closer look suggests that mediation legislation might hamper the development of mediation. In the United States, Benjamin¹ questions whether the recent Uniform Mediation Act 2001 (UMA) is a Trojan Horse carrying within its belly notions that are likely to alter the original values and purposes of mediation practice. In Australia, Carroll² asks what a uniform mediation Act would achieve: 'is it a case of all for one and one for all?' She also asks whether there is a need for 'one at all'?

The question of whether New Zealand needs mediation legislation is a vexed one which has resulted in polarised debate in other jurisdictions. The need for the question to be addressed and the debate to flourish in New Zealand is a reflection of the coming of age of mediation in this country. We foresee a much greater focus on the theoretical framework for mediation in New Zealand in the next decade. This will enhance the great strides mediation has taken in the last decade, and result in a more thoughtful approach to its future development.

The debate

To provide a background to the discussion, the debate can be simplistically summarised as follows:

The case for

The increasing popularity of mediation makes it a powerful tool. Consumers are at risk from incompetent, unethical and dangerous mediators. Legislation would improve the quality of mediation services and provide protection for consumers. It would regulate mediators by a process of registration and uniform standards as well as establishing a clear, consistent and certain approach to definitional and fundamental process issues. Legislation would also remove a number of taxing ethical dilemmas for mediators.



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The case against

The beauty of mediation lies in its informality, voluntary nature, versatility and adaptability. It accommodates different contexts and approaches. To regulate it would be the death knell of mediation as we know it. Mediation legislation is superfluous and unnecessary – particularly at this stage of development.

Mediation legislation – purposes and types
Objectives of mediation legislation

Calls for mediation legislation are driven by a number of objectives, which in turn are driven by perceived benefits. The fact that the issue has been well explored in other parts of the world helps us understand these.

State endorsement

Legislation would provide government endorsement of mediation as a significant dispute resolution process. One barrier to using mediation is a sense that it is both peripheral and a soft option. Legislation would give mediation greater weight and credibility and foster confidence in its use. It would also raise awareness of mediation and counter another barrier to its use – lack of information about what mediation actually is.

Clarification and consistency of models and/or approach

As noted, an obstacle to mediation's growth is lack of understanding of what mediation actually is. Legislation could clarify this by providing a standardised definition and standardised procedures across the spectrum of mediation practice (both private and statutory). This would facilitate clearing out the 'clutter' of the many statutory models in New Zealand. Such an approach is advocated by commentators who consider that institutionalising a dispute resolution process as part of a state-provided system should provide consistent terminology and a standard approach to process issues.³

Certainty

Another goal would be to increase

the predictability and reliability of approach to fundamental legal questions relating to mediation, in particular confidentiality of the process. As discussed in Part 2 of this article, these issues can and do cause practising mediators – and users – some difficulty. Clear statutory guidelines on confidentiality and privilege issues would provide certainty and protection to both practitioners and consumers of mediation.

Achieving consistency and certainty across the states on the important issues of confidentiality and privilege in mediation was the primary goal of the UMA in the United States.⁴ The UMA seeks to 'replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible and helpful rules'.⁵

Consumer protection

One concern shared by mediators and the public about lack of regulation of mediation is the risk to consumers from exposure to inexperienced, unqualified, fly-by-night mediator 'wannabes'. Consumers currently rely on representations made by providers of mediation services as to their quality. To ensure that mediation is efficient and effective, the reasoning is that there should be minimum qualifications for mediators and requirements of certification, training, ethical codes and professional standards. According to this argument, all mediators should also be licensed and certified to a single standard just as the professions and most trades are licensed according to a standard of knowledge, adequacy and proficiency.

The aim would be to boost consumer protection through mediation legislation which clarifies the practice of mediation and introduce certainty in relation to the above issues. This goal would be specifically targeted by legislation that:

- codifies a set of standards and a system of registration and accreditation of mediators;
- requires a certain level of disclosure between parties to mediation.

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Arguably, this would place parties to mediation on a level playing field and shortcut some of the legalistic discovery processes;

- requires disclosure of mediators' qualifications (and competency to mediate) and conflicts of interest that would impact on their impartiality. Such disclosure would ensure that mediation is efficient and effective, enhance credibility of the mediation process and foster consumer confidence in it;
- endorses the enforceability of both agreements to mediate and agreements made in mediation. At present, 'all forms of dispute resolution are dependent for their full effectiveness on judicial recognition and acceptance because, without that recognition and acceptance, they are not enforceable against the will of a defaulting party, and their value is greatly reduced'.⁶ Formal recognition by legislation of these agreements would provide consumer protection. It would remove the existing scope for agreements to

mediate to be held invalid because the process prescribed is not sufficiently certain.⁷ Traditionally, an agreement to agree is void for uncertainty,⁸ as is an agreement to mediate, which is incomplete because it fails to provide a mechanism or the means of establishing a mechanism by which the purpose of the agreement can be achieved.⁹ Although an agreement to take defined steps will be sufficiently certain,¹⁰ this requirement can be a stumbling block for drafters. In addition, parties to mediation need to have confidence that the agreement they reach in mediation will be enforceable.

At present, common law principles govern the question of enforcement where one party wishes to set aside the agreement. Where this action is based on misconduct by the mediator, competing issues of immunity and privilege arise.

Mediator protection

Mediator immunity is seen by many as a positive way to ensure that people enter the 'profession' without risk of suit, which in turn will assist its

growth. A mediator is potentially legally liable to others for a number of acts, including deviation from contractual obligations, departure from ethical standards, failure to perform competently or gross misconduct or fraud. Because a mediator is not an advocate but rather acts in the spirit of impartiality and neutrality demanded of judges, some believe that immunity from civil liability should be extended to mediators.

The idea is that mediator immunity from civil suit could be conferred by legislation. However, this is by no means a unanimous view. There are dissenters of international stature, such as Justice Michael Kirby who considers that immunity should not be extended to private mediators, as they may not have adequate training and are performing for reward to themselves.¹¹ Even amongst those who consider mediator immunity is generally worthwhile, there are questions as to its appropriate limits. This issue is discussed further in Part 2 of this article.

What kind of legislation could be appropriate?

The question 'Do we need a mediation Act?' focuses on the big picture of mediation legislation, general legislation as opposed to context specific legislation. In other words, a mediation Act as opposed to mediation prescribed by statute as a dispute resolution process in specific statutory contexts, for example the *Residential Tenancies Act 1986*, *Employment Relations Act 2000*, *Human Rights Act 1993*, *Privacy Act 1993*, *Resource Management Act 1991*, and the *Health and Disabilities Commissioner Act 1994*, to name just a few of the many New Zealand statutes which provide for a reference to mediation. In theory, a mediation Act would extend to all mediations (both statutory and private) conducted in the jurisdiction, unless they were specifically excluded from the ambit of the Act.

Examples of general legislation enacted in the Australian Capital

Territory and Tasmania (in Australia) and in the United States are considered below.

Another approach is to consider regulation to enhance and support (as opposed to mandate or provide for) mediation and protect practitioners and users from harm. Carroll identifies three specific types of legislation that exist to support and regulate mediation: procedural, regulatory and beneficial. Each has a different function.¹² A mediation Act could contain all three types, or one or two only.

[Procedural] legislation reflects the trend towards the institutionalisation of mediation ...

Procedural legislation

This refers to legislation that *specifies mediation* as a dispute resolution process. It can either compel parties to mediate or provide for (but not require) mediation. With this type of legislation the powers of the mediator, and the procedures to be followed, may also be prescribed. This type of legislation reflects the trend towards the institutionalisation of mediation,¹³ which commentators note has spawned much of the extensive – but piecemeal – mediation regulation that exists today in many jurisdictions.

Regulatory legislation

Legislation of this type *regulates the practice* of mediation by mediators. This type of legislation deals with and prescribes standards of competency, appropriate qualifications and an approval process or registration scheme.¹⁴

Beneficial legislation

Beneficial legislation *protects mediators and consumers*. It 'supports



the mediation process by clarifying the rights, obligations and protections of parties to mediation, to mediators and, to a limited extent, third parties to the mediation.¹⁵ Typical provisions include protection of the confidentiality of the process and protection of mediators from civil action.¹⁶

The question 'Do we need a mediation Act?' focuses on the need for *regulatory* and *beneficial* legislation. This involves going beyond the point of how we get to mediation (which may be via statute, agreement or contract) and looking at the value of and difficulties with regulation and protection of the process and those involved in it.

General mediation legislation in other jurisdictions

Australia

The need for mediation legislation has received considerable attention in Australia and has been the subject of detailed consideration by NADRAC (the National Alternative Dispute Resolution Advisory Council)¹⁷ in various papers, in particular: 'A Framework for ADR Standards' in 2001 and a discussion paper entitled 'Issues of Fairness and Justice in Alternative Dispute Resolution' in 1997. The former is a

Nevertheless both the ACT and Tasmania¹⁹ have adopted general mediation legislation and it is on the agenda in Western Australia where there has been a recommendation by the Western Australian Law Reform Commission that a mediation Act be enacted.²⁰

The *Mediation Act 1997* (ACT) contains both regulatory and beneficial provisions. The primary purpose of the legislation is to establish a system of registration of mediators by an approved agency, together with the standards of competency to be met. No particular model of mediation is advocated by the legislation. Registered mediators are subject to provisions in the Act relating to admissibility of evidence, protection from defamation and immunity from civil suit. The Act does not provide for exceptions to mediator immunity, nor for the admissibility of evidence on the issue of mediator misconduct. This is discussed further in Part 2 of this article.

United States of America

The UMA was drafted as a collaborative effort between the National Conference of Commissioners on Uniform State Laws and the American Bar Association Section on Dispute Resolution and was approved and recommended for enactment by the former in August 2001. Its purpose was to provide the States with clear guidelines on issues of confidentiality and privilege and to ameliorate the problems arising from the fact that the current rules on mediation are found in more than 2,500 State and federal statutes with more than 250 of these dealing with issues of confidentiality and privilege alone.

The primary focus and centrepiece of the UMA is a privilege that permits the parties, mediator and non-party participants to prevent the use of mediation communications in legal proceedings that take place after mediation. The objective is that the 250 odd privilege statutes existing among the States be repealed and the model provisions adopted with the result that what is, or is not, admissible in one

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report to the Commonwealth Attorney-General on the current position of standards for ADR in Australia and a future direction for their development. It recommends that accreditation of ADR practitioners be assessed on a sector by sector basis rather than by the application of uniform standards to ADR processes and for self-regulation by service providers.¹⁸

jurisdiction will be treated in the same way in another jurisdiction. Other rules relating to confidentiality (disclosure in circumstances other than legal proceedings) and immunity would continue to be dealt with by State laws.

The UMA also includes model provisions for the disclosure of conflicts of interest by the mediator and compels mediators' disclosure of qualifications when asked. The UMA does not attempt to introduce uniform provisions relating to mediator qualifications or standards for mediation. These would also continue to be regulated by State laws.

Considerable collaboration time and consultation was involved in the evolution of the UMA. However, debate over it was highly polarised and even today the UMA does not have the support and commitment of a number of interest groups, for example, the International Academy of Mediators.

Moreover, the adoption is not a 'done deal' and there is opposition in some States. It is early days, but at the time of writing only one State has adopted it although apparently it is being introduced in a number of others this year where it has been recommended by bar associations and ADR committees.²¹

United Kingdom and Europe

Increasingly general mediation legislation is contemplated in this region. However, as yet, no legislation has been implemented. Karl Mackie, the Chief Executive of the Centre for Effective Dispute Resolution (CEDR), notes a trend in the United Kingdom towards professionalisation and institutionalisation of mediation which, he says, raises concerns. This is within the context of a number of factors: active case management encouraging use of mediation; a significant increase in court referrals to CEDR Solve, CEDR's dispute resolution service; a government pledge for government departments to avoid litigation by using ADR (underlined by statements of expectation that local authorities do the same); and two significant cases

suggesting that refusal to mediate is a 'high risk course to take.'²²

The European Commission issued a green paper on ADR in April 2002. It covers issues such as confidentiality, validity of consent and the training and accreditation of neutrals. CEDR has responded to the green paper acknowledging the need for the maintenance of high standards and

Initiatives at [the Government] level highlight a significant trend towards use and development of mediation.

reputation of mediation but advocating that excessive regulation is unhelpful to the development of a relatively new process that requires nurturing.

Context: status of mediation in New Zealand ***Overview and trends***

Mediation and ADR is getting some traction in New Zealand. The question is how do we nurture its development and what is the best approach at this stage of its development?

We are currently seeing the implementation of mediation and consideration of ADR procedures across a spectrum of areas, to different degrees, and at a number of different levels: the government, industry, community and within the ADR world. It is in fact these trends that generate the enthusiasm for the protection and consistency that it is perceived legislation would bring.

Government

Initiatives at this level highlight a significant trend towards use and development of mediation. This shows the Government has a fundamental appreciation that most disputes get resolved, it is just a question of how



and when – and at what cost. While ADR advocates understand that costs savings are but one benefit, it is naïve to think that cost efficiencies don't sharpen the focus, not least for the Government which funds the court infrastructure. Initiatives exist at a number of levels:

- *Policy level*

The Law Commission is reviewing dispute resolution in the family court and courts in general. The Discussion Paper distinguishes between 'judicial mediation' or settlement conference type mediation that typifies the existing family court process, and a purist's 'client centred' mediation, so some comment is expected on the potential benefits of the latter.

Seeking Solutions, the second stage of the overarching review of the court system, has ADR squarely in the frame, with recognition in the paper of some advantages of avoiding trial. Questions of the benefits (and risks) of integrating mediation into our civil systems are raised and some preliminary options are canvassed. It is arguable that these reviews are a gentle nudge in the direction of ADR – and mediation – in themselves. Certainly the titles – *Access to Justice*, *Seeking Solutions* and even *Family Court Dispute Resolution* – indicate a move to consensual, interactive forms of resolving conflict as opposed to dispute disposal at the litigation end of the spectrum.

specific problem (see discussion below). Another recent legislative intervention is the dispute resolution framework set up under the *Employment Relations Act 2000* which has had a significant impact on management of employment disputes.

- *Practical level*

The Weathertight Homes Dispute Resolution service is an example of a practical response to a very real crisis. The 'leaky homes' saga threw up a quagmire of issues for the legal and construction industry. The government consulted widely before designing the service but, notably, ensured that dispute resolution professionals had key roles in defining it. In addition dispute resolution expertise has been prioritised over industry expertise (though in many cases they are combined) in the recently appointed mediation panels.

Another practical initiative being undertaken by the Department of Courts is a program of research looking at ADR in civil cases. Within the context of the promotion of ADR over the last five years through case management guidelines, this will look at how and why cases settle, what effect ADR has on the process, what might be barriers to use and the quality of existing assurance frameworks. This responds to a real need to have greater empirical evidence of the benefits of ADR to parties – and the courts – in developing policy in the area.

Industry

There are a number of indications that commercial enterprises and particular industries have an increasingly sophisticated awareness of the cost of conflict. There is a growing focus on resolving conflict as early as possible (through mediation and ADR

processes) and prevention of conflict is starting to be addressed by some of the following initiatives:

- Industry dispute resolution schemes are growing to deal with customer disputes and complaints. The

[Law Commission reports] indicate a move to consensual, interactive forms of resolving conflict as opposed to dispute disposal at the litigation end of the spectrum.

- *Legislative level*

The most recent example of mediation legislation is in relation to the *Weathertight Homes Resolution Service Act 2002*, a piece of legislation created to respond to a

banking industry and the insurance industry have had ombudsman schemes since 1992 and 1994 respectively. Last year, the electricity industry set up an Electricity Commission and, if New Zealand follows the Australian pattern, this could be extended to the gas industry.

- Volumes of commercial mediation seem at worst static, and some practitioners report a rise. While much information on volumes is anecdotal, it is clear that a number of businesses have determined that mediation is a much more effective way of settling disputes than beating a track to the court door. Mediation practitioners report considerable repeat business.
- Academics and commercial mediators are observing a trend towards self-resolution. Much academic discussion is around dispute systems design and conflict management rather than dispute resolution. Globalisation may hasten this process as initiatives in large multinational corporations filter through. One commercial mediator recently predicted that within 5-10 years we may see a seismic shift that sees a genuine fall off of third party neutrals as parties approach conflict holistically and internally.

Community

Community mediation in New Zealand has not seen the same level of participation as in the United Kingdom and the United States. Schemes have been set up and failed for lack of resources and public information. In Australia, successful community programs are State funded and it is interesting to note that Community Justice Centres are one model highlighted as worth considering in the Law Commission's recent discussion paper *Seeking Solutions*.

The most sustained community initiative is in restorative justice. Here programs that have developed from the roots up have found a groundswell of support and are being taken seriously at the government level with publicly

funded restorative justice programs and pilots being implemented in a number of regions.

Mediation community

New Zealand has two professional ADR organisations: LEADR NZ and AMINZ. They have similar general goals in terms of mediation – development and promotion. Each of their particular origins have caused them to develop in different ways and meet different needs. The existence of the two organisations may reflect the

... within 5-10 years we may see a seismic shift that sees a genuine fall off of third party neutrals as parties approach conflict holistically and internally.

relative immaturity of mediation as a profession; it is still finding its way. As it grows and develops and strands are pulled together, there may be a natural evolution towards one professional organisation as in other professions. The concept of a peak mediation accreditation body has been considered in Australia.

Existing legislation in New Zealand

The trends and developments described above occur against a backdrop of the incorporation of ADR processes into statute over the last 30 years. There is no single piece of general mediation legislation in New Zealand, but rather a range of procedural and regulatory measures that refer to mediation or ADR to some degree in specific contexts. In 1999 there were approximately 30 statutes containing some type of mediation or conciliation model of dispute resolution.²³

Some of this subject specific legislation mandates the use of



'mediation' or ADR and regulates the process and the mediators to a degree. For example, the *Residential Tenancies Act 1986* and the *Employment Relations Act 2000* provide for the appointment of mediators and specify the rules that apply to mediations occurring within the context of the particular Act.

This legislation typically regulates institutionalised State employee panels of mediators, rather than private mediation although there are some exceptions, for example under the *Medical Practitioners Act 1995* where private mediators are contracted on an ad hoc basis. The most recent legislation is the *Weathertight Homes Resolution Services Act 2002* regulating private mediators contracted to the Service for a fixed period of time.

Other legislation provides for processes that pay lip service to mediation, but stipulate a decision making process. For example, the *Fire Service Act 1975* prescribes the appointment of a rural fire mediator 'to investigate and determine' matters whose 'decision' is final and binding.

An overall lack of consistency in approach to mediation, both in definitional and procedural terms, in these statutes²⁴ is concerning.

Summary

In our view the general trends and the current legislative environment indicate a healthy, dynamic but immature mediation environment. It is piecemeal and, in some instances, problematic for reasons highlighted in this article. However, trends suggest that ideas are evolving, initiatives are being tested and across the spectrum of our dealings with each other, awareness of the benefits of mediation is taking hold. ●

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Endnotes

1. Benjamin, Robert D, 'The Uniform Mediation Act: A Trojan Horse?' <www.mediate.com/ethics/ethicsforum2.cfm>.

2. Carroll, Robyn *Trends in Mediation Legislation – Developments in Australia and the US*, p 6.

3. See, for example, Baylis, Claire 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (1999) 30 VUWLR 279 and Altobelli, Tom 'Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 (1) ADRJ 200.

4. Uniform Law Commissioners Press Release, August 2001 'New Mediation Act Approved' <www.nccusl.org/nccusl/pressreleases/prl-08-01.asp>.

5. Hoy, Bridget Genteman 'The Draft Mediation Act in Context: Can it Clear Up the Clutter' (2000) 22 St Louis ULJ 1121, 1122.

6. Kennedy-Grant, Tomas 'Expert Determination and the Enforceability of ADR' NZLJ, June 2000, p 223.

7. Above, note 2, p 27.

8. *Walford v Miles* [1992] 1 All ER 453.

9. *Money v Ven-Lu-Ree* [1988] 2 NZLR 414 (CA) and [1989] 3 NZLR 129 (PC)

10. Above, note 6, p 225.

11. Kirby, Justice Michael, (former) President of the Court of Appeal, Supreme Court of New South Wales, 'Mediation: Current Controversies and Future Directions' (1992) 3 ADRJ 139,145.

12. These three types of legislation are found in either subject specific or 'context' mediation legislation, for example, the ERA 2000, or they may be contained in mediation specific or 'uniform' legislation which applies to mediation practice in a range of different contexts, eg the *Mediation Act 1997* (ACT).

13. We discuss this trend in Part 2 of this article. In essence institutionalisation refers to the development of mediation which started as a community based process in which party and community empowerment is a key goal, to the place where mediation has become an 'institution' in itself. Evidence of this is found in the incorporation of mediation in other institutions, most notably courts,

businesses and Government agencies.
See above, note 2, p 6.

14. *Mediation Act 1997* (ACT) provides for the registration of mediators.

15. Above, note 2, p 8.

16. *Ibid.*

17. NADRAC is an independent advisory council in Australia established in 1995 and charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient dispute resolution.

18. Above, note 2, p 18.

19. *Alternative Dispute Resolution Act 2001* (Tas) provides for court-referred mediation and deals with issues of privilege and immunity in certain circumstances for mediators.

20. WALRC: *Review of the Criminal and Civil Justice System in Western Australia - Final Report Project 92* (1999).

21. Information provided by Stanley Fisher, the state wide UMA co-ordinator (Feb 2003).

22. Mackie, K 'The professionalisation of commercial mediation?' September 2002 <www.cedr.co.uk/index.php?location=/library/articles/professionalisation.htm>.

23. Above, note 3.

24. It is interesting to compare, for example, the mediation/ conciliation provisions in the *Residential Tenancies Act 1986*, *Employment Relations Act 2000*, and *Human Rights Amendment Act 2001*.