

9-1-2003

## Do we need a Mediation Act? — Part 2

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### Recommended Citation

Clapshaw, Deborah and Freeman-Greene, Susan (2003) "Do we need a Mediation Act? — Part 2," *ADR Bulletin*: Vol. 6: No. 5, Article 4.

Available at: <http://epublications.bond.edu.au/adr/vol6/iss5/4>

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## The institutionalising of ADR

# Do we need a Mediation Act? — Part 2

Deborah Clapshaw and Susan Freeman-Greene

*Continued from (2003)  
6(4) ADR 61.*

### Evaluation: possible problems and real tensions

A closer look at general mediation legislation highlights a number of difficulties.

### Creating suitable definitions and descriptions

The objective here would be to create clear and consistent definitions of 'mediation' and 'mediator'. The legislation would describe and define a mediation 'model' and delimit the mediation process.

The difficulties with this are two fold.

First, defining mediation by itself is a minefield. Boule<sup>1</sup> expands on this and notes a number of reasons: terms often used in defining mediation such as 'voluntary' and 'neutrality' are in themselves open to widely differing interpretation; it has not yet developed a coherent theoretical base; it is used in different senses, with different agendas, in different contexts; and there is wide diversity in its practice, use and purpose. Where would legislators put their line in the sand in this milieu? Would they define it conceptually or descriptively? How, and by whose standards, could they get it 'right'?

And 'mediation' is just one of the words that would need definition.

The debate in the United States over definitions within the Uniform Mediation Act (UMA) shows the conundrums that need to be faced. The words 'neutral' and 'impartial' are not attached to the mediator in the definition of mediation in the model. This is due to the acceptance that these words suggest an ideal that is impossible to attain. Yet an open letter put together by Susan Dearborn

entitled the 'Identity of a Mediator' argues strongly that mediation needs to be defined by its aspirational qualities and to do away with them 'results in a loss of an essential characteristic and core value of the mediation process, and fundamentally changes the role of mediators in dispute resolution.'<sup>2</sup>

The second difficulty, which follows on from the first, is the inevitable consequence of putting the development of mediation into a straitjacket. Think of legislation that describes and proscribes the mediation process; should it, for example, prescribe a purely facilitative process? A number of mediators 'provide information', 'evaluate' and some 'advise'. Would they be excluded from coverage of any statute? Even facilitative mediators reality check and play the devil's advocate — a form of pressure. While an expert mediator may be very clear on the limits here, we suggest a number are not — and yet may well be effective in their context. Mediation legislation, in one stroke, could remove one of mediation's strengths — its versatility. Benjamin states:<sup>3</sup>

The intent and inspiration for mediation practice is to view disputes outside of the strict constraints of the legal dispute resolution paradigm; mediation is a kind of safety valve or escape hatch out of a bogged down and often myopic system. Many times for example, in divorce or environmental disputes, courts and lawyers are not only ineffective in managing the dispute, but actually exacerbate the conflict. Mediation allows for a more systemic and thoughtful approach and gives individuals and communities more direct responsibility for the required problem solving... ..A perhaps unintended, but none the less serious consequence of the

UMA, is that mediation is likely to be more closely associated with, and brought in under the auspices of, legal practice and the overall effectiveness of the process is limited thereby.

These points suggest great care is needed. The divergence of opinion and polarisation of views point to the answer — that it is plainly too soon to put the line in the sand. As Benjamin continued in respect of the UMA:

Like a dictionary defines words, a uniform code defines behaviour. To paraphrase Voltaire, he who compiles a dictionary of words, sets meaning and constructs reality. Whether unwitting or intentional, so too do the drafters of the UMA effectively define mediation practice.<sup>4</sup>

As we think about the possibility of legislation, we may be wise to heed this caution.

### Creating suitable standards and rules

The objective here would be to provide certainty in the rules that apply to mediation, particularly in areas that raise vexing questions for mediators — frequently ethical.

One area that challenges mediators and users of mediation relates to limits of confidentiality. Linked to this (and often confused with this) are issues of privilege and mediator immunity — and these are areas that would be addressed in a mediation Act. Again, it seems an attractive proposition to clarify and ensure consistency in these difficult areas. But it is far from straightforward. Rather than trying to define and distinguish these legalistic concepts,<sup>5</sup> in this section we just want to highlight some of the vexing dilemmas that arise in attempting to delimit and codify them.

As is often observed, mediation operates within the 'shadow of the

law'. When it effectively resolves a dispute these problematical questions may be avoided (though in some situations they are pre-empted). But when mediation (or a mediator) 'fails' — or has shortcomings — or is perceived by a party or representative to have shortcomings then these issues come sharply into focus. They can also arise where a settlement has been reached but disclosure (in breach of a confidentiality obligation) has occurred, or where evidence of an outcome (or a statement made within mediation) is relevant to enforce an agreement. Questions then arise as to appropriate limits on protection of the process and the mediator (arguably essential for mediation to work in the first place) and the need for the court (or other adjudicating body) to have all the evidence before it at the next stage.

We note that the characteristic of confidentiality runs counter to the public nature of court proceedings — so that when the two types of process intersect, as when mediation is not successful or outcomes need to be enforced, there will be different perspectives on which principles should prevail.

A closer look at confidentiality highlights the complex considerations in working out appropriate limits and standards.

Confidentiality generally refers to an obligation on parties and mediators not to disclose — to any third party — information given in confidence. This is important to the mediation process — it increases parties' willingness to engage in mediation if they believe what they say can't be publicised amongst work colleagues, business competitors and so on. Information exchanged in mediation to settle legal proceedings is, as between parties, usually 'privileged' and 'without prejudice', which prevents one side using information or documents disclosed in mediation as evidence in a subsequent court hearing. The rationale behind protecting confidentiality — and privacy — is that it encourages open and frank dialogue, which in turn promotes the prospect of settlement. It also protects mediators and reinforces their impartiality by excluding them from

pressure to make disclosures during the mediation (where the mediator has private meetings with one or other party) or after the mediation in later proceedings.<sup>6</sup>

It is, however, generally accepted that there are limits on confidentiality — some of these limits are prescribed by context specific legislation, some by common law, some by mediators' contracts and some through codes of conduct. Depending on where the 'protection' and the 'limit' derive from, there will be very different, and often uncertain, implications. For example, enforceability — and remedies for breach of confidentiality — will vary according to where the obligation comes from; it may be injunctive relief, compensation, imposition of penalties and so on.

What we observe (and have experienced as practitioners) in trying to come to grips with the debate, is that it seems like a government manipulating the economy — regulation or correction in one area cannot happen without distortion or consequences in another. Perhaps the best way of illustrating the linkages and consequences is to make a few observations and raise a few issues around these subjects. These are just a few of the multitude of issues that arise when you examine this area.

- Immunity is considered valuable for mediators on the basis that they ought to operate without fear of suit, for a number of reasons: for the job to appeal; for the effective administration of justice; the ability to 'review' the process would undermine confidentiality and thus its integrity; and as mediators are 'neutral' and parties have full control of the outcome, parties cannot complain about the outcome. However, we would suggest that contrary to the ideal, mediators do influence outcomes; neutrality is a bogus concept and process management impacts on the parties' choices. Unethical or incompetent mediation practice ought to be challengeable. This brings us back full circle to the 'confidentiality' debate — or mediator regulation (which is discussed below).
- Statutory immunity often provides

blanket immunity, yet private mediators rely on contractual terms and may never achieve the same protections.<sup>7</sup>

- Where statutory immunity has been granted in general legislation, questions are still asked about limiting immunity. The *Mediation Act 1997* (ACT) provides for no exceptions to mediator immunity or for the admissibility of evidence on the issue of mediator misconduct, despite calls for limitations and exceptions by the ACT Attorney General in the Discussion Paper preceding the implementation of the legislation.<sup>8</sup>
- Common law privilege may protect information in respect of one dispute, but what if the information gained or learned is relevant in another dispute? This was at issue in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* (unreported, CA 272/00, 7 June 2000) where the competing principles were articulated. But even if you provide clarity on this, what about the learned understanding of representatives — or parties — about others' negotiating strategies or 'bottom lines'?
- Assuming you wish to address 'confidentiality' to provide consistency and certainty, choices need to be made as to which aspect of it you wish to cover. Even after a lengthy process to establish a uniform Act in the United States, it only addresses confidentiality in legal proceedings. Other rules relating to confidentiality (other forms of disclosure) and immunity will continue to be dealt with by state laws.<sup>9</sup>
- How do you standardise those to whom confidentiality might apply when there may be different needs in different contexts? For example, in environmental public policy disputes there will be a much greater need to inform and involve outside constituents than in, say, a dispute between neighbours.
- Who should 'without prejudice' privilege extend to? Just the parties to the agreement, or other interested parties in the same dispute?
- How do you enforce confidentiality in a real sense? Litigation costs associated with seeking a remedy are



prohibitive and there are some real evidential issues as to breach and loss. A statute may not help. Under the *Employment Relations Act 2000*, remedy by way of a compliance order can be taken out through the Employment Relations Authority (ERA) reinforcing the confidentiality provisions – but if there has already been a breach, then the damage may be done. Otherwise, remedies for parties to a settlement under the ERA are simply those that derive from breach of contract at common law, with the consequential evidential issues as to breach and loss.

- Even with provisions protecting statements made in mediation from use in subsequent legal proceedings there may be problems. A statement made about a fact in mediation may be protected but if a party approaches mediation as a fishing expedition, the information could be sourced another way (for example, through discovery) even if the statement itself cannot be revealed.<sup>10</sup>
- Supposedly obvious limitations to privilege — or confidentiality — pose difficult questions. For example a typical limitation might be on ‘communications which constitute or disclose criminal conduct’. But attempting to nail this down raises as many questions as it answers. A first question is what if someone indicated proposed criminal conduct? Is that covered by the limitation? Secondly, where is the line? We might be clear on our duty to disclose if someone admits drug dealing, but is a mediator operating under this provision obliged to disclose if they find out in the course of a mediation that a party is claiming a benefit and working? Or that there has been some petty theft by an employee? Or that a punch up took place that is clearly ‘assault’? Or that criminal activity is simply alleged by one party? The truth is that individual mediators make their own judgments on these matters according to their own ethical thresholds no matter what code they are operating under. They would still need to under general legislation — the answers are not clear-cut. The extensive debate as to where

obligations should fall, what their limits should be, how far protection should extend and what exceptions there should be underscores how difficult it is to draw and hold a coherent line through these principles that accords with divergent philosophical standpoints. The courts in different jurisdictions around the world are trying to grapple with them and find the appropriate balance between the numerous competing values.

We suggest that one of the reasons they have difficulty is due to the relative immaturity of mediation as a profession and the somewhat unnatural and conflicting principles that underline the differences between ADR and mediation processes (consensual and subjective) and adversarial litigation processes (imposed and ostensibly objective). We fear that in trying to regulate and codify some of these legal and ethical issues we may create more problems than we solve. It is simply too early.

#### **Registration and review of mediator conduct**

Again, on the surface this seems an easy way to address issues of mediator accountability. If mediators are regulated then exceptions to immunity could be neatly dovetailed in. More detailed scrutiny of this leads to further questions. Leaving aside the conceptual conflict between protecting confidentiality and reviewing parts of the process for the purposes of reviewing mediator conduct, there are additional problems:

- The very flexible and informal nature of mediation, the range of different styles, approaches and ‘models’ makes it extremely difficult to formulate standards of competence and criteria against which they will be measured. This is hard enough in specific areas. For example, users of the Mediation Service, where 40 mediators deal in similar types of work, report a huge diversity in approach and style. This is not in itself a bad thing. Issues of consistency need to be balanced with the need to tailor one’s approach to a particular situation. Issues of standards of competence need to be evaluated in accordance with the

goals of the service and the legislation it supports. This all takes time.

- Our professional bodies, whose business is this area, have different measures of competence and different hurdles to jump to establish them. Questions of process knowledge and management have to be balanced against ‘skills’ and expert, practising mediators are not always in agreement about whether an appropriate level of competence is reached.
- Qualifications do not always guarantee a better service. In one American study there were no significant differences in results achieved with a less qualified mediator than with a more qualified mediator. What counted were not qualifications but experience and style.<sup>11</sup>
- Fears have been expressed that the creation of standards and regulation could result in a cartel or an elite class of mediators.<sup>12</sup> Benjamin worries that the style of mediation would be unduly conformed to a more legalistic approach, potentially overrun by lawyers, and that its uniqueness, that is, mediation reflecting a different and important approach to managing conflict that includes multiple disciplines and respects peoples’ ability to make competent decisions for themselves, will be lost.<sup>13</sup>

#### **Integration with existing legislation and practice**

Legislation will require policy decisions on the degree of reform that the mediation field requires. It will require answers to questions in two areas – each of which will impact on the type, nature and extent of legislation and how that integrates with existing legislation and practice. The questions are:

- What should be covered by any such legislation?
- How do you integrate existing legislation into general legislation?
- How important is context-specific legislation and how would you integrate it?

#### **What should be covered by legislation?**

Which particular aspects of the field

should be reformed and which should be allowed to develop organically? There is enormous scope for different approaches to this question: will legislation codify existing understandings and practice in the mediation field or will it go further? Is this indeed possible? For example, are there mainstream approaches which can lay claim to define the mediation process? Will it take a different approach to regulatory and beneficial provisions? Will it leave registration to professional organisations such as LEADR or AMINZ and provide for immunity of prosecution for mediators?

The difficulties in determining the extent of coverage of any such legislation is evident from the US experience and the UMA — where ultimately it ended up with but one primary focus (as discussed in Part 1 of this article).

### **How do you integrate existing legislation into general legislation?**

While the idea of consistency may appeal, integrating existing legislation that references mediation into general legislation would prove an extremely difficult process. As we have noted, there are a number of statutory references to mediation and conciliation. The models are widely divergent and frequently, according to Claire Baylis,<sup>14</sup> problematic as they approach every aspect of process and practice in different ways — from terminology to substance. Baylis's view is that much of the legislation has been implemented randomly, without thought for its effectiveness (or fairness) in resolving disputes, or particular types of dispute. While that is a concern, we are more worried that general legislation may overlook what we see as highly important — a considered analysis of what type of process and approach different contexts require.

### **How important is context-specific legislation and how do you integrate it?**

This raises the critical question — can one size really fit all? Our view is that the answer is no. Different types of

dispute have very different needs. Any general legislation should accommodate the many different types of disputes which are mediated. Yet it became clear to the drafters of the UMA that it was impossible to know about the full range of disputes mediated:

While many experts are knowledgeable about traditional court mediation programs and traditional private mediation practices, there exists a wide range of other disputes that are 'mediated' in other contexts and the extent to which these practices exist are difficult to ascertain.<sup>xv</sup>

Remembering that the UMA's primary focus was on confidentiality, the example of child protection mediation highlighted the problem. Typically mediation in this area involves the non-criminal issues in cases of child abuse and neglect such as placement of the child, visitation, treatment for the child and parents, and so on. Allegations of child abuse and neglect frequently form part of the mediation communication. Issues arose as to whether or not this information ought to be protected, given public policy. However, without protection those involved in this area recognised that parents will not be likely to discuss these allegations in mediation — which 'will likely serve to inhibit what has been shown to be a very helpful form of ADR in an area that benefits children, parents and the state'.<sup>16</sup>

This is but one example — there are all sorts of areas where different types of dispute will have different requirements. Some may have different needs for confidentiality, for example, under the *Employment Relations Act 2000*, collective bargaining (done by the mediation service) is excluded from the general confidentiality provisions for mediation services. Other types of disputes may have requirements for representation and mediation qualifications. For example, family mediators may need additional training in family psychology or law.

Both in terms of integrating existing context specific legislation — and any new context specific legislation — there would need to be exclusions from the general legislation. It is foreseeable that there would end up being so many

exceptions to the general rules that they would be meaningless.

As in any area where new legislation is considered, there are many competing principles and tensions. The tensions addressed here are:

### **Consumer protection v over-regulation**

The consumer protection goals of mediation legislation are meritorious but there are enormous problems associated with their achievement through general legislation, which we discussed above. This raises the question whether the actual and perceived risks are sufficient to warrant government intervention, or whether there are adequate protections in place.

There are already some generic protections in place. Consumer protection legislation may afford parties to mediations some protection, namely the *Consumer Guarantees Act 1993* and the *Fair Trading Act 1986*. For example, s 9 of the latter, the 'catch-all' misleading and deceptive conduct provision, may be invoked where a private mediator misrepresents their qualifications and competency to mediate.

As noted, there are professional bodies providing training and accreditation services and regulating mediators in New Zealand. Both AMINZ and LEADR act as private accreditors of mediators and promote mediator quality and accountability. However, their influence extends only to mediator members, with other private mediators (and mediations) being regulated only by market forces.

In New Zealand, the public sector Industry Training Organisation (ITO) has established mediation unit standards for registration on the New Zealand Qualifications Authority national qualifications framework. These standards are new but could potentially provide the norm for training outcomes in the future.

Both AMINZ and LEADR have adopted professional codes of conduct to act as guidelines for mediation practice. Additional guidelines and standards have also been established in specific areas of mediation practice. For example, there are guidelines for



Family Mediation developed by a National Working Party on Mediation in 1996.

It has been asked whether these kinds of standards play more than a *de minimis* role:

Standards, while known by most practising mediators, are regarded as little more than a benchmark of accepted conduct where any issues of practice and ethics may arise, but not necessarily binding upon the mediator or enforceable by the parties to the mediation.<sup>17</sup>

We recognise that these and many other international standards provide guiding principles for ethical behaviour only. This topic is beyond the scope of this paper but, in essence, the argument is that it is often not possible to prescribe specific ethical rules in the myriad of circumstances in which ethical issues may arise. The absence of clear prescriptive rules is acknowledged and the reasons for this have been explored above. We do not believe this compromises the value and efficacy of mediation sufficiently to warrant legislation.

In the United States the International Academy of Mediators (IAM) promoted the view that uniform legislation 'must not be restricted to the granite-like rigidity of conventional legal theory. It must be sufficiently adaptable to permit the continued growth of mediation as the social process that enhances individual citizens' understanding and ability to successfully resolve their own problems.'<sup>18</sup>

We endorse this approach and favour self-regulation through the two professional organisations in New Zealand which have become increasingly more active in the areas of training, accreditation, standards and quality control of their members. AMINZ has recently developed a comprehensive complaint and disciplinary procedure and both organisations have introduced stringent continuing education and experiential requirements for continued accreditation.

You only need to look at arbitration to caution against regulation. Arbitration, like mediation, was originally intended to be an informal

and efficient alternative to adjudication. With increasing regulation, that process has become so legalistic and formalistic that it is as costly and cumbersome as the litigation process. We would not wish to see mediation succumb to the same fate. As one commentator has suggested: 'We must be wary of letting regulators go so far that we will soon be searching for methods to deregulate a process which is no longer alternative.'<sup>19</sup>

It is perhaps also worth noting that legislative regulation of mediation outside of a court or governmental agency setting, where arguably different considerations apply, is antithetical to the current trend towards the deregulation of professions and industry.

#### **Consistency v diversity**

These competing principles were recognised and balanced by NADRAC in its consideration of the development of standards for ADR in Australia. NADRAC believes that it is important to recognise the diversity of contexts in which ADR is practised and to promote the development of standards within those particular contexts (the diversity principle). Equally, it is necessary to promote some consistency in the practice of ADR by identifying essential standards for all ADR service providers (the consistency principle). Overall, NADRAC<sup>20</sup> proposed the development of standards for ADR based on a framework and that all ADR service providers be required to adopt and comply with codes of practice established in their sector.

If there has to be a choice, we favour diversity over consistency. NADRAC purports to have found a way through, which will allow both (see 'The Way Forward' below). And that may be an intermediate step. But if the question is mediation legislation or not, consistency is less significant in a country the size of New Zealand, where the problems arising from jurisdictional differences across states and between state and federal law simply do not apply. In our opinion, mediation in New Zealand is too young for it to be circumscribed by a drive for a degree of consistency, which

may put a stake in the ground but simultaneously knock out its heart.

#### **Protection of the integrity of the process v mediator accountability**

This topic has been discussed in detail above. The tension is between preserving the defining characteristics of mediation, namely, its privacy and confidentiality, and the need for mediators to be accountable for their actions. As noted, different approaches have been adopted in different jurisdictions. For example, in the ACT there is a blanket exclusion on mediation communications being disclosed in subsequent legal proceedings with the effect that evidence on the issue of mediator misconduct is inadmissible and mediator immunity is absolute. In the United States, by contrast, there is an express exception to mediation privilege to permit evidence of professional misconduct by a mediator.<sup>21</sup>

Case law in New Zealand suggests that the courts will enforce the confidentiality of the mediation process and contractual terms, which protect mediators from civil liability. Therefore, we are in favour of the status quo.

#### **Uniform legislation v context-specific legislation**

It is not questioned that some degree of regulation is required for court-annexed mediation and government-endorsed mediation within statutory tribunals and government agencies. Consumers and practitioners in these mediation schemes can be afforded protection by the inclusion of procedural guidelines in the relevant statutory framework, rather than in a broad uniform Act which would inappropriately apply uniform standards across the diversity of practice areas – in a way that does not reflect specific needs in particular areas. Again, the problems with general as opposed to context-specific legislation are discussed above.

#### **Appropriate legislation v 'hyperlexis'**

Sir Geoffrey Palmer's diagnosis of 'hyperlexis' — or an overactive law

making gland – as our national malaise is worth noting here. He comments that:

New Zealanders tend to exhibit an innocent and misplaced faith in the efficacy of legislation ... We seem to be addicted to passing legislation for the sake of it, and to believe that legislation can cure our inner most ills ... As a respected New Zealand Judge, Sir Alexander Turner, wrote in 1980:

'The belief is widely held, that there is not a human situation so bad but that legislation ... will effectively be able to cure it.'<sup>22</sup>

For there to be a reason for legislation, we need to look for the harm – what should be protected against? The most likely danger is from incompetent or unethical mediators. But in 1989 the New South Wales Law Reform Commission, after reviewing the need for consumer protection and arguments for and against regulation of mediators, concluded that the risks to clients did not warrant government intervention.<sup>23</sup> CEDR and NADRAC have recently also expressed this view.<sup>24</sup>

In our view uniform legislation is superfluous to need. There is no significant harm or market failure that would justify a new law. The risks associated with this stage of mediation's evolution do not outweigh the benefits of its organic growth. Legislation would stultify and inhibit its natural development which, while improvements could be made, is adequately regulated by the market, by professional organisations and in the case of statutory mediation panels, by context specific legislative provision.

### **The way forward: legislation or better alternatives?**

To answer this, we need to identify the prime goal of the mediation field in this country. In our view, the prime need is for mediation to continue to develop and become a mainstream dispute resolution process. Will mediation legislation or other alternatives better advance that goal?

One key question identified by Karl Mackie of CEDR relates to two basic characteristics of mediation – its subjectivity and flexibility. Should the parties fundamentally determine the

design of the ADR process, or should an institutional agency determine the procedure?<sup>25</sup> In other words, should the ADR process be tailored to the parties, the type of dispute – or can one size fit all? CEDR have moved away from the label ADR towards EDR – Effective Dispute Resolution. This recognises not only the flexibility of mediation, but also the variations in what might constitute EDR at different times; that is the spectrum of dispute resolution (including litigation). As we have indicated, there is even a spectrum of process within mediation (from passive facilitation to directive evaluation and different combinations thereof). Mackie concludes: 'it would be inappropriate therefore to start from a presumption that there can be a simple set of regulations or ethical guidelines for EDR'. We agree, and implementing one set of rules under a legislative framework would impact on growth.

What then are the alternatives? Do we need to do anything at all? Are there ways we could more effectively expand the use of the process, build up the credibility (and accountability) of mediators, keep standards high and ensure integrity of the basic values of the process? How do we best nurture the evolution of mediation?

A number of recommendations were made by NADRAC in its report 'A Framework for ADR Standards'.<sup>26</sup> Some of these include:

- Continuation of the development of standards for ADR – to maintain and improve the quality and status of ADR – within a framework that allows organisational variation within particular contexts, but also a general code of practice which could be widely applicable across the whole ADR field. The key to this is that it would be an ongoing process that responds to evolution of the field. Such a code would cover issues such as informed consent, appropriateness of a process for a particular dispute, practitioner requirements of knowledge, skills and ethics, and so on.
- Greater self-regulation by professional bodies with the need for greater or lesser regulation to be assessed on a sector by sector basis.

- The development of a peak body (from the ADR field itself) which could provide the appropriate infrastructure for development and implementation of appropriate standards.
- An effective independent complaints mechanism that relates back to a code of practice.
- Accreditation to be determined on a sector by sector basis.
- Concerted consumer information and education initiatives.

In New Zealand we see evidence of context-specific regulation and self-regulation. Private mediators are 'regulated' by increasingly sophisticated market forces and in many cases by our two professional bodies. Statutory mediators are regulated by specific legislation. Private mediators contracted to undertake mediation under statute, for example, the Weathertight Homes Dispute Resolution Service, are governed by both statute and the rules of their professional associations.

These forms of 'regulation' help to meet the demands to keep the standards bar high, and ensure adequate protection. Do we need more? Our view is that continued evolution is preferable to general and constraining legislation.

But we recognise that there is room to focus on some of the issues that informal development raises. For that reason we believe the NADRAC approach, and some of its recommendations for moving forward (without wholesale legislation), are worth considering. A 'peak body' driven by the ADR industry which addresses these issues coherently may be necessary. The diverse contexts need to be allowed to thrive, but an overarching and dynamic code of practice driven by the ADR industry and informed and promoted by all service providers, government, and consumer bodies, is a potential way through the competing requirements to allow the field to burgeon and maintain its integrity.

CEDR's view is similar in conclusion – general legislation is not considered a way forward. Rather, development of mediation is seen as best achieved through the encouragement of business,



court and government policies and the use of penalties for failure to use mediation in appropriate cases. One key initiative in the UK has been the Lord Chancellor's Department's government pledge in March 2001 that all government departments seek to avoid litigation by using mediation and other neutral-assisted dispute resolution procedures wherever possible. Even local authorities, while not bound by the government's pledge, are still expected to consider using mediation where appropriate. Corporate pledges in America have also been effective in growing awareness of and encouraging use of mediation and ADR.

Our view parallels the approaches of NADRAC and CEDR – issues will emerge in the ways ADR and mediation develop, but general legislation is not the answer to them. We don't wish to see mediation follow the path of its first cousin, arbitration. The risks of over-formalising the process and allowing it to be captured by the professions are that its overall effectiveness will be reduced. Preservation of the unique and special nature of mediation requires that it not be seized upon or held captive in the camp of any particular discipline and that it not be required to conform to a legalistic approach which would be embodied in comprehensive uniform legislation.<sup>27</sup>

## Conclusion

One of the symbolic pictures of the mediation process is the diamond. We frequently use it to show how its shape (from top to bottom) reflects the stages of the process. An initial presentation of positions and issues may seem relatively limited, but through expression and exploration, mediators broaden the scope of the discussion unmasking interests, conflicts and perspectives that may not have been apparent at the outset. Frequently this seems chaotic and even disturbing to those of us used to working with controlled information and within certain parameters. However, experience tells us that without this

'chaotic' stage mediation frequently fails — impasses occur and parties get stuck at the same place they were before the mediation. Going straight to solutions — or trying to narrow down the issues too early — is counter-productive. In terms of the diamond — you need its broad middle before you can start tapering it down, moving through defined issues to options and ultimately reaching solutions.

In our view, the diamond is also a useful metaphor for the broader development of mediation. We are at the beginning of the chaotic stage — still working towards the broad middle of the diamond. The field is evolving and changing rapidly. The initiatives and developments we see give the impression of maturity, but we believe we are reasonably early in the stages of the development spectrum. We need some time at this stage before we can see our way clearly to answer some of

fundamentally adaptable and flexible process. For now, we can work on some intermediate — and less risky — ways to continue the nurturing of our profession: increased self regulation; promotion of dispute resolution clauses; promotion of initiatives in industry and government such as 'pledges' to support wholesale use; consideration of 'peak' bodies to promote codes of practice; and the continued efforts of our professional bodies to set benchmarks that have credibility with both consumers and practitioners.

As Jean Jacques Rousseau said 'good laws lead to the making of better ones; bad ones bring about worse'. We caution against allowing our over-active law making gland to dominate, and prescribe instead a wait and see approach, allowing mediation to progress naturally and unimpeded to adulthood. ●

... issues will emerge in the ways ADR and mediation develop, but general legislation is not the answer to them. We don't wish to see mediation follow the path of its first cousin, arbitration.

the questions we have posed in this article. Until we have greater clarity on them, our view is that general legislation would be going too far too soon.

Karl Mackie of CEDR<sup>28</sup> says 'the primary need for European and UK government initiatives concerns the promulgation of the social environment and actions necessary to enable the growth of EDR referrals, not the regulation of EDR practice or of the profession. The proven benefits of mediation alongside limited risks justify this approach of promotion as a priority compared to regulation.'

The same reasoning applies in New Zealand. In time the market may need to be regulated, but premature regulation may inhibit the growth of a

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*The authors of this article are both practising mediators and have written the article from that standpoint. The views expressed in this paper are their personal views.*

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### Endnotes

*Editor's note: references to 'Part 1' are to Part 1 of this article, published in the last issue (Volume 6 Number 4).*

1. Boulle, L *Mediation — Principles Process and Practice*, Butterworths, Sydney, 1996, pp 3-8.
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3. Supra, Part 1 note 1.
4. Ibid
5. For a useful summary of the distinctions see supra, Part 1 note 2, p 9.
6. Supra, note 1, p 282.
7. Caroll supra, Part 1 note 2, p 24.
8. Caroll supra, Part 1 note 2, p 25.
9. Caroll supra, Part 1 note 2, p 17.
10. Boulle supra, note 1, p 285.
11. Rogers and Mc Ewan 'Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations' (1999) 13 Ohio St JDR 831 at 857.
12. Supra, Part 1 note 11, p 147.
13. Supra, Part 1 note 1.
14. Supra, Part 1 note 3 re Baylis.
15. Firestone, 'An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act', September 2002, <[www.acresolution.org/research](http://www.acresolution.org/research)>.
16. Supra, note 15.
17. Redfern, 'Standards for Victorian Mediators' (1997) 8(1) ADRJ 135, 37.
18. Excerpt from letter dated 24 December 2001 from the President of the IAM to Richard Reuben. <[www.mediate.com/ethics/ethicsforum2.cfm](http://www.mediate.com/ethics/ethicsforum2.cfm)>.
19. Hughes, G 'The Institutionalisation of Mediation: Fashion, Fad or Future?' (1997) 8(4) ADRJ 288, 290.
20. NADRAC *Framework for ADR Standards* Recommendation 12, at 83.
21. *Uniform Mediation Act 2001* (US) s 6(a).
22. Palmer, Sir Geoffrey and Palmer, Dr Mathew *Bridled Power – New Zealand Government under MMP*, Oxford University Press, Auckland 1997, p 150.
23. Caroll supra, Part 1 note 2, p 17.
24. Supra, Part 1 notes 22, and 20.
25. Supra, Part 1 note 22.
26. Supra, note 20.
27. It is worth noting that the NCCUSL, UMA Drafting Committee was comprised virtually entirely of lawyers.
28. Supra, Part 1 note 22.

**PUBLISHER:** Oliver Freeman **PUBLISHING EDITOR:** Linda Barach **PRODUCTION:** Kylie Gillon **SUBSCRIPTIONS:** \$495.00 per year including GST, handling and postage within Australia **FREQUENCY:** 10 issues per annum plus binder and index **SYDNEY OFFICE:** 8 Ridge Street North Sydney NSW 2060 Australia **TELEPHONE:** (02) 9929 2488 **FACSIMILE:** (02) 9929 2499 [adr@richmondventures.com.au](mailto:adr@richmondventures.com.au)

**ISSN 1440-4540 Print Cite as (2003) 6(5) ADR**

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