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Evolving statutory frameworks for ADR in New Zealand

'One law for all'

Myles Stilwell

This article¹ considers some of the implications of adopting the UNCITRAL Model Law on International Conciliation in New Zealand.

The main proposition is that general legislation may assist in harmonising specific legislation. It may also serve as a vehicle to promote more informed popular understanding of processes.

While reference will be made to authorities where available, the private nature of ADR processes necessitates some reliance on anecdotal evidence, experience, or assumption, throughout the following treatment.

Background

Litigation is our model of final dispute resolution, built up over many centuries. The workings of the courts have achieved a mystique and level of complexity of process and procedure that can be daunting to laypersons and in most cases necessitates the

engagement of at least legal advice, if not representation.

The alternative to the courts system is the use of ADR processes. Whether adjudicatory or consensual, they empower the parties in a dispute to decide on procedures or settlement.

It is preferable that ADR processes are broadly understood by the public. Ideally they will be accessible, reputable, and not hindered in their development, or so constrained as to prevent the creativity that may help them to remain appropriately 'alternative' to the more structured court process. How such development is best supported is the central consideration of this article. There is strong resistance by some commentators to the notion of legislation as something imposed from above and facilitating capture of the mediation process by special interest groups. Some see the passing of legislation as necessarily restraining development,

which would otherwise be achieved organically (allowing the virtues of flexibility and creativity to flourish). At the same time, some standardisation or repeal of existing legislation may help in clarifying for the public the nature of alternative processes.

Current situation of ADR in New Zealand

The three main components of ADR are negotiation, mediation and arbitration. Whether negotiation in general will ever be the subject of regulating legislation is doubtful, given its universality in human interaction. The regulation of those explicitly engaged by others to undertake negotiation is perhaps another matter, for the present arguably adequately covered by the law of contract and professional codes.

The principal concern of this article will be with mediation and arbitration,



and the influence of legislation upon these processes.

Arbitration

Arbitration is a process explicitly regulated by statute. It is broadly understood and experienced in industry in New Zealand as the engagement of a chosen third party to make a legally-based binding decision upon (typically) a commercial dispute between the parties. It need not be confined to commercial matters, but may apply to any dispute that is not contrary to public policy.² It is governed by the *Arbitration Act 1996* (NZ) (in turn largely an adoption of the UNCITRAL Model Law on Commercial Arbitration (Model Law)³), and despite a level of complexity about it, it has proved workable in the hands of both legally qualified arbitrators and those not legally qualified but experienced in the applicable industry. The majority of those training in arbitration (at least in the experience of the Dispute Resolution Centre, Massey University) are not legally qualified, which indicates continuing support and industry involvement beyond the legal fraternity in arbitration as a dispute resolution process.

There have been anecdotal suggestions that the number of disputes being dealt with by arbitration is increasing at the same time that referral of such disputes to court processes is reducing.⁴

A formal and constrained process?

Arbitration practice in New Zealand is typically formalised, replicating a courts-based process. This is understandable, given that arbitration is a rights-based process employing a third party decision-maker who is expected to apply the law to the decision-making process. The *Arbitration Act 1996* (1996 Act) attempted to limit the ease of recourse by a dissatisfied party to the courts following an award. The procedures adopted in arbitration may be in the hands of agreeing parties or the arbitrator, and there is much scope under the 1996 Act for the lessening of formality associated with the process.

The broad gulf between formalised arbitration imitating a highly structured court process, and the informality of the 'look/sniff arbitration'⁵ leaves considerable scope for reduced formality.

Shadow of the law

The relative ease of challenging the arbitral process in favour of a court hearing has only recently been formally countered by the enactment of the 1996 Act, with its deliberate restraint on the ability of Courts to upset an arbitral award. Reduced access to the High Court from an arbitration may well result, over time, in less need for legally-

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qualified arbitrators or representatives. It is suggested that most current arbitrators will have gained much of their experience under the later years of the previous legislation, or have been taught by those experienced in the earlier legislation, with perhaps a leaning to formality as a means of risk aversion.⁶ Similarly, teaching programs modelling appropriate form to students may support a level of formality (that becomes set as 'the' model) while articulating flexibility. Evolution by practitioners towards a lessening of formality may well be in its early stages.

The recent change in legislation based on the UNCITRAL Model Law on International Commercial Arbitration⁷ and increasingly accepted globally, may yet see the considerable flexibility offered by the 1996 Act taken up by parties, with arbitral processes becoming less rather than more formal. Increasing complexity or capture by particular interest groups is not a necessary result.

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alternative dispute resolution processes for the parties.

The thrust of the argument here is that arbitration is a process controlled by a model law statute, and the effect of this is predominantly positive. The 1996 Act offers flexibility in the process of arbitration. This does not sacrifice certainty of outcome or industry appreciation of it as an appropriate resolution process. The prominent involvement of lawyers at present is in part a legacy of the increasing difficulties experienced with the earlier legislation, and need not be an indicator for the future of arbitration.

Mediation considered

It is worth comparing arbitration with mediation when considering a possible Act of Parliament to guide mediation.

There are anecdotal suggestions that the use of mediation is increasing in general. Certainly in recent years there has been a substantial increase in state-provided mediation. There appears to be an increasing overall awareness of mediation in New Zealand, although not necessarily a clear understanding of the defining characteristics of mediation.

It seems likely that most direct public contact with mediation is via processes under employment legislation or Family Court settlement conferences.

Wider common awareness may also be due to the publicised use of mediation in some high profile employment and sports disputes. Media portrayal of mediation includes both consensual and adjudicatory processes, often without an attempt to distinguish the two. Legislation that includes provisions for a decision on a dispute by 'a person employed ... to provide mediation services'⁸ also does not support public understanding of the role of a mediator.



Statutory development within mediation

At present, no single Act covers generic mediation in New Zealand. Instead there are statutory forms such as s 144 of the *Employment Relations Act 2000* (ERA), practice notes as issued recently in the Environment Court,⁹ regulations such as the conciliation provisions of the *Sharemilking Agreements Order 2001* (NZ SR 2001/128), and government-provided services such as the Ministry of Housing Tenancy Mediators.

Researchers have considered the range of legislation in detail, and in considering the 30 such statutes in place in 1999, Bayliss drew three conclusions. These were:

1. There is wide divergence among the models, which appears to be largely arbitrary.
2. These divergences may be so fundamental as to affect the legitimacy of the process as models of mediation/conciliation.
3. More recent enactments have exhibited a worrying lack of substantive detail.¹⁰

Clapshaw and Freeman-Greene¹¹ have subsequently noted the range of provisions concerning state-employed mediators, private mediators contracted on an ad hoc basis, and others which 'pay lip service to mediation but stipulate a decision-making process'.¹²

Despite this proliferation of specific legislation dealing with mediation processes in particular settings, there appears a perception among some practitioners and writers in the ADR field that alternative processes, particularly mediation, are evolving freely and to their best purpose, while unhindered by legislative or institutional restraint. At the same time, practitioners may welcome a statute as a means of promoting public recognition of mediation and regulation of service delivery.¹³

The question is whether the present situation with seemingly random and inconsistent legislation is appropriate as part of the evolutionary process, or problematic and in need of change?

The creation of statutory frameworks for ADR arguably increases the likely need of the layperson for specialised legal assistance and therefore expense,

which in turn create difficulties of access. In New Zealand, access problems have however been countered to a significant degree by the provision of publicly funded and cheaply or freely-provided dispute resolution services. These have been provided by state-employed, or state-contracted practitioners. However these have been engaged under separate statutory provisions, by separate statutory entities. The effect of this has been to create areas of dispute resolution specialisation. This may well have benefits in certain areas, but has also been seen as having potential difficulties.¹⁴

The specialisations and range of legislation arguably limits public understanding on the whole, but the wider consciousness of mediation (however basic) is probably due to the increased state employment of mediators and the encouragement of the use of mediation under statutory enactment.

Areas of uncertainty

Confidentiality and privilege have been noted as core characteristics of mediation, and have been generally supported by the courts. While there are broad understandings on boundaries of confidentiality among mediators, there is doubt in the detail. Competing responsibilities to the parties versus the public good are at times blurred. Similarly, mediator immunity from suit for negligence is a matter for individual contracts to specify (or statutory backing where it exists) rather than broad principle. As they stand, these matters are confusing to the public and a risk for the practitioner, and some broadly applicable clarity may help both public and practitioner.

Anecdotal evidence suggests there is increasing use of mediation processes by commercial interests, apparently at the same time that arbitration is also experiencing increased usage. The possible reasons for the latter have been traversed above. Regarding mediation, the increase may be due in part to a growing recognition that well-drafted consensual outcomes may be more enduring in a business relationship than imposed ones, and that there may be value in engaging an impartial third party to assist with the negotiation process.



The increasing popularity of ADR indicates that the present system is working and changing. The issue is whether further evolution should be guided, or occur 'organically'. It is noted above that legislation has been intertwined with the organic development of mediation and is clearly responsible for some of the recent growth in mediation.

Responses to the present situation

Would harmonising legislation only serve to constrain further development, or could it be seen as simply another stage in the organic development of mediation?

We do have a range of legislation involving mediation, with considerable variations in terminology and application. Is this an environment free from restraint in which mediation may best develop further? If history is to be a guide, ad hoc legislation may well continue as a response to circumstance. However, perhaps Bayliss' observation that recent enactments have exhibited a lack of substantive detail is indicative of a move to facilitative rather than restrictive legislation.

Clapshaw and Freeman-Greene identify a number of potential problems with establishing general mediation legislation.¹⁵ These are :

- Creating suitable definitions and descriptions
- Creating suitable standards and rules
- Registration and review of mediator conduct
- Integration with existing legislation and practice.

They conclude that one size cannot fit all.¹⁶ They say that there would necessarily be so many exceptions to any general rules that the latter would be meaningless, and that it is too early in this developing field to regulate and codify the legal and ethical problems. They raise questions such as what should be covered by legislation and what should be left to develop organically. Will legislation codify current practice or will it go further? Will registration remain with professional organisations,

and provide immunity of prosecution for mediators?¹⁷ They conclude that the inability to clearly answer these questions means that the time is not yet ready for general legislation.

It is worth noting again the variations in terminology used in the existing specialised enactments, and at times their differences in basic principle. While there may not currently be significant harm or market failure in the present range of statutes, there would be benefit in the harmonisation of these provisions where possible. Where necessary, divergence from acknowledged core principles of mediation could then be specified.

It is argued there is likely to be

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no harm in the adoption of general legislation. A Mediation Act is not of itself required to be other than a guide and detail is not necessary. It may be noted that general legislation has been enacted elsewhere, for example the *Uniform Mediation Act* in the US,¹⁸ and the Australian Capital Territory's *Mediation Act 1997*.

An area that raises doubts about unnecessary regulation is that of accreditation and regulation of practitioners. In New Zealand while anyone may call themselves an arbitrator or a mediator, affiliation to the two main organisations (AMINZ, LEADR) is common, including among those employed by the state. Those practitioners gaining most of their income from ADR processes are likely to be either state employees or contractors, or lawyers (although numbers are unclear). Training in the field is mainly by the above organisations and universities, and there is an NZQA standard in mediation.¹⁹ The range perhaps suggests a challenge for the public in assessing quality among

these various possible backgrounds.²⁰ However legislation need not regulate the registration of mediators, and indeed the 1996 Act does not do so for arbitrators.

Interestingly the NZ Law Commission stated:

... we do not consider it necessary to define or restrict the form of mediation used in a state-managed system. Indeed, different models and techniques are still developing and a strength of mediation lies in its ability to remain flexible and to adapt methods to each set of circumstances.²¹

How far this flexibility goes, whether in the state or private sectors, is a matter for debate.

An earlier Law Commission report²² agreed with a LEADR submission that private mediators may be more concerned with durable outcomes than 'success' rate statistics.²³ This is difficult to evaluate with certainty, and may exaggerate organisational imperatives in the public sector over financial concerns in the private. However, at a time of apparent public concern with the size of the state budget, close scrutiny of public spending and some clamour for reduced taxes, it is suggested that such pressures as may exist that focus on agreement as a measurable outcome are only likely to increase.

Legislation

Clapshaw and Freeman-Greene say we have a tendency to over-legislate, citing Geoffrey Palmer's reference to 'Hyperlexis – or an overactive law making gland'.²⁴ However is it necessary to look for harm to legislate? The intent here need be no more than general facilitative legislation. Certainly there may be exceptions for specific contexts, but the purposes of raising the general



profile of mediation, gaining public understanding and popular access may be sufficient justification for general harmonising legislation.

Proposals for legislation applying to mediation have drawn comment that this would create an increased degree of formality, and perhaps capture by lawyers,²⁵ as it is argued has occurred in arbitration.²⁶ However to draw such a comparison is to overlook the lengthy and evolving history that arbitration has had as a process operating in the shadow of the law, and to overlook the ongoing evolution and potential for responsiveness of arbitration as a process.

It is argued here that particularly with regard to mediation, the development of the field would be better enhanced and guided under enabling legislation of a general nature. This could be accompanied by the repeal (where appropriate) of the many duplications or variations of process that have been enacted over recent years in particular.

Where divergence from a standard mediation model is required, such as the case where a mediator may transform

Act? It is suggested that less is better if the apparently constraining effects of legislation are to be avoided.

Confidentiality and privilege are the critical matters explicitly covered by the Model Law.

Terminology is unlikely to be a problem, and indeed a review of existing legislation may dispense with some confusion. The Model Law explicitly incorporates mediation under the term conciliation.

Parallel concerns about the specificity of terminology were noted prior to the enactment of the ERA. It was frequently stated in the business press that insufficiently precise terms such as 'good faith' would lead to a feast for lawyers fighting over the interpretation of this phrase. The term remains largely undefined, clearest when it is absent, but is broadly understood nonetheless, and has not led to repeated court actions.

While the detail question above is a subject for debate, the codification of the existing statute-based mediation processes according to their requisite characteristics of form should not be difficult, despite the varying terminology.

It is difficult to see how this would represent any greater constraint than exists under the current range of statutory provisions, while it would have the additional advantage of transparency, accessibility and commonality.

It is suggested that the adoption of the UNCITRAL Model Law on

International Commercial Conciliation would be an appropriate legislative step to tidy the existing statutory situation applying to mediation in New Zealand. This would accommodate the desires of those concerned about the constraining effects of legislation, while clarifying in principle issues of privilege and confidentiality.

The inclusion of art 12 will be noted as allowing the accommodation of existing statutory mediation/arbitration processes without the need for modification to the Model Law.²⁸ The Model Law is an example of legislative restraint, and its passage through many drafts apparently saw it becoming more minimalist as it progressed,²⁹ allowing for more ready adoption internationally without significant changes.

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into a decision-maker, this could be noted as a specific exception within a uniform Mediation Act. In some statutory settings (see s 150 of the ERA, among other statutory provisions) this is accepted as a process and the mediator/adjudicator has statutory protection from suit. At present the same does not apply in the private sector and requires a cautious approach by a practitioner to avoid possible exposure to legal action.

Research conducted with ADR practitioners²⁷ indicates some support for the idea that mediation could be promoted by having its own statute (as with arbitration). Supporters suggest this would enhance public recognition and increase confidence by regulating mediation service delivery.

What would be needed in a Mediation



The criticisms of legalistic approaches need attention. Clapshaw and Freeman-Greene reject general legislation as following the arbitration model and allowing 'capture' by the professions. They assert that conformity to a legalistic approach would be embodied in comprehensive uniform legislation.³⁰ It is arguable however that a degree of de facto capture already exists between AMINZ, LEADR and state-employed mediators.

There does appear to be a broad recognition that there may be some value in having a guiding body. Adam³¹ suggests AMINZ and LEADR might be the two 'approved agencies' considering the ACT Legislation. Clapshaw and Freeman-Greene go further and suggest a 'peak body' driven by the ADR industry and informed and promoted by all service providers, government and consumer bodies.³² They support the approach of NADRAC in Australia, albeit without wholesale legislation.

Taking a similar position is the Law Commission in its consideration of mandatory mediation. It proposes a multi-disciplinary working group composed of mediation practitioners, lawyers, policy makers and trainers to oversee its implementation. While the issue of mandatory mediation is beyond the scope of this article, it is worth noting that the particular issues to be advised on by the above group would be:

- Qualification levels for placement of mediators on the court list
- A code of ethics and review or complaints procedure
- Rules for privilege and confidentiality, mediator immunity and good faith of the parties in mediation.

Flow-on benefits

Pitchforth suggests that for most skilled and competent practitioners operating at present, there would be little change to practice under the Model Law. He suggests it would reinforce confidentiality for the parties, in turn supporting public understanding of this rule of process.³³

While the Model Law is explicitly commercial in application, there is nothing in it to restrict its application beyond commerce into other areas of mediation.³⁴ It may be loosely considered a 'one size fits all' model.

This is not seen as being incompatible with Bayliss' concerns³⁵ of 'a kind of postmodern resistance to the notion that processes should be defined in any detail. The concern is that this will constrain any flexibility and diversity of approach'.

Bayliss says, however, 'where mediation/conciliation are established as part of a statutory process of dispute resolution affecting people's rights and entitlements under law, clarity and consistency are necessary' and favours a reform of the existing legislative models and a standard approach to process issues which could be deviated from where required by the nature of disputes in a particular field.

Education

Bayliss, in her consideration of the statutory models of mediation/conciliation, stated 'it is my belief, that in New Zealand the public, many lawyers and even some mediator/conciliators are not clear about the distinctions drawn in the statutory models'.³⁶

The Law Commission discusses the effect of the proposal that mediation become a 'part of the general culture of civil litigation'³⁷ and recommends a presumption that mediation will be attempted as part of the standard case management track. Undoubtedly this would see further advances in public knowledge of mediation as a process. At present there is no one body charged with fulfilling the educative process on a society-wide level. Such a role could well be co-ordinated by the type of advisory body referred to above.

However, it is considered that there is potentially clear benefit to sharing approaches and cross-fertilisation beyond what is currently occurring in the state sector³⁸ and perhaps in training programs. The assembling of an organisation with membership drawn from those involved in the varying fields of mediation, private and state-sector, and perhaps beyond practitioner to include multi-disciplinary input, somewhat akin to NADRAC in Australia, is likely to assist the development of mediation and broaden its use and profile.

Conclusion

The enactment of general legislation

and accompanying harmonisation or repeal of conflicting or confusing legislation, would support the acknowledgement of core principles applicable to mediation. Divergence where necessary can be reasoned and explicit.

Such legislation need not attempt or have the effect of halting the development of mediation as a practice.

A forum for debate and sharing of ideas is likely to be the best protection against the capture of mediation by specific interest groups and possible constraints upon growth. General legislation of itself need not cause such constraint, and indeed in the case of the adoption of the Model Law would indicate a conscious broadening of mediation into the explicitly commercial field at the same time recognising the basic commonality of value and principle in assisted third party consensual resolution of disputes.

Perhaps 'One law for all' is to overstate the case, but not by much. If a specific Mediation Act leads to a clearer understanding of core principles of mediation in the public consciousness, this will provide a very sound base for the further development and expansion of mediation into the future. ●

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Endnotes

1. A resume of this article was presented at the ALTA Conference, Waikato University, 6 July 2005.

2. Willy, AAP, *Arbitration in New Zealand* 2nd ed, LexisNexis NZ Ltd, 2003, New Zealand, pp 1 and 4 (but note other restrictions, for example: s 155(2)(a) of the *Employment Relations Act 2000* (NZ), which excludes the use of the *Arbitration Act 1996* (NZ) in employment disputes).

3. See <www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>.

4. Willy, above note 2 at p 1.

5. Green, P, and Hunt, B, *Brooker's Arbitration Law and Practice*, Wellington, Brooker's, 1993, A10.02.

6. Or perhaps 'because that is the way it has always been done'.

7. See s 5(b) of the *Arbitration Act 1996*.

8. Section 150(1) of the *Employment Relations Act 2000* (NZ). For another example, consider the provisions in the *Commodity Levies Act 1990* (NZ), where s 11(e) deals with appeal 'against decisions of mediators'.

9. <www.lawyers.org.nz/general/Practicenotes/Alternative_Disputes_Resolution.htm>.

10. Bayliss, C, 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand' (1999) 30 *VUWLR* 279 at 280. These points are a brief summary of the conclusions set out.

11. Clapshaw, D, and Freeman-Greene, S, 'A Mediation Act – Do we Need One?' Paper presented to AMINZ Conference, Auckland, 21–22 February 2003.

12. Above note 11 at p 14.

13. Saville-Smith, K and Fraser, R, *Alternative Dispute Resolution: General Civil Cases* NZ Ministry of Justice, June 2004 at p 50.

14. NZ Law Commission, Report 82, *Dispute Resolution in the Family Court* March 2003, Wellington, New Zealand p 88, [390].

15. Above note 11 at p 15.

16. Above note 11 at p 23.

17. Above note 11 at p 22.

18. International Bar Association, Mediation Newsletter, Vol 1 No 2, Aug 2005 *Mediation Under National Law: United States of America* Van Ginkel, E, p 43.

19. <<http://nzqa.govt.nz/framework/explore/domain.do?frameworkId=1004>>.

20. Interestingly, neither AMINZ nor LEADR sites appear on the first page of 'google' searches for mediation, mediator, arbitration or arbitrator (as of 25 June 2005).

21. NZ Law Commission, Report 85 *Delivering Justice for All* March 2004, Wellington, New Zealand at p 92 [130].

22. Above note 14.

23. Above note 14 at p 88 [389].

24. Above note 11 at p 27, citing Sir Geoffrey Palmer and Dr Mathew Palmer *Bridled Power – New Zealand Government under MMP* Oxford University Press, Auckland 1997, p 150.

25. And indeed cl 6 'Definitions' in the current Lawyers and Conveyancers Bill claims 'mediation, conciliation, or arbitration services' as 'legal work' and

New developments in ADR

Western Australia Institute of Dispute Management

The Western Australian Institute of Dispute Management (WAIDM) has recently been established as the Western Australian Registry of the Australian Centre for International Commercial Arbitration (ACICA).

The mission of the WAIDM is to provide a centre of excellence in domestic and international dispute management, research and training together with the provision of arbitration, mediation and negotiation services to the legal and business communities.

To that effect, WAIDM offers continuing education and professional development programs, including short courses, to both the legal and business communities, in the area of arbitration, mediation and negotiation. These programs include:

- Graduate Certificate in Dispute Resolution;
- Professional training in arbitration law and practice (not-for-credit professional program, accredited by the Chartered Institute of Arbitrators);
- Participation in the prestigious Willem C Vis International Commercial Arbitration Moot.

WAIDM maintains a register of qualified mediators and arbitrators. Further information may be obtained from WAIDM's Registrar for the purpose of conducting arbitrations, mediations and negotiations. The contact email address is: m.everall@murdoch.edu.au.



attempts restriction of their practice accordingly.

26. Clapshaw and Freeman-Greene above note 11 refer to arbitration as an example of over-regulation at p 26.

27. Above note 13 at p 50.

28. Although this will not resolve questions of private mediator liability.

29. Pitchforth, R, 'Should We Adopt the New UNCITRAL Model Law on Mediation?' A paper presented to the AMINZ Conference, Auckland,

21–22 February 2003, p 171.

30. Above note 11 at p 30.

31. Adam, K, *Should New Zealand Pass Mediation Legislation?* Retrieved from LEADR website, <www.leadrnz.co.nz/index.cfm/Articles/Miscellaneous_articles/Should_NZ_pass_mediation_legislation> at p 13.

32. Above note 11 at p 30.

33. Above note 29 at p 179.

34. See note b to Article 1(1) of the UNCITRAL Model Law on International

Commercial Conciliation.

35. Above note 10 at 293.

36. Above note 10 at 285.

37. Above note 21 at p 97 [150].

38. The Inaugural Public Sector Mediation Forums (PSM) in December 2003 and October 2005 were welcome moves towards the explicit sharing of knowledge and expertise between State agencies and may be considered more purposeful than the label 'organic developments' might suggest.