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**Legal influences on ADR**

# The purpose of court-connected mediation from the legal perspective

**Olivia Rundle**

The divergence of mediation practice from dominant paradigms of mediation is widely recognised.<sup>1</sup> Mediation practice within the context of general civil litigation is particularly prone to diverge from the dominant theoretical notion of mediation. It is likely that the perspectives of legal participants, who are influenced by the legal world view, contribute to this divergence. Lawyer perceptions of the purpose of court-connected mediation are likely to align with the goals of the formal civil justice system.

**Legal perspectives**

There are three main reasons that justify the focus on legal participants to explore the divergence of court-connected mediation practice from mediation theory. First, court-connected mediation tends to be very lawyer driven.<sup>2</sup> Second, there are many accounts in mediation literature of inappropriate lawyer expectations or behaviour within mediation.<sup>3</sup> Third, because court-connected mediation occurs within the legal system, legal perspectives have a significant impact on the practice of mediation in that setting.<sup>4</sup>

To obtain an understanding of the perceptions and approaches of legal participants in court-connected mediation, I have reviewed documentation, interviewed approximately 30 per cent of the legal practitioners who practise in the Supreme Court of Tasmania's civil jurisdiction, interviewed the mediators who mediate in that jurisdiction and observed a small number of mediations at the court.

**The dominant theoretical notion of mediation**

To establish that a divergence exists between court-connected practice and

mediation theory, it is first necessary to define the dominant theoretical notion of mediation. The satisfaction purpose is the dominant mediation purpose promoted in both theory and practical training.<sup>5</sup> From this view, the purpose of mediation is to maximise the satisfaction of individual needs and interests or to minimise suffering. It is interest based as opposed to rights based. This notion of mediation is influenced by the negotiation theory articulated by Fisher and Ury.<sup>6</sup>

Satisfaction is promoted by many features of mediation, including disputant participation in the process and control of content, active listening techniques and a flexible process that can be adapted to meet the individual needs and interests of the disputants. If satisfaction is prioritised then the

the Supreme Court of Tasmania by myself and by some lawyer interviewees. One such practitioner described the 'typical' process conducted in the Court:

I tell them how much money I want and why and they tell me that I can't get any money and why. Then you talk about it and then you go out and exchange offers and the mediator talks to them to persuade them to come into the middle.<sup>9</sup>

The nature of court-connected mediation practice can be explained in part through the legal perspective of the purpose of the process. Preliminary analysis of my interview data suggests that from the legal perspective the primary purpose of court-connected mediation is institutional efficiency or justice

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approach to mediation is likely to be primarily facilitative, perhaps with some use of evaluative or settlement techniques.<sup>7</sup>

**Court-connected mediation practice**

Contrary to the approach to mediation most widely promoted in mediation literature, court-connected mediation has a tendency to be orientated to settlement and to involve an element of evaluation.<sup>8</sup> That tendency has been observed in

delivery rather than individual satisfaction.

**Institutional efficiency**

There is evidence of a preoccupation with settlement rates in the Supreme Court of Tasmania, as the only measures of the success of the program to date are the number of mediations held and the number that have resulted in an immediate settlement.<sup>10</sup> The Chief Justice stated in his Annual Report of 2004–05:

Court-annexed mediation is a very

popular and successful means of resolving civil disputes. It provides expedition, saves costs and produces a just result. Without it the Court would not be able to cope with its caseload.<sup>11</sup>

No empirical evidence has been published in respect of the court's mediation program that supports these claims about expedition, cost savings and the delivery of justice. There is evidence that the court has improved its ability to cope with its caseload but those improvements are not solely attributable to the mediation program.<sup>12</sup>

From an institutional point of view, the primary purpose of mediation is often to settle disputes with minimal cost and prior to trial.<sup>13</sup> This public benefit of mediation is an aspect of the satisfaction purpose described by Bush and Folger.<sup>14</sup> There is, however, a conflict between the private and public benefits of mediation that are promoted in the pursuit of satisfaction. An overemphasis on institutional efficiency, which is achieved by high rates of settlement, may detract from the capacity of mediation to maximise the satisfaction of individual needs and interests. Court-connected mediators are likely to be influenced by the legal institution's preoccupation with settlement.

## Justice delivery

The Chief Justice's claim that mediation 'produces a just result'<sup>15</sup> demonstrates his concern that court-connected mediation ought to facilitate the delivery of justice. This concern is shared by many legal practitioners. For example, one lawyer interviewee stated that:

Mediation is an objective process and the client's needs are not relevant because the outcome will be determined by the influence of the law.<sup>16</sup>

This comment demonstrates an emphasis on the application of legal rules at the expense of mediation attributes that emphasise the individual needs of the disputants.

Court-connected mediation occurs within the context of the litigation process, with a degree of compulsion<sup>17</sup> and under the supervision of the court. The law

therefore has a powerful influence over the nature of the mediation process. Legal norms of procedural fairness and substantive justice are likely to be applied to provide safeguards for fairness.<sup>18</sup> The prioritisation of justice may detract from the capacity of mediation to maximise the satisfaction of individual needs and interests, which may differ from strict legal entitlements.

## Conclusion

Contrary to the dominant theoretical notion of mediation, legal participants are unlikely to perceive that the primary purpose of court-connected mediation is to maximise the satisfaction of their clients' individual needs and interests through creative problem-solving. They are more likely to perceive court-connected mediation as a process that can both improve the efficiency of the legal system and deliver justice by resolving disputes fairly and within the anticipated range of legal outcomes. The prioritisation of these goals detracts from the dominant theoretical goal. The legal world view prioritises objectivity and certainty over individualism and flexibility. The extent of the influence of legal perspectives on the practice of court-connected mediation is a question worthy of further investigation.<sup>19</sup> ●

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## Endnotes

1. Michelle Lebaron and Zena D Zumeta, 'Windows on diversity: lawyers, culture, and mediation practice' (2003) 20(4) *Conflict Resolution Quarterly* 463; Nadja Alexander, 'Mediation on trial: ten verdicts on court-related ADR' (2004) 22(1) *Law in Context* 8; Carrie Menkel-Meadow, 'Pursuing settlement in an adversary culture: a tale of

innovation co-opted or "the law of ADR"' (1991) 19 *Florida State University Law Review* 1; Ronald J Gilson and Robert H Mnookin, 'Disputing through agents: cooperation and conflict between lawyers in litigation' (1994) 94 *Columbia Law Review* 509; Laurence Boule, 'Extending the courts' shadow over ADR' (2001) 3(10) *ADR Bulletin* 117; Laurence Boule, 'Minding the gaps: reflecting on the story of Australian mediation' (2000) 3(1) *ADR Bulletin* 3; Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the theoretical underpinnings of mediation: implications for practice and policy' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39; Bernadine Van Gramberg, 'The rhetoric and reality of workplace alternative dispute resolution' (2006) 48(2) *Journal of Industrial Relations* 175; Christine Chinkin and Micheline Dewdney, 'Settlement Week in New South Wales: an evaluation' (1992) 3 *Australian Dispute Resolution Journal* 93; Julie MacFarlane, 'Culture change? A tale of two cities and mandatory court-connected mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244.

2. Menkel-Meadow, above note 1.

3. Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <[www.leadr.com.au/articles](http://www.leadr.com.au/articles)> at 25 June 2007; Tania Sourdin, 'Facilitative judging' (2004) 22(1) *Law in Context* 64; Australian Law Reform Commission, *Issues Paper 25: ADR — It's role in federal dispute resolution* (IP25, ALRC, 1998); Gilson & Mnookin, above note 1; Menkel-Meadow, above note 1.

4. Gilson & Mnookin, above note 1; Lebaron & Zumenta, above note 2; MacFarlane, above note 1; Menkel-Meadow, above note 1.

5. Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed, 2005), 19–20.

6. Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

7. Mediation models are described in Laurence Boule, *Mediation: Principles,*



*Process, Practice* (2nd ed, 2005) 43–47; David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005) [5.45]–[5.110]. For discussion of the cautious use of evaluation in a primarily facilitative process see Richard Birke, ‘Evaluation and facilitation: moving past either/or’ (2000) *University of Missouri Journal of Dispute Resolution* 309; John Lande, ‘Toward more sophisticated mediation theory’ (2000) *Journal of Dispute Resolution* 321; Marjorie Corman Aaron, ‘ADR Toolbox: The highwire art of evaluation’ (1996) 14 *Alternatives to the High Cost of Litigation* 62, 63.

8. Boule, ‘Minding the gaps’, above note 1.

9. Lawyer 11 (of the lawyers interviewed).

10. See for example Chief Justice Cox, *The Chief Justice’s Annual Report 2003–2004* (The Supreme Court of Tasmania, 2004) 8.

11. Chief Justice Underwood, *The Chief Justice’s Annual Report for The Supreme Court of Tasmania*

2004–2005 (Supreme Court of Tasmania, 2005) 7.

12. Steering Committee for the Review of Government Service Provision, *Report on Government Services 2007: Part C Justice* (Australian Government Productivity Commission, 2007) Box 6.9 ‘Civil Timeliness Factors.’ Increasingly active case management and decreasing numbers of matters filed have also contributed to improvements in timeliness.

13. This conclusion is drawn from the focus of most internal evaluations of court-connected mediation programs, which is almost exclusively institutional efficiency. Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 70–73; Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001); Henry Jolson, ‘Judicial determination: is it becoming the alternative method of dispute resolution?’ (1997) 8 *Australian Dispute Resolution Journal* 102; Wayne D Brazil, ‘Court

ADR 25 years after pound: have we found a better way?’ (2002) 18 *Ohio State Journal on Dispute Resolution* 93 at 124.

14. Above note 5, 20.

15. Above note 11.

16. Lawyer 42 (of the lawyers interviewed).

17. *Alternative Dispute Resolution Act 2001* (Tas) s 5(1). The power to refer without consent may influence consensual referrals, particularly in jurisdictions where the court has demonstrated a willingness to exercise the power. See Tania Sourdin, ‘Making people mediate. mandatory mediations in court-connected programmes’ in David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia: Cases, Commentary and Materials* (1993) 147.

18. The connection with the court can enable some benefits of procedural fairness to be delivered as well as some advantages of mediation. See Astor and Chinkin, above note 13, 64.

19. The author’s thesis will explore these issues.