A MEDIATION ACT - DO WE NEED ONE?

Deborah Clapshaw and Susan Freeman-Greene

A. INTRODUCTION

1. DO WE NEED MEDIATION LEGISLATION?

This is a good topical question – but not an easy one. At first blush, as mediators, there seems a simple answer. We want mediation to flourish. Surely a law that facilitates, supports and regulates a dispute resolution process which has grown exponentially in use 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, Benjamin[1] questions whether the recent Uniform Mediation Act 2001 is a Trojan Horse carrying within its belly notions that are likely to significantly alter the original values and purposes of mediation practice. In Australia, Carroll[2] 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 - do we need 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.

2. THE DEBATE

Viewed simplistically, but to provide a background to the discussion, the debate is as follows:

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.

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 its development.

3. OUTLINE OF THIS PAPER

To answer our question we need to explore a number of areas. In this paper we will:

(i) look at what general mediation legislation might achieve and its type – what would its purpose and objectives be? What would such legislation cover? We will draw on overseas experience – and debate - in this area. (Section B)

(ii) provide a sense of context – how mature is mediation in New Zealand? What are the trends? What mediation legislation already exists? (Section C)

(iii) look at the possible problems in establishing such legislation and whether there is a current harm or market failure which might warrant legislative intervention. We will then evaluate its benefits and risks by exploring the tensions in the competing principles central to this debate. (Section D)

(iv) consider the best way forward. Our view is that legislation may not be the best way to ensure and sustain the development of mediation at this stage of mediation's development in New Zealand; there may be better alternatives. (Section E)

B. MEDIATION LEGISLATION – PURPOSES AND TYPE?

1. WHAT ARE THE 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.

Broadly these objectives include:

- State endorsement of the mediation process
- Clarification and consistency of models and/or approach.
- Certainty regarding fundamental process issues.
- Consumer protection.
- Mediator protection

A closer examination of each of these indicates the rationale behind the goals:

(i) State Endorsement

Legislation would provide the government's endorsement of mediation as a significant dispute resolution process. One of the barriers to the use of mediation is a sense that it is both peripheral and a soft option. Mediation legislation would give it 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.

(ii) 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 is by providing a standardised definition and standardised procedures across the spectrum of mediation practice (both private and statutory). This would allow 'the clutter' of the many statutory models in New Zealand to be cleared up. Such an approach is advocated by commentators who consider that when a process is institutionalised, as part of the State provided dispute resolution system, there should be consistent terminology and a standard approach to process issues[3].

(iii) 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 we will discuss in Section D of this paper, 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 Uniform Mediation Act 2001 (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]

(iv) Consumer Protection

One concern amongst mediators and the public is that as mediation is an unregulated practice, consumers are at risk from inexperienced, unqualified, fly-by-night mediator "wannabes". Consumers are currently reliant on the representations made by the provider of the service as to its quality. Therefore, 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: if the professions and most trades are licensed according to one standard of knowledge, adequacy and proficiency, then all mediators should also be licensed and certified to one standard.

The aim would be to boost consumer protection through mediation legislation which

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

- Requires disclosure of mediator's 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 agreements both 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 draftspeople.

  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.

(v) 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 help 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. As the job

of a mediator is not as an advocate but involves the impartiality and neutrality demanded of Judges, some believe that immunity from civil liability should be extended to mediators.

The idea then, is that mediator immunity from civil suit could be conferred by legislation. However, this is not a unanimous view and has 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. See the further discussion below on this in D1.

2. WHAT KIND OF MEDIATION LEGISLATION ARE WE LOOKING AT?

The question "do we need a Mediation Act"? focuses on the big picture of mediation legislation. The focus is on 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 which has been adopted in Australian Capital Territories ("ACT"), Australia and the United States are considered below in Section B3.

We are also talking, in this paper, about provisions that are required to enhance and support (as opposed to mandate or provide for) mediation and protect practitioners and users of it from harm. Carroll identifies three specific types of legislation that exist to support and regulate mediation. They are procedural, regulatory and beneficial and they each have different functions. [12] A Mediation Act could contain all three types, or one or two only. The types are:

(i) 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 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.

(ii) 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]

(iii) 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. We are looking 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.

3. EXAMPLES OF GENERAL MEDIATION LEGISLATION OVERSEAS

(i) 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", 2001 and a 1997 discussion paper entitled "Issues of Fairness and Justice in Alternative Dispute Resolution".

The first of these ("A Framework for ADR Standards") is a 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]

Notwithstanding, both ACT and Tasmania[19] 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 Mediation Act 1997 does not provide, either, for exceptions to mediator immunity, or, for the admissibility of evidence on the issue of mediator misconduct. Further discussion of this takes place in section D below.

(ii) United States of America

The UMA was drafted as a collaborative effort between the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Bar Association ("ABA") Section on Dispute Resolution and was approved and recommended for an enactment by the NCCUSL in August 2001. Its purpose was to provide the States with clear guidelines on issues of confidentiality and privilege and 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 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 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 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 though apparently it is being introduced in a number of others this year where it has been recommended by state bar associations and ADR committees.[21]

(iii) United Kingdom and Europe

Increasingly general mediation legislation is contemplated in this region, particularly in Europe. However, as yet, no legislation of this sort 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 or institutionalisation of mediation which, he says, raises concerns. This is within the context of a number of things: 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 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 reputation of mediation but advocating that excessive regulation is unhelpful to the development of a relatively new process that requires nurturing.

The direction they will take is uncertain; what is clear is that they are in for a debate – this debate.

C. CONTEXT: STATUS OF MEDIATION IN NEW ZEALAND

1. OVERVIEW AND TRENDS

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

Where then, are we?

We are seeing the implementation of mediation and consideration of ADR procedures across a spectrum of areas and to different degrees, 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.

(i) Government

The initiatives at this level highlight a significant trend towards use and development of mediation. This shows, at least, 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 we, as 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 policy level*

  The Law Commission is reviewing dispute resolution in the family court and courts in general.

  The Report on the Family Court dispute resolution system is expected by the end of March, and with the distinction made in the Discussion Paper between the 'judicial mediation' or settlement conference type mediation that typifies the existing family court process – and a purist's client centred mediation- comment is expected on the potential benefits of the latter.

Seeking Solutions, the second stage of the overarching review of the courts system has ADR squarely in the frame, with recognition in the paper of some of the advantages of avoiding trial. Questions of the benefits (and risk) 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 names: *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.

- *A 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 specific problem. This is discussed 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 relationship disputes.

- *A 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 clearly 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 is being undertaken by the Department of Courts, which has just commissioned a programme of research looking at ADR in civil cases. Within the context of the promotion of ADR over the last 5 years through the case management guidelines, this will look at how and why cases settle, what effect ADR has on the process, what barriers to use might be 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.

(ii) Industry

There are a number of indications that commercial enterprises and particular industries have an increasingly sophisticated awareness of the cost of conflict. They look to resolve it as early as possible (through mediation and ADR processes) – and are beginning to consider how to prevent it:

- Industry dispute resolution schemes are growing to deal with customer disputes and complaints. The 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 we follow 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 of our information on this 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. 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 here. 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.

(iii) Community

Community mediation in New Zealand has not seen the same level of participation as say 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 such Community Justice Centres are one model

highlighted in the Law Commission's recent discussion paper 'Seeking Solutions' as worth considering.

The most sustained community initiative in a linked area is in restorative justice. Here programmes 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 programmes and pilots being implemented in a number of regions.

(iv) Mediation community

As we know, New Zealand has two professional ADR organisations LEADR NZ and AMINZ. They have similar general goals in terms of mediation – development and promotion. It is also well understood that each of their particular origins have caused them to develop in different ways and meet different needs. While this isn't the place to look at these matters, we suggest that the existence of the two organisations may simply reflect the relative immaturity of mediation as a profession. It is still finding its way. As it grows and develops and strands are pulled together – it may be that the natural evolution is towards one professional organisation as in other professions. The concept of a peak mediation accreditation body has been considered in Australia.

2. EXISTING LEGISLATION IN NEW ZEALAND

The above trends and developments occur against a backdrop of the incorporation of ADR processes into statute over the last 30 years. We have no single piece of general mediation legislation but a range of procedural and regulatory measures that reference 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 is the Weathertight Homes Resolution Services Act 2002 which regulates 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 with their 'decision' being final and binding.

Overall there is very little consistency in the approach to mediation (both in definitional and procedural terms) in these statutes [24] which raises concerns .

3. SUMMARY

In our view the general trends and the current legislative environment indicate a healthy, dynamic but young mediation environment. It is piecemeal and in some instances, problematical for the reasons we highlight in this paper, but the trends suggest that the 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.

D. EVALUATION: POSSIBLE PROBLEMS & REAL TENSIONS

1. POTENTIAL PROBLEMS WITH ESTABLISHING MEDIATION LEGISLATION?

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

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

(i) 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 mediation process.

The difficulties with this are two fold.

Firstly, defining mediation by itself is a minefield. Boulle[25] expands on this and notes a number of reasons: the terms often used in defining mediation such as voluntary and neutrality are in themselves open to widely differing interpretation; it hasn't 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 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.'[26]

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 aren't - 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[27]:

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 being legal practice and the overall effectiveness of the process 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 behavior. 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.[28]

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

(ii) 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 are 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[29] – 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.[30]

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, and 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 mediator's are 'neutral' and parties have full control of the outcome, parties cannot complain about the outcome. But, 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 in (iii) below).

- Statutory immunity often provides blanket immunity (is that wise?), yet private mediators rely on contractual terms and may never achieve the same protections[31].

- 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. [32]

- 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* (unrep) 7 June 2000 CA 272/00 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.[33]

- How do you standardise who confidentiality might apply to 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 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 can't be revealed.[34]

- 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. First question – what if someone indicated proposed criminal conduct? Is that covered by the limitation? Secondly, where is the line? We might be clear of 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 judgements 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.

These areas are fraught. The extensive debate in the area – as to where obligations should fall, what the limits of them 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 problems we may create more problems than we solve. It is simply too early.

(iii) 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 ones 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' for example – and expert, practising mediators are not always in agreement about whether an appropriate level of competence is reached.

- Indeed, 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.[35]

- Fears have been expressed that creation of standards and regulation could result in a cartel or an elite class of mediators.[36] 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.[37]

(iv) 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 – and difficulties - 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? And so on.

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 (See Section B3(ii)).

We believe that our inability to answer these questions clearly, indicates they are not ready to be answered.

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 references to mediation and conciliation. The models are widely divergent and frequently, according to Claire Baylis[38], 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.[39]

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'.[40]

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 different 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 to the general legislation. It is foreseeable that there would end up being so many exceptions to the general rules that they would be meaningless.

2. WHAT ARE THE TENSIONS: THE COMPETING PRINCIPLES?

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

- Consumer protection v over regulation.
- Consistency v diversity.
- Process protection v mediator accountability.
- Uniform legislation v context specific legislation.
- Appropriate legislation v 'hyperlexis'.

(i) 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 in section D1. This raises the question whether the actual and perceived risks are sufficient to warrant Government intervention, or whether there are adequate protections in place.

From a broad perspective 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, Section 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 accreditators 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, the 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"[41]

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 in section D. 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.'[42]

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 in our view 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.'[43]

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.

(ii) 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[44] 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 in E 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.

(iii) Protection of the Integrity of the Process v Mediator Accountability

This topic has been discussed in detail in Section D1. 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 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[45].

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.

(iv) 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 in D1 above.

(v) Appropriate legislation v 'Hyperlexis'

Sir Geoffrey Palmer's diagnosis of our condition 'hyperlexis' - or an overactive law making gland - 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.[46]

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.[47] CEDR and NADRAC have recently also expressed this view.[48]

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.

E THE WAY FORWARD: LEGISLATION OR BETTER ALTERNATIVES?

To answer this, we need to identify what the prime goal of the mediation field in this country is. 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?[49] 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". [50] 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 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 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 direct context 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 - even ad hoc – 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 Departments 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 fall out of 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.[51]

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

Karl Mackie of CEDR [52]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 [Effective Dispute Resolution] 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.'

We agree: 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 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 (AMINZ and LEADR) 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.

Deborah Clapshaw and Susan Freeman-Greene[53]

---

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* – page 6

3 See for example, Claire Baylis "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" (1999) 30 VUWLR 279 and T Altobelli (NSW ADR) "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, page 223

7 Supra, note 2; page 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 Supra, note 6; page 225

Deb Clapshaw 10/2/03 8:35 PM
Deleted: u

Deb Clapshaw 10/2/03 8:36 PM
Deleted: 7

11 Kirby , Justice Michael, 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 - e.g. the Mediation Act 1997 (ACT) discussed in section B3

13 We discuss this trend in Section C1. 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 supra note 2, page 6.

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

15 Supra, note 2; page 8

16 Ibid.

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

18 Supra, note 2; page 18

19 Tasmanian Alternative Dispute Resolution Act 2001 which 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 to writers 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 Supra, note 3re Baylis

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.

25 Boulle, L *Mediation - Principles Process and Practice* , Butterworths (Sydney) 1996, pages 3-8

26 Dearborn,S "The Identity of a Mediator" April 2001 http://mediate.com/articles/dearborn.cfm

27 Supra, note 1.

28 Ibid

29 For a useful summary of the distinctions see supra, note 2; page 9

30 Supra, note 25; page 282

31 Supra, note 2; page 24

32 Supra, note 2; page25

33 Supra, note 2; page 17

34 Supra, note 25: page 285

35 Rogers and Mc Ewan "Employing the Law to In crease the Use of Mediation and to Encourage Direct and Early Negotiations" (1999) 13 Ohio St JDR 831 at 857.

36 Supra, note 11;page-147

37 Supra, note 1

38 Supra, note 3 re Baylis

39 Firestone, "An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act" *(30/9/2002)* www.acresolution.org/research

40 Supra note 39

41 Redfern, "Standards for Victorian Mediators" (1997) 8(1) ADRJ 135,137.

42 Excerpt from letter dated 24 December 2001 from the President of the IAM to Richard Reuben. www.mediate.com/ethics/ethicsforum2.cfm

43 Hughes, Gina "The Institutionalisation of Mediation: Fashion, Fad or Future?" (1997) 8 (4) ADRJ 288, 290.

44 NADRAC *Framework for ADR Standards* Recommendation 12, at 83

45 Uniform Mediation Act 2001 – USA Section 6(a)

46 Palmer, Sir Geoffrey and Palmer, Dr Mathew *Bridled Power – New Zealand Government under MMP* Oxford University Press, Auckland 1997, page 150

47 Supra, note 2; page 17

48 Supra, notes 22 and 44

49 Supra, note 22

50 Supra, note 44

51 It is worth noting that the NCCUSL, UMA Drafting Committee was comprised virtually entirely of lawyers.

52 Supra, note 22

53 The authors of this paper are both practising mediators and have written the paper from that standpoint. Deborah is a mediator in private practice and Susan is with the Employment Relations Service. The views expressed in this paper are their personal views.

Deb Clapshaw 10/2/03 11:51 PM
Deleted: (Caroll

Deb Clapshaw 10/2/03 11:50 PM
Deleted: Caroll

Deb Clapshaw 10/2/03 11:50 PM
Deleted: Caroll

Deb Clapshaw 10/2/03 11:50 PM
Deleted: Boulle

Deb Clapshaw 10/2/03 11:50 PM
Deleted: (FN

Deb Clapshaw 10/2/03 11:45 PM
Deleted: "."

Deb Clapshaw 10/2/03 11:46 PM
Deleted: {

Deb Clapshaw 10/2/03 11:46 PM
Deleted: .

Deb Clapshaw 10/2/03 11:46 PM
Deleted:]

Deb Clapshaw 10/2/03 11:50 PM
Deleted: Caroll

Deb Clapshaw 10/2/03 11:35 PM
Deleted: . The writers wish to acknowledge …