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Mediation comes of age

*Opinion article
by Mark Beech*

A profound change in the way we resolve disputes is gathering pace in New Zealand.

This is the result of the unprecedented rise in the use of mediation, or alternative dispute resolution (ADR), in our justice system – the like of which has not been seen before.

Mediation has been a part (albeit small) of government services for more than 100 years. The Labour Department's employment mediation service can trace its beginnings to the very early twentieth century. Today, mediation is routinely used in other areas of statutory dispute resolution, including tenancy and weathertightness issues.

What's different now is the spread of mediation into our civil and criminal justice system.

The High Court and the District Court, including the Family Court, is each embarking on major changes that promote early settlement using ADR over an extended and expensive trial-focused litigation process.

Further recognition of the value of mediation can be seen in the legislative changes impacting on financial service providers. We can expect to see higher demand for ADR expertise later this year after the dispute resolution provisions required under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 become operational.

These are important changes for all New Zealanders – why?

Because our courts are groaning under the weight of their workload – the Family Court, for example, has 65,000 new cases a year; the District Court handles 180,000 criminal charges against citizens and conducts 2700 jury trials a year. This costs our small country plenty.

By comparison, mediation offers potentially enormous savings in time, money and emotional stress for parties. In particular, ADR represents a fraction of the cost of litigation; some put it as low as 10 percent of a case that goes through the court process. Mediation offers other benefits too, including allowing parties the ability to air their grievances and yet control the outcome rather than having a decision imposed upon them by the courts.

Mediation in most forums has a high settlement rate. The figures generally cited are 75 to 80 percent of the cases that go to mediation will settle by agreement at mediation. (This is not to say that all cases should be mediated – but the majority of cases can benefit from mediation, even those that need the courts to clarify the most important issues.)

The Family Court reforms in September 2008 began the judicial shift toward ADR. While funding restraints have slowed the new law's implementation, it nevertheless heralds major changes to the way the court works. Significantly, the proposed new family mediation service will not be judge-led. Instead, the plan is for independent mediators to work with an enhanced counselling

service to help parties resolve their differences. This aims to divert less complex family disputes away from formal court proceedings and to resolve them quickly and inexpensively.

Similar hopes are held of the Ministry of Justice-sponsored Auckland High Court mediation pilot, which launched in November 2009. Fifteen lawyers with mediation expertise have been appointed to undertake court-ordered mediations in civil disputes over a nine-month period. It is hoped the use of mediators will reduce the number of full hearings and free up judicial time for other matters, all of which will be cheaper for the parties and the court.

But the most fundamental – and remarkably unheralded – changes are taking place in the District Court. Under new rules, which came into effect on 1 November last year, the trial will no longer be the focal point of the litigation process. Instead, settlement will become the key objective, and all District Court processes will be designed to enhance the prospects of settlement at an early stage.

These changes in the District Court have been years in the making. They have no New Zealand precedent and no clear parallel in the common law world. They are huge.

For lawyers, the toolbox of skills required to make the most of the new rules will be different to what was required in the past. Protracted interlocutory warfare will not be tolerated. Lawyers will need to deepen and broaden their advocacy, facilitation and negotiation skills to successfully conclude settlement negotiations, whether privately by means of mediation, or in the judicial settlement conference.

For New Zealand's cadre of professional mediators, too, the judicial shift toward mediation has major implications. The next few years will be critical to ensuring that best practice mediation models are adopted and that quality mediators – and lawyers trained in mediation skills – are available.

The changes being adopted in our courts are very much in line with the LEADR NZ ethos. By offering highly regarded and internationally recognised training and accreditation, we will play our part in embedding mediation into New Zealand's civil justice system in 2010 and beyond.

Mark Beech is a partner in Tauranga law firm Sharp Tudhope, where he heads the disputes resolution team, and is chair of LEADR NZ, a not-for-profit membership organization for mediation professionals.

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