

**RESEARCH REPORT  
FOR MAPP 581 PROJECT**

**Critical mediation issues: New Zealand  
literature and practice**

**Kay Hewitt  
Masters of Public Policy  
Student No: 300006993  
28 January 2008**

## **ABSTRACT**

The objectives of this research were: to explore whether or not the issues raised in the New Zealand mediation literature correctly reflected the issues faced by mediators in practice; and, to take those issues mediators said were significant in practice, whether or not they had been correctly identified in the literature, and find out what practitioners saw as the best option(s) for mitigating any risks.

A small sample of practitioners was interviewed in-depth. The qualitative information was aggregated and analysed for common themes. The analysis revealed mediators did not see the fragmented statutory framework as a problem in practice. Mediators did see a potential need for government legislation to clarify confidentiality and mediation privilege, and to prevent incompetent and unethical mediators from causing harm.

The report concludes government legislation is unlikely at this time given the new provisions of the Evidence Act 2006 relating to confidentiality and mediation privilege, and the absence of published evidence to show incompetent and unethical mediators are causing significant harm.

Government is a major purchaser of mediation services and has non-statutory options to shape and lead the market. Government is also likely to be influenced by the new Australian voluntary self-regulatory National Mediator Accreditation system.

# CONTENTS

<b>Section One: Introduction</b>	<b>4</b>
Introduction	4
Definition of mediation	4
The Issue	6
Objectives of this research	7
Research methodology	7
Research limitations	8
Key findings	9
<b>Section Two: What mediators said</b>	<b>11</b>
Introduction	11
The mediation market	11
What mediators said	12
Conclusion	27
<b>Section Three: Literature and practice</b>	<b>28</b>
Introduction	28
Confidentiality and privilege	28
Regulation of mediators	39
Towards synthesising literature and practice	46
<b>Section Four: Conclusion</b>	<b>50</b>
<b>Bibliography</b>	<b>52</b>
<b>Appendices</b>	
Appendix One: Glossary	<b>58</b>
Appendix Two: Employment cases with implications for confidentiality	<b>59</b>

# SECTION ONE: INTRODUCTION

## Introduction

When I first read the New Zealand literature on mediation, I was overwhelmed by the fragmented statutory framework, multiple models of mediation and the number of terminology and process issues that were raised. I wondered how mediators were able to function in such a confusing environment, and if government intervention was required. My decision to ask mediators this very question, and to ascertain what they saw as the significant issues facing their profession in practice, was the genesis of this research.

The report proceeds as follows:

- **section one** - introduces the research and its subject matter;
- **section two** - analyses and synthesises what mediators said during interviews;
- **section three** - relates what mediators said to the New Zealand literature and considers policy implications;
- **section four** - contains a brief conclusion.

## Definition of mediation

Mediation is a dispute resolution process that is an alternative to litigation. Alternative dispute processes (ADS) can be broadly classified into three groups: facilitative, evaluative and determinative (LAC, 2006). The role of the third party neutral running the ADS process largely determines how a particular process is classified (Sourdin, 2005).

In a facilitative process, an impartial third party neutral has no advisory or determinative role. In contrast, the third party neutral in an evaluative process investigates the dispute, advises on the facts and possible outcomes, and assists in resolving the dispute. The third party neutral in a determinative process investigates the dispute and makes a determination that is legally enforceable (Legislative Advisory Committee, n.d.).

Mediation is grounded in multiple disciplines and is practiced in a wide range of private, community and institutional settings. As Clapshaw and Freeman-Greene say: “defining mediation by itself is a minefield” (2003, p. 15). There is no universally accepted definition of mediation, either in legislation or in practice, and there are considerable variations in the way mediation is defined and used in New Zealand.

A clear illustration of the extent to which there are variations in legislation and practice in New Zealand is the role of the mediator working under the Employment Relations Act 2000 (ERA) compared to the role of the mediator working under the Human Rights Act 1993 (HRA) and subsequent amendments. Under the ERA, a statutory mediator has the power to decide the outcome of the mediation, if necessary, and therefore has determinative powers similar to an adjudicator or arbitrator. Under the HRA, statutory mediators have no power to decide mediation outcomes. However, both sets of mediators regard themselves as working primarily in the facilitative model.

Boulle, Jones & Goldblatt (1998) suggests that to help deal with definitional problems and the diversity of practice, it is useful to distinguish between four models of mediation that are not mutually exclusive and have different objectives:

- in settlement mediation, the objective is to reach compromise;

- in facilitative mediation, the objective is to negotiate in terms of the underlying needs and interests of the parties, rather than their legal rights or obligations;
- in therapeutic or transformative mediation, the objective is to improve relationships, dealing with underlying behavioral causes;
- in evaluative mediation, the objective is to reach a settlement based on the parties' legal rights and entitlements, within a likely range of court outcomes.

The following definition of mediation was developed by Boulle, Jones & Goldblatt (1998) and is used in this research because of its inclusiveness:

Mediation is a decision-making process in which the parties are assisted by a third-party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent. (p.1.)

## **The issue**

In line with a global trend, New Zealand has legislated and continues to pass new legislation advocating voluntary mediation or requiring compulsory mediation. However, New Zealand does not have an overarching statutory framework within which to position the divergent models of mediation now enshrined in legislation.

In 1999, Claire Baylis wrote a seminal article reviewing the multiple statutory models of mediation and conciliation embedded in approximately thirty statutes in New Zealand. In her conclusion, Baylis said:

... many of the models contain features which arguably fundamentally affect the fairness and effectiveness of the process ... (p.280).

Researchers writing after Baylis also say many of the statutory models contain terminology and process features which fundamentally affect the fairness and effectiveness of the mediation process. Although the New Zealand literature does contain these common threads, they do not appear to have been tested for significance with practicing mediators. Therefore, it is not clear whether or not there is a serious problem in practice.

## **Objectives of this research**

The first objective of this research is to explore whether or not the issues raised in the New Zealand mediation literature correctly reflect the issues faced by mediators in practice, and how significant these issues really are.

The second objective of the research is to take those issues mediators say are significant in practice, whether or not they have been correctly identified in the literature, and consult with groups of practitioners to find out which are the best option(s) for mitigating any risks they and their clients face, based on their practical experience.

## **Research methodology**

This research was exploratory and qualitative as the emphasis was on obtaining a rich source of qualitative data to mine for insights and patterns. The professional bodies assisted me to send out a generic email inviting

approximately<sup>1</sup> 120 members to participate. The respondents were public service mediators and private sector mediators, with seven of the eight participants based in Wellington.

I interviewed eight mediators over one to two hour periods, conducting seven face-to-face interviews and one phone interview. I used a list of pre-prepared questions, based on my understanding of the literature, as prompts. I collated the mediators' comments thematically, focusing on those issues identified as significant by several mediators.

## **Research limitations**

This research was exploratory. As the sample set is small (eight mediators) and self-selected, the findings can only be regarded as indicative and a guide to further mediation research.

Further, the emphasis in this research has been on examining issues that practitioners say are significant in practice. In this research, "significant in practice" means most mediators I interviewed regarded the issue as a potential threat to the practice of mediation at this time. Therefore, it has not been appropriate, or possible (given the word limit), to discuss all the issues practitioners identified in detail, and relate these to the literature. That in no way indicates they are unimportant.

---

<sup>1</sup> Some mediators received more than one invitation as they belong to both professional bodies.

## Key findings

My findings are:

- The literature is seeking to bring consistency, clarity and certainty to the mediation environment, including the statutory framework, as mediation emerges as a distinct profession and a viable alternative to litigation.
- Practitioners have adapted to the environment, and are getting on with the job, as the confused statutory environment is not a problem for them in practice.
- Practitioners and academics are concerned to protect the practice of mediation. For some of them, there may be a case to legislate to clarify confidentiality and mediation privilege, and to prevent incompetent and unethical mediators from causing harm.
- My own view is that government is unlikely to contemplate new legislation in either of these areas in the short term because:
  - The new section 57 Privilege for settlement negotiation or mediation in the Evidence Act 2006 does seem to be an attempt to reduce uncertainty relating to confidentiality and mediation privilege. There are no court decisions under this provision as yet;
  - There is currently a lack of published evidence to suggest incompetent and unethical mediators are doing significant harm to parties, or the reputation of mediation and mediators;

- Government can use its considerable power as a significant employer and contractor of mediation services to lead and influence standards in the mediation market;
- Government is likely to be influenced by Australia, where a voluntary self-regulatory National Mediator Accreditation system was introduced in January 2008.

## **SECTION TWO: WHAT MEDIATORS SAID**

### **Introduction**

The purpose of this section is to report what mediators said were the significant issues they faced in practice and what they thought could be done to address them.

### **The mediation market**

The mediation market is comprised of three main groups of practitioners: public service mediators, lawyers offering mediation as one of a suite of services and private practitioners. Most full-time mediators are employed by government where mediation is widely used as a statutory dispute resolution process.

There is no published estimate of the size of the mediation market. Membership of one of the two professional bodies, LEADR NZ or the Arbitrators' and Mediators' Institute of New Zealand Inc., is voluntary. The mediation profession is not regulated so anyone can put out a shingle and call themselves a mediator.

## What mediators said

### Statutory mediation processes may differ across agencies

#### Summary

Participants identified differences in the way statutory mediation processes are run and in the mediator's role, but they highlighted more similarities than differences.

#### Discussion

Most of the mediators either worked with, or were familiar with, more than one statutory mediation process and were able to describe these processes in varying levels of detail. The following examples, drawn from two interviews, provide the best illustration of how statutory processes may differ in some ways, yet retain strong similarities:

- Under the ERA, mediators can use any appropriate process to arrive at a decision. Mediators can manage the parties' expectations by telling them what will happen if the mediation does not work out. They can point to relevant case law and what the parties are likely to achieve if they go to the Employment Relations Authority (Authority). Mediators have the authority to make decisions on the outcome of mediations and these decisions are non-reviewable. Most Mediation Services mediators resist making a decision but sometimes doing so is appropriate. Mediation agreements are final and binding if a mediator signs them off. The ERA provides a process for enforcement of agreements through the Authority or the Employment Court (Court). The Authority and the Court have the power to direct parties back to mediation if they are not satisfied that the parties have really tried to mediate their dispute.

- Under the Human Rights Act 1993 (HRA) and subsequent amendments, the Human Rights Commission (HRC) has a role as a neutral third party and collective advocate. Under Part 1A of the HRA, the HRC mediates public processes involving allegations of discrimination through policy, legislation and practice. Such cases may involve Crown Law and other government agencies. The public process can result in a declaration of inconsistency in which case government must report to Parliament on what it intends to do about it.

Under Part 2 of the HRA, the HRC mediates private processes involving allegations of discrimination and these mediations are voluntary and confidential. The HRC does not pursue private mediations where one party does not wish to participate as mediators do not judge the guilt or innocence of parties but are impartial.

Under the HRA mediators have the flexibility to use the mediation processes they judge to be appropriate to each case. Mediators also have an educative role and may involve an outside party in this role. If a dispute is not resolved or settled through mediation, the parties can go to the Human Rights Review Tribunal (HRRT). However, mediators perceive this process is weakened by the fact there are few current HRRT precedents they can point to.

The above examples illustrate that neither Mediation Services nor HRC mediators have solely facilitative roles, but neither do they have identical roles and powers.

Common to both sets of mediators is the flexibility to adapt the mediation process to the needs of the parties and the ability to provide parties with information about likely outcomes if they do not settle. While both sets of mediators say they

only provide information, it would appear they have a partially evaluative role, similar to a conciliator or expert evaluator.

Under the ERA, once a mediator has signed an agreement, it is final, binding and cannot be challenged. Therefore, an ERA mediator has determinative powers similar to an adjudicator or arbitrator. In contrast, under the HRA, a mediator has no power to make binding decisions.

### **Statutory differences are not a problem for mediators in practice**

#### Summary

Participants agreed that working across different statutory frameworks is not a problem.

#### Description

None of the mediators had problems working across different statutory frameworks. As one participant put it, the existence of legislation is largely inconsequential once the parties come to mediation, reflecting mediators' strong belief in the power of the mediation process once parties are in a room.

Mediators can go to any mediation and handle it applying the same basic principles. As one participant said, differences in process reflect the rich texture of the mediation process and there are golden threads observed by mediators such as: mediation is generally facilitative and neutral, and mediators do not make decisions. In essence all mediators speak the same language and a mediator's employment status (employee or contractor) does not change this.

Another reason why mediators say they do not have difficulties working across a number of different statutes is the flexibility of the mediation process. Any

process issues can be discussed and agreed between the parties. As one participant said, it is all about getting the informed consent of the parties.

### **The neutrality of public service mediation must be maintained**

#### Summary

Public service mediators may face challenges to their role as a third party neutral.

#### Discussion

Some mediators talked about how being part of government agencies with diverse responsibilities has the potential to compromise the role of the mediator as a third party neutral, both in practice and in the eyes of the public.

While none of the mediators interviewed said their neutrality had been breached, the concerns they raised included:

- The potential for conflict of interests to arise when mediators and employees from different parts of an agency are working with the parties in different roles;
- Managers who would like to control what goes on in the mediation room;
- Organisational directives that prescribe mediation outcomes and what constitutes a good settlement.

## **Mediators described a range of mediation models**

### Summary

Mediators described a range of mediation models, mainly facilitative. In their view, the correct approach is to devise a process that is right for the set of circumstances.

### Discussion

Participants talked about a range of models, including a pure form of mediation where the mediator is a facilitator who recognises parties can do it themselves. A participant commented that New Zealand has a pure strain of mediation – joint sessions and facilitative for the most part – and he would not want to see this change.

Another participant said that, given where mediation is at the moment in New Zealand, it would be better to describe mediation by its characteristics (a confidential process where the parties have a free and frank exchange of views run by a third-party mediator who does not make a decision).

A third participant described mediation as a sophisticated form of negotiation with the injection of a third-party neutral to assist. He thought it was difficult to move beyond this simple definition and develop a universally accepted description of the mediation process, method, and outcomes. There are many forms of mediation and the approaches adopted can even be polemic. The approach taken by a mediator trained in a facilitative mediation school would be almost an anathema to a transformative mediator. However, these two divergent processes can each work within the same situation.

Several participants commented that there is room for different sorts of mediation. The correct approach is to devise a process that is right for the set of

circumstances. Good, skilled mediators are going to be able to draw on a range of processes from a tool kit according to what they judge to be the most effective on the day. At the end of the day mediators do what the parties need. They may start with one process and end with another or start with a hands-off approach and end up providing information based on expert knowledge.

## **The public confuse statutory mediation with the law**

### Summary

The public does not understand what mediation is and people confuse mediation with other processes, particularly legal processes.

### Discussion

Mediators say part of the mediator's role is making people understand what mediation is and what the process is really about. People think mediation is legislative because it is written in statutory processes. Questions are asked, like: Is this formal? Will this be written down? Will this be held against me? Parties equate mediation with win/lose and think that they will be judged by the mediator.

More than one participant felt people confuse mediation with the law because statutory mediation works heavily in the shadow of the law. One example was the mediation process run by the Disputes Tribunal. If parties do not settle within a set period of time, the mediator becomes the arbitrator. Parties are therefore conscious of the need to impress the mediator and are not necessarily open and honest. The majority of cases in the Disputes Tribunal are arbitrated, panel members are lawyers and the Disputes Tribunal operates like a mini court.

## **The mediator's professional role needs to be clear**

### Summary

The mediator's professional role is not well understood and needs to be clear.

### Discussion

Some participants were concerned that the mediator's professional role is not well understood. As a result, other professions and the public confuse what mediators do.

One participant said the mediator's role needed to be differentiated in legislation from lawyers and counsellors. Another participant said some lawyers see themselves as gatekeepers to the mediation process when their role in mediation is as expert advisors to their clients.

A third participant was concerned that the judiciary talked about counselling, mediation and conciliation in a muddled way and said the differences in these roles needed to be clarified.

A fourth mediator observed that the public see mediators working under a statute for a government agency as part of the system and this creates a different dynamic from private sector mediation. Parties may not see statutory mediation as a voluntary process even when it is voluntary.

## **Compulsory mediation may be justified**

### Summary

The hard part is getting people to mediation. Once parties are in the room, mediators are very confident of making progress. If the process is right, compulsory mediation may be justified.

### Discussion

Some people are scared to come to mediation because they do not understand what mediation is, and they think mediation is like going to court. Mediators say the biggest challenge is getting people to sit around a table. Once they get to the table, mediators are very confident they will make progress toward resolving the dispute.

Some mediators indicated that the voluntary nature of the mediation process means that it is hard to get the process started. One mediator said the mediation process is poorly defined and you cannot force people to mediate when they are not clear about what mediation is. If mediation was better defined in statutory processes, people would go to mediation more often.

Two mediators said there may be a case for compulsory mediation to overcome the barriers if the process was right. Where there are no consequences of not going to mediation, and a party is reluctant to go forward, it is useful to have compulsion.

One mediator indicated that when people are directed to mediation, they may come begrudgingly. It is sometimes difficult to get them to engage in the mediation process. However, once they are in the door, they are captured by the power of the mediation process.

An act is like a corridor where the parties cannot see a light at the end. The mediator opens the door and there is light. Without legislation parties would not get to the door. Therefore the real questions people need to ask about compulsory mediation relate to whether or not the process is consensual once the parties begin mediation.

Another participant said it would be a huge mistake to make people go to mediation before they could get access to the courts. He had been to Los Angeles where mediation was compulsory before parties could go to court. His observation was that introducing mandatory mediation there had been a disaster resulting in: mediators being poorly paid, lawyers gaming the process, and an enormous caseload for mediators.

**Confidentiality of mediation must be protected, by a mediation act if necessary**

### Summary

Mediators are very concerned that the confidentiality of the mediation process is being eroded by the courts. Some mediators would support a mediation act if it clarified confidentiality holistically.

### Discussion

Confidentiality is integral to the mediation process and differentiates mediation from court processes that are generally public. Mediators perceive that the confidentiality of mediation has been eroded by the Employment Relations Authority and by the Employment Court in recent decisions. Although mediators say the erosion has not flowed over into other areas of mediation yet, preserving

confidentiality of the mediation process is sufficiently important for them to support a mediation act if it achieved this.

Confidentiality of mediation is a grey area in law, with different statutory processes coming under different confidentiality requirements that are open to different interpretations by the courts. One mediator pointed out that the law is trying to sort the issue of confidentiality out. The question is whether or not it is sorting it out appropriately and from whose perspective. If confidentiality is sorted within a particular statute, then considerations that fall outside that case may not be relevant for mediation generally.

Another mediator commented that mediators are privy to a wide range of personal, commercial and government information. Parties take it for granted that they can trust mediators to keep this information totally confidential. Parties need to be able to trust mediators or mediators would never get to the bottom of the problem.

However, one participant said there was no need for a mediation act unless it clarified confidentiality and mediation privilege across all statutes and in all courts. Another participant commented that one of the possible reasons for having a mediation act may be to unequivocally deal with management of issues like confidentiality and the balancing of confidentiality with the public interest if the subject ends up in court.

## **Mediators did not see the need for a mediation act to deal with process issues with the exception of confidentiality**

### Summary

None of the mediators saw a strong need for a mediation act unless it dealt holistically with the issue of confidentiality.

### Discussion

Mediators agree it is very important that people know what to expect when they are going into a mediation process. However, while a common definition of mediation, common clauses and consistent process descriptors across legislation could be useful, most mediators do not see current inconsistencies providing a strong rationale for a mediation act. In part, this is because mediators are not convinced that what mediation is really about can be captured in legislation.

One mediator said that, in his opinion, an act would be so general as to be worthless. Another mediator said it was possible that a mediation act may not add anything because in some ways the market finds its own way. Most mediators working in the private market can cover off all of the issues that might be included in an act through contracts and membership of professional bodies. Mediators discuss and agree issues such as confidentiality and conflicts of interests with the parties.

One mediator made the observation that the two areas of life that have the most profound impact on people are living as members of a family and employment. Both of these areas are already statutorily regulated when it comes to mediation. If mediators are members of one of the two professional bodies, they are bound to a code of ethics. Those codes of ethics perform the task of a statute.

Further, it was wrong to use the existence of arbitration and its statutory regime as a rationale for supporting a mediation statute. Parties going to arbitration have surrendered their rights to have a final say about the outcome. The outcome is imposed under a quasi-legal structure, often working within the very footprint of law.

Some mediators were concerned what officials might incorporate in an act or that if New Zealand was to pass a mediation act, like the USA, lawyers could take over. This would be a concern as mediators come from a wide range of backgrounds including law, counselling, management and building. The ability to draw on multiple disciplines is one of the strengths mediators bring to the process.

Several mediators commented that if government was to bring in a mediation act, policy-makers would need to recognise what makes mediation effective and ensure the integrity of the mediation process. Mediation is not a quick fix; it is a quality process that cannot be subjected to unrealistic constraints and needs to be properly resourced.

### **Industry self-regulation could prevent poor mediation practice**

#### Summary

Mediators want to prevent poor mediation practice and say this could be achieved if all members belonged to one of the two professional bodies.

#### Discussion

The mediation profession is not currently regulated by government. Mediators want to ensure that people calling themselves mediators adhere to a code of

ethics, are properly trained and remain competent. They want mediators held accountable for poor practice.

One participant said he strongly supported training mediators. However, he also said people can make mistakes whether they are trained or not. He had not heard of one case of disaster befalling someone at the hands of an unqualified mediator, but he had heard of a disaster or two (not many) involving qualified mediators.

Some participants suggested that mediators could be held accountable if all mediators belonged to one of the two professional bodies, LEADR NZ or AMINZ.

### **Government may need to regulate mediators to ensure high quality delivery**

#### Summary

Some mediators felt that it may be necessary for government to regulate mediators to ensure high quality delivery and the “professionalism” of the profession.

#### Discussion

Mediators are genuinely concerned to ensure that people coming to mediation experience high quality delivery. Mediators are “tinkering with people’s lives on a daily basis and mediators must influence people’s lives positively” (a participant). Therefore, the maintenance of national standards is really important.

Government may need to regulate the profession in one of two ways to ensure high quality delivery: accreditation<sup>2</sup> linked to a mediation act or certification.

---

<sup>2</sup> Refer Appendix one: Glossary for description of accreditation

Certification<sup>3</sup> of mediators would also help mediators become more of a profession. At the moment anyone can call themselves a mediator and there needed to be some barrier to entry so quality standards are set. One participant said there are some interesting issues around the need for ongoing certification of mediators as it is very easy to get de-skilled.

Several mediators also felt that the profession may now need to be regulated to maintain the “professionalism” of the profession. Maintaining professionalism required a commitment to continuing professional development and stopping “back door” mediation.

Another mediator agreed that the profession needed to be regulated in some way, but said any regulation needed to be light handed. Regulation could also be problematic for community mediators.

As one participant said, whether or not the profession now needs to be regulated is the debate that currently consumes mediators. He predicted that New Zealand will end up following the Australian experience<sup>4</sup>.

## **Non-statutory options for mediation**

### Summary

Several mediators also suggested non-statutory options that government could pursue to support the development of the profession. These options included

---

<sup>3</sup>Refer Appendix one: Glossary for description of certification

<sup>4</sup> Australia introduced a voluntary National Mediator Accreditation system, incorporating mediator approval and practice standards, in January 2008. Mediators seeking accreditation will need to belong to Recognised Mediator Accreditation Body (RMAB) responsible for managing the voluntary accreditation system.

promotion, developing a set of common definitions and glossary of terms, and government leading by example in the purchase of mediation services.

### Discussion

One mediator said that the promotion of a common understanding of the principles of mediation was more important than a mediation act as some people think they are involved in a mediation process when they are not. The professional bodies had tried to promote a common understanding of mediation but unless people needed help to resolve a dispute, they are not going to think about mediation.

Participants also suggested that New Zealand could deal with some of the inconsistencies in legislation by adopting a common set of definitions and a common glossary of terms along the lines of those published by the National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia.

Several participants pointed to the pivotal leadership role government could play in the development of the profession given it is the largest provider of mediation services. For example, if government said all mediators either working for or contracted by them had to have specified training or have "x", this would go a huge way towards leading the market and no-one could just hang out a shingle.

Most advertisements for government mediation roles currently require applicants to belong to a professional body. Government role modeling the desired purchasing behaviour could work without legislation or with a very simple act. LEADR and AMINZ would become the certification bodies.

## **Conclusion**

Mediators agreed that working across different statutory frameworks is not a problem for them in practice. While mediators identified issues relating to the mediation process and the mediator's role, they did not see these providing a strong rationale for passing a mediation act with one exception. Mediators are very concerned that the confidentiality of the mediation process is being eroded by the courts. Some mediators would support a mediation act if it clarified the confidentiality of mediation holistically.

The major debate within the mediation profession currently revolves around what the profession now needs to ensure high quality delivery and protect the "professionalism" of the profession. Some mediators feel government regulation of the profession may be needed to achieve these goals going forward.

## **SECTION THREE: LITERATURE AND PRACTICE**

### **Introduction**

In section three, I discuss the two issues that most mediators identified as significant in practice, and examine them in light of the New Zealand literature. These two issues, protecting the confidentiality and privilege of mediation and regulation of the mediation profession, were areas that practitioners indicated might require a mediation act. Then in the final sub-section, I offer an explanation of how the issues raised by the literature and mediators meld if they are viewed holistically.

### **Confidentiality and privilege**

The following discussion of confidentiality and privilege is not exhaustive, and is intended to be at a high level.

#### **The obligation of confidentiality**

Confidentiality goes to the heart of mediation and is vital to its integrity:

The very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to “lay bare their souls” for the purpose of facilitating a ... resolution of their dispute.”<sup>5</sup>

Obligations of confidentiality enhance trust in a mediator and promote confidence in mediation. Without this trust and confidence, people may not perceive mediation as a viable alternative to litigation (NADRAC, 2006).

---

<sup>5</sup>Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd [2001] 3 NZLR 343 (CA), Blanchard J.

Confidentiality in mediation applies at two levels. The mediator has an obligation not to disclose information provided by one party during a separate private session to the other party.

The second obligation of confidentiality extends to the mediation process as a whole and means that mediators and parties to the mediation should not disclose what happens at the mediation to third parties (Boulle, Jones & Goldblatt, 1998). It is this second obligation of confidentiality that is the primary focus of this discussion.

The confidentiality of mediation is justified on the following grounds (Boulle, Jones & Goldblatt, 1998):

- It makes mediation attractive to parties who want to avoid publicity. They know what is said cannot be used against them in another forum including the courts.
- It makes mediation more effective by encouraging parties to be open and candid and to disclose their real needs and interests, increasing the chances of settlement.
- It protects the reputation of mediators, reinforcing their impartiality by excluding them from pressure to make disclosures either during or after mediation.

Where there is a power imbalance between the parties, or only one party stands to benefit financially, then all the other party may stand to gain is settlement without adverse publicity (Goldblatt, 2000). Confidentiality is also important to parties if the information is commercially sensitive or parties want to avoid regulatory scrutiny (Crosbie, n.d.).

Parties are often told that all that takes place in the mediation process is entirely confidential to the mediator and the parties. The reality is that confidentiality of the mediation process and the outcome are not absolute.

... it is a cornerstone of the process that the parties to a mediation ought to be able to speak freely and frankly ... Having said that, however, the law on confidentiality in mediation is developing and is somewhat complex. In short, there are some clear exceptions to the confidentiality rule ...  
(Thomson Brookers, 2007, p.1.)

Goldblatt (2000) and Weavers (2002) recommend that mediators should refrain from promoting mediation as a protected confidential process in every circumstance. Many mediators now qualify their opening statements so that parties know that the mediation is confidential "in so far as the law allows"  
(Sourdin, 2005, p.152).

### **Without prejudice privilege**

Discussion as to the appropriate degree of protection to afford information disclosed during mediation most commonly arises in the context of litigation which ensues after a dispute has not been resolved at mediation. (Crosbie, n.d., p.1.)

Once the dispute is before the courts, it may be necessary for the courts to decide what evidence it can admit in relation to the prior mediation process. At common law, evidence of admissions made in an honest attempt to reach settlement in a dispute is inadmissible in later proceedings. This is known as the 'without prejudice' privilege.

Mediation agreements such as this one are confidential; any matters arising in the course of mediation are not usually to be put in issue in any subsequent litigation or arbitration... The whole point of mediation is to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later rebound to the detriment of any party, should the mediation fail to achieve a settlement.<sup>6</sup>

The courts have made it clear that the rule is not absolute and that confidentiality will be lifted when the “justice of the case requires it”.<sup>7</sup>

### **Confidentiality, privilege and the courts**

At times, uncertainty may occur because there are conflicting guidelines and dispute resolution clauses in agreements or legislation, or because the courts are interpreting clauses in new legislation. Mediation is also a relatively young profession, and the principles that underlie mediation processes potentially conflict with adversarial litigation processes (Clapshaw & Freeman-Greene, 2003).

At the time of writing, two recent decisions in relation to s. 148 of the ERA (Jesudhass v Just Hotel Ltd and Plimmer v Hawkesbury Community Living Trust<sup>8</sup>) have strengthened mediators’ concerns there could be a gradual erosion of the confidentiality and admissibility principles in the courts.

Mediators, participants and the Courts continue to struggle with the fine detail of what confidentiality means in the mediation context. (Powell, 2007, p.1.)

---

<sup>6</sup> Vauluse Holdings Ltd v Lindsay (1997) 10 PRNZ 557 (CA), Barker J. p.559

<sup>7</sup> Rush v Tompkins [1989] AC 1280; Crummer v Benchmark Building Supplies Ltd [2000] 2 ERNZ 22; (2000) 5 NZELC 98,611; Jesudhass v Just Hotel Ltd [2006] 1 ERNZ 173

<sup>8</sup> Ibid; Employment Relations Authority, CA 31/07, 28 March 2007, Montgomery J. A discussion of these cases is contained in Appendix One

### The Evidence Act 2006

The new Evidence Act 2006 encapsulates the common law position in relation to privilege, extending protection to the mediator. However, under s. 57 of that Act, privilege is limited to communication which is intended to be confidential and is made in an attempt to settle or mediate a dispute. There have not been any cases decided under the new s. 57, so it is unclear how this section will be weighed against the confidentiality provisions in other specialist legislation governing mediation such as the ERA.

Powell (2007) suggests that the use of the word communication in the Evidence Act provides a broader protection than s. 148 Confidentiality of the ERA. This later section is the one under which *Plimmer v Hawkesbury Community Living Trust* was determined. However, it is yet to be seen whether the courts interpret communication to be limited to speech and written exchanges or whether actions and more subtle forms of communication are included.

The protection in the Evidence Act 2006 also appears to go beyond what takes place in the mediation room and may now extend to communications on either side of the mediation meetings. In short,

The statute clarifies the confidentiality issues substantially although there will still be fine tuning issues to be resolved....

The statutory protection afforded by the Evidence Act 2006 goes beyond the existing confidentiality provisions of other statutes such as the Employment Relations Act and may well clarify some of the difficulties... (Powell, 2007, p.2.)

## **Public policy considerations**

In this section, I outline the public policy arguments advanced for protecting the confidentiality of mediation and for the courts extending the protection of 'without prejudice' privilege to mediation.

### The United Nations

In 2002, the legal rules governing mediation in many countries were set out in various pieces of legislation that took different approaches to confidentiality and evidentiary privilege. The United Nations wanted to encourage the use of mediation to settle disputes and decided uniformity of legislation would promote the use of mediation by bringing greater integrity and certainty to the mediation process. Therefore, in 2002 the Assembly voted to adopt the *Model Law on International Commercial Conciliation (Model Law)*<sup>9</sup>

The United Nations (2002) said confidentiality and privilege had been the most important reasons why the Assembly developed the model law.

The single most important concern of parties in conciliation is to ensure that certain statements or admissions made by a party in conciliation proceedings will not be used as evidence against that party in other proceedings, and it was considered that a contractual solution was inadequate to accomplish this goal. In order to address this and other matters ... UNCITRAL decided to prepare a model law on the topic ...”  
(United Nations, 2002, p.12)

The United Nations indicated that for mediation to have a chance of success, the parties should be ready to delve into matters that would normally not be considered in arbitral or court proceedings, including matters that the parties considered sensitive or confidential. If there was a risk that some of that

---

<sup>9</sup> The United Nations uses the terms conciliation and mediation interchangeably.

information could be disclosed to a third person or made public or used in arbitral or court proceedings, the parties would be less free and frank and less likely to reach a settlement.

It is therefore critical that the legal regime governing conciliation proceedings lay down safeguards providing the desired degree of legal protection against unwanted disclosure of certain facts and information. These safeguards are the centerpiece of the conciliation regime and a particularly important reason why legislation on conciliation is needed.”  
(United Nations, 2002, p. 39)

However, under the Model Law, the onus is on the party disclosing the information to specifically request that the mediator not share it with the other party (NADRAC, 2006). In New Zealand, the onus is on the mediator to request permission to share information revealed by one party in confidence with the other party.

#### Public policy and confidentiality

The policy underpinning confidentiality is based on maintaining public confidence in mediation. Generally the courts will uphold the confidentiality principle. However, there are arguments for restricting confidentiality obligations based on the need for judicial or public control over the private resolutions of disputes and for third parties affected by mediation outcomes to assert their rights (NADRAC, 2006). For example, the right to breach confidentiality might apply if there is a threat of a crime or harm to a third party made during mediation.

The courts have to weigh competing interests, including competing public policy interests. On the one hand, there is an interest in promoting and encouraging the settlement of disputes outside the courts and in protecting emerging alternative dispute resolution processes; on the other hand there is an interest in

the disputing parties and the courts having the best access to evidence and information, regardless of what happened at the mediation (Boulle, Jones & Goldblatt, 1998; NADRAC, 2006).

A balance is required between supporting mediation, on one hand, and not freezing litigation or upholding illegality, on the other. This balance is not an easy one to achieve. (Boulle, Jones & Goldblatt, 1998, p.288.)

There are times when parties participating in mediation have a formal or informal obligation to report back to someone not at the mediation. These reporting requirements can usually be dealt with through contract.

However, there are a number of cultural, community and family considerations which may make confidentiality in disputes involving indigenous parties problematic. Not only may confidentiality be unrealistic in these circumstances, but also undesirable given the physical living arrangements and extended family obligations existing within indigenous communities. Therefore, any legislation needs to specify exceptions to the obligation of confidentiality, many of which already exist at common law (NADRAC, 2006).

Even where there are legislative provisions and contracts specifying that the mediation is confidential, there may be little a mediator or opposing party can do in practice to stop a disgruntled party from going public (Goldblatt, 2000). While the courts have the power to stop disclosure by granting an injunction, the difficulty is that usually no-one will know about the breach of confidentiality until after it has occurred and the information is already in the public arena (NADRAC, 2006).

Goldblatt (2000) suggests specific mediation legislation may be required to protect mediation confidentiality. Her view is that sanctions are required to stop confidentiality breaches that have a high cost to society.

While there may be risks for the mediator where confidentiality is breached by the parties, the greatest damage is to mediation itself – its reputation, its effectiveness and its value. Where confidentiality of either process or outcome is breached we all lose .... (p.400.)

Adams (n.d.) says a clear legislative decree of confidentiality of proceedings in the form of a mediation act, backed by onerous consequences for breaches of confidentiality, would do much to affirm “this cornerstone of the mediation process” (p.5.) The seven Auckland mediators Adams surveyed supported his approach, but commented mediation agreements already contain similar provisions.

#### Public policy and privilege

It is in the public interest to avoid litigation and promote constructive negotiations, because where agreement is reached, court time and resources can be used more effectively. Protecting the communications made during mediation provides greater certainty about the status of those communications and avoids secondary litigation (NADRAC, 2006).

The public policy underpinning the ‘without prejudice’ privilege is that the law should support parties to reach a settlement without them being concerned there will be subsequent adverse consequences in litigation. Parties should be able to negotiate frankly and without fear that what is said or produced during negotiations will be used in evidence against them at a later date (Boulle, Jones & Goldblatt, 1998).

The inadmissibility provisions allow for more generous, flexible and creative solutions to a dispute (NADRAC, 2006, p.85)

What happens in mediation may not be relevant to the dispute itself and the court permitting an investigation of what happened in mediation risks providing the parties with another 'battleground' to pursue the dispute. Admitting evidence of mediation communications into formal court proceedings can mean that mediation is seen as another component of litigation.

For parties to continue to have faith in mediation and to continue to freely and meaningfully participate, it must not be possible for any admissions or apologies made in attempt to reach agreement to be subsequently used against them in evidence (NADRAC, 2006).

However, there will be times when the courts may have to decide between competing public policy interests<sup>10</sup>. For example, a child's right to be protected from abuse may need to be weighed against the public's general interest in maintaining confidence in mediation.

## **Conclusion**

Some authors and practitioners agree that a mediation act may be necessary to clarify and protect the confidentiality and privilege of mediation. However, support for a mediation act for this purpose ranges from absolute (see Adams (n.d.) to tentative (Carden, 2005) among authors and practitioners. There certainly is a will to explore whether or not such legislation is now necessary given confidentiality and privilege go to the heart of mediation.

New Zealand has not adopted the Model Law recommended by the United Nations and there is currently no interest in doing so. Section 57 Privilege for settlement negotiation or mediation in the Evidence Act 2006, does seem to be

---

<sup>10</sup> Refer Appendix One for discussion of *Jesudhass v Just Hotel Ltd*

an attempt to reduce the uncertainty. However, in the absence of any decisions under this provision, it is not clear how the new Act will work in mediation cases in practice. It is, therefore, unlikely that government would contemplate new legislation at this time.

One difficulty facing the courts is that the Evidence Act 2006 is a general act that may not necessarily over-ride the provisions of specialist legislation such as the ERA. Therefore, it has yet to be seen how much consistency will be introduced into mediation by the new clause.

A general mediation act providing for confidentiality and privilege in mediation, together with necessary exceptions, would have this force.

There is a level of uncertainty that may be relieved by a Mediation Act  
(Carden, 2005, p.20.)

## REGULATION OF MEDIATORS

Mediation takes place in private and what occurs is confidential... Its success is, to a significant extent, dependent on the skills and impartiality of one person... (Law Commission, 2004, p.98.)

Mediators were genuinely concerned to ensure people coming to mediation experienced high quality delivery from a competent, ethical mediator who could be held accountable. During interviews, mediators suggested a range of options for achieving these aims, some of which might necessitate a mediation act.

Clapshaw and Freeman-Greene (2003) refer to a concern among mediators and the public that consumers are potentially at risk from inexperienced, unqualified and fly-by-night mediators. However, the authors conclude legislation is not currently required to provide protection from incompetent or unethical mediators in New Zealand, as there is no significant harm or market failure to justify a new law. They point to generic protections afforded consumers under the Consumer Guarantees Act 1993 and Fair Trading Act 1986, the existence of two professional bodies that self-regulate the profession, and context specific legislation regulating statutory mediation panels.

Adams (n.d.) forms a contrary view in his research, arguing that a mediation act is necessary to differentiate genuine mediators from fly-by-night operators, and to address shortcomings in the self-regulated model. He says few sanctions exist for mediators who act unprofessionally or unethically, especially those mediators who are not members of AMINZ or LEADR NZ.

Kovach (2005) argues that the existence of ethical standards without a means of enforcement or monitoring is problematic. She asserts that if mediation is truly a new profession that subscribes to the precepts of self-regulation, procedures for the enforcement of standards must be enacted.

However, none of the mediators I surveyed provided anecdotal evidence of mediations that had gone wrong because of incompetent, unethical mediators. There is also little evidence in the public domain of a problem. Unlike the real estate industry, the newspapers have not featured recent articles headlining incompetent and unethical mediators defrauding the public. Government said at the time the review was driven by “recent concern” about the effectiveness of the complaints and disciplinary regime, adequacy of entry and annual licensing requirements, and availability of consumer redress (Ministry of Justice, 2007).

That is not to say that examples of poor or unethical mediations do not exist; examples may simply not be available publicly. Mediation is confidential, the public are not clear what mediation is, AMINZ and LEADR NZ (industry’s self-regulators) are private bodies, and there is no independent mediation regulator for parties to complain to.

### **Public policy considerations**

An economic argument that might support government intervention is that mediation is a case of market failure due to the degree of information asymmetry<sup>11</sup> that exists between the mediator and the parties. Mediation is not an established profession (Law Commission, 2004, p.98) nor is it well understood by the public.

The parties are reliant on the mediator’s representations about the quality of service and can only determine service quality with certainty once they have been to mediation. The Law Commission (2004) argued that where the courts could require parties to attend mediation, the state must bear the responsibility for ensuring mediators are competent.

---

<sup>11</sup> Information asymmetry means the buyer and seller have different information about the quality of the service (Weimer & Vining, 1999).

More generally, mediation is a service most people rarely purchase or experience. Therefore, parties may not feel competent to choose a mediator or assess the quality of service they receive, and to lay a complaint if necessary. Parties might regret the purchase of the service, but it may be too late to undo any consequent harm (Weimer & Vining, 1999).

### The role of private third parties

Consumers turn to private third parties, such as professional associations, to help remedy information asymmetry problems. Professional associations set minimum standards of training or experience for members to help users distinguish services satisfying minimum standards (Weimer & Vining, 1999).

In New Zealand, AMINZ and LEADR NZ fill this role in the mediation market, providing training, private accreditation and public referral services. Membership is voluntary and is restricted by qualifications, experience and character, with members bound to a code of ethics.

However, direct information about the quality of service provision cannot always be provided reliably, and service quality may change over time. Therefore, governments may decide to license or certify providers who meet some standard of skills, training or experience (Weimer & Vining, 1999) to protect the public.

### Policy Framework for Occupational Regulation in New Zealand

The New Zealand Government Policy Framework for Occupational Regulation (The Occupational Policy) published in 1999 by the Ministry of Economic Development, is a guide for all government agencies regulating occupations. The underlying assumptions are:

- Intervention by government should only be used when there is a problem or potential problem that is either unlikely to be solved in any other way, or is inefficient or ineffective to solve any other way;
- The amount of intervention should be the minimum required;
- The benefits of intervention must exceed the costs.

The Occupational Policy document contains a clear and well defined process for assessing whether there is a case for intervention and states:

If significant harm is likely, existing means of protection are insufficient, the industry is unable to regulate itself adequately and intervention by Government is likely to improve outcomes, there is a strong case for Government intervention (p.2.).

Occupations self-regulate through codes of practice and voluntary accreditation, meaning the industry decides what is required. Occupations have strong incentives to self-regulate to avoid harm to users, protect their reputation and create a vehicle to promote member services. Sometimes industry self-regulation is backed up by legislation.

When deciding whether or not to intervene, government will weigh industry's ability to self-regulate, expert knowledge and the likely financial gains to members from restricting entry to the occupation, against government's lack of relevant industry knowledge, potential inefficiency and impartiality. Some self-regulatory processes may be supported by legislation (Ministry of Economic Development, 1999).

If government decides occupational regulation by statute is necessary it may require: disclosure of information about the service or provider or practitioners to identify themselves publicly through:

- Registration: requires service providers to be on a register if they want to practice. It does not restrict entry to an occupation or give any information about competence or quality of service;
- Certification: tells the public a practitioner is competent in a particular field when certified, and gives exclusive rights to use a title. People who are not certified can still offer their services and compete with certified practitioners, but they must do so under a different title. Certification does not deal with the quality of work done or the competence of the practitioner once they are they are certified.
- Licensing: explicitly prohibits all but licensed persons from offering certain services and is the least flexible and costly form of regulation. While licensing minimises the risk to the public from unskilled practitioners, it does not usually deal directly with the continuing relevance of those standards or current competencies of the practitioner.

Where licensing is controlled by the occupational group, there are incentives to increase the barriers to entry by raising the standards required to reduce competition for existing members, leading to higher prices and restricting consumer choice. There is strong empirical evidence that professional cartels do raise prices and restrict competition (Weimer & Vining, 1999).

Licensing is justified when the occupation has potential to cause significant harm and the practitioner is a sole operator or works independently of supervision.

Certification and licensing are usually subject to disciplinary processes and sanctions for breach (Ministry of Economic Development, 1999). They therefore provide greater protection to the public than registration.

### **Non- statutory options**

Government does not have to rely on regulation to intervene in a market and can do so by non-statutory means. Available options include: providing information to the public, training members of the occupation, provisions for setting and enforcing standards, and using its purchasing power as a major employer and purchaser of services to specify the standards it requires practitioners to meet.

Government will be reluctant to invoke statutory mechanisms in the absence of evidence of significant irreversible harm or market failure if it can point to consumer legislation, industry self-regulation or non-statutory mechanisms, as these are less costly, less risky and more flexible policy options.

The New Zealand Government is currently a dominant provider of statutory mediation and employs most full-time mediators and contracts many private mediators. Government's ability to influence occupational standards through its employment practices and purchasing power is considerable.

The existence of two established industry self-regulatory bodies that government can work with means industry and government can potentially combine their purchasing power and industry knowledge to indirectly regulate the industry. If government insists all mediators that do its work belong to AMINZ or LEADR NZ, it would be hard to argue a case for greater government intervention.

There are potential drawbacks to this arrangement. Industry's self-regulatory bodies are potentially conflicted when they are charged with protecting the

public's interests and promoting the interests of members. Questions are likely to be raised about industry's ability to handle complaints impartially (Webb, 2007).

NADRAC (2007) says that for mediation to be a viable alternative to litigation, consumers need to be confident that the quality of service to be provided will meet the standards of professionalism, accountability and ethical conduct expected from those providing legal and court-related services.

### **New Australian National Mediator Accreditation**

New Zealand tends to take its lead from Australia, which in January 2008 introduced a voluntary National Mediator Accreditation system incorporating mediator approval and practice standards. Mediators seeking accreditation will need to belong to Recognised Mediator Accreditation Body (RMAB) responsible for managing the voluntary accreditation system.

Unlike New Zealand, Australia mediators were under pressure from government to develop a national accreditation scheme as a result of rogue mediators with Mafia connections. But even then, the Australian Government opted for voluntary industry self-regulation and a commitment to set standards using its major employment and purchasing power.

### **Conclusion**

There is currently a lack of published evidence to suggest incompetent and unethical mediators are doing significant harm to parties, or the reputation of mediation and mediators. Without this, government is unlikely to regulate the market, especially when government can use its considerable power as a

significant employer and contractor of mediation services to lead and influence standards in the mediation market.

Government is also likely to be influenced by Australia, where a voluntary self-regulatory National Mediator Accreditation system was introduced in January 2008, in part to address the problem of rogue mediators. It is unlikely New Zealand will choose to do otherwise without a scandal on the scale of the real estate industry.

## **TOWARDS SYTHESISING LITERATURE AND PRACTICE**

When I first read the New Zealand literature on mediation, I was overwhelmed by the fragmented statutory framework, multiple models of mediation and the number of terminology and process issues that were raised:

While there are similarities between the different models of mediation/conciliation which are established in the statutes, there are striking differences in the ways that the models approach different process issues. These differences related to almost every area of mediation/conciliation practice .... (Baylis, 1999, p.280.)

I wondered how mediators were able to function in such a confusing environment. My decision to ask them this very question was the genesis of this research.

As I talked to mediators, a picture emerged of a professional group that thought deeply about their work, and were not troubled by the wider statutory context that lacked consistency and certainty. In mediators' minds, the mediation process was powerful, and parties were captured by that power once they began

mediation. While the public and other professionals might be confused about what mediators did and what mediation was, mediators were very clear.

The literature and practice did not seem to have the closeness I had expected and I began to look for an explanation. I realised as I read more broadly, that the issues raised by academics and practitioners were the same as those raised in other countries like Canada and Australia. Mediation was an old and wise skill, but a young profession that was still finding its identity, its boundaries, its own theoretical foundations, rules, ethics and standards.

Ideology can be an important part of any discussion of mediation definitions and the issue of neutrality. We should not pretend that there is uniform ideology present in the mediation industry. (Douglas, 2006, p.9.)

The multi-disciplinary backgrounds of practitioners, the multiple models, the diversity of settings in which mediation was practiced meant there was much to debate. Further, the eclectic nature of mediation and its links to litigation and the courts was confusing. Many people did not understand the difference between mediation and litigation.

Policy-makers and legislators had written mediation into statute law with varying degrees of understanding, sector by sector. Because mediation was slow to emerge as an alternative to litigation, policy-makers had not considered whether New Zealand needed a consistent and coherent overarching statutory framework to promote certainty and clarity. In fact, one size could not fit all as different disputes have different needs (Clapshaw & Freeman Greene, 2003).

Since 1999 when Labour came into power, state provision of mediation had expanded rapidly in policy and legislation. Yet, it was not clear that policy-makers fully understood the underpinning principles, values and strengths of interest based mediation processes as an alternative to the formal justice system

(Greenwood, 2004). Therefore, the differences in the statutes reflected the history of mediation and its slow emergence as a separate craft, profession and academic discipline with multiple facets.

Practitioners, who had grown up in this environment, had adapted to the context and were getting on with the job. The literature was seeking to achieve consistency and clarification to bring certainty to the profession and the environment in which practitioners worked. Without clarity and certainty, the mediation process might be discredited and the public and professional confusion continue.

One example of the academic literature seeking to address issues of practice is the paper written by Greenwood and Pitchforth (2007) that reviews three significant New Zealand cases where the process rules were not clear. In each case, one of the parties thought that mediation would deliver a legally right outcome and blamed the practitioner. The authors suggest that what parties expect may be distorted by the growth of alternative dispute resolution processes in the New Zealand statutory or contractual frameworks which incorporate hybrid processes inappropriately labeled mediation.

NADRAC (2006) has often referred to the need for legislative consistency, clarity and certainty when regulating alternative dispute resolution processes, including mediation. A clear framework for statutory powers, obligations and protections relies on clear definitions or descriptions of terms, including the person or body providing mediation, referring agency, process to be used and outcomes to be achieved. However, NADRAC cautions policy makers to weigh the advantages of consistency and the desirability of enabling diversity, flexibility and dynamism.

In New Zealand, LAC (2006) has produced a guide for policy-makers and legislators to use when drafting legislation. The view is that a consistent approach to defining and using alternative dispute resolution terms and

processes in legislation will help dispel the public and professional confusion about what mediation and other dispute resolution processes are, and how each process works.

## **SECTION FOUR: CONCLUSION**

My journey to understand the mediation literature, and to meld it with practice, has taught me that the literature is seeking to bring consistency, clarity and certainty to the mediation environment as mediation matures as a profession, a discipline and a viable alternative to litigation.

While the literature is largely focused on the environment, practitioners are getting on with doing the job. Mediators agreed that working across different statutory frameworks is not a problem for them in practice. They are clear what their role is and they are committed to the power of the mediation process. From that perspective, the fragmented and confused statutory framework ceases to be a burning issue.

However, policy-makers and legislators have yet to address the need for consistency, clarity and certainty in the New Zealand statutory framework. This is only likely to happen over time as legislation is amended or new legislation is passed, or if the profession out-grows its village-like closeness, informal norms of good practice erode, and problems start to pile up. The mediation profession needs to support policy-makers and legislators to understand mediation and the different sector needs.

In the meantime, practitioners and academics are concerned to protect the practice of mediation and ensure that its full potential and benefits are realised. This is why, for some practitioners and authors, there may be a case to legislate to clarify confidentiality and mediation privilege, and to prevent incompetent and unethical mediators from causing harm and give the industry self-regulatory bodies, AMINZ and LEADR NZ, formal recognition.

My own view is that government is unlikely to consider legislating in either case in the near future given: the new provisions relating to confidentiality and

mediation privilege in the Evidence Act 2006; the existence of two industry self-regulatory bodies, the lack of published evidence of significant harm, the opportunity for government to use its considerable power as a significant employer and contractor of mediation services to lead and influence the mediation market; and the introduction of a voluntary National Mediator Accreditation system in Australia.

## BIBLIOGRAPHY

- Adam, K. (n.d.). Should New Zealand pass mediation legislation [Electronic Version]. Retrieved 7 May 2007 from [http://www.leadr.co.nz/db/images/M\\_PDFs\\_articles/mediationlegislation.pdf](http://www.leadr.co.nz/db/images/M_PDFs_articles/mediationlegislation.pdf).
- Arbitrators' and Mediators' Institute of New Zealand, & LEADR NZ. (2007). *Submission to the Social Services Select Committee on the Family Court Matters Bill*. Wellington.
- Baylis, C. (1999). Reviewing statutory models of mediation/conciliation in New Zealand: Three conclusions. In *Victoria University of Wellington Law Review* (Vol. 30, pp. 270-294).
- Boulle, L., Jones, J., & Goldblatt, V. (1998). *Mediation: Principles, process, practice* (New Zealand ed.). Wellington: Butterworths of New Zealand Ltd.
- Boyle, K., & Zutter, D. L. (2006). Regulation of mediation: How could this impact your legal practice? [Electronic Version]. *Bartalk*. Retrieved 15 January 2008 from [http://www.cba.org/BC/CBA\\_Publications/bartalk\\_04\\_06/feature\\_boyle\\_zutter.aspx](http://www.cba.org/BC/CBA_Publications/bartalk_04_06/feature_boyle_zutter.aspx).
- Carden, D. M. (2005). *Confidentiality in mediation*. Paper presented at the AMINZ 2005 Annual Conference, Queenstown.
- Clapshaw, D., & Freeman-Greene, S. (2003). *A mediation act - Do we need one?* Paper presented at the AMINZ Conference, Auckland.
- Colmar Brunton. (2007). Satisfaction and trust in the State services. Retrieved 28 July 2007 from [http://www.ssc.govt.nz/upload/downloadable\\_files/satisfaction-trust-07.pdf](http://www.ssc.govt.nz/upload/downloadable_files/satisfaction-trust-07.pdf)
- Commission, L. (2004). *Delivering justice for all: A vision for New Zealand courts and tribunals*. Wellington: Law Commission.
- Crosbie, F. (n.d.). Confidentiality in mediation. Retrieved 14 December 2007 from [http://www.leadr.co.nz/db/images/M\\_PDFs\\_articles/confidentiality.pdf](http://www.leadr.co.nz/db/images/M_PDFs_articles/confidentiality.pdf)
- Dell, J., & Franks, P. (2007). *Mediation in the statutory context: Employment mediation in New Zealand*. Paper presented at the 9th LEADR International Dispute Resolution Conference, Wellington.

- Douglas, K. (2006). National Mediator Accreditation System: In search of an inclusive definition of mediation [Electronic Version]. *The Arbitrator & Mediator*. Retrieved 12 January 2008 from <http://www.iama.org.au/pdf/jlv25n01.pdf>.
- Duffy, A. (1996). ADR: Consequential civil liability. *New Zealand Law Journal*(July), 271-280.
- Dugan, M. A. (2004). Legitimacy. Retrieved 14 September 2007 from <http://www.beyondintractability.org/essay/legitimacy/>.
- Employment Law Bulletin (NZ). (2006). Editorial note. Retrieved 17 December 2007 from [http://www.lexisnexis.com.helicon.vuw.ac.nz/nz/legal/results/docview/docview.do?risb=21\\_T2720909489&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2720909492&cisb=22\\_T2720909491&treeMax=false&treeWidth=0&csi=274474&docNo=3](http://www.lexisnexis.com.helicon.vuw.ac.nz/nz/legal/results/docview/docview.do?risb=21_T2720909489&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2720909492&cisb=22_T2720909491&treeMax=false&treeWidth=0&csi=274474&docNo=3)
- Goldblatt, V. M. (2000). Confidentiality in mediation. *New Zealand Law Journal*(October), 392-400.
- Goldblatt, V. M. (2001). The mediation market: Demanding the supply. *The New Zealand Law Journal*(August), 273-275.
- Greenwood, G. (2004). Mediation in the mainstream: Critical issues. In *Massey University Book of Readings (2004): Mediation Practice 153.305*. Palmerston North: Massey University.
- Greenwood, G., & Pitchforth, R. (2007). *Creative DIY processes versus standard procedures: Where is alternative dispute resolution heading?* Paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference 3-5 August 2007., New Zealand.
- International Bar Association Legal Practice Division (Ed.). (2007). *Newsletter mediation* (Vol. 3). Montreal: International Bar Association.
- Kovach, K. K. (2005). The collision of two ideas: legal ethics and the world for alternative dispute resolution. *Ohio State Journal on Dispute Resolution*, 21 (Symposium Issue), 123.
- LEADR. (2006). Submission – National Mediator Accreditation System. Retrieved 12 January 2007 from [www.mediationconference.com.au/html/LEADR.doc](http://www.mediationconference.com.au/html/LEADR.doc)

- Legislation Advisory Committee. (2006). Alternative dispute resolution clauses in legislation (Draft). In *Guidelines on Process and Content of Legislation*. Wellington: Legislation Advisory Committee.
- McDowell, M., & Webb, D. (2004). *The New Zealand legal system: Structures and Processes* (4th ed.). Wellington: LexisNexis NZ Ltd.
- Ministry of Economic Development. (1999). Policy framework for occupational regulation: A guide for government agencies involved in regulating occupations. Retrieved 26 November 2007 from [http://www.med.govt.nz/templates/MultipageDocumentPage\\_\\_\\_\\_\\_9117.aspx](http://www.med.govt.nz/templates/MultipageDocumentPage_____9117.aspx)
- Ministry of Justice. (2004). Government response to Law Commission report on Delivering justice for all [Electronic Version]. Retrieved 2 July 2007 from <http://www.justice.govt.nz/pubs/reports/2004/delivering-justice-for-all/delivering-justice-for-all.pdf>.
- Ministry of Justice. (2007). The Government's preferred options for reform of the Real Estate Agents Act 1976. Retrieved 12 June 2007 from <http://www.justice.govt.nz/pubs/reports/2007/real-estate/real-estate-discussion-document.pdf>
- National Alternative Dispute Resolution Advisory Council. (2001). Report to the Commonwealth Attorney-General: A framework for ADR standards. Retrieved 29 July 2007 from [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(A0E22772974CC5513F69378CCFF57C2\)~Framework+of+Report+Body.pdf/\\$file/Framework+of+Report+Body.pdf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(A0E22772974CC5513F69378CCFF57C2)~Framework+of+Report+Body.pdf/$file/Framework+of+Report+Body.pdf).
- National Alternative Dispute Resolution Advisory Council. (2003). Dispute resolution terms. Retrieved 29 November 2007 from [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~1Report8\\_6Dec.pdf/\\$file/1Report8\\_6Dec.pdf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_6Dec.pdf/$file/1Report8_6Dec.pdf)
- National Alternative Dispute Resolution Advisory Council. (2006). Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters,. Retrieved 26 August 2007 from [http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(4E2835B4F8B57940ABC167963688429C\)~Legislating+for+alternative+dispute+resolution.pdf/\\$file/Legislating+for+alternative+dispute+resolution.pdf](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(4E2835B4F8B57940ABC167963688429C)~Legislating+for+alternative+dispute+resolution.pdf/$file/Legislating+for+alternative+dispute+resolution.pdf).
- Powell, C. (2007). Confidentiality in mediation. *New Zealand Law Journal*(May), 139-140.

- Powell, C. (2007). Evidence Act 2006 - Recognises Mediation Privilege: unpublished.
- Professor Sourdin, T. (n.d.). Researching ADR [Electronic Version]. Retrieved 27 August 2007 from <http://www.leadr.com.au/SOURDIN.PDF>.
- Randall, G. E. (2000). Understanding professional self-regulation. Retrieved 15 January 2008 from [http://www.collegeofparamedics.sk.ca/Word\\_Docs/Self%20Regulation%20Article.pdf](http://www.collegeofparamedics.sk.ca/Word_Docs/Self%20Regulation%20Article.pdf).
- Robson, S. (2006). *Jesudhass v Just Hotel Ltd*. Retrieved 17 December 2007 from [http://www.leadr.co.nz/db/images/M\\_PDFs\\_articles/confidentialityinmediation.pdf%20](http://www.leadr.co.nz/db/images/M_PDFs_articles/confidentialityinmediation.pdf%20).
- Sharp, G. (Not dated). The future of mediation: Random thoughts. Retrieved 26 August 2007 from [http://www.leadr.co.nz/db/images/M\\_PDFs\\_articles/thefutureofmediation.pdf](http://www.leadr.co.nz/db/images/M_PDFs_articles/thefutureofmediation.pdf).
- Slate II, W. K., Liberman, S.H., Weiner, J.R., Micanovic, M. (2005). UNICTRAL its workings in international arbitration and a new model conciliation law. *Cardozo Journal of Conflict Resolution*, 6(1), 73-96.
- Sourdin, T. (2005). *Alternative dispute resolution* (2nd ed.). Sydney: Lawbook Co.
- Sourdin, T. (2007). Australian national mediator standards: Approval standards. Retrieved 6 December 2007 from [http://www.uq.edu.au/acpacs/documents/mediation/mediation\\_approval\\_standards.pdf](http://www.uq.edu.au/acpacs/documents/mediation/mediation_approval_standards.pdf).
- Sourdin, T. (2007). Australian national mediator standards: Commentary on approval standards. Retrieved 6 December 2007 from [http://www.uq.edu.au/acpacs/documents/mediation/mediation\\_comment\\_approval\\_standards.pdf](http://www.uq.edu.au/acpacs/documents/mediation/mediation_comment_approval_standards.pdf).
- Sourdin, T. (2007). Australian national mediator standards: Commentary on practice standards. Retrieved 6 December 2007 from [http://www.uq.edu.au/acpacs/documents/mediation/mediation\\_comment\\_practice\\_standards.pdf](http://www.uq.edu.au/acpacs/documents/mediation/mediation_comment_practice_standards.pdf).
- Sourdin, T. (2007). Australian national mediator standards: Practice standards. Retrieved 6 December 2007 from

- [http://www.uq.edu.au/acpacs/documents/mediation/mediation\\_practice\\_standards.pdf](http://www.uq.edu.au/acpacs/documents/mediation/mediation_practice_standards.pdf).
- Stanhope, J. (n.d.). The ACT's support for mediation: Legislation, competency standards and approaches to conferencing and restorative justice. Retrieved 26 August 2007 from <http://www.leadr.com.au/STANHOPE.PDF>.
- State Services Commission. (2006). Development goals for the State services. Retrieved 28 July 2007 from [http://www.ssc.govt.nz/upload/downloadable\\_files/Development-Goals-diagram.pdf](http://www.ssc.govt.nz/upload/downloadable_files/Development-Goals-diagram.pdf)
- State Services Commission. (2006). State of the development goals report 2006. Retrieved 28 July 2007 from [http://www.ssc.govt.nz/upload/downloadable\\_files/sdg-report06.pdf](http://www.ssc.govt.nz/upload/downloadable_files/sdg-report06.pdf)
- Thomson Brookers. (2007). Confidentiality [Electronic Version]. Retrieved 16 December 2007 from [http://www.brookersonline.co.nz/helicon.vuw.ac.nz/databases/modus/adr/adrnp/adrnp\\$12F?sid=q1wsis4xvalmqpuklfx2tr1aud0n1jvw&hli=5&sp=adrnp&si=57359](http://www.brookersonline.co.nz/helicon.vuw.ac.nz/databases/modus/adr/adrnp/adrnp$12F?sid=q1wsis4xvalmqpuklfx2tr1aud0n1jvw&hli=5&sp=adrnp&si=57359).
- Tillett, G. (2004). Terminology in dispute resolution: A review of issues and literature. *Australasian Dispute Resolution Journal* 15, 178.
- United Nations. (2004). UNCITRAL model law on international commercial conciliation with guide to enactment and use 2002, [Electronic Version]. Retrieved Retrieved from <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>.
- Wassner, B. (n.d.). A uniform national system of mediation in the United States: Requiring national training standards and guidelines for mediators and state mediation programs *Cardozo Journal of Conflict Resolution*, 4(1), 1-22.
- Weavers, M. (2002). Confidentiality in mediation. Retrieved 17 December 2007 from [http://www.leadr.co.nz/db/images/M\\_PDFs\\_articles/confidentialityinmediation.pdf%20](http://www.leadr.co.nz/db/images/M_PDFs_articles/confidentialityinmediation.pdf%20).
- Webb, D. (2007). Are lawyers regulatable? [Electronic Version]. *SACL Research Seminar Series*. Retrieved 17 September 2007 from [http://www.victoria.ac.nz/sacl/research/researchseminarseries/2007/dw\\_200907.pdf](http://www.victoria.ac.nz/sacl/research/researchseminarseries/2007/dw_200907.pdf).

Weimer, D. L., & Vining, A. R. (1999). *Policy analysis: Concepts and practice* (3<sup>rd</sup> ed.). Upper Saddle River, New Jersey: Prentice-Hall, Inc.

Wood, G. J. (2006). Mediation - an Employment Relations Authority perspective. Retrieved 17 December 2007 from [http://www.lexisnexis.com.helicon.vuw.ac.nz/nz/legal/results/docview/docview.do?risb=21\\_T2720909489&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2720909492&cisb=22\\_T2720909491&treeMax=false&treeWidth=0&csi=274474&docNo=4](http://www.lexisnexis.com.helicon.vuw.ac.nz/nz/legal/results/docview/docview.do?risb=21_T2720909489&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2720909492&cisb=22_T2720909491&treeMax=false&treeWidth=0&csi=274474&docNo=4).

## APPENDIX ONE: GLOSSARY

**Accreditation:** Accreditation is a process of formal and public recognition and verification that an individual, or organisation, or programme meets and continues to meet, defined criteria.

An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met. (NADRAC, 2006, p.50.)

**Registration:** requires service providers to be on a register if they want to practice. It does not restrict entry to an occupation or give any information about competence or quality of service. (Ministry of Economic Development; 1999)

**Certification:** tells the public a practitioner is competent in a particular field when certified, and gives exclusive rights to use a title. People who are not certified can still offer their services and compete with certified practitioners, but they must do so under a different title. Certification does not deal with the quality of work done or the competence of the practitioner once they are certified. (Ministry of Economic Development; 1999)

**Licensing:** explicitly prohibits all but licensed persons from offering certain services and is the least flexible and costly form of regulation. While licensing minimises the risk to the public from unskilled practitioners, it does not usually deal directly with the continuing relevance of those standards or current competencies of the practitioner. (Ministry of Economic Development; 1999)

## APPENDIX TWO: EMPLOYMENT CASES WITH IMPLICATIONS FOR CONFIDENTIALITY

### Jesudhass v Just Hotel Ltd

In *Jesudhass v Just Hotel Ltd*<sup>12</sup>, the Employment Court was asked to determine the extent to which communications between the parties in mediation could be admitted in evidence under s.148 Confidentiality of the ERA. The Court looked for guidance in interpreting s. 148 of the ERA by looking at the interpretation placed on comparable confidentiality provisions in nine other New Zealand statutes. There had been judicial decisions interpreting and applying some of these provisions but not others.

The Court expressed concern that by not admitting evidence of misleading or unlawful statements made during mediation, there was a danger that the employment institutions could be perceived as failing to encourage parties to deal with each other in good faith. The Court ruled the protections of s.148, including inadmissibility, are lost where communications in mediation are not genuinely for the purpose of settling litigation or potential litigation (Robson, 2006).

This decision is notable because it differs from prior decisions where the Employment Court interpreted s. 148 strictly and ruled all evidence of what occurred in the mediation was inadmissible, including misrepresentation of the facts, “causing parties to suffer injustice” (Robson, 2006, p.2).

---

<sup>12</sup> Ibid

### Plimmer v Hawkesbury Community Living Trust

In *Plimmer v Hawkesbury Community Living Trust*<sup>13</sup>, the Employment Authority considered whether revealing the identity of the people who attended mediation and describing their behaviour<sup>14</sup> to a work colleague, was information protected by s. 148 of the ERA. The Authority concluded that the wording of s. 148 was very clear and confidentiality only extended to statements or admissions made in mediation, documents created for the purposes of mediation and any information disclosed orally. Therefore, there was no prohibition on identifying who attended the mediation or on disclosing reactions of participants during the mediation process (Powell, 2007).

The *Plimmer v Hawkesbury Community Living Trust* decision may have paved the way for parties to share the fact they have been to mediation and who was present with non-parties. It also means that, in some circumstances at least, parties can describe behaviour that occurred within the mediation room. Until now, mediators believed that everything that went on in the mediation room, including the names of those present and their behaviour, was confidential.

---

<sup>13</sup> Employment Relations Authority, CA 31/07, 28 March 2007, Montgomery J.

<sup>14</sup> In this case, one of the parties burst into tears and left the mediation room.