
Should New Zealand pass mediation legislation?

“An analysis of whether the current state of mediation practice in New Zealand requires legislative intervention, and if so, what form it should take ”

Table of contents

<i>Topic</i>	<i>Section</i>	<i>Page</i>
Introduction	1	2
The current situation	2	2
What is a Mediation Act?	3	3
Reasons for enacting a Mediation Act	4	4
Reasons against enacting a Mediation Act	5	6
The likely effects of the Act on stakeholders	6	7
Consumers of mediation	6.1	7
Mediators and lawyers	6.2	8
Practitioners’ responses to the proposed law	7	8
Alternative methods of regulation	8	9
What the Act should and should not include	9	11
Conclusion	10	15
Appendix A – Mediation Act 2002 (<i>draft</i>)	11	16

(1) Introduction

The mediation industry in New Zealand has experienced significant growth in the last decade, in conjunction with a rise in the popularity of other forms of alternative dispute resolution (ADR). Whilst some areas of ADR, such as arbitration, have been subjected to government regulation¹, mediation has remained largely unfettered. Perhaps this is because the mediation industry has been so successful in self-regulating participants that there has been no perceived need for interference. This, however, is not thought to be the case; some aspects of mediation engender inequitable outcomes, others suffer from excessive uncertainty. Despite these shortcomings, the practice has escaped intervention - largely as a result of being overlooked, it is submitted.

The central premise of this essay is that there is a genuine need for the field to be reformed, and that this would best be accomplished by an Act of Parliament. Reasons in support of such a stance will be explored in the fourth section, followed by a review of the counter arguments.

If such an Act were introduced in New Zealand, it would have important effects on mediators, lawyers engaged in mediation and on parties involved. A discussion of these effects can be found in section six. The most significant impact is likely to be on mediators. For this reason, the attitudes of several professional mediators regarding the ramifications of the Act were sought; the results are presented in the seventh section.

An Act of Parliament is rarely the only way to address a shortcoming or deficiency in society, and this is true for mediation also. Several alternative models of regulation will therefore be examined in the eighth section.

Having arrived at the conclusion that legislation is desirable, the final section of the essay will examine which aspects of mediation should be controlled by the Act, and which Parliament should set aside for self-regulation. In addition, a draft version of the proposed Act may be found in Appendix A.

(2) The current situation

The increased role of mediation in recent times is demonstrated by the greater incidence of parties voluntarily entering mediation as an alternative to the court system, and the increased recognition of the process by Courts² and the

¹ Arbitration Act 1996

² For example, the High Court Case Management procedure, which promotes mediation

Legislature³. It is surprising that with so much development in the field, there are nonetheless sparse controls and protections in place⁴. This lack of restriction can adversely affect consumers; any person can present themselves as a ‘mediator’ - no particular training or experience is required. Also, the term ‘mediator’ itself is not standardised; a party may be expecting a mediation and in fact become involved with a person who issues orders or decisions; a process more in the nature of an arbitration. In addition, few sanctions exist for mediators who act unprofessionally or unethically during mediations. This is especially so for mediators not members of an ADR organisation. Furthermore, important aspects of most mediations, such as the requirement for confidentiality, are often only embodied in the mediation agreement, a document which may be poorly drafted or incomplete.

Correspondingly, mediators fare poorly under the current system; they are not protected against legal action unless the mediation agreement provides for this. Also, they may face difficult ethical dilemmas, for example a question of whether a breach of confidentiality is permitted in a particular situation for which they have no recourse to legal rules to resolve. The lack of a universal registration system makes it harder for *bona fide* mediators to differentiate themselves from ‘fly by night’ operators.

The above shortcomings are, in some respects, ameliorated by the presence of mediators’ bodies such as AMINZ⁵ and LEADR⁶. These organisations provide for a system of registration of members and have codes of conduct. Procedures are in place for breach of these codes. However, these two bodies do not fully address the problems noted above; membership for mediators is voluntary, and the two have different, sometimes inconsistent codes of conduct. In addition, the organisations do not (and cannot) grant immunity from prosecution for members.

Therefore, despite the existence of such organisations, New Zealand is clearly in need of statutory reform to the mediation field. The next section will discuss which type of reform is being proposed.

(3) What is a Mediation Act?

Before addressing the issue of the effects of mediation legislation and the advantages and disadvantages thereof, it is important to clarify what it is that is being proposed. This section will merely give the rudimentary features of the legislation; a more detailed proposal may be found in sections 9 and 11.

³ For example, the compulsory mediation provisions in the Residential Tenancies Act 1986, Human Rights Act 1993, Employment Relations Act 2000 *et al.*

⁴ Redfern M, “Standards for Victorian Mediators” [1997] Australian Dispute Resolution Journal 8(1) 135

⁵ Arbitrators’ and Mediators’ Institute of New Zealand

⁶ Lawyers Engaged in ADR

Essentially, a piece of mediation legislation (hypothetically called the ‘Mediation Act 2002’ here) would establish a body of rules that govern those involved with mediation in New Zealand. The Act would be relatively similar to that passed recently by countries such as Australia⁷ and the United States⁸.

The objective of the Act would be something akin to “to establish a system of rules which govern mediators and parties involved in the mediation process in New Zealand. These rules will ensure mediations are fair, effective, and efficient”

The principal areas which the Act would address are:

- Define the terms “Mediator” and “Mediation”
- Provide for a system of registration for mediators, and for dismissal for gross misconduct
- Codify some aspects of professionals’ standards, especially those with respect to confidentiality and conflict of interest
- Provide for immunity from prosecution for mediators
- Establish that mediation communications and documents are inadmissible in court proceedings

The above provisions will, it is submitted, largely address the shortcomings of the current system. Nonetheless, the proposed law has some disadvantages associated with it. These pros and cons are the focus of the next section.

(4) Reasons for enacting a Mediation Act

Promotes awareness of mediation and enhances its credibility

The fact that the Legislature has taken note of mediation and established a body of registered mediators at law will most likely increase the credibility of the process in the eyes of potential mediation clients and lawyers. This may well result in more disputes being referred to mediation; disputants who had, under the existing system, heard of mediation but never seriously considered it— perhaps because they had thought that to suggest mediation would be seen as a sign of weakness - may turn to the state-endorsed mediation process, because of its higher perceived professionalism.

Clarifies and codifies some problematic standards

As noted above, current standards provided by AMINZ and LEADR are relatively broad and somewhat incongruent. The Act would prescribe specific guidelines for practice and give clear circumstances when an exception to these is permitted. For

⁷ ACT’s Mediation Act, for example

⁸ The Uniform Mediation Act, which has been approved for acceptance in 46 US States

example, the Act would specify situations in which the mediator is required to disclose a potential conflict of interest, in the same manner that the Uniform Mediation Act does⁹.

Such clear guide lines are important to both mediators and to parties; for mediators they provide signals of appropriate conduct, and for parties they define what may be expected of the mediator and ensure that the mediator can be held accountable to the prescribed standards.

Provides statutory protection for confidentiality

The confidentiality of the mediation process is often cited as one of its key attributes. However, the current system by no means guarantees that information presented during proceedings or the outcome reached will remain in camera. This is the case even where the parties specifically provide for confidentiality in their mediation or settlement agreement. As noted in a recent article by Goldblatt¹⁰, confidentiality provisions may be ineffective because parties simply choose to ignore them, knowing that the legal redress available to the other party is limited¹¹. In any event, the other party will often be reluctant to bring legal action, conscious of the further unwanted publicity it would bring.

The Act would grant extensive protection to the privacy of the proceedings and specify sanctions for the breach of this. Similar to the ACT's Mediation Act 1997, specific instances in which this protection may be transgressed would be given, for example, when there is threat of bodily injury¹². It is thought that this clear legislative decree of the confidentiality of the proceedings, backed by onerous consequences of a breach, would do much to affirm this cornerstone of the mediation process.

Protects mediators

Under the current system, mediators may be liable at law for their acts or omissions during the mediation unless they provide for an immunity in their mediation agreement. Actions in defamation, the tort of breach of privacy and negligence are conceivable. It is submitted that such an uncertain environment is by no means conducive to the effective resolution of disputes. A mediator should be afforded

⁹ Section 9 requires a mediator to investigate whether any conflicts of interest exist and report on any material ones which are found.

¹⁰ Goldblatt V, "Confidentiality in Mediation" 2000 NZ Oct Law Journal 392

¹¹ Where a contractual obligation of confidentiality exists and this is breached, the other party will generally be entitled to not perform their end of the bargain; for example, refrain from paying money. However, where money is already paid when the disclosure occurs, the cost of recovering it may not be justified, especially when the amount paid is small. It is the knowledge of this fact that may lead parties to disclose information.

¹² The ACT's legislation, for example, provides in s 10 (d)(i) that a breach of confidentiality is permitted where a person's "life, health or property are under serious and imminent threat".

the same protections as a High Court judge, as is the case in the ACT¹³. A mediator's role is, in some sense, not dissimilar to a judge's; both are, ideally at least, impartial, neutral people who hear a dispute and facilitate a resolution. Both should be protected from legal claims when acting within the realm of their duty and in good faith. One of the important provisions of the New Zealand Mediation Act would provide for this immunity.

(5) Reasons **against** enacting a Mediation Act

The Act represents a move towards a more formal, less flexible system

Typically parties opt to enter mediation rather than litigation or arbitration because the process is comparatively cheap, expeditious and remains within the parties' control. One of the chief objections to the proposed law is that these elements will be diminished under it; by introducing more rules and requirements, mediation will take on the characteristics of the very system it was meant to offer an alternative to¹⁴. An interesting analogy is provided by Satkunasignam¹⁵; he contends that mediation, if placed under a legislative shroud, would suffer the same fate as afflicted equity over time; equity, too, was developed to augment the prevailing system of law, which was seen as unsatisfactory. Equity became, like mediation would become under the Act, "rigid and formalistic"¹⁶ and lost its key attractive elements. Thus, the author contends, the history of equity provides a resolute warning that mediation should not become too rigorous.

The Act is superfluous as it replicates existing practices

To some extent, it is correct that the proposed Act would merely codify the current position rather than instigating widespread change in the mediation field; for example, registration procedures are already in place under AMINZ and LEADR and most mediation agreements currently provide for immunity from prosecution. A possible objection to the Act is, therefore, that it is redundant and therefore unnecessary.

This objection to the legislation is, however, not well founded, it is contended. Whilst it is accepted that in, some aspects, the Act goes no further than to embody current practices in statute, it is thought that this is not inherently undesirable. In fact, Parliament often passes Acts which merely declare and clarify the status quo¹⁷.

¹³ Section 12 of the Mediation Act provides that a registered mediator has the same protections as a Supreme court judge, provided the mediator is acting in good faith.

¹⁴ Satkunasignam M, *ADR: Justice through new lenses* (2000) (unpublished thesis, University of Auckland) 95

¹⁵ *Ibid* 95

¹⁶ *Ibid* 92

¹⁷ For example, Insurance Intermediaries Act 1994

Secondly, it is accepted that the Act does not provide wholesale reform to the mediation field. This, however, was not required in the first place; on the whole, mediation as it stands is an excellent method of dispute resolution, and parties are generally served well by it. All that is required, as noted earlier, is a reform of particular aspects of the field. This is exactly what the Mediation Act would achieve.

Inadmissibility of evidence provisions are undesirable

The Mediation Act would provide that, subject to the exceptions discussed below, communications and documents related to a mediation cannot be admitted as evidence in courts or tribunals. While this fetter on information is largely seen as positive, it can also have important adverse effects. Investigations regarding the conduct of parties, for example an inquiry by the Commerce Commission into alleged price fixing, may be hampered if important documents or discussions are not available because they formed part of a mediation. This could, in an extreme case, lead to the failure of a meritorious allegation against a party, simply due to the inadmissibility of evidence.

To address this potential shortcoming, the Act would include a proviso to the general privileged nature of mediation, to allow disclosure in certain circumstances.

(6) The likely effects of the Act on stakeholders

(6.1) Consumers of mediation

The proposed legislation would engender three primary consequences for consumers of mediation. First, it would grant consumers more certainty about the mediation process. This is particularly the case for issues surrounding confidentiality and disclosure of information gleaned from a mediation; the Act would inform a party as to what types of disclosure are permissible and which sanctions may lie for a breach of the provisions.

Secondly, the Act would make parties more aware of the rights they have in the mediation process, and the expectations they could reasonably have of the process and its outcomes. So, for example, potential mediation clients will know that if they opt to enter a mediation, they can reasonably expect the mediator to be accredited and experienced. Also, that party will be able to refer to the Act to ascertain what recourse is available if they feel the mediation has suffered from the bias of the mediator.

Thirdly, the legislation will raise the profile of mediation and make consumers more aware of it as an option for dispute resolution. It is also likely that the process

will, as a result of the increased perceived professionalism, gain higher regard in situations where it was previously looked down upon.

The chief consequences for clients are, therefore, positive. As a result, it is thought that the Act will increase the use of mediation services in New Zealand.

(6.2) Mediators and lawyers

Under the statute, mediators would enjoy immunity from prosecution whilst acting in the capacity of a mediator. In addition, they would have access to clear, binding guidelines on a range of issues which arise in mediation – for example, a mediator would be confident that a settlement reached will be recognised at law, as provided for in the Act. Thirdly, if the Act were passed, mediators would need to apply to become a registered mediator under the Act. For the majority of practicing mediators, especially those already registered with AMINZ or LEADR, this would not pose a problem, as they will already have the attributes required of mediators under the Act. Some practitioners would need to undertake extra training in order to meet the standard required. These are likely to be the three most noticeable effects of the Act on mediators.

Lawyers engaged in mediation would find it easier to give clear and certain legal advice to their clients. They would, for example, be able to provide a party with a clear statement of the circumstances in which that party may validly breach a confidentiality clause. In general, however, the legal profession would not be significantly affected by the new legislation, it is submitted. Potentially, if the Act succeeds in increasing the prevalence of mediation, lawyers would notice a change in the nature of the service they provide; rather than assisting with litigation and providing traditional legal advice, the practitioners may find themselves increasingly acting for parties engaged in mediation.

(7) Practitioners' responses to the proposed law

Of the various participants in the mediation process, it is contended that the Act would most profoundly affect mediators. Therefore, to fully investigate the consequences of the proposed law, it is important to ascertain what changes mediators feel the Act would bring and whether these would be advantageous. Seven practising mediators, all working in Auckland, were asked to provide feedback with respect to this.

The general theme to the replies was that the Act was a move forwards and that it would provide important safeguards and clarifications for mediators and parties. The mediators typically emphasised the immunity from prosecution and confidentiality provisions as welcome terms. Many noted, however, that such provisions were almost universally made in current mediation agreements. It was

generally felt that the Act would not have far reaching consequences for mediators, but that it would be advantageous insofar as it ‘tidied up’ and clarified some aspects of the field. For example, Anna Quinn¹⁸ thought it would be beneficial to have a statutory definition of the term “mediation” and a rule prescribing what type of people can validly give themselves this title.

Several of the practitioners were wary of the legislature’s involvement in the mediation process. Elizabeth Longworth¹⁹, for example, pointed out that although the Act as proposed is largely desirable, it is typical of the New Zealand legislature to follow up an Act with far reaching and troublesome amendments. Tony Dean²⁰ made comments in a similar vein; he felt that the Act would do little but codify existing practices and the few changes which it did make would largely result in the current attractions of mediation – such as its voluntary and flexible nature - being diminished.

All of the mediators who replied were members of the LEADR body. Generally speaking, members of this organisation and AMINZ would not be significantly affected by the proposed legislation; they would qualify for registration under the Act, and they already use safeguards like extensive mediation agreements to cover confidentiality concerns. It is more likely to be those mediators who operate in a less reputable manner on the periphery of the industry which would feel threatened by the Act and would oppose it. This latter group of mediators was not interviewed due to the difficulty of identifying them, but they certainly would provide an interesting avenue for further research.

(8) Alternative methods of regulation

The aforementioned shortcomings of the current self-regulated system provide an impetus for change of some form to occur. It is, however, not the case that the only viable method of bringing about an improvement in the field is by means of an Act of Parliament. Two alternative schemes, incorporation of mediation into the judiciary and regulation of mediation via court rules, are explored below.

Incorporation of mediation into the judiciary

For many centuries, the judiciary has specialised in resolving disputes between groups and between individuals. Although the primary offering of the Courts has always been the right to bring an action against another and have the dispute ruled

¹⁸ Anna Quinn, Anna Quinn & Associates, Auckland. LEADR Advanced Panel of Mediators member

¹⁹ Elizabeth Longworth, Longworth Associates, Auckland. LEADR Advanced Panel of Mediators member

²⁰ Privately employed mediator, Auckland. . LEADR Professional Panel of Mediators member

upon, there is no cogent reason why the New Zealand Court structure could not broaden its scope to embrace a Mediation Division.

In such a Division, mediators would be appointed in a similar manner to that which District and High Court judges currently are, and would be employed in permanent positions. Disputes would be heard in the Mediation Division as a result of the parties agreeing to use this process rather than the traditional litigation division. Alternatively, a dispute may be referred to the Mediation Division by a judge in a litigation, if he or she feels the issue would better be resolved in the alternative forum. It is envisaged that the Division would have several specialist mediation sub-units; such as a General, Tenancy, Environmental, Commercial & Employment section. This would be advantageous as it would allow specialist mediators and processes to operate in each unit.

Not all disputes would be suitable for resolution in the Mediation Division. For example, fraud and drink driving cases are thought to be better resolved under the traditional method of a public prosecutor presenting a case against the accused. To avoid uncertainties arising, a set of guidelines regarding which cases and circumstances which are fit for transferral to the Mediation Division would be required.

This proposed introduction of 'public' mediation would not necessarily spell the end of private mediation; after all, in the current situation a similar type of public/private parallel system exists – arbitration, which in many respects a private court hearing, is not only permitted, but encouraged.

Evaluation

What is being proposed is undoubtedly a large scale change to the nature of the court system; in the Mediation Division, outcomes are not imposed upon parties, and entrenched concepts such as precedent, examination on oath, discovery of documents and the right to appeal are (largely) absent.

Upon closer inspection, it is thought that the proposal is largely infeasible. The idea is most likely to be politically extremely unpopular, since it would involve significant implementation costs, and would most likely lead to job losses in the private mediation area and affiliated industries.

This aside, the mediations that are conducted under a wing of the Court structure may well not be particularly effective; the bureaucracy and formality of the traditional court structure would, to some extent, encroach upon and potentially smother the mediation process. Also, the confidential and expeditious nature of mediation could be under threat.

Manage mediation through a system of Court rules

In a recent article²¹, Michael Redfern surveyed the shortcomings of the mediation sector in Victoria, Australia and noted:

“Whether the courts like it or not, it would appear that the only appropriate course for them to adopt is to become far more involved in the [mediation] process and to develop rules specifically regulating the mediation process”²²

A similar argument can be made for New Zealand. The proposition has certain appeal; it would then be possible to link the benefits of the mediation process with the supervisory strength of the courts. The result would be that parties could engage in private mediations with minimal interference from an external source, but still have the important ability to fall back on the courts protective and authoritative controls²³.

Current New Zealand High Court rules²⁴ state that a judge may direct parties to mediation if they consent to this, but the rules do not go further and define or regulate the process. To implement the above proposal would require that these rules be substantially increased in scope and detail.

Evaluation

One of the important positive consequences of the passage of a Mediation Act is the increased awareness of mediation and the enhanced credibility of the process. It is thought that to bring about changes to mediation by means of High Court rules will not be as effective in realising this desirable consequence.

In addition, the rules may be less accessible to consumers of mediation than an Act would be. This may mean that, for example, a party is unaware of the provisions relating to the enforceability of mediation agreements.

For these reasons, it is felt that an Act is preferable to an amendment to the rules of the Court for effecting change in the mediation sector.

(9) What the Act should and should not include

This section proceeds on the basis that an Act will be adopted in New Zealand, and it attempts to answer the question; ‘Which elements of the mediation field should be regulated and which should be left untouched by the Act?’.

²¹ Redfern, *supra* note 4

²² *Ibid* 141

²³ *Ibid* 142

²⁴ Rule 437(8), Part III, High Court Rules (amongst others) allows this

New Zealand is in an enviable position, in that it has the ability to draw on the experiences of the mediation field in foreign jurisdictions – such as the US and Australia – under their recent mediation legislation. A review of the material²⁵ discussing the various portions of their legislation has informed much of the ensuing discussion.

What the Act should include

A definition of the terms “mediator” and “mediation”

At present, there is little consistency in the definition of what a mediator or a mediation is²⁶; for example, can a mediation be presided over by a person who makes decisions, or is this process no longer correctly called ‘mediation’?

A section providing definitions is an important and fundamental part of the Act and would largely solve these types of problems.

A registration process based on qualifications and experience

This aspect of the Act is one of the more difficult ones. The administrator of the Mediators’ Institute of NZ, Anna Stallworthy, believes it is difficult to measure competency in mediation – she states that “the interaction between mediator and the parties is a very subtle one and [when trying to define competency] you start debating whether we are talking about a set of techniques or an art form or a philosophical stance”²⁷.

This difficulty is also reflected by the diverse ways in which Australian legislation deals with this issue; some Acts²⁸, for example, merely require the mediator to be “suitably qualified and experienced persons”, while others require a judge or warden of the Court²⁹.

Despite this obvious complexity in arriving at a set of standards required of mediators who wish to be registered under the new Act, it is an integral part of the legislation. It is thought that the current standards employed by AMINZ and LEADR provide a useful model for New Zealand’s legislative accreditation system. These systems involve a panel interview and a review of the applicant’s experience and qualifications. Accreditation is possible on multiple levels; for example, the

²⁵ Of particular relevance is discussion of the draft of the US Act; Appel M, “Revised UMA draft released” (2001) 56 (2) Dispute Resolution Journal 96 and supra, note 4, at 135

²⁶ This is also true in some Australian states; see Altobelli T, “NSW ADR legislation: the need for greater consistency and co-ordination” (1997) 8(3) Australian Dispute Resolution Journal 200

²⁷ Stallworthy, Anna as quoted in “Avoiding the Courts- New ways to resolve disputes” *NZ Business* Oct 1994, 24

²⁸ Farm Debt Mediation Act 1994, s12(1)

²⁹ Native Title (NSW) Act 1994

Australian wing of LEADR has ‘Accredited members’ and ‘Advanced Accredited members’, the latter being those who have over 150 hours of mediation experience.

The New Zealand Act should follow the example set by the ACT’s Mediation Act 1997 and allow “approved agencies” to process and determine the outcomes of registration applications. This would be a sensible use of resources – rather than establish a separate government department to deal with registrations, existing organisations are used. It is envisaged that AMINZ and LEADR would be the two “approved agencies”, at least initially.

Clear guidelines on confidentiality and sanctions for breach

Whilst Courts will generally lean towards upholding confidentiality provisions in mediation agreements³⁰, difficulties and a lack of certainty still afflict this area, as discussed above. The system would be more secure if “steps, legislative or judicial, were taken to ensure consistency and certainty in the treatment of information disclosed during the course [of a mediation]”³¹.

The Act should incorporate a broad statement to provide cover for information disclosed during mediations. The law should include evidentiary exclusions, which prohibit parties from adducing evidence from a mediation in a court process. However, it is important that the Act not stop here, but rather incorporate disclosure to the world at large also³².

To supplement this general statement, sanctions for breaches and clear circumstances in which a mediator or a party may deviate from the general rule need to be included. An example of the latter is s 6(3) of the Uniform Mediation Act which allows a deviation where criminal activity or plans to use violence are involved.

Terms regarding the enforceability of mediation agreements

Whether in a business or personal context, parties (almost) invariably seek a final and binding resolution to the issue at hand when they participate in dispute resolution processes. It is therefore vital to the credibility and efficacy of mediation that the process provides robust and legally valid outcomes. It is submitted that the Act should incorporate a section to give legal validity to the outcomes of mediation, rather than leaving parties to their rights in contract and equity³³. A suggested form is that the section provides that “a court may make orders to give effect to any agreement or arrangement arising out of a mediation session”³⁴.

³⁰ McCarthy C, “Can Leopards change their spots? Litigation and its interface with ADR” (2001) 12(1) Australasian DR Journal 35

³¹ Crosbie F, “Prospects of confidentiality in mediation” (1995) 2 Commercial Dispute Resolution Journal 70

³² *Ibid* 69

³³ *Supra*, note 26, at 206

³⁴ This is modelled on s 110(1) of the Courts Legislation (Mediation & Evaluation) Act 1994

What the Act should not include

Rules about the representation of parties

Some mediation legislation, for example Australia's Farm Debt Mediation Act 1994³⁵, regulates the representation of parties. This is thought to fetter the choice of parties too significantly and should not form part of New Zealand's Act. Parties may opt to bring to the mediation 'support persons' or legal counsel for a variety of reasons; for example, a party may bring a friend for emotional support or a lawyer to help them to evaluate their legal position. This option should continue to be open to parties.

As noted by Altobelli³⁶, the issue of representation is related to the issue of balancing power in mediation. Ensuring a level playing field is difficult to achieve, but often legal or other representation assists. It is important, therefore, for parties to be able to choose their own representation in order to redress any perceived power imbalances.

Controls on the cost of the process

A provision should be made requiring the costs of a mediation to be agreed upon in advance (including an agreement as to the sharing of costs between parties). However, it is submitted that for the Act to establish the quantum of fees which a mediator can charge is a direct affront to the free market workings of the sector and should be avoided.

Rules regarding the types of issues which can be mediated

Most mediators agree that there are some types of disputes that are not well suited to mediation³⁷ and are best resolved in an alternative forum. Consensus on exactly what these types are is more elusive, however. It is thought that for the Act to detail which types of issues a mediator can preside over is overly intrusive and should not be attempted.

Under the current situation, a mediator will typically refuse to participate if he or she feels the issue is not appropriate for mediation. In this respect, the self-regulation of the industry is thought to be adequate, and there is no need for the Act to alter the status quo.

³⁵ The Act provides, under s 7 that a mediator must approve any representative a party wishes to bring

³⁶ *Supra*, note 26, at 206

³⁷ Frequently cited examples include where there is a significant public interest in the outcome, where legal precedent is required or where parties do not have a genuine desire to settle.

(10) Conclusion

The increased use of mediation in New Zealand has brought substantial benefits to parties, the Courts, and to the legal profession. Nonetheless, the current self-regulated model of mediation has several key shortcomings, which need to be addressed. The best way to address these issues is to follow the lead of foreign jurisdictions and introduce a comprehensive Act to regulate mediation.

Such legislation would incorporate primarily protections for mediators and the confidentiality aspects of mediation. In addition, a comprehensive registration procedure would be established to ensure all mediations presided over by competent mediators.

The Act would have several important positive consequences; it would provide much needed safeguards for mediators and would clarify areas of mediation which are at present unsettled. In addition, the registration system under the Act improves upon existing accreditation schemes.

No form of intervention is a panacea, and the legislation as proposed does have several associated disadvantages. Of these, the most significant was the risk that mediations under the legislation would lose some of their lustre; the informal and consensual nature of the process could be under threat. The Act, however, represents an attempt to mitigate any such adverse effects whilst still providing the requisite safeguards and certainty. On the whole, it is felt that the significant advances the Act would bring outweigh the potential negative effects.

The final section of this essay examined the form that the legislation should take to ensure the potential benefits of the statute are realised. Were it implemented, the Act would pave the way for mediation to become the benchmark for successful dispute resolution in New Zealand.

(11) Appendix A – Mediation Act 2002 (*draft*)

An Act to establish a system of rules that govern mediators and parties involved in the mediation process in New Zealand. These rules will ensure mediations are fair, effective, and efficient.

CONTENTS

1. Short title and commencement
2. Interpretation
3. Scope
4. Privilege against disclosure
5. Registration of mediators
6. Cancellation of registration
7. Enforceability of mediation agreements
8. Protection of mediators
9. Conflict of interest
10. Costs

1 Short Title and commencement

(a) This Act may be cited as the Mediation Act 2002.

(b) This Act shall come into force on _____

2 Interpretation

In this Act, unless the context otherwise requires, -

Approved agency means a body or organisation declared by the regulations to be an approved agency for the purposes of this Act

Mediation means a process whereby a mediator facilitates communication and negotiation between parties to assist them to reach a voluntary agreement to their dispute. It is irrelevant for the purposes of this definition whether an agreement is reached or not.

Mediator means an individual who conducts a mediation in New Zealand

Mediation information means any statement or communication made (whether written or oral) during a mediation regardless of which person(s) were the intended or actual recipients of such.

Party means an individual or representative of a group who participates in mediation and whose agreement is necessary to resolve the dispute.

Proceeding means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions.

3 *Scope*

(a) This Act shall apply to all mediations conducted in New Zealand, subject to (b), in which;

- (i) the parties are required to mediate by a court order, statute or administrative agency;
- (ii) the parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds himself out as providing mediation

(b) The Act does not apply to;

- (i) mediations in which a judge who will rule on the case presides
- (ii) a hearing, discussion or dispute resolution process which is conducted by a member of staff of a primary or secondary school where all the parties are students

4 *Privilege against disclosure*

(a) Except as provided below, mediation information is privileged as provided in subsection (b) and is not admissible in evidence in a proceeding or subject to discovery.

(b) In a proceeding, the following provisions apply

- (i) A party may refuse to disclose, and may prevent any other person from disclosing, mediation information
- (ii) A mediator may refuse to disclose, and may prevent any other person from disclosing, mediation information
- (iii) Evidence or information which is otherwise admissible in proceedings or discovery does not become inadmissible for the sole reason that it forms part of mediation information

(c) No party or mediator may disclose mediation information or the outcome of a mediation to any other person, except where express written authority for this has been given by all other parties to the mediation

- (d) Any person who discloses mediation information, contrary to subsection (b) or (c), and thereby causes prejudice or harm to any party to the mediation shall be liable in damages to those parties
- (e) A disclosure of mediation information by a mediator is permitted in the following circumstances;
 - (i) where a statute of New Zealand requires the disclosure
 - (ii) the mediator believes on reasonable grounds that an offence involving violence or intentional damage to property is likely to be committed
In the latter category, disclosure is permitted only to law enforcement agencies for the purpose of averting or reporting the commission of the offence

5 *Registration of mediators*

- (a) A person may apply in writing to an approved agency to become a mediator.
- (b) The approved agency will approve an application, provided that the appropriate fee is paid in full and that the mediator meets the requirements of subsection (c).
- (c) In order to be accepted by an approved agency as a mediator, a person must;
 - (i) provide evidence of experience and/or training in mediation. The particulars of which type and level of training and/or experience are required may be found in the instrument “Training and experience for mediators”.
 - (ii) be fit to serve as a mediator, as determined by the approved agency (an approved agency is to consider any relevant criminal convictions an applicant may have in determining this)
- (d) any person who has an application declined may apply in writing to the approved agency for the decision to be reviewed. The agency is to review the decision and provide a written reply to the applicant within 30 working days.
- (e) A person who;
 - (i) has been declined after a review in subsection (d), or
 - (ii) is removed from registration under section 6

shall not be eligible to reapply for mediator status for the period of one year

6 *Cancellation of registration*

- (a) An approved agency may cancel the registration of any mediator if it is satisfied that if a mediator were an applicant under section 5, he or she would not be granted mediator status.

7 *Enforceability of mediation agreement*

- (a) A court may make orders to give effect to any agreement or arrangement arising out of a mediation session

8 *Protection of mediators*

- (a) A registered mediator, has in performance of his or her duties in good faith, the same protections and immunity as a judge of the High Court

9 *Conflicts of interest*

- (a) Before accepting a mediation, a mediator shall
 - (i) make an inquiry which is reasonable in the circumstances into whether there are any facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial interest in the outcome of the mediation and a existing or past relationship with one of the parties, and
 - (ii) disclose any such fact(s) to all parties as soon as is practicable before accepting the mediation

10 *Costs*

- (a) The cost of the mediation is to be agreed on before commencement of the process. Where the parties do not agree as to the allocation of the costs as between themselves, the charges will be paid in equal shares by all parties.

