

# PRIVATE SETTLEMENT- PUBLIC JUSTICE?

*Judge P D Mahony\**

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*In this paper, the Principal Family Court Judge discusses the pros and cons of "court-annexed" mediation services. He notes some powerful constitutional arguments against such forms of mediation but eventually agrees with the stand taken by the Australian and New Zealand Council of Chief Justices in support of a fully serviced court-based system. This paper was delivered at the New Zealand Institute for Dispute Resolution Colloquium held on 29 June 1999.*

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Mediation, as a sophisticated process for resolving disputes, is a modern phenomenon.

It has led to a relatively new and large professional group offering mediation services over wide-ranging fields, including international conflict, commercial and industrial disputes, employment related grievances, environmental issues and breaches of human rights. One of the most productive fields has been child custody and matrimonial property disputes in family law. The Academy of Family Mediators in the United States is a well-established professional body with hundreds of members.

Mediation has been defined as a non-compulsory, non-directive process in which parties are assisted by a neutral mediator to reach a mutually acceptable agreement. It is that definition which has led to the debate as to what extent it can be embraced within the court process and as a court-sanctioned means for resolving disputes - a debate revolving in large measure around the words "*non-compulsory*" and "*non-directive*" as essential components of the mediation process.

The arguments for and against have been canvassed extensively in New Zealand in response to a Department for Courts discussion paper in January 1997<sup>1</sup> and a proposal to incorporate mediation into civil proceedings for the High and District Courts.

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<sup>1</sup> Courts Consultative Committee *Court Referral to Alternative Dispute Resolution: a Proposal to Extend the Use of Alternative Dispute Resolution in Civil Cases* (Department for Courts, Wellington, 1997).

Earlier this year the Australian and New Zealand Council of Chief Justices came down unequivocally in favour of mediation as a court-sanctioned means for resolving civil disputes. This stand is contrary to the weight of opinion in New Zealand, and in particular the position taken by the New Zealand Law Society.

The Society would allow what has been called "*court-filtered*" as opposed to a "*court-annexed*" mediation. This refers to a parallel system of mediation which would include encouragement, but no more from the judges, to parties to mediate in the course of court proceedings, and to grant adjournments for that to happen, but leaving all initiatives to parties and their legal advisers thereby preserving the non-directory, non-compulsory nature of the process.

The two views are based on quite different approaches to the legitimate role of courts and the much used expression "access to justice". The Law Society's submission to the Court's Consultative Committee in 1997 stressed, as a first consideration, that alternative dispute resolution (ADR - here mediation) "must not deprive citizens of their right of access to justice, or subvert the traditional right of access to the courts".<sup>2</sup>

It referred to the Universal Declaration of Human Rights, to legal precedent, and learned commentary to support a view that ADR fell outside the citizen's right of access to justice through the court system; that the role of courts was to decide cases within the framework of the law; that incorporating mediation into the court system created an impossible mix damaging the public policy values inherent in our public justice system, at the same time destroying the essential elements of mediation.

Those views were reflected by others, and in particular the Ministry of Justice itself which referred to the fundamental constitutional need for a court system which decides disputes strictly according to the law, leading to clarity and certainty as to rights and obligations, and all this as the foundation for the citizen's right of access to justice through the courts. This approach defines, in a restrictive way, what justice for the citizen really is.

A fundamental objection to court-annexed mediation is that the notion of compulsory mediation is inherently contradictory creating the risk of its becoming "bureaucratised, costly, ... [with] consequent loss of flexibility and informality".<sup>3</sup> There was the further

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2 New Zealand Law Society "New Zealand Law Society Response to Discussion Paper 'Court Referral to Alternative Dispute Resolution' January 1997" in Department for Courts *Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution: a Proposal to Extend the Use of Alternative Dispute Resolution in Civil Cases* (Department for Courts, Wellington, 1997) 3 ["NZLS Response"].

3 "NZLS Response" above n 2, 2.

danger of litigation and mediation being perceived as merging into one process undermining the advantages of ADR processes as an alternative to court procedures.

The issue, inside or outside the court process, and the compulsory versus voluntary question in relation to mediation, raises other questions. Who controls the process, the court or the parties and their advisers? And in the same way, who is responsible for standards, immunity for mediators, confidentiality and payment?

These subsidiary issues are not difficult to resolve and follow from whatever view is taken of the crucial questions.

The Law Society view would be protective of the traditional role of judges, endorsing the view of Ingleby, where he says that:<sup>4</sup>

The danger in compulsory mediation is that this will lead to a disciplinary power being exercised without judicial restraint. Although, in institutionalised ADR proceedings, settlement is purveyed as a pragmatic response to the prohibitive costs of litigation, those who choose not to be pragmatic are punished (with costs rather than incarceration) for the deviance constituted by standing on their right their wasting of public resources comparably with defendants in criminal trials who are given heavier or lighter sentences for disputing their guilt by a plea of not guilty.

These are serious and weighty arguments by sincere and experienced advocates directed at constitutional issues.

They are supported by an eminent English Judge, Lord Woolf, in his review of Civil Courts' Rules and Procedures in England and Wales for the very purpose of improving access to justice and the cost of litigation, who in his final report entitled "Access to Justice" said:<sup>5</sup>

I also remain of the view, though with less certainty than before, that it would not be right for the court to compel parties to use ADR and to take away or postpone their right to seek a remedy from the courts.

Here is a judge of high standing rejecting the notion of court-annexed mediation, rejecting compulsion to mediate to protect the right to litigate.

I have wanted to give full weight and respect to the views of opponents which would counsel caution in approaching what might be regarded as a fashion, but certainly in their view, a threat to the integrity of the courts in their constitutional role.

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4 "NZLS Response" above n 2, 9-10.

5 "NZLS Response" above n 2, 9.

Surprisingly, very surprisingly you may say, those charged with judicial leadership, both to protect the role and function of courts, and to point up future directions, have taken a much more liberal position with a different starting point and perspective.

In March 1997 at the same time as the Law Society views were being formulated, the Council of Chief Justices made the following statement of principle:<sup>6</sup>

It is a function of the State to provide the necessary mechanisms for the resolution of disputes and court-annexed mediation is part of that process.

Then in April 1999 the Chief Justices approved a declaration of principles on court-annexed mediation. They state the first principle as follows:<sup>7</sup>

Mediation is an integral part of the courts' adjudicative processes and the shadow of the court promotes resolution.

The second principle is an important statement about one proper function of court process:<sup>8</sup>

Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.

The other principles make it clear that mediation should extend to appeals in appropriate cases; that referral to mediation may be compulsory at the discretion of the court; that it should be fully funded, with court-approved, suitably qualified and experienced mediators, with statutory protection and immunity for mediators and confidentiality protected by statute; mediators who will normally be court officers; properly designed mediation facilities attached to courts - in a word, a full developed professional mediation service offered by and within courts.

That bold statement of principles is not a shot in the dark. It followed a survey of courts in Australia and consideration of the New Zealand debate. It considered the Ingleby report. It also considered a major study of Federal court-connected mediation programmes in the United States. It considered issues raised by the Australian Law Reform Commission in its Review of the Adversary System in Australia. The Chief Justices also knew that what they were proposing had been implemented successfully in Family Courts. Chief Justice Nicholson of the Family Court of Australia was one of their number.

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<sup>6</sup> Council of Chief Justices *Australia and New Zealand Council of Chief Justices: Position Paper and Declaration of Principle on Court-Annexed Mediation* (Council of Chief Justices, 1999).

<sup>7</sup> Council of Chief Justices, above n 6, 13.

<sup>8</sup> Council of Chief Justices, above n 6, 13.

The New Zealand Family Court is an outstanding example with an explicit mandate to promote conciliation at every point. In parental disputes over children it funds counselling as a court-connected conciliation service. It has a well-established mediation service provided by the judges with up to 3,000 applications for mediation a year, and in the court room it has made inroads into the adversary system which in the past played havoc in the family law field. The reasons for promoting mediation settlements in many civil cases are as valid there as they are in family law.

Family court practice has long recognised the distinction which the Law Society view ignores in relation to the non-compulsory, non-directive nature of mediation.

Professor Laurence Boulle of Bond University, an experienced mediator and exponent of mediation theory, draws the distinction between the entry into mediation and what happens within mediation itself.<sup>9</sup> In family law we know that many who are reluctant starters, once within the process become willing participants.

One might ask where are the judges coming from? Does this debate sit within a broader context?

In my view it clearly does; and that context has a great deal to do with what societies and particular communities, as opposed to legal theorists, mean by "access to justice".

It is the pressing issues of access to justice, of equality before the law, of equity in the sharing of court resources imperilled by excessive cost, by delay, by outdated and complex procedures, which have driven the judiciary in many jurisdictions to become actively involved in the development of caseflow management systems.

In my view the same considerations have inspired the unequivocal stand taken by the Council of Chief Justices in supporting a fully serviced court-based mediation system within the adjudicative process for civil cases.

If their vision becomes a reality the doors of our courts might again open to the many civil litigants who cannot afford the justice which we now provide, to the ethnic groups who cannot cope with and feel alienated from the adversary system, to women, and in New Zealand, Maori women, and to many others who, though they have the financial means, would want to seek a better option and follow a different path for getting fair, just and more moral outcomes than the often bruising adversarial system can deliver.

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<sup>9</sup> Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practice* (NZ ed, Butterworths, Wellington, 1998).

