The Dispute Resolution Practitioner: Aiming for Professionalism in a Deregulated Environment

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> *Definitions of "professionalism" vary, but at the least they imply the application of a recognised skill by way of a service, and that the "professional" is entitled to be acknowledged as such. However, that can be a double-edged sword. Firstly, the recognised skill only continues to have credence if it meets the benchmarks of a body capable of monitoring and policing it. Secondly, the respect accorded to the individual, and to the profession to which they belong, are inextricably interdependent.*[3]
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> *Mediation has evolved dramatically over the past 20 years; it is now a well established academic discipline with an extensive research base. General training and education programmes lead to mediator qualifications.*[4]

These two quotations broadly describe the landscape which is the subject of this paper. In saying that, we do not necessarily agree with some of the claims made in them.

One of the challenges facing alternative dispute resolution at the present time is how to advance the field as a profession. In a deregulated environment, such as the one that now exists in New Zealand and Australia, there is no restriction on the use of terms such as arbitrator and mediator. How, then, can those aspiring to esteem as a profession, and to the promulgation and maintenance of standards of conduct aligned with that status, protect and advance the practice of dispute resolution? In particular, questions of public confidence, professional supervision, and accountability, and the promotion of training, qualifications and accreditation are vital to the credibility and integrity of the field.

Alternative dispute resolution 'ADR', includes a wide range of dispute resolution processes, both formal and informal. We adopt a modified functional definition to include those processes that have a certain formality and recognisable process, with an acknowledged commencement and conclusion, and conducted by third party neutrals other than judicial officers acting in that capacity.[5] It therefore broadly covers arbitration, mediation, conciliation and related processes, but excludes unsupported conflict resolution processes.

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3 Arbitration and Mediators Institute of New Zealand (AMINZ), Newsletter No. 13 (June 1997).

4 Law Commission *Dispute Resolution in the Family Court* Report 82 (March) 2003. New Zealand.

5 Aster & Chinkin, *Dispute Resolution in Australia,* (1992) [6] Butterworths, Australia, citing the definition adopted in the Working Party Report, Attorney-General, Victoria.

In this paper the focus will be on mediation as a subset of the field broadly described as alternative dispute resolution. By mediation, subject to the overarching functional definition of ADR, we mean, … a decision making process in which 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.[6]

Mediators are independent, qualified and impartial – they are not advocates for any of the parties involved in the dispute and they do not give professional advice of any kind to anyone involved in the dispute. While our definition may be arguable, the fact remains the skills, process and standards implicit in the definition are demanding and not easily acquired.[7]

This paper will briefly examine recent trends and issues in the practice of mediation in New Zealand and Australia; then we will consider the defining characteristics of a profession and then examine these in the context of current practice in New Zealand. Finally we will examine whether, and if so how, the largely unregulated alternative dispute resolution industry can advance and protect its professionalism:

> *Ten years ago those committed to mediation as a process for dispute resolution in New Zealand faced an uphill battle. The legal profession wasn't convinced, the public wasn't often aware of the possibility and Government and the Courts system was largely sceptical.*
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> *If we had our wish in 1993, it would have been to raise consciousness, encourage courts and Government agencies to incorporate a consensual phase into the dispute resolution framework and see mediation (low level, speedy and informal) as a first option. An interest-based process should be a preliminary to the rights-based alternatives.*[8]

Now in 2006 it would seem these aspirations have largely been fulfilled. In particular, the Government is a key driver of developments in the field because it has become increasingly committed to mediation as a process of first choice. By incorporating mediation into the legislative framework in a way that did not seem possible before, the state has generated a significant demand for trained and experienced mediators in areas such as the Family Court,[9] employment relations,[10] resource management,[11] leaky homes dispute resolution service[12] and the Disputes (for civil claims under $12,000.00) and Tenancy Tribunals.[13]

In addition to these specialist mediation services established by legislation in New Zealand, numerous examples of non-legislated industry based and funded mediation services have been

6 Boulle, Jones and Goldblatt, *Mediation: Principles, Process, Practice* (1998) [2], Butterworths, Wellington.

7 Boulle & Wade, *Introduction* (2001) Bond LR 44, describe mediation as in many ways a profession in its infancy showing hallmarks of a profession to its sophisticated analytical and diagnostic tools of practice.

8 Goldblatt, V M *Mediation Practice in New Zealand at the Current Time.* [1]. A paper to the 2nd Asia–Pacific Mediation forum, Singapore 2004.

9 *Family Proceedings Act* 1980 (NZ).

10 *Employment Relations Act* 2000 (NZ).

11 *Resource Management Act* 1991 (NZ).

12 *Weathertight Homes Resolution Services Act* 2002 (NZ).

13 *Residential Tenancies Act* 1986 (NZ).

established. These include the Banking Ombudsman[14] Electricity and Gas Commission, for the resolution of consumer complaints against the industry suppliers, and the internet domain names mediation service, for disputes over New Zealand domain names.[15] These services offer a first tier mediation service followed by a determination. In the case of the New Zealand domain name service, the mediation step described as an 'informal mediation' is a free service and at the next level is an expert determination requiring with a fee of $1,800.00[16] then an appeal with a fee of $6,600.00.

There is no consistent requirement for qualifications and accreditation of mediators operating in the various specialist state and industry mediation services. The employment relations mediation service mediators are employees of the service. In most other cases the mediators are under contract to the service but paid widely divergent rates either on a time (limited) basis or per mediation. Some services require the mediator to maintain membership of and/or achieve accreditation by a professional organisation.[17]

In the employment relations mediation service mediators are selected by interview and given in-house training. In the contracted mediator services the mediators are selected by panels and receive initial training, often as little as a day in length.

Bayliss[18] described the statutory mediation services in 1999 as arbitrarily divergent, some affecting the legitimacy of the process and lacking substantive detail. Clapshaw & Freeman-Greene[19] describe the wide range of mediation services as paying lip service to mediation.

Australian examples of Governmental mediation programmes can be found in Queensland under the Dispute Resolution Centres Act 1990, in Australian Capital Territories under the Mediation Act 1997, and in New South Wales under the Community Justice Centres Act 1983. There is a proliferation of ADR services comprising different processes, rules and costs. In August 1990 the Law Council of Australia proposed a uniform system of mediation in all federal and state courts, which provided for a reference to a lawyer/mediator. It proposed that the process would be voluntary at the outset of litigation, but once litigation had commenced the trial judge could refer the matter to compulsory mediation.[20] No uniform system has since emerged.

Qualification as a mediator under each of the above Australian systems is achieved in a similar manner. In Queensland, for example, applicants express their interest and are put through a selection process involving group and individual interviews and, if successful, through an 'intensive, competency-based (sic) training course' lasting 8 days. If the trainees reach a satisfactory standard by the end of the course, the Executive Manager of the Dispute Resolution Branch of the Queensland

14 www.electricitycommission.govt.nz

15 The NZ domain dispute resolution service mediation panel was appointed in March 2006 and operates from 1 June 2006. The mediation service will not involve face-to-face meetings but is confined to telephone and email interventions. The service is based on the UK domain name dispute resolution service which has been running for approximately 3 years. See www.dnc.org.nz

16 All figures are exclusive of Goods & Services Tax (GST).

17 For instance, Internet NZ Domain Dispute Resolution service. See, www.dnc.org.nz Family Court mediators must be members of the AMINZ panel of mediators or LEADR's panel. See, http://www.nz-lawsoc.org.nz/lawtalk/650family%20mediation.htm

18 All cited in Stilwell, *One Law for All* (July 2005) [3 & 4]. A paper presented to ALTA Conference, Waikato University.

19 Stilwell, [4].

20 Astor & Chinkin, [165].

Government ('DRB') makes a final decision as to who will receive accreditation. Once accredited, mediators must continue to undergo training and skills development as required by the DRB. The mediators are employees of the DRB of the Department of Justice and Attorney-General.

Variations of voluntary and mandatory mediation services exist in almost every Australian Court. The models vary throughout the States, as does the method by which the mediators are sourced: employee, contractor, panel member or private mediator.[21]

In Australia, as in New Zealand, industry based mediation services proliferate using various models of mediation.[22]

None of these systems prohibit unaccredited mediators from operating, but instead provide a funded (or at least subsidised) general mediation service. However, in both Australia and New Zealand there is little consistency in qualifications, criteria or training of either contracted or employee mediators.

Therefore the problem is not just a matter of supply. There are serious questions about the quality, effectiveness and accountability of the mediation services on offer and the need for ongoing evaluation of the quality, integrity, accountability and accessibility of these services. The lack of quality of some mediation processes and mediators, even those employed within a legislative framework, has drawn the attention of a number of commentators.[23] An example from the United States cites under-funded schemes offering mediators, who received little or no training, dealing with compulsory court references of cases of domestic violence. There is reported concern about the quality of mediation services provided, but severe problems are not yet apparent in New Zealand, nor could the writers find any reports of similar issues in Australia.[24]

Not only must individual mediators seek to improve their levels of competence and ethical behaviour for the benefit of their clients, the mediation field as a whole, as suggested in the AMINZ newsletter quoted earlier, must strive to enhance public awareness of mediation services and be seen to respond to demands from consumers for protection and safeguards. In short, mediation needs to be seen as a profession.

Just exactly what does the term profession mean? The term originates from the Latin '*profiteri*', which means to declare aloud, to make a public avowal. The term appeared to enter the English language in the 15th century as a means of signifying that a person had made a solemn vow to enter into religious service. By the 16th century the meaning of the word profession had broadened to include the making of a public declaration that a person had entered into an occupation that was dedicated to saving lives or souls. Such declarations typically referred to the work of priests, physicians and lawyers. By the 19th century it was being used to describe any worthwhile vocation in which a person made money.

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21 Alexander, *What's Law Got To Do With It?, Mapping Modern Movements in Civil and Common Law Jurisdictions* (2001) [344]. Bond LR 335.

22 Astor & Chinkin [347].

23 Astor & Chinkin [12].

24 *Law Commission* R.85 [para 127]. Lawyers concerns about some mediators using "bullying" techniques to coerce disputants to settle, particularly in the Auckland region, are reported in: Saville-Smith & Fraser, *Alternative Dispute Resolution: General Civil Cases*, June 2004, Ministry of Justice, Wellington , New Zealand, [30].

There are numerous definitions of the term profession, some of which are not entirely flattering. For example, Ivan Illich a trenchant critic of the medical profession, argues that patients are '… virtually a passive clientele: dependant, cajoled and harassed, economically deprived and physically and mentally damaged by the very agents whose raison d'etre it is to help.[25]

Perkins, a well known scholar in the field, provides a more positive perspective when he suggests that:

> *The modern world is the world of the professional expert. Just as pre-industrial society was dominated by landlords and industrial society by capitalists, so post-industrial society is dominated by professionals. The power, prestige, influence and incomes stem from their possession of appreciated knowledge based on education, competitive merit and experience on the job – in word, on their human capital.*[26]

These things said, what are generally accepted to be the defining characteristics of a profession? Following Abercrombie and Warde, the following is proposed.[27]

- **Esoteric knowledge:** A professional is in possession of a body of knowledge that is restricted to an enlightened or initiated minority; this knowledge is deemed to be valuable to society and is acquired through advanced education and training.
- **Exclusivity:** Entrance into a profession requires its members to have academic degrees, certification of competency, and a licence to practice that is granted by the relevant professional organisation.
- High ethical standards: Members of a profession are expected to abide by its code of conduct, which sets out the relevant ethical standards.
- **Autonomy:** By virtue of their specialised knowledge, professionals are permitted to exercise their own judgement in the delivery of their services; moreover, they are expected to be self-regulating and self-directing.
- **Accountability:** Even though professionals are autonomous, they are, nonetheless, accountable to regulatory agencies and their peers. Typically this means an association or society of which membership is compulsory and the society is required to regulate entry and standards of practice.
- **A System of Reward:** Typically this involves fees paid by a client in exchange for services; professionals are usually self-employed, although this is much less the case over recent decades, with the corporatisation of some occupations. Enter the cadre of managers.
- **An Ideological Image:** Status is typically deemed to be high; the profession is perceived as expert, responsible and altruistic.

The possession of esoteric knowledge and commitment to service are core elements of a profession. The inaccessibility or specialised nature of this knowledge and commitment to service are advanced as the justification for the profession's authority to establish and maintain standards of practice and self-regulation to ensure quality and accountability that are often buttressed by statute. Professionals are also responsible for the integrity of their knowledge-base, its expansion through

25 Illich I *Disabling Professions* (1997) [2] London: Marim Boyons.

26 Perkins H *The Rise of Professional Society* (1996) [2] London. Routledge.

27 Abercrombie N & Warde *A Contemporary British Society, A New Introduction to Sociology.* (1994) [80-86] London. Routledge

research and reflective practice, and for ensuring the highest standards for its use.[28] These are all seen as dynamic, ongoing duties of the professional – in short, there is a need for continuing education and training in order to maintain the necessary standards of competence.

The effective central management of the membership of a profession is often a crucial statutory responsibility for professional association. They also have an obligation to discipline unprofessional and incompetent behaviour. There is a vital reciprocity in this nexus: public esteem of the profession depends to a considerable degree on the effectiveness and efficiency of the profession's organisation. This requires the participation, support and commitment of members. Actually, the assumption that members are essentially equal in competence and authority and that they basically share the same professional goals, ethical standards and sense of service is probably a fiction.

There are a number of worthwhile analyses of professionalisation and the professionalism of occupations.[29] Kenneth Cloke in his provocative text, *Mediating Dangerously: The Frontiers of Conflict Resolution*[30] suggests that:

> *Professionalism historically proceeds through a number of stages, Starting with the discovery of useful techniques, creative development, and systematisation of skills. Next come professional self-consciousness, the search for legitimacy, and the beginning of territoriality and proprietary behaviours. This is followed by a codification of rules and ethics, escalation of fees, formalisation by attorneys, legislators, and judges, and formal certification. Finally comes dismissal of the impecunious, grandfathering of the unqualified, marginalisation of the unorthodox, and promotion of the mediocre.*

Whether or not this will be the trajectory of mediation remains to be seen. Nevertheless, if the professionalisation of mediation as an occupation is to be progressed, there are several significant issues that will need to be addressed. Despite the burgeoning growth in demand for mediation services, mediation in the sense of a profession or as an occupation presently comprised of practitioners capable of becoming more professional (i.e. the professionalisation of the occupation) is still in a nascent, largely 'pre-professional' state. This suggests the process will be demanding, complex and time consuming.

For the purposes of the present analysis the issues may be grouped as follows:

- The body of knowledge and skills – minimum educational qualification, deemed to be necessary for admission and the right to practice. The characteristic method of selection for professionalism is a tertiary qualification.
- How is this body of knowledge and skills to be obtained (i.e. a curriculum)? How will this curriculum be formulated and approved? Who and how will it be provided.
- The certification of competency and grant of a license to practice – the exclusivity of a profession. A key feature of professional knowledge, perhaps, is that it allows the practitioner to exercise skill and judgment in applying it to the client's particular case.

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28 Friedson E *Professionalism Reborn.* (1994) Chicago: University of Chicago Press.

29 Starr P C *The Social Transformation of American Medicine* (1982) New York, Basic Books: Perkins H *The Third Revolution, Professional Elites in the Modern World* (1994) London, Routledge: Friedson E *Professionalism: The Third Logic* (2001) Chicago, Chicago University Press.

30 Cloke K *Mediating Dangerously, The Frontier of Conflict Resolution* (2001) [53] San Francisco, Jossey-Bass.

- Ethical standards and accountability are also vital characteristics of a profession. Typically the mechanism through which these requirements are formulated and managed is the responsibility of some forum or association (an institute, society or a college) of peers of which membership is compulsory. This association would have the power to regulate entry, establish and monitor standards of practice, provide information and publicity about mediation, a code of conduct and ethical standards, and procedures for disciplining breaches of these provisions.
- The promotion and support of research whereby the body of knowledge and skills of the discipline are tested and expanded and the practice of mediation is monitored and evaluated.[31]

These are formidable challenges, especially in the deregulated environment that now prevails. Previously, in the case of the so called bench mark professions, the creation of the collective infrastructure required for the recognition and formalisation of professions such as lawyers, medical practitioners and engineers has been the subject of statute. Today this is much less likely to be the case. Moreover, it is highly unlikely, at least at the outset, that a single entity responsible for all of the aforementioned functions would be tolerated by current practitioners or favoured by Government, despite the latter's enthusiasm for incorporating mediation as a process of first choice into legislation. That being the case, the search for a constructive way forward will have to take cognisance of the Government's preference, at least in New Zealand, for contestability and flexibility.

Given these issues Boulle, Jones and Goldblatt have suggested that quality, standards and accountability can be promoted through four broad structures:

(a) informed consumer choice and the force of the market;
(b) self regulation by the occupation, with or without involvement by other interested parties;
(c) indirect state regulation, with a statutory framework involving members of the occupation, Government, consumers and other parties; and
(d) direct state regulation, imposed through statute and Government agencies.[32]

They go on to suggest that:

> *At present, the first two structures operate in respect of private mediators in New Zealand and in Australia, and the last relates to mediators attached to courts and Government agencies.*

The question then is: are more comprehensive forms of regulation of mediation, conducive to the professionalisation of this occupation, possible at the present time?

'A profession's most valuable asset is its collective reputation and the confidence which that inspires'.[33] Unfortunately the reputation of mediation and mediators can only suffer if quality and standards are not consistent nor enforced. Reputation will drop to the lowest common denominator.

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31 In this regard the National Alternative Dispute Resolution Council ('NADRAC') in Australia, an independent advisory council which provides the Commonwealth Attorney General with co-ordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for judicial decision is particularly noteworthy and the Council's monograph: *ANR Research.* A research paper, 1 March 2004, is a good example of the effort required to encourage research in the field of mediation.

32 Boulle L, Jones J and Goldblatt V *Mediation Principles, Process, Practice* (1998) [221] N.Z. Edition. Wellington. Butterworths.

33 *Bolton v Law Society* (1994) [2] All ER [492] per Sir Thomas Bingham MR.

Commentators agree that legislation to harmonise conflicting standards, and to increase confidence, by regulating mediation service delivery is needed.[34]

If the mediators are to achieve the status of professionals the first objective must be to effectively introduce, implement and maintain consistent quality and ethical standards. Market forces alone have not done so and are unlikely to achieve this. Given the piecemeal development of specialist mediation services to date, it is unlikely to occur in the future. The only option is some form of imposed regulation.

This is only the first step toward professionalism. As a former President of the American Bar Association eloquently put it:

> *The best way, the only way, to improve our image is so startlingly obvious that we often overlook it. We must serve the public.*[35]

Elements of public service and promotion of research are the next hurdles.

The lead for this must come from the industry organisations, but without strength of numbers they suffer from lack of reach and resource to effectively drive these developments. Public service manifests itself in initiatives such as mandatory pro bono services and by members voluntarily undertaking responsibilities without remuneration.

Research to develop the knowledge and skills of an occupation needs effective funding and research.

Mediators are, in many respects, in a similar position to lawyers. The particular fiduciary duties said to exist between a lawyer and his or her client are:

- Not to make a profit out of that relationship (no profit duty).
- Not to place himself/herself in a position where there is a conflict between the duty as a fiduciary and interest or duty to a third party (the no conflict duty).[36]
- A general obligation by the lawyer to the client, of confidentiality.[37]

These duties and obligations from the lawyer/client relationship also reflect those fundamental to the mediator/parties relationship.[38]

The legal profession has welcomed the new regulatory framework set out in the recently passed Lawyers & Conveyancers Act 2006[39] which followed, in a modified manner, a trend away from comprehensive legislative occupational regulation. Recent years had seen the virtually total deregulation of a number of professions, including accountants[40] and engineers.[41] In the case of

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34 See discussion in Stilwell, *One Law for All*, ALTA Conference paper, 6 July 2005, Waikato University, New Zealand.

35 Dal Pont, *Lawyers Professional Responsibility in Australia/ New Zealand*, 2nd Ed., LBC Information Services (2001) Sydney [16].

36 Cook & Gilbert, *Professional Liability*, New Zealand Law Society, Seminar Booklet, June 2004.

37 Cook & Gilbert, [59]. There is a debate about whether the obligation of confidentiality is a fiduciary obligation. See for discussion of obligation of confidentiality by lawyers acting for parties: *Carter Holt Harvey Forests Limited v Sunnex Logging Limited* (2001) 3 NZLR 343 at 349, 350 per Blanchard J.

38 Indeed *Mediation Conciliation or Arbitration Services* are included in the definition of *Legal Work* in Section 6, Interpretation, *Lawyers and Conveyancers Act* 2006.

39 One of the writers was New Zealand Law Society President at the time of the Bill's initial introduction to Parliament in 2003, but her successor presided over its passing into law on 20 March 2006.

40 *Institute of Chartered Accountants Act 1996* (NZ).

41 *Institute of Professional Engineers of New Zealand Act 2002* (NZ).

accountants, those who choose to become members of the Chartered Accountants Institute and so subject themselves to the educational and ethical requirements and disciplinary process are entitled to call themselves 'Chartered Accountants'. Deregulation also occurred in trades in New Zealand. This latter trend contributed to a crisis in the building industry after an epidemic of leaky buildings and consequent litigation. One of a number of causes of the crisis was reported as being the falling skills and standards of builders, consequent upon the Governments lack of regulation of the sector and the failure of the industry to provide the quality standards necessary[42].

General consumer law which covers the provision of services is a clumsy and ineffective method of ensuring the maintenance of standards and the quality of mediator services.[43] Nor can the existing Industry Organisations be expected to be more effective without some mandate. As the New Zealand Law Commission put it:

> *Mediation is not an established profession, although there are ongoing steps to improve training standards and introduce minimum standards of behaviour. AMINZ and LEADR place restrictions in terms of qualification, experience and character on their membership.*[44]

The Law Commission in its report on the Court system[45] highlighted some serious concerns about the way mediation services were developing in New Zealand and proposed that one organisation 'take responsibility for coordinating all state-managed mediation services to ensure they remain accessible and meet high standards.[46]

The Commission received strong submissions from some to the effect that the existing mediation market negated the need for court involvement Nevertheless, it expressed concern over the way that the market was developing. In particular the spiralling costs in the private commercial mediation area were seen as putting it out of reach for many people. The Commission came to the conclusion that mediation was not as widely accessible or well used as it might be in New Zealand.

The Commission stated it was timely for the significant expertise and knowledge captured in the state mediation models to be better coordinated and have more impact on the market.

The Commission also noted the concerns of some submitters about the quality of mediation provided by some state-employed mediators.[47]

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42 Hunn, Bond & Kernohan, *Report of the overview group on the weathertightness of buildings to the Building Industry Authority*, 31 August 2002 NZ.

43 Relevant legislation includes the *Consumer Guarantees Act 1993* (N.Z.) which implies guarantees in domestic household or personal services of reasonable skill and care and fitness for purpose and the *Fair Trading Act 1986* (N.Z.) which prohibits misleading or deceptive conduct in trade.

44 *Delivering Justice for All*, A Vision for the New Zealand Court System, NZLC, R.85 (2004).

45 *Law Commission* R.85 [para 111].

46 *Law Commission* R.85. Recommendation 37. The report further recommended that mediation be available for all general civil disputes under $50,000.00 for a small fee, recommendation 37.

47 *Law Commission* R.85 [para 127]. Lawyers concerns about some mediators using "bullying" techniques to coerce disputants to settle, particularly in the Auckland region are reported in: Saville-Smith & Fraser, *Alternative Dispute Resolution: General Civil Cases*, June 2004, Ministry of Justice, Wellington , New Zealand.

The Commission recommended one centralised state mediation service which incorporated:

- the need to clearly articulate the role and ethical responsibilities of the mediators
- a coherent policy on the aims and philosophy of the service
- an effective appointment process
- only people who are sufficiently trained being engaged as mediators
- the need for a clear quality review procedure to be instituted from the outset, with performance standards for mediators.

It also emphasised the need for strict appointment criteria and quality control in the area.

Following the Report of the Law Commission, the Government has since indicated it will not be following the recommendations.[48]

The Commission also recommended civil court mandated mediation using private or contracted mediators, but allowing the Judge a discretion to excuse parties from mediation. It recommended that the qualification level required for mediators, the Code of Ethics; and a review or complaints procedure and mediation rules be developed by a multidisciplinary working group. The chosen mediator could either be private or one contracted by the Ministry of Justice. This recommendation was rather peremptorily rejected by the Government.[49]

Since the Law Commission Report was published in 2004, the Family Court has commenced implementation of a specialist mediation service using panels of mediators based on recommendations in an earlier Law Commission Report.[50] The service was delayed in some centres because of a lack of suitably qualified candidates. Anecdotal feedback from family law practitioners is that remuneration paid by the service to it's independent contracted mediators is so low, that experienced mediators are not lining up to join the panel and that many mediators appointed to date are accepting the appointment only to gain experience and to use the mediations as a training ground.

The Law Commission considered that parties should not be compelled to enter into mediation without ensuring that there were sufficient trained mediators, guided by a Code of Ethics to protect the parties and ensure mediator impartiality, and a review or complaints service, in operation. The Commission suggested the cost of this should be a state responsibility.

It seems that, despite the Law Commission's enthusiastic endorsement, we are no further toward gaining a consistent regulatory framework to promote professionalism in mediation. Yet, without such a framework, one can only anticipate the problems with the quality of mediation services, noted by the Law Commission and reported anecdotally, will continue to rise, and the collective reputation of mediation and mediation services will correspondingly decline.

Given it's response to the Law Commission and, in spite of, the proliferation of specialist Government and Industry mediation services the Government is unlikely to be persuaded that all mediators should be subject to licensing or certification requirements.[51] What, however, may be

48 *The Government's Response to the Law Commission Report on Delivering Justice for All*, R.85 www.justice.govt.nz. (Accessed 3 April 2006).

49 *The Governments Response* [para.192]. Various Practice Directions and Rules of Court require the parties to consider Settlement Conferences or private mediation at an early stage. The Judge acts as a mediator at these conferences.

50 *Law Commission Report 82, Dispute Resolution in the Family Court*, March 2003, Wellington, NZ.

51 *The Government's Response* [para. 187].

achievable is a light-handed co-regulatory regime limited only to mediators who choose to participate in these services.

The proposals for reform suggested in this paper scale down proposals for an all encompassing prescriptive or even a standards based Mediation Act[52] and suggest that certain functional classes of mediators be regulated in a co-regulatory manner.[53] This should achieve some consistency in standards and quality in mediation services where mediation is mandated, either de jure or defacto, as well as maintaining the industry involvement and responsibility, but avoiding capture by interest groups.[54] These mediation services may not be legally mandated, in the sense that the disputant has no option legally, but to mediate, but they are defacto mandated services. The only real alternatives to the mediation services are costly and lengthy litigation or adversarial processes through the ordinary courts or specialist tribunals. In those circumstances the State should take some responsibility for the cost and implementation of a regulatory regime for mediators.

Adapting the Law Commission's minimum requirements, any mediators wishing to practice in a Government or Industry run mediation service would be subject to:

- qualification requirements; and
- a code of ethics; and
- a review or complaints procedure.[55]

The Government in it's response to the Commission has clearly signalled that it does not want to take full responsibility for the primary regulation of mediators. It is also conscious of the funding implications of a primary state run regulation system.[56] A co-regulatory system which practitioners fund and which is the primary regulatory framework subject to a Government appointed and funded review body, would probably be more palatable. Practising mediators would also be more likely to welcome an industry-based framework.

The provision of the qualifications, codes of ethics and review or complaints process could be carried out contestably by the existing or new professional organisations, with jurisdiction over their respective memberships. The funding would be provided through a levy or membership fee (as it relates to regulatory, not representative functions) on relevant mediator members. A Government appointed and funded supervisory body[57] reporting to the responsible Minister would advise the Minister on the approval of qualifications,[58] the Code of Ethics and review or complaints procedures. The same body,

52 See discussion in Stilwell.

53 One hallmark of a profession is said to be self regulation as a corollary of it being a public service and requiring special skill and learning: Dal Pont, *Lawyers Professional Responsibility in Australia/ New Zealand*, 2nd Ed., LBC Information Services (2001) Sydney [9].

54 Stilwell [8] argues that a degree of defacto capture already exists between AMINZ, LEADR and State employed mediators in New Zealand.

55 *Law Commission Report* R 85, Recommendation 40. Similar recommendations were made in relation to Court mandated mediation providers.

56 *The Governments Response to the Law Commission*, r.85, *Government Response to Law Commission Report on Delivering Justice for All* presented to the House of Representatives August 2004 [192]. Accessed on 30 March 2006.

57 The Law Commission suggested a multidisciplinary working group consisting of mediation practitioners, lawyers, policy makers and trainers to advise on the qualification levels of mediators, a Code of Ethics review or complaints procedures and rules for privilege and related matters. Law Commission, R.85, Recommendations 40.

58 *Lawyers and Conveyancers Act 2006* (NZ) provides for the setting of qualifications for admission with academic oversight by an independent body, the Council of Legal Education which includes Law Society representatives.

or an independent body appointed by it, would act as a review body and review the conduct of the complaints, if such review is sought by one of the parties to a complaint.

A model for this co regulatory approach has been recently enacted in New Zealand for the legal profession.[59] The Lawyers and Conveyancers Act, inter alia, sets up a framework in which the national professional body for lawyers, the New Zealand Law Society, will establish a complaints system;[60] a Code of Professional Conduct and Client Care rules;[61] as to mandatory continuing education,[62] and requirements for entry into the profession.[63] The responsible Minister must approve the rules.[64]

Lawyers' Standards Committees constitute the primary level of the complaints system. They are appointed by the New Zealand Law Society and comprise at least 3 persons, one of whom must be a lay member.[65] The Standards Committees must investigate complaints, provide negotiation, conciliation or mediation services,[66] make final determinations and lay charges before a Disciplinary Tribunal established under the Act, where appropriate.

The Act is co-regulatory in that the Minister must approve the rules (including the Code of Professional Conduct and Client Care) and also in that it establishes a separate review process for disputants dissatisfied with a Standards Committee decision. The review function is carried out by a lay Legal Complaints Review officer.[67]

The co-regulatory model promotes consistent quality standards, while maintaining independent oversight for those mediators who choose to become part of the Government or Industry Mediation Services system.

The role of the industry organisations[68] in promulgating the Code of Ethics (or Rules of Professional Conduct), in prescribing qualifications and continuing education standards in providing a complaints process, would ensure that the sector has a high degree of involvement. We suggest there need be no specified Industry organisation, as is the case under the Lawyers and Conveyancers Act, with the Law Society, but rather any Industry organisation would be eligible to regulate it's members subject to the terms of the co-regulatory framework. Given the small number of mediators in New Zealand it seems likely that the industry organisations themselves would move quickly to rationalise their activities. Mediator members would be required to retain membership and be accredited by their chosen organisation to practise in the prescribed areas of mediation.

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59 *Lawyers and Conveyancers Act 2006* (N.Z.) was passed into law on 20 March 2006. The Act is to come into force on a date to be appointed by the Governor-General by Order in Council.

60 Section 121.

61 Section 95.

62 Section 97.

63 Part 3 of the *Lawyers and Conveyancers Act 2006*.

64 Section 100.

65 Section 129.

66 Section 143.

67 Section 190

68 Eg: AMINZ or LEADR, NZ.

Derivative benefits of the model would be that, with a more secure membership base, the Industry organisations are likely to better promote research and education initiatives in the sector, to attract volunteers to carry out parts of the regulatory function and to coordinate projects such as pro bono schemes.

The co-regulatory model would provide not only contestability, but flexibility, in that it allows the industry organisations to prescribe the standards and maintain them. To that extent it reflects the NADRAC philosophy by providing a framework which recognises that the establishment and maintenance of standards is a responsibility properly shared by all members of the mediation community.

The central premise of this paper is that there are objective grounds for asserting that there is a significant need for the professionalisation of ADR in Australasia.

In order to progress this proposition the independent elements of the (ideal type) profession were discussed. These elements included specialised work that is believed to be grounded in a body of knowledge and skill with special status in the work force; a formal programme of education or training that produces qualifying credentials recognised by the occupation and associated with tertiary education; and an explicit code of conduct which is rigorously enforced by the occupation.

The other key contingency in this process is the State and its policies. Given the de-regulated environment that presently prevails, at least in New Zealand, comprehensive regulation by the Government is unlikely. But the way forward is not totally blocked. Recent developments in New Zealand that relate to the legal profession and the application of a co-regulatory model encourage us to suggest that this model could be, mutatis mutandis, applied to mediation. Its contestability and flexibility could be attractive to the Government, as could the proposition that it be mandated only for mediators working within Government or Industry Mediation Services. This approach puts the primary regulatory and associated implementation obligations in the hands of the occupation, the mediators, through their industry organisations (eg AM1NZ and LEADR).

We acknowledge that the feasibility of our application of the co-regulatory model to mediation has not yet been fully worked out. Nevertheless, we are of the view that the manifest need for the enforcement of standards in the field, its professionalisation, is sufficient incentive to continue with the task. We certainly intend to because:

> *Ehara te pae i te tawhiti rawa Ki ngä mea kei te reri: No horizon is too far for those who are well prepared.*