

**ADR — ARGUMENT FOR AND AGAINST  
USE OF THE MEDIATION PROCESS  
PARTICULARLY IN  
FAMILY AND NEIGHBOURHOOD DISPUTES**

by

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and

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## **1. INTRODUCTION**

In Australia today, there is an enthusiastic movement towards alternative dispute resolution (ADR). For the uninitiated that means methods of dispute resolution used as alternatives to court adjudication. These processes are available in Australia both as court annexed programmes eg., the Family Court compulsory conferences and also in the private arena eg., the Australian Commercial Dispute Centre (ACDC) markets its schemes throughout Australia<sup>1</sup>.

Alternative dispute resolution processes include negotiation, conciliation, mediation, mini-trials and arbitration. This paper, however, will focus on mediation and the advantages and disadvantages of its use, particularly in the fields of family and neighbourhood disputes because it is arguable that both in Australia and overseas, especially in the United States, mediation in these two areas is the most highly developed and has received the most academic study. In Australia eg., community justice uses mediation almost entirely<sup>2</sup>.

## **2. MEDIATION — A DEFINITION**

Even though it has been said that the objective of mediation is no more than to achieve resolution of a precisely defined dispute, it is nevertheless not an easy task to define the term although many attempts have been made. A more specific definition and one frequently quoted is that of the American writers Folberg and Taylor, namely:

“a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual settlements that will accommodate their needs. Mediation is a process which emphasises the participants’ own responsibilities for making decisions that effect their lives”<sup>3</sup>

In Queensland, the Community Justice Programme recently set up by the Attorney-General’s Department to cater to community level private disputes, explains the process of mediation as practised by them in the following terms:

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1. In Queensland ADR schemes (including mediation) are presently available outside the court system through LEADR (Lawyers Engaged in Alternative Dispute Resolution) and BAQ Pty Ltd (the Bar Association Mediation Service).
2. In Queensland the Attorney-General’s Department has set up the Community Justice Programme.
3. Family Law Council Discussion Paper Family Mediation, 1990 at 6.

“Mediators do not take sides, decide who is right or wrong, or tell people what to do. A satisfactory result is achieved through mutual agreement.”

Dr Christopher Moore defines the process as follows:

“Mediation is essentially negotiation that includes a third party who is knowledgeable in effective negotiation procedures, and can help people in conflict to co-ordinate their activities and be more effective in their bargaining”<sup>4</sup>.

It is desirable at this stage to isolate and highlight some of the individual elements of mediation, as the research shows it is often these peculiarities of the process which lead to the advantages and disadvantages of its application in practice.

(a) Entry into the process is voluntary for all parties in dispute.

Although the writers have seen the term “compulsory mediation” used in research papers it is submitted that this is not true mediation and should not be categorised as such. One argument put forward is that there should be a distinction drawn between coercion into, and coercion in mediation; that a bit of a shove into the mediation process is not too serious given the general ignorance of that process, as long as the disputants reach their own outcome<sup>5</sup>. It has been said that this intake coercion is a rather sad conclusion but one we may have to live with for the moment<sup>6</sup>. The writers disagree with this philosophy. Community education will eventually cure the ignorance of the process problem. It is suggested that if so called ‘mediation’ is compulsory or coerced then a more appropriate title for the process is conciliation. The difference between these two processes, particularly in their application to family law disputes will be discussed later in this paper.

(b) The mediator controls the process, but the disputants themselves control the content and the outcome. A mediator has no authoritative decision-making power.<sup>7</sup>

(c) The mediator must be impartial and neutral.

(d) If either or both parties become dissatisfied with the progress of the mediation then they can terminate the process and simply walk out (indeed the mediator has this right also in certain circumstances).

(e) The process is private and the results are confidential and not available for public scrutiny.

(f) The agreement reached by the parties themselves is not binding in the sense of being enforceable in a court of law unless the parties choose to make the agreement contractually binding.

### 3. MEDIATION: CONCILIATION: COUNSELLING — THE DISTINCTIONS

Primarily, this paper is analysing the use of the mediation process in family and neighbourhood disputes as an alternative to court adjudication. However, it must be pointed out that, particularly in potential Family Court disputes, two other dispute resolution processes are available in Australia, namely conciliation and counselling.

It is important to make clear distinctions between these three processes at the outset because they are often mistakenly pushed under the one umbrella and called ‘mediation’. This is not so. Fuller, for example, has said that in ordinary usage the terms ‘mediation’ and ‘conciliation’ are largely interchangeable<sup>8</sup>. All three processes may have some common elements, but they are distinct and separate processes not to be confused.

4. C.W. Moore *The Mediation Process* Jossey Bass, San Francisco, 1986 at 14.

5. S. Golberg E. Green & F Sander *Dispute Resolution* Little Brown & Co. Boston, 1985, at 490.

6. Frank E.A. Sander ‘Family Mediation: Problems and Prospects’ (1983) 2 *Mediation Quarterly* at 3.

7. *Supra* n.4 at 17.

8. *Supra* n.5 at 105.

#### 4. USE OF MEDIATION IN THE FAMILY COURT

It should be noted that the word mediation is not used in the *Family Law Act 1975* or the Family Law Rules or Regulations. Indeed, it is only in mid 1991 that true mediation is proposed to be introduced into the court annexed processes of the Family Court via pilot projects in New South Wales and Victoria, although the process exists in a number of agencies some of which are government funded<sup>9</sup>.

#### 5. USE OF CONCILIATION IN THE FAMILY COURT

Conciliation is arguably the ADR process that is most available in the Family Court system. It has been practised in that court by Counsellors and Deputy Registrars since the court commenced operation in 1976. It is used in two distinct ways:

- (i) Order 24 Conferences in property and financial matters; and
- (ii) Conciliation Counselling in disputes involving children.

The main distinctions between these two conciliation processes and mediation are that entry into the Family Court conciliation processes is not voluntary, but compulsory (and true mediation must be a voluntary process), and further, in conciliation, the third party makes concrete recommendations, as opposed to suggestions, concerning solutions. Conciliation is, therefore, less concerned with the empowerment of parties to reach their *own* conclusions<sup>10</sup>.

It is suggested that Jenny David's definition of conciliation is appropriate.

“Entry into this process may be voluntary for the initiating party but is never voluntary for the responding party and may not be voluntary for the initiating party. The conciliator controls the process and the conciliator and the parties control the outcome”<sup>11</sup>.

This should be contrasted with the elements of mediation already illustrated.

Even Nicholson J., the Chief Justice of the Family Court of Australia, acknowledges this distinction between mediation and conciliation, and makes it clear that the former process will only be offered for the first time in mid 1991 as a court annexed programme. His Honour said that although it will have a number of the features of conciliation counselling, it will not be just a variation of what the court has been offering for the past 15 years<sup>12</sup>.

The proposed 1991 pilot projects to be situated at Melbourne/Dandenong and Parramatta NSW, will be based on a true mediation model, that is, entry into the process will be on a voluntary basis with no element of compulsion or imposition of agreement. The mediation offered will be co-mediation, that is, with a mediation trained Registrar and Counsellor who will work as a team. His Honour also said that although mediators may, in some cases, proffer alternatives for the parties to consider they will not actively promote any of them, as is the case in the conciliation process<sup>13</sup>.

It is the pros and cons of this proposed court-annexed mediation process and that available in the government agencies and the private arena which this paper will analyse — not those of the compulsory conferences.

9. See eg the Noble Park Family Mediation Centre in Victoria established in 1985. For a list of these agencies see “Exploring Family Mediation in Australia”, Occasional Papers, Family Mediation Seminar, May 1988 at 14 and 15.

10. *Supra* n.3 at 10 and Alternative Dispute Resolution Within the Family Court of Australia, Mediation Sub-Committee Report 1990 at 4.

11. J Mugford (ed) Alternative Dispute Resolution, Australian Institute of Criminology, 1986 at 51.

12. Nicholson J. Mediation in the Family Court 65 (1991) Law Institute Journal at 61.

13. *Ibid.*

## 6. COUNSELLING

This paper is not concerned with the benefits or otherwise of counselling services. Counselling and mediation differ both in their objectives and in the processes used. Certainly, many of the skills of the counsellor and mediator are the same, but they are applied in different ways to different ends<sup>14</sup>. The distinction has been described as follows:

“Mediation is a process . . . in which a third party helps people to negotiate between themselves a clear cut and specific agreement about how they will resolve a specific problem or series of problems . . . Counselling is mainly to do with personal emotional growth, handling interpersonal relations and, if necessary, changing emotional reactions to external problems”<sup>15</sup>.

Despite the overlap in these two processes, their differences must be recognised. Marriage guidance counselling or any personal counselling are not within the scope of this paper. They are not examples of mediation.

## 7. THE ADVANTAGES OF MEDIATION FOR DISPUTANTS AND SOCIETY AS A WHOLE

Mediation of a family or neighbourhood dispute where parties achieve their *own* agreement has innumerable advantages over court adjudication where the judge imposes a decision on the parties. It has become rather a hackneyed comparison but it still holds true that court produces a win-lose result, mediation a win-win outcome. There are a number of commentators who disagree with this view and their criticisms will be analysed; however, the aim of this paper is to establish that overall, despite certain recognised disadvantages in and limitations of the mediation process, the outcome is more positive, more advantageous to both disputants and society than contesting the dispute in court with the attendant financial and emotional burdens.

Some would argue that, in the family law area, there is no need for separate mediator services because Registrars, Court Counsellors, lawyers, psychologists and community health workers already provide sufficient assistance to separating and divorcing couples to negotiate agreements<sup>16</sup>. No-one is saying that mediation is the only answer in the dispute resolution spectrum. It is not meant to be a cure-all.

The courts will never be removed from the divorce process. It is accepted that some cases cannot be settled or mediated.

However, the mere fact that court-annexed mediation is to be introduced in mid-1991 into the Family Court coupled with the fact that community justice programmes in Australia use almost entirely mediation, shows governmental and community recognition of mediation's advantages as an adjunct to the processes already available to disputants.

## 8. SAVINGS IN COST AND TIME

Potential litigants are deterred by the expense of litigation by the costs of executive time involved in the complex and time consuming procedures of discovery, interrogatories, and other pre-trial processes<sup>17</sup>.

However, the new Family Court mediation programme is not expected to be cost effective in the early stages. Indeed, Nicholson J. sees it as being initially more expensive for the court, but cost effective in the long term<sup>18</sup>. Studies in the United States have also

14. G. Pears *Beyond Dispute Alternative Dispute Resolution in Australia* Corporate Impacts Publications Pty Ltd at 71.

15. *Ibid.*

16. *Supra* n.3 at 10.

17. *Supra* n.5 at 318.

18. *Supra* n.12 at 62.

shown that mediation does not initially result in substantial savings to the clients, although it is difficult to transpose data from the American perspective. However, these studies do acknowledge that mediation does however, result in less litigation — thus, less subsequent costs — and possibly less costs to the public<sup>19</sup>.

A further disadvantage in the judicial system is the delay in getting to court which only serves to exacerbate the mutual antagonism created by the adversarial system. This is a major problem with legal intervention. It often occurs too late. An advantage of mediation e.g., in the area of community justice (the CJP in Queensland, CJC's in New South Wales) is that these centres make an effort to educate the community so that people will bring disputes to the programmes in the early stages. Mediation facilities can generally be offered within a few days at most and frequently outside regular office hours<sup>20</sup>. In the family law area, the possibility of early resolution of family conflict reduces financial and emotional costs to disputants.

### 9. VOLUNTARY: CHOICE OF NEUTRAL

It has already been suggested that 'compulsory mediation' is a contradiction in terms. It is not true mediation which must be a voluntary process whether entry occurs via a court annexed programme or a governmental or private agency. Usually, the parties enter into mediation because they understand its advantages and wish to work in a co-operative rather than adversarial way. They may also opt out of the mediation process at any stage. One cannot walk out of a court proceeding<sup>21</sup>.

### 10. FLEXIBILITY AND INFORMALITY

The next advantage to be considered is the flexibility and informality of the mediation process.

Unlike litigation, which focuses on narrow issues determined by prefabricated legal doctrines, mediation does not limit its focus to the discreet legal claims asserted by the parties. They can discuss the relative merits of their positions free from rigid court rules, and not limited to a solution to the problem which is confined by narrow pre-defined legal remedies. A wide range of creative solutions to problems between the disputants is possible with mediation. The litigation process does not always allow a full exploration of the factors underlying a dispute. In mediation parties are free to enlarge the issues discussed and look for underlying causes for the dispute. This is particularly relevant to family and neighbourhood mediation as litigation may only focus on the symptoms of a problem and not the source. Therefore, the problem often remains after the disputants leave the courtroom<sup>22</sup>. With the high cost of litigation and the practice of lawyers to engage in time costing methods there is real pressure to 'get to the point'. Often, the real issues and underlying interests remain buried.

The mediation process is as much concerned with how these people are going to get along in the future as it is with the resolution of the specific problem at hand. This is obviously imperative with next door neighbours and families.

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19. J. Pearson and N. Thoeness *The Benefits Outweigh the Costs* Family Advocate Vol.4 No.2, 1983 at 26. Although not included in the family or neighbourhood dispute area Mr David Newton Chief Executive of the ACDC (1989), estimated that from mid 1986-89 the centre saved the community \$20 million in costs related to litigation and about \$1 million related to court staff and judges. See Maxwell J. Fulton *Commercial Alternative Dispute Resolution*, Law Book Co Sydney 1989 at 90.

20. *Supra* n.14 at 57.

21. It is not expected that parties will be able to choose their co-mediators in the proposed court-annexed mediation programme for the Family Court.

22. *Supra* n.19 at 80.

The informality of the mediation process is an enormous advantage to disputants who have no training to equip them for the legal rules, legal jargon, indeed the complete ritual and mystery which are at the core of the litigation process. The sheer formality of the court system threatens disputants and causes stress. Encounters between the parties are rare and usually emotionally charged<sup>23</sup>. This only antagonises them further. By contrast, it is a mediator's role to hold a mediation at a place, time and length of process which is suited to the disputants. The aim is to reduce stress and provide an atmosphere in which the parties are more likely to reach agreement and in which they feel comfortable. Although the time and place criteria may not be as appropriate for the proposed court-annexed family law mediation, it is to be assumed that every effort will be made to make the disputants feel comfortable during the process.

### 11. PRIVACY AND CONFIDENTIALITY

There are arguments both for and against the confidential, private nature of mediation proceedings. It is quite ironic that often the advantage also contributes to the disadvantage. The latter will not be ignored and will be discussed at a later stage in this paper; however, proponents of mediation argue that the private nature of the process encourages an uninhibited exchange of information, feelings and emotions which is one of the main contributors towards a mutually satisfactory settlement. Without this element, important input could be withheld for fear of embarrassment or damage that could result if it was published in a plethora of legal reports and journals. This surely aids the preservation of goodwill.

### 12. SELF EMPOWERING PROCESS

A number of advocates of mediation emphasise the empowerment it brings to the disputants and even to the communities in which it is practised<sup>24</sup>.

Empowerment has been described as including all the steps by which the parties can be encouraged to take responsibility for finding their own solutions, negotiating their own agreement and implementing it<sup>25</sup>.

The rationale behind mediation is that the parties have to take control over their own lives, not hand their lives over to the state. They must accept the consequences of their own decisions because they control the outcome. It is not imposed on them. This is generally regarded as being psychologically advantageous<sup>26</sup>. The parties can also withdraw from the process at any time if they wish.

Certainly, in theory, the parties also control the litigation process, but this is not so in practice. Once parties enter the litigation process they hand over control of the conduct of their dispute. The client comes to see his actions as dictated by the requirements of procedures. He sees the lawyer's actions as representing, not the clients' own choices, but rather features of autonomous proceedings<sup>27</sup>.

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23. K. Feinberg *Mediation — A Preferred Method of Dispute Resolution* (1989) 16 *Pepperdine Law Review* s.5 at s.7.

24. *Ibid.* at s. 11, see also *supra* n.14 at 32, and Fulton *supra* n.19 at 91.

25. *Supra* n.3 at 8.

26. *Supra* n.15 at 32.

27. *Supra* n. 19 at 103 (Fulton).

### **13. GREATER SATISFACTION WITH RESOLUTION — HIGH LEVEL OF COMPLIANCE WITH AGREEMENT**

This involvement of disputants in arriving at their own solution rather than having one imposed on them is said to lead to a greater satisfaction with the resolution, and, therefore, a higher level of compliance with the agreement than is the case with judicial decrees<sup>28</sup>. Jenny David points out that very few evaluation studies have been carried out to assess this claim, but states a study in support conducted by the Community Justice Centres in New South Wales<sup>29</sup>.

### **14. PRESERVATION OF FUTURE RELATIONSHIPS**

A well documented advantage of mediation, particularly in the family and neighbourhood dispute area, is that a by-product of such an agreement is an enhanced capacity in the parties to preserve a relationship for negotiations in the future as contrasted with the result of the court adjudication process. This is particularly important where there is a long standing relationship between the parties, which is certainly the case in family disputes and usually with neighbourhood relationships.

Folberg and Taylor consider that mediation can indeed educate the participants about each other's needs and help them learn to work together and see that through co-operation positive gains eventuate<sup>30</sup>.

Arguably therefore, if the same parties subsequently have another dispute they are more likely to negotiate at an early stage to settle the problem without needing any third party assistance. This again leads to a long term saving in financial costs to both the disputants and the community.

Although mediation is not therapy, it can certainly be a therapeutic experience.<sup>31</sup>

### **15. REDUCTION IN COURT BACKLOG**

Although it is easy to say that the use of a mediation process reduces the backlog of court cases, it is difficult to confirm this assertion with specific figures. One attempted analysis was of the New South Wales C.J.C.'s where it has been suggested that between 500 to 1,000 cases that would otherwise have ended up in court did not do so because of the C.J.C.'s<sup>32</sup>. The commentator acknowledges that this is just a drop in the ocean compared with the tens of thousands of cases waiting to be heard by the New South Wales lower courts. However, it is suggested any saving is better than none. Certainly, with increased community education about the availability and suitability of mediation services these figures should increase substantially.

### **16. THE DIFFERENCE BETWEEN “LEGAL NORMS” AND “PERSON-ORIENTED NORMS”**

Mediation, unlike litigation, is able to recognise the collision of “legal norms” with “person-oriented norms”.

Both courts and lawyers tend only to give secondary importance to these person-oriented norms. Thus, the court process and lawyer's negotiations are rational and rule governed. Mediation, however, is more accommodating to personal norms and values<sup>33</sup>. These

28. *Supra* n.5 at 92 and *supra* n.19 at 94 (Fulton).

29. *Supra* n.11 at 50.

30. *Supra* n.5 at 97.

31. *Supra* n.6 at 6.

32. *Supra* n.14 at 64.

33. L. Neilson Solicitors Contemplate Mediation — Lawyers Perceptions of the Role and Education of Mediators (1989) 3 International Journal of Law and the Family at 238.

personal norms, though not legally valid in a court of law, may indeed be important to the disputants in reaching a fair and equitable settlement within the context of the particular issues of their unique dispute. An example in the area of family mediation is a personal norm that considers fault as being relevant to the financial outcome of divorce. This would not be recognised by the Family Court as a legal norm, but if it is relevant in accommodating both disputants' personal principles can it be said the resulting mediated government is unfair or unprincipled<sup>34</sup>?

### **17. NEIGHBOURHOOD DISPUTES — ADVANTAGES**

Arguably litigation is simply not the appropriate solution for the vast majority of neighbourhood disputes. Indeed, the use of mediation as the appropriate dispute resolution process in the various community justice programmes around Australia is a reflection of this.

Courts may categorise many neighbourhood disputes as "minor", eg., fighting over a fence, overhanging trees or loud parties. However, in reality, these "minor" disputes can be very bitter and can be a drain on community resources over a lengthy period of time. The dispute may cast into its net the police, social services, local community organisations and may even spill over into schools where children are involved.

Moreover, the community dispute resolution services also manage a range of family disputes of a kind which no court can manage<sup>35</sup>. For example, a dispute may arise concerning elderly grandparents and/or adult children living at home. These are private, "minor" matters to any outsider, yet they are important to the healthy functioning of a family. No court in Australia, including the Family Court would deal with conflicts of this nature.

### **18. DISADVANTAGES OF MEDIATION**

As has already been observed, it is quite an irony that often the advantages of mediation also contribute to the disadvantages. Although the authors are proponents of the mediation process, to give a balanced view, it must be acknowledged there are some disadvantages, although some of the criticism from commentators can be refuted. There are some situations where the mediation process is simply not appropriate. These will also be examined.

### **19. PRIVACY – NO PUBLIC SCRUTINY**

It is said critically that the mediation process lacks the precise checks and balances which are the principal benefits of the adversary system<sup>36</sup>. Justice is simply not seen to be done. But this notion rests on the premise that the courts produce just results, which is disputed in many cases, and further, do disputants really care that justice is not seen to be done if they are happy with the outcome? We think not. Surely satisfaction with an agreement is justice in itself.

Some feminist writers suggest that the powerless, the disadvantaged and discriminated against are disadvantaged by this lack of public scrutiny<sup>37</sup>. Women are included in this group. The argument is that disputes involving these categories of people demand the public arena because without public scrutiny and education there will be no attempt to

34. *Supra* n.5 at 114.

35. *Supra* n.14 at 59. In NSW in the CJC's the figure runs to about 17% of all cases.

36. *Supra* n.5 at 113.

37. Dr Jocelyne Scutt, *supra* n.11, at 203.



reform, legislatively or socially, entrenched discrimination or power imbalances. There is certainly some merit to this proposition but each situation should be dealt with individually on a case by case basis. It is agreed that in the case of severe power imbalances, domestic violence or child abuse, the proposition is correct. Mediation is not suitable. However, it has never been suggested that mediation is always the answer. Sometimes, court adjudication is the only solution and these situations will be dealt with in more detail later in this paper.

## 20. FAIRNESS — IS MEDIATION SECONDARY JUSTICE?

Arguably, the most serious criticism of mediation relates to the fairness of the process. Critics say that mediation represents secondary justice — that only the courts provide first class justice. Owen Fiss, for example, sees that the thrust of mediation is towards a surrender of legal rights.

“I do not believe that settlement as a generic practice is preferable to judgment . . . justice may not be done . . . settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised”<sup>38</sup>.

Fiss asserts that underlying all ADR processes, including mediation, is an assumption of rough equality between the contending parties and that, as a result, it is the rich who can afford first class justice via the court system, and the poor who cannot finance litigation settle for second best — that includes mediation.

It is submitted this theory is fallacious for a number of reasons. Firstly, it is assumed that only a resolution based on law is first class justice. Surely a better definition is that of a dispute resolution process which most satisfies the participants. As mediation offers a win-win result, not win-lose, why can mediation not be termed first class justice?

Secondly there is a difference between theoretical justice and applied justice<sup>39</sup>. In practice, litigation often falls short of the ideal, eg., rarely does the disputant have the right to choose his own barrister, and, indeed, is precluded in Australia from making a direct approach. Solicitors brief barristers for various reasons which may be unrelated to the clients' welfare or the talent of the barrister. Often, the choice is based on friendship, or the barrister may have formerly worked at the solicitor's firm doing the briefing. Everyone in the legal profession is aware of these practices. Does this result in first class justice?

Thirdly, there is the question of access to court adjudication. In theory justice is accessible to all, however, in Australia it seems to be accessible only to the very poor via Legal Aid or the very rich. The middle ground — the majority — miss out. The danger is that disputants in the court process can only obtain the justice they can afford. An inexperienced junior barrister could be easily defeated in court by an experienced senior. Pincus J. of the Federal Court has commented on the role of wealth in the litigation process. His Honour said:

“It is my opinion that nothing can reasonably be done to eliminate whatever advantage can be obtained by the richer litigants' access to the more expensive, and therefore presumably more expert legal assistance”<sup>40</sup>.

His Honour then went on to point out how expedition and lessening the cost of dispute resolution could in fact lessen the inequality which results from wealth disparity. He continued:

38. O.M. Fiss *Against Settlement* [ 1984 ] *Yale Law Journal* at 1,073 as quoted in Goldberg, Green and Sander, *Supra* n.5 at 492.

39. *Supra* n. 19 at 100 (Fulton) .

40 C.W. Pincus, *Judge Asks Why Old Methods Are Still Used to Resolve Disputes* (1988) 23 *Australian Law News* at 11.

“If however, concerted effort is made to augment the possibility of disputes being resolved more cheaply, in court or out, the wealthier litigant’s edge is of less importance. In most civil cases under the present system, where the issue is of any complexity, the party whose pocket is deep enough to last the course must be expected to be able in many cases to force an unequal settlement”<sup>41</sup>.

Thus, the writers are in agreement with the proposition that if one accepts mediation is cheaper and quicker than litigation, it is arguable that where a disparity in wealth exists between the disputants, it is actually mediation which may be the fairer way of resolving the dispute — not litigation<sup>42</sup>.

Finally, it has been said that the theoretical legal system is a far safer path for a disputant than mediation if there is any question of the parties being of different “intelligence, articulation and ingenuity”<sup>43</sup>. Yet, as has already been illustrated, the litigation process as practised falls far short of the theoretical ideal and may not protect disputants any better than or even as well as mediation<sup>44</sup> in this situation.

If these questions of equity are of concern to a disputant, they may withdraw from the mediation process. However, that person must weigh up the probable gains in financial cost, speed of resolution, flexibility and informality, self-determination, privacy, avoidance of stress and preservation of future relationships with what that person sees as a lack of fairness in the process.

## 21. CONFIDENTIALITY — THE PROBLEMS

Another problem attaching to the mediation process is the legal uncertainty about the confidentiality of communications made in the mediation process. Before looking specifically at family and neighbourhood disputes, some general points may be made.

Potential problems arise where disclosures are made by disputants during a mediation, but the parties fail to reach agreement and subsequently go to court to settle their dispute. Also, the fear that the mediator himself or herself is a compellable witness in court and may be required to divulge confidential information would also discourage people from entering into mediation at all. It has been suggested that this uncertainty may act as an impediment to the future development of the mediation process as a widespread method of dispute resolution<sup>45</sup>.

The general approach, in practice, is that before the mediation commences, the mediator should explain the process to the disputants, and gain their consent that the information divulged in the process will not be used by the parties in any future adversarial proceedings. Indeed, this agreement is an incentive for the participants to use the process and a critical ingredient for its success. Certainly, this agreement on its own does not provide watertight protection, but it is submitted that as the disclosures made in a mediation are made within a genuine attempt to settle a dispute, they fall within the protection of ‘without prejudice’ negotiations. This would prevent disputants using information acquired during mediation in subsequent litigation. It has been suggested that once a disputant has learnt of the confidential information, that disputant will still disclose it in court and say that it was obtained from some other source, outside the mediation process. If people wish to perjure themselves, so be it, but the legal protection is there.

It would seem in Australia that mediators, with some exceptions are compellable witnesses. The American writers Folberg and Taylor suggest the mediator should resist to

41. *Ibid.*

42. *Supra* n.19 at 107 (Fulton).

43. *Ibid.* at 104.

44. *Ibid.*

45. *Supra* n.23 at 28.

the best of his or her ability the subpoena of either his or her notes or person<sup>46</sup>.

The Australian commentator, Gordon Pears, has said that, to his knowledge, there has never been a test case on whether a mediator would be held in contempt by refusing to give evidence about mediation proceedings. Victoria and New South Wales had anticipated this problem by giving certain mediators statutory protection against this possibility<sup>47</sup>. Unfortunately, he does not go on to specify which particular mediators enjoy protection. In the United States, mediators are now protected by statute in a number of states. It is believed this legislative intervention will be increased in Australia in the future.

These comments are general in nature and will certainly apply to the private agencies providing mediation services in Australia. However, there is no problem regarding confidentiality for the Community Justice Programme in Queensland dealing with neighbourhood disputes. It is protected by statute.

Furthermore, it is believed that the position of the parties and mediators involved in the proposed Court-annexed mediation in the Family Court will be as follows. They should have: the same legislative protection as marriage counsellors under the Family Law Act and should not be required to report on:

- (a) a party's willingness to participate at the mediation process;
- (b) a party's bona fide (or otherwise) participation in the process;
- (c) the merits of the dispute; and
- (d) anything said by any party in mediation to any person or authority (eg. Legal Aid Commission, Child Support Agency, Family Courts, Department of Social Security, Department of Housing<sup>48</sup>).

This protection, of course, does not attach to other agencies dealing in family mediation, but it is believed as community education results in an expanded use of mediation services there will be legislative intervention to eliminate the problems associated with confidentiality.

## 22. PRECEDENT

One result of the confidential nature of mediation proceedings is that it has prevented the establishment of a useful body of case law on mediation decisions, and that this therefore denies disputants the knowledge of how disputes similar to their own have been resolved. Certainly, this makes evaluation of the mediation process that much harder, but the writers disagree that the lack of precedent is a disadvantage. Seeing it as such ignores the reality of mediation, ie., two disputants trying to find their own mutually agreeable solution. If the parties are happy with the result, why should any comparison be made to the results achieved in a similar dispute but with different parties with different needs and emotions.

Moreover, one of the mediator's tasks is to reality test, that is, the parties are encouraged to reconsider suggested solutions and options, and this is often done by reference to social norms and the results which could flow from an adjudicated decision. No doubt the mediators in the proposed Family Court mediation will engage in this reality testing so that disputants have some idea of what their legal rights would be.

46. *Supra* n.5 at 119.

47. *Supra* n.14 at 35.

48. *Supra* n.3 at 30.

### 23. PUBLIC INTEREST: THIRD PARTIES

The argument usually put forward in this area is that the disputants, protected by the privacy and confidentiality of the mediation process, will come to some agreement which may disadvantage an unsuspecting third party, or indeed, the community in general. Obviously, remedies available under the court system cannot be contrary to the law of the land, whereas the possible terms of mediation settlements are only limited by the perceptions of the disputants. It has, therefore, been suggested that parties may come to an agreement which may involve evasion of tax, health and safety issues, and the parents interests overriding those of children in family disputes<sup>49</sup>.

However, what this proposition ignores is the role of the mediator. Some mediation theorists may argue that a mediator's only role is to facilitate an agreement — any agreement at any price, and that there is no responsibility attaching to the terms of the agreements. It is suggested the majority of practising mediators would reject that view. An ethical and properly trained mediator would terminate the mediation if these situations arose. There are a number of instances when a mediator should terminate the mediation and they will be considered later in this paper. The mediator controls the mediation process and has the right to end that same process.

### 24. ENFORCEABILITY OF AGREEMENT

An advantage claimed for litigation is the enforceability of the judge's decision. This element is said to be lacking in a mediation agreement.

Yet, a number of issues have been ignored in this proposal. Particularly in the family law area, many of the 'losers' in a Family Court battle do not comply with court decisions. The low level of compliance with maintenance orders under the *Family Law Act 1975* is well documented although this has been alleviated in part by the *Child Support Act 1988*. However, it is generally accepted among writers on ADR that compliance with mediation agreements is high, frequently higher than for comparable court imposed decisions which are theoretically enforceable<sup>50</sup>.

In addition, it is possible to give a mediation agreement enforceability by contract. In practice, once settlement has been reached by the disputants, heads of agreement are usually drawn up at the mediation by the mediator or the parties themselves; the disputants will usually then have the terms checked by their solicitors before signing. Once agreed in contractual form, an offending party can be sued for breach of contract.

### 25. UNEQUAL BARGAINING POWER

Every time a mediator sits down to help two parties resolve a particular dispute, the issue of potential power imbalance emerges. This issue is particularly significant in family law disputes, where as already stated, many feminist writers argue there is per se a power imbalance in the man's favour. The authors do not agree with that extreme position, but must acknowledge that where there is a significant inequality between the disputants, mediation is inappropriate — litigation is the better alternative. If the inequality of bargaining power is based purely on the parties financial resources, that situation should not be included in this proposition, because, as has already been seen, the rich can also afford better legal representation, so litigation would not necessarily be more advantageous to the poorer disputant.

It is where a severe power imbalance is based on emotional and psychological factors,

49. K. Lauchland, ADR — A Litigator's Lament (1990) 20 Q.L.S.J. 373 at 380.

50. *Supra* n.14 at 32.

that is, an ability to control others, that mediation may be inappropriate. Power is a relative thing and in family law disputes it is incorrect to say that men are always the more powerful, therefore litigation is more appropriate. Indeed, it may be a problem for a mediator to determine in fact where the power lies in a marital relationship, as the dominant party can often be the one who appears on the surface to be the weaker one, for example, the Canadian mediator John Haynes has pointed out in one case that he mediated the man was physically and emotionally powerful but was reduced to tears by the thought that his wife might deprive him of access to his children<sup>51</sup>.

There will always be some inequalities between disputants but provided the imbalance is not extreme, mediation can actually be a genuinely effective means of dispute resolution, because there are certain specific interventions that mediators can employ to address the problem. Isolina Ricci believes, for example, that the mediator must employ power balancing interventions to both strengthen the weaker position and mitigate overbearing postures<sup>52</sup>. She focuses on the use of educational interventions directed at restructuring the wife's vulnerable entitlement and empowerment<sup>53</sup>. She also suggests that in some cases the power imbalance problem can be solved by appointing a proxy who will negotiate in the place of the weaker party<sup>54</sup>. Also, many power imbalances can be addressed simply by spending time with the parties, together, or even more effectively in separate caucuses. However, Ricci does acknowledge, in support of the argument expressed here, that if after attempting these intervention strategies the imbalance still exists, then mediation will not serve the woman's best interests. In this situation, the mediator should terminate the mediation, or at least suspend proceedings, until the woman has sought legal advice.

## **26. WHEN IS MEDIATION NOT APPROPRIATE — WHEN SHOULD THE PROCESS BE TERMINATED?**

The example of a severe imbalance of power is but one instance of when mediation is not appropriate, and where it is acknowledged court adjudication is the preferred option.

The Family Law Councils' preliminary view of the Family Court pilot mediation programme is that the suitability of parties for family mediation should be actively and skilfully assessed at all stages, and that even if the parties are willing, the mediator should decline to proceed in certain circumstances<sup>55</sup>.

Examples of when mediation is inappropriate are as follows:

- (i) where the parties are hoping to gain some tactical or strategic advantage which is not related to the subject matter of the dispute<sup>56</sup>, eg., to delay proceedings, or as a fishing expedition to gain information;
- (ii) where domestic violence or fear of violence is suspected;
- (iii) cases involving child abuse or sexual abuse;
- (iv) where the parties are so conflict ridden they are incapable of considering the dispute between them apart from their own feelings ie., the "all or nothing" dispute;
- (v) where one of the disputants is so seriously deficient in information that any ensuing agreement would not be based on informed consent; or

51. J. Haynes *Women in Divorce Mediation: Powerless or Empowered?* Conflict Resolution Notes Resolution Centre Inc. Pittsburgh Vol.1 No.1 1983 1 at 1.

52. I. Ricci *Reflections on Promoting Equal Empowerment and Entitlements for Women* as quoted in *Divorce Mediation: Perspectives on the Field*, Haworth Press, 1985, 119 at 120.

53. *Ibid.* at 121. For an example of these interventions see particularly the "traded assurance" intervention at 127.

54. *Ibid.* at 129.

55. *Supra*, n.3 at 15 and 16.

56. LEADR (Lawyers Engaged in Alternative Dispute Resolution) LEADR Workshops Law Council of Australia, 1989 at 35.

(vi) if the disputants reach an agreement which the mediator believes is illegal, is damaging to a third party, is grossly inequitable to one of the parties, or is the result of bad faith bargaining, the mediator should terminate the mediation.

## 27. MEDIATION AGREEMENT AS OPPOSED TO A NEGOTIATED SETTLEMENT THROUGH SOLICITORS

To date, this paper has focused on the advantages and disadvantages of the mediation process as compared with court adjudication. However, before concluding, one final issue should be confronted, namely, why is mediation necessary at all? Why do parties simply not negotiate a settlement through their respective lawyers and eliminate the need for a mediator?

The cost of paying solicitors is one factor, but there are also some fundamental differences between what lawyers do and mediation. When solicitors negotiate for the clients, they control the pace and often the substance of the dispute resolution process. Often the lawyer decides what is best for the client and advises (directs?) the client to accept that decision<sup>57</sup>. With mediation, the disputants negotiate directly with each other and responsibility for the resolution remains with the disputants themselves. The mediator is simply the facilitator of negotiation and communication. It is arguable, therefore, that when agreement is reached through mediation this process is more satisfying to the parties and their increased participation in the process makes them more committed to the outcome.

It has been suggested that the ideal dispute resolution model would be two clients and two highly qualified, equally competent lawyers eager to resolve the problem fairly and fully. This model would solve the problem of insuring that the disputants have the relevant information and background needed to make informed decisions, and to avoid any exploitation of one side by the other<sup>58</sup>. However, this is not the real world. What if one party has a high powered solicitor and the other does not? One party may wish to fight to the finish, whereas the other simply wants a just solution. Hence a skilled mediator may be able to inject the needed element of constructive problem solving that makes the difference (say) between a fruitless donnybrook and a civilised divorce<sup>59</sup>.

It is not suggested that solicitors should be excluded from the mediation process. Indeed, it is advisable that they should come in at the end to review the agreement tentatively reached by the disputants, and they may play an advice-giving role before or during the period of the mediation. Nor is it suggested there is no room for negotiated settlements. Probably 90% of all disputes are currently concluded in this manner. It is suggested, however, that mediation provides another form of dispute resolution which in many instances may be a more appropriate process of resolution than a negotiated settlement through solicitors.

## CONCLUSION

It has not been the aim of this paper to establish mediation as a "panacea for all types of conflicts"<sup>60</sup>. Rather, it is hoped that by weighing up the advantages and acknowledged disadvantages and limitations of mediation, it can be seen there is a definite, and it is hoped expanding role for the use of the mediation process in Australia, particularly in the area of family and neighbourhood disputes. It is hoped that by an education programme that

57. *Supra* n.32 at 237.

58. *Supra* n.6 at 8.

59. *Ibid.*

60. *Supra*, n.5 at 118

canvasses lawyers, law students and the community in general, disputants will be made aware of the existence of mediation and of the advantages of its use in many situations, as an alternative to court adjudication and negotiated settlement through lawyers.

Mediation offers the consumer another alternative — more freedom of choice. It will not remove the court from the dispute scene, nor will it make lawyers redundant. Some cases cannot be settled or mediated. It has not been put forward as a cure-all, but as a worthwhile idea that can save people time and money and a portion of the emotional turmoil that often accompanies adversarial proceedings.

“The spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings but because it fosters interaction among people, and empowers them to control their own lives”<sup>61</sup>.

Lawyers should take note. Mediation is here to stay.

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61 *Supra* n.5, at 142.

