LAW REFORM

EXPERIMENTS IN COMMUNITY MEDIATION

In late 1980, the Department of Justice published a discussion paper[1] outlining the principal features of several Neighbourhood Justice Centre (NJC) programmes in the United States. These programmes use mediation, or a combination of mediation and arbitration, to deal with civil and criminal cases involving people who have some form of ongoing relationship with each other. For example, the Centres handle complaints by neighbours, family members, and work associates in respect of matters ranging from nuisance activities, harassment, property damage and theft, to assaults.

Although it was only in 1971 that one of the first initiatives was taken to process disputes of this kind outside the conventional adversary system,[2] the last few years have seen a mushrooming of NJC's in the United States.[3] Earlier this year, three Community Justice Centres (CJC) commenced operation on an experimental basis in New South Wales, Australia.

In his Foreword to the Justice Department's paper, the Director of the Planning and Development Division states that it is intended "to provide a base for the development of ideas appropriate to New Zealand".[4] Its publication in fact invites debate of several questions. The first is whether there is any need in New Zealand for some alternative means of handling minor interpersonal disputes. Is the existing justice system already dealing with these cases effectively? If it is not, is this because of inadequate resources, or is it because adjudication is an inappropriate mechanism in this context? It is only if the latter is the case that the question arises whether mediation would be likely to provide a more effective means than adjudication of dealing with disputes involving interpersonal relationships. Are there aspects of the mediation process which suggest that it might achieve lasting resolutions where adjudication fails? If there are, do some mediation programmes show greater promise than others? If so, why? For example, does the evidence suggest that it is preferable for mediation services to be provided as part of or separately from the court system? What sort of people make good mediators? Should mediation be offered in conjunction with arbitration? And by what criteria is effectiveness to be measured?

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[1] *Neighbourhood Dispute Resolution Schemes: An Analysis of potential models*, Monograph Series No. 4. The paper is based on a Report of the same title prepared for the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice by Daniel McGillis and Joan Mullen.

[2] The Night Prosecutor Programme in Columbus, Ohio, initiated jointly by the City Attorney and a Professor of Law at Capital University.

[3] McGillis, *Dispute Processing Projects: a Preliminary Directory* (1980) mimeograph, lists 120 projects operating in the U.S.

[4] *Neighbourhood Dispute Resolution Schemes: An Analysis of potential models*, Foreword.

The recent commencement of the Family Proceedings Act 1980, providing for mediation conferences,[5] adds timeliness to discussion of these questions. So, too, does the release of the Department of Justice Paper, "Access to the Law":[6] if the conclusion were to be reached that adjudication is an inappropriate mechanism for dealing with certain kinds of dispute, the remedy would seem to lie not in infusing more legal aid dollars into the court system but rather in reappraising the dispute resolution technique itself. It is the purpose of this note to consider whether there is a case for experimenting with mediation services in New Zealand. A brief description will be given of the New South Wales pilot project. In response to the Justice Department's paper and in the light of recent New South Wales experience, consideration will be given to some of the issues which would arise in establishing a mediation programme in New Zealand.

1. *Is there a problem?*

It has been suggested by some that the NJC concept may be merely a "fad reform";[7] others contend that it represents a constructive response to "a clear public need".[8] Of course, even if the evidence justifies the latter conclusion in the United States and Australia, it by no means follows that a need also exists in New Zealand.

An assessment of whether there is such a need in this country might begin by a consideration of the types of problems with which the overseas programmes seek to deal. These problems are familiar to most New Zealanders. They absorb a great deal of the time and energy of police, judges, court clerks, members of Parliament, lawyers and social workers. They are problems which are minor in the eyes of the law, but for the people concerned they can have major, sometimes catastrophic, significance. For instance, disputes between neighbours over noise or over a dividing fence can lead to a saga of nuisance activities on both sides, verbal and physical violence and even death. Arguments between family members or flatmates over money or property ownership can spark a chain of harassing and retaliatory acts sometimes culminating in personal injury or property damage.

It is not uncommon for police to receive repeated calls for years from alternatively one or other of two warring neighbours; or for a court to be confronted by the same parties who appeared before it only a few months before with essentially the same complaint.

If one of the primary objectives of the courts is to resolve disputes, and to put an end to further litigation, what evidence there is suggests that in the kind of situation illustrated above that objective is being met as

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[5] Family Proceedings Act 1980, s. 13.

[6] Planning and Development Division, Department of Justice, Study Series No. 6 (October, 1981).

[7] Nejelski, *Thoughts about Courts, Their Alternatives and the Dispute Resolution Act of 1979* (1979) Mimeograph.

[8] Cook, Roehl, and Sheppard, *Neighbourhood Justice Centres Field Test—Final Evaluation Report* (1980) Washington, D.C., U.S. Department of Justice.

rarely in New Zealand as it has been in Australia and the U.S.[9] Moreover, it is submitted that this is because the courts are being required to do a job for which they are functionally unsuited, so that problems of recurrence and escalation would not be eased by, for example, channelling more resources into existing justice system facilities.

It is the function of a court hearing an assault charge, for instance, to determine whether the accused person committed the offence charged. The rules of evidence deliberately exclude from the hearing any matters not immediately relevant to that discrete issue. Although evidential irrelevancies, such as previous incidents, may be at the heart of the dispute so far as the accused and the victim are concerned, the court can hear nothing of them. It is certainly not entitled to explore the relationship between the parties, even if that relationship may be the source of future conflict and litigation.

At times, as the parties struggle to get at what is for them the "real issue", the judge will suggest that they try to settle their disagreement outside the courtroom rather than seek a judgment from him. If this process fails, as it frequently does without some form of third party intervention, the court must ultimately give a judgment which may well serve only to inflame further the hostility of the person against whom it is given.

Adjudication is pervasively concerned with issues of right and wrong, of guilt and innocence, of winner and loser. Its all or nothing approach may be appropriate for cases in which the dispute is the only relationship the parties have. However, experience suggests it may be inadequate, if not counterproductive, as a response to case involving ongoing relationships between the disputants, cases in which the legal action may be merely a symptom of underlying conflict.

In essence, these cases may raise "legal" problems in the conventional Anglo-American sense only peripherally. Or perhaps it would be more accurate to say that they call for a more flexible conception of the options available to the legal system for processing disputes than is usual in the common law tradition. If the key characteristic of these cases which prove so intractable to adjudication is that the disputants are embroiled in some form of ongoing conflict, then, rather than seeking to allocate responsibility for an isolated incident, it may be more fruitful to probe the underlying tensions in the relationship which triggered it, and to facilitate a re-orientation of the parties' behaviour toward each other. This is what mediation seeks to do.

A mediator's objective is to promote resolution of disputes by the disputants themselves. The mediator encourages the disputants to articulate their respective perceptions of their conflict. No issue is trivial or irrelevant if perceived as significant by one of the parties, although the mediator will seek to act as an "agent of reality": by a process of questioning and gradually clarifying major issues, he or she will seek to build up a framework for common perceptions between the parties, and ultimately, for communication and some sense of shared responsibility.

The mediator has no power to compel or to enforce a settlement. Instead, he or she appeals to the disputants' self-interests. Any settlement

[9] Unfotunately the lack of statistical evidence compels reliance on the reported experience of justice system officials.

will be one the parties themselves have developed as a workable formula for coexistence. If the settlement is to last, the disputants must see that it is in their own interests to make it work.

While adjudication tends to attribute individual responsibility for *past* actions, mediation fosters compromise by both parties so that they can live together in the *future.* Adjudication focuses on isolated wrongs recognised by the legal system; mediation explores the pattern of relationships and conflict. Adjudication requires disputes to be shorn of all that is irrelevant to the issues objectively defined by the legal system; mediation is concerned with the parties' perceptions, even if they may appear distorted to a dispassionate observer. The end product of adjudication is a judgment imposed on one of the parties and backed up by State sanctions. Mediation requires the parties to take responsibility for a settlement of their own making.

It is arguable that court adjudication of family and neighbour disputes is both wasteful of expensive resources and counterproductive in result. The police-court system is simply not adapted to probing the roots of interpersonal conflict—the "real" problem for the parties. Insofar as mediation is geared to do that, it would seem to have greater potential for achieving lasting resolutions in this class of dispute.

2. *An experiment in providing mediation services: the Community Justice Centre project.*

In late 1979, the New South Wales Government approved the establishment of three Community Justice Centres which would test the effectiveness of mediation as a technique for resolving minor civil and criminal disputes of an interpersonal nature. Planning for the project took over twelve months. Much of this time was devoted to familiarising the public with the concept, and to involving local people in making decision as to how the Centre in their area should operate.[10] The project has a maximum life of three years.[11]

Two of the Centres opened their doors in December, 1980 and the third commenced operation in January, 1981. All are housed in buildings separate from police and court facilities, but are within walking distance from them. The emphasis is on maintaining a relaxed, informal atmosphere in the Centres.

Three full-time staff members are employed at each Centre: a Director, who has primary responsibility for administration and contact with the public; a Co-ordinator, responsible for organising mediations;[12] and a secretary/receptionist. Each Centre also has available to it a pool of trained[13] mediators who are rostered for particular cases. The mediators are

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[10] By means of individual contacts, public meetings and media publicity.

[11] Community Justice Centres (Pilot Project) Act, 1980, s. 32(1).

[12] In practice, there has been considerable interchange of function between Director and Co-ordinator.

[13] Mediators receive 54 hours of initial training which focuses on development of communications skills, especially through role-plays and case discussions. In-service training continues at the Centres after mediators have been accredited.

drawn from all walks of life: housewives, businessmen, tradesmen, students, teachers, secretaries, policemen, trade unionists, journalists. They range in age from young adults to those who have been retired for some years.

All the disputes handled by the Centres must meet the criterion that some form of continuing relationship exists between the parties. The bulk of cases mediated to date have involved conflicts between neighbours or family members. Harassment and various forms of nuisance comprise more than 75% of the inter-neighbour disputes handled by the Centres, whilst assaults have accounted for a further 10% of cases in this category. Family matters have ranged from problems such as harassment following termination of a relationship, assaults, custody and access questions, to disputes over property or money.[14]

Cases are referred to the Centres from the courts, the police, legal aid offices, voluntary social welfare agencies, private legal practitioners, members of Parliament, local councils, and a variety of government departments. Around one third of the cases coming to the Centre so far have been self-referrals.[15]

When a case first presents at the Centre,[16] the Co-ordinator assesses whether it is suitable for mediation. If it is, he or she will attempt to contact the other party to the dispute (Party B).[17] During the initial contact with each party, the nature of the services offered by the programme is explained. In particular, it is pointed out that attendance at mediation is voluntary and that the Centre has no power to make orders binding the disputants

If both parties agree to try mediation,[18] the Co-ordinator schedules a mediation session which is normally conducted by a panel of two mediators. Where possible, the panel is rostered to match the ethnic backgrounds and sex of the disputants. For example, a dispute between a Vietnamese immigrant and his Australian born neighbour would call for a panel which reflected these backgrounds.[19] So, too, in a case in which a woman claims to have been harassed or assaulted by the man with whom she was living, every effort would be made to roster a panel comprising one female and one male mediator.

At the mediation session, one member of the panel again explains that the purpose of the mediation is to help the parties settle their dispute in a mutually satisfying way. Any agreement reached will be one the parties have decided on and feel they can live with.

Party A is then asked to tell his or her side of the story uninterrupted by Party B. Party B then does the same. A heated discussion often follows

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[14] Data on the first six months of the Centres' operation is taken from the *Interim Evaluation Report, New South Wales Community Justice Centres Pilot Project* (August, 1981) (hereinafter referred to as Interim Report) and is reproduced with the kind permission of the Law Foundation of New South Wales.

[15] Interim Report, page 60. The high proportion of self-referrals is thought to be attributable to the public awareness campaign.

[16] The person who initiates contact with the Centre is called Party A.

[17] No contact was made with Party B in 8.7% of cases.

[18] Party B refused mediation in 27% of cases.

[19] Particular efforts have been made in selecting mediators to meet the needs of minorities whose first language is not English.

at this point. One of the mediators will summarise the main issues in the parties' respective stories and seek further clarification from them. The panel will seek to facilitate direct communication between A and B, and primarily by a process of questioning, to focus their attention on the main issues.

In many cases, the panel will then speak with each party alone, and further information may be gleaned in this way. Most importantly, this private "caucusing" can elicit exactly what compromises each party is prepared to make. Obviously, it is essential that what the parties reveal during such a caucus remains confidential.

The joint session is then reconvened, the panel seeking to focus attention on common points of understanding between the parties and to encourage them to look at the underlying causes of their problems. This in turn may prompt the parties to suggest, for example, what they might have done differently, and to see what other modes of behaviour might avoid conflict in the future.

If a settlement is reached, it is in most cases written up by one of the mediators and signed by both parties. Each party is given a copy of the agreement[20] and is asked to contact the Centre if he or she feels the settlement is not working.

If a case has been referred to the Centre, the referral source is advised whether a settlement has been reached.[21] Where the case has been referred by the police or a magistrate, this means that legal proceedings may follow a failure to reach agreement at mediation.

Over two-thirds of cases have so far been mediated within three weeks of the first contact being made with the Centre. The vast majority of cases have been mediated in one session[22] although follow-up mediations have been held in 11% of cases.

Mediation appears to have been successful[23] in 158 out of the 184 cases mediated during the period from January to June, 1981. Completed agreements were reached in 149 of these cases, whilst in 9 a "truce" was declared in which the parties indicated that, although they could not reach a firm settlement at the session, they considered they could now resolve their dispute themselves.

A further 87 cases were reported to have been resolved by the parties without mediation. In some instances, a resolution followed negotiation between the parties by the Director or Co-ordinator. In others, the Centre's contact with Party B opened the way for direct communication between the parties leading to a settlement without third party intervention. At times, Party B seems not to have known that Party A considered there was

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[20] The agreement is not enforceable. See Community Justice Centres (Pilot Project) Act, 1980, s. 23(3).

[21] But not of the terms of the agreement. See Community Justice Centres (Pilot Project) Act, 1980, s. 29(1).

[22] Sessions have lasted from less than one hour (7.3% of cases) to over four hours (12%), with most mediations taking from two to three hours.

[23] The term "successful" is used here as indicating that either a setttlement or a truce was reached during mediation. A further 21% of cases had positive outcomes without mediation, e.g. Party A reports the cause of complaint has ceased following C.J.C. contact.

a problem until contact was made by the Centre. In many such cases, the approach made by a neutral agency has itself been sufficient to prompt a resolution of the complaint.

3. *Some issues in establishing mediation programmes*

What are the criteria of "success"?

Early figures for the N.S.W. project indicate an encouraging rate of successful outcomes for mediated cases. On the other hand, these figures need to be balanced against the relatively high proportion of cases[24] in which Party B has refused to attend mediation, and the cases[25] in which no contact could be made with Party B. At the same time, although at this stage only tentative conclusions can be drawn from the very small statistical sample, the figures suggest there may be a correlation between referral source and attendance at mediation. For instance, both parties have attended mediation in 77% of cases referred by magistrates as compared with an average of 32% for all cases presented to the Centres. Again, although legal proceedings with respect to the dispute had been instituted in only 20% of cases, the disputants appear to have been far more likely to agree to mediation, and to reach a settlement in such cases than in those in which there was no background of legal proceedings.[26]

A similar pattern is evident in the short-term figures for the Centres in the United States Justice Department project.[27] At the Kansas Centre, out of 55 cases referred by the court, 50 agreed to mediation and all those 50 cases were resolved at mediation. Rates of attendance and resolution of court-referred cases were less spectacular at the Atlanta Centre, but it was only in this category of referrals that mediated resolutions far exceeded unsuccessful outcomes.[28]

Self-referrals rather than referrals from the justice system were encouraged at the Venice/Mar Vista Centre in Los Angeles.[29] In the result, the figures for court, prosecutor and police referrals are too low to compare outcomes in those cases and cases reaching the Centre from other sources. However, comparative figures with respect to case loads and total numbers of mediated resolutions for Venice on the one hand, and for Kansas and Atlanta on the other, suggest that the latters' higher rates of case presentation and settlement may be attributable to their more coercive approach to getting parties to mediation.

At least in the short term, these results are not surprising. The high rate of resolutions achieved once the disputants do attend mediation may in large

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[24] 27% of all cases presenting to the Centres.

[25] 8.7%.

[26] Mediated settlements were reached in 56.7% of magistrate-referred cases as compared with 28% of self-referrals.

[27] See *Neighbourhood Justice Centres Field Test: Interim Evaluation Report* (1979), U.S. Department of Justice.

[28] Mediated settlements were reached in 129 out of 184 cases referred by the court. This contrasts with an average setttlement rate of 27.5% for all cases referred to the Centre.

[29] 61% of all cases were self-referrals.

measure be attributable to their being motivated to reach a settlement. Their very presence at the session indicates a shared desire to do something about their dispute.[30]

Getting a reluctant Party B to the door is another matter. There are no legal sanctions specifically directed to failure to attend mediation. Indeed in N.S.W., section 23(1) Community Justice Centres (Pilot Project) Act, 1980 states that "attendance at and participation in mediation sessions are voluntary". Social sanctions also appear to be absent. Institutionalised mediation is largely unfamiliar in most Western societies[31] which tend to be oriented more towards assertion of individual rights than towards compromise in the interests of social harmony.

However, where parties are referred by a court, they may not see themselves as having much choice about participation in "voluntary" mediation. The possibility of an adverse judgment may also provide a strong incentive to compromise. It is possible that this incentive may be lacking, even when referrals are made by police,[32] because, until the case reaches the courtroom, one party may feel he might still be able to outmanoeuvre the other.

Low caseloads at the Venice Centre persuaded the United States Justice Department that heavy reliance on community outreach could not produce a viable programme and funding was discontinued. Ironically, this was done at a time when caseloads were on the increase. More importantly, the decision and the evaluation which preceded it, appear to have glossed over some fundamental issues.

It is arguable that statistics gathered over a mere twelve month operating period can tell very little about the effectiveness of mediation or of the respective referral techniques used by the Centres. It takes *time* for the community to accept new ideas and going to mediation to resolve a dispute is a new idea. If those who use the Centre's services are satisfied, their reports will in time prompt others to use mediation and the number of self-referrals will increase. This is an inherently slow process. By contrast, the authority of the courts is well-established, and few are the people who would consider ignoring a judicial order or "suggestion".

Further, if one of the objectives of NJC programmes is to reduce the burden on justice system resources,[33] then it would seem desirable to encourage disputants to resort to mediation at the outset rather than towards the latter part of police-court processing of their case. It was perhaps premature to dismiss efforts towards early diversion of cases from the justice system after only a year when, in the long run, they may have

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[30] Self-referred cases show high settlement rates once mediation is scheduled, e.g. 75% of such cases were resolved in mediation.

[31] Although mediation has long been informally carried out by clergy, family members, local councillors, etc.

[32] Settlements of police-referred cases are low relative to court-referrals in both the N.S.W. and U.S. projects. In Kansas, e.g. mediated agreements were reached in 41 out of 100 cases referred by police.

[33] See, e.g., *Neighbourhood Justice Centres Field Test: Interim Evaluation Report* (1979) Appendix G, p.80, where the goals of N.J.C.'s are said to include improving the ability of the formal justice system to handle its workload.

produced substantial cost savings. To do so partly negates the utility of having a field test in the first place.

There is also a danger that an overriding concern for caseloads and resolutions in the short-term may lead to the conclusion that court-referred cases are far more likely than say, self-referrals, to be successfully mediated. But how is "success" to be measured? Does it mean simply that an agreement is reached during the session?[34] Or does it mean that the agreement lasts? If success requires some form of longer term resolution of the parties' conflict, how long must the agreement last before mediation is deemed to have been successful?

The value of getting the parties to reach a mediated settlement might be thought to be largely undermined if the agreement breaks down after a short time. It would seem important therefore to know whether there is any relationship between referral sources and the viability of settlements. Given that mediation is *ex hypothesi* directed to assisting disputants voluntarily to evolve their own agreement, it is surprising that scant attention has been paid to assessing the impact of the coercive environment in which mediation has taken place on the durability of resolutions. It is to be hoped that the evaluation of the New South Wales project will address these issues, and that any New Zealand proposals would be based on a cautious appraisal of results such as those in the Federal NJC project.

Referral sources

The significance of referral sources is arguably not confined to the influence they may have on caseloads and case outcomes.

In the New South Wales project, which has worked hard to obtain referrals from as many sources as possible, early figures indicate that only 50% of cases werer referred to the Centres from some justice system source: courts, police, private practitioners and legal aid agencies. In only 20% of the cases in which mediation was sought had some form of legal proceedings been instituted.

It has been suggested[35] that figures such as these may indicate that CJC's tend to *generate* needs within the community for further dispute-resolution resources instead of easing the burdens on them. As the New Zealand Justice Department discussion paper observes, "the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed".[36] The argument appears to assume that insofar as mediation programmes process disputes which have had no contact with the justice system, they attract cases which would otherwise

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[34] If it means only that, there may be no point in the exercise since adjudication undoubtedly yields higher figures of instant resolutions. The real issue is whether mediated or adjudicated resolutions are more likely to last. And has contact with the Centre been "successful" when it opens the way for direct communication between the parties without further intervention?

[35] For example, Tomasic *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighbourhood Justice Movement* (1980), Working Paper produced for the Disputes Processing Research Programme, University of Wisconsin Law School.

[36] *Neighbourhood Dispute Resolution Scheme: An Analysis of potential models*, page 7, citing the Report of McGillis and Mullen op.cit. note 1, *supra*.

have been resolved without the intervention of any formal dispute-resolution mechanism. The conclusion might then be drawn that no referrals should be accepted from outside the justice system.

It is submitted that the argument, and the assumption on which it is based, are untenable. Firstly, they assume information about what would have happened to cases referred by members of Parliament, social workers, local councillors or self-referred cases, had the Community Justice Centre not been available. That information is lacking. Given the intensive public awareness campaign conducted by CJC staff, and given the widely acknowledged difficulties encountered by police and courts in responding to domestic and neighbour conflicts, it may well be that CJC's are seen as a more appropriate initial contact point for cases which would otherwise have been channelled into the justice system.

Secondly, there is little information as to the number of cases which fail immediately to reach the justice system but do so ultimately when hostilities have escalated and when adjudication is inapt to unravel the web of conflict between the parties. For example, ongoing nuisance activities between two neighbours may be perceived by them, or by their advisers, as too trivial to warrant legal intervention, yet may in time precipitate physical violence. Early recourse to mediation may thus forestall a serious assault. The argument that referrals should be limited to justice system sources takes no account of mediation's prophylactic potential.

Thirdly, it is submitted that cost and resource questions are in reality far more complex than those who make the argument would have us believe. Many disputes which do not reach any agency or outside help fester for years, sometimes erupting in violence, sometimes eating away at the individual's mental stability and affecting other members of his family. Other cases return again and again to doctors, social workers, local councils, and members of Parliament, whose training and experience is inappropriate to deal with the dispute effectively. Such cases constitute an unwelcome and costly drain on these resources. The costs to society are no less significant whether they are debited to its health, welfare or justice system accounts.

Resolution Techniques

Many of the NJC projects in the United States use both mediation and arbitration. Once the mediation process is considered to have broken down, the non-coercive mediator dons the hat of an arbitrator with power to make enforceable awards[37] against one of the disputants. It is obviously administratively convenient for one person to assume both these roles with respect to the same dispute. Disputants unable to reach settlement by mediation may welcome the decision of an impartial umpire who can adopt a more flexible approach and make use of a greater range of options than would be available in the courts.[38] However, the procedure might be thought to have a number of undesirable features.

Firstly, the mediator has, by definition, a *facilitative* role. It is not his function to impose a judgment, but to help the parties work out their own

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[37] In New Zealand, see Arbitration Act 1908.

[38] Cf. Small Claims Tribunals Act 1976, especially s. 15(4).

peace formula. In general, disputants readily disclose information to the mediator who is thereby enabled to reach the root cause of their conflict. They may be more circumspect in doing so if they fear the mediator may subsequently make a binding decision against one of them. The prospect of arbitration may thus undermine the value of the mediation process.[39] This is no less likely to be the case merely because the parties have given their prior consent to arbitration.

While the above problem could be overcome by requiring the two functions to be carried out by different people, civil enforcement of arbitrated awards can be seen to be an inherently disturbing prospect where a dispute involves an allegation of criminal conduct. Statements may be made to the arbitrator concerning matters which a court would require to be established beyond a reasonable doubt, for example, an admission of theft. Influenced by the admission, the arbitrator may make a civilly enforceable award, prejudicial to one party without the application of the usual evidential safeguards.

Moreover, it is as well to appreciate that one or both of the parties to mediation will frequently be giving up legal rights which they would otherwise have in the interests of resolving a longstanding conflict and that they do this without the benefit of legal advice. Where only mediation is offered this seems unobjectionable: the parties are free to withdraw from their agreement at any time. Indeed in New South Wales, the Community Justice Centres (Pilot Project) Act, 1980 specifically provides:

> "Notwithstanding any rule of law or equity, any agreement reached at or drawn up pursuant to a mediation session is not enforceable in any court or tribunal";
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> and
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> "Except as expressly provided in this Act, nothing in this Act affects any rights or remedies that a party to a dispute has apart from this Act."[40]

An arbitrated settlement offers no similar latitude for the assertion of legal rights.[41] Taken together, the disadvantages of using arbitration in a mediation programme heavily outweigh any benefits, and may well sabotage the mediation process itself.

Project Staff

As the discussion paper points out, there is wide variation amongst mediation programmes in the backgrounds and qualifications of their staff. Some are staffed by lawyers[42] or other professionals such as psychologists;

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[39] Similar problems may arise under the Family Proceedings Act 1980, s. 16, which enables the Family Court judge who has presided over a mediation conference to hear subsequent proceedings between the same parties.

[40] Community Justice Centres (Pilot Project) Act, 1980, s. 23(3), s. 23(4). The exceptions referred to in s. 23(4) relate to protections with respect to defamation, admissibility of evidence etc. See infra.

[41] See, e.g. Arbitration Act 1908, s. 3.

[42] E.g. Citizen Dispute Settlement Programme sponsored by the Orange County Bar Association, Florida.

others by students;[43] still others seek to draw mediators from a cross-section of the local community.[44]

Citing the McGillis and Mullen Report,[45] the Justice Department paper canvasses some of the advantages and disadvantages of employing lay and professional mediators. Lay citizens are said to "have a vested interest in the welfare of the community and the satisfactory reconciliation of disputing parties. Moreover the opportunity to educate participating citizens regarding the functions and problems of the court may also serve an important function in altering community perceptions of official justice".[46] On the other hand, using lay citizens may require more time to develop community support, and more time and resources for recruitment, selection and training of staff. There may be administrative difficulties because many of the mediators would be part-timers. The staff turnover rate may be higher than if professionals were used.

By contrast, professionals are said to offer greater "expertise". However, professionals are costly and to use professionals may mean the loss of an opportunity to establish "a strong sense of community justice".[47]

With respect, it is submitted that a degree of confusion infects this analysis. In the first place, the use of the word "expertise" is misleading. It cannot be assumed that professionals such as lawyers or psychologists have the kind of training and background which would automatically qualify them as good mediators. On the contrary, both groups of professionals would need to overcome some of the thought patterns which their training had instilled in them. Expertise in mediation requires its own form of specialised training and practical experience. It is the personal qualities[48] and insights of the individual, and not any particular professional background, which seem to be the essential requirements for becoming an effective or "expert" mediator.

Secondly, it follows that whatever background of the would-be mediator he or she will need careful selection and training. That training will need to continue as practical knowledge develops in the course of the service's operation.

Thirdly, administrative difficulties in rostering are likely to be minimal where the team of mediators is well-disciplined and dedicated—a matter which in practice depends neither on full-time status nor on professional qualifications. Moreover, there are advantages in having a pool of part-time mediators available in that it enables the project to operate more flexibly than would be the case with full-time staff. Individual mediators often

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[43] E.g. Night Prosecutor Programme, Columbus, Ohio; and the University of Hawaii Neighbourhood Justice Center project.

[44] E.g. San Francisco Community Board Programme; Boston Urban Court Programme; Community Justice Centres Pilot Project (N.S.W.).

[45] op.cit. note 1, *supra.*

[46] *Neighbourhood Dispute Resolution Schemes: An Analysis of potential models,* page 9.

[47] Ibid., page 10.

[48] There is no "ideal" personality type, but desirable personal qualities seem to include a non-judgmental attitude; an awareness of one's own prejudices; an ability to listen, and to be articulate.

develop a special facility for tackling certain kinds of disputes and their particular talents can be drawn on as these disputes arise.

Fourthly, staff turn-over is in practice likely to depend more on job satisfaction than on whether staff are either full-time or professionally qualified. More importantly, there is every reason for community mediators to be regarded and to regard themselves as professionals in their field. It is an exacting one. This is none the less so because they render service on a part-time or even voluntary basis.

The selection of committed, energetic and astute staff members is perhaps the most important concern of any mediation project. The mediators will make or break it. Using appropriate selection criteria, effective mediators can be drawn from almost any background. Whether one seeks out "lay" or "professional" staff depends less on one's view of the kinds of arguments presented in the McGillis and Mullen Report and more on one's overall programme goals.

The most persuasive argument for involving a wide range of people in the mediation process is perhaps that it generates community understanding of and concern for dispute resolution. This kind of participation benefits both the community in general and the justice system in particular. In New South Wales, for example, the police are highly enthusiastic about citizen mediators. They see this broad-based approach as assisting them in their job of law-enforcement as, in the long-term, it promotes a sense of community in each Centre area.

Of course, community mediation does not preclude lawyers or social workers or police from becoming mediators. Rather, such a programme enables justice system and other professionals to work *qua* citizens with other citizens. This co-operation may even facilitate the breaking down of some unfortunate barriers between the two groups.

Sponsorship and Decision-Making

The Justice Department paper notes that the 1977 Report on Neighbourhood Justice Centres[49] considers "the most basic decision to be made [in establishing such Centres] is whether the project is to be attached to a governmental agency or to be under private sponsorship".[50] The paper points out that New Zealand has no history of private sponsorship for this kind of operation and concludes that two alternatives would therefore be open in this country: police or court sponsorship.[51]

It is indeed the case that Foundation funding of mediation programmes would not seem to be available in New Zealand as it has been in the United States. Such funding can in any event be an insecure basis on which to develop a project. Since Foundations typically provide only seed money, the issue of other continuing funding sources must inevitably be addressed by project organisers. Nor does it seem likely that the legal profession in

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[49] Op.cit. note 1 *supra.*

[50] *Neighbourhood Dispute Resolution Schemes: An Analysis of potential models,* page 5.

[51] Ibid., page 5.

New Zealand would have the resources to undertake such a project on an enduring basis.[52]

At the same time, experience in New South Wales indicates that government sponsorship of a mediation programme does not of itself dictate that it be controlled by either the police or by the courts. Nor, as the paper suggests, does it necessarily pre-empt basic policy decisions such as those concerning the degree of coercion to be applied to disputants, the selection of mediators and the location of the Centre.[53]

The suggestion in the discussion paper arguably blurs the distinction between sponsorship, that is, who pays for the programme and has ultimate control over it, and management, which includes the decision-making relationships within the programme and its relationships with the wider community. Where public money is being spent on a project, it is obviously of the first importance to ensure the accountability of those responsible for it. The conclusion tends to follow easily that a government-funded programme should necessarily come under the policy and operational control of an existing government department.[54]

Of course, police or court-management of a mediation programme may in fact be considered desirable, in that, for example, it virtually guarantees high attendance rates. But it is only one of many management options which can be pursued consistently with the maintenance of proper standards of public accountability. In the final analysis, it is the objectives of those responsible for the programme's development which will determine the framework of decision-making relationships, including the question whether sponsoring and managerial functions should be vested in the same body.

For example, police control of the mediation process would be a favoured option for a project in which primary goals are speed, certainty of attendance at mediation and minimum loss of court time.[55] On the other hand, this is an option which seems incompatible with a concern to preserve the voluntary character of mediation. Nor does it seem compatible with a desire to ensure that mediation services are seen as an alternative to the criminal justice system.

Again, inherent in the concept of "neighbourhood" or "community" justice centre might be thought to be the question whether it is sought merely to provide a government service *to* the community, or to involve local people *in* the delivery of the service and *in* the decisions as to how the service will be provided. This last-mentioned objective is less likely to be attained if managerial control is vested in a single government agency.

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[52] Although Bar Associations have sponsored a number of projects in the U.S., ongoing funding has often been supplied jointly by the local Association and a Foundation and/or State or Federal Government.

[53] *Neighbourhood Dispute Resolution Schemes: An analysis of potential models,* page 5.

[54] E.g. A mediation programme integrated into the court system would be administered by the Justice Department.

[55] The discussion paper cites the suggestion of McGillis and Mullen (op.cit. note 1 *supra*) that "the use of police stationery and the threat of arrest would be likely to ensure the presence of a high percentage of respondents".

In reality, none of these project goals can be regarded as absolute. It would be desirable for the programme organisation to achieve a workable balance of them. For example, in seeking to maintain a non-coercive environment for mediation, it would be foolish to overlook the desirability of early diversion of cases to mediation—in the interest both of minimising disruption to the parties and of maximising resource savings to the justice system. In the CJC project, at least, it has been found unnecessary to sacrifice the first of these objectives in order to secure police commitment. The degree of support for the project necessary to ensure early referrals may be readily forthcoming where referral sources such as police have participated in the project at an early stage, have been given an opportunity to influence decisions about it and understand the benefits of the programme for their own agency.

Similarly, decision-making structures can be devised[56] to accommodate both the goals of community involvement and public accountability. For example, in the New South Wales project, local Centre Committees[57] feed information and recommendations to a Co-ordinating Committee[58] which formulates overall policy guidelines for the project in the light of views expressed at local level. The Committee comprises both government and non-government representatives and is responsible to the Attorney-General. While the government of the day retains ultimate control over the programme, ongoing input from local communities facilitates the making of more informed and arguably more widely acceptable decisions than might otherwise be possible.

The Need for Legislation

Most NJC programmes in the United States have functioned without legislation.[59] At first sight, this absence of statutory regulation can be explained by the voluntary nature of participation in mediation and of adherence to mediated settlements. There is no need to authorise the activities of mediators because they have no coercive powers. However, deeper reflection indicates a number of areas in which legislation would seem to be needed if mediation programmes are to operate effectively. The following areas would require particular attention.

(i) *Privilege*

There can be no effective mediation if the disputants do not trust the mediators. The mediator can only probe deep-seated causes of the conflict between the parties if they feel able to talk freely with him. The disputants will be unlikely to have the necessary confidence in the process if they

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[56] The New South Wales project is used here only to illustrate one of many possible models which could accommodate these goals.

[57] Centre Committees comprise the mediators, who are drawn from the local community. Referral sources may also be co-opted onto the local committees.

[58] Community Justice Centres (Pilot Project) Act, 1980. Schedule 1, sets out the Committee's membership. Section 6 defines its functions, which include co-ordinating the implementing and operation of the project, and making policy recommendations to the Minister.

[59] Although bills have been introduced into both Federal and State legislatures.

believe that disclosures made in the course of mediation may be admissible in evidence in subsequent litigation.

It is understood that NJC programmes do assure disputants that the Centre will treat all disclosures as confidential.

In the absence of legislative or judicial support for mediator-disputant privilege, however, this seems a hollow assurance. It was for this reason that provision was made in the New South Wales legislation to confer privilege on oral and written communications made in the course of mediation.[60] The privilege extends to steps taken in the course of arranging and following up mediation sessions.[61]

(ii) *Secrecy*

Confidentiality is only partly secured by rendering evidence of disclosures made in mediation sessions inadmissible in proceedings. If matters revealed during mediation tend to become public knowledge, the public will quickly lose confidence in the service. Mediators should therefore be under an obligation to maintain secrecy with respect to information they obtain as mediators.

Given the self-evident need for secrecy, it may be sufficient to treat confidentiality simply as one of the mediator's ethical canons. In practice, however, confidentiality cannot be seen as an absolute obligation. For example, section 29(2) of the New South Wales Act, which requires mediators to take an oath or affirmation of secrecy, acknowledges a number of exceptions to the obligation. It envisages circumstances in which the public interest in protecting life or property may outweigh the public interest in the confidentiality of mediation.[62] The significance of both these interests was considered to be such that the scope of the mediators' obligation should be statutorily defined and not left to internal regulation by the Centres. Legislation might also be thought to underscore the gravity of the obligation.

(iii) *Liability of mediators*

It is arguable that a mediator who during mediation obtains information with respect to the commission of a criminal offence would be an accessory after the fact within section 71 of the Crimes Act 1961 as being "one who, knowing any person to have been a party to the offence. . . . actively suppresses any evidence against him, in order to enable him . . . to avoid arrest or conviction". For example, one of the disputants may have been referred to mediation by a court which has adjourned the hearing of a charge of theft. The defence to that charge is an alibi. In the course of mediation, the alibi is revealed to be a fabrication. The mediation breaks down and the court hearing resumes.

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[60] Community Justice Centres (Pilot Project) Act, 1980, s. 28(3), s. 28(4). The privilege may be waived: s. 28(5)(a).

[61] Ibid., s. 28(1).

[62] E.g. s. 29(2) envisages disclosure where "there are reasonable grounds to believe that disclosure is necessary to minimise the danger of injury to any person or damage to any property".

In these circumstances, the mediator might be thought to have both an obligation to preserve the confidentiality of disclosures made to him, and a conflicting obligation, under s. 71 of the Crimes Act, not to suppress evidence. Whether he would be liable as an accessory may depend on the meaning of the words "in order to" in s. 71. They may mean that the primary purpose of the person alleged to be an accessory must have been to enable another to avoid conviction, that he must have desired to bring about that result. Or, by analogy with the majority reasoning in *Hyam* v *D.P.P.*[63] it may be that it is sufficient to attract liability under s. 71 if a person withholds information with knowledge that it is almost certain that the suppression of evidence will *result* in another person's escaping conviction; and it would be irrelevant that the dominant purpose of non-disclosure was the preservation of confidentiality in the interests of providing an effective and credible mediation service. It is unclear which of these interpretation would be accepted.

In practice, these problems are likely to be even more acute if, as in the New South Wales project, some of the mediators are police. Whilst police involvement in a mediation programme can have significant advantages in terms of community-police relations, there is obvious potential for a conflict of obligations qua mediator and qua police officer. Sensitive rostering of mediators can minimise, but cannot eradicate, the possibility of such a conflict arising. As a matter of policy, it is undesirable that mediators should be exposed to this possibility, and legislation would be needed to clarify their position.[64]

(iv) *Defamation*

The possibility of disputants being sued for defamation as a consequence of statements they may make would militate against full and frank discussion during mediation. It is submitted that legislation should provide for the same privilege with respect to defamation to apply to mediation as is available in relation to judicial proceedings.[65]

Conclusion

Adjudication has in general proved itself a highly effective dispute-processing mechanism. However, it appears to be inappropriate in cases in which the court action is merely a symptom of underlying conflict. Mediation probes the causes of conflict and offers the possibility of achieving lasting settlements between disputants.

Overseas experiments with mediation have so far yielded promising results, which indicate that the use of mediation can benefit both the justice system and the community at large. At the same time however, mediation will not be a panacea for the ills of the justice system. An experimental programme in New Zealand could, if adequately monitored, provide valuable information about the most effective ways of deploying this dispute resolution technique.

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[63] (1975) A.C. 55.

[64] See, e.g. Community Justice Centres (Pilot Project) Act, 1980, s. 27(2).

[65] E.g. Community Justice Centres (Pilot Project) Act, 1980, s. 28(2).

A number of significant policy issues would be involved in any decision to establish a mediation programme. Some of these issues are examined in this note, but that examination is clearly not exhaustive. The range and complexity of the issues which arise point to a need for wide-ranging consultation and for careful planning of any mediation programme.

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LAW REFORM—A FULL-TIME COMMISSION?

Stimulated by a paper[1] by Professor D. L. Mathieson the New Zealand Law Society appointed a sub-committee comprising Professor Mathieson and five practising lawyers to examine the various possibilities for restructuring the existing New Zealand law reform machinery.[2] Its recommendations form the basis of a 24-page submission made by the New Zealand Law Society to the Minister of Justice early in 1981.

The paper briefly describes the present procedures, discusses alleged deficiencies and calls, by way of remedy, for a modest full-time Law Reform Commission and revised procedures for processing the Commission's recommendations through the legislature. Not surprisingly the paper makes some valid criticisms of the present machinery (it would be a remarkable system which could not benefit from some change) but its proposed solutions to what it sees as irredeemable weaknesses are open to question.

The Society recognises that the present system of five Standing Law Reform Committees comprising practising lawyers, academic and government lawyers has much to commend it. It concludes that in terms of quantity and usually of quality the various committees have an enviable record. Moreover some 40 out of 71 recommendations have been implemented by the legislature. Why then the desire for change? The reasons given fall under two broad heads. First, a number of detailed criticisms are made about existing procedures of the various Standing Committees. These encompass suggestions of no efficient overall control; inefficient use of time; a process which is too slow and repetitive; a lack of expertise in each member of a committee on every topic dealt with by it; lack of lay representation; insufficient backup by way of research and drafting staff; lack of effective follow-up procedures following completion of a report and time wasted by members on drafting details. Given this melancholy recital it is perhaps surprising to find the Society in the next paragraph stating that "five Standing Committees have produced reports many of which have

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[1] *Revised Law Reform Machinery—A Practical Proposal* (1978) NZLJ 442.

[2] For a description of the present procedures see D. B. Collins (1976) NZLJ 441; G. S. Orr (1980) 10 Victoria University of Wellington Law Review 391 and J. H. Farrar (1980) 1 Canta L.R. 104.