LAWS379 DISPUTE RESOLUTION

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Introduction/Overview

Why should lawyers study DR?

Resolving disputes is at the heart of legal work. In particular,

- Negotiation is the most common form of dispute resolution used by lawyers
- Mediation is the fastest growing form of dispute resolution used by lawyers
- Both will be useful in any field/professional career.

How to study dispute resolution

- Pure theory: use of academia (culture, process, and style)
- Theory based on specific application: statutory regimes, real-life case studies, and how they fit into the law
- Practical work: taking above knowledge and apply it to fact scenarios (including reflection)
- Historical developments: learning about history
- Comparative approach: between borders. Note: negotiation and mediation are non-jurisdictional.

Litigation

Strengths

- *Public enunciation of community values*: this is vital to the rule of law.
- *Principles and precedent*: for the rule of law. Litigation is less common than negotiation, but it remains important.
- *Guaranteed binding decisions*
- *Reduction of power imbalances*: to a degree! You are in front of a judge.
- *Security for the legal system*: every form of ADR is done in the shadow of the law.
    - Ideally, ADR and litigation will complement each other.
    - However, the fact is that mediation and negotiation exist in the shadow of litigation. Both parties know that litigation could begin at any time during the proceedings.
    - Take, for example, mediation where some mediators will undertake risk analysis. One of the risks that the mediator might raise is the likelihood of the case ending up in court.

Weaknesses

- *Cost*: universal for any kind of litigation
- *Time*: overlaps with cost. The longer something drags on, the more expensive the proceeding will be.
- *Damage to relationships*
- *Limited range of remedies*

Negotiation

Negotiation generally

Negotiation is a process in which parties or their representatives communicate with the aim of reaching a beneficial, consensual agreement. The **negotiator's dilemma** is, how do you protect the parties' interests while developing co-operative relationships?

Strengths and weaknesses

Strengths

- *Everyone has experience*: e.g. negotiating a salary with your boss
- *Cheaper and quicker than litigation*: general rule. Exception is when negotiation leads to litigation (pay for both).
- *Preserves relationships*: although the degree depends on the style of negotiation, still better than litigation
    - **Competitive**: can maintain relationships if done professionally, but debatable as to whether it can create.
    - **Interest-based**: focus on each party's interests so it is good for relationships.
- *Flexible*: a good negotiator won't refuse to budge from their position
- *Consensual*: you agree to be bound (if at all), and voluntarily so. This is good! Better incentives.
- *Parties have control over the process*: note that this could be impacted by power imbalances, however.

Weaknesses

- *Power imbalance*: lawyers can neutralise this, but the absence of a third party means this is always possible
- *Lack of procedural safeguards*: cf. litigation, which has the **fucking High Court Rules**.
- *Lack of enunciation of community values/principles*: no chance to make binding precedent.

Popular misconceptions about negotiation

- *It's a game*: it's not
- *It's about compromise and splitting down the middle*: no, this is about interests. You split down the interests.
- *It's about giving up power*: no, it's about identifying and satisfying interests.
- *It's about being nice/nasty*: no, it's about being a **professional**,
- *It's complex*: it can be, but not needlessly so. Also, much more simple than litigation.
- *It's only suitable in a win-win scenario*: no, not necessarily. It's about the parties' interests.

Terminology

	Relationship	Positions	Also known as
Competitive	Competitive	Hard positional	Distributive (receiving)
Co-operative	Collaborative	Soft positional	Distributive (giving)
Interest-based	Collaborative	Interest-based	Integrative

Neither hard nor soft positional bargaining is desirable. Interest-based negotiation treats positions as surface-level and looks at why parties are there in the first place.

Acronyms

- *BATNA*: Best Alternative To a Negotiated Agreement. If negotiation = job interview, BATNA: job offer elsewhere.
- *WATNA*: Worst Alternative To a Negotiated Agreement. WATNA: unemployment.
- *ZOPA*: Zone of Possible Agreement. This is about compromise, so it is unhelpful for IBN.

Competitive negotiation

Competitive negotiation revolves around attempting to maximise self-interest. There is an assumption of a fixed pie (potential gain) to be divided as a result of the negotiated outcome.

Tactics/strategies

- Pursuit of unilateral gain
- Attacks
- Deception

Pursuit of unilateral gain

- What is it?
    - This involves making extremely favourable, self-serving demands.
    - The party will be relatively unwilling to compromise or make concessions.
- What does it result in? If both parties go for this approach, the likely result is stalemate. This isn't always bad (especially if there is a huge power imbalance) but it isn't always constructive.

Attacks

- This plays on the essential dynamic of the competitive strategy: to move psychologically against the other side.
- The aim is to cause the other side to lose confidence in the case and what can be gained from the negotiation.

Deception

- The aim is to trick the other side in ways which strengthen the competitive negotiator's case and make the other side's compliance more likely.
- Due to our ethical obligations as lawyers, we must tread carefully (see below).

Examples of tactics used

- *Negotiation decoy*: tricking the other side into focusing on something you don't actually value, and trade it for something of value.
- *Extreme offers*: to increase value of final settlement with room to "compromise"
- *Negotiation "nibble"*: last minute request for free. "Throw this in and we'll sign right now."
- *Cherry-picking*: best individual items versus overall package.
- *Good cop/bad cop*: bad cop intimidates and lowers expectations (often client), good cop's subsequent offer looks better than it actually is (often lawyer).
- *Limited authority*: to delay and gain more information. Creates time, and belittles the opponent (they sent a junior to the negotiating table today).
- *Brinksmanship*: take it or leave it.
- *Negotiation deadlines*: used to create movement.
- *Appeal to morals*: guilt trip and complement the party into agreeing with your demands. Less useful for lawyers, who are not negotiating themselves but representing their clients.
- *Competition*: drive down the price by comparing to other sources.
- *Name dropping*: to increase status/power
- *Negotiation default*: "do now, explain later" (*fait accompli*). Telling the other side that "what's done is done", but you'll consider the other side nonetheless.

Strengths and weaknesses

Strengths

- *Simple and speedy*
- *Intuitive*: this process just comes to some people.
- *Expected in law*? Every lawyer will need this at some point. However, this pushes certain popular perceptions of the legal profession. Nonetheless, some clients will be expecting a degree of competitive negotiation.
- *Possible big win*: especially if the other side is weak. Even if there are compromises, competitive negotiators are still likely to get a win of sorts.
- *Protects against exploitation*: keeping your guard up = fewer concessions. Stalemate can be beneficial sometimes.
- *Suitable in some situations*: real estate.

Weaknesses

- *Can damage relationships*: you will feel awkward and angry, even if done professionally.
- *High risk of stalemate*: sometimes can be beneficial, but often not very productive.
- *Can fail to maximise potential gain*: positional means money will be left on the table, with lack of flexibility (cf. IBN and Fisher/Ury).
- *Increased costs*: adversarial posture tends to lengthen negotiation and therefore increase transaction costs.
- *Very stressful*: especially for non-competitive people.

Co-operative negotiation

Collaborative negotiators reject the adversarial mindset of competitive negotiators and view the other parties' interests and perspectives as legitimate. This is an "intuitive cooperative style" of negotiating (Mize/Arthur). Focuses on preserving relationships.

Tactics

- *Create a productive environment*: communicate, separate people from problem, promote active participation of the parties.
- *Promote good outcomes*: focus on interests, and aim for "win-win" negotiating.
- *Counter competitive tactics*: if faced with suspected concealment/deception, ask for verification. Model honest behaviour and be the bigger party.

Limitations

- *Vulnerable to exploitation*: if one side is co-operative and the other is competitive, the former party are fucked.
- *Difficult to learn and apply*: requires a broad repertoire of interpersonal skills

Fisher and Ury's IBN use objective standards of decision-making (protecting against vulnerability), and use a set process (addressing the interpersonal skills limitation).

Interest-based negotiation

- Overview
- Definitions
- Process
- Dealing with dicks

Interest-based negotiation (IBN) is a form of negotiation put forward by Roger Fisher and William Ury. Its key elements are:

- *Preservation of relationships*
- *Sharing of information*: presumption that you are fair and open (but not disclosing everything)
- *Communication*: presumption of clear communication
- *Problem-solving*: treat the problem as one that both parties can work together to solve
- *Underpinned by principles*: Fisher and Ury's *Getting to Yes*. In competitive negotiation, the idea is to win.
- *Creativity*: come up with solutions which would otherwise be unavailable outside of other forms of DR.

Fisher and Ury's IBN thus relies on four main tenets

- Separate the people from the problem
- Focus on interests, not positions
- Invest options for mutual gain
- Insist on using objective criteria

Definitions

- *Position*: a fixed idea that will be argued for, regardless sof underlying interests (e.g. sum of money)
- *Issue*: a topic/subject under discussion (aka the "problem")
- *Interest*: one party's concerns, fears, needs or worries underlying their position and issue (aka the "why").
- *Option*: one of a number of possible solutions to resolve an issue/problem.

Process as described in class

1. Preparation
2. Setting the scene/ground rules
3. Developing the list of issues
4. Identification and discussion of interests
5. Generating multiple options
6. Development of objective standards
7. Evaluation of options using standards
8. Agreement/closure

1. Preparation

- *Client's objectives*
- *Client's issues*
- *Relevant law*
- *Speculate other party's interests*
- *Concessions*: what will you disclose? BATNA/WATNA, bottom lines (if relevant)
- *Possible outcomes*: careful not to jump the gun

2. Setting the scene/ground rules: examples

- *Physical arrangements*
- *Use of caucuses*
- *Record of proceedings*: if any
- *Focus on problem, not personalities*
- *One person speaking at a time*
- *No cellphones*
- *Treat other views with respect*
- *Confidentiality (without prejudice)*: important for lawyers
- *Authority to settle*: also important for lawyers
- *Right to withdraw from process*

Focusing on the problem (not the people)

- Negotiators are **people first**. People will always have two interests which you must **entangle**:
    - The **substantive issue**, and
    - The **relationship**.
- Use **perception**: communicate, put yourself in their shoes, look for perceptions/assumptions and break them!
- Use **emotion**: recognise them and make them explicit; they are legitimate.
- **Communicate**: listen actively. Speak to be understood. Speak only for yourself, not the other side.
- **Prevention**: build a working relationship. Stop the negotiation from escalating.

3. Developing list of issues

Make sure **not** to frame them as positions. The best way to do this is to formulate **neutral and open-ended issues**.

Example: a firm is experiences relating to a lot of employees taking sick leave.

- From the **employer's** perspective, the employees are taking too much sick leave.
- From an **employee's** perspective, they should be able to do what they want.

The joint neutral issue is one of **attendance at work**.

4. Identification and discussion of interests

Types of interests

- *Mutual interests*: common ground between the parties
- *Separate non-conflicting interests* (**SNCI**): parties have different interests, but those interests are not in dispute
- *Separate conflicting interests* (**SCI**): parties have different interests, and is likely why a dispute arose.

Methodology

- Behind opposed positions lie potentially compatible interests. Interests **define the problem**.
- Identify interests
    - Ask "**why**?" and "**why not**?"
    - Realise that each side has **multiple interests**
    - **Human needs** are powerful (e.g. dignity)
    - Make an **open list**
- Discuss interests
    - Make your interests **come alive**
    - Acknowledge your interests as **part of the problem**
    - **Look forward, not back**. "Why?" could mean two things, and you should prefer the latter:
        - What **happened**?
        - What **could** happen, with teamwork?
    - Be **concrete** but **flexible**
    - Be **hard on the problem** and **soft on the people**.

However, "good faith negotiation **does not require full disclosure**" (Fisher and Ury). You should still protect yourself.

5. Generate multiple options

You should come up with as many as possible. Be creative and brainstorm openly. However, a good strategy is to let the other party take the lead and go along with the ride, only speaking when necessary.

- *Avoid premature judgment*: brainstorm openly.
- *Avoid a single answer*: be creative. There might be lots of options available to suit interests.
- *There is no fixed pie*: lose the assumption.
- *Their problem is your problem*: IBN assumes teamwork.

Tips

- Change the environment and choose a facilitator.
- Seat the participants side by side.
- Clarify ground rules (e.g. no criticism rule)
- Record everything in clear view

6. Development of objective standards

This step is about developing principles.

- Both parties should agree to these. The aim is to resolve issues using fair and mutual standards rather than to the powerful whims of one party.
- The standards are objective, so this removes power imbalances. If you disagree with an option later, you are not disagreeing with the other side but the standard.
- Good middle ground approach should be taken for formulating the standards.
    - Too broad and it loses all meaning (e.g. "the agreement must be fair" Fair to whom?)
    - Too specific and it loses objectivity
- Never yield to pressure: especially if the other side tries to pull "company policy" on you. Everything is flexible.

Examples

- Market value
- Precedent
- Scientific judgment
- Professional standards
- Efficiency
- Costs
- What a court would decide
- Moral standards
- Equal treatment
- Reciprocity
- Feasibility
- Tikanga

7. Evaluation of options using standards

Look for mutual gain.

- *Identify and clarify mutual interests*: This can introduce good rapport before evaluation, and helps clarify.
- *Dovetail differing interests*: any differences in beliefs? Forecasts?
- *Make their decision easy*: demonstrate that you can walk through their shoes. Don't make threats.

Difficulties

- *Lack of information*: don't mislead and be open. Unfortunately, not every party adheres to this.
- *May require multiple sessions*: might need to discuss options with those not in negotiation
- *Emotions*: difficult if emotions get in the way over options
- *Parties simply cannot agree on outcomes*: goes without saying

8. Agreement/closure

Be mindful of these

- *Use consensus decision-making*: all parties **support** the decision although they may not **prefer** it because in the end they feel that they had an opportunity to be heard, and that's the important thing
- *Accept that there might be a pie after all*: IBN tries its best to expand the pie, but the reality is that pies are not infinite.
- *No is always an option*: remember your BATNA!

All possible options

- *Resolution in full*
- *Tentative resolution subject to confirmation from client*
- *No resolution*: litigation, BATNA, etc.

Dealing with dicks

- Negotiation jujitsu/mental balcony
- Taming the hard bargainer
- More powerful side

Negotiation jujitsu/mental balcony

- *Do not attack their position*: look behind it and try to understand how they got there. You have interests; so do they.
- *Do not defend your ideas*: invite criticism and advice. Keep your cool. Balcony.
- *Recasting*: re-cast an attack on you as an attack on the problem.
- *Ask questions and pause*. Here are some useful phrases
    - "Please correct me if I'm wrong"
    - "We appreciate what you've done for us"
    - "Our concern is fairness"
    - "We would like to settle based on independent standards"
    - "Trust is a separate issue"
    - "Could I ask you a few questions to clarify?"

In using negotiation jujitsu, going to your **mental balcony** can help (William Ury *Getting Past No*)

- **Natural reactions** (which we shouldn't do)
    - Striking back
    - Giving in
    - Breaking off/avoidance
- **Going to the mental balcony**: "objects react. Minds can choose not to." Going to the balcony means distancing yourself from your natural impulses and emotions.
    - *Keep your eyes on the prize*: identify your interests, identify your BATNA, and decide whether you should continue to negotiate.
    - *Name the game*: recognise common tactics (stonewalling, attacking, tricking) and know your hot buttons. Being able to identify and name these things keep you at the top of your game.
    - *Buy time to think*: it's okay to say nothing. Also slow down the negotiations and ask for clarification. Never make an important decision on the spot.

Taming the hard bargainer

This will involve you negotiating the rules of the game. That is exactly the same as the substantive negotiation!

- *Separate the people from the problem*: "we're here to negotiate. If we are finding this difficult, we can reschedule."
- *Focus on interests, not positions*: "why are you committing yourself to an extreme position?"
- *Invent options for mutual gain*: suggest alternative games to play and remind them of the rules designed to benefit both parties (e.g. confidentiality in a dispute where someone's reputation is at stake)
- *Insist on using objective criteria*: ask for the principles behind dirty negotiation tactics. Call them out on shit like giving you lower chairs.

Here are some tricky tactics to be aware of:

- *Deliberate deception*: fake news, ambiguous authority, dubious intentions
- *Psychological warfare*: good cop/bad cop, personal attacks, threats
- *Positional pressure tactics*: refusal to negotiate, escalating/extreme demands, lock-in tactics, "take it or leave it".

The best thing to do is to bring the tactic to their attention. Call them out. Refer back to their interests.

More powerful side: know your BATNA

- *Protect yourself*: don't use a bottom line and formulate a trip wire.
- *Make the most of your assets*: more BATNA, more power. Develop yours and consider what the other side's BATNA might be.

Negotiation ethics

- Restrictions on behaviour
- Lawyers and ethical questions within this context

Restrictions on behaviour

Legal restrictions

- *Contract law*: misrepresentation/mistake/negligent misstatement
- *Criminal law*: fraud
- *Fair Trading Act 1986*: s 9 (no misleading/deceptive conduct)
- *Employment Relations Act 2000*: s 4 (duty to act in good faith)
- *Failure to disclose*: applies in some circumstances
- *Confidentiality*: cannot reveal information gained on a "without prejudice" basis in later court action
- *Lawyers Conduct and Client Care Rules 2008*
    - 2.4: no fraudulent conduct
    - 2.5: lawyer can only certify truth of any matter to any person unless they have taken steps to verify accuracy
    - 2.7: cannot make threats to disclose
    - 5.3: lawyer to always exercise independent professional judgment
    - 10.1: treat lawyers with respect and courtesy
    - 11.1: no misleading/deceptive conduct
    - 12: deal with others using integrity

All potentially guide strategic posturing in negotiating but none of them is likely a "slam-dunk" against strategic posturing. We don't have an answer!

Nonlegal restrictions

- *Reputation*: especially applies to lawyers, who are expected to be professional
- *Moral compass/conscience*: most people have these
- *Good business practice*: truthful conduct will result in more people trusting you and maintain commercial relationships.
- *Ongoing relationships generally*: as above.

Lawyers and ethical questions within this context

Ethically questionable methods

- ***Strategic posturing***: describes the approach to negotiation where **you want to make out your side to be as strong as possible**, therefore **exaggerating** a little. This is almost expected in all forms of negotiation.
- *Deliberate ignorance*: keeping yourself **wilfully ignorant** about things that you don't want to know about. Then it **cannot** be said that you are lying.

How to use strategic posturing

- *Complete honesty*: always being honest regardless of situation
- *Mixed approach*: generally being honest, but deception is acceptable in some circumstances (e.g. Metiria Turei)
- *Deceptive/strategic posturing*: generally being deceptive where possible (within the confines of the **law**).

Any sensible lawyer avoids breaking the law, but can be deceptive in negotiations.

- While some statements are **clear untruths**, it could also be argued that this is just a part of the culture of negotiation.
- Some examples are **exaggerations** where something is made out to be more black and white than it actually is (e.g. "we are confident of our chances at trial")

Therefore, all lies fall under a **spectrum**. In negotiations, you will almost be in your own little world in which people seem to operate to a **different code** in relation to truths and deception than in other areas in their life.

Role of the client

- A client has the final say over the substance of the negotiated agreement
- A lawyer cannot commit their client to an agreement without a client's consent
- A client cannot make a lawyer engage in unethical behaviour

BUT IBN requires the lawyer to consider the other side's interests, even if the might conflict with your client's interests.

- Applying Fisher and Ury, considering the other side's interests **is** in your client's best interests.
- But the important thing is for both you and your client to **accept this**.
- If you do not believe in this, it will be difficult to even try to use IBN.

This can be established through an example: the **prisoner's dilemma** (**Nash equilibrium**).

Nash equilibrium: where each party picks the **optimal choice** given the choices of the other party.

- The police hold 2 criminals separately. Each must choose whether to stay silent or confess.
- If each remains silent, they will both be convicted of a lesser crime (1 year in prison).
- If one confesses and the other remains silent, the confessor will be given immunity as a Crown witness and the other will be sent to prison for 20 years.
- If both confess, neither will be needed to testify against each other, and both will be sentenced to 5 years.

		A's behaviour	
		Remain silent	Confess (defect)
B's behaviour	Remain silent	Both get 1-year sentence	A goes free; B gets 20 years
	Confess (defect)	B goes free; A gets 20 years	Both get 5-year sentence

The negotiation arena is similar to the prisoner's dilemma. Picture value (e.g. cash) as the prosecutor (therefore being competitive = defecting), and process of collaboration as staying silent.

- Instead of a choice between remaining silent or confessing, the choice is whether to collaborate with the other side by disclosing information in order to promote the creation of value, or to defect and emphasise value only.
- Disclosure of information has payoffs (i.e. lighter sentence) but can be more vulnerable.
- If both parties decide to disclose information (and both parties are aware of this), this is the best possible outcome (i.e. lowest sentence for both parties; 1 year in prison each).

Should lawyers be held to a higher standard than non-lawyers? (Selene Mize)

Honesty is a part of being a good negotiator, subject to the caveat that it can put negotiators at a disadvantage. Therefore, lawyers often use strategic posturing to help their clients out. Should this be allowed?

Arguments for

- Negotiations lack the structure of a public courtroom with a neutral judge and rules of procedure.
    - BUT this is a strength of negotiation: to allow flexibility and to get rid of unnecessary fees.
    - Furthermore, negotiations are voluntary.
- Negotiation should better address power imbalances ("partisan advocacy").
    - BUT failed negotiations will end up at court, and those who abuse power imbalances will be held accountable there.

Arguments against

- By banning strategic posturing in the lawyers' code of ethics, lawyers would be held to a higher standard than other negotiators. Why would anyone then pay a lawyer to negotiate on their behalf?
    - This is also unfortunate given the legal acumen and skillset of lawyers.
- Enforcement is difficult because:
    - Negotiations are not public. How would you find it?
    - Deception can be difficult to detect. Where is the line between a fluff/exaggeration and an outright lie?

Therefore, Mize argues that if the government wants to ban strategic posturing, they should do so across the board (not just for lawyers).

Is honesty the best policy? Michelle Wills argues yes. Why?

- Even experts disagree as to whether strategic posturing is helpful.
- A negotiator's economic concerns about honesty in negotiations boil down to:
    1. Will the negotiator suffer economically if they try to be honest?
    2. If the negotiator accepts lying as a negotiating tactic for ensuring immediate gain, will this pose a financial liability in the future?

    Even if the negotiator benefits in the short-term, the argument is that long term effects will most likely come back to bite you.
- Further,
    - Decisions and strategies are made simpler (lying takes effort)
    - Personal credibility gained by behaving ethically constitutes a valuable capital asset
    - Being truthful is good business; no-one, not even businessmen, lives in a moral vacuum.

"As far as negotiation strategy is concerned, refraining from lying … is ultimately the safest way to do business."

Cross-cultural dispute resolution (mediation and negotiation)

Negotiation and mediation must cater for different cultural viewpoints and not be ethnocentric. As Macduff states, "notwithstanding cultural differences, what we have in common is greater than what distinguishes us. It also reflects the assumption that there is a common language of business, diplomacy, or negotiation."

What is culture? For our purposes…

- "The collective programming of the mind that distinguishes the members of the one group or category from another" (Hofstede).
- "A set of values and beliefs acquired from learning, experiences and upbringing, which creates implicit social rules or a code of ethics and behaviour within a specific group" (Fang Law).

Culture is not fixed; it is ambiguous in nature. In fact, the term "cross-cultural dispute resolution" is itself vague as hell.

- Are both parties from non-western cultures, or just one party? Is it the mediator?
- Likely means that there is some sort of clash of cultures (e.g. Maori and Pakeha, NYC and Shanghai). This is still a broad definition, however, so it remains confusing.

Macduff argues that there is a cultural tension today.

- *Universalism*: we are all people, and we have more commonalities than not.
- *Relativism*: everything depends on perspective, and everyone has a different one.

This is important in a DR context. Is there only one way to do things? Should there be a middle ground?

- On the one hand, it is necessary and possible to take account of diversity and cultural norms/practices in the design and implementation of procedures.
- On the other hand, it is both constitutionally vital and socially possible to rely on "culturally-blind" or objectively neutral processes.

However, Macduff argues that there is no "culturally neutral" view or model of conflict, and that understanding the impact of culture on conflict and resolution requires a rich theory of the meaning of culture. He therefore takes a "middle ground" approach in incorporating culture.

The challenge of recognising and responding to diversity (the contemporary expression used to encompass the range of cultural, personal and political differences in modern complex societies raises three issues:

1. We must understand our own capacity to deal with difference. We are all capable of it.
2. We must develop the conceptual and empirical tools to understand the roots of cultural difference.
3. We must recognise the cultural and historical restraints on participation in dispute resolution.

Our approaches to cultural differences in DR must match our theory of culture. Macduff concludes that we should take a middle ground approach.

- On the one hand, a one-size fits all theory of DR embodies a theory of cultural difference as subordinate to a universal image of rationality and citizenship.
- On the other hand, culture is a construction and ongoing project as well as being the expression of core shared beliefs about the world.

Different cultural approaches

- Direct vs indirect communities
    - In **indirect communities**, the focus is often more on **honour** than directness (e.g. Asia).
    - In **direct communities**, **direct** communication is favoured.
- Individualism vs collectivism
- Neutral vs emotional

At the same time, these are **generalisations** and expectations are changing with immigration, etc.

Cross-cultural issues in NZ dispute resolution

Multiculturalism in New Zealand

This is the idea/state where there are many cultures within one geographical nation or within the nation's communities.

- This will depend on **where** you are. **Auckland** is very multicultural – much more so than the rest of the country.
- However, no matter where you are, it is important to know about different cultures to **incorporate their ideas into your negotiation methods**.

Globalisation

Globalisation is the increasing interaction of people through the growth of the international flow of money/ideas/culture.

- While it can be seen as a positive, globalisation sometimes goes too much in **one** way (e.g. from USA, China).
- It can therefore be critiqued to say that **everything has become assimilated**; not just Burger King and Starbucks, but of ideas and thought processes.

Examples in NZ

- *Human Rights Act mediation*: mediators are required to be trained across cultures (e.g. race/ethnicity).
- *Family Dispute Resolution*: cultural competency is a requirement (FDR Regulations 2013, regulation 7).
- *Treaty settlement process*: incorporation of IBN.
- *Te Ture Whenua Maori Bill*: statutory regime where parties will need to go mediation before going to Maori Land Court (like employment).

Building trust

If we're going to engage with culture properly as a DR community, we **must** do it properly. But if we don't do it properly (i.e. token efforts), is that **worse** than **not doing anything at all**? How do we do better than just with token gestures?

- *Face-to-face meetings*: this is a good start for exposure
- *Self-awareness*: address unconscious bias.
    - A good place to start is to ask what culture that person belongs to, and ask what their cultural beliefs are.
    - If you can understand your roots/origins and values, you will recognise that others have similar things!
- *Cultural education and training*: e.g. Te Reo classes.
- *Adapting models*: of negotiation/mediation
    - Is this enough? Or, should we adopt new models altogether?
- *Impartiality and confidentiality*
    - Some cultures do not necessarily value these; this is a very **western** idea
    - Some cultures prefer a communitarian approach (e.g. mediation)

Mediation

Introduction to mediation

Definition

Mediation is difficult to define. We will proceed with Goldblatt's definition, which is formulated as follows:

1. A consensual process
2. Involving the assistance of a third party
3. Which enables the other parties to explore issues of (potential) difference
4. In order to prevent or resolve those differences.

Consensual: in terms of entering mediation.

Difference/dispute: mediation ≠ facilitation, where a facilitator helps others understand an abstract concept, although it is facilitative in that the third party facilitates the resolution of a dispute.

Important points

- At the heart of the modern ADR movement
- AMINZ and Resolution Institute are primarily professional organisations for mediators
- Some mediators are legally trained but not all of them
- Mediation is unregulated in NZ.

Strengths and weaknesses

Strengths of mediation

- Cheap and quick
- Preserves relationships
- Flexible
- Agreement by consent
- Parties have control over process
- Confidential (insofar as law allows)
- Can incorporate minority cultural elements (Maori DR, cultural feminism).

Weaknesses of mediation

- Lack of procedural safeguards
- Mediator bias: rare but appearance of bias just as important
- No precedent
- Non-binding
- Not always appropriate (e.g. criminal)

Popular misconceptions about mediation

- *Mediation is about compromise*: no, you can be staunch and collaborative
- *Mediation is about giving up power*: as above
- *Mediation is about being nice*: as above
- *Mediation is only okay in a win-win situation*: as above
- *Mediation never results in binding agreement*: no, usually results in binding agreement
- *Mediation often fails to reach an outcome*: no, mediation has a very high settlement rate

Does mediation threaten the rule of law in NZ and the role of the courts?

Winkelmann J *ADR and the civil justice system*

- A well-funded and well-functioning court system dealing with both criminal and civil cases is a critical feature of a society which exists under the **rule of law**.
- However, **negotiated settlement** is the principal means by which the **vast bulk of civil disputes are resolved**.
- This has always been the case; cases have been settling at **roughly similar rates for decades**.
- A high rate of settlement is **not** a failure of the civil justice system. In fact, it can be seen as a good indicator of a well-functioning civil court system.
- Cases settle in the **shadow of the law**; without a functioning civil court system, cases would not settle peacefully.
- There is **no research in NZ** as to the impact of mediation on the rates of settlement. Overseas research indicates **no/negligible impact** on the timeliness of disposition, litigation costs and rates of settlement.
- However, **mediation remains actively encouraged in judicial case management**.
- It is common to promote mediation services by reference to the **perceived downsides of court proceedings** (aka "**anti-litigation narrative**"). However, this anti-litigation narrative carries with it the danger of **undermining the civil court system** by eroding confidence in it. This could **undermine the rule of law**.

Evaluative mediation

Evaluative mediation is where the mediator provides substantive expert advice to support the decision-making process.

Strengths

- *Helpful*: parties provided with expert substantive advice to assist in decision-making
- *Prospects*: expert advice can indicate what settlement should be or what would happen if parties were to go to court
- *Reality check*: parties' lawyers often like evaluative mediation as it can mean a third party reinforcing their advice

Weaknesses

- *Philosophy of mediation in question*: is it truly mediation if it involves an expert providing advice?
- *Parties lose power*: can undermine the authority of the parties (they no longer own the process)
- *Legal dangers*: e.g. wrong legal advice
- *Narrows the scope for mediators*: you can't be a mediator unless you have legal training

Settlement mediation

Settlement mediation is where the mediator takes an active role in directing the parties towards settlement.

Strengths

- *Good settlement rates*: although this doesn't necessarily speak to quality
- *Results-oriented*: therefore favoured by governments
- *Quicker and cheaper*: especially compared to other types of mediation

Weaknesses

- *Philosophy of mediation in question*: is it really just assisted negotiation? Or, is mediation itself assisted negotiation?
- *Lack of focus on discussing underlying interests and relationships*: risk of becoming positional
- *Parties can feel under pressure to settle*: this will be the case if settlement is the primary aim

Narrative mediation

The mediator encourages parties to tell their stories and create a mutual empowering story. This is closely linked to transformative, but has a greater focus on storytelling; transformative focuses on actively trying to change/transform.

Strengths

- *Relationships are number one*: useful if relationships are important
- *Therapeutic*: has its roots in counselling
- *Can radically improve situation*: if done well
- *Takes pressures off parties to settle quickly*

Weaknesses

- *Less chance of settlement*: not about settling, but telling a story
- *Too "warm and fuzzy"*: this might be a strength, but some might be put off by this approach and not commit
- *Philosophy of mediation in question*: is it mediation or counselling?
- *Mediator has little to do*: difficult to justify their role

Facilitative mediation

The mediator has no advisory or determinative role regarding the substance of mediation; the mediator facilitates and enables parties to solve their own problems.

Strengths and weaknesses

Strengths

- *Likely the most balanced approach*: solves problems and preserves relationships.
- *Flexible*: arguably no need for expert legal knowledge; the substance is in the hands of the parties
- *Strong focus on underlying interests*: no risk of getting positional
- *Undoubtedly mediation*: philosophy of mediation is not in question; sits comfortably with NADRAC definition.

Weaknesses

- *Can be inefficient*: focus on underlying interests can slow down the process
- *Parties can be left in the dark*: reluctance of mediator to give substantive advice can leave parties confused

Process: 2-6 are usually the core steps; facilitative mediation is flexible, so you don't need to do all of these.

1. Preparation/pre-mediation
2. Mediator's opening statement
3. Parties' statements
4. Mediator's summary
5. Issue identification and agenda setting
6. Issue analysis and identification of underlying interests
7. Private sessions/caucus (if desired/necessary)
8. Development and evaluation of options
9. Conclusion

1. Preparation/pre-mediation: likely overkill in New Zealand. But it could be useful

- Agreeing on time and venue
- Deciding who will attend
- Deciding on who the mediator will be
- Will lawyers be present?
- Signing agreement to mediate
- Preliminary conference (sometimes)

2. Mediator's opening statement: language should signal parties' ownership of process. 5-10 minutes.

- Introduction
- Features of mediation
- Role of mediators
- Process of mediation explained
- Ground rules:
  - Establish authority to settle
  - Note confidentiality/without prejudice
- Parties' endorsement of ground rules

3. Parties' statements: therapeutic aspect of mediation. Should give appearance of fairness (therefore equal time for both).

- Each party outlines perspectives, stories, and problems.
- Party who goes second should not respond to the party who went first.
- Mediator can ask open questions to clarify (only if necessary)

4. Mediator's summary: should be done after both parties have gone.

- Check for inaccuracies
- Use neutral phrasing where possible

5. Issue identification and agenda setting:

- Discover key issues
- List the issues (expressed in neutral terms endorsed by parties)
- Avoid positions (Fisher and Ury)
- Can phrase as questions
- Agreement on first item for discussion
- Interests and issues can overlap (cf. IBN): the question is **why** the parties are there, and this involves a look at the parties' interests

6. Issue analysis and identification of underlying interests

- Facilitate: parties are **problem solving**. They need help – that's why they're mediating.
- Parties communicate about each issue
- Exchange of feelings about the dispute without pressure for premature resolution
- Opportunity to explore underlying interests: ask lots of **open questions** to make sure the parties understand the issues.

7. Private sessions/caucus

- *Provides opportunity for mediator to work with one party*: it is important to stress **confidentiality**
- *Reality testing*: options are discussed and negotiations rehearsed. Good opportunity for mediator to bring things up in passive aggressive manner!
- *Can be held at any point*: depends on circumstances
    - Earlier on to avoid inflicting further damage (if the facts are **sensitive**)
    - In case of **breakdown**/**deadlock** during mediation
    - If parties are **deviating from mediation guidelines**: good chance to re-educate
    - Parties showing signs of **shortcomings in skills**: chance to teach them how
    - **Upon request** by parties
- **Limitations/concerns**
    - Affords mediators with a lot of **potential power** and/or **leverage**
    - Can engender **suspicion**: showing signs of fairness is super important
    - Mediators themselves could be **manipulated**/**influenced**
    - Inadvertent breaches of **confidentiality**
    - Can result in **miscommunication**/**errors** in shuttling process

8. Development and evaluation of options: unlike in IBN, options can be evaluated while being brainstormed

- Creative and mutual brainstorming
- Mediator to facilitate collaborative problem-solving: the mediator should **not** come up with options themselves
- Reality testing the options
- Reframe, paraphrase, summarise: while brainstorming should be encouraged, the mediator can reframe (neutralise)
- Make a list

9. Conclusion

- Agreement (or not; parties decide): what other DR options are available? Litigate?
- Legal representatives may draft binding agreement
- Agreement may not be binding in some cases: must decide
- Affirm and acknowledge parties' involvement in process

Other issues: may want to discuss this with the parties

- Co-mediation: two mediators working together in single mediation.
    - *Benefits*
        - More resources
        - Division of labour
        - Match mediator with party: gender, race, age, class, etc.
        - Balancing of professional backgrounds
        - Positive modelling: mediators showing co-operative problem solving and mutual respect means the parties might do the same
        - More stable dynamics: 2 parties and 1 mediator, or 2 parties and 2 mediators? Seems better to me
        - Mutual debriefing
    - *Weaknesses*
        - Negative modelling: if the mediators are shit then everything will go to shit
        - Patron syndrome: for matching mediator with party, some parties might see mediator as their advocate/ally (even though that's not their job)
        - More expensive
        - Manipulation: potential for good cop bad cop routine between mediators
- Shuttle mediation: mediators move continuously between parties and are the sole source of communication
    - Suitable for settlement/evaluative modes; not transformative/facilitative
    - Attractive for mediators with limited understanding of nature of conflict
    - Can be good for lawyers who are used to this sort of approach in negotiation (back and forth)
- Telephone/video conference
    - *Benefits*: can overcome geographical distances, limited resources, or safety issues
    - *Weaknesses*
        - Mediators unable to observe/react to non-verbal messages of parties
        - Reduced basis for mediators to establish rapport through interpersonal skills
- No separate meetings?
    - Avoid loss of trust
    - However, prevailing trend is for mediators to meet more and not less with the parties separately (Goldblatt)

Transformative mediation

Instead of focusing on settlement or problem-solving, the mediator helps parties to transform their understanding of the problem and transform their relationship.

This is the polar opposite of competitive negotiation.

- This is not positional; and
- This does not seek to get an outcome, or even solve a problem.

Process

1. Informal opening address by mediator
2. Ground rules
3. Open questions: let parties go for it
4. Mediator interventions
    - Reflections
    - Summaries
    - Check-ins
5. Separate sessions (if parties desire)
6. Resolution/conclusion (if parties desire)

1. Informal opening address by mediator

- More of an opening conversation with the parties
- Reinforce party control and choice (autonomy)

4. Mediator interventions

Reflection: the mediator mirrors back to the speaker what the mediator believes the speaker has just expressed.

- Mediator should look to capture both the substance and the emotional tone of what the speaker has said.
- The mediator engages directly and only with the speaking party.
- Useful to help parties make interactional shifts.
    - The *speaking party* can hear themselves speak ("is that what I said? Have I gone too far?")
    - The *non-speaking party* can listen in from a safe distance.

Summary: the mediator organises and condenses what both parties have talked about into topics of discussion.

- Summaries help the parties see the big picture of their conversation, allowing them to get clear and make choices.
- Summaries are like reflections in that they amplify what has been said, but for the whole conversation.
- They should be full and undiluted; do not omit topics.
    - *Topics of agreement*: this could be good for building rapport
    - *Topics of disagreement*: will be more common

Check-in: the mediator checks in to see what the parties want to do.

- This highlights the parties their own responsibility for whether the discussion continues or ends.
- This also brings empowerment and recognition shifts.
    - Do we have an *important decision to make*?
    - A shift in one party can then impact the other, allowing them to make a shift.

Why intervene?

- Mediation should be totally controlled by the parties.
- Problem solving and settlement should not be the only goals.
- A shift in one party can impact the other.
- Empowering parties, they become more articulate and powerful as the process goes on and gain a greater understanding of the issues.

Practical applications of transformative mediation: used by the US Postal Service and Waikato Mediation Services.

Mediation ethics

Start point: there is no regulation of mediation in New Zealand. You will, however, be expected to follow your organisation's code of ethics.

Code of Ethics: from the perspective of a mediator

- Confidentiality/privilege
- Impartiality/neutrality/conflict of interest
- Liability/indemnity

Example: Resolution Institute

Resolution Institute Code of Ethics

- Impartiality
    - *Rule 9*: DR member to disclose all actual and potential conflicts of interest
    - *Rule 15*: DR member to conduct DR process fairly, diligently, professionally, and with independence
    - *Rule 16*: conduct the process in a timely manner and in accordance with the law
- Liability/indemnity
    - *Rule 21*: ensure that they are covered by insurance (indemnity)
- In relation to mediation
    - *Rule 23*: mediation to uphold participant self-determination. This is found in all types, but…
    - *Rule 24*: supporting participants exploring issues, interests and options seems like the Resolution Institute favours a facilitative approach (a la Fisher and Ury)
    - *Rule 25*: advise where necessary, but careful

Resolution Institute Agreement to Mediate

- Two functions
    - Protect mediator (indemnity)
    - Clearly communicate that this is a legal process
- Same old shit as above
    - Mediator to disclose all conflicts of interest
    - Each party to commit to process
- Note: excluding fraud, the parties jointly and severally release, discharge and indemnify the mediator in respect of all liability arising during mediation (cl 23). This has not been tested, but it's there.

Issue: should we not just have one Code of Ethics?

- Lawyers have one source/authority for legal work: the New Zealand Law Society.
- While the Resolution Institute covers a lot of ground, it is just one code. Perhaps it could be better with a single unified code of ethics.

Confidentiality

Just Hotel Ltd v Jesudhass CA249/06, 14 December 2007.

- Parties gathered in mediation over a personal grievance raised by Mr Jesudhass.
- He claimed that JH stated in mediation that he would be dismissed immediately after mediation ended.
- Jesudhass now wants to formally raise a personal grievance. He needs evidence for unjustified dismissal.
- However, there is a confidentiality enactment in the Employment s 148 ("must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation").

Held: no, Mr Jesudhass could not use this information.

- Previous case, *Shepherd v Glenview*, held that information used in mediation could be used. This came as a shock.
- This decision overturned *Shepherd* in favour of confidentiality.
    - There was no ambiguity in s 148; confidentiality to reign, unless public policy directs otherwise.
    - This reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.
    - *Exceptions*: documents which come into existence independently of the mediation, public policy reasons, potentially serious criminal conduct (this last one was not determined; not necessary on the facts).

Confusion of confidentiality issues in Evidence Act 2006 and privilege (Nina Khouri)

In order for a privilege to achieve its objective (in this case, to facilitate candour in mediation and settlement negotiations), the scope of its protection and any exceptions must be clear. Unfortunately, this is not the case here.

- Section 57 of the Evidence Act applies to all civil and criminal proceedings; it states that parties to a mediation (including mediators) have privilege over information was intended to be confidential, and was made in connection with an attempt to settle or mediate the dispute between the persons.
- While this seems straightforward, complications arise when the privilege is challenged.
    - One party disputes enforceability of settlement agreement
    - Professional negligence claim by a client against their lawyer for the lawyer's advice during mediation
    - Allegations that mediator breached ethical/legal obligations
- These are difficult situations. Should NZ take a strict or broad approach?
    - *Strict approach*: everything confidential, no exceptions.
        - Good for being simple and consistent with plain reading of statute
        - Bad for situations where settlement reached by misrepresentation, as it still falls under s 57 (and therefore cannot be raised in litigation/etc).
    - *Broad approach*: common law exceptions to confidentiality
- Tension between promoting the private nature of DR and to promote justice when required.
- The new Evidence Amendment Bill proposes to address this, but only to allow judicial discretion to disallow privilege using a policy-based balancing test ("interest of justice") without providing examples.

As a result, Khouri believes that we are in the same place as we were before.

Other issue: lack of scholarship on this issue! Khouri is one of the few people who have written on this topic.

Mediation regimes: general

- Modern mediation movement took off in the late 1970s and continued to grow until the 2000s. It has now plateaued.
- Mediation movement in New Zealand is most prevalent in statutory regimes. This is part of a global trend of saving costs, saving courts from being overloaded, and social changes.
- As a result of strong state leadership, there was never a grassroots/industrial mediation movement in New Zealand.

Mediation regimes: family law

Framework

- Old: Family Proceedings Act 1980
- New
    - Family Dispute Resolution Act 2013
    - Family Dispute Resolution Regulations 2013

Family Dispute Resolution Act 2013

Philosophical basis: avoid court and minimise involvement from family lawyers

- Duties of FDR providers (s 11): to
    - Identify the matters at issue
    - Facilitate discussion
    - Assist the parties in reaching an agreement in the best interests of welfare and children

  While these are helpful, this is not as comprehensive or helpful as employment.
- Privilege (s 14): unless recorded on a family DR form, any evidence of statements is inadmissible in court

Family Dispute Resolution Regulations 2013

- DR formalised in reg 4; DR organisations to allow for mediation with code of conduct and established process
- Qualifications and competency requirements (reg 7)
    - Able to determine and facilitate appropriate processes to help mediation reach agreements that best promote the welfare of children
    - Have understanding of Family Court processes and family law generally
    - Is culturally competent

Making mediation compulsory (Family Dispute Resolution Act 2013)

Historical background

- It was difficult to get a divorce before the 1980s due to the public stigma surrounding it.
- A changing society led to the Family Court being established in 1980.
- The Family Proceedings Act 1980 also allowed for judicial mediation: before any formal hearing, the judge would sit down with the parties and effectively act as mediator.
- Judges recognised that this work would be better done by others (mediators).

Mediation made compulsory

Major philosophy was to remove (or at least limit) lawyers from the custody DR process (Judith Collins, 2014).

- Paramount importance of relationships: litigation is destructive
- Best interests of the child
- Time/cost
- Confidentiality
- Flexibility

Judith Collins predicted 7000 cases a year to be resolved at mediation after this change.

What went wrong?

- Instead of 7000, there have been around 1500 mediations a year since Judith's 2014 speech.
- While the Ministry of Justice are still doing research, we know the following:
    - *Without notice applications in Family Court skyrocketed*, allowing people to sidestep mediation. We don't know why – these could be legitimate (e.g. more domestic violence cases?)
    - *Mediation is expensive*, and some parties do not meet the threshold for legal aid.
- However, there is a good success rate within the 1500/year. If parties want to mediate, they are more open to resolve.

It was likely a bad move to paint family lawyers as villains. The result was that they adapted to the rules, resulting in an increase in without notice application. This isn't necessarily malicious or anything, as lawyers likely thought that such a decision was in the best interests of their clients).

How could we address this?

- *Cust costs*: mediation is expensive, so make it more accessible
- *Appoint child advocates*: to make sure child's best interests are looked after, even when without notice applications are made
- *Encouraging "collaborative lawyering"*: family lawyers to guarantee that they will represent them until they get to Family Court, dispelling any financial incentives
- *Education*: educate family lawyers in this field.

Mediation regimes: commercial mediation market

The New Zealand commercial mediation market

- The commercial mediation market is small and dominated by a tiny group of high-profile mediators.
- While the market grew quickly from its beginnings in the 1990s to the early 2000s, there is no evidence of similar exponential growth over the past decade.
- What has increased is the number of accredited mediators looking for work opportunities. Supply far outstrips demand, causing some tension and resentment in the mediation community.
- It is probable that the small group of full-time mediators will continue to dominate the market until a 'game-changing' development occurs.
- New Zealand's commercial mediation market may be reaching its natural limits. Commercial mediation is here to stay, but is yet to fulfil its potential.

The mediation profession's key focus should be on growing the market rather than on trying to carve the existing market up into small slices.

How do you grow the market?

Gatekeepers: the lawyers

- Clients have a limited knowledge of mediation and usually follow their lawyers' recommendations. Therefore, lawyers play a key role as gatekeepers to commercial mediation.
- Lawyers know about commercial mediation and support it, but on their own terms.
    - Lawyers are largely against mandatory mediation despite it being common in similar jurisdictions.
    - Many respondents strongly supported freedom of choice (*laissez faire* business ideology).
    - Some also noted that mediation was not always the best forum of DR. (This is true, but this could be addressed by making mediation the default and making exceptions for when it isn't necessary?)
- Lawyers mainly recommend mediation because of cost; it is cheaper than litigation,
- Lawyers prefer legally trained mediators with experience and a good reputation. However, this is not to say they prefer evaluative mediation – just someone who thinks like a lawyer. Lawyers already know the law and don't expect the mediator to know it! Therefore, they are happy with facilitative mediation.

Overall, Morris believes that lawyers are not to blame for the stall of growth of mediation – although they could be doing more.

Educate the users: insurance sector

- Users reported a good knowledge of mediation.
- The insurance industry as a whole is aware of mediation and supports it.
    - Users report they are using mediation often and believe that it is well-utilised in the insurance sector.
    - However, most estimate that the organisations they work for use mediation less than 25 times a year.
- Respondents' main reason for mediation was its cost-effectiveness.
- Respondents' main reason for not using mediation was the other party's lack of willingness.
- Users seemed largely satisfied with mediations they were involved in and reported high success rates.
- The vast majority of users were against mediation being mandatory.
- Most claims managers play a role in selecting a mediator. This shows their engagement in the mediation process, not just lawyers choosing mediators.

Mediation regimes: employment

Framework: *Employment Relations Act 2000*.

- *Purposes*: strong focus on use of mediation to resolve shit
    - Build productive employment relationships
    - Ensure opportunity for mediated solution to problems (especially for essential services and strikes)
    - Access to information and mediation services is more important than adherence to rigid procedures
- Chief Executive of company to hire persons to provide access to mediation services (s 144). This is often HR.
- Method
    - Mediation to be provided by specialists (s 145)
    - Mediation services cannot be called into question on substantial grounds of mediation (s 152).
    - Mediator can provide full and final settlement (s 149), a recommendation (s 149A), or a decision (s 150).
- Requirements
    - Confidentiality (s 148)
    - Good faith (not compulsory but reinforced in case law)
- Employment Relations Authority: investigative body who deals with employment relationship problems which cannot be solved in mediation (s 157)
    - Authority must consider whether an attempt has been made to resolve the matter by use of mediation, and must direct the matter to mediation (or, if necessary, to further mediation; s 159).

Mediation

- Peter Franks argued that the 1970 mediation service was modelled on the US Federal Mediation and Conciliation Service since the 1970s
- Today, employment mediation has eclipsed both arbitration and conciliation as the dominant statutory form of ADR in industrial relations.
- With MBIE doing most of these, the development of mediation in NZ has been heavily influenced by the state with the private sector playing a smaller, supplementary role.

Mediation regimes: tenancy

Statutory framework

Historical background

- Difficulties with tenancy issues in Small Claims Tribunal and District Court
- We adopted the Residential Tenancies Act 19787 (South Australia)

Residential Tenancies Act 1986

- State to provide Tenancy Mediators (s 76).
- Tenancy Tribunal can halt proceedings at any point and refer parties to mediation (s 99). This usually occurs before any hearing takes place.
- Costs: if, in the opinion of the Tribunal, the dispute ought reasonably to have been settled before the Tenancy Mediator but the party whom the order is made against refused without reasonable excuse, that party must pay reasonable fees/expenses of the Tenancy Mediators (s 102).
    - This makes mediation *de facto* mandatory.
- Lawyers not involved in mediations.

Mediation in the tenancy framework

Why adopt it?

- Cost/time
- Flexibility
- Usually straightforward disputes
- Often ongoing relationships
- General mediation on the rise since the 1980s

Issues: is tenancy mediation really mediation?

- Until 2007, tenancy mediation was seen as the standard for mediation.
- However, because most issues were straightforward, there was a shift towards:
    - Fast-track/SWIFT telephone mediation
    - Scheduled (brief) telephone mediation
- The aim was to "fit the forum for the fuss" (according to complexity of dispute) so this was likely a necessary change.
- But then this likely changed the nature of tenancy mediation (from a face-to-face meeting to a 30-min phone call).
- Is still mediation?
    - Possibly. It depends on how much dispute is involved.
    - However, if it is factually objective that one party is behind on rent and the only thing to figure out is a payment plan, this appears to be more like conciliation.

In any case, mediation is less prevalent in tenancy disputes (especially compared to employment and commercial settings).

Mediation regimes: weathertight homes

Statutory framework

Historical background

- This is a specific issue of tenancy issue with the leaky homes tragedy
- European Renaissance of architecture was **not** a good fit for NZ, where it rained.
- First statute: Weathertight Homes Resolution Services Act 2002.

Weathertight Homes Resolution Services Act 2006

- Heavy emphasis on mediation, although not mandatory
- Very complex disputes involving expert advisors and lawyers
- Mediation occurs in parallel to formal proceedings
- The mediator will either be conducted by MBIE or private mediators (ss 77-79)
- Act follows classic structures of mediation: freedom, indemnity, confidentiality
- Most mediations resolved in one full day
- **Co-mediation** is common in this field (use of eclecticism)
    - *Standard mediator*: legal background
    - *Expert mediator*: with engineering/science background.

Adopting mediation

Why?

- Time/cost/flexibility
- Avoids litigation

Issues

- Where will our precedents come from? This was a concern raised by Winkelmann J in her speech earlier.
    - A case like *North Shore City Council v Body Corporate (Sunset Terraces)* [2011] could work
    - But it is just one case!
- Tension between **speedy resolution** and **fundamental rights**

Mediation regimes: resource management/environment

Framework

Historical background: modern environment law is a new and emerging area of law.

- Original: Town and Country Planning Act 1977 and Planning Tribunal
- Geoffrey Palmer: Resource Management Act 1991 (with 1996 amendment introducing the Environment Court).

Resource Management Act 1991

- Mediation to take place upon referral from **consent authority** (s 99A)
    - This was supposed to short-circuit the dispute before it got to the Environment Court.
    - However, Grant has researched this and found that **none** of the parties used this section.
- **Environment Court** directs parties to ADR after proceedings lodged (s 268). **Mandatory**, or need leave (s 268A)

Mediation

Approach taken

- Environment Commissioners often mediate, adopting an **evaluative** approach.
- **Private mediation** also available (if s 99A is used)

Why?

- Environmental sustainability
    - On the one hand, **litigation** sends clear principles/precedents about the environment
    - However, sustainability should be about **working together**, not adversarial bickering
- Often ongoing relationships (e.g. neighbours)
- Time/cost/flexibility
- Process is confidential for parties (although the **outcome** must be reported to the consent authority; s 99A(4))

The idea is to try have the environment represented! But that's not possible. We should ideally all have the environment in our best interest.

Mediation regimes: Human Rights Act

Framework

Historical background

- Modern human rights are a new and emerging area
- Began with Race Relations Act 1971, with use of conciliation but…
    - Conciliation alone wasn't very effective, and
    - Other aspects of human rights needed to be addressed.
- Enter the Human Rights Act 1993, with mediation introduced under the 2001 amendment.
- This was influenced by the Employment Relations Act 2000.

Statutory framework: Human Rights Act 1993

- The Human Rights Commission must provide the resolution of disputes by the parties concerned in the most efficient, informal, and cost-effective manner possible. This is effectively mediation (s 76(1)(b)).
- Once a complaint is brought to the Commission under s 90, the Commission may require mediation or other form of DR designed to facilitate resolution. This is effectively mandatory mediation (s 84).
- Mediation will most likely be face-to-face.
- There will be about 100 a year for a team of 12 mediators.
    - This isn't a lot of mediation. This isn't a sign of failure ("fitting the forum to the fuss"); it's just that most cases don't require it, or should go to Tribunal (human rights aren't often a grey area).
    - When mediation does take place, it has a high settlement rate (50%).
- Co-mediation does work with MBIE employment mediators (if relevant).

Mediation in the framework

Why adopt mediation?

- Ongoing relationships: most often will be in the workplace
- Time/cost
- Confidentiality: often very sensitive subject matter, like sexual harassment (Colin Craig breached this and had to give $120,000 in damages to Rachel McGregor).
- Flexibility: e.g. venue (you won't want to do it at the employer's office)

Issue: should mediation be the primary DR method in an area focused on rights?

- Yes
    - Good for preserving relationships
    - Speediness is good
    - Rights aren't always number one, especially if they could be used as a weapon (a non-lawyer perspective)
- No
    - Public enunciation of values important
    - Sometimes courts are simply the best place (see Winkelmann J)

Mediation from an Overseas Context

Overview

- USA
- Australia
- UK
- Other

USA

- *Federal Mediation and Conciliation Service*: the thing that started it all
    - Modern movement: New Zealand more or less copied the FMCS and Peter Franks after the WWII. Some have argued that this was the beginning of modern mediation movement.
- *Community mediation movement*: others have argued that the modern movement came about as a result of the community mediation during the civil rights era.
    - We don't have one in NZ; we are small. When we set up mediation, we depended on the success of the US.
    - In any case, community movement no longer exists in the US other.
- *Harvard Law School Program on Negotiation*: IBN and mediation have similarities.
- *Clinical legal education*: LAWS379. Also big in the US.
- *US Postal Service*: transformative mediation

Australia

- *National Alternative Dispute Resolution Advisory Council* (*NADRAC*): state-funded, state-run; although this is now called ADRAC due to funding cuts.
- *Mediation under the Native Title Act 1993*
- *Australasian Dispute Resolution Journal*: we don't have one in just NZ
- *Resolution Institute*: Australian company with New Zealand branch
- *Residential Tenancies model*: this is from South Australia

United Kingdom

While they are the country with the most commonalities with NZ, they suck with ADR.

- *Centre for Effective Dispute Resolution* (*CEDR*)
- *Costs regime in civil courts*: barrister elitism broken down by Courts' costs regime.
    - Not trying mediation (or unreasonably rejecting it) will be held against a claimant at the costs stage.
    - If a barrister does not suggest mediation, it makes them negligent.
    - However, this is limited to commercial cases.
- *Resistance from traditional legal profession*
    - GMo's conspiracy theory: elitist barristers.
    - Winkelmann J drew on arguments from Hazel Genn and Lord Neuberger, both from the UK.

Other

- *Civil law jurisdictions* (e.g. Germany): while mediation began in common law jurisdictions, it has branched out.
- *Asian DR hubs*: e.g. Singapore, Hong Kong.
- *International mediation*
    - Disputes in private international law spaces
    - Still a smaller area compared to domestic, but it is growing; arbitration remains the go-to.