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COMMUNITY MEDIATION

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Background

This paper was first researched and presented when I was studying for my LLM through Victoria University in 2014. Two years later, I was given the opportunity to update and present it as part of the 2017 Conflict Resolution Conference hosted by Victoria University in November 2017.

I note that this paper does not cover mediation as part of restorative justice initiatives.

Abstract

This paper outlines the successful development of the traditional mediation template into a community-based model. The history of community mediation is explored within the context of the United States in the 1960s, and in Australia and New Zealand during the mid-1980s. Recent developments in New Zealand – with particular emphasis on the promising developments occurring in Christchurch, Waitakere and Dunedin – are evaluated, though this paper acknowledges that there are limited statistics available since these schemes have only been running for a few years at most. Finally this paper takes three foundation models first postulated by Harrington and Merry, and later by Bush and Folger, and applies these models to the existing New Zealand community mediation schemes to evaluate their success.

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Introduction to community mediation

At some point in their lives, most people become involved with an annoying neighbour, a family disagreement, or a bothersome member of the local community. The differences in question may start as minor personal disagreements but then turn into all-encompassing passionate quarrels which can escalate to a point where conflicts become disharmonious and damaging to both property and persons.¹ Escalation of such disputes can intensify into a social problem felt throughout a community. The community mediation movement advocates that these sorts of arguments can be resolved within the community and outside of the rigid court system.

From humble beginnings starting in the United States in the 1960s, to 79 community mediation centres in America in 1980, growing to at least 250 centres in 1990, this movement now has over 600 service centres in the United States, United Kingdom and Canada alone.² New Zealand first trialled a community mediation service centre in the early 1980s and more recently several new centres promoting this movement have been developed and established throughout the country.

Aims of this paper

This research paper discusses the community mediation movement and has five principle aims:

Chapter 1: To explain the adaption of the traditional mediation model into a viable community-based model;

Chapter 2: To outline the history and development of the community mediation movement with particular focus on the United States and Australia;

Chapter 3: To summarise the developments of community mediation in New Zealand;

Chapter 4: To evaluate and analyse the success of community mediation; and

Chapter 5: To apply the evaluation measures of success to community mediation schemes in New Zealand.

1. Adapting mediation into a community-based model

The definition of mediation

Mediation theory and practice have been widely discussed throughout literature of law, policy and social work disciplines. Mediation has been seen to be more flexible than other forms of dispute resolution, specifically adjudication and

1 Jane Chart "Law Reform: community mediation" (1982) NZLJ 408 at 408.

2 Sandra Lewis "Community Mediation and the Police: An Organization to Organization Collaboration" (Master of Arts in Conflict Analysis and Management Thesis, Royal Roads University, Canada, 2001) at 21.

court proceedings. Advocates also consider mediation “much faster, less expensive, more empowering and procedurally satisfying than the judicial system.”³

Within this expansive literature five attributes of mediation have been commonly identified:

- (1) that it is an informal process;
- (2) which is confidential;
- (3) in which parties participate voluntarily;
- (4) with a third party guiding them to resolution; and
- (5) with an outcome that is arrived at jointly.

This definition is also adopted by the New Zealand Law Commission.⁴ These five attributes make mediation distinct from traditional forms of dispute resolution, such as arbitration (where a third party makes a determination without necessarily identifying who was wrong); adjudication (where a third party imposes a decision that is correct in law); and counselling (where a third party keenly guides parties to a resolution).⁵ Unlike the preceding forms of dispute resolution, the cornerstone of mediation is the parties’ self-determination of their own fate, illustrated in the voluntary outcome of the mediation session and the resulting settlement agreement.⁶

Mediation in New Zealand statutory law

The New Zealand Law Commission has stated that one of their key aims in civil disputes is to provide the parties with an ability to resolve their issues before they come to court.⁷ The Law Commission recognises that if parties resolve their differences outside of court, then the underlying issues are likely to be more accepted, leading to more satisfactory outcomes. Some form of mediation is key in this early contact. This belief is widespread in the justice system and therefore it is not surprising that pre-court mediation in New Zealand is mainly state-led.⁸ There are many statutory instruments advocating the use of mediation as a method of alternative dispute resolution for example in tenancy (Residential Tenancies Act 1986) and family disputes (Family Dispute Resolution Act 2013).

3 Teresa Ann Janz “Preventing ‘Wars’ in our Neighbourhoods with Community Mediation” (Doctor of Philosophy Dissertation, York University, Ontario, 2001) at 31.

4 Delivering Justice for All: A Vision for New Zealand Court and Tribunals (Law Commission, Report 85, March 2004) at 87.

5 Jan Cameron and Ray Kirk Assessing an Innovation: An evaluation of the Christchurch Community Mediation Service June 1984 – December 1985 (1986) at 15; and Paul Hutcheson and Stephen Hooper “Mediation” in Peter Spiller (ed.) Dispute Resolution in New Zealand (1st ed, Oxford University Press, Auckland, 1999) at 57-59.

6 Heyo Berg “Mediation in New Zealand: Widely Accepted and Successful” in Klaus J. Hopt and Felix Steffek (eds). Mediation: Principles and Regulation in Comparative Perspective (Oxford University Press, United Kingdom, 2013) at 1097.

7 Delivering Justice for All, above n 4 at 86.

8 Grant Morris “Towards a history of mediation in New Zealand’s legal system” (2013) 24 ADRJ 86 at 88.

The disputes covered by statutory regimes in New Zealand are handled by the justice system according to the value of the claim or type of the dispute. Advocates argue that there is a place for mediation to be used in New Zealand to resolve disputes at the community level before escalation into the formal justice system. This would also assist in counting some of the social issues that stem from volatile disagreements between community members.

The definition of community mediation

The five qualities of mediation indicate that the same process could be used to resolve minor issues that may not have legal concerns yet but left alone would escalate into a formal dispute:⁹

The goal of the community dispute resolution movement is to teach people to resolve conflict by cooperation, negotiation and mediation, thereby empowering the participants, relieving court caseloads and preventing escalation of disputes.

There are two particular reasons why mediation could be successfully adapted at the community level as a technique to resolve disputes:

- (1) the nature of the parties' relationship; and
- (2) the type of dispute.

This philosophy underpins the community mediation movement. While these two features are universal to all community mediation schemes internationally, other similar denominators are common to all schemes, including the low cost nature of the mediation service.

Relationship of the parties

Community mediation brings mediation within the community fold as a shared responsibility; community members are the main 'actors' in this mediating style. The characteristic of 'community' exists because of the parties involved in the mediation – for example neighbours, families or work associates – and this is the very cornerstone of the restorative nature of community mediation: no matter what type of dispute, the disputing parties have an interpersonal relationship that requires ongoing contact.¹⁰ A long-drawn out court case is unlikely to have a positive influence on the parties' relationship, given that central to the dispute is the relationships between parties. Confirmation of prior relationships is often against the established laws of evidence so are unable to be heard in a litigious dispute though this may be the very heart of the quarrel.¹¹ This is the opposite in mediation: "Mediators are advised that their concern should be not so much with *what* happened, but with *why* it happened."¹²

⁹ Robert Benham "Public Justice: Community programs broaden access to dispute resolution" [2000] Dispute Resolution Magazine 13 at 13.

¹⁰ Mark Austin Waters and Carolyn Hoyle "Exploring the everyday world of hate victimization through community mediation" (2011) 18(1) IRV 7 at 10; and Chart, above n 1.

¹¹ Chart, above n 1.

¹² Cameron and Kirk, above 5 at 18.

Nature of disputes

The type of disputes considered at mediation can vary depending on different jurisdictions and on different communities. In theory, most community disputes could be served by community mediation so long as the interpersonal relationship remained at the forefront of such disputes:¹³

... many of [the centres] also accept family, custody and divorce referrals; school and juvenile matters; victim/offender mediations; hospital collections; inter-group conflicts, such as those within religious congregates or business and non-profit entities; and environmental and land use issues.

These types of disputes are relatively “minor in the eyes of the law”¹⁴ due to the parties or the value of the claim, yet these types of disputes can quickly escalate to criminal or civil liable actions.

There is almost universal acknowledgment among advocates of this movement that all issues and disputes of an interpersonal nature could be served by community mediation. Jane Chart, who assisted in founding the Christchurch Community Mediation Service in the early 1980s, employs the example of a Greymouth resident who was convicted of murdering his neighbour after a long and tiresome dispute involving boundary lines. The offender confessed to the investigating police officer that “The whole thing between us got out of proportion.”¹⁵ Chart identifies that this type of relationship and dispute is highly suitable for community mediation.

Other common attributes

One of the founding beliefs is that community mediation should be provided at no, or low, cost to all members of the community “regardless of ability to pay.”¹⁶ This is underpinned by the strongly-held belief of advocates that justice should be accessible to all and mediation centres should serve the communities in which they operate. There is a strong link between accessibility and the type of communities that service centres operate in and the type of referrals. Referrals will generally come either directly from a party (or parties) or from the court or police system.

Alongside the low cost feature, there are five other attributes that are typical of community mediation schemes. While these factors are not mandatory or universal across all centres, these factors highlight the diversity of such schemes:

- (1) Mediators are community recruits who reflect the diversity of the community they are drawn from (language, culture and race as typical examples).¹⁷

13 Becky L. Jacobs “Volunteers: The power of community mediation” (2011) 11 Nevada Law Journal 481 at 481.

14 Chart, above n 1.

15 Mediation Services What is Mediation? (handout, Christchurch, date unknown) at 2.

16 Tracy Scott “Reflection on the Development of Community Mediation in New Zealand (Comparison between America and New Zealand)” (presentation, New Zealand, date unknown) at 4; Ilene Diamond “Therapeutic Aspects of Community Mediation” (Doctor of Psychology, Wright Institute Graduate School of Psychology, Berkeley, California, 2006) at 74; Lewis, above n 2; and Benham, above n 9 at 14.

17 Lewis, above n 2; and Benham, above n 9 at 14.

- (2) The mediators are volunteers and provide this service without payment on a pro bono basis.¹⁸
- (3) Mediators may not be trained mediators, lawyers or psychologists. While they can range in age and ability, they are recruited for their strong interpersonal and conflict resolution skills rather than their professional qualifications (or lack thereof).¹⁹
- (4) Each service centre will have a range of mediators in order to encompass various parties' needs and "to match some of the demographic characteristics of the disputants."²⁰ Numerous mediators may attend a dispute in a panel arrangement.²¹
- (5) Service centres are likely to be non-profit²² with a "governing/advisory board representative of the diversity of the community served."²³

There are disagreements in the literature about whether these categories do, or should, exist in all true mediation schemes, or, if they do exist, whether they are beneficial. For example, mediators in the current Christchurch-based Mediation Services receive a nominal payment rather than operate on a volunteer basis. Payment in 2013 was \$175 each plus mileage for the first mediation session up to three hours and then \$50 per hour after that.²⁴ In contrast, mediators in the Dunedin Community Mediation Service set up at the beginning of 2014 currently operate on a volunteer basis only. Cameron and Kirk, who evaluated the community mediation pilot in Christchurch in the 1980s, also argued that these factors should not be universally applicable. Cameron and Kirk believed that it is a myth that mediations should be from the community and both argue that such mediators are professional though they may not be professional trained.²⁵

18 Mediation Services Annual Report Mediation Services 1 January 2013 – 17 December, 2013 (Christchurch, New Zealand, 2013) at 7; Mediation Services Annual Report Mediation Services 1 January 2015 – 17 December, 2015 (Christchurch, New Zealand, 2015); and Mediation Services Annual Report Mediation Services 1 January 2016 – 31 December, 2016 (Christchurch, New Zealand, 2016).

19 Lewis, above n 2. In the Christchurch-based Mediation Services service, they have eight mediators on contract as well as two trainees. "All mediators have either been professionally trained and/or working as mediators in the community for a minimum of 5 years. All mediators are either or both members of national mediator membership organizations LEADR or AMINZ." Mediation Services (2016), above 18.

20 Diamond, above n 14 at 150.

21 Two to five mediators handle each mediation at the San Francisco Community Board: See Diamond, above n 16 at 72 and 74.

22 Benham, above n 9 at 14; and Lewis, above n 2.

23 Scott, above n 16.

24 Mediation Services (2013), above 18 at 7. Due to funding issues, Mediation Services become an independent society with charitable status on 17 October 2016. The service is also looking for funding options including a user pays system: Mediation Services (2015), above 18 at 17-18; and Mediation Services (2016), above 18.

25 See Cameron and Kirk, above 5 at 20.

Outcome of community mediation

If the dispute is settled during a mediation session (or sessions), the mediator typically draws up a settlement agreement and both parties sign it at the time. This swift settlement outcome is a benefit of these schemes. While there is no recent information from New Zealand, empirical research out of America shows that there is a high rate of agreement being reached between the parties in community mediation:²⁶

Records from programmes throughout the US demonstrate that 85% of mediations result in agreements between the disputants. Similar studies show that disputants hold these agreements 90% of the time. 95% of disputants indicate they would use mediation again.

Due to the flexible nature of community mediation and to the fact that it may not be aligned with the court process, the resulting settlement agreement may encompass legal and non-legal provisions. Such undertakings may include ceasing particular behaviour (for example noise reduction), vowing future conduct (for example tying up noisy dogs and/or enrolling them in a training programme), or an apology for past behaviour (for example rudeness).²⁷ However, there is no international consensus as to what remedy a party has if the other party refuses to abide by the settlement agreement after the mediation sessions are concluded. This is further discussed in Chapter 5.

2. Global history and development of community mediation

Mediation, in all its various forms, has a long and rich history as a means to resolve conflicts before, or instead of, escalation to a formal justice system for criminal or civil determination. However, the recent movement advocating mediation as an effective tool to resolve community disputes can be traced back to the political and social movements in the United States in the 1960s. Customarily, family or religious elders mediated disputes at the personal or community level due to the social effects of such disputes, but²⁸

... by the late 1960s the mobility and dispersion of modern urbanized life had significantly eroded these mechanisms... Minor civil and criminal matters, with either originated from or cause interpersonal conflicts, besieged the courts.

Courts came to have an increasingly pivotal part to play in resolving all types of disputes between all types of parties and for different social relationships. It was inevitable that reformers turned their minds to whether conflicts could be resolved more successfully at the community level before escalating into the court system.²⁹

²⁶ Evidence from the National Association for Community Mediation America: Mediation Services What is Mediation? (handout, Christchurch, date unknown) at 2.

²⁷ Chart, above n 1; and Waters and Hoyle, above n 10.

²⁸ Diamond, above n 16 at 69. See also See also Jerold S. Auerbach *Justice Without Law?* (Oxford University Press, New York, 1983) at 120.

²⁹ Auerbach, above n 28 at 135-137; Robert A. Baruch Bush and Joseph P. Folger *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed, Jossey-Bass, California, 2005) at 7;

Importantly for the development of this movement, not all advocates of this emerging idea were from the left of political and social ideology; “Some [promoters] envisaged community justice as a return to a time when religious institutions and village elders were primary sources of resolution of disputes within families and neighborhoods.”³⁰ Advocates included “judicial reformers, religious leaders and community organizers.”³¹ This mixture of ideological backgrounds assisted the founding institutions gain momentum and acceptance through various areas of the population.

Neighbourhood justice centres: United States

In America during the 1960s there was a general “movement away from formal adjudication processes for resolving conflicts”³² towards dispute resolution that favoured the community, primarily due to the civil and political unrest featuring racial violence and dissatisfaction and “dis-empowerment of black Americans.”³³

As discussed above, advocates of this movement came from all type of backgrounds – including public office as well as from within needy communities. It was during this time of civil unrest that the United States Government saw the possibility that community-based dispute resolution could assist, and perhaps fix, much of the social disharmony and violence stemming from community tensions. The Civil Rights Act of 1964 outlawed discrimination based on race, colour, religion, origin or gender. This Act also set up a federally funded establishment - the Community Relations Service - the purpose of which was to prevent violence and encourage dialogue on preventing discrimination.³⁴ The Community Relations Service still exists today as the Department of Justice’s “peacemaker”³⁵ for community disputes, focusing on hate crimes within communities. The Service’s mandate is very much community-based and shows federal acceptance of the idea of such schemes working at the community level; the current mandate of the Service mandates the ability³⁶

...to work with communities to help them develop the capacity to prevent and respond more effectively to violent hate crimes allegedly committed on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability.

Alongside this federal statutory initiative, various grassroots service centres, neighbourhood justice centres and community boards were set up from the late 1960s.³⁷ One of the more successful grassroots centres was established in San Francisco in 1975, and this idea spread throughout the country, using assorted means

and Christine Harrington and Sally Merry “Ideological Production: The Making of Community Mediation” (1988) 22 Law and Society Review 709 at 709.

30 Deborah R. Hensler “Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System” (2003-2004) 108 Penn State Law Review 165 at 170.

31 Harrington and Merry, above n 29 at 709.

32 Janz, above 3 at 26.

33 Hensler, above n 30 at 170.

34 Diamond, above n 16 at 69.

35 U.S. Department of Justice FY 2013 Performance Budget Congressional Submission (Community Relations Service, United States, 2013) at 3.

36 At 3. See also Auerbach, above n 28 at 15.

37 Janz, above 3 at 27.

of funding and with varying degrees of success. Most early funding came from local and federal government funds or, more frequently, national and local foundations advocating for alternatives to remedy social violence than the rigid justice system.³⁸

The attraction of community mediation in America remains strong today.³⁹ The uptake of referrals from the justice system to service centres in the United States is now higher than ever and this is reportedly because, at least in part, the vast majority of the established centres do not accept court-referred cases if the court retains jurisdiction over the dispute in question.⁴⁰ In most states community mediation acts independently of the American court justice system⁴¹ and state and federal courts can recommend or compel parties to utilise mediation to settle their disputes.⁴²

Community justice centres: New South Wales, Australia

Following America's example, a pilot community mediation project was established in New South Wales in January 1981. This Australian venture was set up under federal statute (the Community Justice Centres (Pilot Project) Act 1980), had a maximum lifespan of three years, and was funded wholly by state government funds. Three service centres were set up in Sydney in Bankstown, Wollongong and Surry Hills which were all located within walking distance of the two main referrers: police (10% of cases) and court workers (35% of cases).⁴³ At least 50 mediators from various professions, age groups, language, and backgrounds staffed each centre after 54 hours of training.⁴⁴ The statistics from the first year of operation show that the uptake of the mediation service was high. In 1981:⁴⁵

- 70% of the cases involved disputes between neighbours, and were mostly nuisance-based relating to noise, carparking, control of children or pets, drainage and boundary/fencing issues.
- In 28% of these cases, there was evidence of interpersonal relationships breaking down, and harassment and revengeful measures occurring.
- Over 20% of the remaining cases involved family members: breakdown of romantic relationships, care of children or elderly parents, or property rows.

38 Hensler, above 30 at 171; and Diamond, above n 16 at 73.

39 Berg, above 6 at 1098; Benham, above n 7; and Edward W. Schwerin Mediation, Citizen Empowerment, and Transformational Politics (Praeger, London, 1995) at 14. This acceptance is in contrast to Canada's attempts at community service centres: "their growth has been relatively stagnant considering their advantage over the costly, inefficient, time-consuming, and ineffective approach of the courts." Dave Baspaly "Analysis of Community Mediation Programs in North America" (Master of Arts in Conflict Analysis and Management Thesis, Royal Roads University, Canada, 200x [sic]) at 2.

40 Schwerin, above at 33.

41 Diamond, above n 16 at 73.

42 Robert A. Baruch Bush and Joseph P. Folger "Mediation and Social Justice: Risks and Opportunities" (2012) 27 Ohio State Journal on Dispute Resolution 2.

43 Jane Chart "Community justice centres for New Zealand" (1983) NZLJ 39 at 39.

44 At 36.

45 At 39-40.

- The remaining cases (under 10% of the total instances) involved other relationships including friendships, landlord-tenant, and teacher-student.
- Parties in 35% of cases referred themselves to the relevant service centre and 70% of cases that went through the mediation process reached settlement within three weeks of contacting the centre.

The Community Justice Centres Act 1983 extended this pilot program in Sydney on a permanent basis and similar service centres were rolled out in Adelaide and Victoria.⁴⁶ The success of the New South Wales service centres and resulting statistics were heavily influential in setting up Christchurch's community mediation scheme in the 1980s.

3. Community mediation in New Zealand

As discussed above the impetus for mediation in New Zealand has traditionally come from the state rather than the community.⁴⁷ In contrast to the case of arbitration, there is no umbrella statutory framework governing or defining mediation as a whole in New Zealand. However, assorted types of mediation are incorporated into at least 60 statutes governing dispute resolution including human rights, tenancy, employment, leaky homes, and family law.⁴⁸ In general, these statutory frameworks compel participators to attend mediation before being able to access other avenues of the justice system making mediation a compulsory, rather than voluntary, avenue of justice. For example under the Family Dispute Resolution Act 2013, parties have to receive sign-off from a mediator before progressing to a court determination. This divergence from the self-determination definition of mediation may not be seen as detrimental to the definition of mediation as long as the outcome is consensual and voluntary.⁴⁹

However, mindful of global developments, there was a suggestion in the 1980s that New Zealand could replicate the successful grassroots community mediation movement to serve a different function to that of the existing statutory mediation forums.

Reforms in 1980s

In June 1984, a two-year pilot community mediation scheme was set up in Christchurch. Based upon the New South Wales model, the Community Mediation Service, was a creature of statute established under the Community Mediation Service (Pilot Project) Act 1983.⁵⁰ Under the guidance of Jane Chart, there was buy-in from many different facets of the community including the court system, police, district and

46 Jan Cameron "Community Mediation in New Zealand: A Pilot Project" (1988) *The Journal of Social Welfare Law* 284 at 289; Cameron and Kirk, above 5 at 18; and Chart, above n 1 at 409.

47 Ian MacDuff "Mediation in New Zealand: Legislating for Community?" in C.L. Pe, C.S. Gaudio, and A.F. Tadiar (eds.) *Transcultural Mediation in the Asia Pacific* (Asia-Pacific Organization for Mediation, Manila, 1988) at 168; and Morris, above n 8 at 88.

48 Berg, above 6 at 1100; and Morris, above n 8.

49 Peter Spiller *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Auckland, 2007) at 70.

50 Cameron and Kirk, above n 5 at 32; and Cameron, above 46 at 289.

city councils, Canterbury District Law Society and the Citizens' Advice Bureau. Chart had previous experience setting up the New South Wales service centres⁵¹ so it is not surprising that this Christchurch effort was set up in a similar way as the New South Wales centres under founding legislation. The main reason for this legislative framework was that the centre sought to define its relationship with the judicial system and in limited cases replace the court process entirely.⁵² One of the centre's aims was⁵³

to test the effectiveness and acceptability in a New Zealand centre of using mediation to deal with disputes between people who have some form of on-going relationship with each other.

Mediation sessions undertaken at this centre were similar to cases being mediated in Australia at the time. The parties voluntarily came together to state their interests and their perception of the conflict, followed by a discussion to flesh out the underlying issues, while the mediator focused on achieving a jointly acceptable outcome.⁵⁴

Despite a favourable resolution rate, which was comparable with that reported by overseas service centres,⁵⁵ this pilot was not a success.⁵⁶ The referral rate was too low and likewise the caseload; and there were sizable concerns about ongoing funding.⁵⁷ The actual figures of cases mediated did not compare with those that were identified during the preliminary information gathering stage when the pilot program was being discussed.⁵⁸ The overall impact of the Christchurch Mediation Service, as a result, was minimal.⁵⁹

Reforms from 1990-2010

Few developments in community mediation occurred in New Zealand during the two decades, 1990–2010. The most successful was a peer mediation scheme set up in schools by the Peace Foundation in 1991 called “Cool Schools” and still exists today.⁶⁰ This programme is not part of the justice system but is funded by the Ministry of Health to provide staff training and resources to prevent bullying and aggression in two-thirds of schools nationwide.⁶¹

In 1995 Dunedin Community Mediation Association Incorporated was established to focus on mediation “between neighbours, family, friends, workmates and voluntary groups; and promoting and developing dispute resolution skills within

51 MacDuff, above n 47 at 217.

52 See Cameron and Kirk, above 5 at 34-35.

53 Cameron and Kirk, above 5 at 1; and see also MacDuff, above n 47 at 212-213.

54 Chart, above n 1 at 409.

55 Cameron, above 46.

56 Morris, above n 8 at 99; and MacDuff, above 47 at 215.

57 Cameron, above 46; and MacDuff, above 47 at 215 and 216.

58 Cameron, above 46 at 298.

59 At 289; and MacDuff, above 47 at 168.

60 The Peace Foundation “Cool Schools Peer Mediation Programme” <<http://www.peace.net.nz/index.php?pageID=24>>; and Morris, above n 8 at 99.

61 As above.

the community.”⁶² This non-profit organisation was subsequently dissolved in 2004. No further reference has been found in the literature which suggests again that its impact on the wider community was minimal.

Developments from 2010

In the past few years, there have been a number of developments in community mediation within New Zealand. Most notably five new service centres are in development, sponsored by different foundations, and embracing the goal of community mediation to varying degrees. There have been no universal formal studies or data published to date concerning these centres. Two however, in Auckland and Christchurch, report moderate uptake and success and are worthy of further investigation.

Mediation Services: Christchurch

Mediation Services in Christchurch was set up in 2009⁶³ to “provide free/low cost mediation services to all sectors of the community, across all types of disputes outside of those held within government agencies.”⁶⁴ Like Chart, whose experience in New South Wales was instrumental in setting up the 1980s Christchurch model, the driving force behind setting up Mediation Services, Tracy Scott, was involved in an American neighbourhood justice centre and she has set up Mediation Services upon her return to New Zealand based on her expertise.

For the first two years of its existence this centre averaged two referrals a month which increased to 36 mediation sessions in 2012, with fairly consistent numbers since then: 25 sessions in 2013, 20 sessions in 2014; 21 sessions in 2015 and 22 in 2016⁶⁵ with the aim of two mediators running each mediation session depending on availability and experience.⁶⁶ Throughout the service centre’s lifespan, there have been various focuses and change of directions showing that it offers a proactive and flexible service which can be pre-emptive to the needs of the community. As an example in 2013 particular emphasis was placed on mediation of custody disputes and family arrangements,⁶⁷ which was timely given the introduction of new legislation (Family Dispute Resolution Act 2013) making significant changes in this area.

Two of the main sources of continuing anxiety for Mediation Services is its constant struggle to secure ongoing funding⁶⁸ and its dwindling stream of referrals. In 2013 only 60 mediation hours were recorded compared to 129 in 2012, 60 hours

62 The Community Archive “Dunedin Community Mediation Association Incorporated” The National Register of Archives and Manuscripts

<<http://thecommunityarchive.org.nz/node/210522/description>>.

63 Scott, above n 16 at 6.

64 Mediation Services (2013), above n 18 at 1; and Mediation Services (2015), above n 18 at 4-5.

65 Mediation Services (2015), above n 18 at 4-5; Mediation Services (2016), above n 18 at 4; Scott, above n 14 at 14.

66 Mediation Services (2013), above n 18 at 3.

67 As above.

68 Mediation Services (2013), above n 18 at 6; and Mediation Services (2015), above n 18 at 3.

in 2013, 71 hours in 2014, 72.5 hours in 2015, and in 2016 63 mediation hours were recorded over 22 mediation sessions.⁶⁹

Waitakere Community Law Service: Auckland

The Waitakere Community Law Service has run a community mediation project since March 2009 where clients are “offered free mediation services by a LEADR accredited mediator to resolve disputes.”⁷⁰ LEADR – Leading Edge Alternative Dispute Resolvers – is a not-for-profit Australasian organisation specialising in facilitating mediations. This community partnership service was set up to deal with disputes having a value of \$20,000 or less.⁷¹ This service does not cater for businesses; businesses are referred to either private mediation or the Disputes Tribunal.⁷² At its inception the previous LEADR NZ chairperson, Carol Powell stated the service was expected:⁷³

... to include adult siblings disagreements about the care and financial assets of elderly parents, flatmate disputes, consumer and private sale disputes, and neighbourhood disagreements over such issues as shared driveways, fences, barking or aggressive dogs, and late-night partying.

No statistics are available as to how successful this service centre has been nor for the uptake of the offer community mediation.

Dunedin Community Mediation Project

The Dunedin Community Mediation Centre was launched early in 2014⁷⁴ following 18 months of community dialogue and subsequent training by the Christchurch Mediation Service.⁷⁵ Initially it was thought that the service could be run in South Dunedin in conjunction with St Patrick’s Parish Centre.⁷⁶ Latest indications though are that the pilot will primarily run out of Brockville. The creed of the resulting centre is to offer free mediation within a community venue overseen by two mediators.⁷⁷ There are six founding philosophies of this pilot:⁷⁸

- 1 Mediation available to groups experiencing internal conflict and to individuals or families for whom paying would create a barrier.
- 2 Referrals directly, from groups in the community and from more official sources (tenancy, DCC, Police).

69 Mediation Services (2013), above n 18 at 9; Mediation Services (2015), above n 18 at 4-5; and Mediation Services (2016), above 18 at 4.

70 Waitakere Community Law Service Community Newsletter (New Zealand, March 2010). LEADR is a not-for-profit organisation specialising in facilitating mediations.

71 New community mediation service” (13 February 2009) [stuff.co.nz](http://www.stuff.co.nz) <www.stuff.co.nz>; and LEADR NZ Annual Report from the Chair (New Zealand, October 2008).

72 Catherine Harris “Benefits of agreeing to disagree” (13 March 2009) [stuff.co.nz](http://www.stuff.co.nz) <www.stuff.co.nz>.

73 As above.

74 “Community mediation service one step closer to reality” (4 November 2013) Dunedin Television|One Demand – Freeview|HD Channel 39 <www.dunedintv.co.nz>.

75 Mediation Services (2013), above n 18 at 5.

76 Dunedin Community Mediation Stakeholders meeting: Community Mediation Dunedin – a vision (New Zealand, 29 May 2013).

77 As above.

78 Dunedin Community Mediation Stakeholders meeting, above n 76.

- 3 Mediation happening as close to the community as possible – using familiar venues and surroundings.
- 4 Mediators trained and supervised and working in pairs.
- 5 Most mediations free – there may be some for which we charge a fee.
- 6 Possible partnering with an existing organisation to reduce administration and enable us to get started.

There are no current statistics available as to the service's initial reception and subsequent level of success.

Other indications of progress

In recent years 'Welcomed' has been set up by local mediators Sarah Ramsey and Markus Frey through the Wellington's Citizen's Advice Bureau and the idea of setting up a similar centre as the Waitakere model was mooted by law graduates in Wellington in 2012 (though to date this model has not been created). Welcomed has not been particularly active in the couple of years however the service is still available for referrals on an adhoc basis through community or not-for-profit organisations. Another community mediation scheme, Community Mediation Marlborough, is currently run out of the Blenheim Community Law Centre.⁷⁹ Again, no statistics are available with regard to any of the aforementioned developments.

Impact of community mediation in New Zealand

Generally, the impact and uptake of community mediation in New Zealand has been minimal which casts aspersions on the long-term viability of service centres advocating this movement. In 2004 the Law Commission sought submissions on the national justice system and it was "strongly submitted by some that this existing mediation market in New Zealand negates the need for court involvement."⁸⁰ Although it is evident that mediation itself is adopted within the wider New Zealand justice system, the state-led promotion of mediation could be to the detriment of the community-based model. One reason for the slow acceptance of community mediation may be because the statutory mediation schemes are well used, and the Disputes Tribunal's jurisdiction is for low-value claims, and there is no room for community-based measures of this nature.

This social context that underpins New Zealand's recognition for formal methods of alternative dispute resolution may go some way to account for its situation; this paper goes on to evaluate the success of community mediation using ideological foundation models.

4. Evaluating and analysing the success of community mediation

One of the issues that occurs for community mediation advocates is how to quantify success of such schemes and service centres. This question has important practical implications as, invariably, the 'success' of service centres has a direct

⁷⁹ Community Mediation Marlborough
<<http://www.commlawmarlb.org.nz/index.mvc?ArticleID=6>>.

⁸⁰ Law Commission, above n 4 at 89.

relevance to receiving funding. Funding options is normally two-fold: through external initiatives and grants, or through the payment of parties using the services. Both avenues of funding need 'success' whether is for a good investment in time, profit, or social change, or whether the uptake of mediation is based on advertisement, promotion, recognition, and word-of-mouth. The long-term viability of such schemes is heavily based around funding and judging 'success'.

This paper suggests that there is a correlation between the success of such community-based schemes and the ideologies behind the foundation of the service centres. It will then discuss the traditional methods of quantifying success: whether the parties involved in mediation sessions reach a settlement agreement, and whether parties abide to these settlement agreements in the long term.

Ideological foundation models of community mediation

Harrington and Merry spent eight years researching community mediation service centres and determined that there were "three analytically distinguishable projects within community mediation."⁸¹ They first published their provocative findings in 1988, and their three ideologies, or foundation models, are called:

- (1) service delivery;
- (2) social transformation; and
- (3) personal growth.⁸²

Each model has its advantages and disadvantages but also each model can coexist with the others, which is the case in New Zealand.

Bush and Folger⁸³ adopted these three models in 1994 and in 2005 for their research into dispute resolution. They hypothesised that the success of service centres advocating the resolution of disputes depended to a large extent on the ideology behind the schemes' foundation.⁸⁴ This paper takes these three models authored by Harrington and Merry / Bush and Folger and applies them to the New Zealand service centres to evaluate their success.

Bush and Folger also identified a fourth model, the 'Oppression Story', which this paper will not examine as this fourth model refers to the dangers of mediation rather than delivering a prescriptive model.⁸⁵

81 Harrington and Merry, above n 29 at 710.

82 At 709.

83 See Robert A. Baruch Bush and Joseph P. Folger *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, California, 1994); and Robert A. Baruch Bush and Joseph P. Folger *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed, Jossey-Bass, California, 2005).

84 Robert E. Mackay and Amanda J. Brown *Community Mediation in Scotland: A Study of Implementation* (The Scottish Office Central Research Unity, 1998) at 4.

85 Bush and Folger (1994), above n 83 at 22-24; Bush and Folger (2005), above n 83 at 15-18.

Service delivery model⁸⁶

The first of the ideological models is the service delivery model. In this model emphasis is placed on how mediation can alleviate court congestion and help administer justice. Bush and Folger called this model the ‘Satisfaction Story’ as community mediation increased parties’ satisfaction by reducing the inevitable suffering caused by the court system.⁸⁷ Inherent in this model is the belief that the formal justice system, namely litigation, is “inappropriate for interpersonal problems; they are too slow, public, and adversarial”.⁸⁸ This belief stems from the historical understanding of community mediation as was evident in 1960s America.

Bush and Folger believed that service centres founded under this model were set up purely to alleviate the public perception of dissatisfaction with the legal system, namely that disputes involving litigation were costly, lengthy, favoured the wealthy, and were damaging to interpersonal relationships.⁸⁹ Diverging from the traditional view of mediation as a voluntary process, under this model it is encouraged that courts mandatorily enforce mediation as it is seen as an incentive to alleviate congestion in the wider court system.⁹⁰

Because of the weight on service delivery, typical service centres under this model are state-funded and referrals primarily come from within the existing justice system, the police or directly from court. Harrington and Merry believe the pinnacle of this model to be the three pilot federally-funded neighbourhood justice centers set up in the United States after recommendations from the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976.⁹¹ These centres were a reaction of stakeholders in order to manage the increasingly high demands on the judiciary caseload and to provide better access to justice for the community members.⁹² Closer to home, in the 1980s both the New South Wales service centres⁹³ and the Christchurch Community Mediation Service operated under this model.⁹⁴

While this model may be the most popular model internationally,⁹⁵ the recently developed New Zealand centres are not founded entirely under the service delivery model, though it can be argued that some of the flow-on effects of centres are certain benefits (such as easing court case loads and promoting better access to justice). None of the newly-established New Zealand centres are sponsored by the state nor by a particular court; these developments are primarily run from within the community by the community without court or police referrals. The community mediation

86 Harrington and Merry, above n 29; and Mackay and Brown, above n 84 at 4.

87 Bush and Folger (1994) above n 83 at 16-18; Bush and Folger (2005) above n 83 at 9-10.

88 Harrington and Merry, above n 29 at 714.

89 Janz, above n 3 at 27.

90 Harrington and Merry, above n 29 at 720.

91 Also known as the Pound Conference: Auerbach, above n 28 at 15; Diamond, above n 16 at 69; and Harrington and Merry, above 29, at 709.

92 Diamond, above n 16 at 70.

93 Cameron and Kirk, above n 5 at 18.

94 As above.

95 Janz, above n 3 at 28.

scheme in Waitakere is conceivably the best example of a New Zealand scheme operating under this model. In spite of this, the Waitakere scheme does not receive separate funding for the mediation service and the mediation costs are included within the wider Community Law Service's budget and endowment. For Harrington and Merry, one of the tenets of this service delivery model is that the mediators would be brought into mediate from outside the community.⁹⁶ This is what happens in the Waitakere Community Law Service who partnered with LEADR to bring in professional mediators as required.

Out of the three models discussed in this paper, the service delivery model has the easiest task of quantifying success. This model can rely on statistical outcomes of settlement agreements between the parties to judge the success of service centres. Other statistics may be useful, such as the time between referral and settlement, and where centres aided congestion of the court system. Using these quantitative methods of measuring success may be a relatively easy way of judging a service centre's success under this model, yet there are still limitations as there is an inherent lack of comparable data between cases seen in court or dealt with by mediation.⁹⁷ This is a problem for New Zealand centres as no statistics currently exist and thus it is difficult to use this model as a measure of success.

Social transformation model⁹⁸

The social transformation model focuses on community social justice and is appropriately called the 'Social Justice Story' by Bush and Folger.⁹⁹ Service centres set up under this model will be typically located within the needy community and will not have any ties to the justice or court system, in strict contrast to the service delivery model. Harrington and Merry argue that this model was formed out of the peoples' revolutions in Cuba, Chile and Portugal, and American campaigners seized upon this type of community empowerment to create "a new sense of community through self-governance or neighborhood control, decentralized judicial decision-making, and the substitution of community members for professional dispute resolvers."¹⁰⁰

This model is also considered to be the grassroots model for social change, where such transformations come from community members rather than from the state or judicial system. Thus, service centres under this model are unlikely to be creatures of legislation. The aim of the "grassroots movement [is] to decrease individual and community dependency on formal legal procedures, thus empowering people to work together to promote social justice issues like reducing inequality."¹⁰¹ The community itself runs the centre for the benefit of its own community members

⁹⁶ Harrington and Merry, above n 29 at 710.

⁹⁷ Cameron and Kirk, above n 5 at 20; and Roman Tomasic and Malcolm M. Feeley *Neighborhood Justice: Assessment of an Emerging Idea* (Longman Inc, New York, 1982) at 183.

⁹⁸ Harrington and Merry, above n 29; and Mackay and Brown, above n 84 at 4.

⁹⁹ Bush and Folger (1994) above n 83 at 18-19; Bush and Folger (2005) above n 83 at 11; and Teresa Janz, above n 3 at 28.

¹⁰⁰ Harrington and Merry, above n 29 at 715.

¹⁰¹ Janz, above n 3 at 28.

and there is a strong emphasis on “building the community’s capacity to solve its problems itself.”¹⁰²

As this model heavily relies on the ability of the community to train and run the relevant service centre, as well as seek the funding to keep the services running, it requires a lot of investment and buy-in from community stakeholders. Centres often adapt and change to incorporate other aspects of community wellbeing (such as advocating for policy changes relating to crime and discontent within the community) in order to have a wider collective impact and have greater opportunities for funding streams.

This model is demonstrated most effectively by the grassroots schemes established in the United States since the late 1960s which emphasise “the community’s needs for empowerment, peace and justice.”¹⁰³ In New Zealand, there is currently no example of a pure service centre based on this social transformation model. However the two closest are the Waitakere Community Law Service and the new Dunedin Community Mediation Project. Given the distinctive base of the Waitakere service centre – operating inside an established community-based organisation – it is the centre with the most resources available for it to work within a community and advocate for members, though its role is still mostly reactionary. Similarly, the newly-established Dunedin Community Mediation Project has a founding mantra that it will work within a community and has engaged a church in Brockville for its pilot as a method of promotion and referral.

Judging the success of service centres under this social transformation model is the most difficult out of the three models. To some degree, success determination can rely on the same statistics as the service delivery model (being essentially case load, settlement rate, and referral numbers). On the other hand, centres have a longer-term emphasis on changing a community as a whole, and seeking social change as an all-encompassing requirement rather than on individual statistics. The main evidence in support of the success of this model is whether harmony in the effected neighbourhood increased after the implementation of the community mediation scheme.¹⁰⁴ There are no statistics of this nature available for the present-day New Zealand centres.

Personal growth and development model¹⁰⁵

This third model promotes benefits on an individual level that eventually flow outward and benefit the community as a whole. Bush and Folger acknowledge this model as a ‘Transformation Story’¹⁰⁶ because the process of community mediation is transformative for the involved individuals who were empowered to resolve their own issues in a supportive environment. This empowerment in turn “fosters the

102 Cameron and Kirk, above 5 at 18.

103 Diamond, above n 16 at 70.

104 Mackay and Brown, above n 84 at 6.

105 Harrington and Merry, above n 29; and Mackay and Brown, above n 84 at 4.

106 Bush and Folger (1994) above n 83 at 20-22; Bush and Folger (2005) above n 83 at 13. and Janz, above n 3 at 28.

‘transformation’ of individuals, relationships and society”¹⁰⁷ which is seen as a type of moral development for the promotion of society at large. For Bush and Folger, this model is the pinnacle of all three foundation models and is what all community mediation schemes should strive towards: “At its heart are the notions of revelation, empowerment and resolution”¹⁰⁸ for the benefit of society as a whole.

This model is focused on the individual, which makes the ability to quantify success easier than the social transformation model, but more difficult than the service delivery model. Similar to the service delivery model, this model pays no attention to legislation or court processes that may make community mediation mandatory; persistent use of personal satisfaction spells out the success of these service centres under this model.¹⁰⁹ The individual parties must be content with the outcome of the mediation for centres under this foundation model to be successful: “This ideological project does not promise that mediation will change power relations or transform communities, it only attempts to make people happier where they are”.¹¹⁰ Because of the weight given to the individual, it is easier to quantify the success of service centres operating under this model as statistics can be amassed from the participants themselves. A survey of users in the 1980s Christchurch community mediation pilot indicated “a surprisingly high level of satisfaction by clients, even where resolutions were not achieved.”¹¹¹ Nevertheless, there are no absolute statistics of this nature available for the present-day New Zealand centres.

5. Evaluating the success of community mediation in New Zealand

Success under the ideological models

Evaluating the recent success of community mediation in New Zealand is difficult given the lack of formal statistics. Nevertheless, this paper argues that a mixture of all three ideologies will be the most successful, with heavier reliance on the social transformation and personal growth models. This is primarily due to the influence and buy-in that communities must have in order to promote the centres to ensure consistent caseloads and referrals. Community members must be able to see the benefit in these mediation service centres, including faster delivery of justice and a win-win voluntary resolution which are two of the considerable advantages. These advantages in turn promote service centres towards Bush and Folger’s ultimate goal of transforming society to work within affected communities and empowering communities to work together for their own benefit.

The three longest running current schemes in New Zealand, being Christchurch, Waitakere, and Dunedin, all operate under a mixture of the three foundation models with only minor emphasis on service delivery. The biggest overall concern of all service centres is the lack of funding available. This concern is shared worldwide and studies have indicated that funding is precarious principally if mediation is not

107 Janz, above n 3 at 28.

108 Waters and Hoyle, above n 10 at 10; and see Janz, above 3 at 28-29.

109 Harrington and Merry, above n 29 at 720.

110 As above

111 Chart, above n 43 at 40.

offered under statute as a method of alternative dispute resolution.¹¹² Of particular note is that none of the existing community mediation schemes in New Zealand are set up under legislation and thus are supported from within communities rather than referrals from police or the court system. This has enduring implications, as funding for the personal growth and social transformation models is more likely to come from private foundations having little-to-no support from government or the public sector.¹¹³ Funding in the service delivery model generally requires a partnership with the public sector playing a leadership role in promoting and organising resources;¹¹⁴ Waitakere Community Law Service is the closest to this paradigm being a joint venture between LEADR and the legal advice centre. It is noticeable that this service centre was initially set up under the service delivery model but has morphed into a beacon of social transformation given its position of working within a community legal advice centre and receiving capital benefits and additional funding streams, which the Christchurch and Dunedin schemes struggle to maintain. Funding is the driving force behind keeping the doors of these service centres open for the benefit of its community members.

The outcome of mediation

Aside from determining success based on the Harrington and Merry / Bush and Folger models, there is also the problem of quantifying success in the outcome of mediated sessions. There are two main ways of determining outcome success:

- (1) by the settlement rate of mediation sessions; or
- (2) the enforcement of the settlement agreements.

Community mediation service centres will have better sight of the former statistics as they are likely to hold records for those parties who have reached settlement, though not the terms of the agreement itself. Arguably more important is the longevity of the agreement itself, and whether the initial dispute between the parties was resolved satisfactorily. Service centres are unlikely to maintain these records or have the resources available to seek evidence to support this limb of success. As an example, the Mediation Service in Christchurch boasts a high settlement rate: in 2013 73% mediations reached agreement, in 2012 84% reached agreement, 2013 73% reached agreement, 2014 77% reached agreement, and in 2015 83% reached agreement.¹¹⁵ In contrast there are no statistics on whether parties abided to the settlement agreements in the long term; there are no statistics for any current New Zealand centre.

Interestingly, there is no international norm as to the enforcement of settlement agreements reached in mediation in the wider justice system if a party does not abide by them. While overseas evidence suggests that “... the compliance rates are higher

112 Mackay and Brown, above n 84 at 63.

113 Harrington and Merry, above n 29 at 718.

114 As above.

115 Mediation Services (2013), above n 18 at 10; and Mediation Services (2015), above n 18 at 6-7.

for mediated outcomes versus adjudicated claims,”¹¹⁶ different jurisdictions have different processes of enforcing settlement agreements. In the New South Wales pilot of community mediation service centres in 1981, any settlement between the parties could not be used as evidence in any later judicial proceedings;¹¹⁷ this is not the case in other systems. There is no uniformity in the current New Zealand schemes on this point, however it is unlikely that these settlement agreements can be enforced as something special in court under current common law. Parties seeking to rely on agreements in mediation would therefore have to rely on general contractual law grounds and would be reliant on seeking remedies through the appropriate court/tribunal with particular jurisdiction having regard to the nature of the dispute.

6. Conclusion

This paper concludes that the traditional example of mediation – being an informal, voluntary, and confidential process with a third party guiding parties to a deliberate outcome – can be successfully adapted into a community-based model. This adaptation was a success in the United States during the 1960s, in a time of civil, political and social turmoil, where the establishment of service centres advocating the use of community mediation (either through statute or as a grassroots movement) were prevalent. This accomplishment was replicated in New South Wales, Australia where a pilot was set up in 1981 under federal statute. This pilot reported a high success rate and was extended in 1983 as a permanent measure in New South Wales, Adelaide and Victoria. Following this example, the largely ineffective Christchurch Community Mediation Service was set up under statute in 1984 though the centre suffered from a low rate of referrals and an inadequate caseload. Twenty years later, several community mediation centres have been established within New Zealand with the most promising developments occurring in Christchurch, Waitakere and Dunedin cities. Each of these developments can be linked to slightly different models or foundation ideologies, which may go some way to account for its relative success or otherwise. To date though, insufficient evidence has been collected to be able to judge their overall success or failure.

It was evident in researching this paper that evaluating the recent success of community mediation in New Zealand is difficult given the lack of formal statistics. However, it is suggested that the most successful models will be those that rely on the social transformation and personal growth models proposed by Harrington and Merry / Bush and Folger. Community members must see tangible benefits in order to use and refer themselves and others to service centres. Currently all New Zealand schemes operate under a mixture of all three foundation models with secondary emphasis on service delivery. The biggest concern of all schemes is the lack of available funding, which can stem from shying away from the service delivery model and thus not having a centralised mandate to help in the wider justice sector.

116 Becky L. Jacobs “Volunteers: The power of community mediation” (2011) 11 Nevada Law Journal 481 at 485-486.

117 Jane Chart “Community justice centres for New Zealand” (1983) NZLJ 39 at 40.

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