Before we look forward, we need to look back: The history of mediation in New Zealand’s legal system

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1. Introduction

…mediation in all its forms is not universally good when viewed from the perspective of the litigant or the state. Moreover, although mediation has a place alongside a system of civil justice, it can only be as a complement to that court system and not as a substitute or replacement for it. Civil litigation before the courts is not dead, or dying. Adjudication of rights through the courts, whether in a full trial or in a summary form, does and should continue to remain at the heart of our system of justice.

(Chief High Court Judge Helen Winkelmann, AMINZ Annual Conference, August 2011)

In 2011 Justice Winkelmann challenged the growing role of mediation in the New Zealand legal system. Justice Winkelmann affirmed the pivotal role of adjudication in upholding fundamental rights in the civil justice system. She also warned mediation lobby groups that any undermining of litigation will ultimately undermine the rule of law and democracy.

How did mediation come to challenge New Zealand’s constitutional traditions and pose a possible threat to fundamental rights, the rule of law, and democracy? This paper charts the history of mediation in New Zealand and argues that mediation has most often complemented, but sometimes challenged, our constitutional traditions.

The history of mediation in New Zealand reflects a number of influences and developments. While proto-types of mediation can be found in New Zealand’s early industrial relations, the modern mediation movement is primarily a result of state-led reform in a variety of legal areas. The executive has been the primary instigator of mediation in New Zealand’s legal system so, if Justice Winklemann’s claims are accurate, the executive should potentially carry some of the blame for any undermining of adjudicative constitutional traditions.

Philip Joseph describes New Zealand as “the acme of legislative supremacy.”¹ This paper will argue that most mediation in New Zealand has resulted from statutory regimes put in place from the late 1970s to the present day. Mediation’s legislative basis and New Zealand’s commitment to parliamentary supremacy could suggest that mediation flows from New Zealand’s most pervasive constitutional tradition. Mediation’s challenge to constitutional tradition is most obvious in relation to Dicey’s third limb of the rule of law. Joseph states that “Dicey’s third meaning was the superiority of the common law over constitutional codes as a method of protecting rights,” but then goes on to argue that “However, this meaning has little relevance to the rule of law doctrine” and in particular,

seems to contradict parliamentary supremacy. If aggressive promotion of mediation does indeed undermine the civil courts, it does not necessarily follow that this undermines the rule of law in a New Zealand context.

The rise of mediation in New Zealand has been ad hoc and pragmatic with a distinct lack of systematic development. This pragmatic change was a response to pressures such as the cost and delay involved in litigation, and major social trends which challenged traditional ways, including traditional approaches to resolving disputes. Mediation continues to play a vital role in the New Zealand legal system but the exponential growth of the 1980s and 1990s has slowed as mediation begins to clearly locate and confirm its ‘territory’ in the New Zealand legal system. There has been some ‘push-back’ from the legal profession in relation to mediation. The discourse accompanying this resistance has often taken the form of defending the traditional constitutional roles of adjudication and litigation.

This paper focuses in particular on the problems associated with litigation and adjudication that led to the modern mediation movement. Adjudication is at the heart of the British constitutional traditions inherited by New Zealand but much of New Zealand’s ADR reform has been influenced by overseas models from the United States and Australia. Any threat posed by mediation to constitutional traditions must be seen in this historic context. This context reflects an intense reliance on British jurisprudence, often at the expense of alternative New Zealand constitutional traditions, such as Maori customary practices.

There is relatively little scholarship on the history of mediation in a New Zealand context. The date range of the paper begins with the first clear incorporation of mediation into New Zealand’s legal system, through employment law, and ends with recent examples. The flourishing of mediation in New Zealand is a result of several, interlinking processes. Major legal reforms during the late twentieth century, many inspired by overseas developments and most implemented by the state, led to the mainstreaming of mediation, and to a formalised Alternative Dispute Resolution (ADR) movement. Mediation is at the heart of the modern ADR movement, both in New Zealand and in many overseas jurisdictions. Ultimately the development of mediation has been ad hoc and pragmatic and was a response to specific challenges facing the New Zealand legal system, for example, the expense and delay involved in litigation.

The scope of this paper is ambitious hence the wording ‘towards a history’. An important omission must be noted. This paper is focused on the New Zealand legal system as established in 1840. Maori customary law and dispute resolution processes, including Maori mediation approaches, have been largely ignored in this system until recent times. While this paper will discuss mediation processes which involve Maori as New Zealand citizens, it will not analyse the history of customary Maori dispute resolution, most of which continues to exist outside New Zealand’s formal legal system.

Providing a sophisticated history of ADR in any jurisdiction is a very ambitious task but one that legal historians should not shy away from. The approach in this paper combines an over-riding thesis with the close examination of developments in specific areas of law. Seven main areas have been chosen. These areas are well-known for using mediation and also represent a wide variety of legal topics.

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2 At 164-5.
This paper does not attempt to cover all the manifestations of mediation in the New Zealand legal system. Areas where mediation plays a less pronounced role are not specifically explored, for example, mediation connected with the Privacy Act 1993 (the Act does not actually mention mediation), the Health and Disability Commissioner Act 1994 (which does mention mediation but has only resulted in a very limited amount of mediation in practice) and Te Ture Whenua Maori Act 1993 (mediation is restricted to certain areas such as fisheries and aquaculture). The paper also focuses primarily on state-led mediation. As will be argued, most examples of mediation in New Zealand flow from legislation, but much of the increasing amount of commercial mediation provides an important exception. Examples of ‘med-arb’, such as the Disputes Tribunal, while incorporating aspects of mediation, are not considered mediation for the purposes of this paper. Also, community decision-making processes relating to offending such as the family group conference and other restorative justice processes are not defined as mediation, despite being related in certain ways.

While discussing coverage, it is important to note that much of the ‘mediation versus adjudication’ debate revolves around a very vague definition of ‘civil justice’. Technically, civil matters are those which are not criminal, thus covering most areas of law. Yet Justice Winkelmann’s 2011 speech focused on the District and High Courts despite her broad opening definition: “And when I speak of a system of civil justice I speak of the provision that our society makes for people to bring civil claims before the courts.” In her seminal work defending civil justice, Hazel Genn distinguishes family disputes from civil disputes. Attorney-General Chris Finlayson lists some types of disputes suited to mediation (including family, leaky homes and employment) and then moves on to state that “the biggest challenge for us as lawyers and mediators is in regards to civil litigation, particularly of a commercial nature.”

This paper takes a broad view of civil justice, for example, incorporating employment, family and environmental law, all of which have their own specialised courts in New Zealand. Restricting analysis to only those civil cases which are routinely heard in the District and High Courts cannot provide a comprehensive picture of mediation’s history in New Zealand.

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3 Section 61 in the original Act.
4 Introduced primarily by Te Ture Whenua Maori Amendment Act (No 2) 2004.
5 Med-Arb can be defined as a process which begins with mediation, but in the event that parties fail to agree, the parties allow the mediator to transform into an arbitrator and make a binding decision.
6 Winkelmann H, “ADR and the Civil Justice System” (paper presented to AMINZ Conference, Auckland, 2011).
8 Finlayson C “Alternative Dispute Resolution and Litigation works ‘hand-in-hand’” (AMINZ Breakfast Speech, 2 September 2011).
The quotations below demonstrate some of the key arguments against the so-called anti-litigation narrative. These quotations inform the arguments developed in this paper.

In my experience, both the ideology and practice of mediation can encourage a zealot-like adherence among recent converts – perhaps people weary of adversarialism. New recruits to mediation often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated, while mediation offers a nirvana-like vision of a world rid of conflict, with only peace. For passionate adherents, there is no value in judicial determination; there are no legal rights, only clashing interests and problems to be solved.9 (Hazel Genn)

Anti-law and anti-litigation rhetoric has assisted in downgrading the social value of the civil justice system as a means of developing and publicising the common law, while the emerging ADR profession has undermined adjudication with a postmodern argument that tells us that morally equivalent clashing interests are too complex for courts to decide, that there are no ‘facts’ than can be found in court and therefore no substance to which the coercive power of the state can be legitimately applied.10 (Hazel Genn)

But they [Mediation and ADR] are not part of the framework of government. They are not, nor can they be, an aspect of the state in the same way that the civil, family and criminal justice systems for part of the state.11 (Lord Neuberger)

Many ADR practitioners could agree on the image of the courts as something best avoided: nasty, brutish, but never short, by parties who are making their own arrangements under the blue skies of mediation or arbitration. I hesitatingly suggest another metaphor may be more appropriate. The courts cast a long shadow over disputants and practitioners, like the canopy of a rainforest might over the teeming ecosystem below. The undergrowth is also a vital part of the environment – grows in the protective and nourishing shadow of the vegetation above.12 (Chris Finlayson)

2. Methodology

In a leading Australian ADR textbook published in 2002, Astor and Chinkin provide a brief history of ADR in Australia. Before embarking on the summary they note “we recognise the limitations of this survey as an account of ADR in Australia and strongly urge the need for a legal and social historian to research the topic.”13 Twelve years later the call for legal historians to engage more with ADR is still relevant, as much in New Zealand as in Australia.

Few comprehensive attempts have been made to chart ADR history in common law jurisdictions. In those that do exist, a range of methodological approaches have been used, all of which have clear limitations. Perhaps the most comprehensive attempt is Barrett and Barrett, A History of Alternative Dispute Resolution.14 In this work, a broad overview of ancient and medieval anecdotes is provided after which the book details the history of ADR in United States industrial relations. Given that the thesis is ADR in the United States proceeded from developments in industrial relations, this is understandable. However, it downplays other important influences. Jerold Auerbach’s Justice Without Law? is another

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9 Genn, n 7, at 83.
10 At 121.
12 Finlayson, n 8.
example of a sophisticated treatment of this subject. Auerbach traces the history of ADR in the United States back to its earliest roots in settler communities. Published in 1983 it is not able to connect these early developments with the blossoming of the modern mediation movement from the 1980s onwards.

Many mediation textbooks include a brief overview of mediation history. For example, in Astor and Chinkin’s textbook, developments are structured under subject headings, including: Arbitration, Tribunals, Community Justice, Industrial relations dispute resolution and the Family Court. There is no clear thesis. As quoted above, the authors were not attempting to replicate the Barretts’ efforts in writing a comprehensive history. Yet without an overriding thesis it is very difficult to engage with the key issues relating to the historical development of ADR.

In a New Zealand context, Ian MacDuff wrote an important article in 1988 looking at the development of the nascent New Zealand mediation movement. MacDuff concluded that “Yet much of the growth in mediation to date has not been in the form of private and agency models so much as statutory and (ironically) formal uses of mediation.” In some respects, the present article picks up on MacDuff’s conclusions and tests their validity 26 years later.

3. The development of mediation in different areas of law

a) Employment Law

New Zealand historians have largely ignored ADR with the notable exception of industrial relations and employment law. Most of New Zealand’s labour historians have not been legal scholars. This is not a weakness as such but has contributed to the way in which labour history often fails to make connections with wider ADR trends. Arbitration sits at the heart of New Zealand’s employment law history. This has been the case since the Industrial Conciliation and Arbitration Act 1894. The form of compulsory arbitration used under this statute and its successors was formalised and ultimately driven by the Arbitration Court. This can be defined as alternative dispute resolution but does not fit easily with ADR’s key aim of providing a flexible, more informal alternative to the traditional court system. However, the conciliation and mediation processes used in New Zealand’s employment law are of direct relevance to this paper. The two concepts are differentiated in the employment context but by the 1970s important stylistic and process-based similarities existed between them. In certain respects, the conciliation process used from 1894 to the 1970s can be seen as a forerunner to modern employment mediation.

It is worth acknowledging at this point a particular area of confusion surrounding ADR terminology in New Zealand’s legal system. Claire Baylis has written at length on this problem and provided working definitions for mediation and conciliation sourced from the

Australian National Alternative Dispute Resolution Advisory Council definitions. The key distinction is that a mediator deals only with process and has no role in advising on, or determining, content or outcomes. A conciliator may advise on content and outcomes and usually has specialist knowledge in the subject area.\(^ {18}\) This distinction is helpful but is not clearly made in New Zealand employment and family law. The confusion over terminology suggests an ad hoc approach to developing ADR and a lack of theoretical rigour underpinning New Zealand’s ADR models.

Barrett and Barrett locate the history of American ADR in the struggle of workers to resolve disputes with employers. Their thesis is that the modern ADR movement has its roots in United States labour history.\(^ {19}\) This is a fairly convincing argument in an American context but does not transpose well to New Zealand’s history as will be seen in this paper. When the modern ADR movement, and in particular mediation, began to spread across different areas of New Zealand law in the 1970s and 1980s it was not heavily influenced by developments in New Zealand employment law.

The conciliation process started with the passing of the Industrial Conciliation and Arbitration Amendment Act 1908. The Act established the position of Conciliation Commissioner.\(^ {20}\) This neutral third party chaired a Conciliation Council which could hear disputes between employers and employees and make a recommendation for resolution. If the parties did not accept this resolution it could still be heard by the Arbitration Court at the next stage of the process. The Conciliation Council effectively conducted an inquiry into the dispute. It was more actively involved in solving the dispute compared to modern mediators but the relative informality of the process suggests a mediation proto-type, especially in the prohibition on lawyers which emphasised the primacy of disputing parties rather than their representatives.\(^ {21}\)

The Conciliation Commissioner and Conciliation Council was a third party charged with facilitating an outcome but lacking the power to making a binding order. The Conciliation Commissioner process was less flexible and less accessible than modern day employment mediation but it was clearly an early form of alternative dispute resolution. Its place in the employment dispute resolution process enabled it to prevent many disputes progressing to the more formal, and more expensive, Arbitration Court. Peter Franks defines its role as chairing “negotiations between unions and employers for collective agreements.”\(^ {22}\)

Mediation formally became part of the employment legal framework in the Industrial Conciliation and Arbitration Amendment Act 1970 which set up the Industrial Mediation Service. One of the key reasons for introducing mediation was “mounting concern at delays in the more formal methods of dispute resolution, particularly arbitration through the Court, during the 1960s.”\(^ {23}\) For a time mediators existed in parallel to conciliators creating some

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\(^ {20}\) Section 29.

\(^ {21}\) Section 36(3).


confusion given the similar roles. When introducing the Bill into Parliament in 1970, lawmakers acknowledged the previous informal existence of mediation in the New Zealand legal system. Minister of Labour Jack Marshall stated, “The next new provision is that relating to industrial mediation. This idea of mediation is an old one, but it is being incorporated in our legislation for the first time. It is an old idea that differences may be settled when a third person comes in to mediate between two conflicting groups; it is a new concept in our legislation.”

The term ‘mediation’ has been used in relation to industrial relations since the early 1900s. For example, during the West Coast Blackball Mine strike the Evening Post reported that “the Labour Department having failed in its efforts at mediation will now put the law into operation.”

Franks argues that the 1970 mediation service was modelled on the United States Federal Mediation and Conciliation Service. This is one of many examples of New Zealand borrowing ADR approaches from overseas jurisdictions but the Industrial Mediation Service was also a product of 76 years of New Zealand dispute resolution innovation. New Zealand’s modern mediation movement did not grow out of industrial relations dispute resolution but, to the extent that mediation existed in a New Zealand legal context prior to the 1970s, employment law was its main location.

The mediation and conciliation processes were refined in the ground-breaking Industrial Relations Act 1973. Under this Act a mediator could provide binding decisions if both the parties and mediator agreed. This can be seen as an early version of ‘med-arb’. The ability of the mediator to make binding decisions is a controversial issue and arguably undermines mediation’s emphasis on the independent decision-making capacity of parties leading to voluntary agreements. It also demonstrates the malleable nature of the term ‘mediation’ in employment law.

Over the next 25 years mediation became the preferred form of third party dispute resolution under employment legislation. This was ultimately a pragmatic development reflecting what was occurring in practice. Historically, conciliation had been used for disputes of interest. In practice, direct bargaining largely replaced the conciliation process although conciliation retained a formal statutory role. While mediation effectively replaced conciliation as the preferred third party process, mediation’s substantive focus has been primarily on rights disputes rather than interest disputes.

From 1987 mediation became increasingly prominent in employment law. The Labour Relations Act 1987 provided for a specific mediation service. The Employment Contracts Act 1991 disestablished this service but provided a mediation service for parties before the Employment Tribunal.

The Employment Relations Act 2000 re-established a formalised, government mediation service managed by the Department of Labour. Since the early 2000s, this service has

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24 (14 October 1970) 369 NZPD 4045.
25 “The Strike” Evening Post (Wellington, 4 March 1908) at 7.
27 Section 67(4)(e).
28 Section 251.
featured what is arguably the leading state mediation team operating in the New Zealand legal system. Despite fundamental ideological differences in the five post-1970 Acts, every one prioritises mediation. As a result, mediation has eclipsed both arbitration and conciliation as the dominant statutory form of alternative dispute resolution in industrial relations. In a recent survey of employment mediation, Risak and McAndrew found that New Zealand employment mediation is primarily carried out by the Department of Labour but with a significant minority of private mediations conducted by private providers. This supports the argument that the development of mediation in New Zealand has been heavily influenced by the state with the private sector playing a smaller, supplementary role.

This paper has linked the development of employment mediation back to the early twentieth century. This is an impressive length of time in a legal system effectively created only 174 years ago. It could be argued that employment mediation actually derives from New Zealand’s constitutional traditions, in this case, the resolution of industrial disputes through conciliation and arbitration. Employment adjudication continues in New Zealand’s employment court, alongside a successful statutory mediation regime. In this area of law it is difficult to see how mediation could undermine the rule of law.

b) **Family Law**

Prior to the 1960s family law did not incorporate alternative methods of dispute resolution beyond basic negotiation. Family disputes were resolved through the traditional legal system, beginning with negotiation and moving to litigation if negotiation failed. It is important to note that many of the currently busy areas of family law were not particularly busy before the 1960s. With divorce being a rare occurrence, relationship property matters and custody disputes did not demand the time and resources they do in today’s system. Those disputes that did arise were awkwardly spread across the court system. The fundamental societal changes that led to the modern ADR movement also helped to create modern family law. In particular, the challenges to traditional thinking that occurred in the 1960s and 1970s included challenging the traditional adversarial approach to dispute resolution and challenging the societal expectation that couples would remain in unhappy marriages. The increase in divorce, with resultant property and custody disputes, began in the 1960s, peaked in the 1980s and continues at that peak level today. It is no coincidence that family law was one of the first areas in New Zealand’s legal system to adopt ADR. ADR’s strong emphasis on preserving relationships is an excellent fit.

In tracing the beginnings of ADR in family law it is important to establish definitions first. In 1939 the first Labour Government introduced the Domestic Proceedings Act which established conciliation in matrimonial cases. This Act replaced the antiquated Destitute Persons Act 1910. Conciliation in this context means counselling. The counsellor was charged with trying to effect reconciliation and if unsuccessful, conciliation. Understandably there was no expectation of legal knowledge or training on the part of the conciliator. This

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30 The peak level is approximately one third of all marriages ending in divorce, Statistics New Zealand (22 June 2012), http://www.stats.govt.nz/browse_for_stats/population/mythbusters/marriages-end-divorce.aspx viewed 21 March 2013.
can be seen as alternative dispute resolution in a legal context but is quite different to the way mediation operates in the modern New Zealand legal system. The conciliation/reconciliation approach was continued in the Matrimonial Proceedings Act 1963, which allowed the Court to adjourn proceedings to attempt reconciliation. This process was delegated by the Court to “a suitable person with experience or training in marriage counselling, or in special circumstances some other suitable person.” As with the 1939 Act the conciliator did not directly engage with legal issues but rather focused on the relationship, in parallel to legal proceedings. Despite being a comprehensive revision of family law, the Domestic Proceedings Act 1968 effectively outlined a more formalised version of the 1963 Act in relation to ADR. Developments during the 1960s and 70s did not adequately address increasing concern about the nature of family law and the way in which it was being handled by lawyers and the courts.

The incorporation of ADR into family law underwent a fundamental shift with the Family Proceedings Act 1980. The Act was part of a comprehensive overhaul of family law, following the recommendations of the 1978 Royal Commission on the Courts. This government initiative reflects a reality with ADR developments in New Zealand. In addition to a strong state leadership role, individuals and private organisations have provided important impetus and support. In the newly created Family Courts, mediation was included in addition to counselling. Conciliation became a broad term incorporating the roles of mediator and counsellor. Therefore from 1980 conciliation existed in the same context as mediation, with mediation being a sub-set of conciliation. As with employment law, mediation would soon eclipse conciliation as a dominant ADR term in family law.

Family law mediation in the 1980 Act adopted a very specific form. Family Court Judges would chair ‘mediation conferences’ at which lawyers could be present. Another unique feature was the power of the judge to require attendance at counselling and/or mediation. The voluntary nature of mediation was thus challenged. The result was a voluntary/involuntary hybrid approach where the judge could not force an outcome upon parties at mediation but could force parties to engage in mediation. The Family Proceedings Act was heavily influenced by developments in the United States although this was a two-way process. The incorporation of mediation in New Zealand family law appears to be a less organic process as compared with employment law.

Judge-led family court mediation is not a particularly strong example of a flourishing, modern mediation movement. With potential mandatory attendance, judicial oversight and pressure to settle, the process as designed is more akin to a pre-hearing settlement conference.

31 Section 4(b).
33 For example two Dunedin judges, Ross SM and Murray SM, played key roles in reforming family law during the late 1970s, as discussed in Taylor N, “Establishment of the New Zealand Family Court” (2006) 5 NZ Family Law Journal 169.
35 Section 14.
36 Section 17.
37 “New Zealand has an outstanding reputation in the United States for its reforms in family law.” Found in “New Zealand approach to divorce ‘more humane’ than American” *Law Talk* (Wellington, 29 November 1974) at 8; Inglis, n 32, pp 18, 88-99. “Another feature that presents itself in our family law is the influence that the United States has on it” as found in Geoffrey Palmer (19 November 1980) 435 NZPD 5109; Taylor, n 33, at 1, also cites the influence of Canada and Australia.
As mediation conferences became less common, in 2008 the mediation role was extended to suitably qualified mediators via amendments to the Family Proceedings Act 1980 but these provisions were never brought into force. The provisions would have enabled private mediators to effectively replace judges in mediating family disputes. Despite successful pilot programmes, funding issues delayed the introduction. Partly due to government delay in effectively incorporating private mediation into the state-led process, family law mediation continued to be state dominated, to the clear frustration of private mediation practitioners.

In the face of government delay, the Family Court acted. In 2010 the National Early Intervention Process allowed experienced family lawyers to conduct mediation in relation to parenting disputes under s130 of the Care of Children Act 2004, thus reducing the amount of judge-led mediation. In 2012 the Family Court Proceedings Reform Bill was introduced in Parliament proposing an out of court Family Dispute Resolution Service which would focus on alternative dispute resolution. In 2013, the Family Dispute Resolution Act was passed followed by the Family Dispute Resolution Regulations. The new regime privileges mediation in custody matters and seeks to restrict access to the Family Court. It effectively removes lawyers from custody mediations and provides the opportunity for accredited mediators to facilitate resolutions. Thus it could be argued that after 34 years of family court mediation, the process is now becoming more recognisable as a modern mediation approach.

With counsellors and mediators charged with reducing the likelihood of litigation, ADR, and in particular, mediation, has moved to the centre of family law practice in New Zealand. Private mediation services have existed alongside the Family Court processes for some time. There is little data as to how widespread private family mediation is but, as with private employment mediation, it is likely to be significantly less common than state-led mediation.

Family and employment law have been the standard bearers for mediation in the New Zealand legal system since the 1970s. In both areas, relationships are of paramount importance, whether preserving on-going relationships or managing the conclusion of relationships. As early as 1982 it was predicted that because the “conciliation/mediation approach of the new Family Courts was proving so successful it might eventually spread to the general courts replacing to some degree the traditional adversary system”. That same year, one lawyer viewed “the mediation conference as being the greatest innovation that he had seen in 37 years’ involvement with the law”. Statements of this nature became increasingly common during the 1980s and 1990s as mediation was mainstreamed. As will be discussed later in this paper, the seemingly unstoppable momentum of the modern mediation movement slowed during the late 1990s. As of 2014, the adversarial system remains dominant in New Zealand demonstrating the limitations of any challenge by mediation to New Zealand’s constitutional traditions.

38 Section 12, especially ss 12(c)-(j).
39 Principal Family Court Judge Peter Boshier “Mediation in the Family Court: Where to Now?” (paper presented to the Arbitrators’ and Mediators’ Institute of New Zealand, Auckland, February 2011) at 5.
40 Carol Powell “Let’s get the new family mediation service into our Family Courts” found at, http://www.leadr.co.nz viewed 21 March 2013.
41 Boshier, n 39, at 9.
42 Zondag B, “Family law and court administration: access to justice and getting the organisational basics right” (2009) 6 NZ Family Law Journal 223 at fn 111.
43 Family Court Judge Ray Pethig, in “Family Courts Successful” Law Talk (Wellington, 2 April 1982) at 2.
44 “Family Courts: A great innovation” Law Talk (Wellington, 6 October 1982) at 1.
The two quotations above could be seen as part of an anti-litigation narrative. The fact that the predictions have not come to pass indicates family mediation’s role as a complement to adjudication, rather than a replacement. That said, the regime set up under the Family Dispute Resolution Act 2013 could seriously challenge the role of adjudication and litigation in this area of law. Family law has been one of the main targets of the mediation lobby groups, many of whom resented the former statutory regime being closed to the wider ADR profession, and in particular, non-legally trained mediators.

c) Environmental Law

During the 1980s and 1990s mediation spread through the New Zealand legal system. The spread was primarily facilitated by statutory provisions. An excellent example of this can be seen in environmental law. The Planning Tribunal was established by the Town and Country Planning Act 1977. This Tribunal lacked the formality of a court but did not obviously incorporate modern ADR techniques until this area of law was reformed under the Resource Management Act 1991 (RMA). In introducing the RMA Bill in 1989, Minister of the Environment, Geoffrey Palmer, stated that “A significant new feature of the Bill is the provision of greater encouragement for mediation in all of the processes. That means that parties will be encouraged to reach agreement amongst themselves and that informal pre-hearing meetings can be held, rather than the parties always saying, ‘See you in court.’”\(^{45}\) This development was also a pragmatic response to an increase in Planning Tribunal work, and the increasing costs associated with environmental law disputes.\(^{46}\)

Sections 99 and 268 of the RMA explicitly provide for ADR. Section 268 provides for mediation, conciliation, or “other procedures designed to facilitate the resolution of any matter” to occur at any time after lodgement of Tribunal – later Environment Court\(^{47}\) proceedings. The Court may initiate ADR, but parties must consent to its use. If ADR is used, and fails, the Court can make a binding ruling in line with the process established in 1977. Environment Commissioners are often requested to mediate and provide advice on the parties’ arguments. Interestingly, these Commissioners may, with the agreement of the parties and the Court, still decide the case afterwards if ADR fails. Section 99 provides for ADR to occur at the pre-hearing stage with the process managed by the consent authority rather than the Tribunal. In 2005, s 99A was introduced specifically referring to the use of mediation at the pre-hearing stage indicating the increasing importance of mediation in relation to other dispute resolution methods.

The presence of mediation in environmental law is not as high-profile as in employment and family law. The RMA does not privilege mediation in the way the new family dispute resolution regime and Employment Relations Act do. Despite this, “The mediation provisions of the RMA are frequently used, with a good measure of success.”\(^{48}\) In 1993 only six Commissioner-assisted mediations were recorded. In the year 2005/2006 the Court conducted 544.\(^{49}\) In contrast, the RMA’s arbitration provision is rarely used.\(^{50}\)

\(^{45}\) (5 December 1989) 503 NZPD 14167.
\(^{46}\) (28 August 1990) 510 NZPD 3953.
\(^{47}\) The Planning Tribunal became the Environment Court under the Resource Management Amendment Act 1996.
\(^{49}\) Oliver M, “Implementing Sustainability – New Zealand’s Environment Court-Annexed Mediation” (paper presented to Indian Society of International Law, New Delhi, 2007).
Environmental law is a model of how ADR can be used effectively in various areas of law without engaging in a ‘turf war’ with litigation and other adversarial processes. That said, lawyers have attempted to set boundaries to prevent mediation becoming too pervasive and arguably, undermining the rule of law. For example, a suggestion during the 1990s to make mediation compulsory under the RMA was criticised by leading practitioners. As Sir Geoffrey Palmer’s 1989 speech suggests, the introduction of mediation into environmental law did aim to reduce litigation but the evidence above suggests an effective partnership between ADR and the adjudicative Environment Court.

d) Tenancy Law

Another model of statutory mediation is found in the Residential Tenancies Act 1986. It is one of the earlier examples of the incorporation of mediation into the New Zealand legal system and, like many others, was state-led. In this model, mediation is voluntary and usually occurs before a Tenancy Tribunal hearing. As with most other statutory ADR examples, the primary aim of mediation is to resolve the dispute so it does not proceed to the more formal Tribunal adjudications. As with the Environment Court, the Tenancy Tribunal has the ability to halt proceedings and refer parties to mediation. The 1986 Act charged the Housing Corporation with providing mediators. Interestingly, the mediators have specialist knowledge in tenancy issues and therefore could be seen to also perform a conciliation role. In fact, the terms mediation and conciliation were used interchangeably during parliamentary debates leading up to the passing of the Act. Mediation has proved successful in tenancy law, with over half of cases settling through this ADR process during its first decade in operation. As with employment, a sizable team of publicly-funded mediators carries out most tenancy mediation in New Zealand.

As with other mediation models introduced from 1980, tenancy mediation was inspired by overseas developments, in this case, the South Australian Residential Tenancies Act 1978. The ever-present danger with importing overseas models is relevance. As Venn Young (National) stated during the Bill’s second reading “What is the relevance of South Australia to New Zealand?” The answer to this question reflects directly on the nature of New Zealand’s modern mediation movement. It is not a truly home-grown movement but one that to a large extent has echoed developments in overseas jurisdictions, especially the United States and Australia. This is not necessarily a negative trend but can raise issues of applicability, as voiced by Jim Gerard (National) during the second reading in 1986, “I believe that the Bill came about because the Minister went to South Australia and, after

50 Nolan, n 48, p 314.
52 Section 99.
53 Section 76.
55 56 mediators as at 2006, Gill et al, n 54, at 327.
56 (19 September 1985) 466 NZPD 6896.
57 (25 September 1986) 474 NZPD 4673.
looking at what was happening there, came back and drafted the Bill.” To be effective, overseas models must be adequately adapted to suit New Zealand’s unique legal and social environment.

On the other hand, the importation of foreign models also demonstrates that the New Zealand legal system has faced similar challenges to overseas jurisdictions, especially in relation to process. The Minister of Housing in 1986, Phil Goff, clearly enunciated the reasons for the Act, “The old tenancy law...did not provide an adequate system for resolving tenancy disputes. The district court was too slow and too expensive. Small claims tribunals ought to have been more suitable, but they were not universally available, and they too were under pressure and could react only slowly to circumstances that needed immediate resolution.”

Delay and cost remain two of the most pressing problems in New Zealand’s legal system and since the 1970s mediation has been seen as the leading solution.

As seen in Phil Goff’s statement above, mediation was introduced partly to replace a costly and inefficient civil court system. Tenancy law is a good example of strong state-led action in introducing mediation into New Zealand’s legal system. If New Zealand truly is “the acme of legislative supremacy” then the 1986 legislative regime can be seen as part of New Zealand’s constitutional traditions.

e) Weather-tight Homes Resolution

A more disturbing development in property law concerns the law relating to weather-tight homes, a euphemism for leaking homes. In the early 2000s, it became apparent that relaxed regulation of the building industry during the 1990s had resulted in thousands of poorly built homes. These homes suffered from endemic leaking primarily caused by the use of untreated timber enclosed in monolithic cladding. The ‘Mediterranean’ design of the buildings allowed water to enter the cladding which then rotted the timber from the inside, compromising structural integrity. Affected home-owners desperately looked for someone to sue including the builders, architects, property developers and local councils. In debating the Weatheright Homes Bill in 2002 at the third reading, Sue Kedgley described the magnitude of the problem, “Probably no more important legislation than this has been to this House this year. This legislation affects the livelihoods and sanity of many, many hundreds, and perhaps thousands, of New Zealanders. It attempts to respond to a very, very serious crisis in New Zealand. Many New Zealanders are attaching great hope to this legislation, and have a great interest in it.”

In an attempt to contain this disaster and associated legal action the government primarily looked to the most efficient and cost-effective process available, namely, mediation.

The symbolism of this decision is important. After three decades of striving for acceptance in the legal system, mediation was being considered the first, and best, remedy to resolve a national crisis. The Weatheright Homes Resolution Services Acts of 2002 and 2006 testify to the established position of mediation in the modern New Zealand legal system. The purpose of the 2006 Act is to “provide owners of dwellinghouses that are leaky buildings with access

58 (8 December 1986) 476 NZPD 6002.
59 (25 September 1986) 474 NZPD 4669.
60 (19 November 2002) 604 NZPD 2192.
61 Since 2001, the government has provided guidelines on ADR resolution clauses in legislation as part of the Legislation Advisory Committee process.
to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings.” Mediation is seen as the embodiment of a “speedy, flexible, and cost-effective procedure.” Sections 13-21 of the 2002 Act established a mediation service specifically to resolve weather-tight home disputes. Section 101 of the 2006 Act established the Weathertight Homes Tribunal. The Tribunal may refer a claim to the state-funded mediation process with the parties’ agreement. The whole mediation process is voluntary, from beginning to end, consistent with orthodox mediation philosophy. If mediation is unsuccessful in reaching settlement the matter can be adjudicated by the Tribunal.

The practical effectiveness of mediation can be seen in the statistics. According to Ministry of Justice statistics, most claims (85%) are settled by mediation without requiring adjudication. This includes both state-funded and private mediation. Other statistics put the number of eligible claims resolved at: mediation 64%, adjudication 8% and other means (private mediation or negotiation) 28%. The adjudication process in the Weathertight Homes Tribunal has been comprehensively criticised. Ultimately adjudication is the exception with mediation being the norm and thus mediation has shoulder the burden of resolving one of New Zealand’s biggest legal crises.

To a lesser degree, the mediation process has also been criticised. The concerns relating to mediation focus on the supposedly vulnerable role of the claimant who enters mediation without legal representation. One possible result is that claimants are pressured to settle for less than a fair amount. These criticisms have come mainly from lawyers who specialise in weather-tight issues. This makes it difficult to separate objective criticism from professional self-interest. Possibly the strongest argument for adjudication is the successful Supreme Court decisions relating to unit title claims, for example, North Shore City Council v Body Corporate 188529 (Sunset Terraces) [2011] 2 NZLR 289 (SCNZ). These cases have resulted in major victories for claimants and prove that while mediation is more “speedy, flexible and cost-effective” than adjudication, there should always be a role for a binding, rights-based, public process. Mediation’s role in resolving weather-tight homes disputes is ultimately a pragmatic state response to a time-sensitive crisis.

North Shore City Council provides a convincing argument for the public value of the civil courts but mediation is the preferred form of dispute resolution in this area of law. In some respects adjudication is the supplement to mediation, rather than the default option, thus switching the traditional relationship between the two forms in New Zealand’s constitutional system.

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62 Section 3(a).
63 Weathertight Homes Resolution Services Act 2006, ss 80-1.
64 Department of Building and Housing Mediation factsheet (Department of Building and Housing, Wellington, undated), http://www.dbh.govt.nz/userfiles/file/publications/WHRS viewed 21 March 2013.
f) **Human Rights Law**

Mediation’s rapid acceptance in New Zealand’s legal system can be seen in its incorporation into human rights law. An early example of ADR in this area is in the Race Relations Act 1971. This Act provided for conciliation, rather than mediation but, as with employment law, conciliation eventually morphed into mediation. Section 13(b) of the Act provided for a conciliator to ‘conciliate’ the dispute.  

The much more comprehensive Human Rights Act 1993 also contained no specific mention of mediation, instead using the term conciliation in sections 77 and 80. Interestingly, section 80 provided for compulsory conciliation. The description of the conciliation process was similar to mediation in that it aimed to identify issues and “use its best endeavours to secure a settlement between the parties.”  

As in employment law, conciliation and mediation overlap in definition and practice. The ADR processes set up by the Human Rights Act relate to claims of discrimination. While ultimately parties could have matters relating to discrimination heard by the Human Rights Review Tribunal, the aim was to resolve most complaints using ADR.

This problem was clarified by the pivotal Human Rights Amendment Act 2001 which, under the umbrella term ‘dispute resolution’, effectively replaced conciliation with mediation. As with mediation in processes such as Weather-tight Homes dispute resolution, the emphasis is on “the most efficient, informal, and cost-effective manner possible.” In New Zealand, by 2001, this could be seen as a very long way of saying ‘mediation’. It is mediation that emerged from the 2001 amendment as the dominant way of settling human rights disputes. This move was specifically influenced by the success of mediation under the Employment Relations Act 2000. It received complete support from submitters during the select committee process. Margaret Wilson, who led the 2001 reform process, openly stated that “The objective of the new procedure for dispute resolution was to settle the matter as quickly as possible through the Commission, employing skilled mediators to deal with all complaints accepted by the Commission.”

Sections 76 and 77 of the 2001 Amendment Act outline the dispute resolution process. While s76(2)(c) lists a variety of approaches, “including information, expert problem-solving support, mediation, and other assistance”, further mentions of ADR in the Act focus on mediation. The other approaches listed are somewhat vague when compared to the tried and tested mediation approach. Revealingly, the annual *Te Rito: Human Rights Case Studies* publication states that “the Commission’s Enquiries and Complaints Service is founded on mediation and aims to achieve solutions that are acceptable for all those involved.” Alternative dispute resolution can still be ordered by the Tribunal and the Director of the

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68 Six years later, the Human Rights Commission Act 1977 established the Human Rights Commission but the Act does not mention conciliation or mediation except in relation to the Race Relations Conciliator.

69 Human Rights Act 1993, s 80(2)(b).

70 Human Rights Amendment Act 2001, s 76(1)(b).

71 (16 August 2001) 594 NZPD 11034.

72 (8 November 2001) 596 NZPD 12992.


Human Rights Commission, breaching the conventional mediation practice of voluntariness.  

In *Te Rito*, the Human Rights Commission proudly outlines examples of successful mediations. For example, the 2008 summary exclaims, “Over the year, mediators closed almost 70 per cent of complaints within 60 days and almost 98 per cent within a year.” As with employment, family, environmental, tenancy and Weather-tight Homes resolution, mediation has ineritably overtaken the other possible ADR methods available. In some of these areas, it has even challenged the primacy of litigation, or more broadly speaking, adjudication. Beyond this practical reality, many legal institutions are openly promoting the success of mediation rather than bemoaning the decline in other methods of dispute resolution. Human rights law is an excellent example of this trend. The mediation approach used in this area of law has proved to be very flexible with mediations occurring on marae, in churches and using telecommunications approaches such as video conferencing. In a sign of lateral thinking, the Department of Labour mediators have worked in tandem with the Human Rights Commission mediators to tackle complaints that include both employment and human rights issues.

Mediation under the Human Rights Act is an excellent example of state-led, pragmatic legal reform. Unlike areas such as employment, human rights law is a relatively new field of practice. Happily the growth in human rights law has coincided with the growth in mediation. As with family law, it is probably no coincidence that mediation has become more prominent due to its practical effectiveness in resolving modern relationship-based problems such as breaches of human rights. In these cases, the traditional adversarial approach is usually more effective as a last resort. Perhaps more than any other area discussed in this paper, human rights mediation potentially threatens litigation’s dominance in upholding fundamental rights. However, as long as mediation operates in the ‘shadow’ of the court system then this will not undermine the rule of law.

**g) Commercial disputes**

This paper has argued that state-led statutory regimes have been the dominant driver of the modern New Zealand mediation movement with private mediation providers reacting to government initiatives. An important and growing exception to this argument is in the area of commercial disputes. Historically commercial disputes have been resolved in the first instance through negotiation between parties, often involving legal representatives. If these negotiations failed, litigation would commence. Arbitration was another option although a limited one especially before the passing of the Arbitration Act 1996.

Following from mediation’s rise during the 1980s, commercial mediation began to increase during the 1990s and into the new century. A particularly good example is in the insurance

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75 Section 84(4). This seemingly contradicts the Commission’s public claim that mediation is voluntary, see Takitimu C, “The Human Rights Commission Replies” *Dominion Post* (Wellington, 17 September 2012).
77 Human Rights Commission, n 74, p 6.
78 Recently incorporated into the Ministry of Business, Innovation and Employment.
Instead of being driven by a particular statute or tribunal, many mediations were a result of clauses in commercial contracts which stated that mediation would result in the event of a dispute, and/or, parties seeking to avoid the cost and delay of court proceedings. Mediation clauses have become increasingly common, often in place of the more traditional arbitration clause.

Unfortunately for the purposes of this paper, very little research exists on the extent of private commercial mediation since the 1990s. Many private mediation providers are involved in this area but resolution outcomes are confidential and the private mediation market is effectively unregulated with no existing reporting obligations. This lack of research was noted by Justice Winkelmann in 2011 and creates a major hurdle for those attempting to analyse the development of mediation in New Zealand’s legal system. Anecdotal evidence has suggested a significant rise in private commercial mediation in recent times but many of these anecdotes come directly from private commercial mediators promoting mediation through professional publications.

Mediation in commercial law is one area where the state seems reluctant to take a leadership role. This has probably contributed to the particularly ad hoc growth of private mediation in relation to commercial disputes, which make up the majority of civil cases.

4. The District and High Courts

At the heart of Justice Winkelmann’s argument is the vital role that the District and High Courts play in the New Zealand legal system. The potential for mediation to be used in all civil cases, that is, not just in employment, family and other existing areas, was highlighted in a number of reports during the late 1990s and early 2000s. These reports included the Courts Consultative Committee discussion paper “Court Referral to Alternative Dispute Resolution: A Proposal to Extend the Use of Alternative Dispute Resolution in Civil Cases” (1997), the Law Commission’s “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals” report (2004) and the Ministry of Justice-commissioned report “Alternative Dispute Resolution: General Civil Cases” (2004). All recommended that the District and High Courts take a more systematic approach to diverting cases to mediation, in part to relieve the pressure on the court system and reduce expense and delay. These recommendations have not been comprehensively implemented.

Some progress has been made, for example, clause 1.7 of the District Court Rules 2009, states that parties before the courts can request to break for private mediation at any time. Clause 7.79(5) of the High Court Rules 2008 also allows for the judge to direct parties to mediation with the parties’ consent. As part of standard practice, judges and lawyers should inform parties of ADR options throughout the civil procedure process. These developments have the potential to increase commercial mediation given the dominance of commercial matters in civil cases. For the purposes of this paper, judicial settlement conferences conducted are not considered as mediation given the compulsory, adjudicatory context.

81 As above.
82 As above and Barton C, “Disputes settled without going to court” NZ Herald (Auckland, 9 March 2012).
83 (NZLC PP85, 2004).
84 Saville-Smith K and Fraser R, Alternative Dispute Resolution: General Civil Cases (Ministry of Justice, Wellington, 2004).
These conferences provide a vital role but are even more problematic than Family Court judge-led mediation in terms of meeting the definition of mediation.

Justice Winkelmann’s speech praises the amount of negotiated settlement that occurs in the ‘shadow’ of the civil court system. Settlement can be seen as a form of alternative dispute resolution but if it does not actually utilise the court’s adjudicatory powers then it raises similar questions to mediation regarding the rule of law, that is, does the promotion of negotiated settlements in order to avoid litigation undermine the court system? Justice Winkelmann rightly notes that settlement has been a feature of our civil justice system for decades. Therefore, like mediation, it could be seen as a developing constitutional tradition.

5. Legal Education and Community Mediation

This paper has focused on the use of mediation within the New Zealand legal system with particular emphasis on statutory examples. Other evidence of the rise of mediation includes the increase in academic attention and the formation of professional organisations. From the late 1980s New Zealand law schools began to regularly teach ADR courses.85 These courses took various forms. On its establishment in 1990, Waikato Law School introduced a compulsory dispute resolution course with a strong emphasis on negotiation and mediation. In addition to this course, an advanced ADR course taught cutting edge techniques such as narrative mediation. The creation of Waikato Law School overlapped with the blossoming of ADR in New Zealand and it is no coincidence that ADR was emphasised in the curriculum. During this time, the four other law schools86 created elective courses which included ADR and Victoria University established the New Zealand Institute for Dispute Resolution (recently disestablished).

This paper is primarily concerned with mediation in a legal context, which includes legal education, but it is important to note that commerce faculties have also played an important role in mediation teaching and scholarship. The most comprehensive ADR tertiary programme was developed outside of legal education. The Dispute Resolution Centre in the College of Business at Massey University, established in 1992, has trained students in ADR techniques for two decades. The creation of the centre was heavily influenced by the Arbitrators’ and Mediators’ Institute of New Zealand.87 As with Waikato Law School, its establishment reflects the ‘golden age’ of ADR in New Zealand during the 1990s.

Legal academics also began to research and publish in the mediation field. Most New Zealand law schools have employed at least one ADR specialist since the early 1990s. From 1996 to 1997 New Zealand even produced its own short-lived ADR journal, the Butterworths Dispute Resolution Bulletin. Overall, mediation research output in New Zealand has not been particularly high, although some important textbooks and journal articles have been produced. Compared with the vast output of mediation literature in the United States, and to a lesser degree in Australia, New Zealand has not yet fulfilled its potential as a hub of mediation scholarship. Mediation in the academy reached a high point during the 1990s, a trend reflected in the wider New Zealand ADR movement.

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85 Although special ADR courses appear earlier, for example at Victoria University in 1980, “New Conflict Resolution Course at Victoria” Law Talk (Wellington, 17 October 1980) at 115.

86 Auckland, Victoria, Canterbury and Otago.

This paper argues that statutory incorporation has been the most important reason for the rise of mediation in the New Zealand legal system but this should not overshadow the important role played by private institutions. Indeed private institutions, groups and individuals played an important role in pressuring Parliament to pass the statutes discussed in this article. This occurred through directly lobbying the government, providing ideas to the Law Commission and Royal Commissions of Inquiry, providing written and oral submissions to select committees and using the media to advocate for change.

Also, there was a largely unsuccessful attempt to replicate the flourishing community mediation model found in the United States. This paper argues that community mediation has played almost no part in the creation of New Zealand’s modern ADR movement, unlike in the United States. A pilot programme was conducted in Christchurch in 1984-5 after deciding that “available legal facilities were not dealing adequately with disputes among neighbours, family members and others who have continuing contact with each other.”

In line with most other New Zealand mediation developments, this model was based on a foreign example, in this case the New South Wales programme. The pilot resulted in a disappointingly low number of cases being heard. The programme did have some success in resolving disputes but this was not enough to launch a nation-wide initiative. In an odd twist the programme was found to have “neither reflected nor fostered any overt sense of ‘community’; no such intentions are explicit in Service goals or objectives.” Given that community-building has always been at the heart of the United States model, this outcome was very disappointing. As MacDuff points out, New Zealand’s most obvious example of community-based mediation was still established through legislation unlike most examples from other jurisdictions.

A more successful example of community based mediation, albeit non-legal, is the “Cool Schools” peer mediation programme designed and introduced by the Peace Foundation in 1991. The programme trains students to act as mediators for peers and continues to runs two decades after its introduction. It has been introduced to hundreds of New Zealand schools although it is restricted to primary and secondary education, thus not a form of community mediation in the wider sense and not an example of mediation in the New Zealand legal system. The limited nature of community mediation in New Zealand, especially relating to law, has helped to ensure that mediation would be primarily a state-led phenomenon.

6. **Conclusions**

From the 1970s to the late 1990s, mediation exploded onto the legal scene in an assertive and formalised way. No self-conscious mediation movement existed in New Zealand before the 1970s. Two decades later, mediation was so much in vogue that a Wellington mediation

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90 At 298.
91 MacDuff, n 17, at 168.
92 At 213.
93 See website for more information, [http://www.peace.net.nz](http://www.peace.net.nz) viewed 21 March 2013.
week was held in 1996 and an Auckland mediation month in 1998.94 As detailed in this paper, mediation processes were incorporated into various statutes in a vast array of areas. In some areas, such as family law, mediation challenged litigation’s monopoly. Private use of mediation increased as litigation became increasing expensive and inaccessible. An organised and political ADR movement emerged led by ADR practitioners and legal professionals disillusioned with litigation outcomes. Mediation has overwhelmingly dominated this movement. As a law student during the 1990s, I remember being repeatedly told by lawyers and legal academics that mediation was ‘the way of the future’. Peter Salmon QC’s statement from 1996 encapsulates this viewpoint, “Indeed I predict the time will come when mediation – at least as a first (and often last) stage in the dispute resolution process – will become the rule rather than the exception.”95 This challenge to New Zealand’s constitutional traditions is understandable when one looks at the legislation discussed in this paper passed from 1980 to 2002.

- Family Proceedings Act 1980
- Residential Tenancies Act 1986
- Labour Relations Act 1987
- Resource Management Act 1991
- Employment Relations Act 2000
- Weathertight Homes Resolution Services Acts 2002

Four of the most important ADR statutory initiatives had occurred by 1991. Mediation was formally introduced into employment law in 1970, family law in 1980, tenancy law in 1986 and environmental law in 1991.

The two leading ADR professional bodies in New Zealand are the Association of Dispute Resolvers (LEADR) and the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ). LEADR in New Zealand was established in 1993 as an off-shoot of the Australian parent organisation and has been the more legally focused on the two organisations. The acronym formerly stood for Lawyers Engaged in Alternative Dispute Resolution. It has played a key role in introducing and training lawyers for the mediation environment. The organisation has expanded over the years to incorporate non-legal mediators. LEADR is focused primarily on mediation, whereas AMINZ, as its title conveys, covers both mediation and arbitration.

The contemporary form of AMINZ is a result of the 1996 merger between New Zealand’s three main arbitration and mediation bodies. New Zealand’s arbitration professional organisation, the Chartered Institute of Arbitrators, had roots going back to the 1970s, while the Mediators’ Institute of New Zealand was created in 1991.96 According to Derek Firth, the first version of AMINZ was established “in December 1987 to replace the New Zealand Branch of the Chartered Institute of Arbitrators.”97 This organisation then merged with the Institute of Employment Arbitrators and Mediators and the Mediators’ Institute of New

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97 Firth, n 94, p 129.
Zealand. The ADR profession is not formally regulated in New Zealand so LEADR and AMINZ exist as the primary quality assurance mechanisms. The two organisations dominate private mediation work in New Zealand and act as lobby groups to promote ADR. While both groups have been key supporters of the mediation movement in New Zealand neither group actively led the process of creating this movement which began sometime before the organisations were formed. It could be argued that their existence is primarily a reaction to statutory initiatives and overseas trends. Other notable private institutions include the New Zealand Law Society’s Dispute Resolution Committee established in 1993 but since disestablished, the Building Disputes Tribunal and the New Zealand Dispute Resolution Centre.

When Justice Winkelmann spoke of an ‘anti-litigation narrative’ while addressing the AMINZ conference in 2011, she would have been well aware that some AMINZ members (as well as those from other ADR lobby groups) could be seen as key proponents of this narrative. For example, AMINZ’s executive director, Deborah Hart, made the following statements in 2012:

Mediation...is more concerned with mutually satisfactory outcomes than judicial procedures that usually entail somebody losing, and often losing big. Of course litigation has its rightful place and is necessary for some disputes. But litigation and its attendant escalation of conflict really ought to be the last resort, whether a dispute involves the Family Court, the Canterbury rebuild or almost any business-related case in these straitened times. Businesses using mediation will usually be picking themselves up and moving on much more quickly than those caught on the treadmill of litigation.

Since the turn of the century it could be argued that the rate of increase in the use of mediation has plateaued. During the 1980s and 1990s approximately 30 statutory references to mediation were created. From 1998 to 2008 that number increased to 43, averaging out at approximately 15 references per decade for the last three decades. Mediation remains strong and vibrant and continues to be incorporated into different areas of law but since the late 1990s it has become clear that mediation will not replace litigation as the dominant form of dispute resolution in the near future. Throughout the period of growth for mediation, the legal profession provided lukewarm support. While some lawyers and judges strongly advocated for mediation, others stressed the potential negative outcomes, especially in relation to legal work. A 1997 New Zealand Law Society commissioned survey showed that “only a third of lawyers see mediation as a developing area of law for themselves.” From this the Auckland District Law Society concluded that “Though lawyers are aware there is a

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98 As above.
99 Forbes, n 96, at 415.
100 Hart D, “Why litigate when you can mediate?” Otago Daily Times (Dunedin, 4 January 2012).
102 Baylis “Reviewing Statutory Models of Mediation/Conciliation in New Zealand”, n 9, at 1.
demand for alternative dispute resolution, and in theory think this is an area of the law that will grow, many appear reluctant to commit to the process of mediation.”

Has mediation reached its natural limit in New Zealand? Proponents of mediation would argue that no natural limit exists. Mediation can be used in nearly all disputes and entirely novel areas will continue to emerge, for example, weather-tight homes issues and Canterbury earthquake insurance matters. Those more wary of mediation could argue that many of the obvious areas for mediation were ‘colonised’ early on in the movement, for example, employment and family. Mediation may struggle to secure a role in less obvious areas.

The history of mediation in New Zealand can be traced back to developments in industrial relations in the late nineteenth century, but as a self-aware, dynamic, widespread movement its beginnings are much more recent. Led by developments in employment and family law, the modern New Zealand mediation movement took off in the 1980s and continues to grow, albeit at a slower rate in recent years. Six of the seven examples of mediation in New Zealand’s legal system discussed in this paper reflect strong state leadership. This is not to say that private individuals and institutions blindly followed government initiatives. Indeed, many government initiatives were inspired by private voices, but ultimately these were government initiatives, publicly funded and controlled by the state. There is no real history of organic, community-based mediation in New Zealand’s legal system which clearly differentiates our mediation history from the United States, and even Australia. Interestingly this conclusion reflects that of MacDuff’s 26 years ago, “There is, therefore, a paradox at the heart of mediation in New Zealand. The paradox is that, for the most part, the impetus for the development and implementation of mediation as an alternative forum has come from the political centre and has been promoted through legislation.”

New Zealand’s mediation movement is part of a global trend, especially in common law jurisdictions. Court overload, high litigation costs, social changes and subsequent challenges to traditional approaches of resolving disputes led to calls for mediation, conciliation and negotiation to supplement, and even replace, adversarial litigation. In New Zealand the response to these issues has been ad hoc and pragmatic, in line with New Zealand’s wider legal history and stereotypical ‘number 8 wire’ mentality. There has been no concentrated and systematic attempt to integrate mediation into the New Zealand legal system, but rather an on-going incorporation spanning over four decades.

The modern New Zealand mediation movement did not flow directly from industrial relations. If the United States movement did, this may be because the United States was leading the way and had to draw its inspiration internally rather than externally. New Zealand on the other hand was a ‘fast follower’ and did not need to create a modern movement from scratch. It could look abroad for inspiration. Therefore New Zealand has looked to overseas jurisdictions for modern mediation approaches. This trend is partly due to New Zealand’s

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105 At 91.
108 As per Barrett and Barrett, n 14.
small size and comparative lack of resources. The United States and Australia, in particular, have been influential in providing New Zealand with mediation and ADR models.

Since the 1970s mediation in New Zealand has successfully established itself as the leading alternative to litigation. It is here to stay and should continue to grow in use and popularity. During its heady peak in the 1990s it seemed that perhaps mediation could even replace litigation in many areas of the legal system. This now seems unlikely and, in light of Justice Winkelmann’s arguments, this may be the best outcome for legal dispute resolution in New Zealand. Though it is worth noting that when legislators reformed the regulatory framework for New Zealand’s lawyers in 2006 one particular method of dispute resolution was clearly promoted to resolve complaints under the Act - mediation.109

The rise of mediation in New Zealand can be seen as a challenge to New Zealand’s constitutional traditions but it can be argued that a more accurate way to view this historical development is that mediation complements, and flows from, constitutional traditions. Statute law has been the principle way of incorporating mediation into New Zealand’s legal system. This is assertion of parliamentary supremacy, perhaps the most distinctive tradition in New Zealand’s constitution. The argument between the civil courts and the mediation lobby groups could be seen as a battle for territory rather than a jurisprudential debate. It could even be seen as British traditions conflicting with American developments. The ‘civil justice’ argument fails to provide mediation with a proper role in New Zealand’s constitutional structure while the ‘anti-litigation narrative’ overstates the negative aspects of adjudication before the courts. Regardless of underlying causes, and given the historical context detailed in this paper, it seems highly unlikely that mediation will seriously challenge adjudication’s privileged position in our legal system. The most likely outcome is that both forms will continue to co-exist, sometimes clashing, but more often complementing each other and, most importantly, providing a variety of ways in which New Zealanders can resolve their disputes.

**What’s next?**

It is always dangerous to predict the future, even based on a close analysis of the past. However, some predictions can be made in relation to mediation’s role in the New Zealand legal system:

- Mediation will continue to complement New Zealand’s constitutional traditions. It will not undermine the rule of law or fundamental rights.
- Mediation will continue to be incorporated into appropriate statutory regimes, especially where the need for a ‘speedy, flexible, and cost-effective procedure’ is prioritised.
- Private mediation will increase, especially in commercial contexts, although we currently lack the research to know what it is increasing from.
- Those in the legal profession resistant to mediation will be forced to engage with it or risk losing clients.
- Mediation scholarship in New Zealand will only increase when universities (and law schools in particular) fully accept it into the teaching curriculum and research culture. This will not happen in the short-term.

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109 Lawyers and Conveyancers Act 2006, s 130(b).
• In some areas of legal practice, mediation will continue to *reduce* the amount of litigation and the use of lawyers, for example, in family law. It will not *replace* litigation and the use of lawyers.

• As the use of mediation increases, the mediation profession will need to be formally regulated in a similar way to the legal profession (although the regulation will be less comprehensive and rigid).