

Mediation and the Family Court

— EIP five months on



By Maria Kazmierow, barrister and mediator

The Early Intervention Process (EIP) was launched on 12 April 2010. The scheme is tailored to create more appropriate and efficient management and resolution of *Care of Children Act 2004* applications in the Family Court. Applying a triage approach (and adopting a standard and urgent track) for standard track applications, alternative dispute resolution has been brought to the forefront with the introduction of counsel-led mediation to bolster the already existing judge-led mediation process.

Mediation, alongside counselling for parties and *Parenting through Separation* course attendance, "front loads" standard track EIP parenting disputes towards self-determinative resolutions/educative initiatives.

In this model, mediation is the primary and ultimate opportunity for parents to settle their parenting and guardianship disputes as decision makers, before a stranger (the Judge) decides what is best for their children and their families.

Self-determination, with the focused assistance of skilled, neutral, specialist family law mediators, is a powerful message for parents, and a powerful dispute resolution tool. In my experience, most parents seize that opportunity with open arms and come to the table with a genuine desire to work out their issues without a 'stranger' making that very personal decision for them.

Building on important recommendations out of the Law Commission's report, *Dispute Resolution in the Family Court* (NZLC R82, March 2003), nationwide, EIP, counsel-led mediation is the culmination of several successful family court mediation pilots and the recent Christchurch Family Court's counsel-led mediation experience.

With this background of trial and success, Principal Family Court Judge

Boshier comments that "counsel-led mediation is one of the most important and exciting aspects of the Family Courts' new Early Intervention Process".

Other national organisations concerned with mediation complement this view. The New Zealand Law Society's (NZLS) Family Law Section Chairperson Anthony Mahon comments, "The introduction of a mediation tier to cases concerning children is to be welcomed."

National mediator organisation LEADR is also supportive of this initiative. Board member Carol Powell comments that "the EIP scheme is a positive step forward, with the judiciary and lawyers working within the system to offer mediation to Family Court clients, which is long overdue".

Given this, how does counsel-led mediation work, who mediates, and how is it faring?

How does counsel-led mediation work?

When a 'standard track' application under the *Care of Children Act* is filed at court (and counselling has occurred or been dispensed with), lawyer mediators are appointed from a panel list held by Family Courts, by Family Court Coordinators.

They are required to conduct the mediation in a defined time period (six weeks from the conclusion of counselling) and then report back to the Court as to the outcome.

The mediation process and techniques used should reflect the mediators' training and experience, being 'best mediation practice'.

Qualifications for appointment as a mediator

Mediators must be qualified and experienced family lawyers, and are appointed under section 130 of the *Care of Children Act* as counsel to assist the Court.

Current necessary qualifications are



that mediators hold a current practising certificate, have a minimum of five years' practice in the Family Court (or equivalent experience), demonstrate cultural awareness/awareness of disability issues, be a current member of LEADR's panel or advanced panel with current accreditation of ongoing practice and training, or AMINZ's panel of mediators (either Associate or Fellow) with current certificate of continuing professional development, and be able to demonstrate that they have in place arrangements to undertake regular professional supervision.

The Family Law Section is soon to provide an additional continuing legal education gateway for mediators wanting to be placed on the list of EIP mediators in the Family Court which will not require counsel-led mediators to be LEADR or AMINZ accredited. In partnership with Massey University, NZLS has now supplied a mediation training module which will commence either in late 2010 or 2011, and will be in two parts. It will also require completion of the NZLS Lawyer for the Child Course. This will be linked to ongoing training and accreditation through NZLS.

How many mediations and mediators?

The Ministry of Justice has confirmed that since 12 April 2010, there have been 1,035 referrals to counsel-led mediation (although not all of these have taken place).

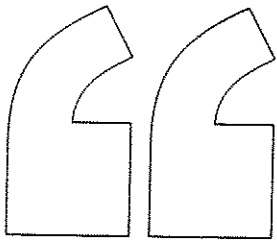
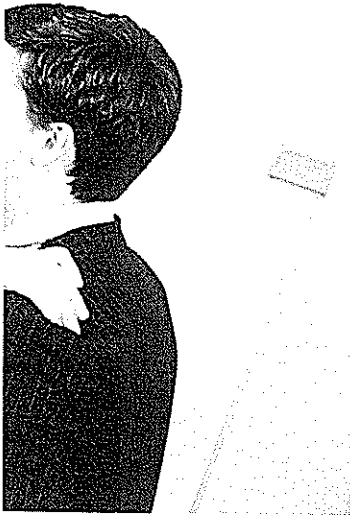
As at 17 September 2010, 172 people were approved to undertake counsel-led mediation. Of these, 46 are in the Auckland region.

Counsel-led mediation – perspectives after five months Mediation outcomes?

The experience of mediators in Christchurch provided statistical outcomes where over 80 per cent of cases were resolved by orders being made or parties reaching informal agreement (NZLS Seminar, *Early Intervention Process – new Family Court case management*, March 2010, at 8). On a quantitative analysis, this is a clear success.

How is EIP, counsel-led mediation faring? Statistically, it is too soon to tell. Both the Ministry of Justice and Judge Boshier confirm this. However, Judge Boshier confirms that the "Ministry of Justice has set up a careful monitoring programme to gauge throughput and volumes on both the EIP urgent and standard tracks". The Ministry of Justice further confirms that outcome data is being collected and is progressively being extracted. Judge Boshier does note that anecdotally, "the experience of Judges thus far is that few cases are proceeding beyond mediation to the 45-minute, rule 175 Conference, and even fewer to hearing thereafter".

Then there is the issue of how success is to be defined. Executive Director of AMINZ Deborah Hart comments that AMINZ would prefer any outcomes analysis to be both quantitative and qualitative. In particular, Hart comments that outcomes need to be "good, durable outcomes for families. We do have a model for (assessing) good outcomes from the mediation pilots".



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National perspectives of counsel-led mediation

Consistently, national bodies concerned with EIP mediation expressed a desire to "get it right" with the mediator skill base, qualifications, and ongoing mediation skill development.

Mahon comments that "the challenge for the Court and the profession is now to ensure that the timing and process of each mediation is appropriate to the particular case and that the selection and ongoing professional training requirements of the mediators is of a high standard. The Family Law Section has established mediation groups throughout the country to provide support and structure for development of best practice for EIP mediation".

Powell comments that "several Family Court pilots which were carefully monitored and reported upon [made] consistent recommendations for the qualifications of mediators. This is a golden opportunity to get it right and to ensure that the benefit of this ground work is not lost. Mediation is a professional skill base with international standards for accreditation and ongoing professional development and I trust that the scheme will take advantage of this opportunity to build these professional skills into the Family Court Process".

Hart shares the concerns about ensuring mediator quality and expertise. In particular, she commented that working towards resolving the following would assist with ensuring the scheme's success:

- **Quality assurance of newly appointed lawyer mediators** (that they are sufficiently well trained in mediation skills and experienced in mediating; this is different from being trained and experienced as a family lawyer);
- **Ensuring sufficient numbers of mediators nationwide;**
- **Facilities for mediations** – the current scheme means that if mediators do not have their own mediation rooms (or cannot secure a room from the lawyers involved or the Court), they must fund this from a fixed grant payment;
- **Mediation fees** – In Hart's view, the fee paid is *modest*, given the time involved in mediation best practice (ensuring genuine pre-mediation conferences with parties and counsel occur as well as a the mediation itself) and the competing administrative financial drains on the fee (the pre-loading of administration in liaising with lawyers and parties to get a mediation date, and funding mediation room hireage).

- **Interim vs final orders** – Enduring settlements that are good for families sometimes mean that interim orders are necessary as a result of a hearing or a mediation. A one-size, final orders approach is not always in the best interests of all the mediating families.

Hart's concern is that the scheme needs to be as good as it can possibly be for the well-being of families, and so these factors need to be addressed. The scheme is "not that envisaged by the Law Commission in *Dispute Resolution in the Family Court*, the pilot, and legislation, but a halfway house, which is better than nothing at all, but far from where it could be". Hart expressed AMINZ's support "as an organisation, to do all that we can to make the scheme work as well as possible while we await funding for the legislated scheme".

Judge Boshier acknowledged that compromises "had to be struck insofar as the mediation process is concerned (including) open-ended remuneration expectation, and so hours and hourly rates have been very conservatively set".

His Honour is complimentary about the standard of mediation thus far, stating that "mediators have risen to the challenge and are turning in absolutely excellent work. I believe this is at least in part due to the skills that are being learnt at LEADR and AMINZ training. We are seeing the use of techniques that address the issues underlying the dispute with much greater prospect of long-term solutions".

Mediators' and family lawyers' experiences

At a micro level, judges, mediators, family lawyers, and Court staff have been hugely supportive of the EIP initiative, and of counsel-led mediation. Judge Boshier acknowledges this, and notes "what I can indicate anecdotally, and as reported back to me from the Family Court Bench, is that the Family Bar has embraced the concept of counsel-led mediation warmly".

Many Family Court lawyers have both the skill and enthusiasm to support alternative dispute resolution, both as mediators and advisers to participant parents. Family lawyers turned mediators warmly welcome the opportunity to extend their practice into the mediation arena. When non-mediator lawyers prepare their clients with care ahead of the mediation, this inevitably pays dividends for parents. Family lawyers and mediators' enthusiasm, commitment, and support are pivotal to the scheme's success, and to the outcome of every mediation.

Noting that strong base of support and commitment, mediators

and lawyers have been concerned about some matters associated with the scheme.

One issue is that of 'final orders only, except in exceptional circumstances'. Given the particular family and children involved in mediation, and the transformative effect that mediation can have, resulting in dramatically different parenting arrangements (than those envisaged by either parent), a testing time for those arrangements can be of benefit. Interim orders and adjournment of mediation to reconvene after a test period can assist in resolving matters with finality.

Judge Boshier's comments indicate that there may be some leeway. His Honour notes, "In those exceptional cases where only an interim agreement can be obtained, the Judges favour interim orders being requested, but with the provision that they will become final in a prescribed time, *unless* a meaningful change is triggered. In other words, we prefer not to promote interim agreements which require later court review."

The concerns about the availability of mentoring, supervision, and the opportunity to maintain and extend skills are issues that many mediators share, wanting to ensure best practice occurs. It is a welcome development that the Family Law Section is now addressing these matters, meeting understandable concerns from new counsel-led mediators. Both LEADR and AMINZ are offering skills-based support tailored for family lawyer mediators.

Hart's comments on remuneration and the significant administrative drains on mediators' paid time resonate also for many mediators. With thought and cooperation, administrative issues may be able to be dealt with nationally or regionally (perhaps by practice note or protocol or otherwise), lessening this burden on mediators.

Lawyers comment that the quality of mediation rooms count – the space and surroundings, white boards, access to breakout rooms and the like. They often comment on having enjoyed working with colleagues in this different context, and seeing a new side to their colleague's skills. Tea, coffee, and the provision of snacks also rate well.

As a mediator, the transformative power of a mediation experience for parents is a hugely positive part of being a mediator. When parents reach a resolution that was better and different to what they believed was "best", stating that the process was positive, therapeutic, and the mediation time flew, it is one of the best forms of feedback and success this new initiative can give. It offers the best hope for the finality of a mediated resolution.