

# Connecting up courtrooms and mediation rooms

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## LEADR Fellow Geoff Sharp calls for urgent rethink of state-funded mediation in New Zealand civil courts.

Australasian LEADR Fellow and respected Wellington commercial mediator, Geoff Sharp, has called for an urgent rethink on state-funded mediation in New Zealand's civil courts.

He also called on the Government to establish an independent advisory body to ensure mediation is "truly integrated into the fabric of New Zealand's civil justice system".

Mr Sharp made the comments in a keynote speech titled "The Blooming of ADR" at a LEADR event in Auckland in September in which he noted that never before in his 10 years as a mediator had he witnessed "such intense activity" in New Zealand's mediation community.

Mediation is currently being introduced to New Zealand's Family and High Courts. Also in the District Court, a "remarkable philosophical sea change" to the litigation process is underway that "will inevitably lead to an emphasis on mediation", he noted.

Under the new rules in the District Court, which come into effect on 1 November, the trial will no longer be the focal point of the litigation process. Instead, settlement will become the key objective, and all District Court processes will be designed to enhance the prospects of settlement at an early stage.

This "has no New Zealand precedent and no clear parallel in the common law world," he said.

Mediation generally costs a fraction of the cost of litigation; some commentators put it as low as 10 percent of a case that goes through the court process.

Mr Sharp was much less positive about the Auckland High Court's upcoming mediation pilot. The pilot will involve 50 cases to be mediated by a panel of 15 mediators appointed at the sole discretion of the Chief High Court Judge.

"Most people will see the connecting up of our courtrooms and mediation rooms as a good thing, and largely they are right," Mr Sharp said. "But my point is that we need to *do* it right.

"Just what cases are to be mediated and who appoints the mediator are as yet unknown – although we do know mediators will be paid \$3,000 a day from public moneys. Clearly, this level of funding is unsustainable in the long term and if the pilot is to be rolled out in its present form, it would only take 300 or 400 mediations a year to take the budget into the millions of dollars.

"But more than that, why public money should be used to mediate a well-heeled corporate dispute is beyond me – especially when there are so many other aspects of our justice system in desperate need of funding.



Referring to new rules in the District Court, Geoff Sharp speaking at the LEADR dinner said that there is "no clear parallel in the common law world".

"To accept the need for taxpayer-funded mediation in our civil courts is to forever devalue it and prevent the legitimate development of mediation as a profession which would, in turn, benefit those who choose to use it," Mr Sharp said.

He said international experience shows clearly that governments can rarely afford well-run, well-funded mediation panels in the courts, and he has seen the evidence "first hand" in Los Angeles.

"The LA Superior Court mediation program handles 40,000 cases a year and runs an annual budget of \$1.5m – that's just for the administration as the mediators are either pro bono or on low capped rates. It is widely accepted this program is a mess that inhibits the growth of mediation."

Mr Sharp said while the High Court pilot was designed with the best of intentions to relieve the pressure on judicial time, it "was not the right way to go".

Instead, New Zealand should look to the UK, which has a user pays mediation model. "The courts there encourage cases to mediation and penalise litigants on costs should they unreasonably decline to mediate, even if they win at trial."

This "stick and carrot" approach worked extremely well and without the need for closed court panels or public funding. It had also allowed the mediation community to evolve gradually with supply matching demand at all levels. The South African High Court had decided recently to follow the UK costs approach.

Mr Sharp also applauded the work of Australia's National Alternative Dispute Resolution Advisory Council (NADRAC), and said New Zealand should have "a NADRAC of our own".

"This would bring together practitioners, judiciary, academics and organizational thinkers to advise our own Attorney General and other ministers on things mediation," he said.

Mr Sharp said he had approached Attorney General Chris Finlayson about this idea, and was "hopeful that it can be developed".

"My hope is that we are brave enough to insist on an integrated approach across all our courts that will reflect a dispute resolution philosophy not a dispute resolution band-aid.

"I see our courts encouraging – not compelling – mediation and having the power to sanction parties with costs when appropriate.

"Importantly, it would allow the mediation community to meet the challenge, not by closed panels chosen by the judiciary but by an open cadre of mediators at all levels of their professional development. These mediators would be required to achieve the status of court-certified mediators, perhaps with specialty certification in civil, employment, family and environment areas.

"The parties would then be free to choose any court-certified mediator who would also have LEADR or AMINZ (both professional membership bodies for mediators) standing behind the program, with complaint and disciplinary procedures in the event of problems."