

## Article for 'IAMA Pulse' (April 2013)

### The Great Regulation Debate

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Should mediation practice be regulated? This is a hotly disputed issue. It is one in which there exists a wide divergence of both practice and views on the issue across the globe. Some jurisdictions, including civil law countries in continental Europe, have moved rapidly to legislating in somewhat rigid terms as to who may mediate, how they should be trained, how they should be regulated and by whom. Hong Kong too recently signalled its intent in the aftermath of its Mediation Ordinance passed on June 2012 with the establishment of a single accreditation body. Other jurisdictions, especially those in the common law world, have by contrast favoured *laissez faire* approaches with generally no legal rules governing requisite training and accreditation. My own jurisdiction of Scotland falls into the latter camp. Nonetheless, a light touch form of self-regulation exists through the Scottish Mediation Network – a linking organisation seeking to set standards in such matters as requisite training, adoption of appropriate ethical codes of practice, CPD requirements, and adoption of complaints and grievance procedures for mediators across all fields.<sup>1</sup> The court-annexed mediation schemes in existence in Scotland only recruit mediators who are members of the Scottish Mediation Network's register.<sup>2</sup> This is analogous to the position in Australia in which mediator accreditation is not compulsory but the National Mediator Accreditation System has gained prominence over recent years as a minimum accepted standard and a prerequisite for court-annexed mediation activity.

Arguments in favour of regulation include: building consumer confidence in the process; helping legitimise mediation as a mainstream form of dispute resolution; raising the professional standing of mediators; providing quality assurance in, and accountability of mediators. In the opposing camp it is argued that regulatory regimes may be 'captured' by powerful professional groups; regulation may have the effect to homogenise practice and limit plurality and innovation; 'grassroots' endeavours may be stifled by raising required standards; operation of the market is most efficient regulatory mechanism.

While there are clearly merits on each side of the argument, my own view is that in contexts in which mediation forges more solid bonds with formal justice through for example, rendering it a pre-requisite for legal aid, embedding within statutory dispute resolution schemes or linking with the court through in-house schemes or court-referral rules, then the argument for a measure of regulation and standard accreditation becomes irresistible. The need for accountability and assurance of adequate standards in such cases is paramount. There is perhaps an equally powerful argument, however, that in respect of such matters as high end commercial mediation, with legally informed sophisticated players, the market is perhaps best left to govern itself. The reality is that at this level, mediators are appointed by reputation and standing in the eyes of disputants and their lawyers. Moreover, perspectives on mediators are often not gleaned from training or experience in that field, but from their

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<sup>1</sup> See <http://www.scottishmediation.org.uk/>

<sup>2</sup> Services acting in certain dispute areas in Scotland such as family and community mediation also have their own (often more exacting) practice standards provisions.

general experience, standing and gravitas gained in another professional field (as, for example, judge, barrister, accountant or banker).

In terms of training for mediation practice, again there is generally a civil law/common law divide on the issue. Civil law countries have generally adopted rigorous educational requirements marrying substantial theoretical learning with practical skills training.<sup>3</sup> By contrast, standard mediation training in common law jurisdictions has tended to take the form of short skills-based courses, typically 30 or 40 hours in duration.<sup>4</sup>

The schism over training approaches (and in fact regulation more generally) relates to a debate over the extent to which mediation practice represents a distinctive skill-set in its own right or is rather something that one augments to existing professional skills and experience. Equally there is a debate as to whether mediators are born rather than made – i.e. to what measure is mediator ability borne out of innate personality characteristics rather than being based upon skills that can be learned?<sup>5</sup> There are no easy answers to these questions. With the best will in the world, many will struggle to learn the ways of mediation no matter how extensive their training while, others – like ducks take to water – will find translating their innate abilities into mediation practice a relatively effortless endeavour. Equally the extent to which the dispute context in which mediation practice takes place is important is questionable too. Mediators may benefit (and be more attractive propositions in the market) from a pre-existing grounding in the dispute area in which they seek to mediate. In this sense, taking into account the prior learning and experience of individuals in related professional areas in any prescribed training provision is a complex and likely controversial issue.

The regulation debate will doubtless rage on. It is likely that as mediation becomes more entrenched, however, moves towards introducing regulatory frameworks will gather pace globally. Jurisdictions will continue to grapple over such issues as whether regulation should be standardised across the field or sector specific, and whether legislative intervention or self-regulatory measures are more appropriate. The sharing of international experiences and collecting of empirical evidence as to the effects of different regulatory models will be instrumental in together charting the future course of the emerging field of mediation.

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<sup>3</sup> See discussion in N. Alexander (2006) "Introduction" in N. Alexander (ed) *Global Trends in Mediation* 2<sup>nd</sup> edn (Kluwer)

<sup>4</sup> The Scottish Mediation Network has a minimum requirement of 40 hours training. Issues evaluated include the understanding of ethical values, communication skills, conflict management skills, displaying empathy, understanding the legal context of disputes and active listening.

<sup>5</sup> According to recent research the most important attribute of effective mediators is the ability to establish a relationship of trust and confidence with the parties (SB Goldberg and M Shaw (2007) "The secrets of successful (and unsuccessful) mediators continued: studies two and three" *Negotiation Journal* 23(4): 393-418)