

## University of Tasmania Open Access Repository

### Cover sheet

**Title**

How court-connection and lawyers' perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania

**Author**

Olivia Rundle

**Bibliographic citation**

Rundle, Olivia (2010). How court-connection and lawyers' perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania. University Of Tasmania. Thesis.  
<https://doi.org/10.25959/23210669.v1>

Is published in:

**Copyright information**

This version of work is made accessible in the repository with the permission of the copyright holder/s under the following,

Licence.

Rights statement: Copyright Copyright the Author

If you believe that this work infringes copyright, please email details to: [oa.repository@utas.edu.au](mailto:oa.repository@utas.edu.au)

Downloaded from University of Tasmania Open Access Repository

Please do not remove this coversheet as it contains citation and copyright information.

**University of Tasmania Open Access Repository**

Library and Cultural Collections

University of Tasmania

Private Bag 3

Hobart, TAS 7005 Australia

E [oa.repository@utas.edu.au](mailto:oa.repository@utas.edu.au)

CRICOS Provider Code 00586B | ABN 30 764 374 782

[utas.edu.au](http://utas.edu.au)

---

# **How court-connection and lawyers' perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania**

---

By

**Olivia Rundle**

B.A., L.L.B. (Tas), Graduate Certificate in Legal Practice

Barrister and Solicitor of the Supreme Court of Tasmania

Family Dispute Resolution Practitioner

Mediator Accredited under the National Mediator Standards (LEADR)

Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD)

University of Tasmania

February 2010

This thesis is dedicated to my family: Drew, Ruby and Daschel.

## Declaration

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis. To the best of the candidate's knowledge and belief no material previously published or written by another person is contained in this thesis except where due acknowledgement is made in the text of the thesis. Nor does the thesis contain any material that infringes copyright.

This thesis may be reproduced, archived, and communicated in any material form in whole or in part by the University of Tasmania or its agents, and may be made available for loan and copying in accordance with the *Copyright Act* 1968 (Cth).

Parts of this thesis were published or submitted for publication in journals during candidature. These were as follows:

- Rundle, Olivia, 'Barking Dogs: Lawyer attitudes toward direct disputant participation in court-connected mediation of general civil cases' (2008) 8(1) *QUTLJJ* 77.
- Rundle, Olivia, 'The purpose of court-connected mediation from the legal perspective' (2007) 10(2) *ADR Bulletin* 28.
- Rundle, Olivia, 'Evaluating Dispute Resolution' (2005) *Law Letter* 10.

Signed

.....

Olivia Rundle

February 2010

This thesis states the law as at 1<sup>st</sup> November 2009.

# Abstract

This thesis analyses the shaping of mediation within the court-connected context. It answers three questions:

1. What is possible within court-connected mediation?
2. What is happening within the Supreme Court of Tasmania's mediation programme?
3. Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?

The potential scope, purposes and practices of court-connected mediation are identified through an examination of mediation theory and particular issues that arise within the context of the formal justice system. All theoretical and practice models of mediation promote a degree of mediation's core features of responsiveness to the individual disputants, self-determination and cooperation. These features of mediation are realised when some key opportunities are extended to disputants within the mediation process. The opportunities are: to explore individual disputants' interests and preferences regarding the content of discussions, for disputants to participate directly during the mediation process and to work cooperatively to respond to the conflict. It is concluded that there is no reason why mediation cannot deliver these key opportunities within the context of the litigation system. Court-connected mediation has broad potential and may promote a variety of purposes and incorporate a range of practices.

This thesis presents a case study of court-connected mediation practice in the Supreme Court of Tasmania ('the Court') to compare the possibilities of court-connected mediation with the reality of practice. There are no explicit constraints in the Court's mediation programme. A broad definition of mediation applies, there are no clear statements about the purpose for which mediation has been introduced into the litigation process and there are no restrictions on the kinds of mediation that may be practised. Despite this broad potential, it is concluded that mediation within the Court's programme tends to have a narrow legal scope, where non-legal concerns are largely ignored, lawyers rather than disputants are the main participants and competitive approaches are sometimes adopted within the programme.

The explanation for the differences between the theoretical potential of court-connected mediation and the reality of its practice in Tasmania is based upon the influences of the connection with the formal civil justice system, court-connected mediator's practices and the ways that lawyers approach mediation. The qualitative analysis of interviews with lawyers and mediators reveals how these participants approach court-connected mediation, their perceptions of its scope and purpose and insight into some of the dynamics of lawyer-client relationships.

This thesis concludes by considering whether there are implications for the Court, lawyers, disputants, mediation theorists and court-connected mediation generally. Some recommendations are made in response to the research findings.

# Acknowledgments

My co-supervisors, Terese Henning and Professor Kate Warner (University of Tasmania) have maintained consistently high expectations, which have challenged me to make huge improvements in my research, writing and analytical skills throughout my candidature. This research has been taken in directions that were unforeseen at the outset and Terese and Kate have remained supportive through those necessary changes. They have been readily available for consultation throughout my candidature.

The enthusiasm and encouragement of my research supervisor, mentor and friend Associate Professor Samantha Hardy is greatly appreciated. Our conversations and Sam's thoughtful feedback have been invaluable. I cannot imagine what this thesis would have been like without her generosity, guidance and patience.

I also extend my thanks to the Law School, University of Tasmania, for providing a scholarship that has enabled me to undertake my research. The postgraduate allowance that has been provided has also enabled me to attend relevant conferences and workshops. Throughout my candidature I have been welcomed as a member of staff and given opportunities to teach in the undergraduate program. I am particularly grateful for the support of Professors Don Chalmers and Gino Dal Pont during the revision process.

This research would not have been possible without the support of the Supreme Court of Tasmania. In particular, the generosity and cooperation of the following people is acknowledged and appreciated: The Honourable Chief Justice Underwood AO (as he then was), The Honourable Associate Justice Holt, the past Registrar Ian Ritchard, Registrar Elizabeth Knight, Merrin Mackay, Malcolm Farmer and Shelley Bawdin. The willingness of Ian, Elizabeth and Merrin to maintain a constructive working relationship with me over a long period of time is particularly appreciated.

My gratitude extends to all the people who agreed to be interviewed, surveyed or observed for the purposes of my research, including legal practitioners, mediators and litigants.

I also thank NADRAC for convening the ADR research forums, which provided me with opportunities to discuss my research with other researchers in the dispute resolution field. All those researchers who have provided feedback and encouragement during my candidature are acknowledged, particularly Professor Kathy Mack (Flinders), Kathy Douglas (RMIT) and Rachael Field (University of Queensland).

Finally, I thank my family and friends. To my husband, Drew Byers, for his love, support and patience. Thanks also to my children Ruby Rundle and Daschel Byers for loving me, for putting up with my grumpy moments and for reminding me that having fun is really important. Thanks also to my sister Nell Rundle, my mother Catherine Ikin, my father Greig Rundle, my step-father Chris Ikin and my mother in law Val Byers.

# Table of contents

<b>Dedication</b>	ii
<b>Declaration</b>	iii
<b>Abstract</b>	iv
<b>Acknowledgements</b>	v
<b>Table of contents</b>	vi
<b>List of charts</b>	ix
<b>List of tables</b>	x
<b>Chapter 1</b>	1
<b>Introduction</b>	
1 <b>Aim</b>	1
2 <b>Scope</b>	7
3 <b>Significance</b>	9
4 <b>Thesis structure</b>	12
<b>Chapter 2</b>	17
<b>Mediation Theory and the Dilemma of Court-Connected Mediation</b>	
1 <b>Introduction</b>	19
2 <b>Historic and contextual background</b>	22
3 <b>Diversity of mediation theory and practice</b>	43
4 <b>Core features of mediation</b>	82
5 <b>Conclusion</b>	122

<b>Chapter 3</b>	125
<b>Research Design</b>	
1 <b>Introduction</b>	126
2 <b>The research design</b>	126
3 <b>Court records</b>	133
4 <b>Interviews</b>	144
5 <b>Observations</b>	158
6 <b>Conclusion</b>	159
 <b>Chapter 4</b>	 161
<b>Court-connected Mediation Practice in the Supreme Court of Tasmania</b>	
1 <b>Introduction</b>	164
2 <b>Background</b>	166
3 <b>Program characteristics of mediation in the Supreme Court of Tasmania</b>	177
4 <b>Participants in court-connected mediation</b>	212
5 <b>Styles of mediation practice</b>	240
6 <b>Quantitative outcomes of mediation in the Supreme Court of Tasmania</b>	255
7 <b>Conclusion</b>	286



<b>Chapter 5</b>	291
<b>Lawyers' perspectives of court-connected mediation</b>	
1 <b>Introduction</b>	294
2 <b>General legal practice</b>	297
3 <b>Preparation for mediation</b>	314
4 <b>The roles of participants in court-connected mediation</b>	333
5 <b>Lawyers' perspectives of the goals of court-connected mediation</b>	367
6 <b>Conclusion</b>	408
 <b>Chapter 6</b>	413
 <b>Discussion and Conclusions</b>	
1 <b>Introduction</b>	414
2 <b>Key findings</b>	415
3 <b>Recommended Responses</b>	443
4 <b>Conclusion</b>	472
 <b>Appendices</b>	477
<b>Appendix A: Lessons learnt from the original research design</b>	479
<b>Appendix B: Interview Schedules</b>	491
<b>Appendix C: Mediation form</b>	500
<b>Appendix D: Case codes</b>	502
 <b>Selected Bibliography</b>	507

# List of Charts

## Chapter 2

Riskin	Problem-definition continuum	68
Riskin	Mediator orientations	68
Alexander	Mediation metamodel	71

## Chapter 4

3.2	Mediations held in various locations between 1 July 1999 and 30 June 2006	183
3.3	Types of matters mediated 1999/2000 to 2005/2006	185
3.4A	Total number of mediations conducted 1999/2000 to 2005/2006	189
3.4B	Stage of litigation as which mediation occurred as a percentage of mediations held during relevant time periods	193
3.4D	Hobart finalisations (all matters)	200
3.4E	Hobart torts finalisations	202
4.1	Number of mediations conducted by mediators	214
6.1A	Proportion of mediations resulting in an immediate settlement 1/7/1999 to 30/6/2006	257
6.1C	Rates of immediate settlement at mediation of Hobart torts and commercial matters	259
6.1D	Timing of consensual settlement in Hobart mediated matters	261
6.2A	Hobart matters allocated a trial date 1998 to 2005	271
6.2B	Percentage of Hobart listed matters finalised by consent or determination	272
6.2C	Hobart listed matters that were mediated	274
6.2D	Percentage of matters that were finalised within 12 months of lodgement	277
6.2E	Percentage of caseload pending 12 months and 24 months after lodgement	279

## List of tables

### Chapter 3

4.1A	General Characteristics of legal practitioner interviewees	149
4.1B	Comparison of general characteristics of legal practitioners in the population sample and interview sample	150
4.1C	Main case load of interviewees	151

### Chapter 4

3.4C	Hobart finalisations and whether the matter was referred to mediation or not	199
6.1B	Mediation settlement rates of Hobart finalised matters	258
6.1E	Manner of finalisation of Hobart torts matters 1999/2000 to 2005/2006	264
6.1F	Hobart torts finalisations that were mediated 1999/2000 to 2005/2006	265
6.1G	Percentage of Hobart torts finalisations in which the matter was mediated	266
6.3	Hobart torts: ratio of matters filed to matters finalised by court determination 1996 to 2006	285