

ISSUES OF FAIRNESS AND JUSTICE IN ALTERNATIVE DISPUTE RESOLUTION

The NADRAC Discussion Paper "Issues of Fairness and Justice in Alternative Dispute Resolution", published in November 1997, identifies a number of strategies designed to address barriers to fairness and justice in ADR and invites comment.

On a global level, the breadth and scope of the paper makes a concise response seem simplistic. Therefore, the following discussion focuses on issues or strategies which are considered to be critical to broadening community access, enhancing professional standards and consolidating effective service delivery by ADR practitioners.

The following comments express the views of the writers, and are not endorsed by the Board of Management or necessarily shared by the membership of the Australian Dispute Resolution Association Inc.

ACCESS TO ADR

Cost of Justice

As we draw to the end of this century the cost of justice is increasingly beyond the resources of a significant proportion of the community (arguably, most private citizens and many small businesses). In part this arises from limited public funding of court services and inadequate Legal Aid funding. There are significant impediments to effecting reform of the justice system, and significant reform is unlikely in the foreseeable future.

ADR methodologies provide an option for the community to resolve disputes and achieve 'justice' without reliance on the framework of the formal legal system. Educating the legal profession, the judiciary and perhaps most importantly 'front line' staff in the legal system, government and public servants, is critical to expanding the access of the community to 'private justice' in those circumstances where 'public justice' is unavailable, unsuitable or impracticable.

Voluntariness

One of the core values of mediation is voluntariness. In the context of the increasing demands on the formal justice system the voluntariness of mediation has already been compromised to an extent. In some areas, mediation has been legislated as a prerequisite to an adjudicative determination of a dispute. By removing voluntariness from mediation the risk is that it is made a servant of the formal justice system in contrast to the liberating alternative from which it evolved.

While 'compulsory' mediation may serve the state, in terms of reducing the cost of justice, the community and the practice of mediation may not necessarily be well-served. The philosophy of ADR is founded on self-determination and the removal of voluntariness is inconsistent with the concept of self-determination.

A key element in the ethical practice of mediation is the assessment of the suitability of participants and the dispute for mediation. An aspect of this assessment is the parties willingness to mediate.

Within the framework of legislatively mandated or court referred mediation:

- parties should ideally have some choice in the selection of mediator
- the mediator should still have an obligation to assess for suitability
- parties should have the right to seek to withdraw from mediation at the assessment stage (after receiving detailed information about mediation) and to terminate mediation without the withdrawal from mediation limiting their access to other forms of dispute resolution

Obligations of Solicitors To Advise Clients

Currently, the obligations of legal practitioners to advise their clients about their options for resolution of disputes, i.e. ADR alternatives, are too weak.

There should be a positive obligation on lawyers to provide information on ADR options, and a written advice about the suitability of the dispute to the various ADR options. This will require further education of the legal profession and arguably the development of the concept of core ADR options in specific practice areas, eg. for family law: counselling, mediation, arbitration, ENE; for commercial litigation: mediation, ENE, expert determination, arbitration etc.

Community Education

While considerable resources (public and private) have been employed in training mediators/ADR practitioners nationally, limited resources have been expended on community education to generate an awareness of the options available to individuals and organisations involved in disputes.

There is a saying that knowledge is power, and people can only take responsibility for managing their own disputes if they have the knowledge to enable them to do so.

Therefore, accepting that the point made at 10.31 that “many groups do not have the information they need to make an informed decision as to how best to deal with a dispute” cannot be challenged, points 10.32, 10.33 and 10.35 automatically follow. However, if fairness and equity are to be achieved the community needs impartial and unbiased information.

NADRAC should consider developing ‘model’ materials and authorising their reprinting with acknowledgment for community education purposes, in order to ensure that neutral and impartial sources of information are made widely available to the community through a wide variety of sources.

Referral Resources

At present, referrals to ADR/mediation services are often ad hoc or self-referrals. There are community advice and referral services in a number of settings (eg within or associated with various government departments). An education and training program, including an education kit and referral information, would be invaluable in educating such services (eg Fair Trading Centres, Women's Information Service, Migrant Resource Centres, community centres, legal aid offices etc.).

A different and more innovative approach would be to support the implementation of a 'one-stop shop' model such as is being developed in Tasmania. Based on a Canadian model, Tasmania is planning to create centralised service/information centres providing a range of local, state and federal government and private sector services in one location. This assists the community by making it easier to readily access services which they might not have known existed, in a cost-effective and efficient way. Implementation of an alternative model of centralised information is being undertaken in Victoria via computer terminals, for example in shopping centres.

ADR information would be more readily available to the community if provided in conjunction with such a 'one-stop shop' model of information and service delivery. An internet site providing general information and advice and facilitating links to service providers would also be an effective way of reaching a broad audience.

PROFESSIONAL STANDARDS AND DEVELOPMENT

Standards of Practice

The issue of accreditation and standards has been the subject of considerable debate and consultation in the ADR community over the last decade. There are a range of options from the 'do nothing', and minimalist options, through to the maximalist options, effectively 'professionalisation' encompassing such structures as Colleges or Boards of Accreditation. Similarly, the assurance of quality control by a sanctions based system; or, on the other hand, a system based on competency and qualification.

In addressing the issue of professional standards it is useful to consider the needs of various stakeholders. Government seeks assurances that consumers will be protected at least cost to government. The community wants to make informed choices about services and have a means of redress if service standards are not met. Mediators want to ensure that the flexibility of the process is maintained and ethical practices are encouraged.

Many mediators take the view that the prescription of the practice of mediation is both unworkable and undesirable. Analogies can be drawn with a range of other professional service providers (for example legal practitioners, counselors etc.) where there are qualification requirements for entry and mechanisms to deal with complaints and ethical/professional breaches, but limited prescription of professional practice. Mediation should not be seen as the preserve of an elite few but a process which can be implemented by anyone with appropriate knowledge and skills. It has been widely recognised that mediation can be taught to and

practiced by people of all ages from all walks of life. However, where mediation is practiced for reward high standards should arguably apply, and the client has a legitimate expectation that they will be protected from malpractice.

It is suggested that a competency and qualifications based approach is most likely to meet the needs of all those with an interest in quality assurance in the practice of mediation. Such a system could encompass a code of conduct, competency standards and competency-based training, peer review and a complaints mechanism.

One option would be to develop an 'Industry Charter' comprising satisfaction standards for clients, for example: "were you treated with respect?", "did you feel you had choices?", "were your concerns addressed?", "was it cost-effective?" etc. Community education would be essential to the success of this alternative.

In researching and developing models of quality assurance appropriate to the practice of mediation, NADRAC might consider researching the profile of current mediators, their qualifications, the nature and number of matters being mediated and current issues of concern. A national survey of practitioners and agencies, conducted in conjunction with organisations such as MAV, SADRA and ADRA, would shed light on the state of mediation practice in Australia and provide a benchmark for evaluating the impact of future regulatory initiatives.

Practice Guide

The Discussion Paper provides a range of guidelines on enhancing the effectiveness of mediation/ADR practice when working with clients with a range of different needs and circumstances.

In the absence of any other national standards or guidelines, NADRAC is encouraged to extract the practical guidelines and compile them in a "Practice Guide", to be made widely available to practitioners and those undertaking training in mediation. The many sectional ADR organisations could be invited to contribute to or comment on a draft document. A formal 'endorsement' by various organisations and associations might also be considered.

A "Practice Guide" specifically targeted at issues of relevance to organisations and agencies providing dispute resolution services (as opposed to individual practitioners) could encompass guidelines relevant to systems design, training, public education and data collection (as outlined in chapter 10). More detailed guidelines on such subjects as the sensitive issue of bringing to public attention trends or patterns evident in the ADR practitioners or agencies' work is also required.

Training

The strategies identified in the Discussion Paper involving training and development are strongly supported. The challenge will be to design nationally relevant and accredited training packages which can be accessed by ADR practitioners/mediators in a variety of settings (including in isolated rural communities).

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Of particular importance, given the issues raised in the paper, and the current training available are:

- intake and assessment principles and techniques
- process flexibility and design options to suit the parties and manage power differentials
- client education (providing appropriate and effective information to potential and actual clients)
- cultural/cross-cultural awareness

Code of Conduct

An informal 'discussion group' comprising representatives of a range of ADR organisations in Sydney has met and discussed the concept of a voluntary Code of Conduct for mediators. A draft is currently being developed based on research of the codes in place across a range of service providers and representative bodies. NADRAC, by supporting the project, and facilitating broader consultation on and promulgation of the Code, once it is developed by the group, would contribute to the achievement of equity and fairness in the practice of mediation. Community awareness of the existence and content of such a Code would be a mechanism to enhance community confidence in selecting mediation as a dispute resolution method.

National Competency Standards

The availability of an objective measure of a training course is of value both to potential employers and to those seeking training. NADRAC is ideally placed to initiate and support the development of National Competency Standards for mediators. These could be modeled on the ACT Competency Standards already published.

Alternatively, a set of standards, specifying minimum requirements for process and practice could be developed. Such standards would need to include specific competencies appropriate to ADR/mediation in particular settings (eg Family Law Act matters, where parties are from a Non-English Speaking Background, Aboriginal parties, etc.).

Based on ADRA's experience over the last decade we suggest that the formulation of National Competency Standards should be approached using a range of consultative processes. The ADR community consists of a plurality of interests and many members of this diverse community would be sceptical of bureaucratically imposed national standards for a variety of reasons. It would be hoped that the development of National Competency Standards through consultative processes initiated or endorsed by NADRAC would attract broad input into their development and result in widespread support for their adoption and ongoing revision in the years ahead.

A lesser option is that NADRAC could provide guidelines or recommendations for training providers on competencies and possible topics to be addressed in mediation training. Training providers should be encouraged to provide participants

with a statement of competency outlining the subject matter encompassed to enhance the recognition of skills and knowledge and aid employers in identifying training needs.

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