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Developing the overview

Is ADR part of a movement towards consumer-oriented legal services in Australia?

Michael Robertson

Introduction

The idea of consumer responsive law continues to attract attention among law reform bodies.¹ And the 1995 *Justice Statement* identified as one of the government's 'key themes and beliefs ... a determination to ensure that [legal services] are delivered more efficiently and with a much greater awareness of and orientation to their consumers — the public.'²

Judging by appearances, there seems, in certain areas at least, to be some evidence of a trend towards legal service delivery with a consumer focus in Australia.

Mediation appears to be one of those areas. In fact, ADR, which is a product of different social pressures, has in a sense been a 'leader' in consumer-oriented legal service delivery. For example, mediation is said to be 'person-centred', unlike litigation, and is voluntary and consensual rather than imposed and coercive.³ User-friendliness is, undoubtedly, a basic component of consumer-oriented (or user-centred) legal service delivery.

As ADR gathers momentum, as seems most likely, it will probably continue to play an important part in the wider 'movement'⁴ being described here. And

if this movement runs its course, it could see significant changes in all areas of legal service delivery, and not just in those areas connected with dispute resolution. Lawmakers, lawyers, and government agencies have already begun to adopt a range of consumer-oriented delivery techniques, with varying degrees of commitment and success.

Some of these developments are undoubtedly good news for consumers of legal services. Recent innovations and changes in the services delivered by the Australian Tax Office⁵ can be cited as an example. But there are features of the new legal service delivery climate that raise awkward questions. For example, in spite of the rhetoric of client-centred service charters, just how serious is the commitment to the consumers of legal services? Are consumer-oriented services really intended for the benefit of legal consumers, or do they merely happen to represent the cheapest way (for the public purse, that is) to provide legal services in the current economic climate?

It is, perhaps, too soon to have a firm view on these questions. There is, presently, far too much uncertainty about the future of legal services generally. But there remains a distinct possibility that the needs of legal users, the everyday ➤



➤ consumers of legal services, will be put to the back of the queue when public spending is prioritised. Recent developments with legal aid funding suggest that this is already happening.

Consumer-oriented legal services

Just what are consumer-oriented legal services, and what does a legal consumer expect from the legal service delivery system today? Here are some suggestions, evident from some of the developments taking place across the legal service delivery industry⁶:

- Consumer responsiveness — This requires a determination on the part of the legal service provider to achieve a clear understanding of who the users are, what their reasonable expectations are, and the levels of their skills. Delivery mechanisms must then be designed or adjusted to meet users' needs within the parameters of what is legally and practically possible.
- Client-centredness — From the point of view of the lawyer or other service provider, 'client-centredness' involves understanding and adapting to the perceptions and expectations of individual clients with whom one is engaged in a legal service delivery arrangement.
- Providing access to legal information which is both in plain language and comprehensible — Education about legal rights assists in demystifying the law, permits empowerment of consumers to deal with the system directly, and allows them to deal more effectively with legal service providers. A reasonable level of legal awareness also fosters an element of preventive legal behaviour. Armed with knowledge, a user can use the legal system to advantage and avoid some legal difficulties, including the

avoidance of costly dispute management at a later stage.

- User-friendly dispute resolution mechanisms — Mediation currently has enormous appeal, and not only to consumers. In time it will become clearer

whether mediation or other dispute management commodities are, from the consumer's perspective, substantially an improvement on traditional litigation. So far, it seems clear that they are, and that ADR has a significant future role to play in the management of many, but not all, disputes both within and beyond the court system.

- Allowing a greater degree of self help and assumption of control — Legal self-help, in court connected matters or elsewhere, implies that the user has a greater measure of control over the processes made available by service providers. Self-help is usually associated with litigation but, from the consumer's perspective, it has a much wider appeal. The motivated legal user will acquire legal information (if it is available) and use it in dealings with government agencies, businesses and other consumers. Armed with sufficient information, the user can accomplish many legal tasks traditionally perceived to be the exclusive domain of the professional.
- Recognising consumers' legitimate interests as well as their rights — Giving recognition to parties' interests, as well as their rights, is an ingredient derived from mediation practice. This person-centred approach is a virtue in general consumer-oriented legal practice if it means taking account of legitimate consumer interests which

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cannot readily be expressed in legal terms.⁷

- Wherever possible, utilisation of processes and procedures which are voluntary and consensual rather than coercive and imposed — This principle is also derived from the mediation literature,⁸ but it may have application in other areas of legal service delivery. It requires the avoidance of practices which disempower or marginalise the user, unless there is realistically no other way of providing the service. Disempowerment must certainly not exist merely for the convenience of the lawyer, the official or the institution.
- Consultation — In the context of the preparation of legislation, consultation makes for better law.⁹ Consultation with the persons most likely to be affected is a virtue which should be basic to the practice of all service providers, and not only makers of law and policy.
- Less costly services — Consumers must genuinely be able to afford basic legal services. This is a perennial 'access to justice' issue.
- Efficient, effective and courteous service — All consumer-oriented legal service providers require periodic training on how best to serve the community and individual users.
- User-friendly documents from all legal service providers, and simplified rules and procedures in all courts and agencies — Comprehensible, practicable procedures for users is a basic fairness requirement.¹⁰
- Legal service institutions in physically accessible places and user-friendly physical facilities.
- Service providers to adopt and advertise consumer oriented standards.
- Accountability of legal service providers — Consumers, by definition, require manufacturers and service providers to be answerable for their products. It should make little or no difference whether the supplier is a

public or a private institution.

- Reporting or monitoring mechanisms for breaches of performance standards — Service accountability in a narrow sense requires, first, the adoption of systems to ensure that citizens can report breaches of standards of service providers. Secondly, the provider must be prepared to respond to complaints or suggestions with integrity.
- Performance monitoring by 'benchmarking' — This involves striving for best practice in order to maximise Australian standards of legal service delivery.
- Legal service providers must be open to further consumer-oriented changes — Consumer-oriented legal services are evolving. Components, principles, and standards will constantly require reassessment and modification.

On the basis of this 'checklist', incomplete though it may be, it is possible to assess the performance of most, if not all, legal services.

Some key features of consumer-oriented legal services

Mediation, to take this example again, is a method by which parties seek solutions that are based upon their 'mutually compatible subjective needs, wants and preferences'.¹¹ It is also a 'self-empowering' process.¹²

The current reforms in some Australian civil courts, where mediation is increasingly being encouraged (or required), mean a shift away from exclusive reliance on traditional, grievance-remedial practices. One component of this shift in orientation is a growing appreciation of the merits of interest-based, rather than rights-based, legal service delivery.¹³ And, simultaneously, these reforms involve the enhanced use of a style of legal delivery that *facilitates private choice*.

Evidence of similar changes may also be emerging in the services of the Australian Tax Office, to take another example.¹⁴ Some of the tax office reforms involve greater taxpayer participation in the revenue ➤

"... the 'top down' element of administrative power and regulation is yielding to a greater degree of citizen involvement in the process."



➤ collection process and are premised upon a belief that initial *self-assessment* will lead to more compliance. This use of self-assessment signifies a greater degree of self-help or individual assumption of responsibility. It also seems clear that, in this instance, traditional administrative regulatory methods are giving way to less directive methods. Put in another way, the 'top down' element of administrative power and regulation is yielding to a greater degree of citizen involvement in the process.

On the basis of these two examples, therefore, consumer-oriented legal services, including ADR in some cases, seem to signify increased opportunities for self-help, individual assumption of control, and private choice. This involves a change in the style, or method, by which providers offer their services and may signal the beginning of a gradual departure from traditional, heavy reliance on the regulative and reparative methods of legal service delivery.

Why consumer-oriented legal services?

Those who are sympathetic to the needs and expectations of consumers of legal services would prefer not to be cynical about legal service delivery that places the consumer at the centre of the legal picture. After all, if legal services are *not* user centred, but are more inclined to be sympathetic to the needs of legal service providers, one would have to say that something is awry.

However, there are other possible explanations for what appear to be positive developments in this field.

One is the commercialisation of law and legal practice, which some see as an inevitable development in the contemporary world. It is a process that sees the emergence of products, the result of intellectual labour, which can be likened to the production of tangible goods. Legal production — whether it is the work of lawyers, courts, governments or other legal service providers — is more conspicuously becoming a

commodity in a legal industrial market.¹⁵ Legal services come as packages, and increasingly they are being mass-produced. Legal jargon is changing to reflect these developments: law is an 'industry' made up of different sectors, including the 'dispute management industry'.

In simple terms, law can increasingly be seen as a commodity in a competitive, consumer market. This necessarily has implications for legal service delivery.

Another feature of the industrialised legal climate is the *corporatisation* of government institutions which specialise in the delivery of legal products to the consumer public. Furthermore, there are growing signs of *privatisation* — or contracting out — of legal services which were traditionally perceived to be the exclusive domain of public sector institutions. Indeed, the basic assumption that the Australian litigation system will continue to be 'public' and 'state supported' has recently been questioned.¹⁶

The drive to make legal services *cheaper*, for both suppliers and consumers, is clearly a factor in these developments. Mediation is a case in point. Although mediation may be consumer-responsive in an important sense¹⁷ — and can be marketed on this basis — it seems more likely that its growth is being driven, in part at least, by the need to reduce public spending on litigation processes. For example, it has been said that the 'principal purpose' of referrals to mediation and case appraisal is 'to achieve settlements so that the pressure on the court is reduced'.¹⁸ Increasing the number of courts, judges and support staff is

apparently not a viable option. The point seems to be a simple one: because certain legal commodities, like mediation and case appraisal, are perceived to be cheaper than full-blown litigation, both for the public purse and the litigants themselves, they should be tried whenever possible.

There seems, also, to be a growing perception that an element of citizens' self-help in the legal service delivery process reduces the State's delivery costs. If this is true, it suggests that the encouragement of self-help in the legal system, which involves the utilisation of the user's own resources in achieving legal outcomes, amounts to the 'commodification' of the user's own labour. Put differently, the courts' or administrations' encouragement of self-help, at a time of fiscal constraint, is a way of shifting some of the costs of state-citizen legal transactions onto the consumer. This amounts

to a variation of the 'user-pays' approach to legal services: rather than (or in addition to) cash payments for services, the consumer is encouraged to contribute her or his own service or intellectual labour to the transaction.

It seems plausible to suggest that contemporary legal systems will be constrained to make even greater use of self-help legal delivery techniques, especially where this permits reduced state expenditure in pursuit of primary social goals.

In this changing environment, the portrayal of the legal user as a 'consumer' of legal services is hardly surprising. In a sense, consumer-oriented legal services are a necessary adjunct to the commercialisation and industrialisation of law. ➤

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"In some ways, the role of mediation and the form that it takes over the next decade or so, may provide some kind of litmus test of the success or failure of consumer-oriented legal service delivery."

Are consumers at greater risk?

➤ Not surprisingly, this climate of consumer-oriented legal services contains some risks for consumers. After cutting through the rhetoric of client-centred service charters with their promises of more efficient, effective service, at least two important questions remain for consumers of law. In the longer term, can consumers really look forward to (1) higher levels of participation in the legal system and (2) greater accountability of legal service providers? Or, is it the case that citizens are gradually becoming subjects 'at the foot of the throne of the marketplace'?¹⁹

In some ways, the role of mediation and the form that it takes over the next decade or so, may provide some kind of litmus test of the success or failure of consumer-oriented legal service delivery. ●

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Footnotes

1. Access to Justice Advisory Committee, *Access To Justice: An Action Plan* (Sackville Report) (1994) (Australia).

2. Attorney-General's Department, *The Justice Statement* (1995) (Australia) at 4.

3. L J Boule, *Mediation: Principles, Process, Practice* (1996) at 34-39.

4. However, some ADR may not be consumer oriented to the same degree as voluntary mediation, for example.

5. Australian Taxation Office, *Taxpayers' Charter* (1997).

6. Made up of lawmakers, government agencies engaged in legal services, courts, tribunals, legal professionals, and other private sector legal service providers.

7. G L Davies, 'Fairness in a Predominantly Adversarial System' paper presented at Conference on *Beyond the Adversarial System: Changing Roles and Skills for Courts, Tribunals and Practitioners*, The National Institute for Law and Ethics and Public Affairs and The

Australian Law Reform Commission, Brisbane, 10-11 July 1997, at 5 says that, in dispute resolution, 'an interest based solution ... may in some cases benefit both parties more than a rights based solution will benefit either'.

8. Boule, above n 3, at 35.

9. Sackville Report, above n 1, at 466.

10. Sackville Report, above n 1, at 324, relying on the Administrative Review Council, *Administrative Review of Government Business Enterprises*, Discussion Paper (1993).

11. N Gold, 'Tomorrow's Legal Services: Facilitating Change to Secure the Future' paper presented at the APLEC International Conference on *Skills Development for Tomorrow's Lawyers: Needs and Strategies*, Australasian Professional Legal Education Council, Sydney, 4-8 September, 1993 at 14.

12. F S Mosten, *The Complete Guide to Mediation* (1997) at 18.

13. In the context of dispute resolution, this has been described as 'a paradigm shift' which signifies potentially massive changes for law: Gold, above n 11, 10, 14.

14. Above, n 5.

15. See generally, J H Wade, 'New and Recycled Services by Family Lawyers — Responding to a World of Change' (1977) 11 *Australian Journal of Family Law* 68; marketing of legal products involves cutting production costs, use of systems, technology, specialised paralegals and immediate billing.

16. Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (April 1997) at 129.

17. Boule, above n 3, at 35.

18. The Hon Justice C Brabazon QC, 'The Education of Advocates in a Less Adversarial System' paper presented at Conference on *Beyond the Adversarial System: Changing Roles and Skills for Courts, Tribunals and Practitioners*, The National Institute for Law and Ethics and Public Affairs and The Australian Law Reform Commission, Brisbane, 10-11 July 1997 at 3.

19. J R Saul, *The Unconscious Civilization* (1977) at 80.