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New applications for ADR: the Ombudsman as dispute resolver

Tom Stodulka

After initially working with the NT Commissioner for Public Employment, early in 1997 I moved to the Office of the Ombudsman as Deputy Ombudsman.

My background in law and ADR was very appropriate to such a setting and I was particularly fortunate to have arrived at a time when greater emphasis was being placed on dealing with complaints by means of mediation and conciliation.

Conflicting systems?

It is sometimes asked, is the use of ADR in conflict with the spirit of an Ombudsman's classical investigatory function? I do not believe so. My own experience is that ADR provides an Ombudsman with an excellent means of resolving many complaints. It is an effective and inexpensive tool which can often provide all parties with a fair and equitable result which the parties themselves have achieved. Sir Laurence Street promotes the view that the mechanisms of alternative dispute resolution should be seen as additional or complementary to litigation. I think this is a view equally apt in the context of the Ombudsman where alternative dispute resolution is sometimes additional to the investigative role of the Ombudsman.

From 'informal resolution' to mediation and conciliation

It is fortunate that an Ombudsman is not restricted by the sometimes inflexible limitations of our traditional adversarial system. It is the Ombudsman's charter to provide the public with positive remedies in a very broad jurisdiction, and to achieve this I believe they must be

allowed to use flexible methods of procedure. This flexibility is supported by Burt CJ in *R v Dixon; Ex parte Prince* (1979) WAR 11; when describing the essential character of the Ombudsman he said, 'In the discharge of those functions and subject to the Rules of Parliament he is master of his own procedure.' This is also confirmed in legislation which gives the Ombudsman authority to determine some complaints without the need for an investigation, where he or she is of the opinion, having regard to the nature and seriousness of the complaint, that it may be resolved expeditiously (*Ombudsman (NT) Act 1978*).

For some years now Australia has seen an increasing acceptance of ADR and an enormous change to our traditionally adversarial culture. In organisations such as the Ombudsman, which for years have practised ADR in the context of 'informal resolution', the formal and more structured ADR processes could not have developed without strong commitment and continuing support from senior management.

At the recent Australasian and Pacific Ombudsman Conference in Darwin, the Hong Kong Ombudsman presented a paper on ADR practices in his office and concluded that ADR methods often work to the benefit of both the complainants and the complainee organisations. His research indicated that ADR resulted in greater satisfaction for all involved and a shorter waiting time for the complaints to be resolved than the time needed for investigation.

There are three ADR methods used by the Hong Kong Ombudsman:

(i) Rendering assistance/clarification

In many circumstances, the complainant's grievances arise because of a lack of knowledge of government policy or procedure or misunderstanding of the circumstances of the matter. They are thus provided with assistance, explanation or clarification by the Ombudsman on the basis of the information and comment as provided by the complainee organisations.

(ii) Internal complaint handling program

This was introduced in January 1996. An opportunity is accorded to complainee organisations to resolve simple complaints through their complaint handling systems. Under the program, the Ombudsman refers simple complaints, with consent from the complainants, to the organisations for direct reply. The Ombudsman then monitors the reply and intervenes only when the organisation has failed to address and/or resolve the complaint satisfactorily.

(iii) Mediation

Mediation is a new service introduced by the Hong Kong Ombudsman in April 1997. In the voluntary and confidential mediation process, mediators act as a neutral party who will not make decisions or offer opinions on the merits of the dispute. Mediation allows both the complainant and the complainee organisation an on-the-spot chance to hear each side's story and to resolve their differences by themselves. The ultimate aim is to foster a 'win-win' situation in line with the Ombudsman's principle to strive for a resolution to a problem rather than finding fault.

Recent examples in the Northern Territory

Police complaints

As a result of a joint initiative between the NT Police Commissioner and the NT Ombudsman an informal resolution program has recently commenced for conciliation of *minor complaints against police*. It is based on similar programs operating throughout Australia. During the initial training phase, this program has received wide acceptance by police and a positive response from complainants who have had their complaints conciliated. ➤



"The effective handling of complaints can positively influence and enhance the public perception of the Police Service."

➤ Although most of the minor complaints which are considered to be appropriate for informal resolution are conciliated by an authorised police conciliation officer, it has been found that in other jurisdictions there is scope for some minor complaints to be mediated by an independent mediator from a Community Justice Centre or similar organisation. I think it is important to allow for this additional flexibility.

In May 1996 the NSW Ombudsman conducted a review of the minor complaints conciliation program and found that although some of the matters may appear minor, each one represented a serious problem for the individuals involved. It was also found that conciliations which were carried out with a genuine commitment and sensitivity could effectively address the concerns of the complainant. Systemic problems could be identified and the accountability of individual police officers to the public could be increased. The effective handling of complaints can positively influence and enhance the public perception of the Police Service.

Health complaints

Another area of interest for the ADR watchers is *health complaints*. In the NT it is anticipated that we will join all other Australian jurisdictions with the establishment of the Health and Community Services Complaints Commission in July 1998. As in a number of smaller jurisdictions the NT Ombudsman will be appointed as the Health Complaints Commissioner and granted powers under separate legislation.

Many will be aware that ADR, in the form of conciliation, plays a major role in the mechanisms used for responding to complaints against health providers. The successful use of ADR by the Victorian Health Services Commissioner in resolving health complaints gained considerable support in the May 1997 Final Report of the Victorian Law Reform Committee (Parliament of Victoria Law Reform Committee, *The Legal Liability of Health Service Providers — Final Report*, May 1997, Government Printer, Melbourne).

The Victorian Law Reform Committee

thought that the role of the Victorian Health Services Commission (HSC) should be expanded and recommended that, a 'party to a claim of negligence arising out of the provision of health services should be able to choose conciliation before the HSC prior to the issue of proceedings as an alternative to court-run pre-trial conferences' (*Victorian Law Reform Committee Recommendation 26*, p 209).

Conclusion

With an increasing number of successful mediations and conciliations in the context of complaints against public authorities, I believe that we will see an expanding role for the mediator and investigators trained and skilled in mediation.

Some ADR critics see the use of mediation and conciliation merely as a response to the resource constraints that many organisations are experiencing. It would be naive not to recognise that these constraints have played a part. However, ADR has been found to work well in many cases both for the complainant and the organisation being complained about. ●

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