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Joanne Staugas

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The role of judges in ADR

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It is difficult to provide an authoritative pronouncement on the state of mediation in SA without the benefit of any empirical data. The Australia-wide (and doubtless worldwide) trend of privatised justice being administered by an array of industry codes and schemes underpinned by either legislation or contractual arrangements is also evident in SA.

Many of the ADR processes provided by industry and commercial arrangements to operate outside of the courts require the parties to mediate before litigation can be commenced. There appears to be a growing demand for mediation and other ADR processes, driven by an increasing awareness of the benefits, in areas of cost and risk management, of implementing strategies for dispute prevention at an early stage.

In most respects, the profile of mediators in SA is unlikely to be too different to that of mediators in other states, although there are fewer of them and I suspect they are not as busy. The profile is one of retired judges, amongst them former Chief Justice the Honourable Leonard King, former Justices Jacobs, Fisher, Bollen and Brebner, the former Chief Justice of the District Court and an assortment of barristers, lawyers and retired professionals.

The one differentiating feature of the SA system that I believe will not be encountered elsewhere, is the current trial of sitting judges being appointed as mediators.

Pilot programme

The legal profession in SA and elsewhere has been criticised for not grasping the nettle of change as it occurs in the adversarial system of justice and for failing to embrace simple non-radical options for more efficient dispute resolution processes. In South Australia the judiciary has forged ahead.

In what appears to be an approach that stands apart from the national trend, the Supreme and District Courts of SA presently are conducting a pilot programme which provides a mediation service for litigants. The pilot programme provides for records to be kept against which future developments may be assessed. It is intended that the pilot programme will run for the whole of 1998 and court mediations will be conducted in accordance with a legislative scheme which was enacted in 1996.

Some features of the legislative scheme are:

- mandatory consideration of ADR by parties to proceedings;
- the courts constituted of a Judge are empowered to refer matters to mediation and conciliation without the consent of the parties;
- the courts are empowered to achieve negotiated settlements and Judges may mediate, but one who does so will be disqualified from taking any further part in the proceeding;
- terms of settlement achieved in a mediation may be embodied in a judgment;
- the Registrar is required to file a memorandum signed by the mediator recording the outcome where a mediation resolves by agreement, whereupon the court shall enter judgment which can be enforced against any party.

This seemingly efficient and cost effective administration of justice by the courts of SA seems a desirable response to the demands of the community for greater access to justice. Under the pilot programme the courts provide a single panel of mediators comprising retired and sitting judges. When a mediator is appointed by a court from the panel, any cost to the court of the conduct of the mediation is met by the Courts Administration Authority from funds provided pursuant to the *Judicial Administration (Auxiliary Appointments and Powers) Act 1988*. On the other hand, where the parties agree upon the appointment of a private mediator, the cost of the conduct of the mediation is to be met by the parties.

Areas of concern

There are some issues that arise as a consequence of the blurring of judicial and ADR functions that occurs when a process such as mediation is brought into a judicial system based on adversary, advocacy and adjudication. This is not to say that there is no place for non-adversarial processes within the courts, rather that there be clear definition of processes suitably administered from within the courts and that those processes be regulated. I do not believe that mediation is a suitable process for administration by an adversarial system of justice.

Much has been written in recent times by learned members of our judiciary, amongst them the former Chief Justice of the High Court Sir Gerard Brennan, Justice Michael Kirby, Justice Fitzgerald President of the Queensland Court of Appeal and SA Supreme Court Justice Olsson, regarding mediation in the judicial ➢

➢ institution. Many of these commentators have expressed considerable criticism.

My own consideration has brought me to the view that the development of the law in general is a critical aspect of the role of our judges. Increasingly the courts are being criticised for their judgments and it is difficult to see how a relaxation of the court's role in a system designed to impose decisions on warring factions will improve the situation.

A judge's role is to decide a case by applying legal authority, principle and policy. Judges are traditionally decision-makers not deal-makers. There are a wide range of matters that come into play in a mediation that go well beyond the types of matters that a judge can reasonably and properly concern himself or herself with in order to achieve a settlement. Probably the most significant of these is the private discussions that are held by the mediator with each party.

Sir Laurence Street has written about the issues facing the mediating judiciary and warns that if courts provide mediators from their own personnel, they place at risk public confidence in the integrity and independence of the judicial system. Sir Laurence says, and I believe rightly, that private access to a representative of the court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice and absence of hidden influence that the community rightly expects and demands that the courts observe.

Sir Gerard Brennan has written much about the administration of justice and the state of the judicature which he describes as impartial and independent of government and any other centre of financial or social power. It must be competent; it must enjoy the confidence of the people; and it must be reasonably accessible to those who have a genuine need for its remedies.

> A major consideration is accountability for the exercise of judicial power, which lies in the reporting of judgments and the critical appreciation given by reported reasons. The courts create precedent by which the law is applied and there is a risk that precedent will be similarly undermined by a shift in focus of judges away from decision-making towards resolution without an imposed decision, which is true mediation. Sir Gerard has said that the administration of justice by the courts should not be compromised by the intrusion, however unintended, of the commercial interests of third parties. This is exactly what mediation is all about, namely getting the parties to focus on their commercial interests. The facilitator of mediation should be either a private mediator selected by the parties or a specially trained court officer, not an appointed judge. Mediation presents a threat of compromise to what many eminent jurists describe as the most important judicial quality, namely detachment. This is a major issue that must be carefully considered before a culture develops in our courts that has the potential to undermine the overall integrity of the judicial system.

Conclusion

My main concern is that judges mediating disputes, while acting for laudible motives, will unintentionally erode the conditions that have been developed and maintained in order for there to be a truly impartial judiciary, accountable to the public and the legal profession.

In my view, the solution is to formulate suitable pre-trial processes defined and regulated by Rules of Court that provide for an opportunity to settle at an early stage and which can be managed by specially appointed court officers, but to leave the consideration and implementation of other ADR processes, in particular mediation outside of the courts, to the parties and their legal advisers. ❖

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