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The ALRC makes its report

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Editorial

The ALRC makes its Report

Laurence Boulle

We can now see the fruits of the Australian Law Reform Commission's (ALRC's) long labours. The ALRC has just produced its Report No 89, *Managing Justice — a review of the federal civil justice system*.

This is the final report of the ALRC in its investigation of the adversarial system of litigation, following a reference from the Commonwealth Government in 1995 to consider 'the need for a simpler, cheaper and more accessible legal system'. Wide consultations and a number of discussion papers preceded the final report, which is likely to be a point of reference in the legal system for many years to come.

The Commission is now chaired by Professor David Weisbrot and it has produced a thorough and well argued report, with excellent scholarly credentials and supportive material. It is also a weighty tome, coming in at 750 pages, which include an executive summary, a summary of recommendations, lists of cases and legislation, and a very useful index.

Some of the topics covered in the report are:

- education, training and accountability in the legal system;
- legal practice and model litigant standards;
- legal costs;
- legal assistance;
- general issues in practice, procedure and case management; and
- specific issues of litigation in the Federal Court, Family Court and merits review

tribunals such as the Administrative Appeals Tribunal.

It is reassuring to note the ALRC's approach to the 'judicial system in crisis' syndrome which has prevailed in recent years. There are of course numerous problems and defects in the civil litigation system but, as the report points out, it is difficult to find a civil justice system anywhere in the world which does not have serious problems. The Commission suggests that the many flaws in the Australian system are reparable and that it is not helpful to talk about the system being 'in crisis'.

While readers may differ over whether or not the defects can indeed be repaired, the Commission is surely correct in recommending that we move away from the 'crisis talk'. Apart from anything else, there is a debasement of common language in the continual use of the term crisis — if there was further deterioration would we have a 'critical crisis'?

The report is also candid about issues on which it has changed its mind during the course of the consultations and deliberations. For example, in an earlier discussion paper the Commission proposed the establishment of a standing national judicial commission to receive and investigate complaints against federal judges. In moving away from that proposal, it now advocates that each federal court system have its own regime for ensuring judicial accountability and that the legislature develop rules for dealing with serious complaints ➤



Editorial Panel



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➤ against federal judges.

Inevitably only a small part of the report relates to ADR matters. Even in this area there are limitations imposed by the constitutional boundaries within the legal system. While the court system is federally organised, ADR by its nature strives to overcome jurisdictional limits.

Nevertheless, for ADR followers there are a number of significant matters, some of which relate to the Commonwealth government as a user and provider of dispute resolution services.

Some of the main recommendations that deal with ADR include the following:

- legal practitioners should be required to undertake instruction in conflict and dispute resolution techniques as part of the professional development that is required to maintain a current practising certificate (rec 7);
- national model professional practice rules should include a standard requiring legal practitioners to advise clients, as early as possible, of relevant non-litigious avenues for resolution of the dispute which are reasonably available to the client (rec 18);
- national model professional practice rules should include a provision relevant to the practice of lawyer-neutrals in ADR processes and lawyers acting for clients participating in ADR processes, and should include a rule requiring practitioners to participate in 'good faith' when representing clients participating in such processes (rec 20);
- the Office of Legal Services Co-ordination (OLSC) should facilitate appropriate education and training programs to support dispute avoidance and management plans for government agencies and to promote awareness of the content and importance of the model litigant rules (rec 25);
- legal aid commissions should standardise data collection nationally and publish this data in their annual reports, with respect to both inhouse and assigned cases, on outcomes in conferencing and/or alternative dispute resolution services within legal aid commissions (rec 39);
- legal aid commissions should investigate establishing self-funding arbitration

schemes for family law property disputes, with a fee calculated by reference to the value of the property in dispute (rec 47);

- legal aid commissions should develop a comprehensive referral directory for legal and non-legal advice and services in each State and Territory which includes information as to avenues of dispute resolution (rec 56);
- the Attorney General's Department should develop a 'best practice' blueprint applicable to dispute avoidance, management and resolution for federal government departments and agencies (rec 68);
- each federal department and agency should be required to establish a dispute avoidance, management and resolution plan (rec 69);
- an interagency dispute management working group should be established and co-ordinated by the OLSC to provide a forum for sharing experience and knowledge on dispute management and resolution, to assist in developing dispute avoidance, management and resolution plans, and to evaluate such arrangements (rec 70); and
- the Federal Court should continue to monitor the use and outcomes of court annexed mediation. The Federal Court should develop a practice note requiring parties to inform the court, at the conclusion of a matter, about their use of private mediation services and the outcome — that is, whether the mediation assisted to resolve all or a significant part of the dispute (rec 92).

Here, indeed, is great food for thought, particularly in light of the imminent introduction of the Federal Magistrates' Court, the proposed introduction of the Administrative Review Tribunal to replace the Administrative Appeals Tribunal, and the long awaited amendment to the *Family Law Regulations*.

For further information on its report, the ALRC can be contacted on 02 9284 6333, by email at <info@alrc.gov.au>, or at their website at <http://www.alrc.gov.au>. ●

Laurence Boule, General Editor.