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Law Reform Commission of Western Australia review of the civil justice system

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ADR in the court systems

Law Reform Commission of Western Australia review of the civil justice system

Belinda Buschenhofen & Michael Mills

LRC Report

In September 1999 the Law Reform Commission (LRC) of WA released its final report entitled *Review of the Criminal and Civil Justice System* (the Report).[1]

The Report proposed various recommendations aimed at reforming the use of ADR for civil matters in WA.[2] The intention of the LRC was to provide guidelines for practitioners and litigants to resolve matters quickly without going to trial.[3]

This article will discuss some of the Report's recommendations on ADR, and comment on the implications of the Report for the current practice of ADR in WA.

Use of ADR in WA courts

During the past decade, ADR has been used increasingly in WA and already plays a significant role in the justice system. All WA courts presently consider a form of ADR for all parties involved in a civil dispute before the matter proceeds to trial. An officer of the court acts as the neutral party in the process. The dispute is usually confined to the matter before the court.

Supreme Court

The Supreme Court introduced mediation in 1993 under the case flow management powers of the Court[4] in an attempt to reduce the backlog of matters in the civil list awaiting trial. The procedure was initially used only in the expedited list but is now used throughout the civil list.[5]

District Court

All parties involved in civil litigation in the District Court are required to attend a pre-trial conference following filing of entry for trial.[6] It is estimated that about half of all actions are resolved without assistance from the Court, and another 30 per cent of actions resolve with the assistance of a registrar trained in ADR. Only 2 to 5 per cent of the 7000 civil actions initiated in the Court each year complete trial.[7]

All registrars have been trained in ADR. The method used at the conference varies from being facilitative to using a neutral evaluator, depending on the convenor and the particular dispute. Approximately half of all matters are resolved without a registrar's assistance, and a further 30 per cent resolve with that assistance.[8]

Local Court

Since 1996 parties to litigation in the General Division of the Local Court have been able to request that a pre-trial conference be listed following the filing of a defence to a claim.[9]

In practice, if the parties do not request a pre-trial conference, it is usual for a magistrate to direct that such a conference be held. The conference is presided ➢

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➢ over by an officer of the court who has undertaken training in ADR processes. A further conference will be held if the matter is not resolved at the first conference, after which the matter is listed for trial.

Interestingly, despite the pre-trial options for settlement, a significant number of matters settle on the day of the hearing.[10]

Implications for ADR practice

The recommendations proposed by the LRC are designed to assist in shifting the focus of the dispute away from the litigious 'rights based' dispute resolution embodied in the court process and towards 'interest based' dispute resolution, where the parties meet in a non-adversarial context and are encouraged to come to a resolution on which both parties agree.[11] While this objective has formed the basis for ADR practice in WA for some time, the changes proposed by the LRC significantly alter the extent to which ADR can be used to resolve disputes at its various stages.

The recommendations highlight the fact that current ADR practice in WA could benefit from:

- establishing a method of classifying disputes which would enable the courts to quickly identify the types of disputes readily amenable to ADR;
- increasing litigants' awareness of the benefits of ADR as an alternative to litigation;
- establishing incentives for the parties to negotiate in good faith;
- giving neutral mediators appropriate training; and
- legislative reform to clarify the parties' rights and protect the essential elements of the process (privilege and confidentiality).

I will discuss various recommendations made in the Report in the context of the above areas for reform.

Which disputes are amenable to ADR?

At present, there exists no system for classifying the types of disputes which come before the courts, and therefore there is no easy way of determining which types of cases are amenable to ADR. The Report stresses that in order to identify appropriate characteristics of cases amenable to ADR, and those which should proceed directly to trial, it is necessary to accumulate such data.

Increasing litigants' awareness of the benefits of ADR

Changing the mindset of litigants and their lawyers

ADR is of dubious value where it is regarded as merely another step in the litigation process. The Report recommends that a litigants' 'handbook of pitfalls' be developed which outlines the risks and pitfalls of litigation generally. The handbook would list the benefits to be gained by engaging in ADR and discourage the perception of court ordered ADR as merely another step in the litigation process.[12]

The Report also recommends changes to the *Legal Practitioners Act 1893* (WA) to impose an obligation on a legal practitioner instructed in a civil matter to draw his or her client's attention to, and advise them on, ADR.

Should ADR be compulsory?

While 'pure' dispute mediation involves no compulsion, it is difficult to assess whether mandatory ADR processes could be effective, due to the lack of data available.

The LRC posed the question whether the state should be entitled to insist that parties attempt to resolve matters quickly and without trial through ADR, when this process entails the parties using public resources to assist in the resolution of private disputes. The Report concluded that unless a particular case is assessed as unsuitable for ADR or falls within a number of specified exceptions, the parties should be expected to seek to resolve the dispute in good faith without resorting to litigation.[13]

The Report stressed that this recommendation was not to be interpreted as requiring the parties to 'capitulate on their principles or go beyond or below the sound elements of their case', but merely to 'reconsider those parts of their case which they accept ... are not clear or strong'.[14]

Who pays for court ordered ADR?

Central to the viability of court ordered ADR is the issue of who should pay for the service.

The present court based system of ADR is based on the premise that ADR can avoid the more expensive and time consuming costs of litigation in the publicly funded court system. Accordingly, the court bears the ➢

➢ cost of mediators.

The Report recommended that ADR undertaken prior to litigation should be funded by the litigants themselves. Where the parties choose an external, court approved mediator after litigation, they should share the cost equally. Even where the courts appoint neutrals outside the court system, the Report recommended that litigants themselves should continue to fund the process, as it would be too costly for such external mediations to be publicly funded.[15]

Where a case manager determines that court based ADR is appropriate, it would remain publicly funded.

Incentives to negotiate in good faith

Costs disclosure

At present, case management registrars have the power under the *Supreme Court Rules* to require solicitors to provide clients with statements of fees to date, an estimate of likely future costs, and the likely amounts recoverable if their client's case is won or lost. These orders are typically made before the pre-trial mediation conference and after the close of pleadings.

The LRC recommended that costs disclosures also be implemented in the ADR process at the discretion of the neutral.[16]

Sanctions for failing to negotiate in good faith

One of the most contentious Consultation Draft proposals was that of denying access to litigation in the courts if parties refuse to engage in ADR.[17] The LRC concluded that if parties refused to negotiate in good faith, they should be subject to sanction, but not denied access to the publicly funded court system.

The LRC recommended that the neutral should make an assessment of the parties' refusal to negotiate in good faith. Although the LRC recognised that imposing sanctions would involve the neutral making a value judgment on the process, it came to the conclusion that the neutral would not be compromised in making an assessment. The reasons the LRC cited in support of sanctions were that:

- a broad range of matters will fall outside the guidelines for referral to ADR;
- parties' wishes must be considered in the assessment of suitability for ADR;
- parties will have the opportunity to put their views personally at the initial meeting with the case manager; and
- according to rec 52, the only thing expected from the parties is an openness to consider those parts of their case which they accept or, after discussion, realise are not clear or strong.[18]

The party refusing to negotiate would incur a sanction at the costs stage of the proceedings.

Skills required by neutral mediators

Is legal knowledge necessary?

The Report noted that while it might be useful for a mediator to have some legal knowledge, mediators should not be required to have legal qualifications. Because the ADR process is essentially interest based, all that is required from mediators is that they have skills which would assist the ADR process.

A skilled neutral would also be capable of addressing the potential power imbalance in the ADR process should only one party have legal representation. In such a case, the skilled neutral who is familiar with the law on the subject matter of the dispute could ensure that the appropriate questions are asked of the self-represented party so that the dispute is more likely to be resolved fairly.[19]

The Report proposed that the training requirements for court appointed neutrals be dealt with in the proposed mediation Act.

Community based ADR

The LRC saw no reason why better resourced community mediation services could not play a significant role in court ordered ADR. However, provision should be made for parties to obtain information about their legal rights.[20]

Need for legislative reform

Effective ADR requires full and frank discussion between the parties. The Report recommended that a mediation Act be enacted which includes provisions based on the *Evidence Act 1995* (Cth). The Act would ensure the confidentiality of mediation conferences and to provide ADR neutrals with privilege from being required to give evidence of what transpires during the course of ADR.[21]

Conclusion

The Report recognises that the success of ADR depends on the attitudes of the parties. It is this premise that informs the recommendations that litigants have access to an appropriate method of ADR to optimise their chances of the dispute never reaching the trial stage.

However, while the Report is clearly aimed at using ADR to avoid litigation, it acknowledges that ADR and litigation should be seem as complementary rather than competing dispute resolution processes. The Report stresses that the attraction of ADR does not outweigh the need to maintain a civil justice system which is accessible, fair and equitable.[22] ●

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Endnotes

1. LRC of WA *Review of the Civil and Criminal Justice System* Project No 92, State Law Publisher, September 1999 (the Report).

2. The Report also proposed Alternative Criminal Charge Resolution (ACCR) in criminal cases, a topic which is beyond the scope of this article.

3. LRC of WA *Review of the Criminal and Civil Justice System: An Executive Summary* October 1999, State Law Publisher, October 1999.

4. *Rules of the Supreme Court (WA)* O 29.

5. In 1997, for example, of approximately 1300 civil proceedings filed in the Supreme Court, the Court conducted 283 mediations, of which 25 actions proceeded to trial after mediation failed and matters were resolved prior to trial: Report, para 11.5.

6. *District Court Rules* (WA) O 1, rr 2 and 3.

7. Report para 11.6.

8. LRC of WA *Consultation Draft: The use of Court-based or Community*

continued on page 92 ➢