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The ADR Bulletin

Making comparisons in ADR

Testing ADR processes

Dr Tania Sourdin

'One obvious problem in comparing the cost and benefits of ADR processes with those of traditional litigation is that any comparison with the cost of those cases that go to trial can be flawed because many civil cases are settled out of court.'

Until recently, there has been little focus on *how* dispute resolution processes work. With the introduction of ADR processes into the litigation system there have been calls for a greater evaluation of these processes and a call for 'proof' that such processes are quicker, cheaper or more satisfying. Such 'proof' has been difficult to obtain, partly because there has been little empirical evidence about how the traditional system works and about the costs and benefits of more traditional adjudicatory processes.

Outside the litigation system there has also been little focus on how disputes are resolved. Anecdotally, it has been suggested that there has been a decline in litigation and that more disputants are now accessing ADR processes before commencing litigation.

Evaluating ADR processes

What is evaluated — processes within and outside court and tribunal systems?

In addition to difficulties in terms of what is evaluated — for example, ADR processes within the litigation system (that is, through a court or tribunal governed process, or where parties simply opt out of existing processes without informing the court of their intentions) or ADR processes that may discourage litigation from commencing — there are significant methodological and conceptual difficulties in comparing ADR processes with traditional litigation and also in terms of evaluating and defining processes.

One obvious problem in comparing the cost and benefits of ADR processes with those of traditional litigation is that any comparison with the cost of those cases that go to trial can be flawed because many civil cases are settled out of court.[1] In addition, some of the possible benefits of ADR are difficult to measure. For example, the increased use of ADR may lead to a decrease in litigious or adversarial behaviour,[2] foster better relationships between parties to disputes or result in higher levels of compliance with outcomes.

Definitional variations — what is mediation?

Significant definitional variations among different States, courts and tribunals in relation to the range and variation in processes also makes evaluation difficult. There are considerable variations in the way in which ADR processes are defined and used in Australian courts and tribunals.[3] Another difficulty with research about processes is that processes are described similarly in legislation and rules but their application may vary greatly in practice. The variations mainly relate to the position and role of the neutral facilitator. This factor may mean that research findings are not at all comparable across jurisdictions or in different regions.

For this reason recent research that has taken place into ADR processes may have little general utility. For example, in relation to mediation, numerous definitions exist. In some jurisdictions the mediator is perceived to be active in making recommendations and furnishing advice to the parties. In most jurisdictions the mediator's role is perceived to be purely facilitative, and sometimes it has been recommended that 'the mediator's hand not be seen in the outcome'. In practice the processes used may not follow a pure mediation model (where the mediator may not proffer any opinion or advice) but may more closely resemble an evaluative model.

Evaluation research

Despite the issues noted above, there have been numerous attempts in the past decade to evaluate ADR processes. These attempts have at times been made in the context of a broader inquiry into justice (as with the Australian Law Reform

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Commission), or case management (see the RAND report reference below) or in response to specific ADR initiatives. In addition, research data is increasingly being produced by performance measurement technology that is in place within some courts and tribunals that will at least indicate where intervention and resolution may occur.

However, many evaluation reports remain 'unreported' as part of internal court or tribunal circumstances, or are not comparable in the Australian setting. For example, an American study by the RAND Institute for Civil Justice is one of the few comprehensive empirical studies currently available on the effects of court related ADR on cost, delay and perceptions of fairness.[4] The research evaluated six federal district courts that had mediation or early neutral evaluation programs. The study found that there was no strong statistical evidence that these ADR programs significantly affected or reduced time to disposition or litigation costs.[5] However, in many of the mediations studied the mediator gave an opinion on the likely outcome of litigation. The processes used tended to be evaluative rather than facilitative. The more facilitative programs appear to have produced more positive outcomes.

While there is no conclusive evidence about the cost and benefits of court related ADR, many studies suggest different benefits for some types of disputes. In one study of Family Court cases in Queensland, the average legal fees paid by clients involved in family law disputes were examined and there was clear evidence of lower fees where ADR processes were used.[6]

The indicators that could be employed in evaluating ADR processes include user rates, compliance with outcomes and removal of the sources of the problem.[7] Indicators can also relate to some of the more specific advantages of mediation over litigation — speed, convenience, informality, costs saving, greater control of the process, confidentiality and preservation of ongoing relationships.

The recent Australian Law Reform Commission (the Commission) report, *Managing Justice — A Review of the Federal Civil Justice System* (2000), highlights the need for ongoing empirical evaluation research in the general civil justice area. The Commission also noted as a general observation in its executive summary that:

> The Commission acknowledges the importance of ADR as a tool in resolving cases quickly, less expensively and to the satisfaction of parties. However, the Commission also cautions against uncritical acceptance of ADR as a panacea for all ills of litigation, much in the same way that tribunals were intended to provide the 'solution' to litigation problems in the 1970s.

The Commission research in the Family, AAT and Federal Court areas concentrated on a variety of aspects that included a focus on timing, case management and costs. The focus on mediation and other forms of ADR formed a small part of the research. This is partly because the amount of mediation practiced in each of these jurisdictions is small (this finding alone is of considerable interest, and could arguably have attracted further comment) and because the prime focus of the Commission was judicial adjudication, case disposal and outcomes rather than the key issues of relevance to ADR practitioners and theorists.

Conclusions

A large number of evaluations have now been conducted into ADR processes. However, most have adopted differing methodologies and as each has examined very different processes there are no conclusions that can be drawn either about methodology or the utility of ADR processes.

In past years, issues about who evaluates, how evaluations occur and what is evaluated have meant that much of the ADR that occurs in the community (particularly outside the immediate vicinity of the litigation system) remains 'unmeasured'. Recent evaluations suggest that a more coherent policy approach is emerging and that the government and other key sectors are supporting quantitative and qualitative research in the ADR area. The long term impact of such a policy change is difficult to determine. However, it appears likely that continued growth in ADR evaluations will mean that there will be more ADR to measure in the future, and may also lead to a greater

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focus on micro skills and ADR process improvements.

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Endnotes

1. For discussion of the methodological difficulties in evaluating ADR programs see Matruglio T *Researching Alternative Dispute Resolution* Justice Research Centre, Sydney August 1992; Caspi S 'Mediation in the Supreme Court — Problems With the Spring Offensive Report' (1994) 5(4) *Australian Dispute Resolution Journal* 4; Keilitz S (ed) *National Symposium on Court Connected Dispute Resolution Research — a Report on Current Research Findings — Implications for Courts and Research Needs* State Justice Institute, US 1994.

2. It has been suggested that those exposed to co-operative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour: Wanger P 'The political and economic roots of the "adversary system" of justice and "alternative dispute resolution"' (1994) 9(2) *The Ohio State Journal on Dispute Resolution* 203.

3. Australian Law Reform Commission *Background Paper on ADR* 1996, p 12.

4. Kakalik J and others *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* RAND Santa Monica, California 1996.

5. As above, p 53.

6. Cunningham M and Wright T *The prototype access to justice monitor, Queensland, A joint project of the Department of Justice, Queensland and the University of Wollongong* Justice Research Centre, Sydney 1996, p 29.

7. Ingleby R 'Why not toss a coin? Issues of quality and efficiency in alternative dispute resolution' in *Papers presented at the Ninth Annual AIJA Conference 1991* AIJA, Melbourne 1991.

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