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New horizons for ADR

Mediation and its place within the parliamentary system

by **Greg Rooney**

In his article 'ADR in Australian legislatures: are there prospects?' (2002 4(9) ADR 117), Laurence Boulle asks if there is room within the parliaments of Australia for alternative dispute resolution processes. My answers to this threshold question are 'yes' and 'why not?'

ADR processes have proven themselves to be effective aids to decision-making and conflict resolution in all areas of commercial, public, private, administrative and judicial life. There is no apparent reason, in my view, why this situation would be any different if such processes were used within the parliamentary system.

If one accepts the premise that the use of ADR has application within the parliamentary process then the question to be asked is — what form of ADR would work? Could it find a place within the current structural processes and, if so, could it enhance the effectiveness of parliament?

Style of Australian parliaments

The parliaments of Australia engage in robust debate on day to day issues that affect the nation and the States and Territories. Parliamentary processes are designed to explore and debate these issues with the ultimate aim of making a decision. These decisions are ultimately tested with the voting public in an election.

The public cut and thrust of political debate within parliament, as well as its subjective and opinionated nature, is an important social process that allows the public to examine the performance and value of their parliamentary representatives and the government of the day. ADR processes would need to work within these parameters. In this

context the term ADR would need to be defined as 'additional' rather than 'alternative' dispute resolution.

Potential models of ADR

It is then necessary to explore whether all processes that come within the broad definition of ADR would work within the parliamentary system. The National Alternative Dispute Resolution Advisory Council (NADRAC) has divided ADR into three distinct groups:

- processes that are determinative, such as arbitration and private judging;
- processes that are advisory, such as case appraisal and mini trial; and
- processes that are facilitative, such as mediation and conciliation.

I do not believe that there is a place for an adjudicative process within parliament. It is the role of the courts to provide the adjudicative role. The parliament should not be fettered in its decision-making powers by some form of internal rights based adjudication process. This separation of powers between parliament and the judiciary forms the basis of the doctrine which is at the core of our democratic processes.

The parliament is also well served with advisory processes to assist in the functioning of parliament. The committee system and the use of Senate inquiries are good examples.

This leaves the facilitative processes of mediation and conciliation. There is debate as to how the processes of mediation and conciliation should be defined. Both processes generally seek to set up a safe place for parties to take time out from their conflict to negotiate. It is suggested that conciliators play a more advisory role than mediators — although it should



be noted that in practice mediators often oscillate between a 'pure' facilitating role and a strategic reality tester and advisor role during the course of a mediation session. The practical differences between a mediator and a conciliator can, therefore, be blurred.

It is generally agreed, however, that neither process has a determinative function. For the purpose of this article I will use the word mediation as a generic term to cover both of these facilitative processes.

Mediation in the spotlight

I think it would be helpful to look further into the process of mediation so as to consider how it might be used to aid the current parliamentary process. Mediation can be viewed as having two points of focus.

First, it can be used as a means to focus on breaking a deadlock between parties in conflict. The mediator will provide a place for the parties to carry on their adversarial negotiations behind closed doors. The mediation remains an adversarial process with the mediator cajoling, encouraging and pressuring parties to settle. This adversarial style of mediation is the most commonly used form of mediation by lawyers.

One reason for lawyers' preference for this model is that it closely mirrors the adversarial processes that are so embedded in current legal culture. Lawyers have a high comfort level with adversarial negotiation. It is for this reason that most legal mediations are currently being referred to 'experts' such as retired judges and senior barristers who engage in an adversarial style of mediation.

Second, (and alternatively), mediation can have a more creative and empowering aspect. It can be used to help parties explore mutual interests so that the outcome ends up being something more than just a compromise. The interest based approach requires the mediator to provide a safe place for parties to take

time out from their positional battle to explore their common interests. This form of mediation seeks not only to break impasses but also to create fresh opportunities and improve commercial and personal relationships.

Mediators who use a more interest based approach are less likely to hold themselves out as 'experts'. They tend to focus on developing a creative negotiation relationship with the emphasis on encouraging the parties developing or reclaiming their own expertise. This style of mediation is starting to grow in popularity with commercial solicitors who have clients involved in long term contractual arrangements.

In my view, because of the adversarial nature of the parliamentary system and the healthy representation of lawyers within it, the adversarial mediation model would, at first, be favoured. However, over time I believe the more expansive interest based model of

the day when our parliamentarians use non-adversarial processes to achieve outstanding results.

Dispute systems design

If mediation is to be introduced into the parliament then the way it is introduced will be critical to its success. I would suggest that it be implemented by way of a process called dispute systems design. This process requires the key stakeholders within each parliament to design their own particular system. It is this act of being responsible for its creation that increases the likelihood of the system being workable and, more importantly, being used. You would then end up with eight different parliamentary mediation systems, one for each of Australia's eight parliaments.

Another essential aspect for the success of mediation is the need for some form of coercion for parties to attend. In our western culture it is

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mediation could develop.

This trend towards a more facilitative, interest based approach is starting to occur with lawyers who regularly refer matters to mediation. It can also be seen in the development of project alliancing in the oil and gas industry and relationship contracting in the building and construction industry. These two delivery systems are designed to produce better than 'business as usual' results.

The drivers of these systems are good working relationships and an alignment between all parties so that the risks and the rewards are shared. They specifically exclude adversarial behaviour, litigation and even some ADR processes. If the highly conflictual building and construction industry can move away from adversarial approaches to more interest based ones so as to achieve better results, then so can our parliamentarians. We might see

much easier to engage in adversarial conflict than to sit down with your opponent and talk. Experience shows that mediation is not used unless there are some judicial or administrative pressures placed on legal practitioners and parties to attend. I would suggest that someone, such as the Speaker of the House or a Select Committee, should have the power to direct parties to attend mediation.

Parliamentary mediation in practice

If mediation were adopted by parliament, what would it look like?

In my view, mediation would need to be a formal part of the administration of parliament under the designated officer in charge of parliamentary administration. A suggested name would be 'the office of the



parliamentary mediator'. The mediators would become public servants bound by secrecy provisions. They could be selected by a committee representing parliamentary members of all parties. They would have fixed terms. Conflicts about standing orders, personal clashes, misconduct and even political conflicts could be referred by the speaker or a select committee. All the normal confidentiality provisions would apply.

Would it be used? This is the big question. The adversarial culture is heavily embedded in the parliamentary process and the use of mediation would require a huge change in culture — but that has not prevented the legal profession and commercial sector from adopting it.

The writers Ury, Brett and Goldberg¹ talk about the concept of power, rights and interests when people engage in conflict. People can use power battles to resolve disputes such as strikes and lockouts. They can use a rights based approach such as industrial tribunals or courts. Or they can use interest based negotiations such as mediation.

The dominant driver of the parliamentary process is the use of power based on superior numbers.

For interest based mediation to be considered you would first have to convince the parliament of the benefits of a system in which a neutral person creates a venue in which he or she controls the process and where parties in conflict engage in an interest based negotiation.

The first job would be to explain interest based negotiation to politicians. This is something that we in the mediation profession have had difficulty in effectively doing within our own profession and to those outside it. Trying to explain it to politicians would require us to get our own house in order first.

Second, politicians would have to be convinced of the value of having a neutral third party involved in the negotiations. There is an unwritten law that does the rounds in local government administration (shire clerks, engineers, town planners and so on) that 'he or she who controls the agenda (and by inference the flow of information) controls the outcome'.

To let go of that control and mediate has been one of the biggest hurdles for administrators to overcome. The perceived loss of control would have to be dealt with.

The concept of directing your energies to maintain control is illusionary. It often results in a loss of control because there is a narrowing of focus. Mediation offers a period of 'time out' in which a safety net is created to allow a broadening of the focus.

Benefiting the parliamentary process

The next step would be to demonstrate how it would benefit (in the sense of complement or add to) the parliamentary process. The challenge would be to convince the dominant party, the government of the day, that it would gain advantage from the process — or, more importantly, that the opposition would not be advantaged.

If the dominant party could improve the quality of decisions that come out of its term of office then there should be fewer time bombs waiting to explode. After all, history shows that governments lose elections rather than oppositions winning them. Often exploding time bombs have a life of their own. Mediation can offer a measure of containment.

In light of the recent controversies surrounding the performances of members and the quality of decisions coming out of the eight parliaments of Australia, it is perhaps timely to look seriously at systems that can help produce a better working atmosphere for our political representatives and better outcomes from our parliaments. ●

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Endnotes

1. Ury, Brett and Goldberg *Getting Disputes Resolved* Jossey-Bass San Francisco 1988.