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ADR Bulletin

Shaping ADR through legislative instruments

Developments in mediation legislation

Robyn Carroll

Following a comprehensive review of the criminal and civil justice system in WA, the Western Australian Law Reform Commission (WALRC) recommended, along with many other things, that a Mediation Act be enacted in WA.[1] No legislative action has been taken on that specific recommendation to date, but as the WALRC's recommendations are gradually implemented some form of legislation remains a possibility.

This article will comment on the Mediation Act recommendation and highlight some of the many issues that need to be addressed if similar action is taken in any other jurisdiction. These include whether there is a need for a Mediation Act, the benefits and disadvantages of an Act, and what such an Act might cover. A further issue that will be touched on is the possibility of uniform mediation legislation in Australia.

All States and Territories and the Commonwealth have legislation that applies to specific areas of disputing, or to particular dispute resolution forums, such as courts and tribunals. The steadily increasing number of statutes in which mediation is provided

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for as a dispute resolution process raises questions about the need for legislative provisions that clarify the legal status of mediators and further the objectives of mediation by protecting the integrity of the process in other ways. The types of provisions that are currently found to a greater and lesser extent in legislation can be categorised as regulatory provisions or beneficial provisions. (These can be distinguished from procedural provisions, which establish mediation as a process under a particular statute and, in some instances, set out procedural aspects of the process.) A brief overview of regulatory and beneficial mediation legislation follows, as background to a discussion of Mediation Acts.

Regulatory legislation

This is legislation that regulates the practice of mediation by mediators. Typically this type of legislation establishes standards of competency, including minimum qualifications and an approval process or registration scheme. The legislation will generally confer power on an appointing or accrediting body to confer and revoke accreditation or registration in appropriate circumstances. While it is usual for there to be some process for the appointment of a mediator in the legislation, it is more common for legislation to provide for mediators to be approved than registered.

Beneficial legislation

This is legislation that supports the mediation process by clarifying the rights, obligations and protection of parties to mediation, mediators and, to a limited extent, third parties to the mediation. Typical provisions include protection of the confidentiality of the process and protection of mediators from civil action. It can also include legislation that imposes duties on mediators. Where legislation imposes on the mediator a duty of non-disclosure, it reinforces the confidential nature of mediation. Where the legislation imposes on the mediator a duty to disclose, it protects other interests that may be affected by the mediation process.

Central to these beneficial provisions are the rules of confidentiality, privilege and immunity. Confusion can result from the use of these words because they are often used interchangeably.

- 'Confidentiality' refers to the obligation imposed in certain circumstances on parties and mediators not to disclose to any third party (including in court proceedings) information given in confidence. There are various remedies for unauthorised disclosure of confidential communications. These depend on the source of the obligation: common law, equitable or statute. Remedies include injunctive relief, compensation and the ability to prevent privileged evidence being admitted in a court or other legal proceeding.
- 'Privilege' refers to 'a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed'.[2] The rules of privilege involve careful balancing of competing interests.[3] A successful claim of privilege renders evidence of what was said, or documents exchanged, inadmissible in court. The law of privilege, therefore, has a narrower application to mediation than the law of confidentiality.

  The tendency to refer to information exchanged in mediation as 'confidential and privileged' occurs because it is the confidential nature of the information that leads the law to treat it as privileged. On their own, however, each term is capable of referring to different rules.

  The word 'privilege' is used also to describe the protection afforded to parties and mediators from legal liability. For example, the law of defamation recognises that statements that might otherwise be defamatory will not be actionable if they are published in circumstances where for policy reasons the law confers a qualified or absolute privilege. Some statutes expressly provide protection from defamation.
- Similarly, the law recognises that there are policy reasons for conferring immunity from civil suit on those involved in judicial proceedings. While it is a privileged status to be immune from suit, it is less confusing if the word privilege is not used in this context. Statutory provisions conferring immunity generally refer to 'protection' of the mediator[4] or 'exoneration from liability'.[5] In this article, provisions that provide protection from liability will be referred to as conferring immunity.

Mediation Act 1997 (ACT)

The ACT is the only jurisdiction that currently has one Act of broad and general application to mediation and mediators: the *Mediation Act 1997* (ACT) (the Act). Containing both regulatory and beneficial provisions, the Act provides for the registration of mediators who, once registered, are able to invoke the provisions relating to admissibility of evidence (s 9), protection from defamation (s 11) and immunity from civil suit (s 12). Mediators are also bound not to disclose information obtained in a mediation session other than in prescribed circumstances.

Registration is granted under the Act to a mediator who satisfies an 'approved agency' that they have satisfied the necessary requirements for approval, including that they have achieved the standards of competency prescribed under s 5 of the Act.

The Act does not prohibit the practice of mediation by unregistered mediators, nor does it define mediation. Any person practising as an unregistered mediator would need to rely on context specific legislation or the common law if legal proceedings were brought against them by the parties, or if they were called to give evidence about what took place in the mediation.

Competing principles in regulatory and beneficial legislation

Not surprisingly, efforts to regulate a dynamic and developing process like mediation bring to light competing principles. There is tension between the need to balance consumer protection with concerns about over-regulating a developing and diverse practice. Tension also lies between the competing desire to protect the

integrity of the process by upholding confidentiality while ensuring appropriate levels of mediator accountability. There is a fine balance to be reached between the desire to protect the integrity of the process and thereby to encourage its use by providing legal protection to the parties to mediation and the mediator, and not bringing the integrity of the process itself into question. It is suggested that further attention is needed to ensure that neither confidentiality nor immunity is conferred in terms so absolute that mediators are not held accountable for serious misconduct.

There are many forms of accountability — remedies resulting from legal proceedings being only one. Ideally mediation practice will be guided by standards acceptable to consumers and mediators alike that are adopted rather than imposed. NADRAC's most recent report, *A Framework for ADR Standards*, identifies two further principles that need to be balanced in any efforts to impose standards or regulate ADR in Australia. These are the diversity principle and the consistency principle.[6] It is suggested that these principles are important not only to regulation and regulatory legislation but also to beneficial mediation legislation. Balancing all of these principles poses challenges at the policy formulation level. Balancing diversity and consistency raises questions in particular about the efficacy of uniform legislation.

Diversity principle

As mediation is a flexible and adaptable process, unhampered by the many procedural and evidential rules that apply to determinative processes, it needs to be sensitive to diversity. The need for this sensitivity applies equally to regulation and legislation. Concerns about over-regulation of family mediation practices with a resultant lack of diversity among family mediators prompted another term of reference to NADRAC, leading to the report on Pt V of the *Family Law Regulations 1984* (Cth).[7] Concerns have also been expressed about the adverse impact of standardisation of processes and practices on Aboriginal ADR processes.[8] It is argued that cultural and social issues are unlikely to be adequately taken into account by uniform standards on matters such as flexibility, ethical practice, training and accreditation, and confidentiality.

There are also dangers in enacting legislation that is unduly prescriptive about what constitutes mediation. If mediation is too narrowly defined so as to exclude any advisory role by the mediator, or if the expectation of mediator neutrality is too high, arguably this will inhibit the growth of mediation in areas of disputing where it has a great deal to offer.

The introduction of mediation specific laws, by virtue of their general application, poses obvious difficulties for the diversity principle. In turn, this poses difficulties for uniform legislation. There are concerns that 'uniformity' will stifle the growth and development of a process whose hallmarks are innovation and creativity. While there are arguments against uniformity, it does not of necessity deny the benefits of 'model legislation' that can be adapted and applied to diverse but similar mediation contexts to achieve higher levels of consistency than at present.

Consistency principle

As it is a basic premise of law making that like cases should be treated alike, there is a reasonable expectation of consistency in the way that mediation is dealt with in legislation. In an emerging field like mediation it takes time to settle on the appropriate legal rules and to apply them consistently. Closer examination of mediation and other ADR legislation reveals that there are a number of ways in which consistency issues arise.

Definition of consistency

There are numerous difficulties surrounding the definition of mediation. As Laurence Boulle points out, mediation is not easy to define.[9] As mediation often is not defined in the legislation that provides for its use, variations will occur depending on whether a conceptual or practical definition is adopted and applied in a statutory context.[10]

There are arguments for and against wide and narrow definitions of

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mediation and it is important that these are considered. While at one level the question of what constitutes mediation is fundamental to our understanding of the process, from a consistency viewpoint it is important that, whatever our understanding, like processes are defined in like ways. One task for drafters of any future Mediation Act will be to decide whether mediation should be defined in the Act, and if so, what definition is most appropriate.

Rule consistency

This aspect of consistency relates to the substantive rules applicable to the parties, the mediator and others affected in some way by the mediation process. There are numerous ways that rule inconsistency can arise: there may be different rules relating to the same process in different Acts; there may be inconsistency in the rules applied to other ADR processes; and there may be different rules applied between jurisdictions. The following are some examples of this.

- *Consistency between mediation processes*: examples of inconsistency can still be found in privilege, disclosure and immunity provisions.[11] Arguably, the greatest need for legislative consistency is with respect to privilege. Overall there is a discernible trend to render mediation communications and documents used in mediation inadmissible, subject to specified exceptions. It is with regard to the exceptions that there is the most inconsistency. There are also variations in the wording of the provisions that determine the scope and application of the privilege: what constitutes a 'mediation communication'; when a 'mediation session' commences and ends; and in what proceedings the evidence is inadmissible.
- *Consistency between ADR processes*: the introduction of a Mediation Act would necessitate a review of other legislation containing regulatory or beneficial provisions relating to mediation and other ADR processes. An obvious example is the *Commercial Arbitration Act 1985* (WA) (CAA). Section 27(1) provides that:

  > Parties to an arbitration agreement —
  > (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; … whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

  Section 51 of the CAA provides:

  > An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity.

  These provisions raise two obvious questions. First, do arbitrators conducting mediation under s 27(1) of the CAA have the protection conferred on them in their capacity as arbitrators under s 51 of the CAA? A literal reading of s 51 would suggest not. Second, if a Mediation Act were introduced, would it be the intention that immunity along the lines of provisions operating under other Acts, for example the ACT *Mediation Act*, be conferred on an arbitrator when mediating? If so, the anomalous result would be to confer greater protection on the same person acting as a mediator than as an arbitrator.[12]
- *Consistency between jurisdictions*: obvious difficulties arise when different jurisdictions apply different laws and regulations to the practice of mediation in a particular dispute. Practitioners operating on a national basis and national users, such as insurers, are faced with differing provisions and court decisions in different jurisdictions. 'These legal differences create prospective inconsistencies over the rights and obligations of parties and providers in ADR.'[13] Consequently, NADRAC recommended the following.

  > That Commonwealth, State and Territory Governments undertake a review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes. That this review provide recommendations on how to:
  > (a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and
  > (b) provide means by which consumers of ADR services can seek remedies for serious misconduct.[14]

  The need for rule consistency has become even more imperative by the use of online mediation. Concerns about cross-jurisdictional mediation is one factor underlying the *Uniform Mediation Act 2002* in the US.

Uniform legislation

Another issue for consideration is whether there is scope for uniform legislation in Australia, that is, where the same law is enacted by each State and Territory and the Commonwealth. In the US an ambitious project was undertaken by a joint committee of the American Bar Association and the National Conference of Commissioners on Uniform State Laws to create a Uniform Mediation Act (UMA). The final draft was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in August 2001.[15]

The Drafting Committee argued that uniform mediation laws would be of general benefit for a number of reasons. First, uniformity is necessary in order to predict if something which is or is not admissible in one jurisdiction will be treated in the same way in another jurisdiction. Second, uniformity is important in cross-jurisdictional mediation. With the increase in online mediation this is an issue of growing concern. Third, without uniform laws, a person signing a mediation agreement will not know where a future mediation will take place and therefore what privilege the law will provide. Finally, it is argued, uniformity contributes to simplicity.[16]

The primary focus of the UMA is a privilege that assures confidentiality in legal proceedings. The objective is for the 250 privilege statutes that presently exist among the States to be repealed and the model provisions adopted. The UMA, therefore, aims for uniformity in only one aspect of beneficial legislation. Other beneficial rules relating to confidentiality (disclosure in circumstances other than legal proceedings) and immunity will continue to be dealt with by State laws. The UMA does not attempt to introduce uniform provisions relating

to mediator qualifications, authorisation of mandatory mediation or standards for mediators. These also would continue to be regulated by State laws.

Proposal for WA Mediation Act

Presently in WA mediators are subject to general law principles and any applicable context specific legislation. As a result, there are some areas of mediation practice which operate outside any regulatory or beneficial legislation. Nonetheless, many mediators belong to professional associations or organisations that require their members to adhere to codes of ethics and other voluntary standards, and limited forms of protection can be achieved by contractual agreement.

One consequence of the present patchwork of laws is inconsistency in the rules that apply to mediation proceedings between different areas of mediation practice in WA. The same mediator working with parties involved in a neighbourhood or other community dispute will be in a different legal position compared to when she or he mediates under directions in the Supreme Court or as an approved family mediator. More particularly, a mediator in a community mediation centre in WA does not operate with the same certainty as to their legal status as their counterparts, for example, in NSW, Victoria, or Queensland.

Concerns have been expressed by the Aboriginal ADR Service about difficulties with confidentiality in resolving disputes involving Aboriginal and Torres Strait Islander communities and the uncertain legal status of their mediators.[17] While community mediation centres can limit their liability through written terms in contracts made between the centre and the participants in mediation, in some instances (particularly in disputes involving Aboriginal people in remote communities) it is considered inappropriate to enter a formal agreement in this way. Consequently, mediators act in some cases without even the level of protection that a contractual term can provide.[18]

While the calls for a Mediation Act in WA have not attracted a lot of attention outside the ADR community, it is clear that concerns do exist about the need to protect the confidentiality of the process and the potential exposure of mediators to legal action.

The WALRC made a number of recommendations and as the terms of reference related to the court system, most of the recommendations focus on ADR in court proceedings. There are, however, important recommendations concerning community mediation. Of the recommendations in the Final Report relating to ADR, five are directly relevant to the key recommendation that a Mediation Act should be enacted.

The WALRC recommendations recognise the potential for mediation specific legislation to support mediation in WA. It is suggested that there are good reasons to introduce some form of mediation legislation in WA. These reasons include further State endorsement of mediation as a significant dispute resolution process, the educative function of legislation and the consistency that can be achieved through legislation. There are many issues surrounding such legislation and the competing principles of consumer protection and self-regulation, confidentiality and accountability, and diversity and consistency pose challenges.

Matters to be considered if a Mediation Act is introduced

First, it needs to be clear as to which areas of mediation practice the legislation would apply and how broadly mediation is defined. The WALRC recommendations do not extend to mediation within WA other than in the courts and community mediation centres. If mediation specific legislation is introduced it should aim to support the practice of mediation wherever it takes place in WA, including in boards and tribunals,[19] and private mediations. This will lead to a greater degree of consistency in the law. Where diversity is required, in terms of process and procedure, regulation and beneficial provisions, this can be achieved in legislation specific to the area of dispute.

Second, it needs to be clear what type of provisions the legislation would contain. The WALRC recommendations refer to confidentiality, privilege and

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appropriate exceptions. They also envisage a process for regulating mediation practice including registration of approved neutrals. Other beneficial provisions that might be considered for inclusion are disclosure, immunity and enforceability of agreements. The broader the application of the legislation, the more difficult it becomes to apply one provision to various contexts. While some aspects of disclosure, for example mediator disclosures to the parties, may be suited to a general rule, the need for disclosure to third parties is more variable. Closer consideration needs to be given to the value of consistency in this respect.

The same applies to enforceability of mediation agreements. While there may be arguments in support of providing statutory immunity to mediators, the rationale for doing so is quite different from the rationale for protecting confidentiality by conferring privilege on mediators. Any provision for immunity needs to be balanced by effective accountability mechanisms, such as qualification and practice standards, and being amenable to complaints procedures.

Third, it needs to be decided what form the legislation will take. It could be legislation specific to mediation, in the form of a Mediation Act or, if the legislation were confined, for example to beneficial provisions, by amendments to the *Evidence Act 1906* (WA) in similar fashion to the *Evidence Act 1958* (Vic). If the legislation were intended to have narrower application it might be appropriate to be included in context specific legislation, such as a Community Mediation Centres Act.

If regulatory provisions are enacted, consideration will need to be given to the regulatory function taken on by the State, including how standards of practice will be regulated. Investigation into this would be assisted by examining the registration scheme used in the ACT and other situations where regulatory provisions are in place, for example in court annexed mediation. It will also be advisable to monitor progress made towards self-regulation in the wake of NADRAC's *A Framework for ADR Standards*, as this will have implications for regulation schemes.

The spectre of cross-jurisdictional uniform legislation raises similar issues. First, to what areas of mediation practice would uniform legislation apply? There would be immense difficulty co-ordinating the legislation in all Australian jurisdictions to apply to all or a range of contexts. In any event, in the light of the diversity principle, it is difficult to see good reason or support for uniform cross-context legislation.

Second, what aspects of mediation law would benefit from uniformity? Clearly there are benefits in cross-jurisdiction consistency and certainly there is scope for more consistency between regulatory and beneficial provisions in all Australian jurisdictions. The most pressing case for uniformity, as recognised in the US, is the law of privilege as applied to mediation. There is potential to achieve uniformity by adopting s 131 of the *Evidence Act 1995* (Cth) or similar. In practical terms, however, this is unlikely in the absence of moves to adopt a uniform law of evidence in Australia.

The absence of a practical imperative or political will to enact uniform mediation laws or, more particularly, a uniform provision on admissibility of evidence, need not detract from developing 'model' laws that provide an educative and drafting tool. There are a number of other reasons why 'model' provisions, rather than enacted uniform provisions, may suffice. By contrast with the US, the volume of legislation in Australia is low.[20] Also, the inconsistency in legislation in Australia, while pronounced, is far less than in the US. Much of the legislation in Australia has been drafted with the benefit of experience with earlier models so some of the technical difficulties, such as with respect to confidentiality and privilege, have been avoided.

Another important reason why model legislation may suffice is that in key areas in which mediation is used in Australia, uniformity already exists. In family law there are statutory provisions concerning admissibility of evidence, disclosure and immunity that apply nationally by virtue of Commonwealth legislation. In this area of practice there are national advisory bodies that have input at a policy level.[21] In addition, the institutionalisation of mediation within courts has been accompanied by co-ordination of policies on procedure, practice and legislation.[22]

To conclude, mediation laws need to be developed to achieve rational and workable rules that balance the twin principles of consistency and diversity. While there is merit in seeking consistency, uniformity should not be regarded as an end in itself. Similarly, while there may be merit in a Mediation Act, careful consideration needs to be given to the form it should take. ●

This is an abbreviated version of an article by the author published at (2002) 30 UWAL Rev 167.

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Endnotes

1. WALRC *Review of the Criminal and Civil Justice System in Western Australia Final Report* Project 92 1999.
2. *Butterworths Concise Australian Legal Dictionary* Butterworths Sydney 1997 p 316.
3. In mediation a court will be aiming to balance the desire to protect the confidentiality of the process against the policy of ensuring that the court has before it the benefit of all available evidence.
4. See *Supreme Court Act 1935* (WA) s 70; *Mediation Act 1997* (ACT) s 12; *Family Law Act 1975* (Cth) s 19M.
5. *Evidence Act 1958* (Vic) s 21N; *Community Justice Centres Act 1983* (NSW) s 27.
6. NADRAC *A Framework for ADR Standards* Canberra 2001 p vii.
7. Above note 6.
8. Helen Bishop, Manager of the Aboriginal Alternative Dispute Resolution Service, Department of Justice, WA, submission to NADRAC on the Development of Standards in ADR entitled *Influences Impacting on Aboriginal Alternative Dispute Resolution Processes in the Context of Social and Cultural Perspectives*, copy on file with author.
9. Boulle L *Mediation: Principles, Process, Practice* Butterworths Sydney 1996 p 3; and see above note 1 on some of the difficulties with definitions.
10. Mediation is not defined in Western Australian Acts. Some legislative examples of where mediation

or the mediation process is defined are set out in ALRC *Review of the adversarial system of litigation: ADR — its role in federal dispute resolution* Issues Paper 25 1998 p 25.

11. For a discussion and critique of absolute immunity and inconsistencies in the law in this respect see Carroll R 'Mediator Immunity in Australia' (2001) 23 *Sydney Law Review* 185 at 194–95.

12. Not surprisingly there have already been calls for arbitrators to be granted fuller immunity by statute. See Hunt R 'The Uniform Commercial Arbitration Acts: time for a change? Part 1' (1999) 17 *The Arbitrator* 208, where he argues that the *Uniform Commercial Arbitration Acts* should be amended to provide the more complete immunity afforded by s 74 of the *Arbitration Act 1996* (UK).

13. Above note 6 at p 78.

14. Above note 6 at p 79.

15. Details of drafts and the final styled draft are available at <www.pon.harvard.edu/guests/uma>.

16. *Uniform Mediation Act*, May 4 2001 Draft 'Prefatory Note' Pt 2.

17. Bishop H *Western Australian Dispute Resolution Association Newsletter* December 2000 p 2.

18. Information provided during an interview by the author with Helen Bishop, Manager of the Aboriginal Alternative Dispute Resolution Service, 7 November 2001.

19. The WALRC recommendation for the creation of a WA Civil and Administrative Tribunal is currently being implemented by the WA Government.

20. Writing in 2000, Altobelli approximated that there were 104 statutory instruments across Australia referring to mediation or mediation like processes: Altobelli T 'Mediation in the nineties: the promise of the future' (2000) 4 *Macarthur Law Review* 103 at 122.

21. These include NADRAC, the Family Law Council, the Family Services Council and the Family Law Section of the Law Council of Australia.

22. For example, Law Council of Australia *Proposed Model Rules for Court-Annexed Mediation* Amendment No 4 (11 February 1994) endorsed by the Standing Committee of Attorneys-General, available at <www.lawcouncil.asn.au/policies.html>.

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