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# The personal and the political in ADR

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# ADR bulletin

The monthly newsletter on dispute resolution

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Volume 6 Number 10

## Critical issues in ADR

# The personal and the political in ADR

Interview with **David Bryson**

General Editor



**Laurence Boule**

Professor of Law,  
Bond University, Queensland

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Diary and happenings

*This is the first in a series of dialogues between the editor and leading ADR theorists and practitioners about critical issues in the field. The contributor in this dialogue is David Bryson*

*David, you have referred in the past to the tension between the daily work of conciliators and mediators and wider trends in the global society.*

*What do you mean by this?*

**DB:** Let me illustrate with a story about an ADR meeting I conducted some time ago, which still occasionally haunts me.

I was facilitating a workplace dispute, referred to me as part of a mandated ADR scheme. It was a meeting between a 30 year old male skilled worker, who had suffered a serious injury that will be with him for the rest of his life, his employer, and the insurer. The worker had a union representative but I asked the worker to speak for himself first. With passion – eyes flashing, and at high volume – he told how his doctors had said he was unlikely to ever work in his profession again. He described his headaches, depression, episodes of violent outbursts, heavy doses of anti-depressant medications, and how his wife had recently left home with the kids. He was now struggling to make ends meet.

*Apart from this powerful verbal narrative, what else was occurring in the room?*

**DB:** While telling his story he occasionally flashed a look at his former employer, who had retreated into the corner of the room, but most of his attention was focussed on the neat, fashionably dressed woman of his own age from the insurance company. She had made the decision to terminate the workers' compensation payments because the insurance doctors claimed he could return to his pre-injury duties. The worker blamed the insurance company as being primarily responsible for what had happened to him – he claimed they had ignored his treating doctors' views, lost documents they had been sent, not returned phone calls, and hidden behind bureaucratic red tape. In the weeks prior to the meeting he had suspected he was under video surveillance, something the insurance company neither confirmed nor denied.

Once all had had their say and I summarised the key issues in dispute, I broke for private meetings, first with the employer and insurer. As I took my place after closing the door I saw that the insurance representative was quietly crying. Tears began to run down her cheeks, which she occasionally wiped away with the back of her hand, leaving a smudge of mascara. She was disappointed with me for not preventing the worker from telling his story in the way he did. 'You should have stopped him saying what he said! I am just doing my job,' she said.

*With such distress in a separate meeting, was this the occasion to acknowledge her predicament and make an apology of some kind?*

**DB:** I certainly expressed concern for her feelings. I explained that one of the primary goals of ADR was to allow an opportunity for participants to express their feelings as well as their substantive concerns and that all responses are OK so long



## Editorial Panel

**Nadja Alexander**

Professor of Dispute Resolution,  
Director of Practice  
Australian Centre for Peace  
and Conflict Studies,  
University of Queensland

**Tom Altobelli**

Associate Professor,  
School of Law,  
University of Western Sydney

**David Bryson**

Conciliation Officer,  
WorkCover Conciliation  
Service, Victoria

**Peter Condliffe**

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and Facilitator, Victoria

**Margaret Halsmith**

Consultant, Mediator,  
Facilitator, Trainer, Perth

**Shirli Kirschner**

Resolve Advisors Pty Ltd,  
Sydney

**Michael Mills**

Partner,  
Freehills, Sydney

as there is no disrespect or abuse. I said that in providing for this I was not favouring a person because they expressed themselves with heat rather than with coolness.

I consciously decided not to make an apology because I thought the rawness of the narrative was legitimate in such a meeting. And besides, who was to apologise for what?

However, it was as if we were all caught up in a larger drama in which the actors could only change a sentence of the script, but carried the weight of the success or failure of the play.

*What do you mean exactly?*

**DB:** One of the things that strikes me about this experience is that it was like I was facilitating between two diametrically different worlds and the individuals within them: one overflowing with personal anger, grief, loss and failure; the other the cautious, dispassionate corporate world where decisions, needing to be justified to managers and auditors, are heavy with expert evidence, cost estimates and cautious admissions of responsibility. I am sure this experience is a common one for ADR practitioners working in many different contexts.

A part of me is at home with the ability of ADR (even compulsory ADR) to offer a human contribution to what Helen Garner in her book *The First Stone* calls the 'complexity of context'. ADR has a much broader view of the concept of relevance than the courts, and that is a crucial part of its role in society. But I can be rattled sometimes by the transaction when it brings such wrenching, incompatible tensions into the same room, across the one table.

*Are you saying that it is not possible for ADR to function in dispute situations where such worlds collide?*

**DB:** No I'm not. I witness daily the valuable contribution that ADR plays in its role, however limited, in humanising interactions within a system. But there are occasions when the wider context is thrown into high relief, when it is uncomfortable for me to transact a consensual exercise when the real, unspoken issues at stake centre on global tensions between the individual and the nature of their employment and, as with the people in my story, therefore between the

individuals themselves. Not only does it feel like the ADR event does not make any difference to something or someone beyond the particular event, but there is discomfort that the real players are not at the table and that I am acquiescing in the face of that absence.

*I agree with you that this response may be felt by ADR practitioners in various contexts. I wonder whether this arises because the ADR movement has jettisoned a fundamental political and critical role in society in its drive to be accepted, professionalised, and institutionalised?*

**DB:** I think that where there are host systems to ADR – industrial, jurisdictional, government, legal – then those of us who are working in that context, or are thinking about how ADR can function best within those systems, have to recognise the wider tensions and enter into the debate about the governing environment. This is *political* in the broadest sense of the word.

*So you're suggesting that ADR policy-makers should become more political and socially-responsive?*

**DB:** Yes, because to rely on others to do so may not be a sustainable position any more. Government and regulatory bodies have had these debates beaten out of them to some extent, or they resort to short-term pragmatic ADR solutions rather than actions based on real public policy considerations. The issue for the introduction of ADR is greater than 'let the forum fit the fuss'. It must include questions like, 'Is the presence of this fuss something that we want to tolerate in our society, our industry, our workplace?'

Interestingly, these debates often result in the introduction of structures outside ADR that are non-consensual, big-stick mechanisms that provide the boundaries for ADR functions and the capacity for it to work effectively.

*Do you have examples of when this has been done, when ADR has demonstrated a more political and socially-responsive contribution? After all, conciliators and mediators are hardly a well-organised group.*

**DB:** The clearest examples I know of are in industry-based ADR schemes, such as the National Electricity Market,

and the Telcos service providers industry association (SPAN), where code rules govern the way competing participants relate to one other when they disagree. Different levels of dispute resolution intervention, from consensual to determinative, are prescribed and there is built in expert assistance and coaching along the way. There are other shining examples from large organisations, like the US Postal Service or the Australian Defence Force, where ADR has been an integral and significant part of the cultural shift in the environment, rather than an add-on. These examples have not come about by accident but through individual ADR champions, passionate about improving the health and wellbeing of the organisation and its people, carefully designing ADR into the fabric of the system, not merely tacked on to resolve fuss.

Misconceived ADR schemes are in danger of losing their way by lurching from consensus to coercive mechanisms, and back again, where policy and decision-makers introduce ADR without considering the whole picture. There are commentators who, for these reasons, have serious doubts about some court-annexed schemes. Workplace mediation is another example where the fundamental management or organisational issues are not dealt with directly: instead the mediation focuses on individuals.

The difficulty comes where the systems are less contained, less able to be defined as 'systems', where the goals are unclear and responsibility is duck-shoved between stakeholders,

where there are irreconcilable and mutually exclusive interests. Many community, industrial, legal and commercial interactions with government or multinationals have these characteristics and it is hard for ADR to make a difference to the 'system' as a whole.

*Being more political may be appropriate for ADR policy-makers, but what about the practitioners?*

**DB:** The ADR event is so intrinsically bound up with the individual practitioner, isn't it? The most we can give users of our service is the best of ourselves. This dialogue is about what happens when the 'event' we transact is isolated from the bigger picture and therefore forced to over-extend its significance.

To underline my point – what any ADR practitioner requires is an external framework that addresses the overall objective, and does not foist that responsibility on the ADR transaction or practitioner. When the framework is absent, or in place but not operating effectively, then the transaction at the micro level is highly problematic.

*David, this is a challenging issue for practitioners.*

**DB:** We need to change our thinking. ADR is not intrinsically a good thing. What if our starting place is: 'We design the resolution of disputes primarily through ADR because in this particular context ADR has a role to play in achieving our ultimate objective' – support of the rule of law, social obligations of an industry, or sound management of an organisation and its people.

Taking the workplace dispute at the beginning of our dialogue as an example, the major task for government and regulators is to put in place mechanisms to manage broad objectives. The design of the ADR service will then follow – management at the front door (what is appropriate for mediation? what is not?), administrative processes congruent with the goals of ADR (the interests of users are pre-eminent), outcomes focused both on the individual case and the system as a whole (reporting on emerging issues in the system), and care of the practitioners (acceptable performance criteria, peer and professional support).

*But coming back to the individual practitioner, I wonder ultimately whether you are talking about the preservation of the soul of the mediator?*

**DB:** Yes, we are not just talking about designing good structures. If I am isolated as an ADR practitioner – isolated from making a political or social contribution – then over time the tensions of this work will get to me. I will either withdraw into an ADR practice increasingly devoid of a humane spirit, or turn my lack of power into outrage.

This is a deeply personal struggle but one worth having. In the meantime the best we can give each other is the space to talk about it. ●

*David Bryson is an ADR practitioner who lives in Melbourne. He can be contacted at [dbrysonaus@hotmail.com](mailto:dbrysonaus@hotmail.com)*

