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Mediation in the Supreme and County Courts of Victoria: a summary of the results

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Empirical findings in ADR

Mediation in the Supreme and County Courts of Victoria: a summary of the results

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Does court-connected mediation work? What happens in mediations connected to cases filed in the Supreme and County Courts of Victoria? What factors are related to efficiency and lasting outcomes? In what ways could the existing processes be improved? These questions and many more were examined in a research project commissioned by the Victorian Department of Justice and completed by Professor Tania Sourdin in September 2008.

The Research Report, Mediation in the Supreme and County Courts of Victoria, *was launched by the Attorney-General of Victoria The Hon Rob Hulls MP on the 1 April 2009 and its recommendations are currently being considered by the Department of Justice in consultation with the courts and the profession. This article summarises the main findings and recommendations.*

Overview

Most mediations connected to disputes filed in the Supreme and County Courts of Victoria take place with the assistance of private mediators who are funded by litigants. In the Supreme Court a small number of mediations are also conducted internally by Associate Judges. In 2008 mediation processes were responsible for the estimated resolution of more than 25% of active,[1] complex disputes that may otherwise have been the subject of a full hearing in Court.[2]

The Research Report explored how mediation was used in the Supreme and County Courts of Victoria, using a methodology which combined:

- a detailed literature review;
- a quantitative and qualitative analysis of civil disputes finalised in the Supreme and County Courts of Victoria from February to April 2008 (553 case files were examined and parties in those cases were surveyed with 98 usable disputant surveys returned and 34 mediator surveys returned and analysed); and
- direct interviews and focus groups with litigants, mediators and legal representatives.

The Research Report focused on examining whether mediation processes used in disputes:

(1) resolved or limited the dispute;
(2) were accessible;
(3) were considered by the parties to be just or fair;
(4) used resources efficiently and promoted lasting outcomes; and
(5) achieved outcomes that were effective and acceptable.

Information contained in this newsletter is current as at July 2009

Editorial Panel

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The results indicated that, for the most part, mediation met these objectives. However, the findings also suggested that the quality of mediation processes in these court-connected programs could be improved.

Use of mediation

Mediation was the most common process for finalising disputes (43% of survey respondents had their dispute finalised at mediation). The results also showed that dispute age (age of dispute measured from when the cause of action arises) may be more strongly associated with mediation outcomes than case age (age of case from when it is filed in court) and that younger disputes were more likely to be finalised at mediation than older ones.

Mediation may also have assisted to narrow issues in matters that were not finalised at mediation — for example, it is likely that some matters were settled by negotiation once a referral to mediation had been made and that others may have been finalised by a negotiation following the mediation. This indirect effect of mediation can lead to cost and other savings even if a matter is litigated following the mediation. The recommendation made in relation to these findings was to target younger disputes — those where the dispute arose less than one year before the proceedings were filed in court — for an early referral to mediation. Mediation of disputes at a younger age is likely to decrease their likelihood of becoming intractable and may save costs and time.

Although the sample size was relatively small, cases involving disputes over land (77% finalised at mediation; n=13) and property (67% finalised at mediation; n=4) had higher resolution rates at mediation, while cases where litigants sought a declaration from the court were less likely to be finalised at mediation (29% were finalised in mediation; n=5). These findings suggest that some matters may be more amenable to resolution by mediation and it was therefore recommended that the appropriateness of mediation should, for example, be carefully considered in matters where the parties are seeking declaratory relief.

Improving quality

Information concerning mediation, case type outcome and dispute duration needs to be coupled with an understanding of what occurred in mediation. In focus groups it was noted that many 'mediations' in personal injury matters had the following characteristics:

- the process was of a short duration — often less than two hours;
- the plaintiffs were often not involved in the conference at all;
- the negotiation could be described as compromisory or competitive.

Focus group discussions and feedback provided on the mediator surveys suggested that a form of abbreviated conferencing was used mainly in personal injury matters and called 'mediation'. Mediators and others considered that these processes could not and should not be described as mediation.

Less than half of the mediators (considering all case types) appeared to have followed any industry standard mediation model. Only 9% (n=3 out of 34) used visual aids such as a whiteboard or butcher's paper, a significant proportion did not hear from the parties in the opening statements (in 88% of cases the legal representatives made the opening statements) and many appeared to have quickly broken into a shuttle negotiation after a relatively short joint session (on 47% of occasions private sessions were held immediately after the opening statements). These findings suggest that, in reality, many 'mediations' could more properly be characterised as conciliations, conferences or evaluations.

To enhance the quality of mediations, it was recommended that the courts define and describe the mediation process to be used by external mediators mediating court-connected disputes and ensure that all mediators are properly trained and accredited. This would require clearer process models and descriptions, improved quality assurance processes (through monitoring and regular evaluations), requiring mediators to comply with the standards set out in the National Mediator Accreditation System (NMAS)[3] and ensuring that only accredited mediators operate in the sector.

Responses to questions raised about participation during mediation suggest that some of the disputants involved in mediation did not consider that they were able to adequately participate in the process. Only 49% of mediation participants (n=18 out of 37) agreed they had control during the process, 47% (n=18 out of 38) said they did not feel comfortable during the mediation and 59% (n=22 out of 37) reported they would have liked to participate more during the process. This finding is likely to be linked to the type, and at times, variable quality of mediation services that were provided. Only a small number of mediators held a preliminary conference or conducted intake work with disputants (mediators conducted an intake in 34% of mediations) and this may mean that disputants were less able to participate in the process (or understand the process and prepare).

It was recommended that participation in mediation by the disputants be fostered and intake and preliminary work be supported by court staff and encouraged from external mediators. A quality framework that recognises those that deliver high quality mediation services should be implemented to further support disputant participation and empowerment.

Access

The research indicated that litigants from lower income categories, such as students, clerical, sales and community workers, and the unemployed and retired, were more likely to use mediation to finalise their dispute. This suggests that affordability may play a role in determining the processes accessed by litigants. The previously recommended early referral to mediation may assist lower income litigants in saving costs.

Another interesting finding regarding access to mediation related to the location of litigants. A comparison of the postcodes of survey respondents showed that mediation was the process that was most likely to be used with litigants drawn from all geographical regions except for rural Victoria, where negotiation was the most commonly used process. It was also interesting to note that a larger proportion of rural,

outer Melbourne and Geelong and other regional area clients were likely to attend trial and a hearing than inner-city clients (who were more likely to attend mediation and negotiation). In this respect, it was recommended that strategies to increase mediation use in regional Victoria, such as circuit mediation programs, are put in place.

Effectiveness

The resolution rates of the mediation processes were at least 45% (using court file data where mediators returned their reports) and may have been as high as 65% (using sample survey data). The resolution rates are lower than has been recorded in some comparable studies[4] and this may be a result of the age of the dispute, costs already incurred, as well as factors relating to the quality of the mediation processes. The quality framework recommendations made above to ensure that conferencing processes are not categorised as mediation are also applicable to these findings, where clear descriptions of the mediation process by the courts are needed to provide a more accurate representation of mediation use and resolution rates.

Plaintiffs using the court system were more likely to have been previously involved in a legal action (68%; n=32). Mediation processes that support party empowerment and negotiation learning may be more likely to reduce future litigious behaviour. The courts can address this issue by articulating models and process descriptions for mediation to assist in reducing disputing behaviour into the future.

There are other matters that may be less relevant but could improve efficiency. These include reducing waiting times for litigants, as well as ensuring that reality testing of outcomes takes place (to support durability and compliance with outcomes) and perhaps ensuring that information about processes is made available so that adequate party preparation occurs prior to a mediation taking place.

Timeliness

In the Supreme Court the median number of days from when a matter was filed in court to the first mediation was 324 days. In the County Court the median number of days from the day the matter was filed in court to the day of the first mediation was 260 days.

The median case age of Supreme Court matters was 426 days and in the County Court it was 341 days. This means that in both jurisdictions mediation usually took place three-quarters (76%) of the way through an expected full case duration (to trial). This is quite late in proceedings and can lead to increased costs.

It was recommended that mediation takes place at an earlier time in some types of disputes. For example, mediation referrals should be considered within two months of a response being lodged in younger cases and in certain categories of matters (property and land disputes).

Fairness

Perceptions of fairness in mediation were generally higher than for the other dispute resolution processes. However, 67% (n=24 out of 36) of disputants who finalised their dispute at mediation considered that they were pressured to settle the dispute (39% said they 'agreed' and 28% said they 'strongly agreed' that they were 'pressured'). This 'pressure' may relate to a range of factors including the raising of alternatives (ie, the raising of potential litigation outcomes) that may have meant that parties felt pressured.

It was recommended that models of mediation that support disputants and encourage their participation are promoted by the courts under a quality framework.

Costs

The disputant survey asked how much was spent on professional fees, disbursements and other costs during the dispute. The respondents reported that the median value for total costs spent on matters finalised as a result of mediation, negotiation and hearing process ranged from $30,500 to $48,400. Mediation was reported to have incurred the lowest costs (Median = $30,500), suggesting that litigant costs were reduced as a result of mediation.

A similar picture emerged from the mediator surveys, where mediators believed that in 82% of mediated cases the process helped to save parties costs. The median amount saved by mediating was perceived by mediators to be $50,000. Furthermore, a relationship was found between perceptions of fairness and case costs;[5] it showed that the more money a disputant spent on resolving a dispute, the less likely they were to think that the process was fair.

The majority (58%, n=52 out of 89) of mediated cases only required 1–2 court events and 30% (n=27) required 3–5 court events. Although these cases drew on court resources prior to mediation, it is clear that mediated matters required less case management than matters finalised at trial (55% required 3–5 court events; n=30 out of 55), pre-trial conference (73% required 3–5 court events; n=8 out of 11) or at negotiation (45% required 3–5 court events; n=34 out of 76).

It was suggested that earlier referral to mediation may assist in saving costs and that educating representatives and litigants about mediation and conducting intake processes may assist to reduce the 'pressure' placed on

Mediation processes that support party empowerment and negotiation learning may be more likely to reduce future litigious behaviour. The courts can address this issue by articulating models and process descriptions for mediation to assist in reducing disputing behaviour into the future.

litigants and reduce the number of court events.

Outcome

In contrast to the findings of previous studies,[6] 56% of mediation clients advised that either they or the other party were successful, with only 29% believing that both sides were successful. In a previous study dealing with mediation by Sourdin and Matruglio,[7] disputants were more likely to perceive that the outcome was a 'win–win' outcome. This is more likely when integrative interest-based processes (rather than distributive) processes are used as agreements are more likely to reflect additional intangible and tangible elements such as apology, respectful communication and explanation for past behaviour.

In this respect, it was recommended that the courts clearly articulate the mediation process and its stages that they wish mediators conducting court-connected mediations to use. Mediators need to be adequately trained and skilled in this model, and representatives and parties need to have clear obligations in relation to the way that they participate in mediation.

Satisfaction

Parties who had their dispute finalised at mediation reported moderate to high levels of satisfaction with the process. More specifically, 81% (n=30 out of 37) of those who finalised their dispute at mediation were satisfied with mediation as the process that finalised their dispute, 78% (n=29 out of 37) were satisfied with the way the process was handled and 63% (n=24 out of 38) were satisfied with the outcome. These are positive findings suggesting that for disputants who resolve their dispute the majority are satisfied with the mediation process.

However, although mediation clients were generally satisfied, there were no significant differences in the levels of satisfaction with mediation and the other dispute resolution processes (when bundled together) examined in this research. Furthermore, the satisfaction ratings of mediation in this research were not as high as those found in a previous study[8] of a court-connected mediation scheme in NSW. There may be a number of reasons for these lower satisfaction ratings. It may be that perceptions in the present research were negatively affected by delay (although in some past studies this was also a factor) or that less opportunity to participate in the mediation (reported above under 'Improving quality') also reduced disputant satisfaction with the process.

The way in which disputants engage and participate in mediation is influenced by legal representatives and mediators. There are issues about to what extent a mediator can 'control' a representative. This issue has been the subject of much recent attention by the Victorian Law Reform Commission[9] which suggested that it is appropriate for litigants and representatives to have certain overriding obligations in terms of their approaches to litigation and ADR processes. Good faith reporting has been suggested as a way of enabling mediators to indicate where representatives or litigants have engaged in negotiations in an obstructive or uncooperative manner. Mediators also need to be properly trained and accredited and it was recommended that the courts ensure that, at a minimum, mediators mediating court connected disputes meet the requirements set out in the NMAS standards.[10]

Conclusion

The Research Report found that mediation was contributing greatly to the finalisation of disputes filed in the Supreme and County Courts of Victoria. Disputants' perceptions of fairness and levels of satisfaction with the mediation process were moderately high and the process saved costs for many litigants. However, the research also indicated that mediation services were not as accessible to litigants from rural Victoria and mediation often took place quite late in the proceedings. Furthermore, many participants were not able to participate in the mediation process as much as they would have liked and felt pressured to settle their dispute.

These findings may be related to the models of mediation that were used and arguably much of what was called 'mediation' could not be described in this manner if one considers available definitions and descriptions of the process.

The report made recommendations regarding the improvement of quality into the future. The enhancement of existing standards and supporting 'excellence' in mediation, as well as promoting quality using a range of approaches was suggested. These approaches could include 'quality forums' and the distribution of more information about the results of ongoing monitoring, evaluation and mediation practice initiatives. Issues of quality and recommendations for establishing a Quality Framework are discussed in detail in Chapter 6 of the Research Report and in forthcoming publications by the authors. ●

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Endnotes

1. Excluding those cases finalised by default or where there has been no response from a defendant.

2. See T Sourdin, *Mediation in the Supreme and County Courts of Victoria* (The University of Queensland and Department of Justice, Victoria, Melbourne, 2008) 10 and 15–16 for estimate details.

3. See Australian National Mediator Standards, *Approval Standards*, <www.leadr.com.au/documents/Approval%20standards.pdf> viewed 11 May 2009; and Australian National Mediator Standards, *Practice Standards* (September 2007) at 11, <www.leadr.com.au/documents/Practice%20standards.pdf> viewed 11 May 2009.

4. T Sourdin and T Matruglio, *Evaluating Mediation — New South*

Wales Settlement Scheme 2002 (La Trobe University and the Law Society of New South Wales, Melbourne, 2004). This study reported a 69% resolution rate at mediation.

5. The correlation between perception of fairness and case cost was statistically significant and negative, when examined for all types of resolution processes: [r=-.47, n=79, p=.000] and for mediation only: [r=-.53, n=37, p=.000].

6. For example T Sourdin and T Matruglio, *Evaluating Mediation — New South Wales Settlement Scheme 2002*, above note 4.

7. T Sourdin and T Matruglio, *Evaluating Mediation — New South Wales Settlement Scheme 2002*, above note 4 at 22. In this study, 65% of survey respondents said that both sides were successful.

8. T Sourdin and T Matruglio, *Evaluating Mediation — New South Wales Settlement Scheme 2002*, above note 4, at 26. In this study, 96.7% of survey respondents were satisfied with the way the process was handled and 89.8% were satisfied with the outcome of their dispute. See also T Sourdin and N Balvin (in press) 'Lessons from the "Mediation in the Supreme and County Courts of Victoria" Research Project1, *Australasian Dispute Resolution Journal*.

9. Victorian Law Reform Commission, *Civil Justice Review Report* (Victorian Law Reform Commission, Melbourne, March 2008).

10. Australian National Mediator Standards, *Approval Standards*, <www.leadr.com.au/documents/Approval%20standards.pdf>_viewed 11 May 2009; and Australian National Mediator Standards, *Practice Standards* (September 2007) at 11, <www.leadr.com.au/documents/Practice%20standards.pdf> viewed 11 May 2009.

ADR DEVELOPMENTS

Mediation privilege in the UK

The Civil Mediation Council in the UK published a Guidance Note on 8 July 2009 about confidentiality in mediation. The Note was issued following the judgment in *Farm Assist (No 2)* 2009 EWHC 1102 which had addressed mediation privilege.

Civil Mediation Council Guidance Note No 1

Mediation confidentiality

8 July 2009

The courts are developing the law relating to mediation confidentiality and so-called mediation privilege on a case-by-case basis. Mr Justice Ramsey's recent judgment in *Farm Assist (No 2)* has aroused widespread interest among mediators. Articles by Michel Kallipetis QC and Bill Wood QC are at <www.themediatormagazine.co.uk> and an article by Tony Allen is on the CEDR website at <www.cedr.com>. Sir Henry Brooke, CMC Chairman, has written a short summary of the effect of this judgment, which is on the CMC website at <www.civilmediation.org>.

There are the following practical lessons to be learned from this judgment:

1. Mediation agreements should continue to specify that the mediation proceedings are conducted on a 'without prejudice' basis.

Note: 'Without prejudice' privilege is a privilege of the parties, not the mediator. The parties may both/all agree to waive this privilege, or it may be overridden in exceptional circumstances. The exceptions include cases of dispute as to whether an agreement has been reached at the mediation and cases of serious misconduct, eg fraud, duress etc.

2. Mediation agreements should continue to make it clear that what is said during mediation proceedings will be confidential.

Note: This contractual confidentiality extends to the mediator, who can seek to maintain it even if the parties are willing to waive it.

3. Mediation agreements should not restrict the circumstances in which a mediator cannot be compelled to give evidence in court.

Note: The CEDR Model Agreement now provides that 'the parties will not call the Mediator as a witness nor require [him/her] to produce in evidence any record or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process.

In *Farm Assist (No 2)* the language of the agreement referred only to litigation or arbitration in relation to the dispute. The judge held that this wording was not wide enough to cover a different dispute — as to whether duress had been deployed by one of the parties during the mediation.

According to the law stated in this judgment, a court may override a claim to contractual confidentiality if it considers it necessary to do so in the interests of justice. There is an ongoing debate as to whether, even if a mediator is ordered to give evidence, he/she may rely on a so-called mediation privilege and decline to give evidence about 'confessional exchanges' he/she had with either party. Such an approach has recently received authoritative support. (Sir Michael Briggs, 'Mediation Privilege?', *New Law Journal*, 3rd and 10th April 2009)

In reviewing their mediation agreements mediators and mediation providers may wish to consider a term requiring a party who seeks to call a mediator to give evidence to indemnify the mediator in respect of any costs he or she incurs in dealing with the application and even to provide for mediators to be paid at their hourly rate for the time spent dealing with such applications or giving evidence.