

**Comments by Helen Marks, Director Alternative Resolutions and Equity –
Department of Defence**

**ALTERNATIVE DISPUTE RESOLUTION IN THE CIVIL JUSTICE SYSTEM
– ISSUES PAPER**

2. About ADR

It is moderately important that there is a consistent use of ADR terms.

Any difficulties which arise regarding terminology could be overcome if mediation and other ADR processes are consistently taught and applied in practice. At present training providers teach their own preferred method of mediation process. This can vary (even slightly) from training provider to training provider. For example, I arranged training for some Defence mediators using two different training providers, and when I came to assess the mediators for suitability to mediate in Defence I found that the mediators were using different processes, one of which was more suited to the resolving of workplace disputes than the other. The other process was more suited to resolving commercial or contractual claims (and is likely to be applied in courts and tribunals).

Fundamentally, interest based negotiation skills and techniques are what underpins mediation and other possible ADR processes. Any negotiation is unique and flexible and is a process which attempts to address the interests, needs, fears and concerns of to achieve the best outcome for parties. In essence ADR processes are merely assisted negotiations and as such flourish in a climate of structured flexibility.

So the issue is not limited to that of achieving a common terminology.

For inexperienced practitioners having a well defined process to follow is important. However as practitioners improve their knowledge and skills they become less reliant on following a set ADR process and more able to adapt flexibly to apply the most suitable process to meet the needs of the parties and the characteristics of the dispute.

Flexibility and creativity in problem solving is the essence of successful ADR practice, whatever the context.

Inconsistency in the use of terms does impact on the understanding of consumers.

There is likely to be a greater need for certainty and consistency in terms used when an ADR process conducted as part of a court ordered process than for mediations or other ADR processes conducted in other contexts.

There should be sufficient certainty in terms used to enable parties to understand what they can expect and what may hopefully be achieved. If parties are represented then informed and consistent explanations should be offered.

The capacity of ADR processes to achieve outcomes beyond that which can be ordered by a court is relevant, and this reflects that these are processes where the parties have the capacity to determine / negotiate the outcome for themselves.

The advantages of common process models for ADR processes allow the consumer to choose the one best suited to the conflict or dispute. For instance, commercial or contractual disputes may benefit more from early private sessions, while in interpersonal disputes which are the common basis of workplace programs separation of parties early will rarely lead to a successful outcome.

I do not think that the solution lies in adopting statutory definitions, rather the issue should be addressed in the training arena. It would be unfortunate if the outcome of an ADR process (as statutorily defined) was undermined or challenged merely because the process was not rigorously followed. From my experience of the management of complaints in a government department, where processes are defined often develop over time to be different from the issues originally raised to ones where the complainant says that a step in a mandated process has been missed or not followed as closely as it should have been. This then gives rise to a new complaint or claim for defective administration, with no real benefit to the individual or the organisation.

3. Promoting Public Awareness of ADR

There may be many trained ADR practitioners but there are very few who have sufficient understanding of the range of ADR processes available and the knowledge, skill and capacity and experience to deliver high quality professional ADR services. Those who do are much in demand. Those who don't are seeking opportunities to develop these sophisticated skills 'on the job', and this is a high risk for the unwary customer.

Successful promotion of ADR services is dependent on the capacity of the profession to deliver consistent and high quality services, which achieve successful results at a reduced cost to individuals and organisations.

Value for money is the catch cry of all government agencies. ADR processes are not particularly cheap, and nor should they be. However an organisation needs to know that there is some certainty of success, both in resolution and value for money terms before embarking down an ADR route. This is often dependent on the other party and their willingness to participate in such a process in good faith with a willingness to resolve the matter in this way.

Having the legislative authority to settle matters in mediation, outside the court mandated processes, is somewhat lacking in government departments and agencies. Settlement is very difficult to achieve if the claimant is unwilling to provide the necessary deed of release to the government department or agency. So risks exist if ADR processes are used, early and outside of the court mandated umbrella.

It is not just disadvantaged groups who shy away from mediation; it is equally problematic where there is a power imbalance – such as employee and employer; which is the David and Goliath concept. Some Unions actively oppose parties

participating in ADR processes, viewing this as an erosion of their 'rights' to achieve an outcome to which they are entitled. This external resistance can impact adversely on a party's willingness to participate in such a process.

It is important for commonwealth, territory and state government departments and agencies to carefully select matters referred to mediation. It is well known that ADR is not suitable to every dispute and so its use should be avoided in those cases which are clearly assessed as unsuitable, for whatever reason. Notwithstanding this, it is still difficult to build confidence to try other than highly regulated embedded processes in 'tradition' focussed government departments and agencies. Success breeds success. Only when levels of confidence in using these processes has been built is there more room for referring the 'more risky' cases to ADR.

Insisting on compliance with the Legal Service Directions and the model litigant rules will help promote confidence, not only in the ADR process, but also in the decision maker's confidence that this is a government directed option and therefore sanctioned.

High level champions for the use of ADR within government departments and agencies are important to achieving and enhancing greater respect for the use of ADR processes. Having instructions which direct the use of 'ADR first' will also bring confidence that these processes are part of mainstream considerations in the resolution of complaints and claims.

More training for lawyers is warranted. They need to understand that the skills relevant to conducting litigation are different to those used in the ADR so that they can identify and practice the different skills and techniques relevant to ADR processes

4. Provision of ADR Services - Questions

Defence has a comprehensive dispute resolution program with six full time dispute resolution practitioners, who mediate, conflict coach, and conduct group facilitations. As necessary external service providers provide a range of ADR services to Defence and these include experienced ADR practitioners and judicial mediators. The mediation of internal Defence disputes primarily focus on workplace issues and this requires specialist knowledge of the organisation and its culture. Not all external service providers are sufficiently attuned to the organisation and workplace issues to practice their craft within this context. At times an external dispute resolution practitioner is preferred especially where issues of 'independence' and impartiality are paramount considerations.

Judicial dispute resolution

There are distinct advantages in **retired judges** conducting ADR processes in certain situations.

Some matters are of sufficient complexity and gravity that they warrant the presence of a retired judge, who is able to bring all his / her experience and knowledge to bear to assist parties to resolve their dispute and reach a legally binding agreement. Final binding agreements at the conclusion of mediation or other ADR processes require indemnities to be executed by the parties, one of whom in Commonwealth

matters must hold delegated authority to bind the Commonwealth under the relevant Act or Regulation.

The issue of confidentiality can be properly dealt with in pre-mediation and settlement agreements.

Private, community and government based ADR

The benefits of a government department ADR service is that it is provided by practitioners who have been trained and assessed as competent to provide ADR services in that workplace to meet the needs of personnel and the organisation within the organisational context. These services are required to meet the particular needs of the organisation and are funded and accessible to personnel

The drawbacks of the Defence ADR service are few, however services of internal mediators and other ADR practitioners needs to be managed and monitored to ensure that independence, impartiality and confidentiality are be maintained.

An integral part of ADR services in Defence is the intake assessment process and the requirement that the practitioner determine if a matter is suitable for mediation and that the parties participate voluntarily and in good faith.

The quality of the ADR service provided in Defence is constantly monitored and maintained by the Director Alternative Resolutions and Equity and staff to ensure that high skills levels and professional standards are maintained.

Defence is developing a robust professional development program for its ADR practitioners consistent with the National Mediation Accreditation Standards, with additional requirements for their personal and their ongoing professional development.

The issue of cost is relevant as experience in Defence suggests that where the user client has to pay for the service it forms a barrier to accessing this as an option.

5 Referral and assessment – Questions

There is a need to enhance the understanding of ADR and negotiation in a consistent and comprehensive way, especially throughout the legal profession. The level of knowledge and understanding is low. Web based, internet, intranet and printed material is provided to personnel in Defence. This is normally provided when assistance is sought, but is readily available to those able to search the web. It is supplemented by one on one explanation of ADR processes by dispute resolution practitioners either in discussions with management or with the parties, especially during intake assessment discussions.

It is difficult to know what type of approach to obtaining information readily will work best in the range of forums where ADR services are provided. In Defence it has been a slow and process promoting this service to personnel across the organisation using a range of media, however successful promotion of the product within the organisation has grown most effectively by word of mouth.

6. ADR and litigation – Barriers and incentives – Questions

Changing the adversarial culture promoted by lawyers is an essential ingredient to success.

The Legal Services Directions (LSD) issued by the Attorney General which promotes model litigant principles has been helpful to persuade for the use of ADR early for the proper resolution of claims against the Department. Promoting incentives within government departments which realise financial and other benefits may encourage uptake of early and appropriate use of ADR services. What these will be may vary, and could include the rating of a department against set merit based criteria.

Barriers to the use of ADR before civil proceedings are commenced may include the attitude of lawyers and claimants, the capacity to effectively resolve the claim outside of a court process, and inadequate financial directions and delegations available within government departments. Review of current legislative and regulatory arrangements could open up new opportunities for effective early resolution of claims.

Once legal proceedings are commenced a party's position in relation to the claim may harden to such an extent that they consider that they have an investment in the matter being decided by a court. At that point effective resolution of the matter outside of the court regime, be that court mandated mediation or otherwise, is less capable of being achieved.

The cost of using an ADR process to resolve matters that have escalated to that level is often significant, and may even be comparable to the cost of court proceedings. While it may be possible for some of the costs of ADR services to be borne by each of the parties, it is likely that a large government department will bear most of the financial impost of entering into such a process. This may be an incentive to an individual claimant to agree to mediation rather than risk exposure to a court costs order.

The draft model mediation clause appears to relate only to disputes arising out of a contract. Many matters that arise in Defence do not arise from contractual disputes and so it is difficult to see how such a clause would be of assistance to a wide range of matters which potentially would benefit from use of ADR services. If this clause, or similar, were to be introduced say under the LSD then it may have a wider ambit and impact.

Mandatory ADR – Questions

Requiring disputants to participate in an assessment of the dispute for suitability for ADR is supported. Experience suggests that unless the parties are also willing to participate in such a process with a view to resolving it in this way then it is less likely that resolution will be achieved. Disputes in a sense need to be 'ripe' for such a process and if the timing in the use of ADR is wrong then again successful resolution is unlikely. Appropriate assessment by a skilled ADR practitioner is an essential component before ADR, be it voluntary or mandated, is attempted.

Statutory provisions requiring litigants to attend ADR before they can file civil proceedings may mean that matters which are suitable and ripe for resolution in this way will be seriously considered, before the parties commit to the adversarial court process with the attendant costs and delays. The opportunity that ADR processes provide for parties to take a 'reality and a financial' check on the range of best, worst and probable options for resolution may persuade them to reach agreement at this stage.

Resolution of the claim or complaint may be full or partial and its enforcement outside of the decision of a court is in the hands of the parties. The goal of mediation and other ADR processes is that the parties will reach a sustainable and lasting agreement. However without their commitment to honour the agreement it is unlikely that this will be achieved.

It may be that the market for ADR services and the level of practitioner expertise to conduct ADR processes of this complexity and nature is not sufficiently mature at this time. Currently the pool of sufficiently trained and skilled ADR practitioners is limited however over time this problem should be overcome if there is sufficient work to sustain the profession.

7. Use of ADR in Government disputes – Questions

I am not sure how the role of an independent dispute resolution manager would work in practice, and I think that there are other more practical measures that can assist in promoting the use of ADR in government disputes beyond what may be a 'toothless tiger' appointment.

Internal to government departments the presence of an ADR champion is important, and that person/s needs to be sufficiently senior and influential to make a difference throughout the organisational layers where decisions are made. The new interagency working group on ADR may be able to craft a strategy of influence. In addition it is also advantageous to have someone within a government department who is skilled and knowledgeable and who can advise and guide management on the use of a suitable ADR approach for matters which arise.

A key factor in successfully promoting the use of ADR by government departments is the nature of instructions that departments give to external legal service providers about the manner in which the department wishes the claim / litigation to be progressed. If a standard form of instructions to external legal providers includes a direction that all proper avenues for early resolution of the claim are to be explored and used then it is anticipated that opportunities for use of ADR services will be more commonly adopted.

The requirement for targeted instructions by government departments to legal providers would not only increase the use of ADR it would also lead to legal firms ensuring that their lawyers were sufficiently committed and skilled in the use of ADR.

Routine monitoring of legal costs associated with the litigation processes in government departments and the conduct of external audits by say the Department of Finance may help to shift existing practices.

It seems that the legal or executive regime within organisations to settle matters early can be improved to allow for and in fact encourage the use of ADR to resolve not only matters before a court or tribunal – but matters that are heading in that direction if a negotiated settlement cannot be reached and finalised; one which is binding on the parties.

Targeted guidance material and training of Commonwealth officers in ADR processes would assist in the take up of ADR; however the best advertisement is stories of the successful use of ADR, both within and between government departments.

Mediators are currently identified by a range of means, including seeking advice on panel members who are part of professional organisations such as LEADR, or through the courts, or merely through a working knowledge of ADR professionals and their relevant experience. This is of limited utility and it would be helpful if a national register of ADR practitioners, with their professional profiles and contact details, was published and regularly updated. This information could also be web based. For example <http://www.brisbanemediations.com.au/>

9. Data, evaluation and research - Questions

Defence has for many years conducted an external evaluation of its workplace ADR services and this information has proved invaluable in the measurement and improvement of the quality of the services it provides. Personnel are offered the opportunity to respond to an online questionnaire on the ADR service provided. This is sent directly to an external consultant who analyses the data and provides a report to Defence. Individual respondents are not identified in the Reports provided to Defence.

This evaluation is a value for money service and it is regarded as an essential part of managing a successful dispute resolution program within a government organisation.

Increasingly individuals and organisations seek information and guidance through the internet. Comprehensive information from this source, presented in a problem solving manner, could be helpful in disseminating and encouraging greater use of ADR. This information could cover the field, from workplace dispute resolution processes to matters dealt with by courts and tribunals. Funding for such a project, with the appointment of a suitably skilled researcher to collect, analyse and present the information for inclusion on such a site would seem to me to be a valuable means of encouraging the use of ADR processes, in all its alternative forms.