

National Alternative Dispute Resolution Advisory Council

ADR Research

*Background paper for
research round table*

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Introduction

- 1 This paper summarises some themes to be discussed at the NADRAC research round table. The NADRAC research committee recognises that research about ADR processes may take a number of forms.
- 2 The research committee seeks ‘to improve the quality and consistency in statistical information about ADR in courts and tribunals, and in other agencies providing ADR services’ by focussing on developing and sharing research methodologies and approaching and assisting to develop common understandings and approaches to ADR research. NADRAC recently published a summary of published ADR statistics (now available on the website). NADRAC also hopes to promote ‘theory meets practice’ opportunities by encouraging liaison between researchers and policy makers.
- 3 NADRAC is also liaising with the Productivity Commission, AIJA and other relevant bodies regarding improved statistical collection in relation to Court-based ADR. NADRAC hopes eventually to develop a guide to ADR research that focuses upon the development of methodologies in respect of qualitative and quantitative research.
- 4 This paper outlines the purposes of ADR research and the types of data and information that could be collected. Possible approaches to research collection are then examined. This background paper is primarily focussed on developments in qualitative and quantitative research.

Approaches to research

- 5 In focussing on qualitative and quantitative research, there is no intention to understate the importance of literature based and observational research in the ADR area. Much ADR research is literature based and involves an analysis and discussion about processes and theory – essentially ADR research of this type involves a researcher digesting information about ADR and rather than merely describing processes and will involve the researcher analyzing and creating hypothesis and discussion to explain what may occur or what could occur under certain conditions. This form of research is arguably the most common approach to research in respect of ADR.
- 6 Research can also be based upon the observation of systems and processes and often an analysis may be the combined result of a writer’s direct experience of an ADR system and process as well as a comparative literature review. By contrast ‘action research’ may involve the researcher engaging in the process and in effect assisting and reporting on the outcomes that are reached.

- 7 Other forms of research that may also involve components of observational, action and literature based research are often defined as qualitative and quantitative research. Quantitative research involves the collection and analysis of data that is relevant to a research hypothesis. There is much ADR research that is currently focussed on quantitative methodologies. For example, when courts and tribunals collect data about the processes that are used to manage cases, quantitative data is often the result. In this context quantitative data may include statistics relating to timeliness, outcomes, cost and efficiency indicators (for example, how many events have been attended or documents filed). Often this data is relied upon in the day to day management of services.
- 8 By contrast, qualitative research provides information about how and why processes may operate. Qualitative information may be gathered using a range of methodologies. For example, it is commonly collected using combined freeform questionnaires, focus groups, structured interviews and other techniques. Often qualitative and quantitative data is collected simultaneously. For example, ABS demographic data may be used to apply to a survey population. Qualitative data may be collected to determine the perceptions of that survey population. Increasingly, ADR research involves a range of combined research approaches – literature based, qualitative and quantitative. This type of research can be used to review and evaluate programs and may take place on an annual or less frequent cycle.
- 9 Much ADR research is conducted within the litigation system and is quantitative in nature. There has been little focus in the civil litigation system on qualitative research. In addition there are difficulties in terms of what is evaluated – for example, ADR processes within the litigation system (that is, through a court or tribunal governed process, or where parties simply opt out of existing processes without informing the court of their intentions), or ADR processes that may discourage litigation from commencing - there are significant methodological and conceptual difficulties in comparing ADR processes with traditional litigation and also in terms of evaluating and defining processes.
- 10 One obvious problem in comparing the cost and benefits of ADR processes with those of traditional litigation is that any comparison with the cost of those cases that go to trial will be flawed because many civil cases are settled out of court.¹ In addition, some of the possible benefits of ADR are difficult to measure. For example, the increased use of ADR may lead to a decrease in litigious or

1. For discussion of the methodological difficulties in evaluating ADR programs see T Matruglio *Researching Alternative Dispute Resolution* Justice Research Centre Sydney August 1992; S Caspi 'Mediation in the Supreme Court – problems with the spring offensive report' (1994) 5(4) *Australian Dispute Resolution Journal* 4; S Keilitz (ed) *National Symposium on Court Connected Dispute Resolution Research – a Report on Current Research Findings – Implications for Courts and Research Needs* State Justice Institute USA 1994.

adversarial behaviour,² foster better relationships between parties to disputes or result in higher levels of compliance with outcomes.

- 11 For ADR processes that are evaluated outside the court and tribunal systems there has been little guidance in 'how' to evaluate although increasingly there are methodologies that are being developed. Clearly, sound ADR research in all of its forms can assist to test assumptions about ADR practice and processes, develop sound practices and ensure that ADR practice and processes expand where appropriate.

A summary of research approaches

The *empirical* method or the traditional 'scientific' approach involves testing a 'falsifiable' hypothesis through objective, quantitative data. It usually involves rigorous experimental design (eg control groups or matched samples) with tests of statistical significance applied. Empirical research may also be linked to qualitative research via 'triangulated' studies.

The *interpretive* method which uses subjective and reflective processes, such as in depth interviews or focus groups, in which researchers give their own meaning to the information obtained. There may be research questions but no clear hypothesis that can be simply accepted or rejected. Descriptive statistics may also be used. Interpretive methods frequently underpin policy research, for example, analysis of the outcomes of public consultations.

The *post-structural* method which works on the assumption that meaning is not fixed by underlying structure (eg theory or paradigm) but is continuously open to new interpretation or 'deconstruction'. Post-structural methods may be particularly useful in examining interactions in a specific ADR process, for example a feminist analysis of power dynamics in a mediation session.

Action research methods that involve active participation by the research participants in the formulation of practical research questions, the research design and the interpretation of the results. It is often seen as part of a process of social or organisational change, or the development of 'best practice'. Action research is commonly used in the community development field.

Eclectic or mixed methodology uses a variety of research methods.

2 It has been suggested that those exposed to cooperative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour; P Wanger in 'The Political and Economic Roots of the 'Adversary System' of Justice and 'Alternative Dispute Resolution' (1994) 9(2) The Ohio State Journal on Dispute Resolution 203.

Definitional dilemmas

- 12 One issue that causes preliminary concerns regardless of the type of research conducted can be described as the ‘definitional dilemma’. Despite the work of NADRAC and Standards Australia these issues are still relevant and require researchers to test what is being evaluated – for example, is what is being evaluated mediation, evaluative mediation, conciliation or some other process?
- 13 For example, in one of the largest studies conducted in the United States³ that discussed the impact that mediation had within court systems, more than 50% of the ‘mediators’ gave advice or proffered an opinion – an approach that would be problematic when one considers the current Australian NADRAC definition of mediation. The variations mainly relate to the position and role of the third party facilitator. This factor may mean that research findings are not at all comparable across jurisdictions or in different regions.

Evaluation research

- 14 However, there have been numerous attempts in the past decade to evaluate ADR processes. These attempts have at times been made in the context of a broader inquiry into justice (as with the Australian Law Reform Commission), or as part of a review of case management (see the Rand report reference above) or in response to specific ADR initiatives. Other ADR research has considered community expectations and the role of lawyers in ADR. In addition research data is increasingly being produced by performance measurement technology that is in place within some courts and tribunals that may indicate where intervention and resolution can occur. Some of this research is linked to priority research areas that are guided by the Productivity Commission. Data based research processes are summarised further below.
- 15 There are a number of forms of evaluation:
 - *Outcome evaluation* looks at the extent to which the program achieves its goals. It will attempt to measure performance or effectiveness by, for example, gaining data on the results of an ADR process. Outcome evaluation provides information on whether a program is effective. Outcome evaluation may also involve exploring issues about who accesses services and may do this by reference to other available comparable data (for example, ABS statistics).
 - *Process evaluation* looks at what actually happened, and may describe *what* interventions took place and when, who was involved and what

3.J Kakalik et al An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act RAND Santa Monica California 1996, 53.

people thought about the process. Process evaluation provides information on *why* particular approaches are effective.

16 Evaluations can be *formative* or *summative*.

- Formative evaluation takes place during the implementation of a program and assists the decision-makers to modify the program as required.
- Summative evaluation takes place at the end of a specified period. It summarises the overall outcomes of the program and make recommendations about its future.

RAND model

In 1995, RAND's Institute for Civil Justice produced a guide to evaluating alternative dispute resolution programs⁴. The guide suggests that evaluations are conducted to answer two fundamental questions:

- Is the program accomplishing its goals?
- How can the program's performance be improved?

The main steps in designing and evaluation are:

- Identify program goals
- Develop appropriate measures of outcomes
- Collect the right type of data for the measures
- Choose a study design
- Develop an analysis plan

The steps in developing a data collection plans are:

- Identify program goals
- Develop appropriate measures
- Identify appropriate data sources
- Develop data collection instruments
- Collect the data.

The guide includes examples of data collection instruments, such as surveys, and provides sample data analysis plans.

4 Rolph E & Moller E (1995) Evaluating Agency Dispute Resolution Programs, Santa Monica, RAND

Quantitative and Data Based Research

17 Data can be used for the following purposes:

- *Management* by an organisation of its ADR program, which includes ongoing internal administration and external accountability.
- *Program evaluation*, which is concerned with the efficacy, operation and effectiveness of a particular program in order to inform decisions about its future.
- *Theoretical research*, which is concerned with increasing underlying knowledge of process and practice questions.

Data for management purposes

18 Data may be used to assist in the ongoing management and administration of an ADR program for the purposes of:

- *Internal performance management*
This involves the collection of information to enable improvement of internal operations.
- *External accountability*
Data on activities and achievements may be used by organisations to report to their stakeholders or funding bodies.
- *Comparative performance*
This compares the performance of different organisations (or jurisdictions).

19 This form of data collection usually involves reporting against agreed *activity* and *performance indicators*.

- Activity indicators include *inputs* (eg numbers of matters referred, resources provided/costs of services) and *throughputs* (eg number of sessions)
- Performance indicators includes *outputs* (eg ADR processes completed), *outcomes* (eg number or % of matters resolved) and *impacts* (contributions to broader goals - eg reduction in litigation).

Glanfield and Wright model

One approach to data collection is for individual ADR organisations to develop a target, such as percentage of cases resolved through ADR, then report their actual performance against this target. Several ADR agencies use this approach, for example, the Family Court of Australia, the Federal Magistrates Service, the Victorian Dispute Settlement Centres and the Queensland Residential Tenancies Authority.

The use of such targets is advocated by Glanfield and Wright⁵ with respect to the collection of statistics by courts. They suggest the following principles:

- Performance has to be measured against goals fixed by the courts.
- The courts should set goals for themselves, in measurable terms.
- Performance measurement should support management activity.
- Key means comprehensive but simple and few.

Glanfield and Wright also propose measures relating to court performance. While these measures have been developed for the processing of court cases, they could also be used as indicators for the effectiveness of ADR programs in assisting court to manage case loads. The measures are:

- backlog (number of pending cases taking too long)
- overload (number of cases in excess of the number that can be processed within time)
- clearance ratio (ratios of new registrations to finalisations)
- attendance index (number of pending cases in which there have been more than benchmark number of attendances (or ‘trips to the courthouse’))

Types of data

- 20 Quantitative data is measurable information, including statistics. Statistics may be *descriptive* (simple counting and presentation of numbers) or *interpretive* (used to support or reject a scientific hypothesis and tested for statistical significance).
- 21 *Measures* may combine quantitative data in various ways (eg efficiency = outputs/inputs; effectiveness = outcomes/inputs, cost effectiveness = effectiveness/cost; settlement rate = number of agreement/number of finalised cases).

5 Glanfield and Wright (2000) Model Performance Indicators for NSW Courts Sydney, Justice Research Centre

- 22 The quality of data may be judged according to whether it is *valid* (it means what it says it means), *reliable* (consistent and comparable) and *authentic* (honest). Data may also need to be *economical* (useful information, with low effort to collect).

Program evaluation using data

- 23 Evaluation that is based on data (quantitative evaluation) involves the interpretation of data in order to make decisions in relation to programs or schemes. Evaluation may also focus on the performance of individual organisations or practitioners or the appropriateness of practices or approaches.
- 24 Although evaluation can be part of a routine planning process, program evaluation tends to take place at critical time in the development of program, for example, in determining whether a pilot program should be wound up or extended, where long term funding is an issue or where there are doubts about the viability of a program. Evaluations therefore tend to be more rigorous, comprehensive and time-consuming than routine data collection and are frequently conducted by an independent consultant or agency.
- 25 While it is difficult to evaluate a program in its early stages, the need to collect baseline data suggests that evaluation needs to be considered when the program is commenced.

Program Based Research Agenda⁶

McEwen (1999) suggests the following strategies to better connect theory and practice:

- make the ADR context a central focus of research
- undertake a fuller account of process and work of third parties
- widen our view of ADR impact or result
- re-examine what research methods are best for studying ADR programs
- ground research in the contexts that matter to policy makers and practitioners.

Multi-phase evaluation

The evaluation of PDR in legal aid commissions⁷ aims to meet the needs of both policy-makers and program managers through a multi phase evaluation design. Phase one provides a preliminary analysis and baseline data; phase two involves monitoring and improving the programs; phase three summarises the outcomes of the programs and make recommendations as to their future.

⁶ McEwen C (1999) 'Towards a Program-Based ADR Research Agenda' Negotiation Journal 15, 4, pp325-336.

⁷ Melville et al (2000) op cit.

Research priorities

- 26 Several writers have attempted to draw together the outcomes of ADR research, especially mediation research, and to suggest priorities for future research.⁸
- 27 The research literature on mediation suggests that rates of agreements seem to be consistent across diverse forms of mediation and service types (about 50-85%), and that there is high client satisfaction rate with mediation. Mediation appears to work best where there are multiple (rather than single) issues. Compared with adversarial methods, mediation produces higher compliance and lower re-litigation rates. Outcomes are at least as positive for mandated as for voluntary referrals. There is low awareness of ADR, and low uptake of voluntary ADR. The long term impacts, substantive fairness and overall cost effectiveness of mediation are unclear.
- 28 Many researchers⁹ now argue that it is important to go beyond the general questions (eg ‘does mediation work?’) and focus on questions such as:
- What specific interventions work when, with whom, at what point in time, especially in dealing with power imbalances?
 - Factors (ie criteria) which indicate the suitability of different forms of ADR for different parties and disputes.
 - How to adapt ADR processes to the needs of different racial, ethnic and socio-economic groups.
 - How the effectiveness and cost effectiveness of ADR is affected by contextual factors (eg jurisdictional ‘culture’, the role of insurers and other key players as well as organisational policies).
- 29 These research priorities requires more sophisticated statistical processes which can track many variables over time, the collection of highly specific information on parties and processes, and the integration of qualitative and quantitative data (ie mixed methodology).

8 Kelly J (1996) ‘A Decade of Divorce Mediation Research: Some Answers and Questions Family and Conciliation Courts Review 373, 375

Australian Law Reform Commission - Issues paper 25

Melville A, Hunter R & Giddings J (2000) Phase One of a National Evaluation of Primary Dispute Resolution Programs in Legal Aid Commissions (unpublished report to the Commonwealth Attorney-General's Department).

Kressel K and Pruitt D (1989) Mediation Research: the Process and Effectiveness of Third -Party Intervention, San Francisco, Jossey-Bass.

9 Carneville P & Pruitt D (1992) ‘Negotiation and mediation’, Annual Review of Psychology 43, pp331-582

Kelly J op cit.

Sacks M, Reichart K & Proffitt W (1999) ‘Broadening the Evaluation of Dispute Resolution: Context and Relationships over Time’, Negotiation Journal 15, 4, pp339-347.

Integrating data collection, evaluation and research?

- 30 Program managers, evaluators and academic researchers may be critical of each other's approach. Routine data collection often lacks the rigour required for program evaluation, while program evaluation may seem an excessive burden on an organisation's resources and not produce timely and useful information. Theoretical researchers may be critical of the lack of rigorous methodology associated with routine data collection and evaluation. Theoretical research, however, may be seen as too concerned with narrow theoretical questions which have little practical value and with research designs which are not feasible in the real world.
- 31 A more fruitful approach¹⁰ may be to try to enhance the links between these aspects of data collection through strategies such as:
- Build an evaluation plan into any ADR program, so that routine data collection can be useful for everyday management as well as for a more rigorous program evaluation.
 - Encourage theoretical researchers to focus on answering practical and useful questions.
 - Ensure that program evaluation is based on well developed theoretical knowledge.
 - Build partnerships between researchers, policy makers and practitioners.

¹⁰ Sacks et al (1999) *ibid.*