

National Alternative Dispute Resolution Advisory Council

ADR Research: a resource paper

A paper intended to promote discussion and assist those who are researching dispute resolution processes, programs, systems and practices

March 2004

Contents

CHAPTER 1. INTRODUCTION	2
NADRAC's interest.....	2
Structure of this paper	3
CHAPTER 2. OVERVIEW OF RESEARCH	4
What is meant by research?	4
Approaches to research.....	4
Choosing a research approach	4
Primary research	5
Secondary research	6
Mixed or 'triangulated' research.....	6
Program evaluation.....	7
Insider or outsider research.....	7
Research philosophies	8
Research ethics	9
CHAPTER 3. CONTEXT AND SYSTEMS: THE BIGGER PICTURE.....	10
Nature of disputes and conflicts	10
Relationship with other systems.....	11
Cultural context.....	11
Policy context.....	12
Language and terminology	12
Approaches.....	13
Resources.....	14
CHAPTER 4. OBJECTIVES: WHY?	15
Identifying the objectives	15
How can achievement of objectives be measured?	16
Approaches.....	16
Objectives of programs/organisations.....	16
Objectives of processes.....	17

Resources.....	17
NADRAC’s consultation on ADR standards (2000-2001).....	17
Sourdin(2002).....	19
CHAPTER 5. ACCESS: WHO USES ADR SERVICES?	23
Approaches.....	24
Resources.....	25
Access to ADR Services.....	25
Social Trends.....	26
Towards Practice Guidelines.....	26
Other resources.....	26
CHAPTER 6. EVALUATING EFFECTIVENESS: IS ADR ‘SUCCESSFUL’?.	29
‘Success’ of ADR	29
Short and long term impacts.....	29
Unintended consequences.....	29
Points of comparison.....	30
Causality.....	31
Solutions?.....	31
Meta-analysis.....	32
Program ‘success’.....	32
When to evaluate?.....	32
Impact of evaluation.....	32
How well are we performing? Issues in ADR statistics.....	33
Published ADR statistics.....	34
Combining quantitative and qualitative research.....	35
Possible approaches.....	35
Cost-benefit approach.....	35
Program evaluation: RAND model.....	36
Target setting.....	37
Other examples and resources.....	38
CHAPTER 7. CLINICAL RESEARCH - WHAT IS ACTUALLY HAPPENING ‘IN THE ROOM’?	42
Practitioners.....	43
Participants.....	43
Communication, interaction and dynamics.....	43
How robust is the process?	44
Approaches.....	44

Examples and resources.....	45
CHAPTER 8. INTEGRATION: BRINGING TOGETHER POLICY, PRACTICE AND RESEARCH	46
The development of practice.....	47
Integrated research design.....	48
Examples and resources.....	48
CHAPTER 9. NEXT STEPS: WHERE TO FROM HERE?	50

Chapter 1. Introduction

- 1 The continued development of dispute resolution relies upon an improved understanding of the context, goals, accessibility and effectiveness of ADR processes and interventions. In addition, a continuing focus and exploration of micro skills enhances the development of more effective dispute resolution practices. This paper is intended to promote that understanding by assisting those who are researching dispute resolution processes, programs, systems and practices.
- 2 Research, which can broadly be broadly defined as a systematic enquiry into an issue or problem, is not solely as an academic pursuit. Many individuals, groups and organisations are engaged in research on dispute resolution, whether informally or formally. This paper therefore promotes the concept of research as a shared activity among practitioners, policy makers, program managers, academics and specialised research bodies.

NADRAC's interest

- 3 The Australian National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory council. It provides the Australian Attorney-General with 'coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.' The issues on which NADRAC provides advice include:
 - 'the suitability of alternative dispute resolution processes for particular client groups and for particular types of disputes
 - the quality, effectiveness and accountability of Commonwealth alternative dispute resolution programs
 - ongoing evaluation of the quality, integrity, accountability and accessibility of alternative dispute resolution services and programs
 - programs to enhance community and business awareness of the availability, and benefits, of alternative dispute resolution services
 - the need for data collection and research concerning alternative dispute resolution and the most cost-effective methods of meeting that need.'
- 4 In attempting to address these issues, NADRAC has undertaken a series of activities to improve quality and consistency in statistical information about ADR in courts, tribunals and other agencies providing ADR services. It has produced a

Resource paper on ADR research

- compendium of published ADR statistics. It has liaised with the Productivity Commission, Australian Institute of Judicial Administration and other relevant bodies with a view to improving statistical collection in relation to Court-based ADR. It has prepared submissions advocating improved ADR research and data collection. It has initiated specific research projects relevant to its own priority areas.
- 5 NADRAC has also sought promote ‘theory meets practice’ opportunities by encouraging communication between researchers, practitioners and policy makers. It convened a ‘roundtable’ on ADR research, held in Melbourne in February 2003. The 50 participants at that roundtable provided valuable insights and information, which, together with other material, has formed the basis for this paper.

Structure of this paper

- 6 This paper is structured around the themes developed at the roundtable and identified as being of importance to those involved in research.
- Chapter 2 provides an overview of research approaches, philosophies and ethics
 - Chapter 3 considers the bigger picture, that is, research into the context for ADR
 - Chapter 4 explores research into the objectives for ADR and the criteria against which ADR might be assessed
 - Chapter 4 examines research on accessibility, that is, ‘who uses, or could use, ADR services?’
 - Chapter 5 examines how the effectiveness of ADR can be explored
 - Chapter 6 focuses on clinical or micro-skill research, that is, ‘what happens in the room?’
 - Chapter 7 considers how to enhance links between research, policy and practice
 - Chapter 8 identifies possible future strategies, that is ‘where to from here?’
- 7 The order of these chapters does not indicate any priority in terms of importance, nor does it imply a strict sequencing of tasks. Readers may have an interest in one aspect of research and focus on a chapter most relevant to that interest.

Chapter 2. Overview of research

What is meant by research?

8 As indicated in the introduction, this paper uses the term ‘research’ in its broadest sense to cover any systematic enquiry into an issue or problem. Such enquiry could include:

- *Clinical research* by practitioners, such as reflective or reflexive practice, which seek to improve ADR practice by examining and improving the practitioner’s interventions
- *Management information systems* that seek to assess and improve on internal and external organisational performance
- *Program evaluation*, which is concerned with the efficacy, operation and effectiveness of a particular program in order to inform decisions about its future
- *Policy research* that assist decision makers to set overall goals and frameworks for ADR services
- *Theoretical research*, which is concerned with increasing underlying knowledge of process and practice questions.

Approaches to research

Choosing a research approach

9 Research can take many different forms. It can be primary or secondary, based on qualitative or quantitative information, outcome or process focused, formative or summative, conducted by insiders or outsiders, and underpinned by diverse research philosophies. Most importantly, research can use a combination of methods that complement each other. The appropriate research approach depends on needs of each situation taking into account matters such as:

- the needs and views of stakeholders
- the nature of the issues being examined
- the resources (including time) available to examine that topic
- the values of the individuals and organisations involved, and

Resource paper on ADR research

- the availability of comparable or existing research.

Primary research

10 *Primary research* is research that gathers new information relevant to a topic, while *secondary research* uses and analyses existing information. Often research will involve both primary and secondary research.

11 Primary research relies on a wide range of methods for collecting, analysing and interpreting different form of information. This information may be qualitative or quantitative in nature. Examples of methods include:

- *Qualitative*

Qualitative research provides information about how and why processes may operate. Qualitative information may be gathered using a range of methodologies. For example:

Combined freeform questionnaires, focus groups, structured interviews and other techniques

Observational research based upon the observation of systems and processes and often an analysis

The combined result of a writer's direct experience of an ADR system and process as well as a comparative literature review

Action research (see below), which involves the researcher engaging in the process and in effect assisting and reporting on the outcomes that are reached.

- *Quantitative*

Quantitative research may involve empirical studies in which data is relevant to a research hypothesis research is collected and analysed.

Quantitative research can also involve routine data collection. For example, courts and tribunals collect statistics relating to timeliness, outcomes, cost and efficiency (such as how many events have been attended or documents filed). Often this data is relied upon in the day to day management of services but it may also be relevant for broader enquiry.

- *Mixed methods*

Often qualitative and quantitative data are collected simultaneously. For example, ABS demographic data may be applied to a survey population. Qualitative data may then be collected to determine the perceptions of a

Resource paper on ADR research

particular population which has been the subject of quantitative data collection exercise.

Secondary research

12 Secondary research assists in the identification of relevant issues, processes and theoretical constructs. Examples of secondary research are outlined below.

- A ‘desk audit’ is often used as preliminary step in an enquiry. It involves the collection and categorisation of existing technical data. Such an audit may reveal key information gaps or identify common themes or issues in existing practices. Examples of desk audits are the compendium of ADR statistics¹ and the summary of ADR standards and training programs contained in the discussion paper on the *Development of Standards for ADR*².
- Literature based research involves a deeper analysis and discussion about processes and theory. Research of this type involves a researcher collecting and analysing literature about ADR (for example, academic papers, research reports, policy document, technical literature). This analysis could lead to a discussion on hypotheses to be tested by primary research, or to provide direction for future policy or practice development. Examples of such research are NADRAC’s diversity discussion paper³, and the paper on court referral to ADR prepared by Assoc. Prof. Kathy Mack for the AIJA and NADRAC⁴.
- Meta-evaluation involves the evaluation of a selection of specific evaluation studies in an attempt to draw broader conclusions from these studies. Meta-evaluation could also involve the aggregation of separate data sets in order to increase sample size. Meta evaluations have been conducted in areas such as family mediation, where there has been a long history of small research studies without clear or statistically significant overall conclusions.⁵

Mixed or ‘triangulated’ research

13 Increasingly, ADR research involves various combinations of research approaches. An example is ‘triangulated’ research, which involves qualitative, quantitative and literature based research. Different aspects or issues may be explained using all three research methods, or a selected issue may be explored by reference to qualitative, quantitative and literature-based information.

¹ NADRAC (2002) *ADR Statistics*, Canberra, Commonwealth of Australia.

² NADRAC (2000) *The Development of Standards for ADR*, Canberra, Commonwealth of Australia.

³ NADRAC (1997) *Issues of Fairness and Justice in ADR*, Canberra, Commonwealth of Australia.

⁴ To be released in the near future

⁵ See for example Kelly J (1996) ‘A Decade of Divorce Mediation Research: Some Answers and Questions’ *Family and Conciliation Courts Review* 373, 375.

Program evaluation

- 14 Program evaluation is a form of applied research in which each of the research methods above may be used. Program evaluation is concerned with whether and how the objectives of a program, scheme or organisation are being met, and may address issues such as efficacy, operation and effectiveness. This can be used to inform decisions about the future of that program or to suggest areas for improvement and development. Evaluation can be one-off or part of a regular review that takes place on an annual or other cycle.
- 15 Evaluation can focus on the outcome (what was the result), or on process (what happened).
- *Outcome evaluation* considers the extent to which the program achieves its objectives. An attempt may be made to measure performance or effectiveness by, for example, gaining quantitative data on the outcomes of an ADR process. Outcome evaluation can also involve exploring other issues such as who accesses services and may do this by reference to other available comparable data (for example, ABS statistics).
 - *Process evaluation* describes *how* the program worked, what interventions took place and when, who was involved and what participants thought about the service provided. Process evaluation can provide information on *why* the aspects of the program or particular interventions are effective.
- 16 Evaluations can be *formative* or *summative*. Formative evaluation takes place during the implementation of a program and assists to inform decisions about program modifications. By contrast, summative evaluation takes place at the end of a specified period, investigates the overall outcomes of a program and makes recommendations about its future.
- 17 A good evaluation design combines each of the above elements. That is, it would consider both outcomes and processes, and would provide useful information during and at the end of the implementation of program. In order to do this effectively, an evaluation plan needs to be developed at an early rather than late stage in the life of a program.

Insider or outsider research

- 18 Research and evaluations may be conducted:
- internally, that is, by the organisation or individual providing the dispute resolution process or service, or
 - externally, that is, by an independent person or organisation.
- 19 Internal research may be more attune to the needs of the organisation and is less intrusive. Organisations may also be more willing to accept the outcomes of their

Resource paper on ADR research

- own enquiries. There are issues concerning the role of researchers when ‘insider’ research is conducted. The researcher’s own interests may assist to define the issues but may also create concerns about independence. This can affect the nature and rate of responses and consequently the reliability of research outcomes.
- 20 Conversely, external researchers may have greater credibility with external audiences and may be more willing to question and test the assumptions of the organisation. Research outcomes may be seen as more reliable. Outsiders may, however, have greater difficulty in understanding the unique issues confronting the organisation or program under study and so may be getting ‘good answers to the wrong questions’.
- 21 Research can involve both ‘insider’ and ‘outsider’ investigators in which responsibilities for different aspects of the research are shared. For example, an organisation may decide to conduct its own formative process evaluation with guidance from an external researcher who also carries out the summative outcome evaluation. As external involvement in the reviews of programs and schemes are becoming more common, mutually understood processes and performance indicators are important.

Research philosophies

- 22 The research approach needs to be congruent with the researcher’s own value set and with the philosophy underpinning the particular program being examined. The attitudes of the users of any research may also be relevant. Examples of research philosophies are:
- The *positivist* approach assumes that there is an objective reality which can be tested and measured. It uses the traditional ‘scientific’ approach of testing a ‘falsifiable’ hypothesis through objective, quantitative data. It is typified by rigorous experimental design (such as control groups or matched samples) in which tests of statistical significance are applied.
 - The *interpretive* approach places value on subjective human experience. Researchers interpret the information obtained through reflective processes, such as observations, in depth interviews or focus groups. There may be research questions but no clear hypothesis that can be simply accepted or rejected. Descriptive statistics may also be used.
 - *Participatory action research* is based on the principle that reality is socially constructed. Research methods involve active participation by the research participants in the processes examined, the formulation of practical research questions, the research design and the interpretation of the results. It is often part of a process of community development, organisational change or the development of ‘best practice’.

Resource paper on ADR research

- The *post-structural* approach 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’. Even the nature of theory is open to interpretation. For example, participants at NADRAC’s roundtable suggested a broader view of ‘theory’ that included ‘ideas’ and ‘systems of ideas and beliefs’. Post-structural analysis could look at ‘how professional, cultural and linguistic discourses impact on ADR, and whether some discourses are dominant’.

Research ethics

23 Ethical principles play a guiding role in determining the parameters and approach undertaken in research. Research conducted under the auspices of universities and other specialised research bodies will ordinarily require approval by the appropriate ethics committees, especially if it involves client interviews or surveys. Research conducted elsewhere may also need to address ethical issues including:

- confidentiality and privacy issues
- psychological, social or economic impacts of the research itself
- the particular needs of process participants (such as children), and
- the reporting of sensitive material or research findings.

24 Research into dispute resolution processes raises special ethical issues as the research participants may be in a continuing dispute with each other. For example:

- Interviewees may know each other very well, but are in conflict. Like mediators, researchers who interview both participants in the same dispute will need to be especially careful not to disclose inadvertently confidential information from one to another (for example, by the researcher’s non-verbal signals in response to direct question from an interviewee).
- The impact of the research on the dispute itself needs to be considered. For example, a dispute that has been dormant for some time may be rekindled when a participant receives a follow up questionnaire that reminds them of their past grievances.
- As the dispute may be subject of ongoing litigation, the research itself could become part of the dispute. For example, issues may arise about the admissibility in court proceedings of information obtained in a research exercise in the event that a participant’s lawyer issued a subpoena to the researcher.

Chapter 3. Context and systems: the bigger picture

- 25 This chapter explores some of the ‘big picture’ or macro issues associated with dispute resolution, that is, consideration of the broader context and process in which dispute resolution takes place. As a participant at roundtable explained,

We need a description of what is actually happening: people, processes, goals, programs, outcomes, unintended consequences. What are we doing? Who is doing it? Why are they doing it? To whom are they doing it?

- 26 Context sets the scene for research. It influences the research method to be used, the objectives of dispute resolution processes, the target groups to be reached, the criteria for evaluating effectiveness and the nature of clinical practices. As Chapter 6 shows, contextual factors also play a critical role in the actual outcomes of dispute resolution processes themselves.
- 27 Contextual issues include the nature of dispute or conflict, the relationship between the dispute resolution process and other systems, culture, policy environment and terminology.

Nature of disputes and conflicts

- 28 A fundamental question for those involved in dispute resolution is examination of the disputes or conflicts that the dispute resolution process is designed to address including questions such as:
- What is the nature of the conflict in the area of examination?
 - What types of disputes occur, what are the impacts of the conflict, who are the participants?
 - How is the use of dispute resolution options determined?
 - How are disputes resolved or finalised currently and elsewhere?
 - When do interventions take place?
 - What other options exist for dispute resolution or management?
- 29 Consideration of these question is critical to ensuring the suitability of dispute resolution processes, that is to:

Resource paper on ADR research

Understand the nature/ landscape of disputes and fit the dispute management approach to the dispute. For example, mediation is now being used for disputes where some other option would be more appropriate. Are the processes appropriate? (Comment at roundtable)

Relationship with other systems

- 30 It is also important to consider the relationship between the dispute resolution processes and other systems, for example, the civil and criminal justice systems, industry and marketplace, organisational structures, the educational system, the community, government and the international environment. Consideration of a dispute resolution process may require an examination of question such as:
- What is the place of ‘private’ dispute resolution within the publicly funded justice system?
 - How does the adversarial common law system, such as in Australia, UK, USA and Canada, influence our approaches to dispute resolution?
 - Where are dispute resolution processes ‘located’ within industry self-regulation or business structures?
 - How can better conflict resolution capabilities enhance community development or individual skills and vice versa?

Cultural context

- 31 The cultural context influences how disputes and conflicts are construed and the assumptions about how they are best resolved. Indeed, some see culture as the starting point for any examination of dispute resolution⁶. We are often ‘blind’ to our own cultural assumptions and may not become aware that a cultural issue exists until we come into contact with someone from a different culture. It is therefore important explore cultural context through questions such as:
- How does our own (or organisation’s) culture influence our approach to dispute resolution?
 - Do dispute resolution processes or systems fit ‘culturally’ within the participants’ or organisations’ values (for example, is there a preference for adjudicative or competitive processes?)

⁶ see for example Pedersen P. (2003) ‘Cultural Constructs of Conflict and Peace’ paper delivered to NADRAC conference ‘ADR: a better way to do business’ 4 Sept. 2003, Sydney, Canberra, Commonwealth of Australia.

Also see discussion later in this paper on John Paul Lederach 1995 ‘A Framework for Building Peace’ in *Preparing for Peace: Conflict Transformation Across Cultures* New York, Syracuse University Press.

Resource paper on ADR research

- Are participants perceiving the dispute resolution process, system or outcomes in a particular way based on cultural experiences and preferences?

Policy context

- 32 Policy, whether public or private, explicit or implicit, provides the framework for decision-making. It therefore shapes research priorities and processes. Policy also affects the level of regulation, the definition of processes and program objectives. A changing in policy may mean that processes and systems are required to fulfil different or additional objectives.
- 33 The policy context influences funding or sponsorship decisions, which in turn influences the ‘ownership’ of any given dispute resolution process. As roundtable participants observed ‘ADR has become more institutionalised; what then is the impact of such institutionalisation?’
- 34 The policy context may also determine who will make use of the results of the research and how such results are to be used. It is important to consider the audience, that is, whom are we trying to persuade? Indeed, quantitative research may not be the only or even the best means to influence decision makers:

Many of debates about data, methods, etc. are a useful narrative for a given audience. ‘Bean counters’ may respond to numbers. Often, however, CEOs respond to a single powerful case study ... horses for courses. Understanding rhetoric can guide ‘methods’
...(comment at roundtable)

Language and terminology

- 35 One issue that raises concerns for researchers 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? An example of this dilemma arose in one of the largest studies conducted in the United States⁷ that investigated the impact of mediation within court systems. The study reported that more than 50% of the ‘mediators’ gave advice or proffered an opinion – an approach that would be problematic when one considers NADRAC’s description of mediation⁸.
- 36 Process variations may relate to the position and role of the dispute resolution practitioner. Such variations mean that research findings may not be comparable

⁷ Kakalik J, Dunworth T, Hill L, McCaffrey D, Ashiro M, Pace N, Vaina M (1996) *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act*, RAND, Santa Monica California p53.

⁸ NADRAC (2003) *Dispute Resolution Terms*, Canberra, Commonwealth of Australia.

Resource paper on ADR research

- across jurisdictions or regions and that research methodologies need to consider specific definitional variations.
- 37 The use of the broad term ‘ADR’ (if taken to mean ‘alternative’ dispute resolution) may also be problematic⁹ as the term ‘alternative’ may imply that the effectiveness of ADR is to be compared with the courts. As outlined in Chapter 6 this may not be the most appropriate point of comparison.
- 38 Researchers also need to consider other terminological issues in dispute resolution¹⁰, for example, the distinction between ‘conflicts’, ‘complaints’ and ‘disputes’, between dispute ‘settlement’, ‘resolution’ and ‘management’ and between the colloquial, sociological and legal meanings of ‘fairness’. Terms for service users (such as ‘consumers’, ‘clients’, ‘parties’, ‘participants’ ‘disputants’ or ‘litigants’) and for service providers (such as ‘industry’, ‘profession’, ‘practitioners’, ‘dispute resolvers’) themselves can imply a particular view about the nature of dispute resolution practice.

Approaches

- 39 A range of research methodologies can be used to gain an overall picture or describe the ‘landscape’ of dispute resolution, that is to ‘map’, ‘profile’ or ‘audit’ the field. Information sources and methods can include surveys, formal RFIs (requests for information), literature reviews and data generated by individual practitioners and organisations such as courts and tribunals.
- 40 A two stage process may be useful:
- First, a broad but shallow inquiry (or ‘trawl’) in which all aspects of the issues are examined on a fairly superficial basis. This provides an overall picture and identifies where significant issues require further examination.
 - A deeper but narrower inquiry that examines a smaller number of issues in depth. Such an enquiry may use triangulated research methodologies to delve into underlying issues and seek more specific information.
- 41 Information can be structured and analysed in various ways. For example, it can be presented as a taxonomy or matrix that lists elements and features of the system¹¹. Quantitative information may be presented in tables or charts as descriptive statistics. Qualitative information could be grouped under issues, themes or problems (as in the case of this paper) or analysed using qualitative methods such as content or discourse analysis.

⁹ See NADRAC (2002) *ADR Terminology: a discussion paper* and (2003) *Report of submissions* Canberra, Commonwealth of Australia.

¹⁰ see NADRAC (2002 & 2003) above

¹¹ See for example the Law Council of Australia’s summary of ADR programs at www.lca.asn.au

Resource paper on ADR research

- 42 There have been numerous attempts in the past decade to evaluate ADR processes in a broader contextual manner. These attempts have at times been made as part an inquiry into the justice system (as with the Australian Law Reform Commission¹²), as part of a review of case management¹³ or in response to specific ADR initiatives. Other ADR research has considered community expectations and the role of lawyers in ADR. Some research is linked to priority research areas that are guided by the Productivity Commission.
- 43 Specific research studies can also inform comparative and contextual research. The following examples may assist those conducting such research.

Resources

- Alexander N, Hinchy R *'Appraising the Case Appraisers: Survey of Queensland Case Appraisers'* (currently unpublished).
- ALRC – Managing Justice (Report No. 89)
- Burn D & Horarid (1999) 'Patients' Complaints about Medical Practice', *Medical Journal of Australia*, pp 598-602.
- Corns C, Fisher T, O'Malley P (1993) 'Mediation and Reparation' *Restitution for Victims of Crime, Interim Report Chapter 6, pp. 125-163*, Government Printer, Melbourne
- Elix J (2003) 'Intractable environmental conflict in Australia' *Rural Society*, February.
- Fisher T (1993) 'Victim/Offender Mediation in Australia and Overseas: Practices and Problems', *Australian Dispute Resolution Journal* 4:2 pp.125-38.
- Fisher T (1993) *'Victoria's Dispute Settlement Centres 1992: Principles, Structure, Operations and Distinctive Features'*, p15, National Centre for Socio-Legal Studies, La Trobe University
- Mugford J (1986) "*Alternative Dispute Resolution*", Seminar Proceedings No. 15, Australian Institute of Criminology.
- Submissions to the *Dispute Resolution in Electronic Commerce* discussion paper. www.ecommerce.treasury.gov.au/publications/DisputeResolutioninElectronicCommerceDiscussionPaper/index.htm
- Sourdin T & Elix J Financial Industry Complaints Service Issues Paper 2002 at: <http://www.fics.asn.au/IndependentReview.asp>

¹² <http://www.alrc.gov.au/>

¹³ see for example, Kakalik J, Dunworth T, Hill L, McCaffrey D, Ashiro M, Pace N, Vaina M (1996) *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act*, RAND, Santa Monica California.

Chapter 4. Objectives: Why?

- 44 This chapter examines how research may focus on, or be shaped by, the aims and objectives of an ADR process, program or service. Researchers need to identify not only what the objectives are, but also who has these objectives. They may need to differentiate between, for example, the objectives of an organisation and the objectives of a process.
- 45 Objectives may be well articulated and can be shaped by the context or system. Such objectives can determine the criteria by which ‘accessibility’, ‘fairness’, ‘satisfaction’, ‘success’ and ‘effectiveness’ may be judged. Often, however, objectives are either not clearly articulated or have changed over time.
- 46 Similar issues also arise about how the objectives of the research are to be articulated. Many of the points below could equally apply to design of a research project. Clear articulation of the research questions (which may involve extensive stakeholder input) is essential in ensuring that the research meets expectations.

Note: For editorial reasons, the term ‘objectives’ is used here as a general term to cover similar terms such as ‘aims’, ‘goals’, ‘purposes’, ‘intended or desired outcomes’, or ‘targets’. Researchers may wish to define and organise these terms more precisely. For example, it is common for ‘aims’ to be general and high order, and objectives to be more specific and precise.

Identifying the objectives

- 47 In developing or identifying objectives, it is useful to ask questions about how they came about, how they may have changed and who subscribes to which objectives. Possible questions could be:
- What are the objectives of current dispute resolution programs and processes and any comparable programs or processes?
 - What is the problem to which the dispute resolution process is the solution? Where did the pressure for the process come from?
 - Are there competing priorities which have meant changes to objectives over time?
 - Which objectives are common for parties, practitioners, government and community? Which vary?

Resource paper on ADR research

- 48 Researchers need to take care not to make assumptions about objectives. For example, the objective of policy may not simply be about cutting costs, as the following comment indicates:

From a policy adviser's perspective, the issue is how to ensure spending is on the most effective processes ... to identify the best or a range of processes to produce the best outcomes ... [ie] substantive qualitative outcomes. Discussion of [the bottom line - dollars] leads to reduction of funding. (comment at roundtable)

- 49 In conducting a needs analysis, researchers need to consider how stakeholders can be involved in establishing the objectives. This may also be an issue in determining the research design as the goals and objectives of the research and the research emphasis need to be informed by significant stakeholder input.

How can achievement of objectives be measured?

- 50 The second question concerns the methodology used to examine the objectives. The methodology may be mixed in respect of some objectives. For example accessibility may be evaluated through reference to demographic information as well as qualitative information obtained in focus groups relating to specific issues (such as how age or ethnicity impacts upon participation in a process or scheme).
- 51 It clearly benefits those researching and evaluating programs if objectives are measurable. However, the ease of measurement should not drive the development of the objectives themselves. For example, 'justice' and 'fairness' may be difficult to quantify but may still be valid objectives.

Approaches

Objectives of programs/organisations

- 52 There are many well developed planning and consultative processes for setting and clarifying the objectives of programs and organisations, for example:
- Business planning, which examines the needs of the whole business, sets the vision, mission, goals and operations, to identify:
 - current situational issues - where are we now?
 - future objectives - where to we want to be?
 - process issues - how will we get there?
 - Strategic planning, which is one aspect of business planning concerned with broader goals and strategies rather than detailed operations. The objectives can also change as a result of broader system wide changes.

Resource paper on ADR research

Objectives of processes

53 Clarifying the objectives of processes, including the goals of ADR itself, may be a more difficult and nebulous task. There may be many more stakeholders involved who may:

- have competing goals, and
- have limited capacity or interest in participating in planning.

For example, parties may have goals vis a vis the resolution of their own specific dispute, but may have not have goals for the ADR process itself.

54 Possible approaches to clarifying process goals include:

- literature review
- surveys of client groups and other stakeholders (either questionnaire or personal interview)
- focus groups
- consultative decision-making, such as a search conference, in which key stakeholders are brought together to identify key issues, goals and strategies for a service, program or community
- action research (see Chapter 2).

Resources

55 There are many facilitation, consultation and planning guides available that may assist in setting organisational and programs goals. One example is:

Justice T and Jamieson D (1998) *The Complete Guide to Facilitation: enabling groups to succeed*, HRD Press, Amherst, Massachusetts

56 In terms of process goals, NADRAC, the Australian Law Reform Commission (ALRC) and Professor Tania Sourdin have published material that may be useful to researchers seeking to clarify objectives. Extracts are reproduced below.

NADRAC's consultation on ADR standards (2000-2001)

57 In its 2000 discussion paper on ADR standards NADRAC sought comment on the following suggested common or core objectives for ADR, namely that ADR

- Resolves disputes
- Uses the process which is considered by the parties to be fair

Resource paper on ADR research

- Achieves acceptable outcomes
- Achieves outcomes that are lasting, and
- Uses resources effectively.”¹⁴

58 Most responses to the discussion paper supported these objectives. Some questioned the validity of the proposed objectives because of lack of empirical evidence, the lack of reference to community interests, and lack of guidelines on the meaning of ‘fair process’, ‘acceptable outcomes’ or ‘effective use of resources.’ Many indicated that apart from macro objectives, processes or systems may have specific objectives.

59 A number of responses proposed additional or modified objectives, which surrounded transformation, dispute management, and broader societal outcomes. Many of these objectives were seen as applying to facilitative rather than advisory and determinative forms of ADR.

60 **Transformative goals**

- *‘Helps empower parties to act in their own interests, and to recognise the interests of others.’*
- *‘An insight into relationship dynamics and transformation in understanding, relationship or behaviour ‘*
- *‘Party empowerment (assertiveness) and recognition (empathy)’*
- *Allow parties ‘to raise and canvass underlying needs and concerns, thus affording them the opportunity to resolve those concerns. ‘(Submission 33)*

Dispute management goals

- *‘Resolves disputes **or** narrows the scope of the dispute.’*
- *‘Clarifies the situation of parties as to their negotiating positions and their options should negotiations break down.’*
- *‘Exchange of information in a without prejudice setting, and clarification of issues and the narrowing of those still in dispute after information exchange and clarification has taken place’*
- *‘Selection of most appropriate and economic method of dispute resolution’*

61 Objectives can also relate to broader societal outcomes

¹⁴ NADRAC (2000) *The Development of Standards for ADR – Discussion Paper*, Canberra, Commonwealth of Australia, p 22.

Resource paper on ADR research

- *'Crime prevention and community health, safety, education and employment, rehabilitation of victims and perpetrators of crime'*
 - *'Social justice' and 'human rights'*
 - *'Promoting the needs of children'*
 - *'Reinforcement of participatory democratic values'*
- 62 Divergent views were expressed at forums and in submissions on how to define fairness and acceptability of outcomes and the extent to which ADR should be expected to contribute to broader social goals. While some felt that fairness and acceptability were purely subjective and could not be defined in objective terms, others felt that an external measure of acceptability was required. For many the need for ADR to promote broader social goals was seen as vital. However, others felt that this was beyond the role of ADR services.
- 63 In relation to 'effective use of resources', a question was raised about whether this was an objective of ADR, or an issue of management. The need to address both service provider and party resources was also raised. 'Lasting outcomes' also may not be relevant objective in all cases as a short term solution may sometimes be the most appropriate outcome in many cases.
- 64 As a result of these comments NADRAC proposed the following objectives for ADR, which would be common for participants, service providers, government and the community:
- To resolve or limit disputes in an effective and efficient way (having regard to matters such as durability, cost, timeliness, etc.)
 - To provide fairness in procedure
 - To achieve outcomes that are broadly consistent with public and party interests.¹⁵

Sourdin(2002)

- 65 The ALRC also considered objectives for the federal litigation system. A range of sub objectives can also be found. Sourdin adapted and extended of the ALRC and NADRAC objectives as follows:¹⁶

¹⁵ NADRAC (2001) *A Framework for ADR Standards*, Canberra, Commonwealth of Australia, pp 13, 14.

¹⁶ Sourdin T (2002) *Alternative Dispute Resolution*, Law Book Co, see Chapter 4.

Resource paper on ADR research

The process should resolve or limit the dispute

- 66 The objective responds to the use of ADR processes as part of a case management approach. Adjudication in each court may deal with only part of the conflict between the parties.

The process should be considered by the parties to be just (or fair)

- 67 The ALRC has noted that one criteria or objective could be that the process be 'just'.
- 68 It has also noted that the term 'justice' resists easy definition – 'A key issue is whether justice should be defined by reference to external "objective" values, or by reference to the parties' own 'subjective' evaluation of the process.'¹⁷
- 69 For example, consistent application of rules and procedural requirements to the passage of a dispute through the litigation system may result in 'just' or 'fair' process or adjudication, whereas participation by the parties (not necessarily their legal representatives) may be essential to ensure that parties perceive the process and outcome as just or fair (for example, in ADR processes).
- 70 A fundamental issue relates to whether it is the process or the outcome that is being explored and how the objective can be evaluated. If the focus is upon the outcome, agreement or solution that is reached as a result of ADR processes then there are issues about whether or not such outcomes should have any objective characteristic.
- 71 ADR literature refers to win-win solutions, options for mutual gain and integrative bargaining.¹⁸ There is also reference to mediation's capacity to promote "wise"¹⁹ agreement..
- 72 Perhaps, the definition of what is 'just' can be determined by analysing the particular process and that the different dispute resolution processes in turn have different objectives. For example, a process such as mediation may involve standards relating to
- inclusiveness
 - openness, and,

¹⁷ NADRAC (2001) *A Framework for ADR Standards*, Canberra, Commonwealth of Australia, pp 13, 14.

¹⁸ Gillespie J and Bazerman M (1997) 'Parasitic Integration: Win- Win Agreements Containing losers', *XIII The Negotiation Journal*, 3, July.

¹⁹ Fisher R, Ury W, Patton B (1991) *Getting to Yes – Negotiating an Agreement Without Giving In*, 2nd ed, Sydney, Random House, originally Fisher and Ury (1981), note that 'a wise agreement is one which meets the legitimate interest of each side to the extent possible, and takes community interest into account' at 4.

Resource paper on ADR research

- fairness in terms of process.

73 A ‘just’ outcome may require a value judgment by neutral and this is inconsistent with many forms of ADR. However, it could be suggested that in negotiation processes, ethics, codes and standards may assist to support outcomes and process that are ‘just’. These components may be measurable in an evaluation.

The process should be accessible

74 The ALRC noted that the concept of accessibility implies that:

- appropriate dispute resolution processes exist and are available
- barriers to participation in the process, such as cost, are reduced or serve to channel parties into more appropriate forms of dispute resolution
- parties and their advisers understand the process, their role in the process, and the reasons for the outcome.”²⁰

75 At present, the various dispute resolution processes that are available to individuals and organisations within our society are funded differently and access to processes is limited by a variety of other factors including geography, gender, employment and information availability.

76 The different funding arrangements mean that much of the ADR system is not funded or supported by the government structures.

77 The variations in cost can mean that in some circumstances it is cheaper to access the government supported litigation system than to access private ADR.

78 This measure may also involve evaluating supportive mechanisms that focus on coordinating and referral processes.

The process should use resources efficiently²¹ and promote lasting outcomes

79 The ALRC has noted, ‘efficiency can be viewed from a number of perspectives including

- the need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste
- the need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation

²⁰ Ibid

²¹ This is an adaptation of the ALRC criteria - the process should be efficient.

Resource paper on ADR research

- the need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.’²²
- 80 Efficiency can also refer to long-term gains, rates of compliance, and the broader costs of unresolved conflict.
- 81 NADRAC has proposed the following objective – ‘achieves outcomes that are lasting.’
- 82 The ALRC also proposed an objective that ‘the process should be timely.’ The ALRC has said that timeliness relates to. ‘...minimising
- the delay between the commencement of proceedings and the hearing of the dispute having regard to the complexity and features of the dispute
 - the time taken to resolve the dispute once the resolution process has commenced
 - the time which parties, their legal representatives, witnesses, judicial officers and others must devote to the process.’²³

The process should achieve outcomes that are effective and acceptable

- 83 The ALRC has proposed an objective that – ‘the process should be effective’. This can be compared with the proposed NADRAC core objective -- "achieves acceptable outcomes".
- 84 The ALRC has noted that “effectiveness implies that:
- the process should ensure, or at least, encourage a high degree of compliance with the outcome
 - at the conclusion of the process, there should be no need to resort to another forum or process in order to finalise the dispute
 - the process should promote certainty in the law.”²⁴
- 85 Satisfaction is a criterion that could be considered when determining whether or not a process is effective. For example, can a process be regarded as effective if all concerned with the process are unsatisfied? In this regard it has been noted that the success of ADR cannot be measured merely by savings in money and time.

²² ALRC, IP 20 at 27

²³ ALRC, IP 25, at 27.

²⁴ ALRC, IP 25, at 27.

Chapter 5. Access: Who uses ADR services?

86 This chapter concerns the way in which research can explore the accessibility and usage of ADR services.

87 The accessibility of dispute resolution services may be an objective in itself (see Chapter 4), and a criterion for success or effectiveness (see Chapter 6). It may not be a universal objective, however. For example, it may not be in the commercial interests of an ADR service provider to encourage increased use of their services to those with limited resources or higher needs. Accessibility is nevertheless a concern of the dispute resolution system as a whole and is therefore a key policy consideration in its own right.

88 Key research questions include:

- **Usage**

Who uses, or could use, the services and processes? Demographic and comparative demographic information may be essential to determine use.

Are services being provided effectively to all groups in the community, for example remote/rural communities, Indigenous communities, aged and disabled groups, ethnic minorities?

Is ADR meeting the needs of disadvantaged people? Do disadvantaged groups have different needs in relation to ADR services? Does ADR give a voice/ access to disenfranchised, marginalised groups at a micro and macro level?

Should some groups be over or under-represented? For example, the education and income levels of service users using an ADR service directed at disputes relating to financial planning are likely to differ from the general Australian population. The research inquiry will therefore be directed at determining the relevant target population.

- **Awareness and acceptance**

To what extent does the target population understand or accept the ADR processes and systems being offered?

- **Broader policy**

Broader policy issues can also be explained for example, is ADR being overused? For example is there a 'net-widening' effect of (court-connected) ADR. Is there increased access to some services that are

publicly funded? Is ADR being used as an alternative to private negotiation and to what extent should this issue be explored.

- **Differential service**
Is there a quality differential between services. That is, are those with resources getting high quality ADR while those without get 'quick and dirty' ADR?
- **Participation**
How do we ensure that resources to provide people with advice, counselling, financial advice etc. to enable effective participation in ADR?

89 NADRAC's compendium of published ADR statistics²⁵ shows that few agencies publish detailed statistical information about the backgrounds of parties using ADR. Those agencies that do report such information (predominantly community mediation services and industry based customer ADR schemes) have accessibility as a key goal in their program. It is possible that other agencies collect but not publish such information. The information nevertheless would be useful to ADR researchers.

Approaches

- 90 Research methodology on accessibility can be drawn from other fields, such as access to justice, community development and consumer driven research.
- 91 An analysis can compare the features of the client population and compare with the demographics of the target population. For example, age and gender ratios of clients may be compared with ABS statistics for the general population for the nations, State and Territory or region. The general population, however, as noted previously, may not represent the population of potential users or the level of unmet need and a more refined analysis may be required. For example, a service targeted to residential tenancy disputes may need to estimate the demographic of those in rental accommodation. In carrying out this analysis, it is vital the same definitions are used for client and comparative data.
- 92 Such information may alert researchers to particular issues but not why or how to address these issues.
- 93 It may therefore be necessary to undertake qualitative research to assess the issues. This may include stakeholder meetings, focus groups or public enquiries. To a large extent the methods depend on the target groups' needs and characteristics. Additional qualitative and quantitative research on outcomes, perceptions of fairness and expectations may also need to be explored.

²⁵ NADRAC (2002) *ADR Statistics* Canberra, Commonwealth of Australia.

Resource paper on ADR research

- 94 A related concern is community ownership of the research process itself. Action research (see Chapter 2), which engages the target groups as active participants in both setting the research questions and method, may be particularly suited to this area of research.
- 95 Of particular importance is the role of culture in any examination of the process of dispute resolution. The work of John Paul Lederach places culture at the centre of mediation practice and encourages practitioners ask communities themselves how they deal with conflict.²⁶

Resources

- 96 In 1997, NADRAC produced a discussion paper on *Issues of Fairness and Justice in ADR*. The paper was developed from a comprehensive literature review. It suggested some directions which could form the basis for recommendations for policy makers and guidelines for practitioners. Some of these recommendations are outlined below

Access to ADR Services

- 97 Programs need to be developed to encourage practitioners to work with members of minority and marginalised groups in order to develop ADR processes which are acceptable to those groups. As well as training, strategies could include:
- the establishment of a national ADR information network to enable service providers to share useful practical information about dispute resolution techniques having regard to the needs of particular groups in our society.
 - the development of information materials about ADR, including the various sorts of ADR, and about the sorts of services they provide.
 - the development of a handbook setting out the advantages and disadvantages likely to be encountered in taking particular sorts of disputes to ADR.
 - the development of pamphlets, videos, or booklets setting out people's basic legal entitlements in relevant areas
 - development of links with advocacy and other services
 - recruitment of members of minority groups as practitioners and to assist in service design.

²⁶ Lederach J P (1995) 'A Framework for Building Peace' in *Preparing for Peace: Conflict Transformation Across Cultures*, New York, Syracuse University Press.

Resource paper on ADR research

- 98 The comparative cheapness of ADR makes it an attractive alternative to the formal justice system for many people. However, there are still some costs associated with ADR. Consideration needs to be given to how those costs can be minimised for those who cannot afford them

Social Trends

- 99 It may be appropriate for ADR service providers to bring to public attention any concerns which they may have about particular social trends and patterns which they have become aware of in the course of their work. Confidentiality issues would, however, need to be taken into account.

Towards Practice Guidelines

- 100 At the outset of proceedings, dispute resolvers should consider carefully the aspects contributing to the identity of each of the parties to the dispute and the ways in which the various aspects of peoples' identities are likely to interact with the ADR process.
- 101 Dispute resolvers need to ensure that they are sensitive to the beliefs, feelings, practices and understandings of the parties to a dispute which may make them uncomfortable with elements of 'standard' ADR practice.
- 102 On the basis of their initial assessment, dispute resolvers may need to make modifications to procedures within ADR processes to address any problems which they have identified. In making changes, dispute resolvers should be sensitive to the elements of each ADR process and of the particular demands which it is likely to place upon each participant in a dispute.
- 103 In some cases, in addition to considering modifications to ADR procedures, dispute resolvers will need to consider which ADR process is likely to be most appropriate.

Other resources

- AC Nielsen (1998): *'Family and Child Mediation Survey'*, report to Family and Community Services, Canberra.
- Bagshaw D, Campbell A, Jelinek L. (2002) *Creating the Future: Evaluation of a program for children and families affected by domestic violence*, Attorney-General's Department Crime Prevention Unit. (This evaluation is relevant to include as it is evaluating a strategy for early intervention and prevention of violence in interpersonal relationships).
- Bagshaw D, Chung D M (2002) *Women and Domestic Violence Research Report for the Partnerships Against Domestic Violence*, Office of the Status of Women, Canberra. Pirie Printers: Commonwealth of Australia. (This research report is relevant to ADR in Family Law settings).

Resource paper on ADR research

- Bagshaw D, Chung D. (2000) 'Gender Politics in Research: Male and Female Violence in Intimate Relationships' in *Women Against Violence: An Australian Feminist Journal*, CASA House: Melbourne, Issue 8, pp. 4-23. (An evaluation of the literature on male and female violence that is directly relevant to ADR).
- Bagshaw D, Chung D (2000) *Reshaping Responses to Domestic Violence Vol. 1, Executive Summary Vol. 2, Final Report Vol 3, Appendices*. Research Report for the Partnerships Against Domestic Violence. Office of the Status of Women, Canberra and Department of Human Services, South Australia. Pirie Printers: Commonwealth of Australia (This research report made many comments about the relevance of ADR to domestic violence and made recommendations for changes to the law and to family Court processes).
- Bagshaw, D (1995) 'Family Mediation Chinese Style' *Australian Dispute Resolution Journal* 6: 11-24.
- Bagshaw, D, Campbell A et al. (2002) 'Children and Domestic Violence': *An Evaluation of Jannawi Resources*, Conflict Management Research Group, University of South Australia, Adelaide.
- Campbell A (2002) 'Working with Children in Family Mediation' *Psychotherapy in Australia*, 8 (4): 46-51.
- IPR Shandwick (1996) '*Family and Child Mediation Perceptions Study*' conducted for Relationships Australia and Family Mediation Centre, Melbourne.
- Frederico M, Cooper B & Picton C (1998) *Mediation and Cultural Values*, Department of Immigration and Multicultural Affairs, Canberra.
- Keys Young (1996) '*Research/Evaluation of Family Mediation Practice and the Issue of Violence Final Report*', Commonwealth Attorney-General's Department.
- McIntosh, J (2002) 'Child inclusive divorce mediation: Report on a qualitative research study' *Mediation Quarterly* 18 (1): 55-69.
- Bauman T & Williams R (2004 – draft) *All in the process: issues in Indigenous mediation and facilitation*, (forthcoming discussion paper by Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra).
- NSW Law and Justice Foundation (2004) *Access to Justice and Legal Needs Research Program: Access to Justice Data Digest: Non-court dispute resolution agencies* (yet to be published)
- Pammer WJ & Killian J (Eds.) (2003) *Handbook of Conflict Management* - Bagshaw, D. *Preparing for Success* Chapter 3, Part 1-'Contested Truths: Disclosing Domestic Violence in Family Law Mediation' Chapter 3, Part 1, Marcel Dekker Inc, New York. In press - ISBN number: 0-8247-4257-5. (Based on domestic violence research studies conducted for the Australian Commonwealth Government).
- Sourdin T & Matruglio M (2003) *Evaluating Mediation – NSW Settlement Scheme 2002*, La Trobe University
- University Electronic Journal of Law*, Vol 7, No 2 (June 2000) (online):

Resource paper on ADR research

Zariski A (1997) 'Lawyers and Dispute Resolution: What Do They Think And Know (And Think They Know)? - Finding Out Through Survey Research', *Murdoch University Electronic Journal of Law*, Vol 4, No 2, June.

Zariski A (2000) 'Disputing Culture: Lawyers and ADR', *E Law - Murdoch University Electronic Journal of Law*, Vol 7 No 2, June (see <http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72.html>)

Chapter 6. Evaluating effectiveness: Is ADR ‘successful’?

- 104 This chapter explores approaches by which the success or effectiveness of ADR can be measured and evaluated. Such approaches underpin theoretical research on the ADR process itself, the evaluation of specific programs and schemes, and routine performance measurement and statistical collection by individual organisations.
- 105 The traditional approach to evaluating the ‘success’ of dispute resolution is to define intended outcomes and the criteria or indicators by which achievement of those outcomes can be judged. The previous chapter suggests that there are diverse objectives for ADR and consequently many different ways to define success. For example, fairness may be more important than settlement of the dispute. Durability and long term impact may be more important than the immediate outcome. ADR also may have broader goals such as capacity building, skills development and reductions in social friction.
- 106 Any evaluation of outcomes, however, needs to take into account unintended and unplanned consequences, whether positive or negative. It is also important to note that the ‘success’ of dispute resolution may refer as much to the process (for example, satisfaction with how a session was conducted) as to the outcome (for example, whether an agreement was reached). As outlined in Chapter 3, indicators for success are determined largely by the context.

‘Success’ of ADR

Short and long term impacts

- 107 Determining the ‘success’ of the process or system requires a consideration of short and long term impacts of different forms of dispute resolution. For example, a dispute resolution procedure that aimed to produce quick results may have an immediate impact on court waiting lists, but, if agreements are not durable, the same disputes may occur at a later stage or arise in another context or jurisdiction. Conversely, a dispute resolution procedure that provided an opportunity for parties adjourn proceedings and undergo mediation in order to find a long term solution to complex issues could see an increase in case ‘disposal times’. A successful dispute resolution outcome in qualitative terms may therefore be a ‘failure’ in statistical terms, and vice versa.

Unintended consequences

- 108 The introduction and use of dispute resolution processes and systems may produce a range of consequences that were not intended or anticipated. For

Resource paper on ADR research

example, the introduction of a low cost and accessible dispute resolution service within an organisation may lead to parties feeling more empowered to seek assistance, and so lead to an increase in the number of formal grievances. Alternatively, a mandatory requirement to use mediation may mean that parties attempt direct negotiation prior to the mediation session itself. This may lead to an increase in the number of matters resolved prior to mediation, but may also lead to a lower than expected agreement rate at mediation, as only the more difficult or complex matters may proceed to mediation.

Points of comparison

- 109 How do the outcomes of ADR compare with traditional processes? The interface between ADR and other processes requires comparative examination.
- 110 There are significant methodological and conceptual difficulties in comparing ADR processes with traditional litigation and also in terms of evaluating and defining processes. Much research on ADR is conducted on processes within the litigation system and is quantitative in nature²⁷. There has been little focus in the civil litigation system on qualitative research. Quantitative research creates difficulties in terms of what is evaluated. For example, in a court or tribunal governed process, parties may simply opt out of existing processes without informing the court of their intentions. Alternatively ADR processes may discourage litigation from commencing in the first place.
- 111 One issue in comparing the costs and benefits of ADR processes with those of traditional litigation is that any comparison with the cost of those cases that go to trial could be inappropriate because many cases would have settled out of court in any event. In addition, many of the possible benefits of ADR are difficult to measure. The increased use of ADR may lead to a decrease in litigious or adversarial behaviour, foster better relationships between parties to disputes or result in higher levels of compliance with outcomes. For example, it has been suggested that those exposed to cooperative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour.²⁸
- 112 For ADR processes that are evaluated outside the court and tribunal systems there has been little guidance in appropriate points of comparison, that is, what would the parties have done if they had not used the ADR process? Clients may be asked at the intake stage to state what they see as the consequences of a dispute if it were not resolved, and practitioners may also be asked to make an assessment of likely outcomes of an unresolved dispute. Such assessments, however, may not be altogether reliable and will be influenced by the client's or practitioner's desires to minimise or to exaggerate consequences.

²⁷ Sourdin T (2002) 'Alternative Dispute Resolution', Sydney, Lawbook

²⁸ Wanger P (1994) 'The Political and Economic Roots of the 'Adversary System' of Justice and 'Alternative Dispute Resolution' in *The Ohio State Journal on Dispute Resolution*, 9(2), 203.

Resource paper on ADR research

- 113 Client assessment of the comparative benefits of, for example, mediation versus other services will be strongly influenced by their expectations. That is, they may be highly satisfied with the outcome of a process about which they were pessimistic, but less satisfied with the same outcome from a process about which they had high expectations.
- 114 A further difficulty in making comparisons is the effect of referral decisions whereby the more suitable or amenable cases are referred to a 'new' dispute resolution process, while the more difficult cases are dealt with through traditional means.

Causality

- 115 The outcomes of a specific ADR process are a largely context bound. That is, the same process may be 'successful' in one environment but 'unsuccessful' in another. Many factors will impact on the effectiveness of an ADR process, such as the appropriateness and timing of referral, the skills of the practitioner and the parties' commitment to settle. It is therefore important to examine the overall context as outlined in Chapter 3.
- 116 The fact that a particular outcome follows the introduction of, or a change to, a dispute resolution procedure does not mean that the dispute resolution procedure is the cause of that outcome. For example, a dispute resolution procedure may be introduced when disputes of a particular kind have reached a peak. The drop in the number of disputes may have as much to do with a natural cycle as with the dispute resolution procedure. Moreover, any changes may be due to other random factors (hence the need in empirical studies to apply tests of probability).
- 117 Research literature has also identified other problem in interpreting research results. These include the 'Hawthorne effect' in which the mere introduction and study of a new process produces positive results, the 'self-fulfilling prophecy' in which the researcher's expectations are claimed to influence the result, and 'cognitive dissonance' theory, which suggests that participants will tend to align their views (eg satisfaction) with their actual behaviour (eg participation in an ADR process).

Solutions?

- 118 There is no easy solution to these methodological issues. Carefully designed empirical studies, such as matched samples and the establishment of control groups, may be necessary to establish a clear link between a dispute resolution procedure and its intended outcome, or to compare the outcomes of ADR with traditional processes. Such approaches, however, raise major practical and ethical issues.
- 119 An alternative approach is to identify the likely problems, use a combination of methodologies to minimise these problems, state the limitations of any conclusions drawn and to identify other possible causes for the observed outcome.

Meta-analysis

- 120 Several writers have attempted to draw together (that is, conduct a meta-analysis of) the outcomes of ADR research and to suggest priorities for future research.²⁹ For example, 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. 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.
- 121 Another and more complex level of analysis attempts to identify the factors associated with the effectiveness of different dispute resolution processes [to be cross referred to the yet to be published paper on court referral to ADR prepared for Australian Institute of Judicial Administration and NADRAC by Assoc. Prof. Kathy Mack]

Program 'success'

When to evaluate?

- 122 Although evaluation can be part of a routine planning process, program evaluation often takes 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 often conducted by an independent consultant or agency.
- 123 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 (or prior to commencement).

Impact of evaluation

- 124 The evaluation process itself and the selection of specific performance indicators may have an impact on the dispute resolution service itself. For example, if the

²⁹ Kelly J (1996) 'A Decade of Divorce Mediation Research: Some Answers and Questions', *Family and Conciliation Courts Review* 373, 375.

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.

Australian Law Reform Commission - Issues paper 25.

Resource paper on ADR research

time taken to close a case is taken to be a measure of success, this could result in pressure on practitioners to close cases prematurely or to apply procedures that will lead quicker, albeit short term, settlement. Conversely, objectives that are more difficult to quantify may assume less importance in the organisation.

- 125 A good evaluation design should consider the impact of the evaluation on the service delivery and, ideally, contribute to its improvement.

How well are we performing? Issues in ADR statistics

A quick overview of number-crunching

- 126 The following paragraphs provide a somewhat simplified description of the types of statistical data that may be relevant to the evaluation of dispute resolution programs and processes. Readers would need to go to more detailed texts for a fuller explanation of these terms.
- Statistical data can be *descriptive* (simple counting and presentation of numbers) or *interpretive* (used to support or reject a scientific hypothesis and tested for statistical significance).
 - *Measures* combine data in various ways. For example *efficiency* is often described as the ratio of outputs to inputs (for example, number of cases closed per practitioner), *effectiveness* as the extent to which outcomes are achieved (for example, number of resolutions) and *cost effectiveness* as the ratio of outcomes to costs (for example, cost per case resolved).
 - The quality of data may be judged according to whether it is *valid* (it means what it says it means) and *reliable* (consistent and comparable). For example, a reduction in waiting times may not be a valid indicator of mediation success even if can be measured reliably. Data also needs to be *authentic* (honest) and *economical* (useful information, with low effort to collect).
 - Data collection by organisations usually involves reporting against agreed *activity* and *performance indicators*. Activity indicators include *inputs* (for example numbers of matters referred, resources provided, costs of services) and *throughputs* (for example number of sessions). Performance indicators include *outputs* (eg ADR processes completed), *outcomes* (eg number or % of matters resolved) and *impacts* (contributions to broader goals - eg reduction in litigation).

Published ADR statistics

- 127 NADRAC's compendium of published statistics on ADR in Australia³⁰ shows that many agencies that provide ADR do not publish annual or any other regular reports, and some report use of ADR without providing statistics. In many instances, aggregated or summary information only is published within a broader organisational or portfolio report.
- 128 In many cases, activity indicators (such as case numbers) only are provided, with no indication of outcomes. In a few cases, outcome indicators only (such as agreement rates) are published, with no indication of actual numbers of cases.
- 129 Resolution, agreement, partial agreement and settlement are the most common outcome indicators used. Other outcome indicators are:
- performance against defined targets
 - client satisfaction
 - timeframes
 - in the case of industry based customer ADR schemes, substantive outcomes (for example resolutions in favour of consumer vs industry member).
- 130 The reliability, consistency and comparability of both activity and performance measures is limited as a result of divergent practices in statistical reporting within and between agencies.
- Many agencies appear to have developed new statistical measures over time to overcome anomalies and to reflect new needs and priorities. Such changes however, make it difficult to track trends.
 - In terms of activity measures some agencies refer to clients, others to cases, referrals, sessions, mediations, conciliations, hours, etc.. Cases, referrals or disputes will probably give the lowest figure. Clients, sessions or hours may be higher. Figures will be influenced by, for example, practices with respect to multiple sessions or multiple parties.
 - With agreement (or resolution or settlement) rates, the 'denominator' varies across agencies. Agreement may be expressed as a percentage of the total cases referred, of cases accepted for mediation, of case proceeding to mediation, or of all closed cases (ie excluding 'pending' cases). Using completed mediations would yields a high 'resolution rate' while using all referrals may give a low resolution rate.

³⁰ NADRAC (2002) *ADR Statistics* Canberra, Commonwealth of Australia.

Combining quantitative and qualitative research

- 131 The appropriateness of each of the commonly used statistical measures can be questioned. For example, ‘resolution rates’ may not be comparable across agencies. It may reflect mere settlement on the day, or a more durable resolution over time. Satisfaction ratings are by nature subjective and may relate more to client expectations of service than to actual outcomes. Financial benefits of ADR may ignore the qualitative benefits of providing fair and accessible methods of resolving disputes.
- 132 While quantitative information provides an overall view of outcomes, it does not explain why these outcomes are happening. For example, a US research study into corporate use of ADR³¹ showed no overall benefits in using ADR. A closer look revealed, however, that, there were substantial benefits where organisations also addressed the systemic and structural factors associated with dispute handling.
- 133 To get an accurate picture of the effectiveness of ADR requires a combination of statistical measures and, as mentioned in Chapter 2, a mixture of both quantitative and qualitative information. Indeed the pure ‘number-cruncher’ may be something of a myth:

Treasury always wants ‘hard’ data, and this is easy to measure, but they need qualitative data as well. A mixed methodology is preferred (comment at roundtable)

Possible approaches

Cost-benefit approach

- 134 An approach to success suggested at the roundtable was to measure maximum benefit for minimum cost, taking a broad systemic view. The following matrix is an example of how success could be measured from a range of perspectives. Within the matrix the measures (whether qualitative or quantitative) might be different against each perspective.

	Costs -----	Benefits
Users	For example: <ul style="list-style-type: none"> • Financial costs • Number of formal agreements • Settlements/resolutions made • Satisfaction with process • Durability of agreements • Time spent (eg waiting time, preparation) concerned. 	

³¹ McEwen C (1998) ‘Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation’, *Ohio State Journal on Dispute Resolution*.

Resource paper on ADR research

Practitioners	For example, mediator assessments of outcomes – did they think it was ‘successful’
ADR organisations	For example, extent of fulfilment of organisation’s mission, goals and strategies
Governments	For example, achieving policy priorities, efficient use of public resources, funding decisions.
Others	For example: <ul style="list-style-type: none"> • Effects on local community/workplace • ‘Ripple’ effects (for example effect on parties’ colleagues, friends and families) • Improved treatment of parties • Gaining of skills
The system as a whole	For example, how ADR and the traditional dispute mechanisms of courts and politics benefit and complement each other, eg: <ul style="list-style-type: none"> • narrowing of issues • numbers kept out of court • time/resources taken to process • the effect of the ADR process on the judicial process

Program evaluation: RAND model

135 In 1995, RAND’s Institute for Civil Justice produced a guide to evaluating alternative dispute resolution programs³². 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?

136 The main steps in designing an 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

³² Rolph E & Moller E (1995) *Evaluating Agency Dispute Resolution Programs*, Santa Monica, RAND

Resource paper on ADR research

137 Similar steps apply in developing a data collection plan:

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

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

Target setting

139 An alternative approach to data collection is for individual ADR organisations to develop a target, such as the 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.

140 The use of such targets is advocated by Glanfield and Wright³³ 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.

141 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)

³³ Glanfield and Wright (2000) *Model Performance Indicators for NSW Courts*, Sydney, Justice Research Centre.

Resource paper on ADR research

- 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')

Other examples and resources

- Australian Commercial Disputes Centre (1995) Assisted Dispute Resolution in the Administrative Appeals Tribunal Unpublished.
- Key Young (date?) *Discrimination Complaints-Handling: a study*, New South Wales Law Reform Commission
- Alexander A (1999) 'Family Mediation under the Microscope' in *Australian Dispute Resolution Journal*, 10(1) Feb.
- Bartlett C & English J (1993) *Mediation in the Spring Offensive 1992*, Victoria.
- Bordow S & Gibson D (1994) *Evaluation of the Family Court Mediation Service*, Family Court of Australia Melbourne.
- Brabazon C & Boule L (1992), *Report on the First Settlement Week Queensland*.
- Cannon A 'An evaluation of the Mediation Trial in the Adelaide Civil Registry', *Journal of Judicial Administration*.
- Caspi S (1994) 'Mediation in the Supreme Court — problems with the spring offensive report' *Australasian Dispute Resolution Journal* 5(4) p 4.
- Chinkin C (1992) 2 *Australian Dispute Resolution Journal* pp93-124.
- Chinkin C & Dewdney M (1992) 'Settlement Week in New South Wales: An Evaluation', *Australian Dispute Resolution Journal*, May, p. 114.
- Commonwealth Attorney-General's Department (1999) *Legal Assistance Needs Project: Phase Two SUMMARY REPORT*, prepared by Rush Social Research Agency and John Walker Consulting Services for Family Law and Legal Assistance Division, Canberra, Attorney-General's Department.
- Commonwealth Department of Family and Community Services (1999) *Child Inclusive Practice* report prepared by Strategic Partners, Canberra, Family and Community Services.
- Commonwealth Department of Family and Community Services (2001) *Through a Child's Eyes: Child Inclusive Practice in Family Relationship Services* report prepared by Marcus Mackay, Human Development Consulting Pty Ltd, Canberra, Family and Community Services.
- Commonwealth Department of the Treasury (1999) *Consumer Redress Study*, Canberra, Commonwealth of Australia.
- David J & Scott M (1994) 'Mediating in the NSW Law Society Settlement Week - A Critique of Mediation Experiences Presented in the Mediator Debriefing Forms', 1 *Commercial Dispute Resolution Journal* pp124-135.

Resource paper on ADR research

- Davidson S (1995) 'Court-Annexed Arbitration in the Sydney District Court', *Australian Dispute Resolution Journal*, 6.
- Davis R (1994), 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers', *Australian Law Journal* Vol 68 October.
- Delaney M & T Wright T (1997) '*Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation*', Sydney, Justice Research Centre.
- Devereux A (1996) 'Human Rights by agreement? A case study of the Human Rights & Equal Opportunity Commission's uses of conciliation' *Australian Dispute Resolution Journal* November 1996
- Dewar J and Parker S (1999) 'The impact of the new part VII Family Law Act 1975', *Australian Journal of Family Law* 13.
- Dewdney M, Sordo B and Chinkin C (1994) '*Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-3 Settlement Week Program*', Law Society of New South Wales, Sydney.
- Elix J (2003) 'The meaning of success in public policy dispute intervention' *Australasian Dispute Resolution Journal*, May.
- Elix J & Sourdin T (2002), *Review of the Financial Industry Complaints Service- Final Report*, Community Solutions, La Trobe University, University of Western Sydney, <http://www.fics.asn.au/IndependentReview.asp>
- Eyland A, Wright, Karris M, Nheu N 'Case Management: an evaluation of the 1996 case management reforms in the District Court of NSW and the County Court of Victoria' Law and Justice Foundation of NSW. (Includes a chapter on the effects of the reforms on disposition type: Victoria encouraged mediation making it almost mandatory, NSW increased the rate referral to arbitration.
- Fisher J & Blondel M (1993) '*Couples Mediation: A Forum and A Framework*', New South Wales Marriage Guidance.
- Fleming P (1998) Masters thesis on outcomes of two mediation services, ANU, Canberra.
- Fuller N (1995) 'Outcomes of family mediation - rates and types of agreements' *Australian Dispute Resolution Journal*, 6.
- Gibson J, Harrison M, Brown C (1996) *Client Attitudes to the Counselling Service of the Family Court of Australia*, Family Court Research Report no. 15.
- Howieson (2002) 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation', *Murdoch University Electronic Journal of Law*.
- Hunter R & Leonard A (1995) *The Outcomes of Conciliation in Sex Discrimination Cases*, Melbourne, Centre for Employment and Labour Relations Law, Working Paper no. 8.
- Hunter R (1999) '*Family Law Case Profiles – stage 2*', Justice Research Centre, Sydney.
- Ingleby R (1991) '*In the Ball Park: Alternative Dispute Resolution and the Courts*', Australian Institute of Judicial Administration, 1991.

Resource paper on ADR research

- Keilitz S (ed) (1994) *National Symposium on Court Connected Dispute Resolution Research — a Report on Current Research Findings — Implications for Courts and Research Needs*, State Justice Institute USA.
- Lambeck F (1997) 'Rental Bond Disputes: A Comparison of Different Dispute Resolution Mechanisms for Rental Bond Disputes in the Australian Capital Territory', *Australian Dispute Resolution Journal*, February.
- Love A, Moloney L & Fisher T (1995) 'Federally Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction', Attorney-General's Department, Canberra.
- Marsden Jacob Associates (1999) *Survey of Small Business Attitudes and Experience in Disputes and their Resolution* Report to Commonwealth Attorney-General's Department
- Marsden, Jacob & Associates (1996) 'The Cost and Effectiveness of Courts and Tribunals for Victorian Businesses: Overview and Recommendations on the survey results on experience and satisfaction', Department of Justice, Melbourne.
- Matruglio T (1992) *Researching Alternative Dispute Resolution*, Sydney, Justice Research Centre, August.
- McCarthy P and Walker J (1996): 'Evaluating the Longer Term Impact of Family Mediation', Relate Centre for Family Studies, Newcastle upon Tyne.
- Moloney L, Fisher T, Love A & Ferguson S (1996) 'Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction', Commonwealth Attorney-General's Department, Canberra.
- Muller D and Associates (1998) 'Use of and Attitudes to Mediation Service among Divorcing and Separating Couples', Relationships Australia, Melbourne.
- Phelan A (1999) *Strategic Use of Client Feedback by Courts: The Experience of the Family Court of Australia*, Family Court of Australia.
- Prior A (1993) 'What Do the Parties Think? A follow-up study of the marriage guidance South Australia family mediation project', *Australasian Dispute Resolution Journal* (4).
- Raymond, T & Georgalis, S 'Dispute resolution in the changing shadows of the law A study of parties' views on the conciliation process in Federal anti-discrimination law' AND
'Review of changes to the administration of Federal Anti-discrimination Law: Reflections on the initial period of operation of the Human Rights Legislation Amendment Act (No.1) 1999 (Cth)'

Both documents are available on the HREOC's website:
www.humanrights.gov.au/complaints

- Rhoades H, Graycar R and Harrison M (1999) 'Can changing legislation change legal culture, legal practice and community expectations', University of Sydney.

Resource paper on ADR research

- Riekert J (1990) 'ADR in Australian Commercial Disputes: Quo Vadis?' *Australian Dispute Resolution Journal* Vol 1 No 1.
- Schumacher L A (1996) '*Disputant Evaluation of the Mediation Process, Components and Outcomes*', Masters Thesis, QUT, 1996.
- Schwartzkoff J & Morgan J (1982) Community Justice Centres– A Report on the New South Wales Pilot Project 1979–81.
- Singer R (1995) 'The Rolling Stones Revisited: Exploring the Concept of User Satisfaction As a Measure of Success in Alternative Dispute Resolution' *Australian Dispute Resolution Journal*, May.
- Sourdin T (2001) *Evaluating processes in the NSW Fair Trading Tribunal – A Pilot*.
- Sourdin T (2002) *Alternative Dispute Resolution*, Sydney, Lawbook Co.
- Sourdin T & Matruglio M (2003) *Evaluating Mediation – NSW Settlement Scheme 2002*, La Trobe University.
- Spegel N M (1998) 'Queensland Lawyer Attitudes towards Mediations: Implications for Training and Education', NLR 1.
- Steer L (1995) 'A Study of Family Mediators', *Australian Dispute Resolution Journal*, August.
- Swann N (1993) '*Report on Settlement Week*', Queensland.
- Tow D & Stubbs M (1997) 'The Effectiveness of Alternative Dispute Resolution Methods in Planning Disputes', *Australian Dispute Resolution Journal*, November.
- University of Western Sydney (1998) *Research report into Farm Debt Mediation Act*, Report prepared for the Rural Assistance Authority of NSW, <http://www.raa.nsw.gov.au>.
- Vardon E (1993) '*Resolutions Week 1992/3 Evaluation Report*', Perth, September.
- Western Australian Equal Opportunity Commission (1994) *Investigation and Conciliation: Report of the Steering Committee into Processes Under the Western Australian Equal Opportunity Act 1984*.
- Wheeler S (1991) 'Lawyer Involvement in Commercial Disputes', *Journal of Law and Society*, Vol 18 No 2.
- Williams A (1992) '*Early Intervention Conference Evaluation - Final Report*' Queensland Legal Aid.
- Young Lawyers Environmental Law Group (1992) '*Report on Mediation in the Land and Environment Court*'.

Chapter 7. Clinical research - what is actually happening ‘in the room’?

- 142 The preceding chapters focused on research into ADR programs and services at a macro level. Many roundtable participants also considered that the conduct of the dispute resolution process itself was a central issue in ADR research. Such micro research examines what actually happens in an ADR session (that is, ‘in the room’), including the dynamics of the session, the interventions and qualities of the ADR practitioner and the behaviour of the participants.
- 143 The need for such research has been emphasised by many researchers³⁴ who argue that it is now important to go beyond the general questions (for example, ‘does mediation work?’ and ‘is mediation fair and accessible?’) and instead to focus on questions such as:
- What specific interventions work when, with whom, at what point in time?
 - What are the best strategies for dealing with power dynamics and imbalances?
 - What are the best means to determine the suitability of different forms of ADR for different parties and disputes?
 - How should dispute resolution practices be adapted to meet the needs of different racial, ethnic and socio-economic groups?
 - What is the ‘right skill set’ for practitioners and for participants?
 - To what extent is a given dispute resolution process sensitive to individual skills and micro issues?
- 144 As with process and program evaluation, clinical research requires an examination of context, objectives and measures of ‘success’. That is, the clinical researcher needs to consider the context of the session, clarification of the goals of the intervention, consideration of the needs of the parties and clarification of the meaning of ‘effective’ or ‘successful’ interventions. As indicated in the opening chapter, a capable dispute resolution practitioner is continuously engaged in a process of research through seeking information about what has worked in the past, reflecting on their own interventions, assessing the effect of these interventions and considering what they may do differently in the future.

³⁴ Carneville P & Pruitt D (1992) ‘Negotiation and mediation’, *Annual Review of Psychology* 43, pp331-582. Kelly J (1996) 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.

Resource paper on ADR research

- 145 Researchers (and practitioners) need to develop a theoretical framework to describe and explain the dynamics of dispute resolution, including the behaviours of the participants, the practitioners and their interactions.

Practitioners

- 146 Research that focuses on the dispute resolution practitioner could include, for example:
- What specific techniques does the practitioner use? For example, does the mediator visually map the agenda using a whiteboard?
 - How do we recognise and measure the effectiveness of a dispute resolution practitioner?
 - What are the desirable personal qualities for a dispute resolution practitioner? For example, is there a desirable psychological profile for mediators?
 - What sorts of competencies do dispute resolution practitioners need? How best can they attain these competencies?
 - What sort of supervision/mentoring is appropriate to maintain and develop the skills of dispute resolution practitioners?

Participants

- 147 Many questions relating to the needs of participants in the ADR process were raised in Chapter 5. Research in this area could also cover such issues as the role of advocates in the dispute resolution process, the qualities, attitudes and skills that participants need to engage successfully in a particular ADR process and the degree to which participants gain a sense of ownership over the resolution of their dispute.

Communication, interaction and dynamics

- 148 Research may also focus on the nature of the interaction between the participants and between the participants and the practitioner, for example:
- Do the participants communicate directly with each other or via the practitioner?
 - How does this change during the process?
 - How is body language used?

Resource paper on ADR research

- 149 Of recent interest is the relative effectiveness of technologically assisted vs face to face communication. As noted in NADRAC's paper on information technology and dispute resolution³⁵, each channel of communication, whether face to face, telephone, videoconference or e-mail has limitations and advantages in dispute resolution processes. There has, however, been little research to date that will guide practice on the use of technology in dispute resolution³⁶.

How robust is the process?

- 150 Research needs to consider the extent to which the outcomes of an ADR process are sensitive to micro factors, such as the specific interventions of the individual practitioner. A participant at NADRAC's roundtable argued that, if a process is sensitive to minor variations, the process is by nature a fragile one. A robust process is not so dependent on minor factors and its outcomes will be more consistent.

Approaches

- 151 The research approaches outlined in earlier chapters can also be applied to clinical research. For example, empirical research may involve statistical analysis of the relationship between observed practitioner interventions and defined outcomes.
- 152 The use of empirical and experimental methods in clinical research raises many practical and ethical issues, however. The dynamics of an ADR session make it difficult for a researcher to take the role of a purely detached observer. Their presence influences the behaviour of the participants and therefore what actually happens. Question of privacy and duty of care may also arise when observing actual sessions.
- 153 For these reason, there is often a preference to use participatory methods in clinical research. Action research and post-structural methods therefore are particularly suited to examining micro-skills, and underpin the concepts of reflective and reflexive practice, which will be examined in Chapter 8.
- 154 One model suggested at roundtable is as follows:
- **listen** use methods such as surveying, interviewing, audioing.
 - **look** use methods such live observations, videoing

³⁵ NADRAC (2002) Dispute Resolution and Information Technology Canberra, Commonwealth of Australia.

³⁶ Note, however, a research study into Online Alternative Dispute Resolution by Conley Tyler M, Bretherton D, Bastian B (2003) for the Department of Justice, Victoria.

Resource paper on ADR research

- **think** reflect, put the experience into a theoretical framework through, for example co-mediation or supervision, generate a hypothesis
- **triangulation** put together the listen/ look/ think elements, for example by corroborative evidence involving short term or longitudinal studies
- **communication** inform other practitioners of what is learned.

Examples and resources

Bagshaw D (date?) 'What Adolescents Say About Peer Mediation In Schools' *Conference Proceedings, 4th National Mediation Conference.*

Bagshaw D, Halliday D (2002) 'Teaching Adolescents to Handle Conflict through Drama', *NJ Drama Australia Journal, Volume 24, Number 2, pp 87-104.* (Research in a South Australian school examining educational drama as an alternative approach to teaching adolescents to handle conflict).

Bagshaw, D (1998) 'What Adolescents Say About Conflict in Schools' *Children Australia, Volume 23, Number 3, pp. 17-22.* (Based on research in South Australian schools designed to inform alternative approaches to handling conflict in schools)

Bickerdike A J, Littlefield L (2000) 'Divorce Adjustment and Mediation: Theoretically Grounded Process Research' *Mediation Quarterly 18:2 pp.55-70*

Davids C, Fisher T, Love T, McMahon M, Nicole A, Spooner N (1996) '*Mediating the Consequences of Crime: An Evaluation of the Victim-Offender Reconciliation Program*', National Centre for Socio-Legal Studies, La Trobe University, Melbourne

Ferguson S, Fisher T, Love T, Moloney L (1996) 'The Words to Say It – Clients' Own Experiences of Family Mediation', *Australian Journal of Family Law 10, 53-63*

Fisher T (1994) 'Victim/Offender Mediation: A Mediator-Researcher's Perspective', *Socio-Legal Bulletin No. 14, pp.23-33*

Fisher T, O'Malley P (1992) '*Alternative Dispute Resolution Strategies for Dealing with Young Offenders*', p 73, National Centre for Socio-Legal Studies, La Trobe University

McIntosh J, (2000) 'Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study' *Mediation Quarterly 18, pp.181-201*

Chapter 8. Integration: Bringing together policy, practice and research

- 155 A key theme of this paper is the need to think of research holistically, that is, as an activity central to practice, policy and program improvement. This chapter explores ways to bridge the gaps that sometimes develop between policy, practice and research.
- 156 Program managers, practitioners, evaluators and academic researchers may be critical of each other's approach. For example, 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. Practitioners may see theoretical research as too concerned with narrow questions which have little practical value and with research designs which are not feasible in the real world.
- 157 Participants at NADRAC's roundtable stressed the need for improved understanding between researchers, practitioners and policy makers by, for example:
- clarifying what policy makers and practitioners need from research and how they will use the results
 - making data collection methods more useful to both research and policy
 - making theory more informative to practitioners and vice versa
 - encouraging greater sharing of information
 - incorporating data from evaluation and research into ADR training and education
 - building ownership of stakeholders
 - integrating existing theory/data into new research questions
 - adopting multi-dimensional and trans-disciplinary research approaches
 - using an inclusive process to design and implement the research

Resource paper on ADR research

- constructing and conveying research information so that it is more relevant especially for clients but also for dispute resolution practitioners, lawyers, courts and others involved in dispute resolution.

The development of practice

- 158 Participants at NADRAC's roundtable emphasised the need to develop among dispute resolution practitioners a stronger capacity to question and challenge their own practices and knowledge base. The capacity for reflective or reflexive practice can be seen as part of enhancing professional practice.
- 159 The concept of 'reflective practice'³⁷ has been applied in many areas of professional activity. It involves critical analysis of one's own actions with the goal of improving future practice. Reflective practice can be facilitated by, for example, a structured supervision or peer debriefing after a mediation session, or by an analysis of a video-taped session.
- 160 The more recent concept of 'reflexive practice' involves not only the analysis of action after the event, but an active and deeper questioning of personal and social assumptions and actions within an interaction itself.³⁸ Such practice could be facilitated by 'live' supervision or coaching.
- 161 Further development in dispute resolution practice would be facilitated by the sharing of learning from practitioner to practitioner. There would be value therefore in documenting successful reflective and reflexive practices.
- 162 A complementary model is evidence-based practice, which has been effectively used in fields as diverse as medicine and law enforcement, and has been explored as a model by dispute resolution organisations such as the Family Court of Australia³⁹. Evidence-based practice combines research evidence (especially empirical evidence) with practitioner knowledge and reasoning in order to design and implement the most effective interventions. Strategies could include making research evidence immediately available to practitioners (by, for example, computerised 'expert systems') and by providing continuous objective feedback to the practitioner on the impact of their interventions. In contrast to fields such as medicine, the usefulness of evidence-based practice in ADR is limited by the lack of current empirical evidence to guide specific interventions and the difficulties in evaluating ADR mentioned earlier in this paper.

³⁷ Schon D (1998) *Educating The Reflective Practitioner*, San Francisco, Jossey-Bass.

³⁸ Rothman J (1997) *Resolving Identity-Based Conflict: in Nations, Organizations and Communities*, San Francisco, Jossey-Bass.

³⁹ Family Court of Australia (2001) *Evidence-based Planning and Practice in the Mediation Service*, Internal report.

Resource paper on ADR research

- 163 Other means for better integrating theory with practice were suggested at the roundtable. These suggestions included the delivery of theory at continuing education forums and the establishment of a professional doctorate in ADR.

Integrated research design

164 Several research models aim to better link research with practice and policy. An example is collaborative research, in which ownership is shared by all stakeholders of the research design, its execution and its analysis. Another approach is to build an evaluation plan into any dispute resolution program, so that routine data collection can be useful for everyday management as well as for a more rigorous program evaluation. For example, the evaluation of primary dispute resolution services in legal aid commissions⁴⁰ aimed to meet the needs of both policy-makers and program managers through a multi phase evaluation design. Phase one provided a preliminary analysis and baseline data; phase two would involve monitoring and improving the programs; phase three would summarise the outcomes of the programs and make recommendations as to their future.

165 McEwen (1999)⁴¹ 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.

Examples and resources

Crewe E & Young J (2002) *Bridging Research and Policy: Context, Evidence and Links*, Overseas Development Institute, London at http://www.odi.org.uk/publications/working_papers/wp173.pdf

Bagshaw, D & Baker D (2003) 'And the cobbler's children have no shoes. Promoting national collaboration between dispute resolvers in a climate of competition' *Australasian Dispute Resolution Journal* (A report of the findings of an extensive survey).

⁴⁰ Melville at al (2000) op cit.

⁴¹ McEwen C (1999) 'Towards a Program-Based ADR Research Agenda', *Negotiation Journal* 15, 4, pp325-336.

Resource paper on ADR research

- Bagshaw D (1999) 'Developing Family Mediation Standards - An Australian Experience' *Mediation Quarterly*, Jossey-Bass: San Francisco, Volume 16, No. 4, pp. 389-406. (A research process was used to develop these standards in 1995).
- Crewe E & Young J (2002) *Bridging research and policy, Context, Evidence and Links*, London, Overseas Development Institute Working Paper 173, at http://www.odi.org.uk/publications/working_papers/wp173.pdf
- Fisher T (1998) 'Mediation: Shaping the Future' *Conference Proceedings*, Latrobe University, Melbourne.

Chapter 9. Next steps: where to from here?

166 The roundtable suggested a number of strategies to enhance ADR research, policy and practice. The publication of this paper is one such strategy. Other strategies include:

- Establish an information sharing network. A network list server is one means to achieve this. An information network may need to take account of regional issues by, for example, establishing several ‘chapters’.
- Build collaborative arrangements between research bodies and service providers by, for example, moving PhD and professional doctorate students into workplaces.
- Make current and past research more visible and accessible by, for example, publishing reports of government projects and making past research instruments available for future researchers.
- Make more use of existing resources and educate practitioners and policymakers on how best to use research.
- Involve a wider range of people in partnerships, including the users of research and those in remote locations.
- Establish ADR as a national research priority and use current research funding (such as Australian Research Council ‘Linkage’ and ‘Network’ grants) for ADR research.
- Encourage greater openness by workplaces and institutions.

167 The need to link research with practice has been a recurring theme throughout this paper. There are varied resources that can assist practitioners ranging from reports of large scale research, though to articles about effective interventions in specific ADR sessions. They can be in printed form or electronic, local and overseas, in English or in other languages. Collections of ADR resources are located in many places, from libraries, government agencies, education and research institutions, and in the personal libraries of practitioners. The potential exists for a kind of clearinghouse or ADR resource centre (web-based or physical) which attempts to draw together either materials in these collections or the location of such materials. This would be a major undertaking not just in establishment but in continuing maintenance and development. Collaboration between organisations and individuals with an interest in ADR would be needed to carry this concept further.

Resource paper on ADR research

- 168 A possible way to support information exchange and the continued development of ADR research is the creation of an ADR research network supported by the Australian Research Council⁴², which would provide

an environment supporting highly creative, interdisciplinary research that is not averse to risk taking, and which aims to move a field forward or create exciting, novel research themes.

The February 2003 roundtable was in effect the preliminary stage in the development of such a network. It will be up to ADR research bodies and other interested organisations to decide on the next stages.

- 169 As mentioned in the introduction, NADRAC sees research as a shared activity involving practitioners, policy makers, program managers, academics and specialised research bodies. Sound ADR research in all of its forms can test assumptions about ADR practice and processes, and help to develop more effective ways of resolving disputes. NADRAC hopes that this paper will contribute to the future development of ADR research and looks forward to the continuing exchange of ideas and information.

⁴² See <http://www.arc.gov.au>