

Submission by the Dispute Resolution Committee of the Law Society of New South Wales in response to the NADRAC Reference concerning Proposed Model Dispute Management Plans for Government Agencies

Most organisations have tried some form of alternative dispute resolution (ADR). Yet as practical and effective as ADR can be, in most organisations it still serves only the "back end" of disputing, usually long after the dispute arose. The field of ADR is now moving to the "front end" of disputing, through the introduction of methods for preventing unnecessary conflict; and where conflict does arise, responsibly managing it.¹

When organisations go beyond ad hoc, case-by-case dispute resolution and turn their focus to systematically integrating all of these approaches into their day-to-day business, and add processes that shift their conflict culture towards prevention, this phenomenon is called a "dispute resolution system" or "conflict management system".

What differentiates a "system" from case-by-case approaches is that in addition to dispute resolution techniques, a system has features that focus on the prevention of unnecessary conflict and (when conflict does arise) on managing conflict. Disputes are often simply the symptom of an underlying problem. A system lays the foundation for addressing the causes of the conflict, rather than just the dispute.

"Conflict" is a word that encompasses all disputes and much more. Conflict denotes any difference, problem, tension or dispute experienced by one or more parties, whether or not the conflict has been brought to the attention of the others. Conflict can be generally said to have become a dispute after there has been some stressed interaction and position-taking by the parties.²

When an organisation takes a systems approach to conflict management, it introduces two key components:

1. It develops or improves its dispute resolution model by reviewing and modernising its basic dispute resolution procedures. It selects a variety of dispute resolution procedures that it intends to use, and organises them in a low-to-high cost and low-to-high intervention sequence, a "dispute resolution model".
2. It also creates, according to Lynch, a "fostering and sustaining environment"³,

On its own, a dispute resolution model is not a system. The dispute resolution model is only one of two core components. Various supporting processes and structures need to be introduced to the organisation to facilitate a successful dispute resolution system.

¹ Jennifer Lynch, Q.C. "Are your Organisation's Conflict Management Practices an Integrated Conflict Management System?". January 2003. www.mediate.com. accessed May 2003. See also the ADRoIT Principles developed jointly by IAMA, the ACS and the PMI, which advocate a dispute avoidance culture and ways to achieve that.

² Ibid

³ Ibid

These support structures assist the organisation in:

- preventing and managing conflict in relation to internal and external disputes; and
- creating a culture of conflict competence - the creation of an environment where all who experience conflict feel comfortable to raise it, knowing it will be dealt with respectfully and responsibly.

The system should constantly reinforce the concept that conflict management means much more than dispute resolution and that interest-based language and behaviour must become everyday practice. It should create "an atmosphere and culture where all conflict may be safely raised and where persons will feel confident that their concerns will be heard, respected and acted upon, with support provided. The "default reaction" shifts from one of shrugging off or escalating conflict, to accepting it positively and encouraging early, low level solutions." ⁴

A conflict management system needs to incorporate the following elements:

1. Leadership:

- Sincere and visible championship by leadership from all stakeholder groups;
- Corporate mission, vision and values that are consistent with a conflict management philosophy;
- An organisation-wide policy of conflict management: organisation-wide encouragement, requirement and support of "conflict competent" behaviour that emphasises prevention of unnecessary conflict, identification and management of conflict, and earliest possible resolution;
- Resources, both human and financial.

2. Structures:

- A conflict management central co-coordinator with high level reporting;
- Stakeholder participation in the development;
- Conflict management system with an oversight body of stakeholders;
- Access to a confidential, neutral person (organisational ombudsperson) and support from other knowledgeable persons to whom people can go for advice, coaching, referring, problem-solving - and listening, which is the most used "option" in a conflict management system;
- Strategic communication of the initiative across the organisation with consistent messages and consistent terminology;
- Clear dispute management procedures for disputes with external organisations;
- Documentation of conflict management policies and codes of practice;
- The ability to adapt the system and to make continuous improvements;
- Safeguards such as privacy, confidentiality, impartiality of neutrals, protection of rights, respect for diversity, protection against reprisal, access to disclosure and relevant information;
- System monitoring and evaluation.

⁴ Ibid

3. Training:

- Training, skills-building, learning programs and coaching to create capacity to deliver services; to create awareness and understanding of the system; and to create capacity in all relevant stakeholders to understand, recognise, and acknowledge conflict, to manage relationships in a conflict competent manner, and to resolve disputes.

4. Practices that encourage a front-end approach to conflict management.

5. Feedback system:

- Collection of on-going information about what has been done as well as what has been learned. This data is analysed in such a way as to impact future decisions and actions. The feedback system should be able to detect the possibility of systemic problems that are causing organisational pain and suffering. By doing so, appropriate steps can be taken to remedy the problems identified by the system.⁵

Conflict Management Options

There should be a variety of options available to deal with disputes as they arise. Generally conflict management processes range across a spectrum from minimum to maximum external intervention, from minimum to maximum formality, and from minimum to maximum enforceability of outcome.⁶ As indicated earlier, the ideal is a coordinated and supportive array of interest and rights based options for dealing with all types of problems as early as possible.

Such options should include:

- Application of the ADRoIT principles⁷ at the incipient stages of a project or contract to ensure that any potentially divisive developments are avoided.
- Interest-based negotiation which will require some training. As an informal communication tool, it can prevent conflict from escalating into disputes. Negotiation allows disputes to be resolved close to the source without involving a third party.
- Conflict Coaching: Conflict Coaches would work on a one-to-one basis individualising interventions to meet specific needs. Conflict Coaching can be both preventative and reactive. It is preventative in that it raises the conflict awareness competency of the organisation. It is reactive in that amid a "conflict crisis" a coach could be called in, much like a paramedic, to help an individual deal with an immediate crisis.

⁵ Thomas, Rian. "Conflict management Systems: A Methodology for Addressing the costs of conflict in the workplace". September 2002 Mediate.com

⁶ Tillett G. Resolving Conflict. A Practical Approach. Page 45. Oxford University Press 2002

⁷ ADRoIT Principles developed jointly by IAMA, the ACS and the PMI, which advocate a dispute avoidance culture and ways to achieve that.

- Ombudsperson: The purpose of the office would be to provide a possible path to fairness and justice, as well as consistency across the organisation. The ombudsperson can also take into account cultural needs. Through helping to develop options, and informal intervention if requested, an ombudsperson should be able to foster resolution of most issues or get them appropriately referred.

- Investigation: Normally found in disciplinary procedures, the investigation should afford procedural fairness to the complainant and respondent, including notice to the respondent, a reasonable opportunity to respond, reasonable timeliness, and impartiality by the decision maker.