

# NSW Law Reform Commission

## REPORT 67 (1991) - TRAINING AND ACCREDITATION OF MEDIATORS

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## Terms of Reference and Participants

### New South Wales Law Reform Commission

To the Honourable P E J Collins BA, LLB, MP

Attorney General for New South Wales

### ALTERNATIVE DISPUTE RESOLUTION

### TRAINING AND ACCREDITATION OF MEDIATORS

Dear Attorney General,

We make this Report pursuant to the reference from the then Honourable R Mulock, LLB, MP, Attorney General for New South Wales, to this Commission dated 20 January 1988.

Hon R M Hope QC

(Chairman)

Assoc Professor David Weisbrot

(Commissioner)

Professor Helen Gamble

(Commissioner)

September 1991

### Terms Of Reference

On January 20, 1988 the then Attorney General for New South Wales, the Honourable R Mulock, LLB, MP, made the following reference to the Commission.

To inquire into and report on:

- (a) the need for training and accreditation of mediators;
- (b) any related matter.

### Participants

#### Commissioners

For the purpose of the reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members:

The Hon R M Hope QC (1990- )

Professor Helen Gamble (1988- )

Associate Professor David Weisbrot (1990- )

## **NSW Law Reform Commission: REPORT 67 (1991) - TRAINING AND ACCREDITATION OF MEDIATORS**

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## Executive Summary

The New South Wales Law Reform Commission was required to inquire into and report on the need for training and accreditation of mediators. This Report presents the results of the Commission's inquiries, its conclusions and recommendations.

The focus of the Report is consensual dispute resolution:

where a neutral third party uses a structured process in a formal manner and setting to assist the parties to negotiate a mutually acceptable resolution of matters in dispute between them.

Mediation is the primary process covered by this description and is used as a representative term for consensual dispute resolution in the Report. Without limiting this definition, the Commission considers that processes such as conciliation and facilitation are also covered. Excluded from the Commission's focus and recommendations are arbitration, case management techniques within courts and tribunals, and informal conflict resolution. A narrow, prescriptive approach to classification has not been adopted in the Report.

An overview of current consensual dispute resolution practice in Australia presented in the Report covers programs and practices in community mediation, family and community dispute resolution, programs in courts, tribunals and administrative agencies and other areas in which the processes have been adopted.

### Need for training

The Commission accepts that training is desirable as an effective way for mediators to become competent, and to demonstrate the credibility of the process. However, the Commission is not persuaded that there is a need for the law to require all mediators to practice only after completing specified training. The Commission therefore does not make any recommendation to make training mandatory. The Commission believes that the management of agencies and programs which employ or accredit mediators and mediators themselves, have the primary responsibility for training.

### Need for government regulation

The Commission considers that government regulation of mediators and consensual dispute resolution is necessary only to meet a clearly demonstrated need. It must be for the benefit of the public rather than the private interests of practitioners. There is no evidence that the risks to clients warrant government intervention so as to prevent the unauthorised practice of mediation. The forms of regulation which currently operate provide sufficient control over the quality of service and adequate consumer protection for the clients of mediators. The practice of mediation in Australia is in the early stages of evolution, with clear standards of practice yet to be established. It is therefore not appropriate to impose a rigid regulatory framework.

**The Commission recommends that no government regulation for the accreditation of mediators is currently required.**

### Court and Tribunal Connected Dispute Resolution

The use of consensual dispute resolution within the justice system has increased significantly in recent years. Less formal and less adversarial procedures have been adopted to reduce costs and court congestion and improve the satisfaction of litigants. The Commission considers that the State has a responsibility for the quality, integrity and accountability of consensual dispute resolution processes used within courts and tribunals.

**The Commission recommends that dispute resolution programs connected with courts and tribunals must operate in accordance with clear guidelines and adequate resources to ensure the integrity of the process and quality of service. One aspect of this concerns program objectives. Case management should not be the sole or primary reason for implementation of a program thereby reducing rather than enhancing the rights of parties.**

The Commission also recommends that program guidelines require that mediators undergo appropriate training in dispute resolution techniques as a condition of their employment. The Commission makes no other specific recommendations about the content of guidelines because of the formative nature and diversity in application of dispute resolution processes to the justice system.

#### **Advisory Council and Dispute Resolution Data Base**

The Commission recommends that an Advisory Council on Dispute Resolution be established with the primary function of advising the Government on dispute resolution policy issues.

Members of the Advisory Council should be broadly representative of practices, programs, and users which will ensure that its advice to the Government will enable policies to be developed which are effective across the diversity of dispute resolution practice.

The Commission further recommends that the Advisory Council have responsibility for the creation and publication of a Database of Dispute Resolution containing information about programs, agencies, practitioners and training, which will assist the advisory Council in preparing advice to the Government and allow the public to make more informed choices about dispute resolution options.

## 1. Introduction

### THE TERMS OF REFERENCE

1.1 In January 1988 the then Attorney General of New South Wales, the Honourable Mulock, LLB, MP, made the following reference to the Commission:

To inquire into and report on:

- (a) the need for training and accreditation of mediators;
- (b) any related matter.

1.2 Although the terms refer specifically to *mediators*, mediation is only one of a wide range of methods of dispute resolution increasingly being used both within the court-based dispute system and privately. For convenience, the Commission has referred to this as the *alternative dispute resolution* (ADR) reference. The terminological confusion in this area has created difficulties; ADR is a label of convenience, not a unitary concept.

1.3 Alternative dispute resolution in its broad sense is the formal use of procedures other than adjudication in the courts to resolve disputes. This wider view has been used where the focus is on supplementing and complementing as well as replacing traditional court-based adjudication. It embraces modified procedures directed at settlement of litigation in the court system, non-judicial adjudication (arbitration and expert determinations), and various means of dealing with disputes which emphasise consensual resolution. This broad perspective has guided recent government policy documents,<sup>1</sup> as well as the recently published journal in this area.<sup>2</sup>

### Consensual dispute resolution

1.4 A narrower view of ADR distinguishes the way resolution is achieved. This is the Commission's preferred approach for the purposes of this reference. According to this view, ADR methods are consensual or non-adjudicative. Resolution occurs by agreement of the parties themselves, facilitated by the efforts of a neutral third party, usually without power to compel a settlement. These methods may be used in a range of settings in the judicial and administrative systems, and privately. Some maintain an even more limited view of ADR, considering it to be restricted to uses not at all associated with the formal justice system, although the Commission does not accept this narrow view as appropriate for this reference.

1.5 *Mediation* is the most prominent of a number of consensual methods of dispute resolution. It is defined as a process by which a neutral third party uses a structured process to assist parties to reach agreement about matters in dispute between them.<sup>3</sup> Our enquires have considered other forms of consensual dispute resolution.<sup>4</sup> These may depart from the pure elements of mediation, but the Commission believes that the issues regarding training and accreditation are similar and therefore fall within the focus of this reference. In this Report the term mediation is used as representative of such consensual dispute resolution processes.

1.6 In this Report and in the accompanying publication of the *Directory of Dispute Resolution*, the Commission has also used the term *dispute resolution*. Methods and processes at first labelled alternative are increasingly considered to be within the mainstream of dispute resolution options. The Commission believes that this usage should be encouraged.<sup>5</sup> It may diffuse many of the problems with terminology as well as facilitate the inclusion of new techniques which may emerge with experimentation with process and context.

### BACKGROUND AND PURPOSE OF THE REFERENCE

1.7 This reference acknowledges recent interest in and the formal use of an array of processes other than the mechanism of judicial adjudication to resolve disputes. Evidence of this was presented in papers at the seminar Alternative Dispute Resolution,<sup>6</sup> conducted by the Australian Institute of Criminology in 1987 which examined the use of mediation and conciliation in Australia at that stage, and also arbitration, and drew attention to key policy

issues associated with the implementation of ADR both within and outside the court system. Although the practice of ADR was only then limited in Australia, several crucial issues were raised. These included definitional problems, training, quality control and accountability, and the need for assessment and evaluation.

1.8 The Commission was prompted by its participation in the seminar to seek a reference on alternative dispute resolution and provide a forum in which some of the policy issues associated with its implementation could be addressed. In choosing the restricted area of the need for training and accreditation, the Commission intended to focus on one of the key aspects necessary to establish the quality and accountability, and therefore credibility, of practitioners in the eyes of consumers and their advisers. Practitioners, program administrators and policy makers had already acknowledged these to be significant issues.<sup>7</sup> This State has a direct interest in the quality of services that are promoted and adopted for the role they play in reducing the number of civil disputes (and, indirectly, criminal matters) in the court system.<sup>8</sup> As the use of ADR expands, particularly with public funding, court and program administrators as well as consumers must face the questions of who are qualified to be neutral third parties, how to select those people, and what specific training is necessary to perform that role.

1.9 A subsidiary purpose in seeking the reference, and a necessary feature of the conduct of the inquiry, was to gather data on the extent and nature of ADR practice in Australia. This has proved a difficult task, given the rate at which new programs and experiments with ADR procedures are being implemented. It has contributed to the nature of the recommendation for creation of a dispute resolution database and the Commission's decision to produce a *Directory of Dispute Resolution* to accompany this Report.

#### **Critique not attempted**

1.10 The Commission has not attempted any critique of the new approaches to dispute resolution beyond that which is incidental to the issues of training and regulation. We are aware of significant research which suggests that introduction of the new approaches should be done with care so as to avoid, as far as is consistent with the program's aim, the disadvantages for which they have been criticised. These relate to the emphasis on compromise in the absence of substantive and procedural legal protections and the possibility of coercion in reaching a negotiated settlement. Questions of access to, and the quality of justice, the extension of state control, and quantifying the savings claimed for these approaches have also been raised.<sup>9</sup> The Commission believes that the experimentation and expansion of ADR which has increasingly occurred in recent years will continue. The perceived advantages of ADR to those who use it are that it is a faster, cheaper, less formal and more accessible and satisfying way of resolving conflicts.<sup>10</sup> The appeal for governments lies in the savings of money, time and resources which can be achieved. The future of ADR is assured.<sup>11</sup>

1.11 This Report does not evaluate ADR processes, nor does it endorse any particular ADR program or process. The reference did not require or permit such enquiries, and the Commission is not currently in a position to make those judgments. The Commission believes that experimentation with ADR programs is valuable and also that it is essential to evaluate programs, processes, training courses and mechanisms for quality control and regulation. Evaluation should and frequently does occur as an internal process, but there is also a need for external review. The Australian Institute of Judicial Administration is conducting a project on ADR which will combine an analysis of the merits of ADR, with an empirical study of programs already operating in Australia.<sup>12</sup> It should provide very useful assessments of the efficacy of some ADR programs, and provide data on which policy decisions can be based. Further research is likely to be conducted by institutions such as the Bond University Dispute Resolution Centre and the Centre for Conflict Resolution at Macquarie University.

#### **CONDUCT OF THE REFERENCE**

1.12 The reference required the Commission to undertake wide-ranging research and engage in extensive public consultation. The research was necessary because of the nature of ADR, its novelty, and the lack of easily accessible materials. The consultation was vital to ensure the effectiveness of our enquiries, and acceptance of our recommendations. The Commission has been assisted greatly by the willingness of many in the dispute resolution community to provide assistance and information about ADR programs and courses. In return, the Commission has been an information source for practitioners and researchers in the area who have drawn on the reference material collected by the Commission and on its experience.

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1.13 The Discussion Paper was the Commission's principal means of public consultation, seeking to stimulate debate by presenting the issues and asking for responses to the specific questions it posed. Submissions were received from across Australia, representing the views of those in ADR agencies and programs, professional associations and of individual practitioners, academics and interested persons. Appendix A contains a list of those from whom submissions were received. The views expressed are referred to throughout the Report. The Discussion Paper has also been in demand as a teaching resource and as a guide for other policy discussion.

1.14 The Commission also engaged in direct consultation with various people and groups in the dispute resolution community, both formally and informally. Meetings were held with representatives of the Family Mediation Centre, New South Wales Law Society, the Dispute Resolution Committee, Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Australian Commercial Disputes Centre (NSW) (ACDC) and Community Justice Centres (NSW). Informal discussions were held with numerous mediators, ADR program and court administrators, lawyers and others interested in the use of ADR.

1.15 The Commission developed specific options for the regulation of mediators and sought comments on these from a number of interested people. The Commission appreciates the support given by the dispute resolution community to this reference. The information provided and opinions expressed have been vital to understanding dispute resolution practice and formulating the recommendations in this Report.

1.16 The Commission appointed Jennifer David as Honorary Consultant to the Division on the ADR reference. Ms David is currently Adjunct Professor of Law, University of Technology, Sydney and Chief Executive Officer, LEADR. The Commission expresses its thanks to Ms David for her advice on dispute resolution practice and policy which was generously given.

### THE REPORT

1.17 This Report presents the Commission's conclusions and recommendations. *Chapter 2* indicates the range of dispute resolution programs and processes across which the recommendations should apply. This is supplemented by the accompanying publication, the *Directory of Dispute Resolution* noted below.

1.18 *Chapter 3* is concerned with the issue of training. Submissions overwhelmingly argued that training for mediators was desirable, if not essential, and the Commission has endorsed this position. It has declined, however, to make a formal recommendation to implement any legal requirement for training at this stage. *Chapter 3* refers to opinions expressed in submissions about the questions posed in the Discussion Paper on training, and some conclusions about issues in mediator training.

1.19 *Chapter 4* considers the policy issues which are relevant to the question of regulation of dispute resolution practices. *Chapter 5* presents a range of approaches already in operation and considered by the Commission. In *Chapter 6* the Commission makes recommendations for court and tribunal connected ADR. The unique position of these services and programs gives rise to some important issues, particularly concerning quality and accountability.

1.20 *Chapter 7* presents the Commission's main recommendations: that a Dispute Resolution Advisory Council be created to advise the government about dispute resolution practice; and that a Dispute Resolution Database be established. The information contained on the Database would be made available to the public and provide a valuable resource to the Advisory Council on which to base its advice to the government.

### Directory of Dispute Resolution

1.21 In the course of this reference, the Commission faced the difficulty of precisely identifying the nature and extent of ADR programs and services available. This stemmed from two causes: the lack of readily available sources of information; and the rate at which programs are being established and modified. This problem must be common to many: researchers, new program administrators, lawyers and others who advise clients with disputes, and potential users alike.

1.22 The Commission therefore determined that data about programs and services, including training courses, should be published. Such a publication should contain information about the nature of dispute resolution services provided as well as promote the availability of the services. It can be seen as a forerunner of the



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Database of Dispute Resolution which the Commission recommends, and serve those functions which are identified for the Database. The Directory was published with the financial assistance of the Law Foundation of New South Wales, which the Commission gratefully acknowledges.

### FOOTNOTES

1. See New South Wales Attorney General's Department *Alternative Dispute Resolution and the New South Wales Court System* (Sydney, January 1990); Victoria *Attorney-General's Working Party on Alternative Dispute Resolution Report* (Attorney-General's Department Melbourne, June 1990); and South Australia Attorney-General's Department *Alternative Dispute Resolution: Green Paper* (Adelaide, 1990).
2. *Australian Dispute Resolution Journal* (Law Book Co, Sydney, 1990).
3. Jay Folberg and Alison Taylor *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Jossey-Bass, San Francisco, 1984) at 7; New South Wales Law Society's "Guidelines for Solicitor Mediators" (1988) 26 *Law Society Journal* (6) 29; New South Wales Law Reform Commission *Training and Accreditation of Mediators* (DP 21, 1989) paras 2.7-2.12.
4. See Chapter 2.
5. See also Editorial (1990) 1 *Australian Dispute Resolution Journal* 175.
6. Jane Mugford (ed) *Alternative Dispute Resolution, Proceedings of a Seminar on Alternative Dispute Resolution held by the Australian Institute of Criminology*, Canberra, July 1986 (AIC, Canberra, 1986).
7. *Ibid.*
8. See *Alternative Dispute Resolution and the New South Wales Court System* note 1 at 18-20.
9. Richard Ingleby "Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution" Paper presented to Australian Institute of Judicial Administration Conference, Melbourne, 18 August 1990; Richard L Abel (ed) *The Politics of Informal Justice* (Vols 1 & 2) (Academic Press, New York, 1982); Roman Tomasic and Malcolm M Feeley (eds) *Neighbourhood Justice, Assessment of an Emerging Idea* (Longman, New York, 1982).
10. See Jennifer David and Patrick Cavanagh "Taking the Plunge" (1990) 25 *Australian Law News* (10) 3 1.
11. See, for example, the Prime Minister's Fourth Term Initiatives Statement supporting arbitration and mediation and its implementation by the Courts (Mediation and Arbitration) Act 1991 (Cth) assented to 27 June 1991; Australia, National Legal Aid Advisory Committee *Legal Aid for the Australian Community: Legal Aid Policy, Programs and Strategies: a Report*; (AGPS, Canberra, 1990) at 198-202.
12. Mediation conferences in the Federal Court, Family Court Order 24 Conferences, and the Small Claims Tribunal, Victoria; Ingleby note 9.
13. For example, for the Victorian Attorney - General's Working Party Report see note 1.

## 2. Consensual Dispute Resolution

### THE PROBLEM OF DEFINITION

2.1 A fundamental issue for the Commission was to define the boundaries of dispute resolution for the purposes of this reference. The problem was created by the diverse range of alternative dispute resolution practices in use, the divergent and even conflicting goals, ideologies and assumptions driving them, and the resulting confusion over terminology.

2.2 This Chapter explains that consensual dispute resolution has been the focus of the Commission's enquiries, and why this approach has been adopted. Without limiting the application of recommendations contained in this Report, the Commission identifies the relevant processes and presents an overview of the current state of consensual dispute resolution practice in New South Wales and the rest of Australia. The processes and activities which the Commission considers fall outside the terms of the reference and its recommendations are indicated.

### Alternative dispute resolution

2.3 There is no universally accepted definition on which the Commission can rely for specifying the dispute resolution processes to which its recommendations should apply. The most commonly used term is *alternative dispute resolution* (ADR). The processes which are given this label show a range of characteristics from ADR's constituent elements. It may be *alternative* in procedure, attitude, institutional structure, forum; or in the nature of disputes. The *disputes* range from those falling within the judicial system, those dealt with by the administrative system, to those for which a litigated solution is either inappropriate, not desired or unavailable. *Resolution* is achieved predominantly by consensual means, although directive and adjudicative approaches may be used, either initially or if agreement is not possible; and it may have a binding or non-binding status. The various processes which broadly fall within the boundaries of ADR exhibit a complex matrix of characteristics related to the degree of confidentiality, procedural formality and privacy, the role of participants, the role of substantive legal rules, the nature of participation (ie where control of participation, process, content and outcome lies) and the status of the outcome.

2.4 On its widest interpretation, ADR incorporates everything from procedural reforms in the courts and more efficient case management techniques, adjudicative procedures by non-judicial personnel through the now familiar applications of commercial, community and family mediation, to the private operation of grievance handling mechanisms in organisations and the non-specific activities of intermediaries and the use of conflict resolution techniques. The Commission considers that this approach sets too broad a scope and that practices at either end of such a spectrum lie beyond the scope of ADR envisaged by the Commission's reference.

### DESCRIBING CONSENSUAL DISPUTE RESOLUTION

2.5 The focus of this reference is on the activities of neutral third parties in what the Commission describes as *consensual dispute resolution*, that is:

where a neutral third party uses a structured process in a formal manner and setting to assist the parties to negotiate a mutually acceptable resolution of matters in dispute between them.

Processes which fit this description of the general model include mediation and conciliation. These and other processes are explained below.

2.6 There are several key elements to the processes which fall within this description. The first is the *participatory* role of the parties who have responsibility for negotiating a *mutually acceptable* resolution of their dispute. Another is the *impartiality* of the *neutral third party* whose function is, by using a *structured* process, to *assist* the parties to negotiate a resolution, without power to impose the fact or terms of a settlement. Frequently, negotiation and the settlement focus on the full range of *interests and needs of the parties*, (substantive, procedural and psychological) rather than strictly on their legal rights. The setting is *formal* rather than casual. The Commission recognises that these key elements may not always be fully displayed in the processes it

considers to fall within the definition of consensual dispute resolution, either because of constraints imposed by the legal or institutional context, or by choice. Variations to the general model will occur, without necessarily placing the process outside the terms of the reference.

2.7 The description does not distinguish between the resolution of disputes in private and those resolved publicly in the justice system or administration. However, not all resolution of disputes between citizens in private will occur in a sufficiently formal setting or with sufficient formality of procedure to fall within the description adopted by the Commission. These exclusions are considered later in this Chapter.

### The rationale

2.8 The Commission has adopted this approach for several reasons. In Australia the practice of ADR is only a relatively recent development. The phase of vigorous expansion, experimentation and innovation in the last decade is certain to continue.

Existing programs and processes are being refined with experience. New and more appropriate processes and forums will be created as ADR is applied more extensively and refined. It is both premature and potentially detrimental to impose rigid demarcations at this time. The Commission accepts that there is a need to preserve this flexibility and that our recommendations should not unduly inhibit innovation and experimentation.

2.9 This approach accommodates the current situation where terminology may not be agreed, and institutional, substantive and theoretical variations make more rigid classification both frustrating and futile.<sup>1</sup> The Commission has neither the obligation nor the capacity to prescribe definitions in the field of dispute resolution so as to reduce confusion and disagreement. It may well be necessary to determine more precise definitions for particular purposes such as funding, but that is unnecessary for the purposes of this Report and the recommendations made by the Commission. The better approach is to consider and reflect current practices and allow the boundaries to emerge rather than superimpose them uneasily from outside. Accordingly, the Commission includes an overview of current dispute resolution programs and activities in the Report and has prepared the accompanying *Directory of Dispute Resolution*.

## PROCESSES OF CONSENSUAL DISPUTE RESOLUTION

2.10 Without limiting the description of consensual dispute resolution, the Commission considers that the following processes are within the concept.

*Mediation*: a structured negotiation process in which a neutral impartial third party, the mediator, independent of and acceptable to the parties, facilitates their agreement on a resolution of their dispute by assisting them systematically to isolate the issues in dispute, to develop options, and to reach a mutually acceptable resolution which accommodates the interests of all disputants as much as possible. If requested, the mediator may suggest options for settlement but does not have authority to impose a settlement or its terms on the parties.<sup>2</sup>

*Conciliation*: is widely understood in Australia to be a process similar to mediation but one in which the conciliator has greater authority or responsibility for the terms in which the dispute is resolved by the parties. This occurs either with the consent of the parties or, in many cases, within the terms of legislation under which the conciliation is being conducted. Party participation in the process may also be required under that legislation.<sup>3</sup>

The model of community mediation widely used in Australia defines conciliation to be the activities of a neutral third party bringing the parties together for the purposes of dispute settlement without becoming involved in the process of mediation.<sup>4</sup> In this setting it is undertaken by staff rather than mediators and is outside consensual dispute resolution as described in this Report. Dispute counselling would be excluded on similar grounds.<sup>5</sup>

*Independent expert appraisal*: an independent expert in the subject area of the issues in dispute is appointed to investigate and deliver an opinion on the issues in dispute which may or may not be binding. 'Me expert

often uses mediation techniques, particularly where the opinion is used as the basis of a negotiated settlement.

*Facilitation (Moderation):* a collaborative process in which a neutral person manages the process by which disputes with multiple parties or interests are resolved by participants reaching consensus on the issues. The disputes are often about matters such as environmental issues, or large community disputes, although the process is also used for commercial disputes.

*Case presentation (Aust) - Mini-trial (USA):* a structured information exchange followed by negotiation between representatives of the parties in dispute. Brief and concise summaries of each party's case, and sometimes evidence from expert witnesses, are presented to all parties. The parties then negotiate a settlement, sometimes with the assistance of an independent third person managing the negotiations. This process is usually adopted by corporations, with negotiations conducted by senior representatives of the company who have the authority to settle.

*Mediation hybrids:* dispute resolution processes which combine the consensual features of mediation with the more authoritative resolution methods of arbitration. These include expert appraisal with provision for mediation, appraisal, senior executive appraisal, summary jury trial and neutral-expert fact-finding.<sup>6</sup> The role of a neutral third party is often to mediate with the parties as many issues as possible. With the consent of the parties, or in compliance with legislation, the issues which remain in dispute are submitted to adjudication. In some versions the same person performs the two roles; in others the facilitating and adjudicative roles are split.<sup>7</sup>

## **Exclusions**

### *Arbitration*

2.11 Arbitration is adjudicative, not consensual, dispute resolution, and outside the focus of this reference. Nevertheless it is closely associated with processes for facilitating a negotiated settlement of a dispute. Recent amendments to the Commercial Arbitration Act 1984 strengthen its provisions for both arbitrators and parties pursuing non-arbitral means of settlements.<sup>8</sup> Many of those who practise commercial arbitration are also on the Register of Conciliators and Mediators drawn up by the Institute of Arbitrators Australia. The Arbitration (Civil Actions) Act 1983, which has effect in the New South Wales Supreme, District and Local Courts, requires arbitrators to attempt conciliation between the parties.<sup>9</sup> It is possible that mediation is attempted before arbitration or determination by a referee in matters referred under the Supreme Court Rules Part 72 and Part 72A.

2.12 Although the primary adjudicative function of arbitrators is outside consensual dispute resolution, there are many issues considered in this Report which have direct relevance to their role in facilitating consensual dispute resolution. As well, many issues are relevant to their primary role. The recommendations concerning the Dispute Resolution Database could be considered to extend to arbitration, particularly court connected arbitration. Similarly, the comments in Chapter 6 concerning guidelines for design of court-connected programs are apposite.

### *Case management procedures*

2.13 There has been considerable progress made within court administration in recent years to address the perceived problems of delay and costs. Many initiatives in procedural reform and case management techniques involve a greater degree of non adjudicative activity by judicial and quasi-judicial officers, and administrative intervention in both the pre-trial process and hearing to facilitate settlement of an action or narrowing of the issues for judicial determinations.<sup>10</sup> The Commission believes that informal or procedural encouragement or assistance to parties and their counsel to settle matters does not constitute a consensual dispute resolution process for the purposes of this reference. However, where there is a distinct procedure occurring in a formal setting in which a neutral third party uses a structured process in order to facilitate negotiation by anyone involved in the conduct of the matter with a view to encouraging a settlement or at least narrowing the issues in dispute, this would fall within the boundaries. For example, Issues and Listings Conferences in the Supreme Court would be considered a consensual dispute resolution procedure whilst a trial judge urging the parties to find a settlement themselves would not.

*Administrative dispute processing*

2.14 Similar distinctions need to be made for the use of consensual dispute resolution procedures in association with proceedings in administrative tribunals, and generally pursuant to the administration of departments, agencies and legislation. The establishment of separate forums and tribunals for the more appropriate resolution of disputes in particular categories has usually involved the adoption of less adversarial and more informal procedures which encourage negotiation of a settlement between the parties. As well, approaches to the processing of grievances, complaints and disputes which occur within administrative agencies use procedures which aim to resolve disputes by means which avoid courts and value compromise. The Ombudsman is one example. In determining whether a procedure falls within the concept of consensual dispute resolution, the Commission would use the test of whether there is a distinct or separate procedure in a formal setting in which a neutral third party uses a structured process to facilitate the negotiation of a settlement by the parties themselves. According to this, conciliation by the Anti-Discrimination Board would be included, while the Chairman of the Motor Vehicle Repairs Disputes Committee "using his best endeavours to settle the dispute" would not.<sup>11</sup>

*Informal conflict resolution*

2.15 Structures and techniques for the prevention and processing of grievances and disputes in organisations, social groups and interpersonal relationships have been implemented in response to recent community interest in conflict management and conflict resolution. These occur within an organisational structure such as a school, workplace or community group, or are used at an interpersonal level. In the latter sense, conflict resolution processes merge with the field of personal growth and development. Alternatively, they may be a management response to conflict, either on an informal basis or formally with the creation of a dispute processing system.<sup>12</sup>

2.16 Some examples serve to indicate the diversity of dispute and conflict resolution activities which currently exist.

Conflict Resolution Network activities, including conflict counselling, meeting facilitation, and mediation.

Management consultancy techniques of mediation, conciliation, and facilitation of negotiation.

Dispute processing or grievance handling mechanisms created in firms and organisations for personal and industrial disputes which arise internally eg State Rail, Civil & Civic.

Certain occupations are called upon to perform in the role of conciliator or mediator, eg architects under standard form contracts.

Crisis mediation, such as that by police in civil emergencies.

Celebrity mediation, where the intermediary's status brings parties in dispute together.<sup>13</sup>

2.17 The Commission considers that these applications generally will not amount to a sufficiently formal procedure and setting to be considered to fall within consensual dispute resolution as described for the purposes of the reference. For these activities questions of quality and accountability will be private issues, for the parties or management. However some will be appropriate for inclusion in the Database. The exact terms of the guidelines for inclusion should be determined by the Advisory Council recommended by the Commission.

## OVERVIEW OF CONSENSUAL DISPUTE RESOLUTION

2.18 In this section, the Commission presents an overview of current dispute resolution practices which it considers within the boundaries of its terms of reference. The area is developing rapidly; it is a constantly changing picture. The categories by which dispute resolution programs and activities were presented in the Discussion Paper have been maintained in the Report, although it is acknowledged that the distinction based on substantive contexts may not always be the most helpful. Included are the activities of public and private bodies and agencies, government and non-government bodies and associations. As the private practice of consensual dispute resolution is difficult to document, few references are made to private practitioners.

### **Community mediation**

2.19 Several agencies offer mediation to the communities in which they are located. These are listed in Appendix B. Their aim is to provide a mechanism for the inexpensive, expeditious and fair resolution of minor civil (and sometimes criminal) disputes between people in ongoing relationships. Their preferred method of dispute resolution is mediation, although conciliation and dispute counselling services are also provided. They were inspired by the neighbourhood justice movement in the United States, although there is now an identifiable Australian model of community mediation, pioneered by the Community Justice Centres (CJC) in New South Wales which has been adopted in Victoria, Queensland and the Australian Capital Territory. These centres are government funded and are usually under the administrative responsibility of the Attorney General. The Victorian Dispute Resolution Centres have community management committees with administrative and policy functions. In other States, centres have been established at the instigation of the local community, or another community legal or advice agency.

2.20 Mediators are "ordinary people" selected from the local community and trained for their role as neutral third parties to assist the disputants to negotiate an agreement on any matter in dispute between them. The selection seeks to reflect the diversity in age, ethnic and social backgrounds of the community in which they operate. Community mediation is offered for disputes between neighbours, family members (including matters arising in the separation and dissolution of marriage) and members of groups in the community, and for disputes arising in the workplace and over commercial transactions. Other areas in which community mediation is being applied are environmental disputes and public and private multi-party disputes. CJC mediators are being used in a pilot project for the mediation of civil claims in the Local Court, Sutherland.

### **Family dispute resolution**

2.21 Consensual dispute resolution services are available for a range of family situations in which conflict can arise: general family and inter-generational conflict, specifically for parent/adolescent conflict, disputes between separating and divorcing spouses, and for de facto and homosexual couples. Mediation and conciliation are the dominant processes used, although family law arbitration and private judging are also available. The Commission distinguishes, for the purposes of this reference, marriage and family counselling and therapy services, none of which is a Consensual dispute resolution process within the Commission's description.

2.22 The Family Court has emphasised non-adversarial approaches to the resolution of matters coming under the Family Law Act 1975 (Cth), whether or not dissolution of the marriage is sought.<sup>14</sup> Conciliation is conducted by counsellors and Registrars of the Court, generally for custody, and for property and financial matters. In some Registries, joint conferences are conducted by a Registrar and a counsellor for all matters in dispute. The Family Court has recently considered the establishment of a separate stream within the Court of family mediation to be conducted by Family Court mediators.<sup>15</sup> The proposal is accepted in principle and preparations are now being made for a pilot project in one or two Registries.

2.23 Outside the Court, a range of approaches has been adopted. Several private and government sponsored agencies throughout Australia offer family mediation. These are listed in Appendix C. Many are funded by the Commonwealth Attorney-General's Department for the mediation of disputes which may otherwise result in litigation through the Family Court. Some community mediation centres have a significant caseload relating to family disputes, in family law matters, parent/adolescent conflict, and other interpersonal disputes. There is also a small private practice in divorce mediation. Practitioners come from the ranks of lawyers, social workers, psychologists and counsellors; the practice of mediation supplements their primary professional practice. In response to the report of the National Inquiry into Homeless Children in Australia (Human Rights and Equal Opportunity Commission 1989), the Commonwealth Attorney-General's Department has allocated funds for youth homelessness services in adolescent mediation and family therapy. These are also noted in Appendix C. Each service has its own organisational structure and approach to the mediation process, and some are yet to become operational. Legal Aid Commissions in New South Wales, Victoria and Queensland, have policies which require or encourage the use of mediation for those receiving legal aid for the dissolution of a marriage.<sup>16</sup>

### **Commercial dispute resolution**

2.24 Various processes from several sources are available to those wishing to negotiate resolution of commercial disputes. The sources are noted in Appendix D. The dominant consensual process is mediation, although it is common for parties to agree to a particular form such as independent expert appraisal or case presentation, or to use a hybrid process in which mediation is followed by arbitration if necessary. Their use is challenging the pre-eminence of arbitration as the alternative to litigation of such disputes. The uniform Commercial Arbitration Acts now require arbitrators to attempt conciliation of matters before making a determination.

2.25 Government-sponsored agencies have been created to increase the options for the resolution of commercial disputes: Australian Commercial Dispute Centres (ACDC) in Sydney and Brisbane, and the Australian Centre for International Commercial Arbitration, Melbourne. The ACDC in NSW is also the Asian Pacific Registry for the London Court of International Arbitration. In some States the legal profession has been responsible for establishing dispute resolution schemes with their members as practitioners. There are several independent practitioners of commercial dispute resolution, both in the areas of mediation and arbitration. The professional associations, Institute of Arbitrators Australia, Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Bar Association of Queensland and the Law Institute of Victoria all accredit their members as mediators, arbitrators or specialists in dispute resolution. Mediators can be drawn either from the legal profession, or from the industries from which the disputes emanate.

### **Court connected alternatives to litigation**

#### *Federal Courts*

2.26 In the Federal Court, assisted dispute resolution consists of voluntary mediation conducted by a Registrar or Judge where the agreement reached becomes a consent judgment.<sup>17</sup> In the Family Court, several strategies noted above have been adopted for the resolution of disputes other than by judicial determination. The Courts (Mediation and Arbitration) Act 1991 (Cth) assented to on 27 June 1991 provides a legislative framework in which appropriate methods of alternative dispute resolution may be developed in the Federal and Family Courts. The use of external agencies and providers is contemplated, as well as officers and staff of the Courts.

#### *New South Wales Courts*

2.27 There are only a few procedures within New South Wales Courts which can be identified as falling within the description of consensual dispute resolution adopted by the Commission. Within the Supreme and District Courts, pre-trial conferences are conducted by Registrars who mediate certain matters to explore settlement or narrowing of the issues before trial or arbitration.<sup>18</sup> In the Land and Environment Court, voluntary mediations are conducted by Registrars for disputes in Classes 1, 2 and 3 under the Land and Environment Court Act 1979.<sup>19</sup> In the Local Court at Sutherland, a pilot program for mediation of civil claims has been implemented, using mediators from Community Justice Centres.<sup>20</sup> The concept would also embrace Settlement Week such as is proposed for the Supreme Court for October 1991 in which cases awaiting trial are to be mediated by lawyer mediators in an attempt to achieve early settlement.<sup>21</sup>

2.28 Several other procedures to expedite or encourage resolution have been adopted. In the Supreme Court Commercial Division, the Construction List of the Common Law Division and the Commercial and Building and Engineering Lists of the District Court, procedures are designed to encourage early exploration of settlement by the parties, including the involvement of technical experts to assist in determination of matters in dispute. Such procedures would normally fall outside the concept of consensual dispute resolution except where a mediation session is arranged or occurs pursuant to a reference to arbitrations.<sup>22</sup>

#### *Other Australian jurisdictions*

2.29 Courts in most jurisdictions use various procedures to encourage settlement or narrow the issues for judicial determination. Some of these constitute consensual dispute resolution as described by the Commission, the use of a structured process in a formal setting where a neutral third party assists the parties to negotiate a settlement. A representative sample would include pre-trial conferences in the Victorian Supreme and County Courts, mediation under the Building Cases Rules in the Victorian County Court, pre-trial conferences in the Western Australian District Court and mediation by Masters in the Supreme Court of Queensland. Excluded from the

description are arbitration, either by a judicial officer or a court appointed arbitrator, or other assessor of fact, and procedural steps or informal encouragement of settlement.

### **Tribunals**

2.30 The creation of separate tribunals has frequently been accompanied by the adoption of procedures which provide for conciliation or other attempts to facilitate the settlement of disputes by negotiation between the parties as well as more informal procedures and hearings. Distinctions are difficult to draw, however it is possible to identify consensual dispute resolution procedures in some tribunals, primarily those required under human rights and anti-discrimination legislation to use conciliation. The Commonwealth Administrative Appeals Tribunal is currently assessing the feasibility of introducing a mediation stream for all matters. Appropriate matters are mediated in the Victorian Administrative Appeals Tribunal. Small Claims and Consumer Claims Tribunals in some instances will attempt negotiation of a resolution by the parties before them, and the South Australian Planning Appeals Tribunal has a compulsory conference procedure at which settlements are agreed.

### **Administrative agencies**

2.31 In all jurisdictions Government administrative agencies dealing with a wide variety of legislation and community services have implemented dispute processing systems in which parties are encouraged to resolve their disputes before resorting to tribunals or courts. In New South Wales the Anti-Discrimination Board and the Department of Housing Tenancy Service offer conciliation. Under other legislation, public officials or members of disciplinary and complaints processing authorities may be given powers or instructions to promote a settlement between the parties of matters brought before them. The Commission does not consider that their activities would normally be within the description of consensual dispute resolution adopted for this reference.

### **Other initiatives**

#### *Environmental mediation*

2.32 Interest is growing in the use of mediation to resolve public policy disputes, particularly those concerning the environment. Governments are exploring alternatives to the bureaucracy and to the court's role in determining public policy issues,<sup>23</sup> as are those within the dispute resolution movement.<sup>24</sup> Practitioners are likely to be drawn both from the ranks of mediators practising in other substantive contexts, and from people with expertise in the subject matter of these disputes. Services may be offered through public and private agencies, or by private practitioners. The Commission considers that these activities fall within consensual dispute resolution for the purposes of this reference, and should be covered by the Database and Advisory Council recommended in Chapter 7.

#### *Industry dispute resolution*

2.33 Some industries and professions have established formal dispute processing systems which emphasise informal and consensual approaches, and avoid litigation. The approaches can also be more appropriate to the particular industry - the nature of the dispute, disputants, the values and complexities of the substantive context and organisation.<sup>25</sup> The insurance industry has experimented with various approaches: in Queensland with the Personal Injury Mediation Program in co-operation with ACDC providing for the voluntary mediation of claims arising out of motor vehicle accidents; with an ombudsman within the SIO Consumer Appeals Centre established by the Victorian State Insurance Office; and with many privately arranged mediations over disputes which include those between reinsurers.<sup>26</sup> The Banking Ombudsman scheme, created in 1990, is in fact an industry sponsored private enterprise dispute resolution system in which conciliation is emphasised.<sup>27</sup> Professional associations frequently offer conciliation for disputes between members and their clients.<sup>28</sup>

2.34 Classification of these activities in accordance with the concept adopted by the Commission for this reference can be difficult. They may not be sufficiently formal, public or consensual in approach to warrant inclusion. The Commission considers it is preferable to err on the side of wide interpretation of the ambit of the Database and Advisory Council, particularly for disputes in which legal rights of parties are at issue.

#### *Legal profession*



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2.35 The legal profession, although often criticised for its opposition to alternatives to litigation, has been involved in many initiatives which implement dispute resolution programs, as well as promoting and supporting the use of consensual dispute resolution. The Law Council of Australia has a Policy Statement in support of ADR and has proposed a uniform mediation system in all Federal and State courts. Dispute resolution schemes have been established by the Queensland and Victorian Bar Associations, and the Western Australian Law Society participates in a Dispute Resolution Scheme with other associations. The Law Institute of Victoria has Conciliation Rules for use in solicitor-client disputes, and other dispute resolution panels. The New South Wales Law Society Dispute Resolution Committee has instituted Settlement Week<sup>29</sup> as part of an extensive program of activities supporting ADR.<sup>30</sup> LEADR has been established by lawyers to promote ADR and educate and accredit lawyers as mediators, and the Law Institute of Victoria has approved Alternate Dispute Resolution as an area of specialisation. LEADR is also involved with the implementation of a mediation scheme in the Legal Aid Office, Queensland for the pro-bono mediation of civil disputes (excluding family law matters), which should be the forerunner of schemes in other States.

### FOOTNOTES

1. If it can be seen as possible and desirable, see Austin Sarat "The New Formalism in Disputing and Dispute Processing" (1988) 21 *Law & Society Review* 95.
2. Jay Folberg and Alison Taylor *Mediation: A Comprehensive Guide to resolving Conflict without Litigation* (Jossey-Bass, San Francisco, 1984); Christopher W Moore 77 *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, San Francisco, 1986); New South Wales Law Society's "Guidelines for Solicitors who Act as Mediators" (1 988) 26 *Law Society Journal* (6) 29.
3. Anti-Discrimination Act 1977 s102, see also s92, Workers' Compensation Act 1987 s102. See also Terence Beed, R William Fitzgerald, Deborah Worthington *The Role of Conciliation* (The Civil Justice Research Centre, Sydney 1990).
4. Community Justice Centres Council (NSW) *Report of the Community Justice Centres Council for the year ended 1990* (Govt Printer, Sydney, 1990) at 14.
5. The CJC suggested that conciliation in this sense, dispute counselling and other contacts with clients prior to mediation are even more in need of safeguards for clients than mediation as we have defined it. (CJC) The difficulties which confront efforts to regulate mediation acknowledged in this Report demonstrate the magnitude of such a task. It is clearly beyond the scope of this Report.
6. See Richard G Collins "Alternative Dispute Resolution- Choosing the Best Settlement Options", and Sir Laurence Street "Expert Appraisal with Provision for Mediation" (1989) 8 *Australian Construction Law Newsletter* 17.
7. There is some debate as to the appropriateness of the former situation. It is believed to militate against candour and frankness by the parties, or their commitment to negotiating an agreement. The Commercial Arbitration Act 1984 s27 requires the arbitrator to attempt conciliation, but it may also prevent the use of caucusing, that is, speaking to each party separately, to investigate the possibility of settlement.
8. Commercial Arbitration Act 1984 s27 as amended by the Commercial Arbitration (Amendment) Act 1990. As to the power of arbitrators see *IBM Australia Limited v National Distribution Services Pty Ltd* unreported, Court of Appeal (NSW) CA 4086 1/ 90, 5 March 1991 and earlier related decisions by Mahoney JA (4 February 1991) and Rogers J (Com D No 50554/90 5 October 1990)[1991] ATPR 41-077. For comment on these cases see Warren Pengilly "Trade Practices Act issues and remedies: Can they be arbitrated?" (1991) 29 *Law Society Journal* (4) 65 and "Court of Appeal confirms trade practices matters can be arbitrated" (1991) 29 *Law Society Journal* (5) 77.
9. Arbitration (Civil Actions) Act 1983 s9(l).

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10. eg Supreme Court Common Law Division Issues and Listings Conference, procedures in the Common Law Division Construction List, District Court pre-trial conferences. See also Annesley H De Garis "The Summary Jury Trial: Judicial Alternative Dispute Resolution" (1991) 2 *Australian Dispute Resolution Journal* 51; Andrew Rogers "Mini-trials-diverting the adversarial instinct" (1986)24 *Law Society Journal*(4)27.

11. Motor Vehicle Repair Act 1980 s53(l).

12. William L Ury, Jeanne M Brett Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (Jossey-Bass, San Francisco, 1988).

13. Most recently, the appointment of Sir Ninian Stephen as mediator for the talks on Northern Ireland.

14. Family Law Act 1975 (Cth) ss15, 16A, 43,62,64(1B), 79(9) and 0 24 r 1. See also Courts (Mediation and Arbitration) Act 1991 (Cth) introducing anew Part 111A - Mediation and Arbitration in the Family Law Act 1975.

15. *Family Court of Australia Alternative Dispute Resolution Within the Family Court of Australia* Discussion Paper (June 1990); and also *Family Law Council Family Mediation* Discussion Paper (1990).

16. See Family Law Matters, Guidelines, Mediation, in Legal Aid Commission of NSW *Policy Manual* (September 1990) at 37A. Legal Aid Office (Queensland) Early Intervention Conferencing Project provides a modified form of mediation prior to grant of legal aid.

17. Practice Note 8 "Assisted Dispute Resolution" May 1990.

18. Supreme Court Practice Note 59 Common Law Division, 28 February 1990; District Court Practice Note 13, Guidelines for Registrars presiding at call-overs and pre-trial conferences 16 August 1990.

19. Land and Environment Court Practice Direction April 1991.

20. Chris McRobert "Mediation in Local Courts - An Alternative to Contested Hearings" (1991) 2 *Australian Dispute Resolution Journal* 94.

21. See "The Law Society Inaugurates Settlement Week" (1991) 29 *Law Society Journal* (2) 33; and "Settlement Week" (1990) 28 *Law Society Journal* (7) 29.

22. See paras 2.11-2.12 supra.

23. Public Issue Dispute Resolution Conference, Brisbane, 18-19 February 1991 sponsored by the New South Wales and Queensland Governments; consultancy by ACDC to the NSW Minister for State Development, April 1991 on the use of environmental mediation;

Peter Adier "Resolving Public Policy Conflicts Through Mediation" (1990) *Australian Dispute Resolution Journal* 69; John P McCrory "Environmental Mediation- Another Piece for the Puzzle" (1981) 6 *Vermont Law Review* 49.

24. Mediation: It Won't Cost the Earth, Seminar, Sydney, 10 October 1990 sponsored by the Environmental Defender's Office Lid and the Family Mediation Centre (NSW) conducted by CDR Associates, Colorado who have extensive experience in public policy and environmental mediation in the United States.

25. Jennifer David "An Australian Perspective on ADR" (1991) *Australian Insurance Institute Journal* 20 at 20.

26. Ibid at 27ff.

27. Di Everett, "Australian Banking Industry Ombudsman" (1990) 5 *Banking Law Bulletin*

28. See for example Royal Australian Institute of Architects, Institute of Surveyors (NSW) and the Law Institute of Victoria's Optional Conciliation Rules.

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29. See note 21.

30. Including publication of a Draft Mediation Agreement, Model Dispute Resolution Clauses and Guidelines for Solicitors Acting as Mediators.

## 3. Training

### THE TERMS OF REFERENCE

3.1 The terms of reference required the Commission to consider the need for training of mediators. The Commission's conclusion is that training is necessary for a person to practise mediation and other consensual dispute resolution. This position was overwhelmingly supported in submissions received by the Commission. Nevertheless the Commission does not recommend that the Government regulate to make training mandatory. The need for such a requirement has not been demonstrated. Furthermore, the Commission considers that it is premature to prescribe the training necessary for mediators because of the early stage of its development, and the diversity of current mediation practice.

3.2 This Chapter contains a review of training currently available. At present, most practitioners are trained for a particular context or in the agency model where they intend to practise. Several issues related to training which were raised in the Discussion Paper are also considered, drawing attention to the diversity of approaches and difficulties in training.

### NEED FOR TRAINING

#### The arguments

3.3 The most strongly expressed view in the submissions received by the Commission was that it is essential that mediators practise only when adequately trained, and that failure to do so would be a breach of a duty of care.<sup>1</sup> Whilst accepting the desirability of training, some submissions argued that it is not necessary or practical<sup>2</sup> to insist that all mediators train to meet a particular standard. The case against imposing mandatory training standards was also argued: it could affect the flexibility and diversity of mediation<sup>3</sup> or restrict its viability.<sup>4</sup> In several submissions the need for training was related to the context of practice and the complexity of the disputes.<sup>5</sup> Some submissions considered the client's degree of choice to be relevant. There was less need for training to be imposed where entry to mediation was more voluntary.<sup>6</sup> In a free market, clients would not need the protection afforded by mandatory training.<sup>7</sup> Another view was that mandatory training would be necessary when mediation was practised on a professional basis, particularly where the matter involved parties' rights.<sup>8</sup> It was also proposed that training should be required only for those mediation programs seeking to qualify for public funding.<sup>9</sup>

3.4 The Discussion Paper presented several arguments which the Commission had encountered in support of training.<sup>10</sup> Many similar views were expressed in submissions. Two key themes underly the arguments supporting training. The first is based on the premise that it is the most effective means for a practitioner to acquire the competence necessary for practice which will not harm clients. It is suggested that untrained mediators will be less likely to know when entry to mediation or its continuation is inappropriate; will pressure parties into agreements; will fail to question parties who make agreements which are unworkable, unfair or do not meet their needs; and will lack techniques to deal with power imbalances, intense emotions etc.<sup>11</sup> Practising mediation requires performance and skills substantially different from those of any other practice or discipline. These skills are not automatically acquired from any other occupational background or academic qualification. Even persons with innate relevant personal skills will be more proficient with training. Sincerity and good intentions are not enough.<sup>12</sup> Training offers a mechanism to screen out the incompetent and the unsuitable. Training is an effective means to achieve a satisfactory quality of service. The second theme in arguments supporting training relates to the role of training in establishing credibility for the practice of mediation. It is important that clients and other significant groups such as the judiciary, the legal profession and others who could refer clients to mediation have evidence that mediators are qualified by their training and so have confidence in the process.

3.5 In submissions, the need for training was recognised as important to all concerned: mediators themselves, their clients, employers and service providers, training providers, and regulating authorities.<sup>13</sup> However opinions were divided about the best means to impose a training requirement. The employer or program administration

was most frequently mentioned as the most appropriate.<sup>14</sup> Another preference was for a state regulatory system which would recognise some training courses for those purposes,<sup>15</sup> but little support was expressed for legislation to apply generally to mediators except where training may be a prerequisite to government funding or the conferring of statutory protections.<sup>16</sup> Legislation to require training was considered by others to be unnecessary or even counter-productive to the growth and flexibility of mediation.<sup>17</sup> Self-regulating professional associations were seen to have a role in implementing any requirement for training.<sup>18</sup>

### **The Commission's view**

3.6 The Commission accepts that training for mediators is necessary for competence as a mediator and to enhance the credibility of mediation. We accept that no one is automatically qualified to perform the role of a mediator simply by virtue of professional or occupational qualifications in another discipline, or because of appropriate personal qualities. The role requires knowledge and skills of a distinct process. Training is the most effective way for a person to acquire expertise. Failure to undergo training in the process increases the risk that a mediator's behaviour will be incompetent and unethical, and of harm to clients. The quality of mediation may be demonstrated to potential clients by reference to the training practitioners have undertaken. In this way its credibility can be established.

3.7 However, the Commission is not recommending legislation which would require mediators generally to undergo training before being permitted to practise. This position reflects the conclusions we have reached in Chapter 4 that no need has yet been demonstrated to impose government regulation on mediators. The Commission accepts that there may be a small degree of risk to clients from untrained mediators, but believes that this does not justify government regulation in addition to the mechanisms already operating.

3.8 Declining to make such a recommendation also recognises the formative state of both the theory and practice of dispute resolution, and the diversity in its practise. The Commission does not consider that it is feasible at this stage to prescribe confidently a particular form or standard of training which should be undertaken by mediators. This recognises the debate which occurs about many crucial issues concerned with training and the practice of mediation, and therefore the uncertainty about relevant content and standards.

3.9 At this stage it seems appropriate that responsibility for requiring that practitioners are qualified by means of training lies with the management of the specific agencies or programs which employ or accredit them. They have the right to nominate the standard of training and any other qualifications practitioners must meet. Programs which are connected to a court or tribunal should require any practitioners engaged by them or staff employed to be trained or to undergo training for the program. Direct legislative or administrative controls over other dispute resolution programs should require training as a condition for public support by way of funding or legal privileges. The need for private independent practitioners to demonstrate training qualifications will arise from the operation of market forces and client demand. Professional associations also have a role to play in establishing training standards and recognising members qualifications by appropriate accreditation<sup>19</sup> This is already occurring with the preparation by the Alternative Dispute Resolution of Australia (ADRA) of Draft Standards for the Training of Mediators. These contain recommendations on standards for agencies which train and accredit mediators for the selection of trainees, nature of courses (length, techniques, curriculum, assessment) practical requirements, and the need for statements of ethics and standards of practice. Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Law Institute of Victoria and other legal professional associations have accreditation schemes. Stronger government regulation, including accreditation of courses, is neither necessary nor feasible at this stage of training.<sup>20</sup>

3.10 The Commission is aware that this approach may allow inadequately trained practitioners to operate. It may also exacerbate the fragmentation and even divisiveness which at present characterise some areas of dispute resolution practice as different agencies pursue their own approaches to training requirements and standards. It is our hope and expectation that the maturing practice will demonstrate greater co-operation and willingness to share knowledge and understanding of how mediators should be trained. The Commission's recommendations for an Advisory Council and the Dispute Resolution Database should contribute to this process. The disclosure in the Database of training commonly undertaken should educate potential clients of mediators about the usual level of training which can be expected of practitioners.

### **CURRENT TRAINING OPTIONS**

3.11 Training for those who now practise dispute resolution is available from a variety of sources.<sup>21</sup> The dominant experience in the last ten years has been the creation of tailor made courses to meet the needs of particular programs and contexts of dispute resolution. Mediators have been prepared with a common set of skills thought necessary for the Organisation or program which it is believed could not have been acquired in any pre-existing education or training.<sup>22</sup> There are very few courses which constitute general preparation for dispute resolution practice. A second stage approach to training is emerging, with sources of instruction expanding to include professional associations, private commercial trainers and tertiary institutions. In these courses students are often drawn from different programs and areas of practice, and have an opportunity to appreciate the validity of different models and methods.<sup>23</sup> Over the period approaches to training have evolved in response to changing needs, the availability of resources and developments in the theory and practice of mediation. Clearly this will continue to happen.

### **Community mediation**

3.12 Community mediators are almost exclusively trained for the agency with which they operate. Since 1980, New South Wales Community Justice Centres (CJC) have accredited community volunteers selected and trained through a basic 54 hour TAFE certificated course, supplemented recently by an additional requirement of a CJC course component. The structure, content, process and methodology have changed substantially over the period in response to changing perceptions of training needs.<sup>24</sup> Continuing training opportunities have also been provided so that mediators can fulfil CJC requirements for maintaining accreditation. In addition an accelerated course for mediators with prior training or experience has been offered.<sup>25</sup> For reasons related to CJC needs and funding, as well as for managerial flexibility, the CJC now conducts its own mediator training. This training role has also expanded to provide specific training programs for other government organisations and departments, such as Court Registrars,<sup>26</sup> and other mediation agencies.<sup>27</sup> The pioneer CJC model has been adopted and CJC expertise employed in the training for community mediation programs in Victoria, Queensland and the ACT. In Victoria mediators were originally trained at TAFE Colleges but responsibility for training has now been accepted by the Attorney-General's Department and is centrally coordinated. Other community mediation centres which have grown directly out of community initiatives are most likely to have developed their own courses in-house, or may provide them in conjunction with a TAFE college or another educational institution.

### **Family dispute resolution**

3.13 Mediators in agencies providing family dispute resolution have usually undergone their initial training in association with that agency. The Family Mediation Centre (FMC) in New South Wales has an extensive<sup>28</sup> training course in the agency's model of mediation which has been supplemented with a shorter course for students with prior mediation training. Accreditation by the FMC requires successful completion of its courses, although there is provision to recognise other approved training.<sup>29</sup> The Marriage Guidance Council also has in-house training programs for its mediation services.

3.14 Recently established programs in family and parent/adolescent mediation funded under the Federal Government's guidelines have met the need to have trained staff by various means: employing mediators trained elsewhere; engaging external trainers to devise courses tailored to the program; sending staff to relevant courses available elsewhere; or developing in-house courses. Some private practitioners in family dispute resolution have undertaken training overseas, as have some who work in agencies. Others have received agency training and now work independently. Additional training courses to update or expand skills are available from many of the sources noted above, and from the many trainers who visit Australia.<sup>30</sup>

### **Commercial dispute resolution**

3.15 Practitioners of commercial dispute resolution receive training from several sources. Although some training is tied to an agency, program or procedural model, the approach tends to be more generalist. This no doubt reflects the greater proportion of private practitioners in commercial dispute resolution, the less stringent adherence to a particular process or model within programs or agencies, and the nature of parties and disputes involved. Courses in commercial mediation and other relevant techniques and skills are available from sources such as the Australian Commercial Disputes Centre (ACDC), Lawyers Engaged in Alternative Dispute Resolution (LEADR), Bond University Dispute Resolution Centre and the Institute of Arbitrators Australia (I Arb A). As well, courses in negotiation and mediation are offered by some private management consultants and trainers.<sup>31</sup>

Seminars introducing and promoting consensual dispute resolution for commercial disputes to lawyers and clients are also provided by these sources.

3.16 Commercial mediation courses are generally open to anyone with relevant experience and interest. Other courses provided by the first three named trainers and private firms are tailored to the needs of the particular program, Organisation or context of dispute resolution in which they are given. Overseas training is also a feature of commercial dispute resolution, either undertaken in the United States<sup>32</sup> or from visiting trainers conducting courses in Australia.<sup>33</sup>

#### **Court and tribunal connected programs**

3.17 There is no standard approach to training for personnel used in dispute resolution programs within courts, tribunals and administrative agencies. In some cases a comprehensive training program has been prepared but this is not common. Alternatively, staff attend conferences and courses which are generally available, such as those in negotiation skills or consensual dispute resolution. Some programs commission training providers to present standard courses with specific application to the program in question, or conduct in-house training. In those programs which engage an outside agency or individual practitioners to perform dispute resolution services, the availability of trained personnel is a factor in their appointment.

3.18 Finally, in some<sup>34</sup> of these programs, only minimal or no formal training is required or offered. Skills are developed on the job and through the shared experience of staff. Whilst this may have been an appropriate or even essential approach when the programs began, in the light of the opinions expressed in submissions received by the Commission, this situation should not be viewed as desirable. The issue of training for court and tribunal connected ADR programs is considered further in Chapter 6, and the discussion which follows is also relevant to them.

#### **Tertiary institutions**

3.19 The study of dispute resolution is becoming an accepted aspect of academic curricula in many disciplines, particularly law, but also in social work and industrial relations. Courses currently available do not have the objective of training students as dispute resolution practitioners, although some offer practical experience in negotiation and mediation skills. These courses are designed to make students familiar with the processes, to consider issues involved in their use, and enable them as professionals to evaluate dispute resolution options and make appropriate referrals.<sup>35</sup>

3.20 Various strategies are being adopted as faculties incorporate dispute resolution into the curriculum.<sup>36</sup> Initially dispute resolution is included within established subjects, then distinct advanced courses are created at both graduate and postgraduate levels. A further development is the creation of dedicated dispute resolution programs for post graduate study. Most law schools in Australia treat dispute resolution within existing courses; undergraduate courses are currently offered at four law schools, and post-graduate courses in three.<sup>37</sup> A Masters and Graduate Diploma in Dispute Resolution is being developed for the University of Technology, Sydney for graduates in law and other disciplines. The Dispute Resolution Centre at Bond University and the Conflict Resolution Centre at Macquarie University are both active in teaching and research. An interdisciplinary course is available at Macquarie University where the Conflict Resolution Centre has been established with the support of the Conflict Resolution Network. There are undergraduate courses concerned with mediation for social work students at two universities, where post-graduate research is also being undertaken.<sup>38</sup>

#### **OTHER ISSUES RELEVANT TO TRAINING**

3.21 The Discussion Paper (DP 21) considered various aspects of training applicable to mediators. Most submissions offered comments on the series of questions posed in the Paper. The Commission is not concerned here with stipulating standards for training. This is unnecessary in the light of its recommendations; however, we believe that several issues should be addressed to highlight the perspectives expressed in submissions and to indicate some of the difficulties associated with training.

#### **Sources of training**

3.22 In the submissions, the desirability of training to meet diverse needs was frequently expressed<sup>39</sup> Various combinations of training sources were recommended, for example those offering basic and specialised training; or supplementing theoretical classroom preparation with practical or apprenticeship components.<sup>40</sup> Most submissions favoured training being provided by experienced mediators or mediation services and professional associations. Preference was expressed for existing sources of mediator training. It appears that those currently providing training are considered appropriate and satisfactory as little criticism was voiced.<sup>41</sup>

3.23 The Commission considers that the diversification of training sources will continue in the future. This will be valuable. A monolithic training structure should be avoided. There is a concern that fragmentation will prevent agreement on training standards. Training at different levels is also likely to create a hierarchy (as in many other occupations) affecting the structure of the practice.<sup>42</sup>

### **Tertiary institutions**

3.24 Tertiary institutions were one of the sources of training advocated in some submissions.<sup>43</sup> Their involvement in providing professional training in dispute resolution has been limited to date. These submissions envisaged strong links between the tertiary institution and agencies for providing opportunities for practical experience. There was some call for specialised professional education at graduate or post-graduate level.<sup>44</sup> Evidence suggests tertiary level training is an area which will grow as practitioners themselves demand training at a higher level in order to improve their practice and to obtain formal credentials. Academic institutions are likely to supply the courses to meet perceived needs.

3.25 Although it is a development which may not be welcomed by the entire dispute resolution community, the Commission considers it is inevitable and also desirable that academic institutions play a greater role in providing education in dispute resolution. This does not mean, however, that it should be an exclusive or even dominating role, or that the role of current sources of training is to be diminished. Our position is based on the fact that dispute resolution will, in time, develop as a discrete professional practice for some.<sup>45</sup> and that such practitioners ought to have access to as sound a training in professional skills as desired, commensurate with the role and responsibility expected of professionals. Furthermore, people training in other disciplines will wish to acquire familiarity with, and a degree of proficiency in, the skills of dispute resolution without practising wholly or partly as a mediator.<sup>46</sup> A problem which will no doubt emerge for tertiary courses in dispute resolution practice is how to provide relevant practical or apprenticeship experiences for these courses.

3.26 There is another role for academic institutions the importance of which should not be underestimated. It is occurring now in the United States, and to some extent in Great Britain. Research undertaken within tertiary institutions will result in a greater understanding of dispute resolution theory and philosophy, of the elements of practice of dispute resolution and of effective and ethical behaviour. This will serve to remedy what has been identified as a serious deficiency in dispute resolution training.<sup>47</sup>

### **Who should be trained?**

3.27 Selection of persons to undergo training is generally a matter for course organ-isers. The Commission is not concerned with the exercise of their authority and responsibility to determine who meets the particular entrance criteria. Rather, the Commission is concerned with general principles and setting criteria for access to and suitability for undergoing training. Selection is a key element in the design of mediator training programs. The nature of the students will have a direct impact on the course content, and the demands of practice and training will determine selection criteria.<sup>48</sup>

3.28 As to who should be entitled to undergo training, the view expressed in the majority of submissions is that there should be no pre-determined restrictions. This view was based on both ideological<sup>49</sup> and practical reasons.<sup>50</sup> In some submissions the distinction was made between selection for entry to a training course, and for employment as a mediator: the criteria or restrictions would be applied at the later stage.<sup>51</sup> A similar distinction applies in professions or occupations such as law which require character tests before admission to practice. Where restrictive selection criteria were supported, many submissions referred to personal qualities and commitment to the philosophy of mediations<sup>52</sup> Others would make the interests of clients paramount in the selection process.<sup>53</sup> A criterion for selection of trainees for community mediation services, for example, is the



need to reflect the ethnic and cultural diversity of their clients.<sup>54</sup> The Commission was also urged to consider the desirability of recruitment of mediators with particular language skills for community mediation.<sup>55</sup>

3.29 The necessity for academic qualifications or occupational background is strongly debated. Some submissions referred to the need for people with special sensitivities and skills or with existing specialist knowledge in some contexts, particularly family disputes.<sup>56</sup> Commercial mediators are sought from the legal profession and the branches of industry and commerce in which the disputes arise. It was argued in one submission that trainee family mediators should have legal or behavioural science qualifications<sup>57</sup> because of the specialised knowledge required for the practice of family mediation. Alternatively, the community mediation model as applied to family mediation vigorously maintains that non-professional intervention in family matters is successful, and that academic qualifications are unnecessary, or may even be a hindrance in training family mediators.<sup>58</sup> There was generally no support in the submissions for a prerequisite of academic qualifications for mediation training.

### **The Commission's view**

3.30 The Commission agrees with the view that mediation requires intellectual ability and with the proposition that the presence or absence of academic qualifications is not conclusive evidence of such ability. As noted in the Discussion Paper, completely open entry to courses may be a noble aspiration, but economic pressures and scarce resources are the reality. This makes the selection process an essential element of the design of effective training programs. Constraints on resources and time may determine the nature of prerequisite knowledge, skills or qualities. The basis on which selection is made will reflect the underlying assumptions of those involved, for instance that many kinds of people can learn to mediate community disputes, or that pre-existing substantive knowledge is necessary. Considerations of equity and access may also influence selection criteria. These assumptions should be carefully considered and articulated. It will also reflect the goals of training, such as enhancing community dispute resolution skills as well as preparing mediators for a particular service.<sup>59</sup> Administrators in all programs face the problem of identifying and screening out those likely to be unsuitable mediators, a task made more difficult when they have not been discouraged either before or during training.

### **Selection criteria**

3.31 The criteria which are frequently cited for selection of mediators are personal qualities: an aptitude for developing the skills of mediation and for undertaking mediation, and demonstrated commitment to the practice, the philosophy and principles of mediation.<sup>60</sup> Some enumerations of desirable personal qualities suggest mediators should be aspiring secular saints. All focus on the need to be flexible, non-judgmental, self aware and assertive, have empathy for others and a sense of humour.<sup>61</sup> A rarely articulated<sup>62</sup> but important criterion for dispute resolution in highly emotive areas of interpersonal disputes is the absence of unresolved personal experiences which may impinge on the mediator's necessary neutrality and impartiality.

3.32 It is not always clear how these qualities are to be assessed.<sup>63</sup> Selection based on aptitude presupposes that the abilities which give a person the aptitude to perform or learn the skills of effective mediation may be identified and that whether a person has these abilities can be determined. It also presumes a consensus about what constitutes effectiveness in mediation, what skills are required of a good mediator, and a clear understanding of the role of the mediator.<sup>64</sup> Given the debate about the latter, and limited research about the former, selection based on aptitude criteria must be tentative.

3.33 The uncertainty in this area suggests that various approaches should be considered and evaluated. One recent research project in the United States<sup>65</sup> suggests that it may be possible to design an evaluation process for selecting and training mediators. Component skills of effectiveness in mediation were identified<sup>66</sup> and selection based on demonstrated performance of those skills. There seemed to be no strong correlation between presenting qualifications (including prior mediation training or experience and professional qualifications and performance), or interview-based assessments of ability to mediate effectively, and demonstrated performance of the skills identified. However, on-the-job performance appeared to correlate with performance on evaluation. Honeyman (1990) found little correlation between actual mediator performance and any other factor: age, sex, race, prior experience, law school grades, or relative performance in a written exam.

### Nature of training courses

3.34 The preferences expressed in submissions about desirable features of training courses reflected the diversity of training currently available. The nature of any mediator training program will be determined by the interrelationship of a number of factors. These include the purpose of the course, the prevailing concept and chosen model of mediation, the backgrounds of students and their availability, resources, the context for which training is given, the organisational setting, the target service, its clients and principles.<sup>67</sup> Furthermore, it will be influenced by several other, not necessarily articulated, assumptions about the role of mediators, the transferability of skills, theories of conflict resolution, empowerment, social change and ultimately, human nature.<sup>68</sup>

3.35 The obligation to cater for diverse needs in the nature and method of training was recognised in the submissions. Many advocated a mix of basic and specialised courses.<sup>69</sup> Many emphasised the importance of continuing education and refresher courses where practice has lapsed.<sup>70</sup> Continuing education has been recognised as necessary in many professions.<sup>71</sup> The Commission would suggest that continuing education is essential for a practice such as mediation, which is only in its formative stages with standards of practice and ethical codes yet to be established, and where initial training is not usually extensive.

3.36 The overriding focus in mediator training is to produce competency in the skills of mediation. There seems to be broad agreement that the curriculum should include the following topics:<sup>72</sup>

1. Knowledge of mediation and negotiation theory.
2. The process of mediation.
3. The substantive and procedural context in which mediation will occur.
4. Skills of the mediator, including analytical, communication, organisational and interpersonal.
5. Attitudes, values and ethics of practice.

The curriculum of existing training courses with which the Commission is familiar is based on these components, although the degree of uniformity may be more apparent than real as the weighting of and approach to each varies considerably. Some submissions proposed additional subjects for a syllabus such as management (case and agency), issues of social justice and equity, body language, thinking and logic.<sup>73</sup> Cross-cultural issues, and the use of interpreters were also mentioned as necessary in courses for mediators likely to encounter ethnic clients and cross-cultural issues.<sup>74</sup>

#### *Substantive knowledge*

3.37 The place of substantive knowledge is one area where the views in submissions reflected the unresolved debate about whether there is a generic process of mediation and whether mediation can be taught and practised without reference to the substantive context in which it occurs.<sup>75</sup> Some considered such preparation necessary (either in the core or as a specialised component) but others rejected its relevance.<sup>76</sup> One submission argued that the extent of specialist knowledge needed for family mediation was such as to justify requiring law or behavioural science qualifications, a view obviously not shared by those responsible for training family mediators in community agencies. Others argue that the crucial issue is how the knowledge is used in the mediation process (ie whether mediators recognise when advice is required).<sup>77</sup> There is concern that mediators may cause harm because they lack relevant knowledge to skilfully deal with the dynamics of interpersonal disputes.<sup>78</sup>

#### *Legal knowledge*

3.38 The category of necessary substantive knowledge most often mentioned was legal. This was explained by the mediator's need to identify the legal implications of the dispute, to consider the viability or enforceability of settlements reached, to refer parties to obtain independent legal advice where this is thought necessary,<sup>79</sup> or to understand the legal rights and responsibilities of parties and mediators.<sup>80</sup> One submission proposed that legal

knowledge is necessary only for an intake worker in community mediation or a mediator in a government department administering a law "as it could only be used to decide right and wrong".<sup>81</sup> This view of the role of legal knowledge would not find wide support. For family mediation, it is considered useful to have legal knowledge relevant to parenting and financial and property agreements. The professional or occupational background and training of many who practise family mediation provides much of this substantive knowledge. Where the community mediation model is used, the background of mediators makes it necessary to address those issues in training. The express objective of one course is to make the mediators capable of recognising the limits of their knowledge and responsibility, and where referral and consultation is appropriate.<sup>82</sup>

### **PROBLEMS ASSOCIATED WITH TRAINING MEDIATORS**

3.39 The teaching of mediation in particular, and conflict resolution in general, has received attention only in very recent years. The nature of training required and its novelty creates some interesting dilemmas. The Commission feels that it is appropriate to highlight some of these.

#### **No pedagogical tradition**

3.40 A major problem facing trainers is that there is no established pedagogical tradition. This means courses have been developed in isolation to meet the particular situation. Frequently much duplication has occurred. In these circumstances there is much scope for creativity but also for idiosyncrasy in what is taught and how. Principles of curriculum design involve establishing goals and objectives, determining the essential knowledge base and specific skills and attitudes for course content and identifying the methodology necessary to produce competency and evaluate efficacy.<sup>83</sup> There are many perspectives from which these can be approached in the training of mediators, and there is relatively little by way of theoretical bases on which to rely. There is, as yet, little systematic dialogue or sound research on what constitutes effective curriculum and training programs. Some research is being published in the United States but is not always readily available to program designers in Australia.<sup>84</sup> With more experience, evaluation opportunities, and the involvement of academic and research institutions principles for mediator training should develop. Recent American commentators have suggested that the targets for research should include the efficacy of particular teaching techniques, the degree to which such variables are translated into quality service delivery,<sup>85</sup> comparative analyses of the effectiveness of training programs and models, and what other knowledge would improve mediator performance.<sup>86</sup>

#### **Interdisciplinary approach**

3.41 The difficulties are compounded by the interdisciplinary nature of dispute resolution theory and practice. It has perspectives from the disciplines of sociology, psychology, law, as well as from counselling, communications, political science, organisational behaviour, anthropology, industrial relations, semiotics and game theory. The need to integrate these perspectives places important demands on course design. The challenge is to master the elements from individual disciplines, to translate and apply them across fields, and integrate them into a coherent and effective teaching program so that practitioners are prepared to respond to the multi-dimensional disputes which win confront them.<sup>87</sup>

#### **Need for theoretical base**

3.42 Some commentators have noted the absence of a clearly identified and understood theoretical and philosophical basis in training given to mediators,<sup>88</sup> though it ought to be of "central, crucial and critical importance."<sup>89</sup> The development of theories of mediation, of dispute or conflict resolution and of conflict itself have not received the attention that has been devoted to experimentation in practice and the implementation of programs. Courses focus on the practical, the "how to". Rarely are the theoretical origins of the prescribed procedures identified, explained, or subject to critical analysis. Many courses operate as if, or even declare that, the practice of dispute resolution can take place in a theoretical vacuum, while others present a cursory, one dimensional analysis. Texts available on the mediation process are largely process-oriented, designed for teaching the skills and how to set up in practice and contain limited, if any, treatment of theoretical, philosophical or ideological issues.<sup>90</sup> Models of mediation are more readily distinguished by differences in process than those of theory or philosophy, although there may be significant differences in underlying theoretical assumptions, ideology and values. Training courses for particular models are characterised by positional statements, prohibitions and exhortations, often without explaining the theoretical backdrop.

3.43 The need to expose course participants to a range of theoretical perspectives has been advocated.<sup>91</sup> As it is unlikely that any one theory can provide a satisfactory and coherent explanation of conflict, it is argued that students should explore a range of theories critically, creatively, and be encouraged to develop their own personal approaches. Theoretical studies can also take account of cultural issues and the cultural context of dispute resolution theories and practice, and raise questions of social justice, structural conflict, structural violence, social inequality and ideology.<sup>92</sup>

### **Skills training**

3.44 Several difficulties are inherent in what appears to be the dominant purpose of training courses, that is to develop students' practical skills. Courses frequently adopt process rules which are to be followed strictly, although it is argued that mediators should be exposed to the widest range of strategies and techniques so that flexibility may be achieved in practice.<sup>93</sup> Submissions advocated experiential learning,<sup>94</sup> although the demands of such an approach may not always be understood or there may be no clear model for implementing it.<sup>95</sup>

3.45 Role plays and simulations heavily dominate teaching methods - a situation which creates unique methodological problems. Classroom dynamics can be volatile and unpredictable, requiring careful managements.<sup>96</sup>

### **Ethics**

3.46 A final difficulty is created by the need to address issues of ethical practice in training, particularly, but by no means exclusively, for mediation of interpersonal disputes. This has implications both for what to teach and how to teach it. It can be said that every decision of a dispute resolution practitioner is an ethical one. Recent writing has pointed to difficulties in training practitioners to consider the ethical implications of their performance and how to respond to the inevitable ethical dilemmas they will encounter.<sup>97</sup> Role-playing, which dominates training strategies, is considered inadequate for integrating knowledge into an ethical framework.<sup>98</sup> Courses need to provide grounding in philosophical and ethical theory, and explore tacit ethical assumptions,<sup>99</sup> rather than prepare mediators on the basis of ethical behaviours according to a particular model. Codes of conduct face the danger of falling between the narrowness of being model or agency specific, or being so general as to be little more than pious statements of intention. It has been suggested that ethical teaching and codes should address matters such as legal rights and duties, the limits of competency, and how to deal with specific situations, such as disclosure of physical and substance abuse or illegal activities.<sup>100</sup>

## **TRAINERS**

3.47 Ideally, those who train practitioners in dispute resolution should have both teaching skills and experience in (and indeed commitment to) mediation.<sup>101</sup> The ideal is not always attainable. There are significant structural and practical problems for a practice like dispute resolution, which is in its formative stages. The need to train mediators is pressing, and suitably qualified instructors are not always available. Paradoxically, a criticism is made of the oversupply of trainers from the ranks of those who, after undergoing only basic training and without extensive practical experience, or formal qualifications or skills as educators, proffer themselves as trainers.

3.48 Submissions to the Commission recognised the dilemmas noted in the Discussion Paper about the source and qualifications of trainers, although there are no clear solutions.<sup>102</sup> Formal regulation of trainers at this stage was said to be infeasible and premature,<sup>103</sup> although it was advocated and may need to be considered in the future. This conclusion is consistent with the Commission's view on the need for regulation of training and practitioners generally. It is premature to require formal standards to be met when they cannot be established or enforced readily, nor has need for such a level of intervention been demonstrated. The Commission's recommendation for an Advisory Council and the Database will provide a means by which the qualifications of trainers are on the public record and the quality of training is open to review.

## **FOOTNOTES**

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1. See LEADR, ADRA, CJC, Fisher, Forrest, and Tillett.
2. Monk, Harvey, LEADR.
3. Lismore NC, Fine, LEADR.
4. SCMS.
5. eg Pengilley.
6. MAV, Van T.
7. Davenport.
8. FLSLCA.
9. Wade.
10. DP 21 para 3.2.
11. See Family Law Council *Family Mediation Discussion Paper* (Canberra, 1990) at 31.
12. Greg Tillett *Conflict Resolution: Training and Education* Unpublished paper given at the Conflict Resolution Trainers' Conference, (Sydney, November 1989) (Tillett CRN) at 9.
13. See DP 21 para 3.3.
14. SADRA, Fisher, Forrest, Van T, SCMS, Gosnells DIC.
15. I Arb A, ADRA, FLSLCA, Tillett.
16. Wade.
17. Davenport, MGCSA, LEADR, LIV.
18. Forrest.
19. See Chapter 5 para 5.21.
20. See Chapter 5 paras 5.6-5.11.
21. Information in this section about training courses was supplied to the Commission in the course of enquiries on this reference and for the *Directory of Dispute Resolution* which the Commission is Publishing.
22. See Linda Fisher "Third Party Neutrals - Issues in Training" (1991) 2 *Australian Dispute Resolution Journal* 12 at 15-16; Victoria *Attorney-General's Working Party on Alternative Dispute Resolution Report* (Attorney-General's Department, Melbourne, June 1990) at 46.
23. LEADR, ADRA.
24. Fisher note 22 at 15.
25. CJC *Annual Report* 1989-1990 at 8.
26. Supreme Court Registrars for Issues and Listings Conferences, District Court Registrars for Pre-Trial Conferences, CJC *Annual Report* 1988-1989 at 12.
27. See CJC *Annual Report* 1989-1990 at 19.

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28. Originally 150 hours but 200 in 1991.
29. Eric Stevenson "The Use of Community Mediation in the Family Mediation Centre (NSW)" (1990) 1 *Australian Dispute Resolution Journal* 24 at 28.
30. eg CDR Associates, Colorado conducted courses in 1989 and 1990.
31. eg Effective Negotiation Services.
32. eg Harvard Program on Negotiation, CDR Associates, Colorado.
33. CDR Associates, Colorado conducted a course for LEADR in October 1990 in Commercial Mediation.
34. Perhaps the majority, see Greg Tillett *Conciliation: Processes, Projections and Problems* Unpublished Address to the National Conciliators' Conference, (Sydney, May 1990) (Tillett NCC).
35. See Hilary Astor and Christine Chinkin "Teaching Dispute Resolution: A Reflection and Analysis" (1990) 2 *Legal Education Review* 1; and "Dispute Resolution as Part of legal Education" (1990) 1 *Australian Dispute Resolution Journal* 208 at 208-9.
36. Jenny David "Integrating Alternative Dispute Resolution (ADR) in Law Schools" (1991) 2 *Australian Dispute Resolution Journal* 5; J E Efron "Breaking Adjudication's Monopoly: Alternatives Come to Law School" (1991) 2 *Australian Dispute Resolution Journal* 21. For patterns of development in the United States see Madeleine Crohn "Dispute Resolution and Higher Education" (1985) 1 *Negotiation Journal* 301. Of particular interest is the extent to which alternative dispute resolution processes are incorporated into clinical education programs: Lyn Winzer "Developments in ADR: United States" *Mediation Association of Victoria Newsletter* (December 1989) at 6.
37. Survey by the I-law Council of Australia, August 1990.
38. Universities of New South Wales and South Australia.
39. SADRA, Tillett Forrester, Law Society, Luwenburg, MGCSA, CJC, Davenport, Harvey, Lismore NC, SCMS.
40. MGCSA, LEADR, LIV, MAV, I Arb A.
41. But see CJC, Meggs, Davenport, Tillett.
42. Tillett.
43. FLSLCA, I Arb A, LEADR, LIV, MAV, Lismore NC, Leeuwenburg.
44. Gerondis.
45. As is occurring in the United States, particularly with divorce mediation, see Elizabeth J Koopman and E Joan Hunt "Divorce Mediation: Issues in Defining, Educating and Implementing a New and Needed Profession" (1983) 21 *Conciliation Courts Review* 25 at 29.
46. University of Technology, Sydney LLM course in international commercial dispute resolution has included the ACDC mediator training course; see also Leonard Riskin "Mediation in Law Schools" (1984) 34 *Journal of Legal Education* 259.
47. See below paras 3.40-3.43.
48. See Joseph Stulberg and Ruth Montgomery "Design Requirements for Mediator Development Programs" (1987) 15 *Hofstra Law Review* 499.
49. SCMS, MAV.

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50. LEADR, SADRA.

51. SCMS, Fisher, Davenport, Fine, FMC, ADRA, and CJC in which was noted concern with training courses giving unrealistic expectations to students about employment opportunities.

52. Fisher, Gerondis, WADRC, LEADR, Harvey, LIV, Lismore NC.

53. Gosnells DIC, FMC.

54. CJC Annual Report 1989-1990 at 7; *Victoria Neighbourhood Mediation Centres Evaluation Report* (Attorney-General's Department, Melbourne, 1989).

55. Ethnic Affairs.

56. MGCSA, I Arb A, Renouf, FLSLCA, CJC; Peter Adier "The Balancing Act of Mediation Training" [1984] *Training and Development Journal* (July) 55.

57. Renouf.

58. Stevenson note 29 at 24, quoting Margaret L Shaw and W Patrick Phear *Parent Child Mediation Manual* 1989 (The Institute of Judicial Administration, New York, 1989).

59. Stulberg and Montgomery note 48 at 552-3.

60. Lismore NC, LEADR, LIV, Gerondis. See ADRA Draft Standards for the Training of Mediators.

61. See for example CJC Annual Report 1989-90 at 8, ADRA Draft Standards for Training Mediators.

62. See Lisa Parkinson "Qualification and Training of Divorce Mediators on Britain" in Vermont Law School Dispute Resolution Project *The Role of Mediation in Divorce Proceedings - A Comparative Perspective (United States, Canada and Great Britain)* (Vermont Law School, Vermont, 1987) 185 at 191.

63. ADRA Draft Standards proposes use of written applications and personal interviews by at least two qualified and experienced mediators.

64. Jay Folberg and Alison Taylor *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey-Bass, San Francisco, 1984) at 38-65; John Schwartzkoff and Jenny Morgan *Community Justice Centres: a Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, Sydney, 1982) at 39-40; Stulberg and Montgomery note 48 at 503-8; Robert A Baruch Bush "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation" (1989) 41 *Florida Law Review* 253.

65. Brad Honoroff, David Matz and David O'Connor "Putting Mediation Skills to the Test" (1990) 6 *Negotiation Journal* 37.

66. Based on and testing the propositions of Christopher Honeyman "Five Elements of Mediation" (1988) 4 *Negotiation Journal* 149; and "On Evaluating Mediators" (1990) 6 *Negotiation Journal* 23.

67. See David A Cruickshank "Training Mediators in British Columbia: Moving Toward Competency-based Training" (1989) 7 *Journal of Professional Legal Education* 23 at 24; Family Law Council, *Family Mediation Discussion Paper* (Canberra, 1990) at 31-2.

68. Tillett, NCC note 34 at 3-5; Kevin Avruch and Peter W Black "Ideas of Human Nature in Contemporary Conflict Resolution Theory" (1990) 6 *Negotiation Journal* 221.

69. See ADRA, MAV, Tillett.

70. Forrest, LEADR, LIV, CJC, ADRA, Tillett.

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71. eg MCLE for solicitors.
72. DP 21 para 3.16. See Cruickshank note 67; Fisher note 22.
73. See MGCSA, SCMS, Forrest, WADRC, I Arb A; Tillett.
74. MGCSA, Fisher, SADRA, Ethnic Affairs.
75. See Folberg and Taylor note 64 at 7; Christopher Moore *The Mediation Process*: (Jossey-Bass, San Francisco, 1986); Adler note 56.
76. SCMS.
77. eg FMC.
78. Meggs, Renouf.
79. LEADR, WADRC, LIV, Wade.
80. Tillett.
81. SCMS.
82. Stevenson note 29 at 27; see also Moore note 75.
83. Elizabeth Koopman "The Education and Training of Mediators" in J C Hansen (ed) *Divorce and Family Mediation* (Aspen Systems, Rockville, 1985) 118 at 124.
84. See Kenneth Kressel and Dean G Pruitt *Mediation Research* (Jossey-Bass, San Francisco, 1989).
85. Koopman note 83 at 139.
86. Beatrice Schultz "Conflict Resolution Training Programs: Implications for Theory and Research" (1989) 5 *Negotiation Journal* 301.
87. Raymond Albert "Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution" [1985] *Missouri Journal of Dispute Resolution* 73.
88. See generally Tillet NCC, note 34, CRIV note 12, Schultz note 86, Adler note 56.
89. Tillett.
90. See Blair H Sheppard "The Art and Science of Mediation" (Book Review) (1988) 4 *Negotiation Journal* 161 for a discussion of this approach in texts on the mediation process.
91. Tillet, NCC note 34, CRN note 12; Albert note 87.
92. Tillett, NCC note 34 at 6.
93. Tillett, CRN note 12 at 6, 34.
94. SCMS, LEADR, Tillett, Fisher.
95. Roy J Lewicki "Challenges of Teaching Negotiation" (1986) 2 *Negotiation Journal* 15.
96. See Lewicki, note 95; Astor and Chinkin note 35.



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97. See generally for the teaching of ethics to mediators: Sarah Childs Grebe, Karen Irvin and Michael Lang "A Model of Ethical Decision Making in Mediation" (1989) 7 *Mediation Quarterly* 133; Sarah Childs Grebe "Ethical Issues in Conflict Resolution: Divorce Mediation" (1989) 5 *Negotiation Journal* 179; Kevin Gibson "The Ethical Basis of Mediation: Why Mediators Need Philosophers" (1989) 7 *Mediation Quarterly* 41; Gregg B Walker "Training Mediators: Teaching About Ethical Concerns and Obligations" (1988) 19 *Mediation Quarterly* 33.

98. Cruickshank note 67.

99. Grebe, Irvin, and Lang, note 97; Gibson note 97.

100. Tillett; see Grebe note 97 at 79, Walker note 97 at 34.

101. I Arb A, Lismore NC, SCMS, LEADR, LIV, WADRC, Fisher, FLSLCA.

102. MAV, Davenport, Fine, MGCSA, Lismore NC.

103. LEADR, LIV.

104. CJC.

## 4. Regulatory Policy

### INTRODUCTION

4.1 The Commission considered the policy and practice of regulation from a wide perspective to determine whether there is a need to accredit mediators. It focused primarily on the professional regulation model. According to this model, occupational regulation is only necessary to meet a demonstrated need which is not capable of being satisfied by alternative approaches. This Chapter considers the application of occupational regulation principles to mediation, recognising, however, that it is a newly emerging practice, the purpose and nature of which has not yet been fully explored or agreed upon, neither is its professional status nor its relationship to the traditional legal system settled. Chapter 5 reviews the alternative approaches which may also apply to regulate dispute resolution practice.

4.2 The Commission's recommendation is that no government regulation for the accreditation of mediators is currently necessary. This conclusion recognises that the need has not been demonstrated. Furthermore, the Commission considers that regulation would be premature in the current state of dispute resolution practice, and that the continued flexible development should not be unnecessarily inhibited.

### Forms of occupational regulation

4.3 For the purposes of this reference, the Commission relies on the following definitions.<sup>1</sup>

*Accreditation:* used generally for recognising that a person has undergone a prescribed level of training or meets a prescribed standard of performance.

*Registration:* a list identifying practitioners providing a particular service which is compiled and published, usually by a public body. Inclusion may be conditional upon educational or practical qualifications and/or subscription to a code of practice. The right to identify with the occupational group may depend upon registration.

*Certification:* recognises that a person has completed a prescribed level of education or training or achieved a certain level of competence in performance or skills. It can be granted by either a public body, educational authority, or professional body. When granted by a public body the right to practise may depend on certification. The right to use a professional title often accompanies certification.

*Licensure:* permission to practise a profession is granted only to those holding a licence. Licences are usually issued on government authority when prescribed levels of education, performance or other qualifications are met, and on payment of a fee.

*Co-regulation:* occurs when the administration of a government regulatory scheme is delegated in some degree to practitioners themselves with, in some instances, the participation of representatives of the general public.

*Self-regulation:* occurs when practitioners impose and administer controls on practice. It is a private matter, and confers no legal status or liability.

### POLICY GUIDELINES

4.4 Two recent studies have sought to develop applicable policy guidelines for industry, occupational and professional regulation. The Trade Practices Commission's study *Self-Regulation*<sup>2</sup> reflects the current deregulatory climate and is concerned with implementing regulation which will enhance industry efficiency while maintaining consumer protection and ethical standards of conduct. The Victorian Government has recently adopted principles of occupational regulation and a framework for evaluating regulatory schemes formulated by the Regulation Review Unit and the Victorian Law Reform Commission.<sup>3</sup>

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4.5 Both these studies place occupational regulation in the context of business regulation and within the wider context of a free market economy. In many areas of social life where the State's functions are performed, pure market principles do not and cannot apply. Although the studies contain much that is relevant to the regulation of dispute resolution, particularly the Victorian principles, they are not strictly applicable for our purposes, given the nature of the market model for the supply of such services. In the dispute resolution services industry model, many of the features of a classic freely competitive market are distorted. Many mediators are volunteers, or are remunerated at rates determined by factors other than market forces. Many clients pay little or nothing for a mediator's service, and do not exercise the choice inherent in a market model. On the other hand, in commercial dispute resolution the market model may apply.

4.6 The Victorian Report contains general principles for occupational regulation.<sup>4</sup> The proposed system of regulation must:

- meet a clearly demonstrated public need. It must be for the benefit of the public and not serve only the narrow interests of practitioners;

- be the most effective way of satisfying that need, in the light of insufficient existing or alternative approaches;

- be the minimum necessary to alleviate existing problems; and

- be cost effective.<sup>5</sup>

4.7 The Victorian Report also presents a number of criteria to construct an evaluative framework for assessing occupational regulation.<sup>6</sup> The criteria include whether:

- unregulated practice will cause harm;

- existing protections are insufficient;

- there are alternatives to regulation;

- regulation will reduce existing problems;

- the occupation is well-defined;

- the occupation possesses knowledge, skills and abilities which are teach-able and testable; and

- the benefits of regulation outweigh its costs.

4.8 The Report also considers the manner in which a regulatory system should operate. Several principles are proposed:<sup>7</sup>

- a regulatory system should be non-discriminatory;

- exemptions should generally not be available for those already in the occupation. Participants in occupational regulatory schemes should be subject to re-testing where competence is an aim;

- only in rare cases should administrative responsibility of the system be given to the occupational group;

- representatives of the occupational group should not be allowed to dominate the government's regulatory body; and

- regulatory bodies should be accountable.

4.9 Other principles relate to the proximity of dispute resolution processes and their delivery to the justice system. Access is a relevant issue, related to availability and affordability. An objective of the justice system, both formal and informal, should be its accessibility. The enthusiasm with which court-connected non-judicial dispute reso-

lution is being embraced raises important questions about the availability of sufficient qualified and competent practitioners. It also involves the issue of access to information about the availability of alternatives within and outside the judicial system, and about the qualifications of practitioners. Financial, educational or cultural barriers should not be permitted to restrict access to services.<sup>8</sup> Any regulatory scheme will have an impact on access in all these senses. Policy decisions about regulation must take account of these issues.

### **THE PURPOSE OF MEDIATOR REGULATION**

4.10 The impetus for regulation of professionals in our society usually comes from either of two sources: the occupation itself, including those in the business of training,<sup>9</sup> and the public. The justification for government regulation from either source is usually expressed in terms of public benefit; that is, consumer protection and occupational accountability. However, occupational regulation is justified only when its purpose is identified, it meets a clearly demonstrated public need, and it does not predominantly serve the interests of the occupational group.

#### **Public benefit**

4.11 The public benefit which flows from regulation is the protection it offers to consumers from harm which may be caused by dealing with unfit members of an occupational group. These can be risks to health, safety and welfare, financial risks, risks of criminal activity and risks arising from a lack of information.<sup>10</sup> There is some doubt about the extent to which consumers of dispute resolution services will face these risks. The last risk has particular relevance to mediators and has been called the asymmetric information argument for occupational regulation.<sup>11</sup> It constitutes the most forceful rationale for requiring public recognition of qualifications and standards of practice to ensure some quality control of that practice. The argument rests on the fact that consumers are constrained in the amount of information they have about individuals who practise mediation which makes it difficult to assess the likely competence and quality of service. The high costs of obtaining this information in order to differentiate among practitioners justifies the government intervening to encourage or require practitioners to meet specified qualifications and the public disclosure of information about those qualifications. A consumer can use the publicly available information in selecting a service provider. Other specific benefits may accompany the government recognition of standards attained, for example, legal protections. This form of regulation can also be a mechanism for accountability of practitioners, either indirectly by setting standards of practice against which performance can be measured, or directly where the system involves supervisory and disciplinary elements.

#### **Private benefits**

4.12 There is some concern that regulation confers benefits on members of an occupation when they themselves request it. There is concern that in the process of setting standards of practice and ethical codes which have State sanction, rules to eliminate unqualified and unscrupulous practitioners, to protect clients and to emphasise the service ideal, will be accompanied by rules to reduce competition and artificially enhance the status of practitioners to the detriment of the public.<sup>12</sup> Clearly, the individual practitioners recognised by the State will be advantaged. They are more likely to be employed, have enhanced professional reputations and potentially higher incomes because the pool of competitors is limited. The occupational group will most probably enjoy communal benefits with enhanced reputation or credibility by curbing those whose performance lowers the reputation of the practice as a whole.

4.13 Calls for regulation of mediation are made both in the name of consumer protection and in defence of the reputation of mediation. In submissions, consumer protection was the dominant rationale.<sup>13</sup> Some alluded to the potential for monopolisation inherent in professional control of government regulation<sup>14</sup> but generally the benefits which regulation would bring were viewed positively. One view expressed was that regulation would protect the practice by demonstrating what qualifications are necessary to the well-intentioned and self confident mediators with limited training who are willing to assume a greater responsibility for practice than is warranted by their training.<sup>15</sup> Given the rapid proliferation of people who claim to practise mediation, this view has some merit.

4.14 The Commission accepts that while the calls for regulation are not primarily directed at securing the private benefits which in theory may be conferred on individual practitioners, there is no reason why regulation should

not be capable of simultaneously serving private interests of practitioners. However, the primary benefit must be public in nature and the regulation should not result in control or domination by practitioners themselves.

### **NEED TO REGULATE MEDIATORS**

4.15 The Commission has identified two aspects of the need to regulate mediators. The first relates to protecting interests of individual clients of mediators. The second is the broader public interest in the quality of non-judicial dispute resolution processes, particularly where mediation is an adjunct to or recommended as an alternative to the court system.

#### **Consumer protection**

4.16 Regarding the private interests, it is difficult for the Commission to ascertain whether the welfare of clients is actually at risk, and if so, the nature and severity of the likely harm. The practice is in its infancy and there is little evidence to suggest that the danger or harm to consumers is actual rather than potential. Consumer complaint or dissatisfaction has not gone beyond the level of anecdote: indeed formal evaluation report high user satisfaction levels for ADR procedures.<sup>16</sup> Complaints dealt with through internal quality control and the disciplinary procedures of particular agencies or programs are not a matter of public record. Except for solicitors who mediate,<sup>17</sup> there do not appear to be any formal mechanisms for dealing with or reporting on complaints against members of professional associations. The Commission is unaware of any claim in an Australian court by a client taken against a mediator arising out of a mediation.<sup>18</sup> We recognise that this form of redress would be unlikely for various reasons, including the difficulty of establishing liability and the fact that clients have chosen consensual processes in preference to adversarial in the first place.<sup>19</sup>

4.17 The fact that there is little evidence of complaint does not mean that actionable causes never arise. Nor does it mean that harm does not occur which is not recognised at law nor quantifiable. Clients are potentially at risk from a mediator's incompetence or unethical behaviour, or from conduct outside the mediator's contractual or professional role. One submission claimed that a mediator following the normally accepted model should not fear being sued by clients.<sup>20</sup> However it would be unusual if mediation were able to eradicate incompetent and unethical practice, even though the greatest danger is from unscrupulous fringe operators, and naive, unskilled novices.<sup>21</sup>

4.18 It is difficult to specify with certainty the nature of the risk to clients. An indication can be found in the legal liabilities which may attach to mediators.<sup>22</sup> Principal among these is damage caused by a breach of contractual obligation, for example confidentiality, and by reliance on a mediator's wilful or negligent misstatement. The most likely damage is economic loss, although loss of legal entitlements could also occur.<sup>23</sup> In the United States the question of a mediator's duty to warn a person of danger has been considered.<sup>24</sup>

4.19 In some submissions it was argued that not only has the need for regulation yet to be demonstrated by user dissatisfaction, but that the voluntary and consensual nature of mediation inherently gives parties the means to protect themselves and thus removes any need for government regulations.<sup>25</sup> The parties must consent to the mediator's participation, and the outcome. They may withdraw from mediation at any time. This is the conventional response to calls for controls on mediators.<sup>26</sup> This approach is, however, of limited application across the range of circumstances in which mediation occurs. The claim is relevant when the parties freely and in full knowledge choose mediation and the mediator, and when they may freely choose, without penalty, to discontinue mediation if dissatisfied. It is less applicable to circumstances in which participation is mandatory or less than completely voluntary, to naive parties or to those who have limited access to information and advice. This view relies on assumptions that the parties' levels of sophistication are comparable, and sufficient to recognise the incompetent and corrupt, that they have an appropriate level of professional advice, including legal, and a familiarity with mediation acquired most readily by its frequent use or by appropriate education. The assumptions may be correct for many consumers. However, the contention ought to be regarded with caution given that empirical studies of informal dispute resolution have found that the rhetoric of self-determination and voluntary participation is matched with the realities of capitulation and coercion.<sup>27</sup>

4.20 The potential for clients to be harmed is exacerbated by the nature of the process which is inherently imprecise and manipulable.<sup>28</sup> The greatest danger is from abuse by inept, overbearing or unscrupulous

mediators. The qualities which can make mediation attractive are precisely those which give rise to concern about the behaviour of mediators and the protection of clients.<sup>29</sup> Privacy and confidentiality of proceedings make it likely that evidence of abuse of process may be suppressed. The procedural safeguards and application of substantive law in the formal judicial system are discarded for informal mechanisms which are almost entirely procedural concepts, but in which the procedures themselves can be minimal or flexible. Moreover, the need for disputants to rely on the exercise of due care and skill by the third party occurs in circumstances where there is an element of uncertainty as to guiding principles and the roles of all parties to the process. Standards of conduct, including ethical conduct, are as yet imprecisely defined.<sup>30</sup> There is emphasis on compromise and the parties establishing the relevant norms to produce a resolution in circumstances where traditional norms and protections of substantive law do not necessarily operate. These concerns will be more pressing if the immunity which already exists for some practitioners is extended to others without corresponding mechanisms for protecting the interests of clients denied legal redress.

### **The Commission's conclusion**

4.21 The Commission accepts that at this time the known risks to clients are not sufficient to warrant government intervention. The danger appears to be potential rather than actual, and the existing means of protecting consumers appear to be sufficient. Most clients retain a large measure of power to protect themselves because of the voluntary and consensual nature of the process. Protection is offered by various mechanisms of government regulation and self-regulation which are designed to control the competence of practitioners and the quality of service.<sup>31</sup> Where a practitioner's misconduct or incompetence endangers a client, resort may be had to the particular agency or program, perhaps to a professional association, or ultimately to the enforcement of legal entitlements.

4.22 It is also premature to attempt to implement government regulation when the practice is not sufficiently understood and there is not yet a clear consensus about the matters on which that regulation would be based, such as training and qualifications, standards of practice, codes of ethics, and appropriate disciplinary measures.

### **Need for information**

4.23 One of the risks identified in the guidelines for occupational regulation referred to above arises from a lack of information. Potential clients of mediators are on record with questions about qualifications and quality, and how they may select a mediator or service with confidence.<sup>32</sup> Lawyers who may advise clients to use consensual dispute resolution processes have been found to have similar concerns about the education and training of those who provide such services.<sup>33</sup> These concerns are to be expected. They arise not from direct evidence of incompetence but from an apprehension about the unfamiliar. Lawyers are reluctant to entrust the resolution of disputes on matters of importance to such a procedure. People seeking to enforce or defend their legal rights within the traditional dispute resolution system have the right to expect that in any alternative to which they are referred or encouraged to use, practitioners will be skilled and procedures fair.<sup>34</sup> At present, potential clients must assess the relative quality and suitability of a mediator, program or agency without reference to recognised or formal qualifications. They may use endorsements from subjective expressions of participant satisfaction, and peer recommendation. Objective measures may be available for an agency or program, but this is not yet practical for individual practitioners.

4.24 There is a need for information about the qualifications of mediators to be made public for purposes other than self-promotion. This is a valid function for government.

### **The State's responsibility**

4.25 The second arm of the public interest relates to the State's general responsibility for the administration of justice. This includes the conventional judicial systems, other methods of dispute resolution, and the principle of public policy that private ordering is to be encouraged.<sup>35</sup> In New South Wales an objective of the Attorney General's Department is:

through the effective promotion and provision of alternatives to traditional dispute resolution, and through the provision of information, encourage and enable all members of the community to become informed about

their legal rights and responsibilities so that they are encouraged to settle disputes with a minimum of cost and formality, and as quickly as possible, but consistent with principles of justice.<sup>36</sup>

In both the court system and recently in extra-curial forms of dispute resolution, the State has accepted responsibility for various ADR processes, particularly mediation, "appropriate to resolve virtually any kind of dispute."<sup>37</sup> Government policy in State and Federal jurisdictions has embraced the new processes.<sup>38</sup> The extent to which these have been adopted in courts, tribunals and administrative agencies is notable.

4.26 The quality and accountability of those services in which the State has an interest falls within the State's responsibility. This responsibility extends to promoting standards of design and operation for programs which are publicly funded or provided. This includes court and tribunal connected ADR programs, dispute resolution mechanisms within the administration, and any other publicly funded service. There is a need to ensure that such services are established according to clearly articulated principles, which provide control over the quality of service and accountability for the way in which they operate. The Commission addresses these issues in Chapter 6.

4.27 In the course of this reference the Commission encountered the major problem of finding out exactly what is occurring in dispute resolution. It is an innovative and rapidly expanding area of practice, and information is not easily obtained. This situation provides, in the Commission's view, sufficient reason for the State to perform a role in recording and monitoring the activities of dispute resolution so that there will be publicly available information about their nature and quality. The advice should be available to Parliament, the relevant minister, and the judiciary so that the Government's responsibility for the administration of justice may be better exercised. This purpose will be served by the Commission's recommendation for an Advisory Council and that for the creation of a Database which are presented in Chapter 7.

## CONCLUSION

4.28 The Commission considers that while the principles of occupational regulation may be applied to mediation there is no demonstrated need to regulate mediators by accreditation. This recognises that the experimentation and developments in dispute resolution now occurring are desirable, and the Commission has no wish to inhibit the flexibility necessary for this to continue. The rapidly evolving nature of dispute resolution practice and the need for regulation identified by the Commission, have resulted in the recommendations for a Database and an Advisory Council. These are considered in Chapter 7.

## RECOMMENDATION

**The Commission recommends that no government regulation for the accreditation of mediators is currently required.**

## FOOTNOTES

1. See DP 21 paras 4.6-4.7.

2. Trade Practices Commission *Self-regulation in Australian Industry and the Professions -Report by the Trade Practices Commission* (AGPS, Canberra, 1988).

3. Victoria Regulation Review Unit *Principles for Occupational Regulation*,: Victorian Government Policy on Occupational Regulation 2nd ed (Regulation Review Unit, Melbourne, 1990); Victorian LRC *Principles for Occupational Regulation Report No 2* (VLRC, Regulation Review Unit, Melbourne, 1988).

4. Ibid 15.

5. The Commission acknowledges the continuing debate on the level and cost of government regulation, and the climate favouring deregulation and privatisation.

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6. *Principles for Occupational Regulation* note 3 at 16.
7. *Ibid* 17-20.
8. Victoria *Neighbourhood Mediation Centres Evaluation Final Report* (Attorney-General's Department, Melbourne, 1989) at 26.
9. See remarks on the push for licensing in the United States by Linda Singer at Trans-Atlantic Divorce Mediation Conference reported in Vermont Law School Dispute Resolution Project *The Role of Mediation in Divorce Proceedings: A Comparative Perspective (United States, Canada and Great Britain)*(Vermont Law School, Vermont, 1987) at 207.
10. *Principles for Occupational Regulation* note 3 at 8-9.
11. Robert Albon and Greg Lindsay (eds) *Occupational Regulation and the Public Interest. Competition or Monopoly?* (Centre for Independent Studies, Sydney, 1984) at 5.
12. See Maley's content analysis of ethical codes of Australian professionals, which found that intra-professional "ethical" concerns predominate over client/consumer concerns: Barry Maley "Professionalism and Professional Ethics" in Don Edgar (ed) *Social Change in Australia: Readings in Sociology* (Cheshire, Melbourne, 1974) at 397.
13. FMC, LEADR, LIV, ADRA, CJC, Tillett, Renouf, Ingleby, Foffest, SCMS, FLSLCA, MGCSA.
14. Monk, Ingleby, Davenport.
15. Tillett, Forrest; See also Susan Zaidel "Identity Measures for Mediators" (1988) *19 Mediation Quarterly* 27.
16. Neighbourhood Mediation Centres Evaluation note 8; CJC User Survey in John Schwartzkoff and Jenny Morgan *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, Sydney, 1982) at 111. As to the validity of user satisfaction as a standard of evaluation see Richard Ingleby "Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution" Paper presented at the AIJA Conference, Melbourne 18 August, 1990.
17. See NSW Law Society "Guidelines for Solicitors who Act as Mediators"(1988) *26 Law Society Journal* (6) 29.
18. But see *Howard v Drapkin* (2d July 31, 1990) 222 Cal Appeals 3d 843 in which a mediator in a custody dispute was found to be protected by an absolute quasi-judicial immunity.
19. See DP 21 Chapter 5.
20. FMC.
21. The position adopted by some enthusiasts that something so good could not possibly be unethical is rejected, see Richard Crouch "Mediation and Divorce: the Dark Side is Still Unexplored" (1982) *4 Family Advocate* (3) 27. The proposition referred to in one submission that ethical conduct is unfailingly competent is also not justified (Tillett).
22. DP 21 Chapter 5 and the references it contains. See also Jay Folberg "Liability of Divorce Mediators" in Jay Folberg and Ann Milne (eds) *Divorce Mediation: Theory and Practice* (Guilford Press, New York, 1988).
23. Similar to those from the activities of social workers, Stephanie Charlesworth, J Neville Turner and Lynne Foreman *Lawyers, Social Workers and Families* (Federation Press, Sydney, 1990) Chapter 2.
24. Los Angeles Superior Court Local Rule exempts from confidentiality and privilege mediators complying with the requirements of *Tarasoff v The Regents of the University of California* 17 Cal 3d 425, by informing persons intended as targets of threats about the threats if made in the presence of mediators, see Hugh Mclsaac "Confidentiality: An Exploration of Issues" (1985) *8 Mediation Quarterly* 57 at 65.



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25. Pengilley.

26. See Folberg note 22 at 342.

27. See Richard Ingleby "Catholics, Communists, Alternative Dispute Resolution and Bob Dylan" (1990) 1 *Australian Dispute Resolution Journal* 18 at 20; Gwynne Daviss *Partisans and Mediators* (OUP, Oxford, 1988); Austin Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court" (1976) 10 *Law & Society Review* 339; Howard S Erlanger, Elizabeth Chambliss, Marygold S Melli "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context" (1987) 21 *Law & Society Review* 585.

28. Stephen B Goldberg, Eric D Green and Frank E A Sander "ADR Problems and Prospects: Looking to the Future" (1986) 69 *Judicature* 291 at 293.

29. Robert A Baruch Bush "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation" (1989) 41 *Florida Law Review* 253 note 1 at 254.

30. See Chapter 3 para 3.46.

31. See below Chapter 5.

32. The Investigators, ABC TV 16 May 1990 and the Andrew Olle Program, ABC Radio 702BL 15 August 1990 both aired such public concerns in the course of programs referring to mediation. LEADR frequently receives requests for advice about the qualifications and accreditation of mediators from potential clients.

33. See Legal Aid Policy, Law Council of Australia *Submission on National Legal Aid Advisory Committee Discussion Papers, Funding Providing and Supplying Legal Aid Services* (Canberra, July 1989) 89; The University of Newcastle Upon Tyne, Conciliation Project Unit, *Report to the Lord Chancellor on the Costs and effectiveness of conciliation in England and Wales* (March 1989) at 127; Canada, Department of Justice, *Court Based Mediation in Four Canadian Cities: An Overview of Research Results* (Ottawa, 1988) at 18; Linda Neilson "Solicitors Contemplate Mediation - Lawyers Perceptions of the Role and Education of Mediators" (1990) 4 *International Journal of Law and the Family* 235.

34. Law Council *Submission on the use of ADR as Legal Aid policy* note 33 at 86.

35. See *Rush & Tompkins Ltd v GLC* (1988) 3 All ER 737, *Cutts v Head* [1984] 1 Ch 290 at 306.

36. NSW Attorney General's Department *Annual Report 1990* at 12.

37. *ibid* at 20; see also Premier's direction to NSW Ministers to use ACDC and funding for ACDC and the CJC.

38. Prime Minister's Press Release, Fourth Term Initiative March 20, 1990 and its implementation by the Courts (Mediation and Arbitration) Act 1991(Cth); Attorney-General for South Australia *Green Paper Alternative Dispute Resolution*, (Adelaide, 1990).

## 5. Approaches to Occupational Regulation

5.1 The Commission has identified several approaches to the regulation of dispute resolution. The various models and approaches which are used in the community to regulate the activities of professions and occupations have developed in an ad hoc, contingent manner. They reflect great diversity, and inconsistencies in philosophy and approach, nomenclature, standards, nature and extent of control. Not all may be readily applied to the practice of dispute resolution, although some are used already for particular purposes. They operate in conjunction with obligations imposed by statute and the common law, government administrative controls, and self-regulation, as well as market forces. It is necessary therefore to analyse how well all the approaches currently used meet the community's needs which have been identified.

### PROFESSIONAL REGULATION MODEL

5.2 The traditional model of professional regulation was presented in the Discussion Paper as appropriate for mediators.<sup>1</sup>

5.3 Although there is no legal definition of a "profession", there is a concept with distinguishing criteria which focus on an organised community of practitioners who share a systematic body of knowledge and skills acquired through long prescribed training, and commitment to a set of professional norms. These norms relate to competence, quality of performance and the service ideal, which places devotion to client's interests above personal interests or commercial profit.<sup>2</sup> A more recent approach to the definition of professions focuses on the process of establishing control over the market for services.<sup>3</sup> A process by which an occupation is professionalised can be identified. The activities involved are familiar, and include defining professional tasks, creating a professional association, establishing standards for training and practice, seeking legal support for protective regulation, and creating a formal code of ethics.<sup>4</sup>

5.4 The typical measures for regulation of professions, are designed to affect the structure of the market for services and the conduct of participants. Codes of ethics and standards of practice regulate conduct by indicating how members of the profession should behave towards each other, their clients and the community. Disciplinary procedures enforce them.<sup>5</sup> Structural regulation by licensing, certification, or registration affects the availability of practitioners and the way they can participate in the market. The most common method is to restrict entry by setting qualifying standards. Other approaches divide functions amongst separate groups (such as the distinction between specialists and general practitioners or between barristers and solicitors), or impose controls on organisation and ownership (for example on the right to practise independently).

5.5 Inconsistent or haphazard use of terminology causes confusion in discussion of regulatory policy. Definitions are given in Chapter 4 at para 4.3. Co-regulation, where the government delegates a great deal of responsibility for control to practitioners often has the appearance of self-regulation.<sup>6</sup> Licensing means that practice is permitted only with government authority, although the terms registration or certification are also often used interchangeably for this situation.

### Application to mediation

5.6 The applicability of the professional regulation model to mediation is not at all clear. Mediation can offer examples of most of the activities associated with the preliminary steps in the development of a new profession, but whether this is the likely result, or even the goal, is uncertain. Mediation is yet to take the "obvious first step" of becoming a full-time vocation.<sup>7</sup> Most mediation is practised now, and is likely to continue so at least in the short to medium term, as an additional or associated role for an existing full-time occupation, or in a volunteer capacity. For others mediation represents skills added to existing professional techniques. Practice in most situations depends more on mastery of a process and the exercise of tacit elements of judgment and human relations skills than on the conventional professional training in a body of knowledge or doctrine. The substance of the knowledge required is still a matter for debate.

5.7 Within the ADR community there are ambivalent, even contradictory attitudes toward regarding mediation as a profession. Some see as both desirable and necessary the creation of a separate and discrete occupation, with academic training, strategies and ethics of its own.<sup>8</sup> Within government agencies this is occurring already for

example with plans for Mediators in the proposed Family Court Mediation Service, or conciliators in agencies administering legislation which requires conciliation. For others, establishing mediation as an occupation practised for reward conflicts with the ideologies of deprofessionalisation and client empowerment.<sup>9</sup> According to this view, professionalism as a question of standards of practice and commitment to a code of ethics is preferred to a professionalised service based on academic qualifications alone.<sup>10</sup>

5.8 The communal sense of professional identity which provides a cohesive force for members of the professional group has not emerged. The Commission is aware of tensions and rivalries among dispute resolution practitioners.<sup>11</sup> Submissions noted that regulation could be sought to secure private advantage for some sections of practice at the expense of others.<sup>12</sup> It appears to the Commission that the narrow focus of training and limited experience of most practitioners prevents them understanding and valuing the nature of practice in diverse contexts, so that functional core beliefs which are a common attribute of professions have not yet developed.

5.9 There are other, practical, difficulties in applying schemes of professional regulation to mediators. These difficulties chiefly derive from the enormous diversity of contexts in which mediation is practised. Variables include factors such as the professional or occupational background, level and nature of training undertaken, the frequency or intensity of practice, employment status and the nature of remuneration of practitioners, as well as the substantive context of disputes and the institutional context in which practice occurs. Others relate to the manner in which mediation is performed, often dependent on the substance of the dispute, or the model or approach to mediation being used. Further difficulties are created by the nature of mediation itself, which relies so much on the personal qualities and interpersonal skills of the particular mediator in dealing with the parties in each dispute. The interdisciplinary nature of mediation, with perspectives drawn from communications, law, psychology, sociology, and many other areas creates difficulties for the discrete definition of professional tasks, the requisite knowledge and skills for their performance, standards of practice and ethical behaviours which are necessary for effective professional regulation. The novelty of practices which have only recently emerged as distinct activities undertaken formally and for reward further contributes to the difficulty in establishing the activities to which professional regulation should apply.

5.10 Despite these practical difficulties, professional regulation of mediation maybe feasible should this be what is desired. Specialisation, fragmentation and structural diversity of practice are features of many modern professions to which regulation is successfully applied.<sup>13</sup> The legal profession is an obvious case.<sup>14</sup> The concept is of a unitary profession whose members have the same basic qualifications but who practise in different branches. There are great internal distinctions but also a basic functional core.<sup>15</sup> Mediation's diversity may be overcome for the purposes of regulation but it appears to lack at this time the necessary universally accepted functional core for effective training and regulation. Social work has a variety of equally valid models of practice, and relies heavily on the exercise of human relations skills which makes the assessment and control of practice difficult,<sup>16</sup> however it has emerged as a distinct profession with academic and practical training, standards of practice and ethical codes and legal liabilities. Regulation of mediation should be able to take account of different models, although this will require a greater understanding of competent and ethical practice than appears to exist at present.

5.11 Although the difficulties with regulating mediators on this model could be overcome, it is not recommended by the Commission. It is unnecessary and premature, given the lack of demonstrated need for government regulation at this level, and the current formative state of the practice.

## **ALTERNATIVE MODELS OF GOVERNMENT REGULATION**

5.12 Direct government regulation by the means outlined above is not the only way of controlling the behaviour of members of occupational groups. Even without such approaches, no practice or occupation is unregulated. Various models exist. Some already apply to dispute resolution; others were suggested in submissions to the Commission.

### **Consumer protection**

5.13 The common law imposes certain duties on people in trade and commerce which make them accountable to consumers and clients for injury or loss they may cause in the course of their dealings. The breadth and depth of

these protections have been expanded considerably by the courts over the past half century. The common law has been strengthened by statutes which impose more explicit duties and/or sanctions. The Trade Practices Act 1974 (Cth) and the Fair Trading Act 1987 impose duties on mediators who fall within their terms. The definitions given to consumers, services, business, trade and commerce under the Fair Trading Act clearly makes it applicable to services provided by non-profit organisations or professionals, and to the full range of industrial and commercial activities.<sup>17</sup> The Trade Practices Act will apply to some activities of professional mediators, and to incorporated services, including non-profit-making ones.<sup>18</sup>

5.14 Some submissions considered that reliance on consumer protection legislation was sufficient to protect the public.<sup>19</sup> The regulatory scheme in the Fair Trading legislation is not designed to replace existing occupational or professional controls but to supplement them.<sup>20</sup> Although general provisions of the Act will apply to dispute resolution practitioners, there is a more appropriate method for regulating mediators than using the Code of Practice provisions, given the occupational structure, the nature of their work and their proximity and relationship to the justice system.

5.15 The statutory creation of an ADR Services Ombudsman has been suggested in the context of a State ADR Service,<sup>21</sup> modelled on the Legal Services Ombudsman, under the new Courts and Legal Services Act 1990 in the United Kingdom. Although this approach may be relevant in the situation for which it is proposed, the Commission is not persuaded that it is warranted in New South Wales.

### **Specific legislation**

5.16 Legislative control can be exercised directly over dispute resolution agencies or programs. Community Justice Centres are regulated by the Community Justice Centres Act 1983. This detailed legislative model incorporates extensive control of the forms and processes of mediation used, the provision of mediation services, evaluation, accreditation of mediators, and makes the Centres administratively responsible to the Attorney General's Department and to Parliament by means of an Annual Report. The Dispute Resolution Centres Act 1990 (Qld) is a similarly detailed statute, modelled closely on the New South Wales legislation.

5.17 A modification of this approach is to place agencies or programs within the administrative responsibility and funding of a government department, but provide only a minimal legislative framework, relying on administrative guidelines and/or local managements.<sup>22</sup>

### **Administrative controls**

5.18 Another approach is for the Government to exercise administrative control over the particular program or agency or even individual practitioners using mechanisms to ensure accountability in management and service delivery. As a consequence of receiving funding or legal privileges, many dispute resolution agencies and services are already subject to regulation. Funds are distributed by the Commonwealth Attorney-General's Department for family and parent/adolescent mediation to approved services.<sup>23</sup> Criteria may include, but are not limited to, the level of qualifications and performance of individual staff. These can be applied with flexibility to account for diversity among agencies, and give agencies considerable autonomy while complying with guidelines.

5.19 Such a model is very useful where the State has an interest in ensuring quality and consistency in the standard of service provided across a range of agencies and programs. It may be useful where agencies or programs are used for court-connected ADR, are associated with a State-sponsored dispute resolution service,<sup>24</sup> or receive government funding. With the growing trend for State involvement in the provision of dispute resolution services, both court-annexed and as part of agencies or departments, this is an approach which is likely to be used frequently. Principles of accountability demand that program administrators can demonstrate that the service meets an acceptable standard, and that mediators display an acceptable level of competence. Government administrative regulation in various forms is inevitable.

5.20 While such regulation is often very effective, at this stage reliance on this approach alone is not the most appropriate method for a regulatory system for mediation. Each administrative unit will have its own administrative needs and its own criteria. Standardisation will be difficult to achieve, though a degree of co-ordination is desirable to encourage consistency. Considerable resources and expertise will be required to implement guidelines and

monitor agencies. The greatest limitation of such an approach is that it ignores the small but significant private practice of dispute resolution. On the evidence from the United States and to date in Australia, private practice will expand and any general regulatory system should be able to encompass the whole range of mediation practices.

### **Vocational training regulation**

5.21 Another approach suggested in submissions was to regulate the training courses provided for mediators.<sup>25</sup> In this approach, training standards are developed, usually in consultation with the particular occupation, and courses offered are recognised or controlled in accordance with these criteria. In New South Wales there is legislation to establish an independent Vocational Education and Training Accreditation Board with responsibility to accredit public and private training courses.<sup>26</sup> "Vocational" is not defined other than to exclude university and degree courses. The approach is deliberately broad to cover skills in all occupations but it is not intended to be comprehensive or compulsory. There is no reason why, in principle, this could not apply to training mediators, although the Board is yet to be established and no guidelines are available.

5.22 It is unlikely that the prospective statutory accreditation system will be a viable approach for regulating dispute resolution courses in the short term, should they come within the Board's scope. Government regulation of training courses is premature, will require considerable resources, and will create practical difficulties. There are serious difficulties in establishing comparability among courses. It is likely to introduce an undesirable rigidity and inflexibility for courses which are in a constant state of change as theory and practice develop.<sup>27</sup> In addition, it is relatively common for mediators to receive training outside the jurisdiction, both elsewhere in Australia and overseas, and international trainers conduct courses here.<sup>28</sup> There is no evidence to suggest regulation should operate to restrict training to that available locally. Regulation which targets only courses in New South Wales will have a limited impact on the quality of training undertaken.

## **LEGAL LIABILITIES**

5.23 The conduct of mediators can also be controlled by the application of civil liability, in the same way that the conduct of members of any profession or occupation can be called to account. When individual practitioners are liable for specific instances of actionable misconduct or incompetence it demonstrates to all the existence of a legal liability. It is argued that the existence of a legal liability will have a salutary effect on the quality of performance of all members of the group on which it falls as well as providing those who suffer harm with a means of redress.

### **Bases of legal liability**

5.24 The Discussion Paper considered various bases of legal liability which could arise from a mediator's relationship with clients.<sup>29</sup> Any contract applying to the relationship will impose duties and liabilities. Principles of negligence are also a means of establishing a mediator's liability. Claims arising from negligent misstatement are possible. Mediators may be liable for other torts (such as defamation) without reference to the mediator-client relationship. It has been argued in the United States that the law of fiduciary duties will impose obligations on a mediator which enable a client to seek redress.<sup>30</sup>

5.25 As indicated in the Discussion Paper, the taking of legal action against mediators may present practical problems in individual cases. There will be evidentiary difficulties in establishing liability and causation, identifying and quantifying damage, and determining the applicable standard of care or performance. Liability may be limited or excluded by agreement or on public policy grounds.

### **Immunity**

5.26 The Discussion Paper raised the question of conferring statutory immunity on mediators beyond that already given.<sup>31</sup> The extent of the immunity so given has not been considered judicially, nor has the position of mediators without such protection. The Commission is not aware that action has been taken against a mediator in an Australian court, nor of any successful action in the United States.<sup>32</sup> The Courts (Mediation and Arbitration) Act 1991 (Cth) recently passed by the Federal Parliament gives mediators and arbitrators when performing their statutory functions under the Family Law Act 1975 (Cth) and the Federal Court of Australia Act 1976 (Cth) the same protection and immunity as a judge.

5.27 With few exceptions, those making submissions accepted that mediators could face the civil liabilities mentioned by the Commission. Generally this was implicit in the submissions which called for statutory immunity to be conferred on mediators.<sup>33</sup> The view that mediators should be held to common law and equitable obligations was strongly expressed, but in only a few submissions.<sup>34</sup> It was argued that although a mediator acting outside the accepted model may incur legal liability, clients do not need to rely on those rights to seek legal redress as the more appropriate response should come from disciplinary action by the agency or a professional or regulatory body.<sup>35</sup>

5.28 The call for some form of immunity for mediators is widespread<sup>36</sup> though the basis on which it is sought is rarely explained. The rationales offered in submissions relied on the role of mediators in the system of administration of justice or the protection afforded clients by the voluntary nature of Mediation. Some sought immunities analogous to those conferred on quasi-judicial arbitrators who are liable for fraud but not for negligence.<sup>37</sup>

### **The Commission's view**

5.29 It is clear that regulating the behaviour of mediators principally by means of enforcing individual legal liability presents considerable practical difficulties. As well, it is unlikely to be a favoured method for those who have chosen a private non adversarial approach to dispute resolution. While it does offer the possibility of direct redress for actual harm, it is only that harm recognised by or quantifiable at law. The educative or remedial impact of decisions will probably take a considerable length of time to come into effect, although the potential liability ought to have a salutary effect on conduct. It is likely to be of limited value if immunity is conferred, on more practitioners than now enjoy it, either by statute or court rule, or as courts decline to impose it as a matter of public policy.

5.30 The Commission does not believe that a general immunity from legal liability is either warranted or feasible, despite sweeping assertions that it is necessary, and attempts to extend by analogy judicial and arbitrator (quasi-judicial) immunities to a mediator whose relationship with the justice system is uncertain.<sup>38</sup> The protections which are sought are in themselves limited, and given to those whose actions come under public scrutiny. At common law, the trend has been to place increasing responsibility on professionals, not to limit their liability.<sup>39</sup> All mediators will not be unfailingly competent and ethical. Those who are not should be held accountable. In the absence of an authorised regulatory body which could discipline practitioners, redress can only be sought through employing agencies or professional associations, whose complaint handling mechanisms are still being developed.

5.31 In some circumstances, particularly where accountability and control mechanisms are available, it may be appropriate for particular classes of dispute resolution practitioners to be granted specific exemptions from liability by a court or legislature. This occurs in specific legislation for agencies or programs.<sup>40</sup>

### **Confidentiality**

5.32 In the Discussion Paper the Commission raised the issue of and sought submissions on the need for protection of confidentiality in mediation. It is a topic of much interest and debate among the dispute resolution community.<sup>41</sup> That the effectiveness of mediation depends on participation with openness and candour is almost a truism. Where reasons were given in submissions for seeking legal protection for the confidentiality of mediations, they related to the need to encourage parties to disclose information without fear that it would be used to their disadvantages.<sup>42</sup> Practitioners are concerned, too, that they will be required by subpoena to disclose evidence of communications made within mediation proceedings.

5.33 Opinions differed on how the protection should be achieved. Some considered that it was appropriate to rely on the common law, particularly a contractual term providing for confidentiality in relation to the mediation.<sup>43</sup> The extent to which such a term will be effective has not been tested in a court. Alternatively it was argued that mediation would be covered by the privilege extended to "without prejudice" settlement negotiations.<sup>44</sup> It must be noted that this protection is granted for limited purposes so that its application will be restricted.<sup>45</sup> Demand for statutory protection was strongly expressed, and submissions proposed as models the protections in the Community Justice Centres Act 1983 and the Family Law Act 1975(Cth).<sup>46</sup>

5.34 Certain mediators and mediation sessions already enjoy extensive statutory protection, notably under the Community Justice Centres Act 1983 s28(4), (5), (6), the Dispute Resolution Centres Act 1990 (Qld) s5.3, the Evidence Act 1958 (Vic) ss21J, 21 L, 21 M and the Family Law Act 1975 (Cth) s18. As well, processes in some court and tribunal programs and administrative agencies enjoy confidentiality protections which derive from court rules, administrative policy or statute.

### **The Commission's view**

5.35 In determining whether confidentiality protections should be granted it is necessary to weigh the competing interests of the right to know and the right to privacy. Clearly the effectiveness of mediation will be enhanced when parties can discuss all their needs and interests without fear that this may subsequently be revealed or used against them. However, the public interest and the protection of peoples' rights requires that certain information should not be concealed.

5.36 The Commission does not believe that a general confidentiality privilege for mediation is either feasible or warranted. The class of persons or processes on which it may be conferred cannot readily be ascertained. Nor is the Commission convinced that the case for a general protection has been demonstrated. It is proper, however, that specific classes of mediators, or proceedings, be given a confidentiality privilege. This should be done in the context of a particular program, or agency, or statute, such as has already occurred.

5.37 The nature of the privilege to be granted is also in issue. Blanket protection is not appropriate. Exceptions have been provided for matters such as reporting allegations of physical or substance abuse, criminal activities or threatened criminal activities, for legal actions arising out of mediation proceedings, for purposes of research and evaluation, and with the consent of all parties.<sup>47</sup> There are many situations like these in which exemptions should be considered when confidentiality is proposed.<sup>48</sup>

### **SELF-REGULATION**

5.38 Pure self-regulation occurs where any direct control on members of an occupation is voluntarily imposed and administered by the practitioners themselves. It is entirely a private matter, without government authority, and of itself confers no legal status or liability. The traditional model consists of a representative occupational/professional association which applies membership criteria, determines standards of training and practice and promulgates a code of ethics to which members voluntarily adhere and administers complaint handling procedures. Disciplinary procedures may follow, but without the sanction of the State. In practice, many self-regulatory schemes involve representatives from other interested groups. For mediators these could include representatives from among program or agency administrators, funding or parent bodies, educational or training institutions, related professional associations, consumers and the general public. As well as serving the public interest in this way occupational/professional associations are responsible for representing members' interests, for example on employment issues. An alternative approach to self-regulation is at the level of service delivery, with each employer or provider assuming responsibility for the quality of service, including the qualifications of staff.

### **Benefits**

5.39 Self-regulation can deliver a range of benefits, although its effectiveness is limited. It has the virtues of flexibility and low cost and is said to result in higher standards of practice and ethical behaviour. Where a professional or occupational group publicly assumes responsibility for the training, education and discipline of its members, and promotes a code of conduct, the public interest may be served. The benefits appear to depend upon the appropriateness of the ethical rules, the extent of adherence and self discipline among practitioners, the complaint handling mechanisms in operation, the availability of meaningful sanctions for non-compliance, and community participation.<sup>49</sup> Self-regulation is appropriate where problems for consumers are not widespread and significant, and can be dealt with by recourse to alternative remedies.<sup>50</sup> Naturally, there is concern about the conflict of interest as associations claim to serve both the interests of members and the public. These interests cannot always be coterminous. Other problems arise in respect of the public perception of the motives behind certain restrictions on the behaviour of practitioners (eg on advertising) so that the ideal of public service does not always match the reality.<sup>51</sup> Without ethical rules directed at the public (rather than professional) interest and

meaningful sanctions to enforce disciplinary measures, self-regulation will not necessarily protect the public from incompetent and unethical practitioners.

### **Current approaches**

5.40 Apart from the regulatory controls already referred to, the practice of consensual dispute resolution is largely self-regulating. The most common approach is for each agency or program to take responsibility for the quality of the service it provides. Several measures have been variously adopted. These include a thorough selection process for trainees; accreditation after training; apprenticeship and supervised practice; the mandatory use of a uniform model or a co-mediation model; debriefing and regular supervision; and the use of observers.<sup>52</sup> Professional associations are beginning to take a more active role in ensuring quality of service from their members, although it is much more tentative than the approach at agency level. The Institute of Arbitrators Australia maintains a Register of Conciliators and Mediators.<sup>53</sup> The courts, legal profession and parties use this register to nominate practitioners for particular disputes. LEADR is accrediting lawyers as mediators in each State. Requirements for accreditation include undertaking approved training with satisfactory evaluation, a minimum period of relevant legal practice, and continuing education.<sup>54</sup> In addition, LEADR provides training to lawyers wanting to practise as mediators as well as to courts, tribunals and government. The Law Institute of Victoria plans to establish Alternative Dispute Resolution as a specialisation for which members may check accreditation.<sup>55</sup>

5.41 Various codes of conduct or standards of practice for dispute resolution exist. ADRA has a Code of Professional Conduct for members.<sup>56</sup> The New South Wales Law Society Dispute Resolution Committee has prepared Guidelines for Solicitors who Act as Mediators. It contains guidelines which are compulsory relating to training, impartiality, neutrality and confidentiality and others concerning a mediator's duties and procedures.<sup>57</sup> The Law Institute of Victoria has Standards of Practice for Lawyer Mediators in Family Disputes and recently has drafted a Code for Lawyer Mediators.<sup>58</sup> Some agencies or programs have a code of conduct to which their practitioners must adhere,<sup>59</sup> dealing with matters such as the mediator's responsibilities to the parties, the process, the agency, and the profession.

5.42 Most recently ADRA is preparing Standards for the Training of Mediators which contains a proposal for accreditation of training programs by ADRA, and detailed criteria on which evaluation of a training program would be made.<sup>60</sup> It recommends standards for agencies which train and accredit mediators on the selection of trainees, the nature of training courses (length, techniques, trainers, curriculum, assessment) practical training, and the need for statements of ethics and standards of practice.

### **Submissions**

5.43 Self-regulation in one of its many forms was the preferred option in several submissions. It was claimed that greater control was unnecessary or should be positively avoided.<sup>61</sup> Other supporters considered this form of regulation would be the least likely to restrict flexibility and creativity as the practice of mediation develops.<sup>62</sup> Most appeared to accept that it would serve compatibly the dual objectives of public and professional interest, although the Commission had expressed concerns about this in the Discussion Paper.<sup>63</sup>

5.44 Some community mediation services argued strongly for self-regulation for their services.<sup>64</sup> Such agencies argue that centralised state regulation is inappropriate for volunteer services which are part of a community movement. It is unwarranted and unnecessary as the "community development" process in operation ensures accountability by means which involve consumers, management committees, and professional links. It was claimed that imposition of external controls would create animosity in mediators and management, and threaten the viability of services by imposing extra costs and uncertainty about funding, and unwarranted levels of responsibility on volunteers.

5.45 Other proposals for self-regulatory systems made in submissions were actually advocating co-regulation, in the traditional model of professional regulation. One submission proposed legislation to be administered by a professional associations<sup>65</sup> to license mediators, accredit training courses and set standards of practice. Alternatively, maintenance of a register of qualified mediators was envisaged. Another proposal for voluntary



registration argued that standards of practice and criteria should be determined by a body broadly representative of the field, although practitioners would of necessity play an important role.<sup>66</sup>

### The Commission's conclusions

5.46 In the context of mediation, substantial self-regulation is an important means of ensuring the quality and accountability of dispute resolution services, particularly in conjunction with the various forms of government regulation which are already in place. There is currently no evidence that professional self-regulation favours practitioners' private interests over the public interest in this area. The current consumer orientation and the volunteer status of many practitioners of dispute resolution, make this an area classically appropriate for self-regulation.

5.47 However, there are steps which should be considered to safeguard further the public interest. Self-regulation will develop more sophisticated mechanisms for prescribing and monitoring standards of training and practice as the theory and practice of dispute resolution develop. Greater involvement of consumers is possible. Formal mechanisms for handling complaints and providing consumer redress within the self regulatory approaches should also be considered, particularly where practitioners' legal liability is uncertain or negated by legislation. Codes of conduct and standards of practice have a valuable educative function. They do, however, have only limited potential for ensuring accountability, particularly for defining competent and ethical behaviour across the varied contexts in which dispute resolution is practised. Also, codes of conduct and standards of practice cannot enforce sanctions.

5.48 Finally, there is a limitation on the effectiveness of self-regulation by a professional association because of the fragmentation found in the practice of dispute resolution. No professional association commands the allegiance of practitioners from across the spectrum. Significant divisions and even rivalries exist among practitioners trained in different models, or operating in different contexts. These reflect the fact that the practice of dispute resolution is very young and has not matured to the point where there can be a discrete professional identity with a thorough understanding of professional tasks, standards of practice and training and ethical behaviour on which self regulation (or any formal regulation) can be securely based.

### FOOTNOTES

1. DP 21 Chapter 4.

2. Harold Wilensky "The Professionalisation of Everyone" (1964) 70 *The American Journal of Sociology* 137.

3. See T J Johnson *Profession and Power* (1972); M S Larson *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977); and Richard L Abel *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988). See David Weisbrot *Australian Lawyers* (Longman Cheshire, Melbourne, 1989) at 4-5.

4. Wilensky note 2; also United Kingdom Monopolies Commission, *Report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services*, (HMSO, 1970) at 5.

5. Trade Practices Commission *Regulation of Professional Markets in Australia: Issues for Review* (Canberra, December 1990) at 18. Purely self-regulatory schemes adopt the same approach to control conduct of members of the occupational group. It occurs, however, without the force of sanctions supported with State authority.

6. Professional bodies such as those of lawyers and doctors which appear to have a large degree of control over their own members exercise it with statutory authority and are in fact accountable in varying degrees to the State. See Legal Profession Act 1987.

7. Wilensky note 2 at 142.

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8. Elizabeth J Koopman and E Joan Hunt "Divorce Mediation: Issues in Defining, Educating and Implementing a New and Needed Profession" (1983) 21 *Conciliation Courts Review* 25, referring to family mediation.
9. SCMS; see Peter Adier "Is ADR a Social Movement?" (1987) 3 *Negotiation Journal* 59.
10. SCMS; Wendy Faulkes "The Modern Development of Alternative Dispute Resolution in Australia" (1990) 1 *Australian Dispute Resolution Journal* 61 at 65.
11. See, for example "Peacemakers at Each Others' Throats" *Business Review Weekly* (June 9, 1989) 93; Faulkes note 10.
12. Davenport, Wade.
13. Management, by comparison, has not taken the professionalisation path.
14. Roman Tomasic *The Sociology of Law* (Sage, London, 1985) at 44-45.
15. Weisbrot note 3 Chapter 1.
16. Stephanie Chariesworth, J Neville Turner and Lynne Foreman *Lawyers, Social Workers and Families* (Federation Press, Sydney, 1990) Chapter 2.
17. eg the two Codes of Practice already promulgated relate to retirement villages and the education export industry, Retirement Village Code Practice Regulation 1989 (NSW) No 691, 1989, Education Export (Industry) Code of Practice Regulation 1990 (NSW) No 43, 1990.
18. Trade Practices Act 1974 (Cth) s6(4) definitions of business, services; ss4 and 52.
19. Pengifley, Davenport.
20. eg it does not replace the Legal Profession Act 1987 for solicitors.
21. Victoria Attorney -General's Working Party on Alternative Dispute Resolution Report (Attorney-General's Department, Melbourne, June 1990) para 4.27.
22. eg Victorian Dispute Settlement Centres, governed by the Evidence Act 1958 (Vic) Division 8 - Dispute Settlement Centres ss21L-21N.
23. See *Guidelines for organisations seeking approval under the Family Law Act 1975 (Cth) - Part 11, Marriage Act 1961 (Cth) - Part 1A in relation to the conduct of programs of marriage counselling, family mediation or marriage education* (Attorney-General's Department, Canberra, 1988); *Guidelines for organisations seeking funding of Youth Homelessness Services: Adolescent Mediator; Family Therapy*, (Attorney-General's-Department, Canberra, 1989).
24. Such as that proposed for Victoria by the Victorian Attorney-General's Working Party on Alternative Dispute Resolution.
25. CJC, Pengilley, ADRA.
26. Vocational Education and Training Accreditation Act 1990.
27. See Linda Fisher "Third Party Neutrals - Issues in Training" (1991) 2 *Australian Dispute Resolution Journal* 12.
28. CDR Associates from Colorado, USA conducted several 3-5 day courses in Australia in 1990 for organisations such as LEADR, Mediation Association of Queensland and Family Mediation Centre, (NSW).
29. DP 21 Chapter 5.

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30. See Arthur A Chaykin "Mediator Liability: A New Role For Fiduciary Duties?" (1984) 53 University of Cincinnati Law Review 731 at 732; Arthur A Chaykin "The Liabilities and Immunities of Mediators - A Hostile Environment for Model Legislation" (1986) 2 *Ohio State Journal on Dispute Resolution* 47 at 70.
31. To CJC mediators, by CJC Act 1983 s27; to Dispute Resolution Centre mediators in Victoria, Evidence Act 1958 (Vic) s21 N and Queensland Dispute Resolution Centres Act 1990 (Old) s5.2.
32. Most recently the Californian Court of Appeal decided that third party neutrals should be granted absolute quasi-judicial immunity from lawsuits relating to the performance of judicially connected dispute resolution services: *Howard v Drapkin* (2d July 31, 1990) 222 Cal Appeals 3d 843.
33. ie the argument must be based on an acceptance that clients will have at least a prima facie case of damage for which a mediator could be held responsible.
34. See Fine, Davenport, Wade, FLSLCA, Van T, LEADR.
35. FMC. ADRA implies a similar view.
36. See Pengilly, Law Society, ADRA, Tillett, LIV, FMC, SADRA.
37. eg Commercial Arbitration Act 1984 (NSW) s5 1; see I Arb A, SADRA, Monk, LIV, but see also Fine.
38. Although this was clearly done in the California case *Howard v Drapkin* note 32.
39. Since *Hedley Ryme v Heller* [ 19641 AC 465.
40. To CJC mediators, by CJC Act (1983) s27; to Dispute Resolution Centre mediators in Victoria, Evidence Act 1958(Vic) s21; and mediators in Dispute Resolution Centres, Queensland, Dispute Resolution Centres Act 1990 (Qld) s5.2.
41. Scottish Law Commission *Confidentiality in Family Mediation*, DP 92 (1991). See Note "Protecting Confidentiality in Mediation" (1984) 98 *Harvard Law Review* 441; Hugh McIsaac "Confidentiality: An Exploration of Issues" (1985) 8 *Mediation Quarterly* 57; Lawrence R Freedman and Michael L Prigoff "Confidentiality in Mediation: The Need for Protection" (1986) 2 *Ohio State Journal on Dispute Resolution* 37; Eileen P Friedman "Protection of Confidentiality in the Mediation of Minor Disputes" (1982) 11 *Capital University Law Review* 181; Eric D Green "A Heretical View of the Mediation Privilege" (1986) 2 *Ohio State Journal on Dispute Resolution* 1 at 5; John P McCrory "Confidentiality in the Mediation of Matrimonial Disputes" (1 988) 51 *Modern Law Review* 442.
42. See Fine, MGCSA, SCMS, SADRA, LEADR, LIV, Van T, FMC.
43. Wade, Renouf, Davenport, I Arb A.
44. SCMS, LEADR, LIV.
45. See D Byrne and ID Heydon Cross on *Evidence* (Butterworths, Sydney, 1991) paras 25,350 - 25,385.
46. See Fine, FLSLCA, Law Society, MGCSA, SADRA, Leeuwenburg, MAV, ADRA, CJC, Tillett, Foffest, FMC.
47. See eg CJC Act 1983 s28; DRC Act 1990 (Old) s5.3.
48. See Administrative Dispute Resolution Act 1990 (US) PL101-552 for a comprehensive list of possibilities.
49. See Trade Practices Commission *Self-Regulation in Australian Industry and the Professions* (AGPS, Canberra, 1988) Vol 1 Report at 14.
50. Victorian LRC Principles for *Occupational Regulation, Occupational Regulation Report No 2* (VLRC, Regulation Review Unit, Melbourne, 1988) at 5.

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51. See with respect to lawyers, Weisbrot note 3 at 192-200; see also Jack R Bierig "Whatever Happened to Professional Self-Regulation?" (1983) 69 *American Bar Association Journal* 616.
52. See CJC, FMC, Lismore NC, Gosnelis DIC.
53. The Institute of Arbitrators Australia List of *Conciliators and Mediators* (Edition 1 November 1988).
54. *LEADR Brief* Vol 2 (2) at 1.
55. Graeme Mills "Accreditation of ADR Specialists" (1991) 65 *Law Institute Journal* 57.
56. *ADRAA Newsletter*, November 1989 Vol 3 (4).
57. (1988) 26 *Law Society Journal* (6) 29.
58. (1985) 59 *Law Institute Journal* 163.
59. eg Family Mediation Centre Noble Park, Southern Community Mediation Centre, CJC.
60. ADRA Draft Standards for the Training of Mediators, (unpublished April 1991).
61. Davenport, Forrest.
62. Leeuwenburg, LEADR, LIV.
63. DP 21 para 4.13; FMC.
64. See SCMS, Lismore NC.
65. ADRA.
66. Tillett.

## 6. Court and Tribunal Connected Dispute Resolution

### RECOMMENDATIONS

**The Commission recommends that dispute resolution programs connected with courts and tribunals must operate in accordance with clear guidelines and adequate resources to ensure the integrity of the process and quality of service. One aspect of this concerns program objectives. Case management should not be the sole or primary reason for implementation of a program thereby reducing rather than enhancing the rights of parties.**

**The Commission also recommends that program guidelines require that mediators undergo appropriate training in dispute resolution techniques as a condition of their employment. The Commission makes no other specific recommendations about the content of guidelines because of the formative nature and diversity in application of dispute resolution processes to the justice system.**

#### The rationale

6.1 The use of consensual dispute resolution processes within the justice system has grown markedly in recent years. Court administrators and judicial officers have adopted less formal and adversarial procedures in order to reduce costs and court congestion, as well as to improve the satisfaction of litigants with the dispute resolution process. Government support for these initiatives is on record,<sup>1</sup> as is that of the legal profession.<sup>2</sup>

6.2 The Commission considers that the State, given its general responsibility for the administration of justice, has an obvious responsibility for the quality, integrity and accountability of consensual dispute resolution processes used within courts and tribunals.

6.3 The principal means by which the responsibility will be met is by the design and operation of dispute resolution programs in accordance with clear guidelines, and with adequate resources to ensure that the integrity of the process and the quality of service are maintained.

6.4 Program procedures must be consistent with objectives. There are differing and conflicting reasons for introducing new processes into the justice system; goals of efficiency and economy as well as improving the process for participants. There is a risk that tension and contradictions among multiple program objectives will threaten rather than enhance the rights of parties, by allowing the process to become a form of coercion. Case management and the reduction of court delay should not be the sole, or the primary, reason for implementation of an ADR program into a court or tribunal, as it is this objective which presents the greatest danger of coercion occurring.

6.5 With the exception of the need for mediators to be trained, the Commission does not make specific recommendations about the content of program guidelines. This position reflects both the formative nature of, and the great diversity in, the current state of dispute resolution practices. This diversity is particularly noticeable in the application of the new processes to courts and tribunals in a range of jurisdictions. Furthermore, because program design at this stage is experimental and pragmatic, there is little uniformity. Programs exhibit widely differing, but nevertheless appropriate and valid, characteristics for rules, standards, personnel, procedures, costs and consequences. It is not yet possible to specify with confidence the detail of guidelines, nor is it appropriate for the Commission to prescribe such detail. These should be developed for each program in accordance with principles which maintain the integrity of the process involved and protect the quality of the service provided.

6.6 Consistent with our conclusion that training is essential for competent practice, and in recognition of the State's responsibility for the quality of dispute resolution processes, guidelines for the operation of programs connected with courts and tribunals should require that mediators undergo appropriate training.

6.7 This Chapter considers some of the policy issues which must be addressed in the development of guidelines for the implementation of court and tribunal connected consensual dispute resolution. This discussion seeks to overcome what the Commission has found to be a lack of guidance for those responsible for designing dispute resolution programs.<sup>3</sup> The Commission's recommendation for a Database of Dispute Resolution will provide valuable information.<sup>4</sup> The comments and conclusions in the preceding Chapters relating to training, qualifications and accountability of mediators are equally relevant to practitioners in programs connected with the justice system. Similarly the policy issues considered here specifically in relation to courts and tribunals are common to all dispute resolution practice. Issues of quality and accountability with which the Report is concerned apply whatever the context.

### **PROGRAM OBJECTIVES**

6.8 The active promotion of alternatives to judicial determination in courts has various rationales. Prominent among these are economic goals of improving judicial and administrative efficiency by relieving case load pressures, and reducing delay and costs for litigants. Others look to making qualitative improvements for participants, through more appropriate or satisfying procedures and outcomes. Allied to these are aims to preserve business and personal relationships, build community responsibility for dispute resolution, and avoid untoward precedent-setting results.<sup>5</sup>

6.9 Several difficulties with the decision to implement different dispute resolution methods to courts and tribunals are likely to occur, and some caution is called for. There is a danger that innovations will be oversold, creating unfounded expectations on all sides. Many of the evaluations which have been undertaken on court connected programs show that specific benefits are speculative<sup>6</sup> and it is also clear that the impact of these new processes is not likely to transform courts, individuals or society, at least in the short term. There is bound to be tension and even contradiction between multiple program objectives. The most obvious is that between the desire for early settlement and the desire to improve the quality of process and outcome. Altering the way in which the court's adjudicatory role is performed will have implications for other functions of courts, such as rule determination and enunciating publicly acceptable standards of behaviour.<sup>7</sup>

6.10 The prospects for successful implementation of court connected ADR will be enhanced by the preliminary clarification of program objectives. These should be articulated, communicated and understood by all who will be involved in the program. These groups include those proposing reforms, policy makers, judicial officers and court administrators, the parties to litigation, and their lawyers, and those who will perform the role of neutral third party. The identified objectives should form the basis for selection of the process, design of program procedures, allocation of resources, and evaluation.

### **PROCESS**

6.11 Selection of the process to be used in any court connected dispute resolution program is crucial. The overriding need is to ensure the process meets the objectives identified and is appropriate to the jurisdiction and the needs of the parties. Courts may adopt any of a range of consensual processes. No general preference can be expressed. Program promoters and designers should consider both the advantages and disadvantages, claimed and confirmed, of potential processes in making the selection, as well as their essential elements.

6.12 The terminological difficulties with dispute resolution noted earlier in this Report<sup>8</sup> are nowhere more evident than in connection with courts. The dangers associated with imprecise terminology are heightened when a statute, regulation, court rule or authoritative policy statement adopts a specific reference or operational definition.<sup>9</sup>

6.13 Differences in substance as well as semantics arise when processes developed for private resolution are introduced into the public justice system. The governing purpose for their use frequently has been to streamline the adjudicatory process rather than adopt consensual or collaborative techniques, in which the parties' participation, perceptions and joint problem solving predominate over legal issues and perspectives. The latter approach is not as familiar to the judicial system. There may also be concern about fundamental issues such as the courts' role in and obligations about the fairness of process and outcome in the resolution of disputes. Processes in which the rules of evidence do not apply, or where legal standards are not the only relevant considerations, may sit uneasily in the traditional environment of the judicial process.

6.14 *Mediation* is most commonly adopted when a consensual process is desired. There are many distinct models, and the opportunity for institutional variations across jurisdictions is great.<sup>10</sup> Features such as using a single or co-mediation model, the limits of the mediator's role, and the use of caucuses will vary. Another is the distinction between mediation which is strictly rights-based and mediation which considers the underlying interests of parties, which can also be reflected in the content of any settlement reached. Statutes often require or permit conciliation to be attempted before other methods of dispute resolution are used.<sup>11</sup> The process of conciliation is not defined, and models must be developed within each context.<sup>12</sup>

## **PROGRAM DESIGN**

6.15 The implementation of a consensual dispute resolution program within a court or tribunal will require consideration of several key questions of policy. These need to be determined at the program design stage, so that operational procedures reflect the objectives of the program and preserve the integrity of the process. Although practical concerns are likely to dominate program design, procedures should be consistent with those objectives as well as the principles of the justice system. This section highlights some of the decisions which must be made.

### *Dispute Resolution Database*

6.16 Program designers have a growing number of models on which to draw to determine the most appropriate and effective mechanisms. However access to this information is limited. The Commission's recommendation for the creation of a Dispute Resolution Database should provide a means by which more information is available. Court and tribunal connected programs should be included in the database so that information will be available when a new program is being developed, avoiding both wasted duplication of efforts and idiosyncratic experimentation. A similar project in the United States National Centre for State Courts has created a courts ADR program database.<sup>13</sup>

### *Procedural guidelines*

6.17 The procedures on which any program operates ought to be established in some detail at the design stage, documented and made widely available to all participants and other relevant parties. In the absence of directions and specific operating standards, the quality of the program is threatened. Programs in geographically dispersed jurisdictions need to rely on guidelines for uniformity and consistency. In processes which rely heavily on the personal style of the third party, idiosyncracies should be reduced by reference to standard procedures. The expectations of parties and their legal representatives need to be established and clarified for the process to be most effective.

## **Which disputes?**

6.18 The matters which are to be included in any court or tribunal connected ADR procedure will depend on the objectives of that particular program. The question of suitability must be addressed at two levels: first, in determining the class of matters to which it should apply, and secondly in deciding whether a particular dispute in that class should be included or exempted.

6.19 It is not appropriate that all disputes in which litigation is commenced or applicable should be dealt with by methods other than formal judicial determination. As a matter of public policy, parties should not be deterred from legitimate use of the judicial system and the court's function should not be displaced when issues of law are raised or when it is desirable to establish a precedent or enunciate standards.<sup>14</sup>

6.20 The characteristics of disputes which are considered relevant to determining their suitability for any process include the nature of and relationship between disputants (including their relative power), the dispute's length and complexity, the amount of money at stake and the substance and nature of the issues. Where the selection is based on the substance of the matter a wide range has been considered appropriate, including family dissolution, product liability, professional malpractice, personal injuries, and other tort cases, small claims, commercial causes and minor criminal cases. As yet there is no validated mechanism for matching dispute with process so that the decision about which categories of disputes are suitable must be made in each situation, having regard

to the objectives and process chosen. An alternative approach is to make the processes fully voluntary, that is available in all matters in a jurisdiction, dependent upon the willingness of parties to negotiate a resolution.

6.21 A second level of determining suitability involves considering whether the parties in each dispute are capable of participating as fully as required in the procedure. Involvement is not advocated where parties lack sufficient capacity to understand the purpose of participation and to negotiate for themselves, or where there is a very significant imbalance or inequality of power or capacity.<sup>15</sup> Alternatively, there may be procedural, substantive or other matters in any particular dispute which could make a judicial determination of the issues most appropriate. A mechanism for assessing the suitability of each matter for participation should be available, with guidelines for determining inappropriate cases. Guidelines already in operation for family law matters refer to criteria for excluding matters where there are allegations of abuse or neglect, current history of domestic violence, urgent need for interim relief and previous unsuccessful attempts at mediation.<sup>16</sup> Commercial matters have criteria such as the complexity of questions of law and fact, the expected length of hearing or whether there are allegations of fraud.<sup>17</sup>

#### *Mandatory or Voluntary ?*

6.22 Compulsory participation may be required by statute, court rule or practice direction, or may arise indirectly from the operation of procedures adopted in a jurisdiction. Participation may be defined as attending, attending with authority to settle, or negotiating in good faith. There are complex policy issues involved. Mandatory alternatives to adjudication are justified on the grounds of promoting judicial and administrative efficiency, endorsement by participants, and the educative effect of participation.<sup>18</sup> However, there is undeniable concern that mandatory participation is a denial of access to justice through the courts, that parties are subject to unacceptable pressures to settle, and also that mandatory mediation is a contradiction in terms. Coercion may come about by compulsion to participate, and from covert structural pressures and procedural hurdles which create pressure to settle.<sup>19</sup> Others believe that pressure to enter consensual ADR is acceptable so long as there is no coercion within the procedure.<sup>20</sup> It is claimed that the traditional judicial view that the court has no right to interfere with a party's desire to pursue litigation to trial is being questioned on the basis of efficient use of public resources<sup>21</sup> and that it should not elicit concern if courts encourage parties to attempt amicable resolution.<sup>22</sup>

6.23 There are other aspects to consider when participation is mandatory. One concern is the question of where responsibility lies for deciding that an alternative or adjunct process is to be mandatory. Should this lie with court administrators, judges, or the legislature? Another issue relates to the nature and extent of the participation which may be required, and the possible imposition of sanctions for non-compliance.<sup>23</sup> The court's responsibility for quality control may be expected to be greater in mandatory programs. This would extend to matters such as training requirements, supervision and accountability.

#### **Program operation**

6.24 Several decisions must be made about how any program will operate. These include:

At what stage in the litigation process will the new procedures be available?

Must any conditions be met before the procedure is used?

What time period will be allowed for the process?

Will multiple sessions be available?

On what criteria will a session be adjourned, extended or another convened?

Will parties, legal representatives, witnesses and/or support persons be required or permitted to attend?

Who will have any discretion over attendance?

Will penalties for non-attendance, or inadequate preparation for participation be imposed? Upon whom?



Where will sessions be conducted?

What facilities should be available for use by participants?

6.25 Procedural questions may be inconsistent with processes which are to be much less formal than litigation, but they will be important in the effectiveness of any process. Additional procedural steps such as directions hearings or discovery may be necessary to ensure matters are ready for negotiation. The time allocated should be sufficient. Demands of administrative efficiency must be balanced against the need to provide adequate time for negotiation. It may be necessary to orientate participants to the process, by written or video material. Others may benefit from education about the program's purpose and form. The suitability and convenience of the location and facilities made available will contribute to the program's effectiveness.

### **Personnel**

6.26 Selection, training and qualifications of practitioners in court and tribunal connected dispute resolution programs raise issues considered in Chapter 3 of this Report. The Commission's comments and conclusions should be likewise taken to apply in these settings. There are, however, some contentious issues which should be noted.

6.27 The sources from which personnel are employed depend on the program's objectives, the process involved, human and financial resources available, as well as other less specific influences. Various approaches are currently adopted. Judicial officers or court staff, the legal profession and other professionals, and lay people with relevant experience are being used. Alternatively, the services of an independent public or private dispute resolution agency may be used. No one approach is to be generally preferred, and there is no evidence that any one class of people is automatically qualified by occupational background alone to effectively perform in a particular program.

#### *Judicial officers*

6.28 One contentious area is the use of judicial officers in the role of mediator, conciliator or arbitrator. It does not occur often, but it may in at least one Australian court.<sup>24</sup> It is argued that not only because of their training, experience and disposition are they unlikely to be accustomed or suited to the role of conciliator, but that the confusion of this role with that of impartial adjudicator is undesirable.<sup>25</sup> There is serious concern that actual or perceived breaches of the rules of natural justice will result when the person who mediates a matter may then have responsibility for adjudicating it if no settlement is reached.<sup>26</sup>

6.29 Other concerns relate to the risk of conscious or unconscious coercive pressures on parties from the authoritative judicial position. A similar concern is expressed when other court employees are used. It is feared that proximity to the court and the shadow of the law will inhibit parties' voluntary negotiation of a resolution. On the other hand, some see value in using judges as mediators, although appreciating that not all judges make good mediators. One premise is that judicial authority itself should inspire the parties to serious participation.<sup>27</sup> It is also recognised that judicial skills should be adaptable to the new roles, but that they and other court officials need adequate and systematic education in the techniques they will use.<sup>28</sup> In private dispute resolution former judges are popular as mediators as well as adjudicators.<sup>29</sup>

#### *Public or private sector?*

6.30 There appear to be differences in the conduct of processes between personnel from the private sector and the public.<sup>30</sup> There may be advantages in distancing the process from the court and bureaucratic environment; however, this may also present difficulties in supervision and accountability, as well as potential constitutional concerns. Using the public sector (either court staff or other agencies) generates greater administrative efficiency and accountability, but there is a danger that bureaucratic concerns will predominate where the fact of, rather than the quality of, settlement may be the goal. In such circumstances durable outcomes, user satisfaction and procedural protections may not be achieved.

## **Selection**

6.31 The selection of personnel for these programs is likely to be affected by economic and organisational constraints. These may require that existing judicial officers, court staff or the legal profession are used. Where a discretion can be exercised, preferences for criteria related to personal qualities and commitment to consensual processes have been expressed<sup>31</sup> although views differ as to appropriate selection criteria.<sup>32</sup>

6.32 In the absence of accepted measures of ability, program administrators are likely to rely on a combination of reputation, eagerness and availability.<sup>33</sup> Training and supervision should be directed at ensuring quality of service by practitioners, whatever their background qualifications and experience.

## **Training**

6.33 The overwhelming acceptance of the need for training applies as much to programs connected to courts and tribunals as to private dispute resolution.<sup>34</sup> Unfortunately, there is evidence which suggests that of all alternative dispute resolution options available, court connected programs compare poorly with formal training in dispute resolution techniques provided or required of practitioners.<sup>35</sup> Although the problems of access to training are acknowledged,<sup>36</sup> the Commission strongly recommends that practitioners within court and tribunal connected programs be required to undertake appropriate training. This should include knowledge and skills in consensual dispute resolution as well as knowledge of the subject matter and procedures of the jurisdiction.

## **Funding**

6.34 Financial liability for programs connected to courts and tribunals is another critical issue. Resources in the judicial system are limited, and although consensual processes may be seen as the cheaper alternative, they still require an adequate allocation of resources to be effective.<sup>37</sup> The issue of funding should be addressed at the program design stage.

6.35 Various sources of funding may be available for experimental programs in courts and tribunals, including governments, statutory interest accounts, the Law Foundation, philanthropic organisations, legal aid, professional pro-bono activities and financing, filing fees and direct fee-for-service payments. Existing programs rely on substantial government funding, although in some the parties pay the direct costs of the neutral third party. The best mechanism for financing is not obvious. The option chosen will reflect available resources, as well as the nature of disputes including the amount at stake, the parties' resources, whether court or external personnel are used and whether participation is mandatory or voluntary, as well as the program objectives.

### *State funding*

6.36 Controversy surrounds the view that the State should provide and heavily subsidise dispute resolution options other than litigation.<sup>38</sup> It is argued that the external benefits flowing from the reduced demand for scarce judicial and court resources are sufficient to justify the State accepting this financial responsibility. It is not only the parties themselves but other users of the court system who benefit from the effects of higher settlement rates. Cost savings in court time and personnel may more than offset the public investment in ADR, and other intangible benefits may flow to the community from less reliance on litigation.<sup>39</sup> On the other hand it is believed that the substantial benefits to parties justify their contribution to meeting costs. No preference can be expressed here. The cost/benefit analysis relies on evidence not readily available, so the question remains open.

## **FOOTNOTES**

1. Prime Minister's Fourth Term Initiatives Statement March 20, 1990, implemented by the Courts (Mediation and Arbitration) Act 1991 (Cth).

2. Law Council policy see "LCA Adopts Policy on Alternative Dispute Resolution" (1989) 24 *Australian Law News* (9) 15. See also Chapter 2 para 2.35.

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3. But see Victoria *Attorney-General's Working Party on Alternative Dispute Resolution Report* (Attorney-General's Department, Melbourne, 1990); Australian Institute of Judicial Administration research project (current); Society of Professionals in Dispute Resolution (SPIDR) *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (Draft, July 1990) (SPIDR Mandatory Participation).
4. See also Susan Keilitz "A Court Manager's Guide to the Alternative Dispute Resolution Database" (1990) 14 *State Court Journal* (4) 19.
5. Marc Galanter "Reading the Landscape of Disputes: What We Know and Don't Know (and think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCL4 Law Review* (4) 4 at 28.
6. Richard Ingleby, "Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution" Paper presented to AIJA Conference, Melbourne 18 August 1990.
7. Robert Dingwall and John Eekelaar "A Wider Vision" in Robert Dingwall and John Eekelaar (eds) *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford, 1988) 168 at 176, after J Bell "The Judge as Bureaucrat" in J M Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence* (3rd ser) (OUP, Oxford, 1987); Sir Gerard Brennan "Safeguarding the Courts" (1990) 25 *Australian Law News* (4) 7.
8. Chapter 2, paras 2.1 - 2.10
9. See for example the Family Law Act 1975 (Cth) which espouses consensual dispute resolution and which has a bewildering use of terminology (David Truex "Mediation the Semantic Dispute" *National Bicentenary Family Law Conference Proceedings*, (BLEC, Melbourne, 1988) 178 at 180) including "conciliation", "counselling" and "reconciliation." A Family Court Mediation Service and mediators are to join conciliation counsellors and Registrars who conduct conciliation conferences. Independent mediation services are funded by a mechanism which treats the definition of marriage counselling in the Act as sufficiently broad to include mediation.
10. Hugh McLissac "Mandatory Conciliation Custody/ Visitation Matters: California's Bold Stroke" (1981) 19 *Conciliation Courts Review* (2) 43-51.
11. Anti-Discrimination Act 1977 ss 92, 106, Workers Compensation Act 1987 ss97, 102.
12. David Bryson "Mediator and Advocate: Conciliating Human Rights Complaints" (1 990) 1 *Australian Dispute Resolution Journal* 136.
13. Susan Keilitz "A Court Manager's Guide to the Alternative Dispute Resolution Database" (1990) 14 *State Court Journal* (4) 19.
14. But see Chris McRobert "Mediation in Local Courts" (1991) 2 *Australian Dispute Resolution Journal* 94 at 97.
15. See Robert H Mnookin 'Divorce Bargaining: The Limits on Private Ordering' (1984-5) 18 *University of Michigan Journal of Law Reform* 10 15.
16. New South Wales Legal Aid Commission *Policy Manual* at 37A.
17. Local Courts (Civil Claims) Act 1970 s21 H (3) ; District Court Act s63A in relation to arbitration; Magistrates Act 1989 (Vic) s102(3).
18. SPIDR *Mandatory Participation* note 3 at 11 - 12.
19. eg withdrawal of legal aid for failure to genuinely participate in mediation, costs sanctions for failure to attend, or the exercise of an option for trial or re-hearing: see Julian Reikert "Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?" (1990) 0 I *Australian Dispute Resolution Journal* 31; Dingwall and Eekelaar note 7 at 171; Robert E McGinness and R J Cinquegrana "Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program" (1982) 67 *Massachusetts Law Review* 123 at 125.

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20. Stephen B Goldberg, Eric D Green and Frank EA Sander(eds)*Dispute Resolution* (Little, Brown and Co, Boston, 1985).
21. Paul de Jersey "Alternative Dispute Resolution: Why All the Fuss?" Paper presented to AIJA Conference, Melbourne 18 August 1990 at 7.
22. Sir Laurence Street "The Court System and Alternative Dispute Resolution Procedures" (1990) 1 Australian Dispute Resolution Journal 5 at 10.
23. Margaret Shaw and J Michael Keating *Alternative Dispute Resolution Programs in Ohio, Michigan and Illinois* (Institute of Judicial Administration, New York, 1990) at 82.
24. Federal Court of Australia Rules of Court O.10 r 1(2)(9). Supreme Courts in Western Australia and Queensland, as well as several District Courts use judges and Registrars in this role.
25. Justice Gleeson, Chief Justice of New South Wales quoted by Alan Limbury "A Practitioner's View of ADR" Paper presented at the AIJA Conference, Melbourne 18 August 1990 at 12-13.
26. Victoria *Attorney-General's Working Party Report* note 3, paras 3.7,6.19; Judith Resnik "Managerial Judges" (1982) 96 *Harvard Law Review* 376; but see Steven Flanders "Blind Umpires - A Response to Professor Resnik" (1984) 35 *Hastings Law Journal* 505.
27. R S French, "Hands On Judges, User Friendly Justice" Paper presented at AIJA Conference, Melbourne 18 August 1990 at 18.
28. Id; de Jersey note 21 at 6.
29. In this State the former Chief Justice, Sir Laurence Street frequently acts as a mediator and expert appraiser.
30. Jessica Pearson, Nancy Thoeness "Divorce Mediation: An American Picture" in Robert Dingwall, John Eekelaar (eds) *Divorce Mediation and the Legal Process* note 7 at 21.
31. See para 3.27-3.33.
32. But see Brad Honoroff, David Matz, David O'Connor "Putting Mediation Skills to the Test" (1990) 6 *Negotiation Journal* 37, using an approach devised by Christopher Honeyman, "On Evaluating Mediators" (1990) 6 *Negotiation Journal* 23; and paras 3.31-3.38.
33. Honoroff et al note 32 at 37.
34. See Chapter 3 paras 3.1-3.10.
35. See Jennifer Adams Mastrofski "Mediation in Court-Based Systems: More Variations than Similarities" (1990) 6 *Negotiation Journal* 257; Tillett.
36. DP 21 para 3.21.
37. Greg Tillett "Conciliation: Processes, Projections and Problem" Address to the National Conciliators' Conference, Sydney May 1990 at 10.
38. See Rowland Williams "Should the State Provide Alternative Dispute Resolution Services?" (1987) 6 *Civil Justice Quarterly* 142.
39. Canadian Bar Association Task Force Report: Alternative Dispute Resolution (Canadian Bar Association, Ottawa, 1989) at 70.

## 7. Recommendations for Advisory Council and Database

### RECOMMENDATIONS

The Commission recommends that an Advisory Council on Dispute Resolution be established with the primary function of advising the Government on dispute resolution policy issues.

Members of the Advisory Council should be broadly representative of practices, programs, and users which will ensure that its advice to the Government will enable policies to be developed which are effective across the diversity of dispute resolution practice.

The Commission further recommends that the Advisory Council have responsibility for the creation and publication of a Database of dispute Resolution containing information about programs, agencies, practitioners and training, which will assist the Advisory Council in preparing advice to the Government and allow the public to make more informed choices about dispute resolution options.

#### The rationale

7.1 The Commission believes these recommendations will meet the needs for government regulation which have been identified.<sup>1</sup> The first is the need for the public to have information about the nature of dispute resolution options available and qualifications of practitioners. The second relates to the State's responsibility for providing information about dispute resolution.

7.2 The creation of a representative body to provide advice to the Government on dispute resolution practice will enable informed policy decisions to be made. Its advice will contribute to a better understanding of how quality dispute resolution may best be achieved by considering issues such as training, standards of practice and guidelines for the implementation and operation of services.

7.3 Public benefits will flow from the public disclosure of the information in the Database about dispute resolution services. The information which the Commission proposes for inclusion is noted below at para 7.23. Public access to information will enable parties to make more informed choices about the use of these dispute resolution options. It will provide comprehensive and up-to-date information on which the Advisory Council can base its advice to the Government about developments in dispute resolution on which an assessment can be made about the need for regulation and how it may best be achieved. There may be benefits conferred on those who are recognised by inclusion on the Database, but these are not sufficient to distort the benefits to the public. It should contribute to the development of standards of practice by signalling to program designers and practitioners intending to enter the field the commonly held qualifications of practitioners and the usual characteristics of a service.

7.4 A greater degree of regulation or control is currently not warranted. The risks of harm from the activities of mediators are at an acceptable level in the circumstances, particularly when other mechanisms for accountability and quality control are available. In this Report the Commission has indicated the formative state of dispute resolution practice in Australia and the uncertainty which exists about standards of practice on which more formal regulation could rely. The proposal for a Database should be cost effective; although it will require modest funding from the State, indirect benefits to the public purse will flow from the greater use of dispute resolution processes outside the formal judicial system.

### ADVISORY COUNCIL

#### Membership

7.5 The Advisory Council should comprise representatives of a range of interested parties, selected by the Minister for the breadth, depth and objectivity of the advice they can give. The representatives should include practitioners and administrators of dispute resolution from different services and diverse contexts, members of professional associations, people with expertise in teaching and training, and those who can offer academic and

research perspectives. The Council should have judicial and executive representatives, legal profession and consumer participation.

7.6 The widely based representative composition of the Advisory Council is very desirable. In the administrative structure until recently operative in this State, the Attorney General has had responsibility for, and received advice about dispute resolution policy from, the Community Justice Centres Council, the Australian Commercial Disputes Centre as well as courts' administration. The contribution of each to the Advisory Council will be valuable. However, the composition of the Advisory Council must embrace the full spectrum of dispute resolution service providers and programs. It must have a comprehensive approach to policy making which will be ensured with representatives drawn from all groups concerned with practice.

7.7 Participation of dispute resolution practitioners themselves is very desirable and will be most valuable. Their knowledge and experience will inform and direct the Council, and is likely to make the Council more successful in earning acceptance and support from practitioners generally. Practitioner involvement will reflect the responsibility they take for developing their own standards. For these objectives to be achieved, it is necessary that representation should be substantial and reflect the full diversity of programs and processes.

7.8 The Commission expects the Advisory Council to offer a mechanism for promoting co-operation and greater knowledge and understanding among the various branches of the dispute resolution community. The Council should provide practitioners with a forum in which to overcome the relative isolation of different areas and styles of dispute resolution which the Commission has identified, and also the professional tensions and rivalries which have been observed.<sup>2</sup>

7.9 There are good reasons for the involvement of the other groups proposed. The legal profession traditionally advise their clients on options for resolution of disputes. They also currently play a significant role in provision of mediation and accreditation of mediators, and supporting alternatives to litigation. Public participation will provide the balance and insight to the consumers' perspective. The role of the executive and judiciary reflects the State's responsibility for dispute resolution in the community, and the extent to which dispute resolution processes are now part of the justice system. However, the weight of participation should not be in favour of government, the judiciary or, indeed, the legal profession.

### **Responsibilities and functions**

7.10 The principal function of the Advisory Council is to provide advice to the Government on dispute resolution practice. Creation and supervision of the Dispute Resolution Database would be a major responsibility. Information gathered by this means and by consultation should provide the basis for the Council's advice to the Government. Its role in relation to practitioners would be consultative, educative, and information-gathering, but not regulatory or disciplinary.

7.11 The Advisory Council should provide advice at the request of the Government, but should also initiate consideration of issues relevant to its advisory role on dispute resolution. It should report to the Minister directly on matters referred to it, and on any other matter it determines necessary. In addition it should be required to report annually to the Minister for presentation to Parliament.

7.12 The Council should also be able to contribute to informed debate on dispute resolution policy amongst practitioners and the general public. It should be able to make a valuable contribution on many policy issues, both as a source of information and analysis. This role could be performed by various means, including:

- commissioning and in other ways supporting research and evaluation of dispute resolution practice;

- publishing materials relevant to dispute resolution policy and practice;

- acting as a clearing-house for information;

- and encouraging and providing a forum for public debate.

7.13 The Dispute Resolution Database would be created and maintained at the direction of the Advisory Council. The operation of the Database is considered below.

7.14 The Advisory Council should also act as a reference point on dispute resolution for the general public. The Council should be able to consider matters of concern referred to it by any interested party. Its activities could be directed at educating the community about the full range of dispute resolution processes, their availability and use.

### **Organisation**

7.15 The effectiveness of the Advisory Council will depend on adequate resources and staff being made available. The Council would require a permanent secretariat, albeit of a very modest size. Most of its functions, including management of the Database, could be carried out by one officer with secretarial support.

7.16 The Council's effectiveness will also depend on its independence and ability to represent the entire spectrum of dispute resolution practice. It should have personnel and a location separate from courts' administration, and from any one area of dispute resolution practice in the public or private sector.

## **THE DISPUTE RESOLUTION DATABASE**

### **Creation of the database**

7.17 The Database would be created by individuals, firms, programs or services making application for inclusion, with listings providing information about their services. Categories should be created to allow for listing of private practitioners, either individually or collectively, and for listing private and public programs and agencies, and court and tribunal connected programs. A category for training courses should be considered. This would enhance its consumer protection function by providing better information about the nature of practitioner qualifications.

### **Eligibility for inclusion**

7.18 Participation should be voluntary. The Commission recognises that its voluntariness may limit the effectiveness of the Database but believes that a compulsory approach at this time is neither necessary nor desirable.

7.19 The Database should contain information about practitioners and programs of consensual dispute resolution as defined for the purposes of this Report. This will allow sufficient flexibility to reflect the changes and developments in methods of dispute resolution which will undoubtedly occur. A more narrow approach would limit the effectiveness of the information-gathering function and risk imposing unnecessary restrictions on the way dispute resolution methods develop.<sup>3</sup>

7.20 The Advisory Council should be responsible for determining appropriate guidelines for inclusion in the Database. It is envisaged that these guidelines should be minimal, with relevance being the dominant criterion. Provision should be made in the guidelines for the grounds on which an entry may be rejected or withdrawn from the Database, for example information about programs or qualifications which is false or exaggerated.

7.21 Private practitioners with relevant training and/or experiences should be entitled to offer information for inclusion. Programs or agencies which offer to the public a formal dispute resolution service should be entitled to an entry. It may not be appropriate for a program or service which operates privately, such as internal grievance processing mechanisms within a firm, Organisation or association to seek inclusion, although some of these have a public profile and a significant role in the development of dispute resolution practice. Neither is it appropriate for the advertising of the informal practice of conflict resolution.<sup>4</sup> A category for programs which are connected to courts and tribunals is also necessary. This includes programs where services are provided other than by court personnel, and where external agencies or providers are used.

### **Information on the database**

7.22 The information which is recorded and published in the Database should specify the range of services available to the public and should inform the Advisory Council and the Government about dispute resolution practice in the State. Although reasonable effort should be taken to verify the information which is published, there would be no warranty to consumers of its correctness, nor of the competence or appropriateness in any situation of any provider or service included. Publication should not be construed as endorsement.

7.23 The information which the Commission believes should be on the Database is indicated below.

**Practitioners**

*Identification: name, address, telephone*

Training courses completed

Accreditation/qualifications awarded Professional associations

Other relevant training, education, experience Services, procedures provided.

**Dispute resolution programs**

*Identification: name, address, telephone*

Management and governing body

Staff and their qualifications

Services and procedures available

Type of cases accepted

Other service information, including client eligibility, fees, and rules.

**Court and tribunal connected programs**

Procedures available

Eligibility

Staff and their qualifications

Other program information.

**Training courses**

Course type, duration, frequency

Eligibility

Curriculum

Methodology

Assessment and qualifications awarded.

**Management**

7.24 Administrative functions associated with the Database would extend to applying any guidelines for inclusion, preparing the information and maintaining its currency, and arranging for printing, publication and distribution. Effectiveness of the Database will depend on its dissemination and encouragement for the community to use the information it contains.

**FOOTNOTES**



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1. See Chapter 4 paras 4.15-4.27.

2. See for example "Peacemakers at Each Others Throats" *Business Review Weekly* June 9,1989; Wendy Faulkes "The Modern Development of Alternative Dispute Resolution in Australia" (1990) 1 *Australian Dispute Resolution Journal* 61 at 67; Wade.

3. See Chapter 2 paras 2.5-2.10.

4. See Chapter 2 paras 2.15-2.17.

## Appendix A - Submissions Received

The following submissions were received in response to the Discussion Paper. They are referred to in the text of the Report as indicated within the brackets.

Justice T R Hartigan, President, Administrative Appeals Tribunal (AAT)

Australian Dispute Resolution Association (ADRA)

Judge Brebner, District Court of South Australia

Community Justice Centres Council (CJC)

Mr Philip Davenport, NSW Public Works (Davenport)

Ethnic Affairs Commission of New South Wales (Ethnic Affairs)

The Family Mediation Centre (NSW) (FMC)

Mr David Fine (Fine)

Ms Linda Fisher (Fisher)

Mr David Foffest (Foffest)

Ms Helen Gerondis (Gerondis)

Gosnellis District Information Centre (Gosnell DIC)

Mr Jock Grice

Mr Gracme Harvey, Social Ecology Associates (Harvey)

Dr Richard Ingleby (Ingleby)

Law Council of Australia, Family Law Section (FLSLCA)

The Institute of Arbitrators Australia, NSW Chapter (I Arb A)

Law Institute of Victoria (LM)

Lawyers Engaged in Alternative Dispute Resolution (LEADR)

Community Dispute Resolution Service, Lismore Neighbourhood Centre (Lismore NC)

Ms Virginia Lecuwenburg (Leeuwenburg)

Mr Chris McRobert (McRobert)

Marriage Guidance Council of South Australia (MGCSA)

Mediation Association of Victoria (MAV)

Dr Gordon Meggs (Meggs)

Mr C H Monk (Monk)

## **NSW Law Reform Commission: REPORT 67 (1991) - TRAINING AND ACCREDITATION OF MEDIATORS**

New South Wales Law Society, Dispute Resolution Committee (Law Society) Mr Warren Pengilley (Pengilley)

Ms Emilia Renouf (Renouf)

South Australian Dispute Resolution Association (SADRA)

Southern Community Mediation Service (SCMS)

Dr Greg Tillett (Tillett)

Ms Liesbeth van Tongeren (van T)

Professor John Wade (Wade)

Western Australian Dispute Resolution Service (WADRS)

In the course of the reference submissions were also received from:

Australian Commercial Disputes Centre, Sydney (ACDC)

Community Justice Program, Queensland

Fairfield Neighbourhood Centre (Community Mediation Centre)

The Family Mediation Centre (NSW)

Mr Chris Hawke

The Institute of Arbitrators Australia (NSW Chapter)

Lawyers Engaged in Alternative Dispute Resolution (LEADR)

Legal Aid Commission of Victoria

Mediation Association of Victoria

New South Wales Law Society Dispute Resolution Committee

Southern Community Mediation Service (SCMS)

Youth and Family Service (Logan City)

## Appendix B - Community Mediation Services

### New South Wales

Community Justice Centres, at Surry Hills, Bankstown, Penrith, and Wollongong

Fairfield Community Mediation Service, Fairfield Neighbourhood Centre

Community Dispute Resolution Service, Lismore Neighbourhood Centre

### Queensland

Dispute Resolution Centres (Qld) Community Justice Program, at Brisbane, Logan City and Toowoomba

Dispute Resolution Centre, Caxton Legal Centre, Brisbane

Mediation Matters, Atherton Tablelands

### South Australia

Neighbourhood Dispute Service, Bowden/Brompton

Southern Community Mediation Service (Noarlunga)

Community Mediation Service (Norwood)

Willunga Community Dispute Mediation Service

### Australian Capital Territory

Conflict Resolution Service

### Victoria

Northern Suburbs Dispute Resolution Centre (Preston)

Outer East Dispute Resolution Centre (Wantirna South)

Inner South Dispute Resolution Centre (Windsor)

Frankston Dispute Resolution Centre

Geelong Dispute Resolution Centre

Bendigo Dispute Resolution Centre

Morwell Dispute Resolution Centre

### Western Australia

Gosnells Family/Neighbourhood Mediation Service

Citizens Advice Bureau of Western Australia

### Tasmania

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Community Mediation Service, Tasmania (Hobart)

## Appendix C - Family Dispute Resolution

### Family Mediation

The following family mediation services receive funding from the Federal Attorney-General's Department:

Canberra Mediation Service

Family Life Movement of Australia

Legal Aid Commission of New South Wales

Legal Aid Commission of Victoria (in conjunction with Marriage Guidance Council of Victoria and Family Mediation Centre, Noble Park)

Marriage Guidance Council of New South Wales Couples Mediation Service

Marriage Guidance Council of Victoria Family Mediation Service

Marriage Guidance Council of Queensland Family Mediation Service

Marriage Guidance Council of South Australia Family Mediation Service

Marriage Guidance Council of Western Australia

The Family Mediation Centre (NSW)

Family Mediation Centre, Noble Park

Co-operative Family Mediation Service (jointly provided by Centacare, Family Court of Australia and the Marriage Guidance Council of NSW)

Family Mediation, Tasmania

Marriage Guidance Council of Tasmania

Other services mediating family disputes:

Caxton Legal Service Dispute Resolution Service (Brisbane)

Gosnells Family/Neighbour Mediation Service(WA)

Community Justice Centres (NSW)

Dispute Settlement Centres (Vic) (minimal caseload)

Conflict Resolution Service, Canberra Dispute Resolution Centre, Community Justice Program (Qld)

Except as noted, the following services receive funding from the Commonwealth Attorney-General's Department. Some of these programs are not fully operative as at June 1991.

Hassles Family Mediation Centre, Launceston (Anglicare)

Options Family Mediation Centre, Hobart (Anglicare)

Parent-Adolescent Mediation Centre, Family Mediation Centre, Noble Park

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PAX, Parent-Adolescent Conciliation and Counselling Service, Adelaide

RAPS (Regional Adolescent Mediation and Family Therapy Program), Parramatta

Youth Service Providers, Cairns

Youthlink Mediation Project, Youth and Family Service, Logan City

Youth Mediation Service, YMCA Streetsyde, Perth

Adelaide Central Mission, Adelaide

Watsonia Shopfront Family Resource Centre

Anglicare, Darwin

Rural City of Wodonga

Northern Suburbs Dispute Settlement Centre (funded by Victorian Department of Labour)

Community Justice Centre, Penrith (funded from within CJC program)

## Appendix D - Commercial Dispute Resolution

Resolution of disputes in commercial matters is available through the following organisations. The \* indicates that matters other than commercial are also handled.

Australian Commercial Disputes Centre, Sydney

Australian Commercial Disputes Centre, Brisbane

Australian Centre for International Commercial Arbitration (ACICA), Melbourne

The Institute of Arbitrators Australia (Chapters in each State)

Queensland Bar Dispute Resolution Scheme\*

Victorian Bar Dispute Resolution Scheme\*

Western Australian Dispute Resolution Scheme\*

LEADR (Accreditation given to lawyer mediators)

Dispute Resolution Centre, Bond University\*



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