Australian Law Reform Commission

Issues Paper 22

Review of the adversarial system of litigation

Rethinking family law proceedings

You are invited to provide a submission or comment on this Issues Paper.

IP 22
November 1997
12. The culture of family dispute resolution

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Introduction

12.1 This chapter discusses the prevailing culture in family law proceedings. One of the main objectives of the Family Law Reform Act 1995 (Cth) was to move away from a system in which litigation was the primary form of decision making and to make non-litigious dispute resolution the primary option. This objective is specified in the Act. This legislative change is only one part of the process of changing the culture of legal practice. Lawyers, their clients and the courts also need to change the ways in which they perceive their relationships and responsibilities.

Judicial culture

Judicial attitudes to managerial judging

12.2 Chapters 6 and 9 discuss some constitutional and other legal constraints on managerial judging and the use of non-adversarial procedures. The legal background and training of judges may also reduce their propensity to take a more interventionist approach.

12.3 Family Court judges already have considerable powers to control the conduct of litigation but may not use those powers as much as they could. Many Australian judges may view the exercise of such powers as appropriate only in exceptional circumstances.

12.4 To some extent, this reluctance to use interventionist powers may result from the tendency to appoint judges from the ranks of practising lawyers with significant litigation experience. Judges may be predisposed towards courtroom dynamics that minimise judicial participation. They may also be reluctant to gain a ‘reputation’ as a judge who unduly interferes in case conduct. The views of legal practitioners and fellow judges may influence their attitudes.

12.5 Judges’ perceptions of their role may also limit the extent to which they are prepared to intervene in case conduct. Despite widespread support for measures to streamline adjudication, or divert disputes from the court system, many judges ultimately view their

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role as determining disputes presented by the parties. Judges may therefore not be prepared to implement measures that restrict, or overturn, basic principles such as party control of the litigation process.4

12.6 The Commission is interested in comment on the extent and appropriateness of Family Court judicial intervention in trials.

Judicial attitudes to PDR

12.7 Section 14F of the FLA requires courts exercising jurisdiction under the FLA to consider whether to advise parties about primary dispute resolution (PDR) processes that could be used to resolve their disputes. There has been no substantial research into judicial attitudes towards primary dispute resolution (PDR) processes in family law. However, a 1994 survey into the attitudes of Federal Court judges towards dispute settlement indicated that most judges believed settlement before trial was preferable to going to trial.5 Judges generally considered that it was appropriate for them to encourage parties to settle the dispute before trial or to advise parties to seriously consider alternative means of dispute resolution. However, the judges did not view themselves as having a role in the actual process of settlement. This accords with current Federal Court practice where pre-trial settlement conferences or court referred mediation sessions are usually conducted by registrars rather than judges.6

12.8 Most judges did not believe that participation in pre-trial settlement processes should be mandatory before parties are entitled to a judgment of the court.7 According to one judge

Our experience is that not every case is suitable for mediation. It is often better to let a case run. Many cases settle without the need for any settlement or mediation conference. One needs to have an appreciation of which cases are likely to be helped by mediation and which are not. If one sends cases indiscriminately for mediation, one will impose on parties the burden of unnecessary and wasted expenditure. This is something of which the judges of this Court are very conscious.8

12.9 Comments are sought on the attitudes of the Family Court and courts of summary jurisdiction to PDR in family law proceedings.

Q.12.1 What are the attitudes of Family Court judges to litigation and PDR? Do these judicial attitudes vary depending on the type of case — if so, how?

Q.12.2 What are the attitudes of the Family Court and other courts to PDR in family law proceedings?

Q.12.3 Should section 14G of the FLA be amended so that courts exercising jurisdiction under the FLA must advise the parties to proceedings about PDR methods and not merely consider whether or not to advise the parties?

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7. Id 224.
8. Ibid. The author of the survey preserved the anonymity of the respondents.
Lawyers' culture

12.10 An adversarial 'mind-set' may well extend beyond the conduct of litigation to affect many areas of legal practice. Most lawyers are not litigators and even those who are generally have few matters that proceed to a completed trial. Many lawyers, particularly those who practise regularly in family law, may seek to achieve non-litigious resolution of disputes. Sometimes it may be a client who insists on litigation or a hardline posture. Nevertheless, there is a pervading consciousness in legal practice that litigation is the possible conclusion of any contract, trust or deed of conveyance drawn up or any legal advice tendered. The attitude of many lawyers understandably is one of precaution and anticipation of litigation.

12.11 The aim is to avoid litigation not to invite it. However, such a perspective may bring with it a time-consuming, complex and costly regime directed at covering every circumstance and eventuality. This is the service that lawyers most often provide and it is one that is expected of them by clients who seek legal assistance. The Commission is interested in comments on the extent, if any, to which lawyers are excessively or inappropriately adversarial in their approach to family law.

12.12 Chapter 3 referred to possible differences between legal practice in different regions as one explanation for regional variations in the number of family law matters that proceed to trial. Specifically it was suggested that the Sydney and Parramatta legal professions may be more litigious than their colleagues elsewhere.

12.13 The Civil Justice Research Centre (CJRC) compared civil litigation charging practices and costs as between Victorian and New South Wales firms. It found that a greater number of matters proceeded to verdict in the NSW sample than in the Victorian sample and that there was a consistent trend for both legal costs and the amount recovered by the plaintiff to be higher in NSW. The survey was unable to explain why these differences occurred and suggested further research was necessary to do that. The Commission is interested in comments on whether there are regional differences in family law practice and the causes of these differences.

Q.12.4 To what extent, if any, is the culture of the legal profession in family matters adversarial? What impact does legal culture have on the nature of the proceedings?

Q.12.5 What are the explanations for regional differences in family proceedings with respect to costs and matters proceeding to trial?

Professional ethics

12.14 The term 'professional ethics' refers to specific rules of conduct, rather than any broad notion of social morality or general ethics. Professional ethics centres on a series of duties which legal practitioners owe

- to the law
- to the courts
- to their clients
- to their profession.

9. This did not include family law matters.
12.15 These duties are codified in part by legislation and the rules which govern the conduct of legal practitioners in each jurisdiction and are also based on case law. Ethical duties are administered by courts, which enforce standards of professional behaviour required by law, and professional associations which have the power to discipline their members for breaches of the association’s rules of conduct.

12.16 Commentators have suggested that lawyers’ ethical rules can be interpreted to allow for minimal compliance with their general principles. Thus it has been noted that

Lawyers tend to see rules as things to be circumvented in the pursuit of the client’s interests. They may be honoured in the letter but ignored in the spirit. This is a potentially dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law then the underlying aim soon becomes avoidance rather than compliance. This is, of course, the type of complaint most commonly made of lawyers.11

12.17 For example, duties to the administration of justice may be interpreted narrowly so that they do not restrict a lawyer’s ability to present the best possible case for a client. Distinctions may therefore be made between fabricating evidence and not disclosing evidence.12 The consequences of this lack of candour in litigation can include

- the deliberate suppression of relevant but unfavourable evidence
- the selective presentation of part of the evidence
- the selective presentation of biased expert evidence
- the failure to admit the truth of the facts asserted by the opposition
- the use of tactical attacks on the credibility of witnesses to suggest that the witness cannot be believed on oath, even though their evidence is known to be true.13

12.18 Comment is sought on the way in which family law practitioners balance their duties to clients with duties to the administration of justice. In particular, comment is sought on the extent to which legal practitioners assist the court in ascertaining evidence relevant to the best interests of children. The Commission also seeks comment on the Law Society and Bar Association codes of conduct and guidance for lawyers in family law proceedings. For example, the Law Society of New South Wales has issued a Family Law Advisory Code of Practice which includes provisions on conduct and responsibilities. It provides, amongst other things, that the client’s legitimate interest is paramount subject only to the relevant provisions of the law relating to the interests of children.14

12.19 Legislation and the ethical rules in other common law jurisdictions in some cases is more stringent. Provisions of the United States Federal Code of Civil Procedure (FCRP) are an example. The FCRP provides that an attorney of record, by presenting a pleading, written motion or other paper to the court, certifies that to the best of the attorney’s knowledge, formed after reasonable inquiry

- the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation
- any legal contentions are warranted by existing law
- any allegations and other factual contentions have evidentiary support
- any denials of factual contentions are warranted on the evidence.15

These requirements are backed up by monetary sanctions able to be awarded against defaulting attorneys and their law firms.

**Q.12.6** How effective are the professional rules and codes of conduct in mandating appropriate conduct for lawyers acting in family proceedings? Should the rules be more prescriptive and, for example, give greater guidance on cases involving children?

### Non-adversarial legal practice

12.20 Section 14G of the FLA requires legal practitioners acting in family law proceedings to consider whether to advise parties about primary dispute resolution processes that could be used to resolve their disputes. Many lawyers have a limited familiarity with prescriptive, alternative dispute resolution processes. Family law practitioners, on the whole, may have a better understanding and commitment to such processes than those who practise in other areas. While there is now a greater awareness of alternatives, some lawyers may be resistant to change or consider PDR processes as inferior to judicial dispute resolution or as a form of competition to their own professional service. At the same time there is an active body of support for PDR within the profession and increasing numbers of lawyers offer a range of facilitative dispute resolution services.16

**Q.12.7** What level of support is there within the legal profession and its professional associations for the promotion of PDR within family law? What, if anything, is needed to improve this level of support?

**Q.12.8** Should section 14G of the FLA be amended so that legal practitioners acting in family proceedings must advise the parties to proceedings about PDR methods and not merely consider whether or not to advise the parties?

### Legal education and training

12.21 Many commentators have stressed the need for undergraduate legal education to encompass broader considerations of legal and social ethics.17 Over the last decade, many law schools have begun to use an interdisciplinary approach to legal education which seeks to place substantive law in a broader social context. Many law schools also now incorporate material on alternative dispute resolution processes into their curriculum, or offer electives which deal specifically with such dispute resolution.

12.22 Practical legal training institutes have also adopted a broader approach to practical training, and include components in their curricula which cover legal ethics and non court-based forms of dispute resolution. There are also a substantial number of continuing

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16. eg Lawyers Engaged in Alternative Dispute Resolution (LEADR).
education programs for practitioners which provide information on non-adversarial processes and accreditation for lawyers wishing to engage in alternative dispute resolution practices.\textsuperscript{18}

12.23 A separate Commission issues paper discusses the role of legal education and training in more detail.\textsuperscript{19}

| Q.12.9 What role does legal education play in establishing the legal culture in the area of family law? |
| Q.12.10 To what extent has legal education and training adequately reflected and developed in response to changes in family law, particularly the development of PDR? |
| Q.12.11 Are there any changes necessary to legal education in relation to family law? For example, should there be more emphasis on negotiation and facilitation skills, on social sciences relating to family dynamics and child development, as well as on representing children? |

Public awareness of legal rights and processes

12.24 Within the broader community, knowledge about law and the litigation system is limited. Public awareness about the litigation system is shaped predominantly by media accounts of court proceedings and the dramatic nature of courtroom interaction. This creates an expectation that litigation is the usual way in which the legal system resolves disputes. The dramatic content of television trials may underscore a litigant's need for and expectation of their 'day in court'. Popular culture has yet to fashion a popular interest in and knowledge of alternative dispute resolution.

12.25 Clients depend on lawyers for information and advice on dispute resolution options. Some lawyers may not inform their clients of all dispute resolution alternatives and they may have a preference for litigation where other alternatives could be explored.

| Q.12.12 What type of public information and education are required to enhance public awareness about litigation and PDR processes in family law proceedings? |
| Q.12.13 Should public resources be used to create better public education about these processes and support services for informal dispute resolution rather than bolstering or creating more courts or reforming court procedures? |
| Q.12.14 Can public expectations of a 'day in court' be changed by public education in family law? |

\textsuperscript{18} eg the Masters in Dispute Resolution program offered by the University of Technology Sydney. LEADR also offers training to lawyers interested in dispute resolution.

Australian Law Reform Commission

Issues Paper 20

Review of the adversarial system of litigation

Rethinking the federal civil litigation system

You are invited to provide a submission or comment on this Issues Paper.

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9. Alternative or assisted dispute resolution

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Introduction

9.1 Alternative or assisted dispute resolution processes (ADR) and referral mechanisms have increasingly been integrated into Australian court systems. The role of courts in referring disputes away from litigation and into ADR and the ‘multi-door’ dispute resolution model are examined in this chapter.

Definition of ADR

9.2 Dispute resolution processes that are ‘alternative’ to traditional litigation are often referred to as alternative dispute resolution. ADR is also used as an acronym for ‘assisted’, ‘additional’, or ‘appropriate’ dispute resolution processes, terms which encompass similar processes.1 In this chapter, the term ADR is used to describe processes used to resolve disputes within or related to courts where the processes do not involve traditional litigation processes. The term encompasses processes that are adjudicatory as well as non-adjudicatory in nature and that produce binding and non-binding decisions. The processes include mediation, conciliation, evaluation, case appraisal and arbitration.2

ADR and the courts

9.3 A threshold question is what role courts should have in encouraging ADR. One view is that ADR processes should be kept quite separate and apart from litigation, as an option to be resorted to only with the agreement of the parties.3

9.4 However, the Commonwealth, States and Territories have to varying degrees enacted legislation designed to encourage ADR,4 including ADR that is facilitated by courts.5 Courts have also promulgated rules and practice directions to facilitate ADR and have developed

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1. For example, the Federal Court conducts an ‘Assisted Dispute Resolution’ program.
2. Within each of these processes there is considerable variation in the elements of the processes and in the way they are used in practice. A more detailed discussion of the ways in which these processes are defined and practised can be found in Australian Law Reform Commission Background paper 2 Alternative or assisted dispute resolution Sydney December 1996.
4. eg Farm Debt Mediation Act 1994 (NSW).
case management systems that provide for the referral of cases to ADR processes at defined times.\(^6\) For example, ADR may be recommended to the parties at a directions hearing.

9.5 The Federal Court has conducted an Assisted Dispute Resolution program since 1987. The Federal Court of Australia Act 1976 (Cth) provides that the Court may, with the consent of the parties, refer proceedings or parts of proceedings to mediation or arbitration in accordance with the Court’s rules.\(^7\) Under the Rules, orders made at directions hearings can stream disputes into court based mediation or arbitration processes.\(^8\) The industrial relations area has a tradition of using ADR processes. It is unclear how those processes may alter following the absorption of the Federal Industrial Relations Court into the Federal Court. These issues will be the subject of comment in the ADR Issues paper.

9.6 The ways in which court related ADR is used and the extent to which it is encouraged varies in different courts, depending in part on the attitude of judges and judicial officers responsible for administering case management processes. Some of the issues raised by court related ADR are discussed below.

**Referral to ADR**

9.7 An important issue is whether courts should have the power to require parties to use mediation or other ADR processes in a good faith attempt to resolve their disputes before having access, or further access, to court procedures, even if the parties do not consent.

9.8 Some legislation and court rules, particularly those relating to specialist jurisdictions, provide for mandatory referral to ADR or make participation in ADR processes, particularly mediation or conciliation, a pre-condition to litigation.\(^9\)

9.9 Other ADR programs are not mandatory.\(^10\) Where courts operate ADR programs without a mandatory referral power judges or other judicial officers may still be able to effectively persuade the parties to agree to ADR. A forceful recommendation by the judge to the parties that they should attempt mediation, may be effective even if the judge does not have legislative power to require mediation. Courts may also require attendance at mandatory ADR information sessions aimed at encouraging voluntary entry into ADR programs.

9.10 The Federal Court’s ADR program is voluntary. It has been proposed that Federal Court judges should have power to direct mediation even when the parties do not consent.\(^11\)

9.11 One view is that ADR processes, mediation in particular, require voluntary entry into the process in order to be effective as a means of dispute resolution.\(^12\) For this and other reasons some legal professional bodies do not endorse powers of mandatory referral to

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6. eg Federal Court Rules O 10 r 1(2)(g), O 72; Supreme Court of Victoria General Rules of Procedure in Civil Proceedings 1996 (Vic) O 50.07 (Spring Offensive, 1995); Supreme Court of Queensland, Practice Direction No 4 1987, Practice Direction No 22 1991.
7. Federal Court of Australia Act 1976 (Cth) s 53A, Federal Court Rules O 10 r 1(2)(g), O 72. The Federal Court also refers disputes to court based early neutral evaluation under a pilot program operated by the Western Australian District Registry.
8. In practice, arbitration has been little used in Federal Court proceedings.
9. eg Family Law Act 1975 (Cth) s 79(9); Retail Lases Act 1994 (NSW) Part B; Farm Debt Mediation Act 1994 (NSW); Supreme Court Practice Direction No 4 (Qld).
10. Examples of ADR programs which are not mandatory (but that may nevertheless involve ‘persuasive’ referral) are those based on Federal Court Rules 010 r 1(2)(g); Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW); Compensation Court Act 1984 (NSW) s 38D(1); District Court Act 1973 (NSW) s 164B(1).
ADR. Others consider that a court power to require parties to use ADR, exercised in appropriate cases, can be valuable in resolving disputes. ADR may also have a role to play in promoting a more positive cooperative culture within courts.

9.12 A range of other issues must be considered in assessing the implications of courts having the power to require parties to enter into ADR processes including

- at what point or points in the court process should mandatory referral be considered?
- what cost impact do mandatory referral ADR programs have for the court and for the parties? (see paragraphs 9.18–9.20)
- on what criteria should cases be selected for referral to ADR? (see paragraphs 9.27–9.33)
- what disincentives for the parties to return to the litigation process, if any, should apply?

Q9.1 To what extent should judges or other judicial officers in courts exercising federal jurisdiction attempt to persuade parties to use ADR processes before commencing or continuing with litigation? What forms of persuasion are appropriate?

Q9.2 Should courts exercising federal jurisdiction have the power to require parties to use mediation or other ADR processes? If so, in what circumstances and subject to what rules, sanctions and cost arrangements?

Q9.3 Are parties using ADR processes dissatisfied with the judicial process and 'voting with their feet'?

Internal or external referral to ADR

9.13 A closely related issue is whether ADR should be conducted by mediators, conciliators, evaluators and other third party neutrals (neutrals) employed by the courts, by private or community based neutrals or by a combination of both.

9.14 There are differing views on the desirability of referral to ADR programs conducted by the court (internal referral). Some advantages of internal referral may include the following

- court based ADR more clearly endorses ADR as a court sanctioned alternative to litigation thereby serving an important educative function
- ADR may be more immediately available at any stage of court proceedings and access to it may be better integrated into the court’s processes
- the court may be able to maintain a higher degree of quality control over ADR personnel and the process
- agreements can more easily transformed into consent judgments of the court to provide an added element of enforceability

• if neutrals are officers of the court their independence in the ADR process is guaranteed.  

9.15 Others express concern that the administration of justice by the courts may be compromised by the intrusion of outside neutrals who may have their own commercial interests.  

9.16 Perceptions about the appropriateness of court conducted ADR may differ depending on whether judges, registrars or others conduct the process. One view is that making judges or registrars available to conduct mediation threatens public confidence in the integrity and impartiality of the court, particularly where processes rely on discussions in the absence of one or other party.  

9.17 ADR in the Federal Court has been based primarily on the mediation of disputes by registrars of the Court, although judges have also conducted some mediation conferences. Mediation is conducted by external mediators in a pilot project that commenced in Victoria in early 1997.

**Q9.4 Should courts exercising federal jurisdiction provide a range of dispute resolution processes or is their role only to adjudicate disputes by trial?**

**Q9.5 If courts facilitate the use of ADR processes, should these dispute resolution services be provided by the court, by external referral or both?**

**Q9.6 If ADR is provided within the court, who should provide it — judges, registrars, other court staff?**

### Funding of ADR

9.18 Funding and cost factors are important in framing policy options for court related ADR programs. For example, if referral to ADR is mandatory, courts may have an obligation to make ADR available and affordable to litigants. This will have implications for court funding. User charges for court related ADR may create an additional cost barrier to access to justice. The relative cost, to the court and to litigants, of providing internal or external ADR processes is also important.

9.19 The basis of funding for court based ADR programs varies. ADR programs, including those using external neutrals can be fully or partly funded by courts or be provided on a ‘user pays’ basis. The Federal Court is currently conducting a pilot mediation project in Victoria that relies on lawyer mediators donating their time.

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18. M Black ‘The courts tribunals and ADR’ (1996) 7 Australian Dispute Resolution Journal 138. His Honour has noted that 97% of mediations conducted within the court have been conducted by registrars.

19. As recommended by New South Wales Supreme Court ADR Steering Committee ADR Strategies and Proposals for the Future Recommendations paper 1995. The Committee’s recommendations for funding of external neutrals have not yet been implemented. The Court already funds arbitration in personal injury cases.

20. For example the District Court of New South Wales has imposed a user fee for arbitration; the Victorian County Court, provides mandatory forms of ADR by external neutrals funded by the parties but offers free accommodation for mediations in a purpose built mediation centre. See Waldron CJ ‘County Court Mediation Centre’ (1996) 7(3) The Law Institute Journal 56.
9.20 Generally, federal programs have tended to place a greater focus on funding internal ADR programs. There are signs that this focus may change in the future. The federal government is considering setting up a separate body to plan, contract and manage non-judicial family law services including ADR. The basis for funding these external ADR processes has not been determined.

Q9.7 How should ADR programs related to courts exercising federal jurisdiction be funded?

Training, accreditation and practice standards

9.21 Training and accreditation of mediators and other ADR neutrals and ADR practice standards and guidelines have been the subject of a number of recent reports and recommendations. Many organisations provide training in mediation and other ADR processes but there is no single body available to ensure the competence of mediators or other neutrals.

9.22 National criteria for accreditation have not been introduced, although bodies such as Lawyers Engaged in Dispute Resolution and the Australian Commercial Dispute Centre have developed their own registration or accreditation schemes. The National Alternative Dispute Resolution Advisory Council (NADRAC) is currently reviewing accreditation and training requirements for mediation. NADRAC is also reviewing practice standards for mediators. No Australian standards have yet been introduced.

Q9.8 If court related ADR processes are to be an increasing element of dispute resolution in proceedings commenced before courts exercising federal jurisdiction what training, accreditation, and practice standards issues need to be addressed?

Liability of neutrals

9.23 The protection given to neutrals who assist in resolving disputes by ADR processes, including disputes referred by courts, varies. Some legislation provides neutrals with the same immunity available to judges including, for example, protection from actions for negligence and defamation. The Federal Court of Australia Act 1976 (Cth) provides mediators and arbitrators under the Federal Court’s ADR program with the same protection and immunity as a judge. Other state and federal legislation may provide for more limited protection. Some neutrals may not be covered by any legislative scheme, for example, where parties approach their own expert or mediator. Some protection from liability may be afforded by parties to neutrals by written agreement.

Reporting to the court

9.24 Once a dispute has been referred from a court to an ADR process there is often provision for reporting the results back to the court. Reporting may simply take the form of lodging draft orders with a court that dispose of all or part of the matter. The orders may or may not refer to any agreement reached between the parties. Reporting provisions may require the neutral or the parties to report back on specific matters to the court. For example, reporting may require a mediator to report on the bona fides of the parties present at the mediation. One view is that the mediator’s role can be adversely affected by reporting requirements. The Federal Court Rules make no detailed provision for reporting to the Court on the outcome of mediation.

Confidentiality of communications

9.25 The confidentiality and admissibility in evidence of communications between the parties to ADR processes is another important issue. Again, the position will vary depending on the sort of ADR process and the applicable legislation. For example, the Federal Court of Australia Act 1976 (Cth) provides that evidence of anything said or any admission made at a mediation referred under the Act is not admissible in any court. However, the position of parties and the neutral is not always clear. The Evidence Act 1995 (Cth) may also have implications for confidentiality and admissibility as it provides for new categories of admissible evidence that may arise from ADR conferences.

Q9.9 In ADR programs conducted by courts exercising federal jurisdiction what provision should apply in relation to
- protecting mediators, arbitrators and other neutrals from liability?
- reporting the outcome of ADR processes to the court?
- the confidentiality of communications during ADR processes and the admissibility of those communications in subsequent litigation?

Referral criteria and ‘multi door’ dispute resolution

9.26 The basis on which decisions are made to refer cases to ADR processes is a central issue for the development of court related ADR programs. In Australia, judges or registrars refer cases to ADR either on the application of parties or by mandatory referral. Often particular types of proceedings are actively streamed into an ADR process.

9.27 In the United States a wider range of referral systems have been used. One type of system can be described as the ‘multi door’ dispute resolution model. The concept of the multi door courthouse was developed by Professor Sander in the United States based on the idea of a court with multiple dispute resolution ‘doors’. Cases would be classified and
The operation of the multi-door model depends on referral criteria, that is criteria on which a court, other forum or the parties to a dispute can select the appropriate dispute resolution process. The referral criteria initially proposed by Sander were

- the nature of the dispute — for example, repetitive and routine disputes may be suitable for adjudication but not formal litigation.
- relationship between the parties — for example, where there is an ongoing relationship mediation or negotiation may be most suitable.
- amount in dispute — the expense of the process should be proportional to the amount at stake.
- cost of resolution — if all other factors are equal, cost should be kept as low as possible.
- speed of resolution — if all other factors are equal, the quickest method of dispute resolution should be preferred.\(^{31}\)

Courts experimenting with the multi-door approach have developed different intake and referral processes. For example, one court uses a case classification form completed by the parties and analysed by the court. The form provides for the weighting of responses to questions about the nature of the case, the goals of the parties and outcome factors.\(^{32}\)

There has been some discussion of approaches to the referral of disputes to particular processes.\(^{33}\) In Australia, one focus has been on establishing criteria for excluding cases from ADR. Suggested exclusion criteria have included

- where there is a history of violence or fear of violence between parties
- where there is a history of child abuse or sexual abuse or a serious personal pathology
- where 'a party is unwilling to honour basic mediation guidelines'
- where 'one of the parties is so seriously deficient in information that any ensuing agreement would not be based on informed consent'
- where the parties are not bona fide and the process is used as a 'fishing expedition'
- where counselling or therapy may be required
- where the parties may reach an illegal agreement or disadvantage an unsuspecting third party.\(^{34}\)

The New South Wales Supreme Court's ADR Steering Committee has recommended the development of positive criteria for referral to ADR processes and has proposed a range of factors favouring referral to mediation, non-binding evaluation and arbitration.\(^{35}\) Formal referral criteria have not been developed by the Federal Court. However, the Court is committed to developing systems to identify at an early stage those cases that may be suitable for referral to ADR.\(^{26}\) The Court has noted that mediation is of particular benefit in some types of proceedings, for example in taxation of costs.\(^{37}\)

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32. Superior Court of the District of Columbia Alternative Dispute Resolution Case Classification Form 1996.
34. G Clarke & I Davies ‘Mediation — when is it not an appropriate dispute resolution process‘ (1992) 3(2) Alternative Dispute Resolution Journal 78. The first criteria was noted in recommendations contained in the New South Wales Chief Justice Policy and planning Sub-Committee Court Annexed Mediation 1991. This criteria for exclusion was modified in the report of the ADR Steering Committee ADR Strategies and Proposals for the Future 1995.
37. id 140.
9.32 A related issue is deciding who should assess cases for ADR suitability. From the United States experience, four different approaches can be identified.

- Parties may assess their own cases for ADR suitability. This approach is most common where ADR is voluntary.
- Court staff may assess cases based on interviews, questionnaires or pleadings.
- Judges may be responsible for ADR assessment especially where ADR processes are mandatory, or case management processes provide for certain cases to be streamed into ADR.
- Professional hired consultants screen cases for ADR suitability.38

Q9.10 Should a multi-door dispute resolution model be adopted by courts exercising federal jurisdiction?

Q9.11 Should there be formal criteria for referring cases to ADR programs conducted by courts exercising federal jurisdiction? If so, how should these criteria be developed? Who should undertake the assessment?

Evaluation of ADR

9.33 One option for reform is to identify and encourage best practice referral to court related ADR. There are significant barriers to this approach including deficiencies in Australian court data collection (see chapter 4).

9.34 There are also significant methodological and conceptual difficulties in comparing ADR processes with traditional litigation. One problem in comparing the costs and benefit of ADR processes with those of traditional litigation is that any comparison with the cost of cases that go to trial will be flawed because many civil cases are settled out of court.39 Some of the possible benefits of ADR are difficult to measure. For example, the increased use of ADR may lead to a decrease in litigious or adversarial behaviour, foster a better relationship between parties to a dispute or result in a higher level of compliance with outcomes. These benefits are very difficult to evaluate without significant effort.

9.35 A series of reports have evaluated ADR programs related to Australian courts and tribunals.40 While there is no conclusive evidence about the cost and benefits of court related ADR, many studies suggest that there are significant benefits for some types of disputes. For example, evaluation by the Federal Court of its mediation program suggests that court related mediation is beneficial and worthy of expansion.41

9.36 The Commission will be releasing an issues paper on ADR which among other things will discuss the possible role of ADR as an alternative to some types of federal civil litigation.


Q9.12 Is ADR currently being used effectively by courts exercising federal jurisdiction, particularly the Federal Court? What, if any, improvements could be made?

Q9.13 Is it possible to identify 'best practice' referral to court related ADR or do different ADR referral procedures suit different courts or registries of courts with varying caseloads and judicial and other resources?

Q9.14 What steps should be taken to improve statistical collection so as to identify best practice case referral to court related ADR?