ADR Principles

This paper is an updated replacement of an earlier paper on this topic.

Introduction

This paper outlines the key principles associated with the practice of ADR processes in Australia, and with the operation of ADR programs and services, in Australia. The paper includes a brief overview of the history of the principles and the identification of key influential sources. This paper is not intended to provide comprehensive exploration or analysis.

History

The three key sources for the principles of alternative dispute resolution (ADR) in Australia were published as an Australian Law Reform Commission (ALRC) Issues Paper in 1998 ['ALRC IP20 1998']; a report to the Federal Attorney-General in 2009 ['Access to Justice 2009']; and a brief publication by the then National ADR Advisory Council (NADRAC) in 2011 ['NADRAC 2011].

ALRC IP20 1998

In 1995, the then federal Attorney-General tasked the Australian Law Reform Commission (ALRC) with reviewing Australia's civil litigation system, including specific consideration of 'the use of court-based and community alternative dispute resolution schemes' ['Terms of Reference']. In its 1998 Issues Paper 20, the ALRC set out 'five key objectives of the federal civil litigation system in performing the roles of rule making, determination and dispute resolution.' [paragraph 3.9] Although not "principles" they have become an influential foundation for the development of subsequent principles for ADR. The five objectives are:

> 1. 'The process should be just' – 'consistency in process and result … free from coercion or corruption … inequality between the parties does not influence the outcome … procedural fairness … dignified, careful and serious decision making … [and] an open and reviewable process.' [paragraphs 3.11 and 3.12]
> 2. 'The process should be accessible' – 'appropriate dispute resolution processes exist and are available … barriers are reduced … or serve to channel parties into more appropriate forms of dispute resolution … [and] participants and their advisors understand the process, their role in the process, and the reasons for the outcome.' [paragraph 3.13]
> 3. 'The process should be efficient' – avoid wastage of public funds … reduce litigation costs and avoid repetitive or unnecessary activities … consider the interests of other parties waiting to ... use … the … processes.' [paragraph 3.14]
> 4. 'The process should be timely' – 'minimise … delay … [minimise] time taken to resolve … [within] dispute resolution processes … [minimise] time … devote[d] to the process.' [paragraph 3.15]
> 5. 'The process should be effective' – 'ensure, or at least, encourage a high degree of compliance with the outcome … [after completion] no need to resort to another … process … promote certainty in the law.' [paragraph 3.16]

The objectives described in ALRC IP20 1998 have a clear focus on a civil litigation system that includes "dispute resolution".

Access to Justice 2009

Around a decade after ALRC IP20 1998, the concept and practice of ADR had advanced significantly in Australia. Access to Justice 2009 was produced with the purpose of 'undertak[ing] a broad examination of the federal civil justice system' [p 7], and proposing a justice system framework that incorporated 'non-court models of dispute resolution' [p. 8], which would fall under the broad umbrella of ADR (or DR). In Chapter Five, the Taskforce outlines three key elements in what it calls an 'access to justice framework' [p. 71]. The elements are "Principles", "Methodology", and "Recommendations". The "Principles" are specific to access to justice; the "Methodology" outlines the key activities for giving practical effect to the principles; and the "Recommended applications" show the various ways in which disputants could navigate a justice system that operates according to those principles and methodology.

- Principles – are specific to access to justice; the five principles are accessibility; appropriateness; equity; efficiency; and effectiveness (for more detail, see below).
- Methodology – the key activities for giving practical effect to the principles (including in policy development); the eight activities are providing information; taking action; triaging matters to appropriate processes/forums; promoting fair outcomes; ensuring costs and methods are proportionate to the dispute; building resilience at individual, community and system levels that enables tolerance of systemic change and adjustment, and provides people with the skills to resolve their own disputes; and being inclusive in the sense that there is scope to identify the underlying issues that lead to participation in the justice system.
- Recommendations – the access points for a disputant's most appropriate navigation of a principles-based and accessible justice system, according to the nature of their dispute and the levels of legal assistance available to them.

The report makes clear that the Taskforce intended the principles to apply to all aspects of the civil justice system, including 'non-court models of dispute resolution' [p. 62], or 'informal justice' [p. 68] (ie, ADR). In other words, the whole justice system was perceived as a 'pathway to resolution' [p. 67], whether that be through the courts or through ADR. The five principles are described on pages 62 and 63 of Access to Justice 2009.

> Accessibility
> Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.
>
> Appropriateness
> The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.
> Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.
>
> Equity
> The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.
>
> Efficiency
> The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal

dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.
The costs of formal dispute resolution and legal assistance mechanisms – to Government and to the user – should be proportionate to the issues in dispute.

Effectiveness
The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.
All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.

Whereas ALRC IP20 1998 focuses on a civil justice system that includes forms of dispute resolution, Access to Justice 2009 treats ADR as an integral part of that justice system, with clear terms of reference to that effect.

NADRAC 2011

In 2011, NADRAC published its *National Principles for Resolving Disputes*, a one page document listing seven principles, that NADRAC makes clear are to 'set out a fundamental approach to dispute resolution that is consistent with better access to justice':

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost-effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

Although not antithetical to the views espoused in ALRC IP20 1998 and Access to Justice 2009, the principles enumerated in NADRAC 2011 have a specific and primary focus on ADR processes. However, all three documents treat ADR as an important component in disputants' capacity to access the justice system.

Summary

The three documents demonstrate the development of ADR in Australia's legal and justice systems. They also have many commonalities, with NADRAC's having an understandably stronger focus on ADR. However, commentators have noted that some aspects of the ALRC's objectives and the Taskforce's principles are not easily applied to ADR. For example, efficiency and effectiveness are not readily quantifiable in processes such as mediation: measures of efficiency are affected where there is not

widespread acceptance that pre-mediation meetings are part of the mediation itself; measuring the effectiveness of achieving resolution in mediation is affected by practical delays in agreement implementation that do not necessarily reflect lack of commitment to the process or compliance with its outcomes (ie, the terms of agreement).

Application

Importantly, in the ALRC, the Task Force and NADRAC publications, the outlined objectives and principles are *applicable to all ADR processes, not just to mediation*. A significant proportion of the ADR literature does not always make a clear distinction between mediation and ADR which can obfuscate the relevance and application of additional principles that can be found in, say, the mediation literature.

Principles in relation to mediation

In addition to those outlined above, three key Australian publications include a number of factors that are ordinarily accepted as being definitive of the process as well as having the status of principles or values:

- Self-determination – incorporating empowerment and autonomy in decisionmaking during the process and/or with specific reference to any final terms of agreement) [see Boulle and Field 2018; Sourdin 2020; AMDRAS 2024]
- Fairness of the process and impartiality of the mediator [Boulle and Field 2018; Sourdin 2020; AMDRAS 2-24]
- Good faith participation – incorporating respect, dignity, cooperation, and consideration of each other's views [Boulle and Field 2018; Sourdin 2020]
- Confidentiality – including inadmissibility of information, privilege of communications and various applications to all parties and to the mediator [Sourdin 2020] (NB, many commentators treat this as a requirement of mediation rather than as a principle or value)

Consistency in interpretation and application

Although the principles outlined in this paper have influenced the development of ADR services and programs, not all are consistently interpreted or given consistent practical application. Many ADR programs and services now incorporate some form of triage system whereby disputants are able to access the ADR process most suitable to their situation. Across the States and Territories, there is a range of public, private and institutional programs and services (both online and face-to-face). These have various costs and fees, protecting the principle of equity; however, more could be done to accommodate the needs of minority and non-mainstream groups.

In terms of efficiency, although ADR maintains a reputation for being less costly and more time efficient than traditional court and tribunal hearings, there is inadequate research available to confirm this; there are many anecdotal reports that some ADR processes can be quite costly in terms of time, effort, and money. There is not consensus in the broad ADR sector about what constitutes "effectiveness" and how it might be measured and confirmed in each process, leading to a range of claims about what makes any process effective – including resolution of the dispute; removal from court/tribunal lists; improvement in the disputants' relationship; improvement in the disputants' communication styles; durability of the resolution (ie, whether the terms are implemented in full); and lack of further

reported disputes between those people. In addition, the findings from ADRAC's conciliation project (*Connecting the Dots*, 2022) suggest that many in-house conciliation programs operate according to measures of effectiveness developed specifically to meet the requirements of their program.

Similarly, the mediation literature shows there continue to be various interpretations of the disputants' self-determination and of the mediator's impartiality, and this variation influences the choices mediators make about the styles and techniques that they use in any given mediation process. The legal system and extensive case law have contributed to the complexities inherent to both confidentiality and good faith, making it difficult to clearly explain the meaning and limitations of each in any particular mediation process.

Finally, ADRAC notes that analysis of the interpretation and practical application of ADR principles is heavily reliant on information obtained from reliable research. Unfortunately, there is limited available data about the use of ADR processes in the legal system, and even less data about the use of private ADR (outside the legal system), the latter likely to be a significant and influential proportion of ADR practice in Australia.

For more information about ADR, mediation and other issues raised in this paper, see other papers on this website.

Primary references

Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report to the Federal Attorney-General, Commonwealth of Australia, Australia, 2009)

AMDRAS Board (previously Mediator Standards Board), *The Australian Mediator and Dispute Resolution Accreditation Standards (AMDRAS)*, June 2024

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Boulle, L., and R. Field, *Mediation In Australia* (LexisNexis, Australia, 2018)

Sourdin, T., Alternative Dispute Resolution (6th edition, Thomson Reuters, Australia 2020)