Accountability of ADR practitioners

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This paper was settled jointly by the members of ADRAC.

Accountability of ADR practitioners is important to ensure the credibility and effectiveness of ADR processes. Proper accountability mechanisms are particularly important because ADR is usually private and confidential and rarely subjected to public scrutiny.

At the outset it is important to acknowledge that, like ADR itself, the notion of accountability is not 'one size fits all'. Accountability mechanisms or regimes applicable to arbitrators or court-appointed referees should (and do) differ from those which apply (or ought to apply) in a mediation or conciliation.

Accountability of ADR practitioners involved in court and tribunal-annexed ADR

At present, nearly all such ADR processes (consisting largely of mediations, and conciliation conferences) are conducted by court and tribunal staff who, as public sector employees, are subject to statutory codes of conduct. If they fail to adhere to proper standards of conduct, they may be subject to investigation and disciplinary action, including of a severe kind (depending on the gravity of the conduct in question).

Complaints of misconduct by public sector DR practitioners are usually the subject of internal decision-making in the first instance, with provision for external review.

Enforcement/accountability does not depend upon an individual complainant driving the complaint because public sector bodies owe public duties to investigate and deal with alleged breaches of proper standards of conduct by employees.

However, under most statutory frameworks applicable to public sector DR practitioners, complainants are not assured of being 'kept in the loop' as to the outcome of their

complaints - often because of perceived privacy concerns or because of concerns about the operation of an applicable secrecy provision.

In short, most statutory frameworks of accountability applicable to the conduct of public sector DR practitioners are not complainant-centric in their design or purpose.

The confidentiality of DR processes involving public sector DR practitioners would rarely intrude upon the investigation of complaints against them. However, public sector employees are generally able to invoke the privileges against self-exposure to penalty and self-incrimination, which may inhibit the gathering of factual information about the complaint.

As court and tribunal staff are usually public sector employees, their State, Territory or Commonwealth employer will usually be vicariously liable for their negligence, unless they enjoy a statutory immunity from suit (which often applies).

Accountability of lawyers when involved in ADR

In Australia, there is little doubt that legal practitioners' professional obligations extend beyond the doors of the court or tribunal.

As such, many if not all of the accountability mechanisms affecting legal practitioners apply to their conduct (i) when acting as DR practitioners;[1] and (ii) in representing parties in the course of ADR processes (eg through professional discipline or, when representing parties in ADR processes, through civil actions for negligence, breach of contract, or breach of fiduciary duty).

The High Court recently held (by a 5 to 2 majority) that barristers and solicitors do *not* enjoy an immunity from client suit in respect of professional work performed by them which is directed to settlement of legal proceedings, even where the agreement to settle is to be incorporated in consent orders filed in the proceedings in question.[2]

Thus, when lawyers are involved in ADR processes, the disputants generally have recourse to:

- statutory complaint mechanisms in respect of their conduct, including provision for cost-free internal and external adjudication of their complaints by decision-makers who are empowered to acquire information compulsorily; and
- legal proceedings to enforce rights and/or claim damages for breach of their rights under the general law.

When practising lawyers are involved in ADR processes, the disputants also have some reassurance that:

- those lawyers are required to be insured in respect of their professional work;
- awards of damages to them may be covered by the lawyer's professional indemnity insurer;
- because of the above sorts of factors, a legal firm may be more inclined to run their case on a 'no win no fee' basis.

Accountability of ADR practitioners with other professional backgrounds

ADR practitioners come to ADR with a wide variety of qualifications and experience apart from law. ADRAC regards it as incumbent upon such practitioners to fulfil and maintain any accountability obligations owed to professional organisations of which they are members, and to inform ADR participants of these obligations.

While it is less clear that *specific* professional obligations of other professions will apply when members of these professions act in the capacity of a DR practitioner, or represent a disputant in a DR process, ADRAC considers that professional bodies should (i) be willing to enforce any specific obligations which do apply; and (ii) be astute to enforce any applicable *general* standards of conduct, such as acting honestly and ethically, and not bringing the profession into disrepute.

So far as applicability of *specific* professional standards is concerned, much may depend on the form of DR process. For instance, neutral evaluations, expert determinations, and participation in expert panels by engineers and architects may come within the performance of their professional work. However, it may be doubted that a qualified psychologist is

rendering services in that capacity when they participate in most ADR processes (other than, perhaps, as a support person).[3]

This may have quite far-reaching implications for disputants:

- complaint mechanisms will usually not have a statutory basis;
- they may need to take responsibility for driving any resolution or adjudication of their complaint;
- external (independent) adjudication of any complaint may not be available;
- the person who adjudicates their complaint is unlikely to have any coercive powers and so will not be able to elicit factual information compulsorily;
- rulings or orders for reparation in respect of their losses are unlikely to be enforceable;
- awards of damages in their favour may be unfunded unless the defendant has financial standing;
- law firms may be reluctant to take on their cases on a contingency basis.

It is sometimes said that the absence of a prescriptive accountability regime of the kind applying to lawyers is not only defensible, but closely aligned to various underlying ADR principles – such as self-determination, the need for flexibility, and aversion to the level of formality and 'adversarialism' which often attend rigorous accountability regimes. It is sometimes suggested that the existence of a high-functioning accountability regime is apt to *encourage* disputes, and so-called satellite litigation.

On the other hand, the following points have much to commend them:

- disputants should have access to effective, independent accountability mechanisms which allow (i) facts to be properly investigated and (ii) adjudicative rulings enforced. This is consistent with the rule of law;
- until such time as disputants have access to an effective high-functioning accountability regime, resort to litigation and the 'lawyerisation' of ADR processes is likely to continue;

- the establishment of an effective high-functioning accountability regime will help to professionalise the practice of ADR (that is, help overcome perceptions that ADR is a disparate cottage-type industry);
- the establishment of an effective high-functioning accountability regime will facilitate identification of, and adherence to, proper standards of conduct;
- the establishment of an effective high-functioning accountability regime will encourage disputants to access ADR processes in the first place.

Paradoxically, perhaps, concerns about the perceived lack of accountability of mediators and other ADR practitioners appear to be raised, in the main, by DR practitioners themselves, rather than by disputants. The reasons for this are unclear, but confidentiality provisions in ADR agreements, and inadmissibility provisions under the general law and Evidence Acts of most jurisdictions, may play a role.

ADRAC encourages feedback and comments on these issues, concerns and perspectives.

What standards currently apply?

There are several voluntary professional standards which ADR practitioners can sign up to. For example, mediators accredited under the National Mediation Accreditation System must undertake to comply with prescribed Practice Standards which specify minimum practice and competency requirements.[4]

While ADRAC supports this system of regulation for mediators and sees great benefit in extending such accreditation schemes to all ADR practitioners, there are clear limitations faced by non-statutory schemes. In particular, cancelling membership is the only 'coercive' action professional organisations can take. Such action does not prohibit an ADR practitioner continuing to practice or joining another professional organisation.

In some cases, ADR agreements may also make provision for professional standards, and/or processes for complaint by aggrieved parties. ADRAC understands this to be more

the exception than the norm. Indeed, the confidentiality provisions which exist in most ADR agreements, and statutory inadmissibility provisions in force in most jurisdictions, may actively discourage disputants from pursuing redress in relation to the conduct of ADR practitioners.

What are the possible alternatives?

One possibility for ensuring greater accountability of ADR practitioners is to establish a national disciplinary code which is enforceable by a recognised 'peak' industry body. However, while ever membership of, or registration with, such a body was voluntary, and the body lacked coercive powers, significant limitations would continue to exist.

With a statutory basis, such a body could (i) compel registration; and (ii) implement an enforceable range of investigative and dispositive strategies to hold ADR practitioners accountable for their conduct and provide additional remedies to aggrieved disputants. However, there are many barriers to establishing such a statutory body. In particular, there is limited scope to legislatively regulate ADR practitioners at the national level, save in respect of disputes falling within Commonwealth heads of power. Realistically, a comprehensive national scheme would depend on the States signing up to a national framework.

An alternative to a statutory scheme is a contract-based scheme where parties include provision in ADR agreements for ADR practitioners to be subject to a national (non-statutory) disciplinary code. While ultimately 'voluntary' in nature, a large scale uptake by ADR users and practitioners could result in similar (even preferable) outcomes to a statutory scheme, particularly if registration and enforcement were managed by a single recognised body. In this regard it is noteworthy that, under the general law, DR practitioners can agree, contractually, to subject themselves to a nominated disciplinary regime – including foregoing the so-called right to silence.

What are further barriers to implementation of an accountability regime?

There are perceived issues with overly-prescriptive professional standards, and/or a registration regime, given ADR places a significant emphasis on flexibility. However, while

rigid regulation may not be desirable, there is little doubt that 'ethical behaviour is critical in consensus-based dispute resolution'.[5]

How does immunity from suit relate to accountability?

Immunity from suit is an important consideration impacting upon the accountability of ADR practitioners. An important aspect of the rule of law is the right of persons aggrieved to access courts to enforce their rights, and seek redress for breach of their rights (including through awards of damages).

At present, many ADR practitioners enjoy the same degree of immunity from suit, for actions taken during ADR processes, as a judge. Immunity usually applies to quasi-judicial officers, bodies such as tribunals, as well as other practitioners where the ADR process is undertaken under statute.[6]

The immunity is usually a broad immunity from civil action in respect of conduct within the course of ADR processes, most notably for negligence.

Even where statutory immunity is not available, immunity may be expressly conferred under the terms of an ADR agreement (enabling ADR practitioners to rely on the terms of an ADR agreement as a contractual protection against civil liability). An immunity conferred under an ADR agreement will usually not protect ADR practitioners to the same extent as an immunity conferred by statute.

There is ongoing debate about whether, as a matter of policy, immunity should only be conferred, if at all, on ADR practitioners who make binding decisions, such as arbitrators.

In its 2011 report '*Maintaining and Enhancing the Integrity of ADR Processes*' NADRAC recommended that ADR practitioners conducting private ADR processes, and private ADR practitioners conducting court/tribunal ordered ADR, should not have the benefit of any statutory immunity. NADRAC considered that the position in relation to public sector ADR practitioners was more contestable, and should be the subject of specific review (around now).

1. In the recent case of *Walker v NSW Bar Association* [2016] FCA 799 Besanko J expressed no doubt with the notion, sourced in the Bar Association's revised Senior Counsel Protocol, that a barrister's involvement in ADR processes (as a DR practitioner (such as mediator or arbitrator) or as legal representative) involved the rendering of legal professional services of a kind which could qualify the barrister for appointment as Senior Counsel.

2. See *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. The High Court, by majority, rejected the argument that incorporation of a settlement agreement into consent orders meant that the lawyer's rendering of services was sufficiently (and intimately) connected to the proceedings so as to attract immunity.

3. If the ADR process is directed to resolving a dispute about the performance of professional services by another psychologist, the position may well be different. So, too, may the position be different if the ADR process is intended to be therapeutic (such as private sessions attached to commissions or inquiries into traumatic incidents).

4. Available on http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf.

5. Charles Pou, 'Enough Rules Already! Making Ethical Dispute Resolution a Reality' (2004) *Dispute Resolution Magazine* 19, 22, available on http://www.adr.gov/charliearticle.pdf.

6. See, eg, *Federal Court of Australia Act 1976*, s 35; *Federal Magistrates Act 1999*, ss 34, 35; *Administrative Appeals Tribunal Act 1975*, s 60; *Native Title Act 1993*, s 94R; *International Arbitration Act 1974*, s 28.