Submission to the Senate Legal and Constitutional Committee Inquiry into the Australian Human Rights Commission Legislation Bill (2003)

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Overview and recommendations

This submission argues that assisting dispute resolution should logically be seen as a social service, similar to health or education, which meets an individual or public demand. Dispute resolution should aim for fairness, the maintenance of community standards and public order. Good dispute resolution is part of a good commercial society and its welfare state. It needs to be well managed to achieve good social outcomes. The principles of quality management and risk management are vital to the process. Prevention, rehabilitation, fairness, and related data gathering and funding need to be conceptualised in this context.

However, the Australian Human Rights Commission Legislation Bill (2003) and the commentary upon it obtain a frame of reference from the courts. Australian courts operate upon an authoritarian, pre-scientific, adversarial, confused, wilfully ignorant, uncaring, expensive and therefore socially dysfunctional paradigm. They represent a collegiate monopoly culture which has used its power to enrich itself at the expense of the society, primarily by denying information and their accountability to anybody but each other. They call this independence. They primarily justify their supreme powers of judgement by saying that they represent the social wisdom and their power over the future is entrenched in the Australian constitution.

Attempting to speak in the public interest, I don't give a damn! If the constitution actually says that only the courts can determine cases and everybody else has to conciliate them (Brandy v. HREOC, 1995) why were conciliation and arbitration tribunals set up in the early 20th century? More importantly, the men who wrote the constitution are dead. If what they thought seems really stupid now (and it does) we should ignore it.

Independence should be seen as the duty to act in the apparent public interest, on the basis of broadly conceived evidence about a matter, rather than being swayed to pursue the sectional interests of those with power, including the courts and their lawyers. A legislated duty of care to seek and tell the apparent truth might help many professionals to avoid the common pitfall of any form of advocacy. Independent inquiries, or standardised tribunals with generalist commissioners should make determinations and conciliate according to non-adversarial principles. The decisions of all should withstand public scrutiny. That is how progress is made. We educate children not to bind and silence them but so they will make their own decisions about their health and welfare better than we could. We should point this out to politicians.

Headings and related recommendations:

1. *All assisted dispute resolution or settlement should be conceptualised and treated as social service*
2. *Only recognise truly independent, standardised tribunals which make determinations upon all matters*
3. *WorkCover provides a fund management model which could assist broader risk management*

4. *Judgements should be made by informed people with a duty to seek and tell the apparent truth*
5. *The Bill aims for better management of human rights and education, but greater independence from government is needed*
6. *Rehabilitation and its relationship to compensation and prevention should be considered*
7. *No social group should be exempt from public accountability for their actions*
8. *All dysfunctional legal monopolies posing as independent should be broken*
9. *Break the lawyers' monopoly over charging*

1. All assisted dispute resolution or settlement should be conceptualised and treated as social service

If dispute resolution is not a social service, what is it? Health care and education are social services developed to meet an individual and public demand. Assisting resolution of complaints and disputes should also be conceptualised as a social service, which should be provided in response to pursuit of the individual and public interest in fairness, the maintenance of community standards, and social order. All social services should be carefully designed to obtain improving social outcomes. Consistent quality management principles should be applied to achieve this, unless another course of action appears to be in the public interest. Dispute data gathering should be designed to support such goals.

Viewed from this position, any person or organisation, which makes a submission on the Human Rights Commission Bill, should clearly explain how their views on what ought to be done meet the individual and public interest. In this context, the Competition Policy Reform Act (1995) also requires equal competition on a level playing field of national standards, unless another course of action appears to be in the public interest. In contrast with this, the propositions put about the Bill by the current Human Rights and Equal Opportunity Commission (HREOC) appear primarily based on self-interested industrial grounds, the traditional authority of the courts and the Australian constitution. This is demonstrated later.

Over the centuries the courts have entrenched their powers, but the time for all Australians to use alternative methods of decision making is long overdue. Courts operate according to an authoritarian and prescientific mode of discourse. For example, as I understand it, a high level court decision about a particular situation is commonly used as a precedent to determine judgments in future cases, and thereby to change the law, which is supposedly also the general standard. This argues from the particular to the general, on the basis of the Godlike authority of the decision maker, rather than on the basis a of broadly informed evaluation of the comparative outcome of a wide range of judgments which all supposedly reflect the application of an expected standard. The latter paradigm is scientific, the former is authoritarian.

In the scientific paradigm the professional is expected to exercise informed and independent judgment. For example, in the case of a health practitioner, the term 'independent' means she should deviate from applying the general standard of expected treatment when such a deviation appears necessary to meet the particular requirements of an individual situation, based on the evidence she has broadly gathered about the case. Careful documentation of the treatment and outcomes of a wide range of such independent professional judgments are then studied. Evaluation of the outcomes of these practices may then lead to change of the expected standard practice. Independence should rightly be conceptualised as the exercise of judgment which is justified on the evidence. It centrally involves the necessity for practices to be evidence based and to withstand public scrutiny.

State Occupational Health and Safety (OHS) acts also reflect this broadly scientific concept of independence. They require that employers and workers conduct their business safely. They are expected to apply approved codes of practice, in order to control identified workplace risks. The worker may deviate from the approved code where she judges that, on the general evidence about a specific situation, it would be safer to do so. Evaluation of practice outcomes is then required. Existing codes of practice should be changed when it can be clearly demonstrated that there is a generally safer way of doing things.

In contrast, those who traditionally practice law show no interest in evaluating the physical or social outcomes of their judgments, either on an individual or aggregated basis. Although decisions may be changed in higher courts, this process involves a comparatively uninformed repetition of the process of judgment, carried out in another arena by men with more money and power. This is a completely different process from the one where people make different judgments in the future, because it has been found, as a result of the evaluation of past decision outcomes, that probably a different way of doing things will produce better physical or social results.

The court process is based on an adversarial method of gathering and treating evidence which is savage and bizarre. It is impossible to conceive of any intelligent parent or citizen, let alone a scientist, seeking to resolve a question using this mode of discovery. A good parent, for example, might try to gain a sympathetic understanding of the emotional motivations behind sibling conflict, in order to help the family work towards greater social harmony. In a public inquiry run by a democratically elected government the process is advertised in the newspapers and anyone may come forward with evidence and put their view to a cross-party committee which may also commission research. In contrast, the courts apply a rule bound method of gathering evidence which is determined by the narrow requirements of specific pieces of legislation. Within these confines, the lawyers on opposing sides of an issue are encouraged to secretively gather evidence which is designed to maximise their own case and demolish the other.

A basic expectation of the court appears to be that information should not generally enter the arena unless introduced by the opposing lawyers. Courts also appear to deliberate in wilful ignorance of any evidence which may have previously been received about the matter in other dispute resolution arenas. More generally, all the people engaged in the court process appear expected to blind themselves to a range of information which might educate everybody who would discuss an issue under more normal circumstances. The courts deny such information access on the basis of rules which only the legally initiated understand. To the outsider, the courts seem to equate ignorance with freedom from bias.

Are those who continue to champion such ancient expectations about the appropriate ways to develop human standards evil people? I think they must be, for the legally trained constantly assure of their brilliance. They are clearly comparatively rich, even though the jury system supposedly values judgment by one's peers. For example, the lowest grade NSW local court magistrate gets $150,000 per annum. Could you do that job? What are you making?

The concept of independent decision making by the courts or anybody else, generally means that the decision makers' duty to try to be informed, objective and honest should not be compromised by individuals or groups with vested interests who have power over them. This appears ideally to require that the way a matter is dealt with should withstand public scrutiny, to ensure that the public interest is achieved. This is generally consistent with the public interest in transparency, which is also necessary for effective data gathering to improve service outcomes. Transparency should be required in health, education and dispute resolution services, unless another course of

action appears to be in the public interest. This is necessary for service outcome evaluation, equity and cost containment. I will return to these issues later, in the light of a discussion of the Human Rights Commission Bill and the HREOC submission based upon it.

2. Only recognise independent, standardised tribunals which can make determinations upon all matters

The authoritarian and adversarial principles of the courts have come to Australia from the ancient British common law legal tradition of dispute settlement, which involves determination of a matter by a magistrate or judge. Although democracy and a welfare state increasingly developed in the 19th and 20th centuries, the courts continued to apply many of their ancient expectations to apparent breaches of the statutes enacted by elected parliaments. Work related arbitration and conciliation tribunals were established in Australia at the beginning of the 20th century. Since then governments have established an increasing range of independent tribunals to administer disputes related to particular pieces of legislation, according to rules which are considered at the time to be better than those of the traditional courts. Whether they are encouraged to remain that way is addressed later.

I assume the term 'independent' generally means a tribunal is neither required nor expected to bend to the wishes of a particular minister or his government. However, tribunal decisions may be appealed in the relevant higher courts. According to a 1995 High Court decision, the supreme decision making powers of the courts have been entrenched in the Australian constitution. Elected parliaments may enact new laws as a result of court decisions. The desire of the courts to maintain their judicial powers, and the desire of lesser judicial activists to gain access to the arena, tend to drive all related decision making practices towards those of the courts. For example, although HREOC is a tribunal, in its argument on the Human Rights Commission Bill, it compares its brief and powers to those of the higher courts and generally ignores any relationship of its operations to other tribunals which deal with similar matters, such as Commonwealth and State Industrial Commissions or Administrative Review Tribunals.

In spite of HREOC's apparent disinterest in the relationship, the appropriate treatment of industrial and discrimination related matters is highly controversial. For example, in NSW during the 1980s, when a Labor government was in power, the NSW Labor Council voiced its concern to government about the industrial ramifications of decisions and awards made in the Equal Opportunity Tribunal as a result of complaints taken under the NSW Anti-Discrimination Act. The Labor Council argued that the Industrial Commission should handle work related discrimination issues. The NSW Anti-Discrimination Board and many other organizations and individuals protested successfully against this. They argued that because only trade unions and not individuals can be represented in the Industrial Commission, those individuals who are not union members but who are discriminated against would have nowhere to go unless significant changes were made to the legislation.

In 1989 after a change of government, Professor John Niland provided a report entitled 'Transforming Industrial Relations in NSW' to the NSW Attorney General. In it he pointed out at length that his approach meshed with the direction already being taken at a Commonwealth level under a Labor government. He argued that the greatest burden borne by the Australian industrial community is that the federal parliament, as is indicated by section 51 of the constitution, shall only have power in respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state. He deplored the effects of having many industrial tribunals and recommended that the work of 'the two mainstream tribunals' be integrated and standardised to the maximum extent allowable by

constitutional limitation and federal/state rivalries, 'thus laying down the groundwork for full integration of all State and Commonwealth tribunals in the longer run'.

In 1992, in a submission to the Commonwealth inquiry into the Workplace Relations Bill, the National Pay Equity Coalition argued that:

> The definition of equal remuneration, as specified in ILO Convention 100, should be applied, and the requirements of the Convention met, in the Workplace Relations Bill (and not applied across the Bill and Sex Discrimination Act).
>
> The equal pay provisions should be extended to ensure coverage of all employees, all components of remuneration, and include a right for everyone to take a case in the Australian Industrial Relations Commission irrespective of their employment contract.

Acceptance of this recommendation would also appear to implement the requirements of the Commonwealth Policy Reform Act (1995) that competition should occur on a level playing field of national minimum standards. This presumably includes minimum standards in regard to pay and conditions of work.

More recently, the National Alternative Dispute Resolution Advisory Council (NADRAC) which advises the Commonwealth Attorney General, has distinguished between facilitative, advisory and determinative dispute resolution processes, because there currently appears to be no clear agreement about the practices required by the terms 'mediation, conciliation and determination'. NADRAC suggests that in mediation, disputing parties should meet with the assistance of a neutral mediator, who helps them reach agreement. In conciliation, the disputing parties involved in an alleged breach of law should come together. A neutral conciliator should not make decisions, but may advise or determine the process, make suggestions for settlement terms, and actively encourage agreement. Arbitration is determinative. The arbitrator makes decisions.

Sir Laurence Street recently writes of the 'newly evolving recognition that conflict avoidance, management and resolution are simply three closely related sequential approaches, each of which has relevance and application within the broad field of social, commercial and personal interaction, and that this is inherently the province and function of alternative dispute resolution' (1). However, the HREOC submission on the current Bill indicates that in 1995 the High Court decided (Brandy v HREOC) that a court must make any binding determination of a complaint because anything else is unconstitutional. (Who else other than lawyers or idiots might care about such an argument? It appears to be the intellectual equivalent of an individual saying to his son that he should not undertake a certain action because grandfather forbade it before he died.) In this context, however, does the 1995 decision mean that there is now an expectation by some that all arbitration, which is determinative, should be undertaken in a court? If this is so, why was this problem not noticed when the Constitution and the State and Commonwealth industrial tribunals were first established?

The Attorney General says 'the Commission's function to assist in proceedings, with the leave of the relevant court, as amicus curiae is unchanged'. HREOC explains that Commissioners have the function of acting as 'amicus curiae'(friend of the court) where complaints cannot be conciliated and are referred to the Court for determination. The function is apparently to be exercised where there are special circumstances which may have an impact beyond the parties to a complaint. What exactly might this mean and why would such matters would need to be referred to the Federal Court? WorkCover inspectors or others in arbitration like positions are capable of seeing when an employer and a group of workers may be acting in collusion but

against the public interest as defined by the OHS Act. One needs the determination of matters to be undertaken with the assistance of expert advice, and with the public interested firmly help in view. This is a completely different thing from shoving a matter upstairs to be dealt with afresh by a much more expensive set of decision makers using even more dubious adversarial principles.

HREOC writes that 'a written notice of termination is an essential pre-requisite for access to the Federal Court'. It notes that Clause 46PE (1)(b) of the Bill provides that the President may terminate a complaint if 'the President is satisfied that all the affected persons want the complaint to be terminated'. Clause 46PE (3) apparently provides that the proposed President of the Commission does not issue a written 'notice' where a complaint is terminated 'at the request of the complainants'. HREOC says it would like the word 'affected person used instead of 'complainants', although it also states it is not possible to gain access to the Federal Court when a complaint is terminated on the ground that all the affected persons want the complaint to be terminated. I cannot understand any of this. It seems the lawyers' usual clever mess to me.

However, this reminds me that when I worked in the NSW WorkCover Authority those in conciliation appeared to have a poor record of settling disputes, perhaps because they seldom appeared to hold conferences, and relevant medico-legal documents were not available to them. They led a comparatively secretive life with abysmally organised administrative practices. The WorkCover CEO appeared to leave them to it. He always seemed afraid of someone. State Freedom of Information Acts exempt medico-legal documents, which are reserved for the court, even when paid for by premium holders. It is perhaps indicative of the subservient mindset of those then working in WorkCover conciliation that they recorded all those WorkCover disputes that weren't resolved, as 'proper disputes'. I have often observed that one never seems to go wrong by not upsetting a court or taking its business. In 1996 Sir Laurence Street's report on a model of conciliation for the NSW Scheme was provided to the NSW Attorney General, and conciliation services were established in the Department of Industrial Relations.

HREOC appears content with the High Court judgment in 1995 that the determination of complaints is a judicial function, and all judicial functions have to be handled by a court. However, as a health policy adviser, researcher and teacher at the University of Sydney, I resent this decision bitterly, on the public behalf. What will be its outcomes? I think all determinative processes (decision making) should be done by independent tribunals because the courts are inherently authoritarian, adversarial, unaccountable, socially dysfunctional and outrageously expensive institutions.

3. WorkCover provides a fund management model which could assist broader risk management

Because of the growing multitude of inconsistent court and tribunal processes, effective dispute data gathering is currently impossible. The community, its taxpayers and its premium holders have little idea of how the courts operate and what general outcomes they produce. They have even less data about potential inequities, unintended consequences and associated costs. That appears to be the way the lawyers like it.

However, there is a great deal of evidence collected in State workers' compensation and motor accident arenas over many years, that the traditional adversarial process severely inhibits rehabilitation of injured people by denying them early access to appropriate and effective support. In workers' compensation, a supposedly no-fault insurance scheme, the adversarial method for determining a physical level of incapacity has been particularly illogical. On the other hand, insurance provides any apparent miscreant with few economic incentives to avoid future poor

performance, because the amount of any court award, and its related costs, is borne primarily by all those organizations or individuals who are legally required to have insurance premiums in case an unforeseen claim is made upon one of their number.

Doctors and builders were insured with HIH in case their clients complained about their work. The insurance company invested and administered the premiums in a disgusting fashion. Lawyers helped them. Auditors, like most people, do not like to face anything that might upset them, especially when they are being paid large amounts of money for carrying on as usual. These problems were combined with HIH premium price cutting to attract customers, a rising cost of claims, the multiple lawyers and the courts. HIH went bankrupt. Insurance legislation appears to be supporting socially dysfunctional commercial incentives and related opaque, expensive, accounting systems, at least in this instance. It makes me want to kill, and I have never even been injured or in business, big or small.

However, workers' compensation insurance in NSW has fortunately been designed to avoid some of the key problems associated with the collapse of HIH. Government and industry underwrite the WorkCover fund. The premium holders own the fund, and also establish the appropriate level of benefits and premium prices. The scheme is fully funded. The WorkCover Authority undertakes regulatory and related operations paid for by the fund. It administers the NSW OHS Act and the NSW Workers Compensation Act. It engages twelve insurers which are paid to competitively gather premium, administer claims, collect data and invest premium on behalf of government and industry. Some large organizations may also be approved self-insurers.

The public ownership structure of the WorkCover fund and the prevention of traditional insurer competition on premium price avoid the problems which arose with HIH. WorkCover premium holders never lose control over their own money by having to give it away to an insurance company which does not appear to know or tell them what they are doing with it. WorkCover premium holders know that their fund management structure ideally promotes transparent insurer competition, and also the goals of protective legislation related to health. Furthermore, this structure is cheaper and much more stable than the system would be if private sector insurers were to underwrite it.

In the latter situation the premium pool would have to be broken up between competing insurers who would require large insolvency margins (profits). High profits mean high premium prices. This is necessary so the insurer can avoid the strong possibility they could become bankrupt as a result of competition on premium price, poor investment returns, poor management, the necessary costs of international reinsurance which result from breaking up the fund between insurers, and the growing cost of unexpectedly large, numerous or long tail claims. This unstable tendency interacts with the similarly destabilising effects of the international business and underwriting cycle. The national business system thereby becomes generally more unpredictable.

Obviously, it is vital to intimately involve independent worker experts or representatives, as appropriate, in all policy and management functions related to workers' compensation fund management. This is necessary because the fund is primarily established to provide a socially protective function rather than a commercial one. As a result of recent amendments to the NSW Workplace and Injury Management Act, premium incentives have been provided for employers to establish effective workplace risk management programs. A key requirement of these is that employees are involved in the development, implementation and review of return to work and occupational health and safety programs. This is supported by compulsory conciliation for the permanently injured, aided by independent experts whose judgments are not adversarially driven.

The seriously injured so far have access to common law if they waive other guaranteed entitlements to rehabilitation and related service support.

State workers' compensation acts are supposedly 'no-fault' legislation with workplace based rehabilitation provisions attached. Unlike third party motor accident insurance, the injured worker does not have to prove that someone else *caused* his or her injury. The insurance benefit is gained automatically as soon as the worker is injured. Permanently injured workers are also paid lump sums to compensate them for their disability and for related pain and suffering. The income support of those unable to work because of their injury is met first from workers' compensation premiums, and later by the Department of Social Security. An inquiry into the operation of the NSW Occupational Health and Safety (OHS) Act has recommended that victim impact statements be issued in conjunction with prosecutions under the OHS Act. Under the latter act, WorkCover inspectors, trade union representatives and other persons approved by the relevant Minister may undertake investigations and prosecutions. Fines from prosecutions currently add to government revenues.

Superficially, it seems equitable and efficient that consistent treatment should be available in a range of situations where workers, clients, customers, or members of the community may claim they have been injured as a result of negligent or other unforeseen treatment outcomes. However, any compensation money, as well as any rehabilitation related payments, will have to be met by others in the community somehow. Careful consideration therefore needs to be given to the design of legislation and its related administrative structures in order to get the best outcomes for everybody at the best cost.

4. Judgements should be made by informed people with a duty to seek and tell the apparent truth

Given the above context, no sensible person or organisation should go on in the same old tunnel vision way, thinking purely about their relationships with courts and lawyers. There are many people who could do the job of dispute resolution much cheaper than those with legal qualifications. They may also do it much better than a lawyer could, because they have not swallowed and upheld traditional legal principles for years on end, just so they can pick up money. A legislated duty of care to seek and tell the apparent truth might help many people to avoid the common pitfall of any form of advocacy.

All communities need effective harm prevention and related education and dispute resolution to assist early identification of risk and avoidance of injury. Information on individual complaints and their solutions may also provide information to assist the resolution of related problems. For this to occur, people must have confidence they will be treated in an unbiased fashion. Parties to a dispute should be able to bring someone to speak on their behalf. All parties who have something to say about a matter should normally be heard. Representatives of the parties in dispute may be on panels to hear disputes or make determinations on them, with the best interests of the broader community, organization and individuals firmly held in view. This appears to be consistent with relevant ILO Conventions such as Convention 121, concerning benefits in the case of employment injury.

The benefit of using relevant UN Conventions as guides for local decision making is that they reflect agreed values and principles of an ideal international, multicultural and democratic community. The application of such protective principles can be broadly evidence based and tailored to specific individual and community requirements, consistent with related risk management expectations, including implementation of quality management and relevant

professional standards. When individual judgments and treatment practices are effectively recorded and monitored, comparative analysis of the outcomes should promote effective, equitable, but diverse future practice. The process is designed to allow appropriate diversity in cultural and individual treatment, but to reduce socially dysfunctional features of any traditional decision making practices. In the absence of a universal, multicultural and democratic approach, diversity of traditional practices may lead to increased social differentiation, but also to increased intolerance, moral confusion and conflict.

5. The Bill aims for better management of human rights and education, but greater independence is needed

The Australian Human Rights Commission Legislation Bill (2003) states that:

1. A new Australian Human Rights Commission will be created to replace the Human Rights and Equal Opportunity Commission.

2. The executive structure of the new Commission will consist of a President and three Human Rights Commissioners. Each Commissioner will act on an appropriate generalist basis in handling dispute resolution, rather than as a legislative specialist.

3. Before exercising its power to seek leave to intervene in court proceedings, the Commission will be required to obtain the approval of the Attorney General for the exercise of this power, unless the President of the new Commission is a federal Judge.

4. The Attorney-General will be able to appoint part-time Complaints Commissioners to whom the President will be able to delegate complaint-handing functions.

5. The new Commission will not have power to recommend the payment of damages or compensation. However, it will have an expanded education, information dissemination and assistance role.

The aims or objects of the proposed human rights bill are not clearly explained in the bill itself. However, the bill's Explanatory Memorandum suggests that a primary aim is to replace the current legislatively specialist commissioners with generalist ones so that cases can be judged on a holistic, and therefore more broadly considered and realistic basis. For example, a situation facing a black woman with disabilities will no longer need to be decided according to the specific requirements of a single specialist jurisdiction, which may conflict with the specific requirements under another specialist jurisdiction also covered by the Commission.

As I have earlier indicated, if this hypothetical black woman experienced her disabilities as a result of an accident at work, on the road, or apparently at the hands of her husband or doctor, she might also enter another arena entirely from those presided over by the current commission. In general, the more specialist courts, tribunals and related individuals are provided specifically to administer the requirements of particular legislation, the less transparent, more unfair and more costly the process of dispute resolution invariably becomes.

Increasingly separated but fiercely independent practitioners of dispute resolution processes will generally be increasingly likely to reflect the expectations of specific pieces of relevant legislation, rather than capably dealing with the holistically lived experiences of those in dispute. To the extent that this occurs, the independent process of dispute resolution may deliver

increasingly inconsistent, unknown or unexpected outcomes. This may satisfy the lawyers best, but the process is diametrically opposed to quality management.

Although the duties of the proposed president of the new commission are not made clear in the Bill or the Explanatory Memorandum, the Attorney General stated in his Second Reading Speech that 'the existing commission's powers to investigated and conciliate complaints will be retained, and the bill will complete the task of fully consolidating the complaint handling functions with the president'. The Attorney General also says 'I will be able to appoint legally qualified persons as complaints commissioners on a part-time basis to assist the president with these functions' and 'work will be allocated to a complaints commissioner by the president'. The bill provides for three human rights commissioners to replace the existing portfolio specific commissioners.

It appears from this that the aim of creating a President, rather than another Commissioner, is to establish the managerial conditions for proper public accountability and quality management, through enabling comparison of disputes and Commissioner output. Apparently an earlier review committee recommended that the responsibility for complaint handling (other than under the Privacy Act) be combined in one office-holder. I strongly believe in the importance of having general human rights commissioners rather than specialist commissioners but have no idea why Privacy Act complaints might be treated in a separation fashion. Nobody seems to explain this. However, in the interests of clearly independent decision making, clarity, equity, cost-containment, and general quality management I would personally prefer that:

- The legislation also provides for arbitration (i.e. non-adversarial powers of determination)

- The President is appointed by an appropriate independent community mechanism such as the National Committee on Human Rights Education Incorporated. (This is an independent association dedicated to promoting and extending human rights education in all its forms. It was established with the support of government, business and community groups. The National Committee has also been designated by the Federal Government as the national focal point for the UN Decade for Human Rights Education (1995-2004).

- No more lawyers are ever appointed to the Commission by anyone.

In relation to this, it should be noted that the Attorney General states that 'where a federal court judge is appointed to the position of President, the new commission will not be required to seek approval from the Attorney-General before seeking leave to intervene'. Apart from misguided respect for the views of men who are all now dead, why should one want to bother with the higher courts at all?

More generally, the apparent aims and related changes proposed by the Bill appear consistent with common goals of quality service management. However, it also appears that an aim of the bill may currently be to reduce the independence of the Commission and to increase the powers of the Attorney General over the organisation. This could be done through specific government appointments and/or by reducing the access of the Commission in regard to its current role of providing information to influence court decisions. It would indeed be a worry if any court or tribunal began to see an Attorney General or a government as the boss, which told it what to do.

6. Rehabilitation and its relationship to compensation and prevention should be considered

The proper role of all organisational and professional independence in a democracy, requires consideration. The proper relationship of such organisational or professional independence to

legislated social goals, the courts and their related funding systems, also requires thought. In this connexion attention is again drawn to the WorkCover funding and administration model briefly discussed earlier. The proposed Commission currently has no power to recommend the payment of compensation under any circumstances. This is an important but vexed issue. The Attorney General states that 'the government believes that education is the key to a society in which human rights are respected by all'. Rehabilitation is not mentioned although 'information dissemination and assistance' are.

From the quality management perspective, to spend money on education for prevention and rehabilitation generally seems preferable than to spend money on compensation and related punishment. This is especially the case if the punishment is borne by the innocent instead of or as well as the guilty, and is also very expensive. This may happen, for example, when an insurer goes bankrupt, or when there is an increase to all premium holders as a result of major court awards. It may also happen when there is an out of court settlement to avoid the embarrassment and cost of legal suit to an innocent or guilty party. (Could there even sometimes be an element of blackmail in some suits?)

The concept of compensation is historically the product of the common law and related insurances which were formed before the development of the welfare state. Under earlier statutes and their administrative systems, compensation was traditionally made available only to those who could prove in a court they had been wronged. (The concept of no-fault compensation primarily denotes a welfare system paid for by premium holders.) However, those who run any welfare system should also see the need to promote prevention of injury and independence. In regard to the former, the excellent results which have been obtained by the Road Traffic Authorities and the police in reducing deaths on the road are very instructive. Deaths have been greatly reduced primarily through mass community education, compulsory seat belt wearing requirements, and vigorous enforcement against drink driving and speeding. (However, motor accident insurance still supports a traditional fault based system of legal suit which may be horrifyingly socially dysfunctional for many reasons which I will not go into here.)

7. No social group should be exempt from public accountability for their actions

A HREOC press release states that "the Commission does not support the bill which stands to have a detrimental impact upon the work of the Commission. HREOC believes the bill significantly undermines the Commission's independence in the exercise of its 'intervention powers'".

The first of three submissions on legal information which are provided by HREOC states that its position is based on the 'Paris Principles' established by the UN Commission of Human Rights and the UN General Assembly. According to HREOC the Principles relating to the Status of National Institutions (Paris Principles) set out international minimum standards for independent national human rights institutions internationally. HREOC further states:

> 'the essence of the Paris Principles is that a national human rights institution must have the independence and mandate essential for it to perform its functions effectively and operate in an unfettered and uncompromised manner'.

The Commission says nothing in its submission about how such publicly funded service practitioners should appropriately be held publicly accountable for expenditure of public funds. (Are these issues not addressed in the Paris principles?)

HREOC further quotes the Paris Principles:

> "In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish a specific duration of the mandate……."

HREOC then goes on to complain about the lack of transitional provisions for current Commissioners to transfer to the proposed new organisation. This sounds overwhelmingly like a very common industrial complaint. The Commission appears to equate independence with a *stable mandate*, which is also apparently accepted by HREOC as a fixed term appointment (of unstated length). On the other hand, the Explanatory Memorandum of the Bill refers to part-time commissioners, without discussing their expectations regarding continuing appointment. Neither does the Attorney General.

Whilst HREOC and the Bill appear to equate independence with a fixed term contract, Justice Kirby stated in 1995 that, 'it has been said that without *assured tenure* there will always be a risk that decision makers 'will bend to the will of the powerful or twist to the interests which seem to promise an advantage'. Exactly how long should a fixed term be to assure genuine independence? One year long, continuing until the age of eighty, or something in between? One assumes the lawyers would all argue that the longer the better.

In spite of what Justice Kirby says, it is hard to see why the legal profession should be treated differently from all other people who may neglect their duty to act in the public interest, simply because they fear that to do so will cost them their job or interfere with their career progression. For example, engineers, doctors and many others formerly employed in private or public sector bodies have revealed to the press instances of public safety or environmental protection being ignored, as a result of higher orders designed in the pursuit of political or economic advantage.

The provision of '*assured tenure'* for anyone, including judges, needs to avoid the problem that the privilege might be treated primarily as a personal licence to print money, whilst having a good bludge and a fine wine cellar at the public expense. On the other hand, the best way of protecting all members of the public from oppression, is likely to be to provide all professional groups with a legislated duty to seek and tell the apparent truth about matters of organisational and public importance. Then the media should be able to discuss these things as openly, honestly and with as much information as possible.

In a better system judges should publicly complain if politicians tried to influence them secretly or otherwise inappropriately, and the press should report the debate. The reason for independent decision making is ideally so that the public interest can be followed without interference by powerful sectional interests. The most obvious and democratic way of achieving this is not to promote lawyers and courts, but to champion instead the public right to service transparency and to related public scrutiny and debate across the board. Many lessons about human rights might well be taken from the Australian health and education sectors rather than from lawyers.

8. All dysfunctional legal monopolies posing as independent should be broken

The HREOC submission generally appears to seek to reduce the public accountability of the Commission rather than to increase it. For example, without presenting any evidence for its assertions, it states that 'Australia has been well served by the structure adopted to date of specialist office holders'. (How does it know?) 'As a federal body the wide jurisdiction of the

Commission requires specialist Commissioners and such specialisation complements the generalist officeholders that exist in the state and territory structures.'

It is not clear to me why HREOC implies that specialist functions are better for the Commonwealth whilst generalist ones are better for the States. I have never understood the logic specialist courts or related arenas employ when they make their decisions in the absence of information about how other, previously or differently involved adjudicators or observers have approached a matter. The practice appears to equate ignorance with objectivity. Few doctors, for example, would draw a veil over the findings of other medical examiners, preferring to conduct all their investigations without such information, and calling this practice freedom from bias.

The legally trained, on the other hand, commonly appear to find great value in equating ignorance with objectivity or freedom from bias. They often champion these concepts by building Chinese walls whenever they can, at public expense, to prevent themselves and others from what they apparently perceive to be contamination from outside. However, what may be seen by lawyers as 'objectivity' may be seen by others as a refusal to investigate holistically or to consider all readily available information and perspectives about an issue. HREOC takes the traditional lawyer's position in calling for more specialist Commissioners, and suggests they might respectively focus on rights of children, older Australians, and discrimination based sexual orientation.

Alarmingly, the position of HREOC apparently reflects the position of the UN, as contained in The Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights. The Manual apparently says:

> An effective national institution will be one which is capable of acting independently of government, or party politics, ***and of all other entities and situations which may be in a position to affect its work.*** (My emphasis)

According to HREOC, the manual describes four essential characteristics of independence: independence through legal and operational autonomy; independence through financial autonomy; independence through appointment and dismissal procedures, and independence through composition. No mention of how public accountability is to be obtained. Welcome to the new mafia – the same as the old one?

On the other hand, HREOC states:

> 'the reporting to Parliament on unconciliated complaints is an important public function which should be the responsibility of the Commission rather than of an individual member. This would require and amendment to Clause 49 of the Bill substituting 'President' for 'Human Rights Commissioner'.

HREOC's concern about the importance of being independent apparently does not descend to the level of the individual. It appears to prefer that any apparently slow or stupid brethren should be able to hide within the organisational skirt.

9. Break the lawyers' monopoly over charging

HREOC's view in regard to legal costs is that the rationale for their award must be fairness first and foremost. However, HREOC also notes that this principle of fairness 'could and should be displaced if access to the legal system was unfairly prejudiced by a costs regime'. It points out that it is 'sensitive to the immediate perception that a legal costs regime disadvantages

complainants' and deters them from bringing their cases of discrimination to the Court because of the possible award of legal costs against them. On the other hand, it notes that a costs regime may have the effect of encouraging contingency fee arrangements (which it sees as beneficial).

HREOC further points out that Commonwealth discrimination acts all provide that a person other than a solicitor or council is not entitled to demand or receive any fee or award for representing a party to an inquiry. This seems to me to be in contravention of the Commonwealth Policy Reform Act (1995) which calls for equal competition on a level playing field unless another course of action can be shown to be in the public interest. HREOC seems quite happy that the lawyers' monopoly over dispute resolution should not be challenged by anybody willing to charge a lesser amount for a better product. However, it recommends that Federal Court fees 'could be waived or postponed' and that the procedures adopted by the Court be as 'user friendly' as possible. Talk about the Courts having a licence to print money. I presume the taxpayer will foot the bill for court largesse.

HREOC does not support the current bill or its management changes and writes that 'under the current legislative provisions, corporate management powers are invested in the collegiate body of HREOC as a Commission like the board of directors of a company'. I find this a strangely misleading thing to say. A company has shareholders. Does this statement suggest HREOC would like to be privatised and compete on equal terms with other conciliators in the private market or working for government? HREOC notes that Mr John Basten QC, proposed that complainants should have a right of direct access to the Federal Court, although we are not told whether he thought the playing field for all dispute resolution providers and their clients should be levelled before this happens. HREOC thought those in dispute should try conciliation first.

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A CONSERVATIVE PERSPECTIVE TOWARDS NATIONAL ARBITRATION

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Abstract

This article addresses the recent proposal of the National Alternative Dispute Resolution Advisory Council (NADRAC 2004) for a national mediator accreditation system. I argue that to develop effective dispute resolution procedures and supportive training or accreditation systems, Australia's major dispute resolution needs must first be identified by key stakeholders in industry and community contexts, as well as in the context of laws or related community standards which relevant groups of dispute resolution practitioners may normally be expected to uphold. A range of related hypotheses is presented on the basis of research reports and standards, which address apparent limitations of traditional adversarial court processes and the importance of risk management principles for sustainable development. Further necessary research is identified, which should include consideration of the appropriate relationship between technical and further education (TAFE) and universities. It is concluded that a related reform of NADRAC is also needed, in preference to establishment of the national mediation accreditation system this body recommended.

Define ADR in its primary context and identify the key stakeholders

In its recent paper 'Who Says You're a Mediator?" the National Alternative Dispute Resolution Council (NADRAC 2004) reviews potential models for a national mediator accreditation system and asks for comment. This article addresses this question and related issues. NADRAC is an independent body providing advice on alternative dispute resolution (ADR) to the Australian Attorney-General. It defines ADR as 'a process, other than judicial determination', in which an impartial person (an ADR practitioner) assists those in dispute to resolve the issues between them'. It also states that ADR processes may be facilitative, advisory, determinative or, in some cases, a combination of all three. Mediation is defined as a facilitative process in that the practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Conciliation is defined as an advisory process in which the conciliator is a neutral third party who considers and appraises the dispute. He or she may seek expert assistance in order to provide advice on the apparent facts of the dispute, the law, possible or desirable outcomes and how these may be achieved. Arbitration, expert determination and private judging are provided as examples of determinative ADR processes (NADRAC 2001).

NADRAC points out that its distinctions between mediation, conciliation and arbitration are not consistently made in Australian legislation and that related customs vary greatly. However, if the NADRAC definitions are accepted as correct, then mediation, conciliation and arbitration resemble ascending steps in an approved practitioner's degree of power to judge matters and people, on the basis of all apparently relevant evidence which he or she has gathered about the major issues of concern. In the court, on the other hand, opposing lawyers drive the collection and consideration of all evidence about a matter strictly, according to adversarial principles, presided over by a

comparatively passive judge. The decision-making processes of the court also normally take place in isolation from any understanding of earlier attempts at conflict resolution. Is this wise?

This article argues that in order to develop effective ADR training or accreditation, the key stakeholders in the most clearly relevant communities must be consulted first. Their representatives currently enter into dispute, and therefore they are also the groups most likely to be prepared to pay for any supporting process of dispute resolution, training or accreditation. ADR practitioners may be most broadly conceptualised as those who the key stakeholders entrust to undertake an informed and effective search for evidence, in order to resolve, record and assist prevention of further environmental problems, of which disputes are symptomatic. Essential differences between the ideal aims and practices of courts and lawyers, in comparison to those of ADR practitioners, should also be conceptualised in this context. This is necessary to address the question of the appropriate links which should be made between the goals, management, training and accreditation requirements for services to the courts, compared with those considered appropriate in ADR.

Clearly identify and justify the appropriate role of courts as well as ADR

The legitimacy of courts is taken for granted by many Australians. However, later discussion suggests that policy makers need to question how evidence about any dispute and its related environment should be sought and treated, and by whom. This is necessary to distinguish the ideal differences, if any, between the roles and functions of courts and ADR. Lawyers are trained in law and its practice. However, the requirements placed on the ADR practitioner should perhaps be primarily the same as those placed on any other kind of person in a given environment who takes a broadly informed, sympathetic and scientific approach to gathering evidence, providing advice and making judgments about personal or environmental matters, in the light of legislation or other

relevant standards. If this is so, then lengthy ADR training followed by accreditation may not be necessary. Should the ADR practitioner's qualifications for the role primarily reflect the knowledge requirements of the community and its key stakeholders, in the environment most relevant to the question and its resolution? For example, is construction likely to be the best training ground for all ADR practitioners in the construction industry? If this is so, it may be that industry and community key stakeholders should identify, train and/or approve a range of ADR practitioners who may or may not have any legal or similar qualifications. Such issues require further research.

Many tribunals and related forms of ADR have been established since a British colony was established in Australia centuries ago. This has occurred partly as a result of public dissatisfaction with the ancient origins and related processes of the British common law, which fundamentally prevail still. The passing of the Conciliation and Arbitration Act in 1904 is the most characteristically Australian outcome of this concern. In more recent times policy makers have increasingly perceived a need to move towards more uniform, data driven and apparently effective approaches to the management of risk and related disputes. This is deemed necessary to avoid withdrawal of health and other services to the general public and also to avoid further collapses of insurance companies. Inquiries have now gathered a great deal of evidence that the traditional court process hinders effective risk management. There is growing agreement that more balanced and scientific dispute management systems are needed to replace the ancient adversarial ones Australians have inherited. This has been considered necessary to achieve better injury prevention and rehabilitation, through dispute management processes which can also assist early identification of problems, control of related risks and effective comparative assessment of treatment outcomes. It is also necessary to avoid cost-shifting, and related forms of corruption. (National Committee of Inquiry 1974, NSW Government 1986, NSW WorkCover Review Committee 1989, House of Representatives Standing Committee on Transport, Communications and Infrastructure 1992, Review of Professional Indemnity Arrangements for Health Care Professionals 1995, Standing

Committee on Law and Justice 1997, Heads of Workers Compensation Authorities 1997, Industry Commission 1997, Grellman 1997, Senate Economic References Committee, 2002, The HIH Royal Commission 2003).

A recent research review commissioned by the Australian Institute of Judicial Administration Incorporated and NADRAC discovered that the most consistent finding of legally driven research into mediation is high client satisfaction, although general public awareness of mediation appears limited and uptake of voluntary mediation is low (Mack 2003). The evidence from related jurisdictions also suggests the comparative efficacy of ADR processes in comparison with those of courts (Grabosky and Braithwaite 1993; Fisse and Braithwaite 1993; Strang and Braithwaite 2001; Braithwaite 2002). Most recently, a major report on child custody arrangements in the event of family separation has recommended the establishment of ADR procedures, including parenting plans, to address problems apparently resulting from the inadequate assumptions and processes of the family court (House of Representatives Standing Committee on Family and Community Affairs 2003). Public discussion continues about whether another tribunal is required instead. This appears to be a matter for more comparative research.

In ADR, a range of independent advisors or umpires is approved to assist the parties in dispute. They ideally gather and may determine the answer to a problem from a perspective which is broadly evidence-based and balanced, in the light of relevant legislation and related particulars of the specific situation. This process might colloquially be called 'seeking a fair go all round'. It differs from the adversarial and legally driven approach to evidence gathering and treatment commonly required by courts. Mediators appear the least powerful group on the ADR chain and are therefore those most likely to be easily influenced by the ways of people who are above them in the social structure. For this reason it may be best to consider the appropriate role and training of arbitrators first. Many people, including government health, safety and environmental inspectors may currently act in

arbitration roles, as well as taking prosecutions. The legitimacy of their judgments appears likely to be strengthened when they are empowered by their closest communities, as well as by the government, which is perhaps seen by some people as remote or even threatening to the individual interest.

Research the comparative outcomes of all forms of dispute resolution

Decision making by courts appears primarily to be justified by the highest court, through appeal to the requirements of the Australian Constitution. For example, the Human Rights and Equal Opportunity Commission (HREOC 2003) states that the High Court decided in Brandy Vs HREOC: 1995, that a court must make any binding determination of a complaint because anything else is unconstitutional. HREOC explains that its commissioners have the function of acting as 'friend of the court' where complaints cannot be conciliated and are referred to the court for determination. When courts are the senior frame of reference against which ADR performers judge themselves, there are many economic and social incentives for them to act increasingly like lawyers. The logic of court operations, including any monopoly privileges currently enjoyed by courts, especially at the most influential and costly levels of society, therefore requires additional justification from an evidence based, scientific or related rational approach. As a major champion of ADR, NADRAC should also provide an intellectual justification of court authority, aims and practice, rather than relying on perceptions of constitutional authority.

In comparison, the Workers' Compensation Commission in NSW is an independent tribunal which was set up in 2002 to resolve workers' compensation disputes. The Compensation Court closed in 2003. The President of the Commission, Justice Sheahan, says its arbitrators may exercise mediation and conciliation skills to settle disputes. An arbitrator works with the parties in conference-style meetings, by telephone and in person to assist them to resolve issues, or makes a determination

where this is not possible. During 2003 the Commission expanded its access to approved medical specialists so that it now has 200, compared with 91 arbitrators (WorkCover 2004). Such people are approved by relevant government and industry representatives to make independent judgments about disability and related matters, rather than being attached by their remuneration to the expectations of opposing lawyers or the court. The ADR process ideally enhances the scientific objectivity of all potential judgments and reduces cost. In such systems the injury claimant is also spared repeated health examinations which are normally undertaken by experts whose judgments may only be revealed in court, through adversarial lawyers. The President of the Workers Compensation Commission points out that stakeholders such as lawyers, who are used to the more traditional courtroom approach, need educating about the new system (WorkCover 2004). The question of who is qualified to teach them and what they should learn is addressed again later.

It is hypothesised that key stakeholders in industry and other relevant communities should approve arbitrators, who may or may not start off as mediators, to provide services or make evidence based judgments. Ideally, this should lead to more sustainable development as a result of more healthy and democratic social practices and outcomes. Such hypotheses require testing through comparative research. The Health and Medical Research Strategic Review (1997) stated that Australia should develop a focus on the prioritised creation and assessment of interventions and policy. Adopting definitions from the World Health Organisation (WHO) it indicated that the national research effort should take three forms. Fundamental research should generate knowledge about problems of scientific significance. Strategic research should generate knowledge about specific health needs and problems. Research for development and evaluation should create and assess products, interventions and instruments of policy which seek to improve upon existing options. The effectiveness of all relevant scientific, legal and related cultural paradigms for evidence gathering, analysis, judgment and recording require continuing, systematic analysis, in order to determine their comparative power to meet the needs of relevant communities of key stakeholders.

The establishment of ADR systems and the comparative identification of their outcomes is an aspect of action research. This is also necessary for high quality administration and risk management, which are discussed later. Action research has been described as a problem focused activity proceeding in a spiral of steps, composed of planning, action and evaluation of the results of action. Hart and Bond (1995) state that community education, consultation, monitoring and outcome evaluation are also centrally necessary in action research. Ideally, it is seen as a collective, emancipatory practice for the community involved. In order to understand and change social practices, social scientists have to include relevant community based practitioners in all phases of inquiry (Kemmis and McTaggert 1990). The need for community involvement in all health policy development and administration is acknowledged in national health service goals (Commonwealth Department of Community Services and Health 1994). The maintenance of community order is also closely related to the achievement of national mental health and Aboriginal health goals. ADR is hypothesised to be a comparatively effective process for assisting achievement of all these related aims.

Should all kinds of dispute resolution reflect the requirements of risk management?

The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) advised that health ministers should support national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints. From this perspective, it appears that dispute resolution should logically be managed as a service, like health or education provision, which aims to improve community health and related social or environmental outcomes. In this national context, more flexible and effectively coordinated education provision and related research should ideally be promoted through regional networks of inquiry-based learning at work and in related communities. This should also facilitate a consultative

approach to implementation of relevant standards, and to the identification of those practices which appear most necessary to improve quality of life for communities and individuals. The draft Australian Standard on Dispute Management (Standards Australia 2003) supports a similar perspective, in its provision of a framework aimed at the prevention, handling and resolution of disputes. It sets out a generic dispute management process which incorporates parts of the Australian standard on risk management (AS/NZS 4360 – 1999).

The latter standard supports the risk management requirements of Australian state occupational health and safety (OHS) acts which provide that all employers must identify and control risks in consultation with workers who are given appropriate information and training. Risks to communities should logically be treated in an appropriately coordinated context. Risk management is defined as a way of achieving continuous improvement in production and its outcomes. It is a logical and systematic method of identifying, analysis, treating, monitoring and communicating risks associated with any activity, function or process in a way which will enable organizations to minimise losses and maximise opportunities. It begins with the establishment of the strategic, organisational and risk management context in which action will occur. The next step is to identify and analyse risks in order to assess, prioritise and treat them. The final step is to monitor and review performance. Industry standards and codes of practice support state OHS legislation and assist risk management. People are expected to apply the relevant codes at work unless the evidence is that another course of action is preferable for health reasons in the specific situation under consideration.

The risk management approach required of all workplaces provides the legislative context for a generally more professional attitude to work, which can also be compared with that already required of health workers. For example, a health professional is ideally expected to identify a problem and to apply treatment after consideration of the relevant body of scientific evidence or related protocols. However, the treatment may vary as far as this appears to be necessary to meet the specific health

needs of a specific situation. The reasons for any deviation from the generally expected expert practice should be documented (Johnson 1997). This information should then contribute to a body of related research which is aimed at improving the general outcomes for particular communities and sub-groups in the light of the study of a broad range of specific environments, treatments and outcomes. The Open Disclosure Standard (Australian Council for Safety and Quality in Health Care and Standards Australia 2002) takes a consistent perspective. Its principles are based on the primary concept that when things go wrong, patients and their carers must be provided with information about what went wrong as soon as practicable and in an open and honest manner at all times.

It is hypothesised that all communities may need non-adversarial dispute resolution methods aimed primarily at further harm prevention, with punishment and rehabilitation which is conceptualised accordingly. From this perspective, the information on particular complaints and their resolution ideally provide data which is also designed to help solve many related problems. For this to occur, the parties in dispute must have confidence that their concerns will be fully appreciated and treated in an unbiased fashion. Those in dispute should be able to bring someone to speak on their behalf and all people who have something to say about a matter should normally be heard. Representatives of the relevant industry or community key stakeholders may act alone as ADR practitioners, or act on ADR panels, to assist resolution of concerns or make determinations. They should always have the best interests of the individuals and their communities firmly held in view. Transparency and related data gathering requirements may drive the most effective forms of regulation and scientific development in this context. All health practitioners are being increasingly drawn towards this broadly scientific approach, but more comparative research on a wide range of related services and outcomes is required.

NADRAC Models for a National Mediator Accreditation System

NADRAC sets out five potential models for a national mediator accreditation system under the headings of Professional association; Industry body; Government; Commercial enterprise and Accreditation of organizations that accredit individuals. It first suggests mediators could form a professional association, similar to some existing state registered professional associations. However, it also notes that professions have come under criticism in recent times for restrictive practices, lack of transparency and lack of recourse to independent complaints mechanisms. NADRAC later suggests another option may be the creation of commercial enterprises which offer a range of services on a fee for service basis. The National Accreditation Authority for Translators and Interpreters Ltd. (NAATI) is provided as an example of such a body. NADRAC notes that such enterprises would have to gain credibility with government and purchasers of mediation services, and market their services through 'trust' marketing.

However, the above options also require consideration in the light of Council of Australian Governments (COAG) decisions. In 1990 COAG agreed to mutual recognition of state laws with the aim of creating a uniform national market. All states and the Commonwealth then passed mutual recognition acts. At the same time, COAG began to develop national standards for health and the environment, related occupations and training, social security benefits and labour market programs (Premiers and Chief Ministers 1991). In the relevant legislation, occupations are treated equally, in the sense that the word 'profession' does not normally appear. The governance aim is to create a national platform of standards broadly consistent with relevant international agreements such as the United Nations (UN) Declaration on Environment and Development signed in 1992, and earlier World Health Organisation (WHO) agreements. The first principle of the UN Declaration is that

humans are at the center of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature. Education, monitoring, evaluation, research, dispute resolution and prosecution systems should be designed to support related national goals.

Since 1989 continuing review of all legislation has been occurring, with the aim of identifying those regulatory provisions which appear most suitable for the Australian direction and environment, prior to harmonizing legislation more effectively. Ideally, this should also occur according to requirements of the Competition Policy Reform Act (1995) which seeks to promote competition on a national field of guaranteed minimum standards related to health and environment protection. Equal competition between private and public sector service providers is required unless another course of action is in the public interest (Fels 1996). Although separation of policy and administration is increasingly recognized as necessary to judge the comparative outcomes of competing service provision effectively, state freedom of information legislation currently relates only to the public sector, and medico-legal information is exempt. Does this inhibit ADR as well as identification of effective services and also tilt the playing field for competition in regard to their delivery?

NADRAC suggests that an industry model for mediation might be established which could bring together key stakeholders to define and advance practice in a particular sector or industry. It points out that although mediation is sometimes referred to as an industry, along with courts and other referring agencies, it is unclear whether this is an appropriate term. Do the courts primarily conceptualise themselves as service providers ideally subject to the requirements of good management in the interests of the communities of stakeholders? On the evidence provided earlier, this seems unlikely. I hypothesise that dispute resolution, like education or training, should be vocationally based, according to a broad understanding of the requirements of the industrial or social context for which it is primarily required. This is the assumption, which has traditionally been made, for example, in the state government selection of occupational health and safety inspectors. In

settling workplace disputes, with or without the aid of independent engineering or related experts, these inspectors may be seen as government appointed conciliators or arbitrators, under another name.

NADRAC suggests that a Government model of mediation may enable a minister or a defined official or agency to recognise or accredit practitioners, and that this model is common. For example, the NSW Attorney General may accredit mediators under the Community Justice Centres Act (1983). The Commonwealth Family Law Act (1975) enables the Chief Justice of the Family Court to appoint court mediators. However, NADRAC does not recommend this model because it may be seen as an aspect of direct and central control by government, which is inconsistent with the principle of self-regulation previously recommended by NADRAC. Such concerns do not arise if the ADR related organisation reports openly, and to the whole of government. In such a model, independence may be conceptualised as the responsibility to make informed decisions, which can withstand public interest based scrutiny from any quarter. This emphasis on transparency is consistent with the economist's view that perfect information is necessary for perfect competition and also with the concepts of quality service provision through risk management, as outlined earlier.

NADRAC proposes as its final solution a national mediator accreditation system in which organizations are accredited to accredit individuals. It states that the approval of such organizations would require the development of common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediators. It notes, for example, that the Commonwealth Family Law Act (1975) enables the Attorney General to approve organizations that provide counselling or mediation services according to the standards of a related quality accreditation system and that this also exists in health and vocational education. For example, the organisation Community Services and Health Training Australia is an advisory body which has developed competencies for mediators. While this NADRAC proposal for a national mediator

accreditation system is consistent in some ways with the argument presented in this paper, one should first inquire whether another body like NADRAC is desirable or necessary. Some related research issues will be discussed in the light of existing systems for tertiary education. As a result of this discussion it is concluded that reform of NADRAC and more research is needed rather than the immediate establishment of the new national mediator accreditation system which it recommends.

Key education and related requirements for developing ADR systems

In Australia most post-secondary education occurs in universities which are self-accrediting institutions, or in technical and further education (TAFE) colleges. Both are public institutions. Universities are a Commonwealth funding responsibility and state governments are responsible for TAFE. The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) called for a national effort to improve education of health care providers and advised that curricula for continuous quality improvement should be included in all undergraduate, postgraduate and continuing education. Key stakeholders might consider a similar approach to subject content and delivery for all twelve university discipline groups identified in the last federal budget. This approach might also capture and utilise appropriate tertiary specialists, e-learning technologies and related economies of production to meet identified community requirements. Legal training requires consideration in this context.

The TAFE sector has established processes and training packages for the accreditation of a wide range of vocational skills, including mediation. These form part of the Australian national training packages which the Australian National Training Authority (ANTA) has recently developed. The latter are the primary, competency based, building blocks of vocational education outside Australian universities. A national network of Industry Training Advisory Bodies and relevant others developed them. After a quality assurance process and agreement by state vocational education

ministers, the National Training and Quality Council will endorse them. National qualifications are defined in accordance with the Australian Qualifications Framework which supposedly provides a single coherent framework for all recognised qualifications from Senior Secondary Certification to PhD. ANTA has stated that the packages 'require policy and training specifications to be translated into a clear picture of teaching, learning and assessment materials and strategies' (ANTA 2003: 1).

The claims made for Australian tertiary education require testing in practice, through an open, public examination and trial of appropriately tailored and approved content in all relevant TAFE and university courses, in order to determine how effectively this meets community needs. This process could start with industry and community focus on ADR and law. A reformed NADRAC, with more appropriate peak community representation, might also assist community consideration and trial of course content to meet the demand for effective dispute resolution identified by a range of researchers, including industry and community key stakeholders. In this context, the reform of NADRAC, rather than establishment of a national mediation authority, would appear to meet community requirements best, at least at this conjuncture.

Conclusion

In order to develop effective dispute resolution procedures, and supporting training or accreditation systems, major dispute resolution needs must first be identified by the key stakeholders in Australian industry and community contexts, as well as in the context of the laws or related community standards which relevant groups of dispute resolution practitioners may normally be expected to uphold. Research into the development of effective dispute resolution systems should be supported by related inquiry into how the two largest vocational education systems of the Australian tertiary sector could be more effectively linked to each other and to the requirements of the vocational and related communities, which should normally support them. This could fruitfully begin through an

open, public examination of the content in all TAFE and university ADR and law courses. A reformed NADRAC, with more appropriate representation, might also assist community consideration and trial of ADR course content. A new national, mediation related body does not appear necessary at this stage of development.

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SUBMISSION TO THE REVIEW OF THE DISABILITY DISCRIMINATION ACT

Introduction

This submission relates particularly to page 344 of the draft report on the Review of the Disability Discrimination Act 1992 where the Productivity Commission states that it:

'is considering the potential for a co-regulatory approach under the Disability Discrimination Act 1992. The Commission is seeking views on how a co-regulatory approach might be implemented, including:

- the status that should be afforded to an industry-developed code of conduct
- appropriate deadlines for industry to develop a code of conduct in an area before a disability standard is imposed.'

This submission is also made in the light of the terms of reference of the Committee, especially 2(d)

- The need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication.

In general, on the grounds of equity and efficiency, consistent protective approaches should be taken to those who are injured at work, or allegedly at the hands of a product or service provider, or as a result of other misfortune or negligence in the community. The appropriate legislative treatment of disability therefore needs to be addressed primarily in the light of previous deliberations by the Productivity Commission and other bodies addressing appropriate occupational health and safety and workers' compensation requirements, and also public liability and professional indemnity insurance. The recent report of the Senate on the Provisions of the Australian Human Rights Commission Legislation Bill 2003 should also be considered in this context.

In general, it is recommended that the Productivity Commission inquiry into the Disability Discrimination Act harmonize its approach and recommendations with the Commonwealth, State and Territory Legislative Initiatives outlined in Appendix 5 of the Senate Economic References Committee Review of Public Liability and Professional Indemnity Insurance (2002).

Supporting Argument based on an understanding of the concept "black letter law":

On page 321 the Productivity Commission report on the Disability Discrimination Act refers to 'legislation or Acts of Parliament' and immediately follows this with the statement '(or 'black letter law'). The statement that 'Explicit government regulation (or 'black letter' law) refers to both primary and subordinate legislation' is repeated on the next page, again without explanation of the reference in brackets. What does 'black letter' mean to the writers and why is it not explained?

I am no lawyer, but my understanding of the term 'black letter law' comes from formerly being employed in the NSW WorkCover Authority, immediately after the introduction of the NSW Occupational Health and Safety Act and related rehabilitation requirements under the NSW Workers Compensation Act. From this NSW perspective, black letter law is prescriptive law, which must be followed to the letter. It is old fashioned and inadequate law, often exemplified, for example, in State acts from the turn of the century such as the Factories Shops and Industries Act, the

Construction Safety Act and the Rural Accommodation Act. These acts were all revised with the passage of State OHS Acts during the 1980s. The new OHS acts have a general duty of care focus, supported by regulation, which calls up standards and codes of practice.

Under State OHS Acts employers are expected to provide a safe place of work. Employees are expected to work safely, and sellers to the workplace are expected to provide safe product. Employers are expected to undertake risk identification and control in consultation with workers who are provided with information and training. The WorkCover Authority is the regulator for both the OHS Act and the Workers Compensation Act, which is administered by 12 insurers who collect premium, administer claims and undertake data gathering and fund investment on behalf of government and industry, which also underwrites the scheme. This structure is based on recognition of the need for effective data driven management, which is essential for the management of all risk.

Ideally, when regulations call up Australian standards (for example regarding electrical safety) these must be followed to the letter. When regulations call up codes of practice these provide guidance on how specific risks may be effectively controlled. However, those at the workplace may deviate from the approved code when it is expertly judged on the evidence that another practice is just as safe or safer in a specific situation. WorkCover inspectors act as advisers who may seek independent expert advice to resolve workplace safety disputes. Like the health practitioner who applies a scientifically approved treatment for a patient's disease, the workplace practitioner ideally recognises that particular situations may vary, and should act safely, in accordance with the evidence about the specific context. The action should be documented. Study of aggregated documentations and their outcomes should be a common research process, which may lead to change in a code of practice.

In contrast to a duty of care or 'outcomes based' approach to law, black letter law is closely identified with the common law. It may not even contain objectives. For example, the Australian Human Rights Commission Legislation Bill (2003) does not clearly explain its aims or objects except in an accompanying Explanatory Memorandum, which may be forgotten quickly. Black letter law is inadequate because it attempts to be explicit about required practices, in a way which covers all situations. The result of this is that it is often inadequate and incomprehensible, or may become so over time. It may also become increasingly contradictory as a result of court decisions, and extremely outdated as a result of the march of technology.

Because it has no outcome focus black letter law is essentially authoritarian and also deals poorly with individual variation. It retards technological progress because a person who has found a better way of achieving a safe work process may accordingly find themselves in breach of law. Black letter law encourages a stupid, subservient mindset which can never adequately address problems because it does not care about providing the data for doing so. Black letter law has an essentially prescientific and non consultative approach. It is a creature of the common law, in legislative form.

It is hard to understand why the Productivity Commission draft report on the Disability Discrimination Act does not explain the meaning of black letter law and appears to assume that all law is necessarily 'black letter'. Are the writers perhaps lawyers, who, like the recent Human Rights and Equal Opportunity Commission submissions on the Provisions of the Australian Human Rights Commission Legislation Bill (2003) appear to take their primary frame of reference from the courts? Since 19% of the Australian population currently identify themselves as having a disability, and around one third of these difficulties are musculoskeletal, this could become an increasingly expensive perspective for the Australian taxpayer. In contrast, the Commission needs to understand and recommend the benefits of an effectively coordinated and data driven approach to health management in order to gain more effective risk identification and control. (I suggest reading past Productivity Commission reports which are relevant to this.)

In other disability related jurisdictions steps are already in train to deal with the problems black letter law may exacerbate. For example, the Productivity Commission report on its Inquiry into National Workers Compensation and OHS Safety Frameworks has most recently been released. The Senate Review of Public Liability and Professional Indemnity Insurance draft report (2002) noted that concern about increasing public liability and professional indemnity insurance premiums have featured heavily in the news since early 2001. Problems identified include:

- Major claim and premium increases, exacerbating pressures to insurer insolvency
- Extreme uncertainty and variability in premium increases
- No reliable data for the effective setting of premium rates (For example, the absence of a national aggregated database of health care litigation claims has hindered risk management. It has been impossible to identify where the real risks are, whether they are changing and which size claims are increasing most.)
- Withdrawal of many public services and cancellation of community events due to the fear of legal suit.

The Review of Public Liability and Professional Indemnity Insurance (2002) concluded that litigation may be driven by:

- Legal advertising
- No win no fee arrangements
- Lack of penalties for pursuing unmeritorious claims
- Anticipation/expectation that the insurer will settle; and
- Assumption that courts will take a sympathetic attitude towards a victim – this ties in with the shift in definition of negligence.

Insurers submissions to the Committee estimated that legal costs in personal injury cases amount to 40% to 50% of the total costs. However, nobody really had any reliable data about anything.

The committee came to the conclusion that the court system provides people with economic incentives to litigate, without providing supports for effective rehabilitation or future management. For information on the horrific way in which a long drawn out adversarial court system inhibits rehabilitation of the injured one need only consult the reports of the NSW Standing Committee on Law and Justice inquiry into the NSW Motor Accidents Scheme. However, there are many reports providing similar evidence. In general, workers' compensation structures have been established as a no-fault system which includes compulsory conciliation and the potential for prosecution for negligence under OHS acts precisely to avoid such problems.

In Appendix 5 of its report, entitled Commonwealth State and Territory Legislative Initiatives as at 30th September 2002, the report on the review of Public Liability and Professional Indemnity Insurance outlines a range of measures which States have taken to deal with the above problems. **It is recommended that the Productivity Commission inquiry into the Disability Discrimination Act harmonize its approach with this general direction.**

Carol O'Donnell