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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Attachment:
THE RELATIONSHIP OF QUALITY MANAGEMENT AND LEGAL BILLING

Legal costs and a data driven approach to injury prevention and recovery

In 2004 the NSW Premier called for an inquiry into the current legal costs system, including the calculation and method of presentation of legal bills to clients. The Legal Fees Review Panel produced a discussion paper on lawyers' costs and time billing. I am writing primarily to address the paper's first question for discussion, which is:

What costs disclosure mechanisms should be put in place to ensure that consumers of legal services are able to make informed commercial decisions concerning the costs in their matter relative to the potential outcome at appropriate points in the handling of their matter?

This question can best be addressed by first pointing out that all data systems for treatment and prevention of disputes, (which arise as a result of perceived injuries), should be related to data systems designed for effective treatment and prevention of the types of injury and illness over which disputes arise. Quality management and risk management principles, especially as they are adopted in relation to key Australian health services, provide ideal principles for dispute resolution systems to follow. The value and cost of dispute services to consumers and society should be discussed in this context.

From a public policy perspective, all forms of dispute resolution must be conceptualised as social services which, like health care or education provision, may be delivered and funded by government, in the private or voluntary sectors, or through related partnerships. From a quality management/risk management perspective all forms of dispute resolution are conceptualised as interventions which become necessary when the injury prevention mechanisms of society appear to have broken down.

From this perspective, disputes should provide vital data to assist the prevention of future injury. For example, Australian hospitals and general practitioners provide a wealth of public data which has allowed the identification and prioritisation of population health risks, such as cancers, cardiovascular diseases, etc. for preventive education, research and development. Casemix (diagnostically related group) funding and billing systems which have recently been introduced into Australia support this risk management focus. This coordinated approach to health promotion and service costing is discussed later.

In comparison with the kind of data driven management which has been the norm in the health industry for decades, the legal industry produces an almost total absence of useful quantitative data related to case types, outputs, outcomes and comparative costs. This is evident from reading any Australian inquiry into legal matters. The Legal Fees Review Panel discussion paper suggests that lawyers have historically been preoccupied with billing clients on an hourly basis, but have not shown any interest in establishing data systems to assist prevention of injury or rehabilitation of the injured, let alone rehabilitation of the criminally guilty. The absence of risk management data related to

court operation suggests that lawyers have traditionally sought only to enrich themselves rather than promote better management. The current legal billing system, which is discussed later, does not send the right incentives to anyone.

From a public policy perspective towards disputes, one should distinguish between fault and no-fault legal design and structures. For example, some forms of injury insurance are best conceptualised as providing the premium holder with protection against the economic effects of successful legal suit for negligence. Other forms of injury insurance are best conceptualised as welfare - a means of funding the treatment and rehabilitation of an injury victim, often through modification of their environment, regardless of whether their injury was the result of negligence or bad luck. Punishment for offenders must be conceptualised in a related way, to assist social and environmental protection, rehabilitation and development for communities and individuals, as well as punishment of the guilty. Appropriate compensation of identified victims requires consideration in this primary context.

In summary, from the industry and community development perspective, effective, data driven management requires the design of dispute related data collection systems which aim at preventing problems from arising, treating their causes and rehabilitating individuals and environments which experience their effects. Australian industries are familiar with this quality management/risk management approach as a result of requirements for workplace based risk management under state occupational health and safety (OHS) acts and workers' compensation acts. The health service industry is particularly advanced in implementing quality management and related data gathering systems. I will now discuss two reports in the light of this context and then draw general conclusions about dispute resolution and related billing systems.

What kind of billing and disclosure provides value for clients and communities?

In 1994 the NSW government deregulated the legal profession by amending the Legal Profession Act (1987) in order to release practitioners from any price fixing limitations imposed by scales and fees set by determinations of the former Legal Fees and Costs Board. The abolition of the scales system was relaced with a disclosure system and costs agreements (including conditional ones). This was aimed at preventing client complaints about solicitor failure to notify about significant increases in costs, failure to provide a timely or itemised bill and apparent acts of gross, deliberate overcharging. At the commencement of any client relationship the legal practitioner was henceforth expected to inform the client of the basis on which costs would be charged and likely costs must also be disclosed to clients in writing. The purpose of the amendments was to strike a fair and reasonable balance between the interests of consumers of legal services and the interests of practitioners who enter into any relationship. The Law Society of NSW has produced a Solicitors Guide to costing for its members which sets out a solicitor's responsibilities and obligations and provides sample documentation.

As the Legal Fees Review Panel discussion paper points out, the concept 'value'or 'quality' are elusive terms which must be evaluated by the client. However, hourly rates

are the standard fee structure for most law firms in Australia. The concept of value or quality which is attached to this leads to the assumption that the longer the lawyer toils the more valuable the work generally is. From the perspective of the customer, however, this may be ridiculous. Michel Ryan from Coudert Partners Australia points out that from the perspective of the law firm, under the time sheet system 'the one thing that determines whether it has been a good or bad day is the number of billable hours recorded. Nothing but the size of the bill supposedly reflects how well the lawyer has performed'. In reality, however, as Professor Horstein indicates, 'One thousand plodding hours may be far less productive than one imaginative brilliant hour. A surgeon who skilfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour and many a patient would think he is entitled to more.'

Supposedly in contrast with the billable hours approach, the discussion paper quotes a US lawyer who says that from day one his firm makes it the lawyer's job to ensure the client feels comfortable with constant communication because this is the only way clients can understand what is going on. The discussion paper indicates there is little evidence in Australia that law firms are moving away from hourly billing to adopt a system where communication with the client and related values are high priorities. Other key conceptual billing models dealt with in the paper include contingency fees and percentage fees. In the former case the lawyer is paid only if the client wins. This billing model may protect people from any predatory lawyer who might take on a case which they privately believe the client has little chance of winning. Percentage fee billing arrangement depend on the amount of money involved in settling a matter.

The concept of task-based legal billing, (which is only briefly addressed in the discussion paper), appears most useful from the perspective of the practitioner of quality management, especially if they have experienced this in health care. Task-based legal billing is defined as reporting the cost of legal services by tasks, using billable codes to describe them. The lawyer is apparently required to provide a budget in advance of performing the particular task and may not exceed the budget without prior agreement. From a superficial perspective this form of billing appears to be most consistent with Medicare practice and the Casemix (diagnostically related group) funding model that is increasingly central to the identification of value in regard to health service provision. This is discussed later.

How can legal aid expenditure produce value for money more effectively?

The Premier's call for more information about legal costs followed a report of the Legal and Constitutional References Committee of the Senate inquiry into legal aid and access to justice (2004). Prior to 1997 the legal aid commissions (LACs) of each state and territory were responsible for determining their own budget priorities and expenditure. The Commonwealth participated in such decisions through the Commonwealth Attorney General's representation on the board of LACs. In 1996 the Commonwealth withdrew from this arrangement and introduced 'purchaser/provider' funding agreements for legal aid service provision which restricted the state and territory commissions to allocating Commonwealth funding only to matters arising under Commonwealth laws. The term

'purchaser/provider funding' is commonly used in health care provision and is designed to achieve a separation of policy aims and funding from administration, so that administration is transparent and its outcomes can be assessed comparatively.

The Senate inquiry into legal aid and access to justice recommends an expansion of legal aid services and a new funding model to ensure a more equitable distribution of funding between the State and Territories. It recommends the model should be based on that of the Commonwealth Grants Commission, with increased funding for the Northern Territory to account for special challenges because of high indigenous population and remoteness. The recommendation is made in the light of a discussion of the major inadequacies of existing legal funding models and recognition that there is a considerable gap between those eligible to receive legal aid, and those who are actually able to afford to pay for legal representation on their own account.

But how much current legal expenditure, is well spent from the perspective of the consumers of legal services and the public? Will anyone ever know? Should more public money be poured into what seems to be a murky legal swamp? Improving data gathering for all Australian dispute resolution systems is vitally necessary if more public money is to be provided for them. For example, there is no systematic or quantified information in the Senate report on legal aid and access to justice about the kind of social problems which are dealt with by legal aid commissions. This lack of basic, comparative information about types of dispute, their treatment, and their treatment outcomes can be unfavourably compared with the situation in the health industry, outlined briefly below.

The health practioner undertakes analysis and recording of patients' problems. This may lead to diagnosis, applying treatments and monitoring their outcomes. Data recording is increasingly designed, both nationally and locally, to drive improvements in the quality of treatment outcomes and to prevent further injury. The development of evidence based treatment protocols and Casemix (diagnostically related group) billing systems have been constructed in this quality management context. The latter have replaced earlier billing systems which were based largely on the number of days a patient spends in hospital. Ideally the practitioner will apply an expertly developed and evidence based treatment protocol to a problem diagnosis, unless the specific situation of an apparently atypical patient requires a modified approach, which the expert practitioner should take, and then record. The recording of apparently typical and atypical patient situations, treatments and outcomes provides a data pool which can be studied in order to improve all activity in future. A coordinated management approach appears sensible for dispute settlement.

Australian legal aid services operate in a context where a wide range of tribunals and related dispute resolution systems other than courts exist. These provide many kinds of mediation, conciliation and arbitration (determination) services. Taxpayers, industry and those in dispute may all bear the costs of such processes, to varying degrees. From reading the Senate inquiry into legal aid and access to justice, one learns that while criminal, civil and family matters are all dealt with by legal aid services, around 90% of aid is currently estimated to be used for criminal matters. Areas where people who are too poor to hire a lawyer may seek legal aid also include the following:

Separation, domestic violence and other problems related to the care and protection of children or other family members; personal injury; credit, debt, fines and infringements, shoplifting, fraud, and related social security issues; tenancy issues; discrimination, mental health and guardianship issues; immigration issues, etc.

Because of its breadth, the legal aid area provides government with an opportunity to encourage the widest possible implementation of the kind of output based data gathering and related costing systems which are obviously necessary, but which the courts and their lawyers (unlike health professionals) resist.

Conclusion:

The development of quality management/risk management and related data gathering systems is vital to identify service value for money, in order to maximise it in the interests of communities and individuals. All billing related to the resolution of disputes should be designed in this context and should also promote injury prevention, rehabilitation and cost control. Health professionals, industry and communities should settle their disputes themselves, according to quality management/risk management principles, particularly if this is more effective and cheaper than trying to show lawyers how to improve their game. The attached papers provide related information.