

ALTERNATIVE DISPUTE RESOLUTION AND ACCESS TO JUSTICE IN THE 21ST CENTURY

I INTRODUCTION

In 1997, Lord Woolf delivered his *Access to Justice* report to Parliament.¹ The report came at the end of a lengthy review of the civil justice system in England and Wales, and as a result of complaints about the unwieldy system in place at that time. He identified the problems that he found with the system as follows:

The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.²

To remedy these problems, Lord Woolf recommended wide-ranging reforms. These included simpler rules of court, less complexity in procedure, more flexibility in dealing with cases and particular issues within cases, fixed timetables for progress of matters from filing to trial, and significant changes to legal costs. Importantly, he also recommended a system where litigation was to be discouraged — and alternative dispute resolution (‘ADR’) encouraged, and funded — prior to commencement of proceedings.

In December 2009, Lord Jackson published his *Review of Civil Litigation Costs*.³ His foreword is succinct:

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¹ Lord Woolf, *Access to Justice* (Final Report, April 1997) <<https://webarchive.nationalarchives.gov.uk/19970429165647/http://www.open.gov.uk:80/lcd/justice/final/overview.htm>>.

² Ibid [2].

³ Lord Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>>.

In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.⁴

In a preliminary report that appeared a few months prior to his final report, Lord Jackson summarised the outcome of the reforms implemented as a result of Lord Woolf's review as follows:

It is now ten years since Lord Woolf's reforms to civil procedure ('the Woolf reforms') were implemented. The Civil Procedure Rules 1998 ('the CPR'), which implemented the Woolf reforms, came into force on 26th April 1999. Those reforms have brought huge benefits to civil litigants. Far more cases are settled before issue. Those cases which are contested proceed far more swiftly from issue to trial. We no longer have the repeated tragedy (for such it was) of meritorious claims being 'struck out for want of prosecution'. The case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters. The creation of 'tracks' for cases ensures that each type of case receives an appropriate allocation of resources and degree of attention from the court. The 'fast track' ensures that lower value cases are brought to trial with expedition and that the trial costs (although not the pre-trial costs) of such cases are fixed. The procedure for offers ... has by common consent been a considerable success.⁵

However, Lord Jackson noted that 'despite the general success of the Woolf reforms, the costs of civil litigation continued to rise'.⁶ To this end, he recognised the benefits offered by various methods of alternative dispute resolution ('ADR') and recommended that

[t]here should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small business to the benefits of ADR.⁷

In 2014, the Productivity Commission provided a report, entitled *Access to Justice Arrangements*,⁸ to the Australian Government. The Commission summarised its terms of reference as follows:

The Commission has been asked to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and 'promoting

⁴ Ibid i.

⁵ Lord Jackson, *Review of Civil Litigation Costs* (Preliminary Report, May 2009) 1.

⁶ Ibid.

⁷ Jackson (n 4) 363.

⁸ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014).

access to justice'. There are many definitions of 'access to justice'. As Justice Sackville observed:

Like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people.

For the purposes of this inquiry, the Commission has used the term 'promoting access to justice' to simply mean, 'making it easier for people to resolve their disputes.'⁹

The Commission identified a range of problems with the justice system in Australia, including a lack of knowledge among many in the community of when, where, and how to take action. Other problems identified included difficulties in seeking appropriate legal advice, including finding appropriate providers, assessing the quality of the advice given, and the often significant cost of professional assistance. The Commission also made a wide range of recommendations, such as the provision of community education, benchmarking of legal fees, consideration of significant changes to procedures — particularly in relation to disclosure and expert evidence — and the fixing of fees in certain jurisdictions. In relation to alternative dispute resolution, the Commission made the following recommendation:

Where alternative dispute resolution processes have been demonstrated to be efficient and effective (such as in low value litigation), courts and tribunals should endeavour to employ such processes as the default dispute resolution mechanism, in the first instance, with provision to exempt cases where it is clearly inappropriate.

In addition, courts and tribunals should endeavour to expand the use of alternative dispute resolution processes by undertaking and evaluating targeted pilots for dispute types that are not currently referred to such processes, including wills and estate matters.¹⁰

These reports demonstrate that, for more than 20 years, access to justice in the United Kingdom and in Australia has been beset with problems. These problems relate to many factors, some of which are structural — such as procedures required by courts and other institutions in administering justice — while others relate to insufficient resources or excessive cost and delay faced by litigants. In each of the three reviews referred to above, the use of alternative dispute resolution has featured as part of the solution.

In this article, I deal with mediation and its part in this solution.

⁹ Ibid 3, quoting Justice Sackville, 'Access to Justice: Assumptions and Reality Checks' (Access to Justice Workshop, New South Wales Parliament House, 10 July 2002).

¹⁰ Ibid 48.

II WHAT IS ‘ALTERNATIVE’ ABOUT ALTERNATIVE DISPUTE RESOLUTION?

In *Mediation in Australia*, Boule and Field say that

[w]hile mediation espoused values and principles distinct from those of litigation, it was never accurate to portray it as an alternative system since this implied that litigation was the ‘norm’. In reality, litigation, in which parties in conflict institute legal proceedings and progress through to a hearing, has always been an out-of-the-ordinary manner of dealing with disputes.¹¹

Chief Justice Martin describes the ‘non-alternative’ nature of alternative dispute resolution in the following way:

Achievement of a consensus has always been, and remains by far, the most common means of resolving disputes in most, if not all, societies. ...

As civilisation progressed and societies became more sophisticated, systems of law evolved together with courts capable of enforcing those laws, which enabled disputes to be resolved without resort to force, other than the coercive powers of the courts. However, while enthusiasm for litigation has waxed and waned in different societies at different times, the delay, uncertainty and expense associated with litigation has meant that, generally speaking, it has been regarded as a last resort to be utilised only when all other means of dispute resolution have failed.¹²

Thus, the ‘non-alternative’ nature of alternative dispute resolution is two-fold.

Firstly, only a tiny fraction of the disputes in which the members of a community are engaged throughout a lifetime ever reaches a lawyer’s office, let alone a court. Whether the dispute has arisen from the supply of allegedly faulty goods, unreasonable actions by a landlord or a tenant, perceived unfairness in the bequests left by a testator to family members in a will, or any other of the myriad causes of disputes in our society, the vast majority of disputes are resolved through discussion and negotiation between the parties, with no thought of legal advice being sought, or proceedings being issued.

Secondly, of those disputes for which legal advice is sought and proceedings are issued, only a small fraction has ever proceeded to judicial determination. Most disputes are settled prior to trial.

In both of these senses, determination by judicial decision-making is in fact the alternative, and far less common, method of dispute resolution. Discussion, negotiation,

¹¹ Laurence Boule and Rachael Field, *Mediation in Australia* (LexisNexis Butterworths, 2018) 201–2.

¹² Chief Justice Martin, ‘Alternative Dispute Resolution — A Misnomer?’ (Speech, Australian Disputes Centre, 6 March 2018).

and compromise or consensus-reaching — with or without the assistance of a third party — is the way in which the vast majority of disputes in our society are resolved, and indeed have been resolved for many centuries. Perhaps the increased use of court-annexed mediation is better seen as an attempt, and a justifiable one at that, to reassert it as the norm in the resolution of complex, higher-value disputes.

As determination by judicial decision-making is the exceptional method, and in that sense, the alternative method of dispute resolution, it raises the question of the appropriateness of the deflection of judicial responsibility to the parties and mediators during non-judicial dispute resolution. Indeed, in most cases that come before the courts, the parties, have in fact, already embarked on a process (and often a lengthy one) of negotiation in an attempt to resolve the dispute, albeit on an informal basis, and have turned to lawyers and the courts as a last resort. It is only in rare cases that the defendant has had no notice of the dispute prior to the plaintiff's consulting a lawyer or the issue of proceedings. By referring matters to mediation, are judges simply asking the parties to try again and to try harder?¹³

III DOES MEDIATION PROVIDE ACCESS TO JUSTICE?

That depends very much on how the term 'access to justice' is defined. I was interested to note that the Productivity Commission defined 'access to justice' as 'making it easier for people to resolve their disputes'. Without entering into a philosophical debate about the meaning of 'justice', I am of the view that 'access to justice' means far more than this.

In his 2013 speech to the Supreme and Federal Court Judges Conference, Chief Justice French addressed this question in part. In discussing the role of courts, he noted the words of Professor Owen Fiss, who said:

[A court's] job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in the authoritative texts such as the Constitution and the Statutes: to interpret those values and to bring reality into accord with them.¹⁴

¹³ For example, a study conducted in 2011 indicates that the ADR process in regards to strata title development conflicts in Victoria were a cause of dissatisfaction amongst managers, due to the amount of time the process necessitated and inadequacy of the rules for engaging successfully and efficiently with conflict. See Kathy Douglas, Rebecca Leshinsky and Peter Condliffe, 'Conflict in Strata Title Developments: the Need for Differentiated Dispute Resolution Rules' (2016) 37(1) *Adelaide Law Review* 163, 186.

¹⁴ Owen Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073, 1085, quoted in Chief Justice French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (Speech, Supreme and Federal Court Judges Conference, 21 January 2013) 5 <<http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>>.

He also referred to the role played by courts in dispute prevention, as described by former Chief Justice Gleeson:

Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.¹⁵

He then said the following:

There has been over the past half century or so a tidal wave of enthusiasm in the United States and later in Australia for ‘alternative’, that is to say non-judicial, dispute resolution mechanisms. That enthusiasm is understandably driven by concerns about the costs, delays and stresses associated with court proceedings as well as undesired publicity which they may attract to the parties. But consistently with Professor Fiss’ statement and the observations by former Chief Justice Gleeson, there have also been concerns about ‘power imbalances, the privatised nature of alternative dispute resolution and the ensuing lack of precedent’. As one United States academic observed two years before Professor Fiss:

informal institutions deprive a grievant of substantive rights. They are antinormative and urge the parties to compromise; ... although this appears even handed, it works to the detriment of the party who is advancing a claim — typically the individual grievant.¹⁶

These are important concerns, and ones which the courts, as proponents of alternative dispute resolution, need to consider.

The role of the courts extends much further than simply that of dispute resolution. The interpretation and development of the law is an intrinsic role of courts and judges, and one that cannot be duplicated by any non-adjudicative dispute resolution procedure. Through its interpretation of the law — whether that be statutes or the common law — judges examine, reflect on, and articulate societal norms. This public pronouncement of the law— how it has developed, how it reflects society’s expectations, and how it is to be applied — allows others to ensure that their conduct conforms to those expectations. As Gleeson points out, by doing this, courts facilitate the prevention of disputes. In addition, through judicial consideration, the common law is regulated, adapted, modified, and expanded to meet changing circumstances and societal mores.

¹⁵ Chief Justice Gleeson, ‘The Future of Civil Justice — Adjudication or Dispute Resolution?’ (1999) 9(3) *Otago Law Review* 449, 455, quoted in Chief Justice French (n 14).

¹⁶ French (n 14) 6, quoting Richard L Abel, ‘The Contradictions of Informal Justice’ in Richard L Abel (ed), *The Politics of Informal Justice* (Academic Press, 1982) 267, 298.

The resolution of disputes through mediation does not allow this public exposition of the law, or its principled modification and change. There is a risk that if the majority of disputes are resolved through mediation, the fluid nature of the common law, which allows both certainty and change with the times, would be lost. The common law would become fixed at one point in time, as it is no longer being tested and challenged, and statute law would become opaque. The ability of individuals to satisfy themselves, as well as they can, that they are complying with the law, would be greatly diminished, and the ability of lawyers to give advice to their clients, based on previous decisions would be lost.

Just as importantly, if mediation were to become the primary method of dispute resolution, the right of an individual to enforce his or her legal rights would become lost. Mediation puts the policy of pragmatism above the notion of enforcement of strict legal right. Justice — or at least the kind that can be achieved through the court system — is predicated on the determination of a person's legal rights and the enforcement of those rights. Mediation is designed to a large extent, to ignore those rights; parties are required to put aside their strict legal entitlements and look for a practical solution to the problem that they have. While this no doubt works for some individuals, there will be those for whom a 'practical' solution is no substitute for the determination of the correct position at law. Further, society as a whole will be the poorer for it. The public resolution of disputes demonstrates to society at large the operation of one of the fundamental characteristics of a democracy, that disputes are resolved through the fair and impartial application of the law.

The question of power imbalance is also one that needs to be carefully examined in the context of mediation. While it is the role of the mediator to ensure that power imbalances between the parties are removed as far as possible, in reality this can be very difficult, if not impossible to achieve. This is particularly the case where one party has far more experience and knowledge of the mediation process and the likely range of outcomes than the other. An individual customer of a large corporation will often be disadvantaged in the mediation process, not only in relation to the size of the corporation's legal budget, but also because in all likelihood, this is the first (and only) time that the individual would have been in that type of situation. A large corporation, on the other hand, may well be an experienced mediation party. Confident with the system, such companies are bolstered by a wealth of firsthand knowledge of the outcomes at mediation of other similar disputes, and, in smaller jurisdictions, often well known to the mediator. This immediately puts the corporation in a stronger position than the individual, who may have no idea of the likely outcomes in other similar disputes, and has no way of benchmarking the offers put to him or her.¹⁷

¹⁷ Kathy Mack in 1995 published an article discussing the greater difficulties women faced in the ADR process compared to men. This included disparity created by violence against women, economic and information differential, uncertain legal entitlements, and the credibility gap. See Kathy Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123.

A system which places mediation as the primary method of dispute resolution arguably gives greater power to larger organisations, which receive a significant volume of complaints and claims, over the smaller company or individual for whom a claim may be a one-off occurrence in a lifetime. It permits ‘justice’ to be carried out behind closed doors, in such a way that there are no checks to ensure that the law is being applied equally to all, with outcome-based benchmarks opaque at best and non-existent at worst.

Gleeson expressed these concerns in the following way:

The utility of judicial decision-making which follows, and sometimes establishes, precedent, is an important difference between the work of judges and that of other dispute resolvers. In the importance that is now attached to dispute resolution we some times overlook the significance of dispute prevention. Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.

...

Parties to litigation ordinarily want their disputes resolved as expeditiously, inexpensively, and fairly as possible. They do not want to become involved in leading cases. This, however, should not distract attention from the equally important consideration that most people do not want to become involved in litigation at all, and there is economic and social utility in the availability of a process of public adjudication in the course of which judges declare and apply legal principle rather than seek a solution to each individual dispute which appears fair to them.

There is substantial cost, both to individual litigants, and to the community, in a system of discretionary, or over-particularised decision-making, where, to use a phrase borrowed from another area of the law, individual cases simply constitute a wilderness of single instances.¹⁸

In my view, mediation does not provide access to justice. It provides access to a process that allows parties to resolve disputes on a pragmatic and cost-effective basis, *regardless* of the justice of the case. Parties at mediation need to put aside their strict legal rights in order to reach an outcome by compromise. In doing so, they forgo the opportunity to have their case heard in public, to have an independent third party adjudicate on the merits of the facts and the law presented by each side. They forgo the right to a public statement of the reasons for the decision made, and they agree to put aside the principle of open justice, ensuring that any benchmark for future similar cases is difficult, if not impossible, to ascertain.

¹⁸ Gleeson (n 15) 455–6.

IV WHAT HAPPENS TO THE RULE OF LAW?

This is not the place for a lengthy discussion about what is the rule of law, and how, if at all, it is embodied in Australian law. Suffice to say, the rule of law is invoked on a regular basis by governments and courts, and appears to embody many of the principles identified by Lord Bingham when he described the rule of law as follows:

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public. But it seems to me that any derogation calls for close consideration and clear justification.¹⁹

He then identified eight sub-rules which are embodied in the principle. Three of those are particularly relevant to the question of whether mediation offers access to justice: ‘the law must be accessible and so far as possible intelligible, clear and predictable’;²⁰ ‘questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion’;²¹ and ‘the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation’.²²

Regardless of one’s views on the rule of law as a concept generally contained within Australian law, these are principles which I think the majority of people, whether they be lawyers or lay people, would endorse.

Mediation necessarily involves the flouting of each of these rules. The more disputes that are resolved through mediation, the less accessible and predictable the law becomes. Disputes are resolved through the application of values and concerns that are focussed on individual needs and interests, rather than through the application of the same law to all people with the same (or similar) dispute. The law is largely disregarded as disputes are resolved on the basis of pragmatism, risk management, or some personal value or belief. As more disputes are resolved, regardless of what the law requires, the law itself becomes a shadowy concept that plays second fiddle to these other notions and values. The resolution of disputes becomes an exercise of discretion, that discretion lying with the parties. And there is no uniformity or predictability of decision-making; indeed, the law applies to no one, and becomes merely one factor to put into the scales when weighing up one’s risk of litigation.

¹⁹ Lord Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 69.

²⁰ *Ibid.*

²¹ *Ibid.* 72.

²² *Ibid.* 73.

V CONCLUSION

Mediation is an invaluable tool that allows individuals to resolve disputes, generally more cost-effectively and efficiently than court proceedings. Parties should be given the opportunity to mediate if they wish to do so. However, in cases where the parties have already made genuine attempts to resolve a dispute through negotiation, perhaps a court should think twice before telling the parties to try again. Parties who have been unable to resolve disputes through reasonable negotiation need a real alternative to assist the breaking of the impasse.

Courts and governments should be wary of badging mediation as ‘access to justice’. Nor should mediation be promoted to parties as the more desirable, or primary, method of dispute resolution. While there are problems with our court system as a result of which civil disputes cost too much money and take too long to resolve, mediation alone cannot provide the answer. Although mediation may offer a quicker and cheaper outcome to the parties, it may also lead, in the long term, to a more impoverished legal system, where we find ourselves without a clear articulation of the law and predictability of outcome, and are left with nothing more than a ‘wilderness of single instances’.²³

²³ Gleeson (n 15) 456.