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From ADR to collaborative law

Lawyers post-ADR: mediation and collaborative law

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The aim of the research has been to examine the changing role of the legal profession with regard to the incorporation of alternative dispute resolution practices (ADR) and collaborative law into the profession. It has analysed changes in the legal profession since approximately the 1980s and critically reflects on the nature of these developments.

The evolution of dispute resolution processes

Since the 1980s there has been an evolution of dispute resolution processes in Australia. We have witnessed a movement through three distinct phases; the first what we might call a pre-ADR period with the predominance of adversarial processes in a traditional legal environment. The second was a growth of 'alternative dispute resolution' methods involving non-legal processes and outcomes (as well as non-legal practitioners) and these new methods have been the subject of major legal reform. In the 21st century the third stage is a post-ADR period where alternative methods of dispute resolution are being accepted as a normal part of conflict resolution and have become increasingly institutionalised, rather than 'alternative'. Lawyers have sought to adapt their practices to take account of the changes and adopt alternative methods of dispute resolution as accepted practice and they have been encouraged to do so. Callaghan exhorts lawyers to 'be actively working at securing their involvement in ADR'.[1] To be metaphorical, ADR represents for lawyers not just fruit on the sideboard but it is a real slice within the cake of professional work. One new area of practice, developed in the United States and being promoted in Australia, is called 'collaborative law' or collaborative practice.

Undoubtedly, many lawyers make good mediators and are suited to less adversarial methods of dispute resolution. However, it has been observed that lawyers as a whole are

out of their comfort zone with regard to facilitative mediation, with a preference for shuttle mediation and lawyer-representation/advocacy.[2] 'Mediation' within legal practice is broadly defined to include processes that are more in the nature of settlement and/or evaluation rather than facilitative.[3]

Collaborative law: a new practice

Lawyers may be more in their comfort zone with collaborative law. It is a process that involves two lawyers with their clients negotiating together. The role of the lawyer is to assist the client in a process of shared problem solving. The lawyer has a duty to maintain the integrity of the process, including the requirements of honesty, disclosure and good faith. Collaborative law could have real benefits for parties engaged in ongoing familial or commercial relationships as a less adversarial dispute resolution method. It has been endorsed by the Commonwealth Attorney-General and the Chief Justice of the Family Court. The Family Law Council Report *Collaborative Practice in Family Law* (December 2006)[4] recommended to the Federal Attorney-General that national guidelines for collaborative practice be developed. These are being resisted by the Collaborative Professionals NSW.[5] Guidelines are necessary to inform and protect consumers of legal services.

Notwithstanding the benefits and promotion of collaborative law by the legal profession there are a number of factors that need to be examined. Collaborative family law sessions normally require four to seven sessions.[6] The number of sessions as well as the business formality associated with them (agendas, minutes, debriefing) will have a substantial effect on the costs of the process and will undermine the goals of speedy, inexpensive and informal resolution. Moreover collaborative law could result in a two-tiered method of dealing with family law disputes. It is being promoted as an 'alternative' or an addition to the new Family Law mediation requirements.

The rise of collaborative law leaves open the suggestion that lawyers are creating another dispute resolution process which they control. According to Pollard over 400 professionals (mainly lawyers) have completed two-day basic training courses in collaborative practice throughout Australia in the last two years with courses proliferating all over Australia.[7]

Conclusion

This is an early stage in the development of collaborative law in Australia. Is it a suitable practice for Australia, given the differences in legal culture and practice between the United States and Australia? Its goals, principles and practice need to be evaluated to determine whether it could produce a more satisfactory alternative for lawyers and clients to an ad hoc tacking on of 'mediation' within adversarial processes. Furthermore what are its benefits to clients in terms of costs and process over the new free mandatory mediation provisions of the *Family Law Act*? Further community consultation, law reform and peer consideration of its theoretical underpinning and ethical application is needed, as well as an examination of the models being developed. ●

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A comprehensive version of this research appears in the Australasian Dispute Resolution Journal, October 2007.

Endnotes

1. Callaghan P (2006) 'Roles and responsibilities of lawyers in ADR' paper delivered at Negotiation and ADR skills for lawyers, The University of New South Wales, Faculty of law, Centre for Continuing Legal Education, 1 December, Sydney at p 13.
2. Charlton R 'Whose mediation is this anyway?' (2007) 45(1) *Law Society Journal*, February, 44–45 at 44.
3. Above note 2.
4. <www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications>.
5. Lewis J 'Report recommends enshrining new approach in family system' (2007) 45(3) *Law Society Journal* 16–18, referring to comments of the Secretary of Collaborative Professionals NSW, Lorraine Lopich.
6. Pollard J 'Collaborative Law gaining momentum' (2007) 45(5) *Law Society Journal* 68–74 at 72.
7. Above note 6 at 69.