

Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills

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ABSTRACT

Human rights and anti-discrimination law in Australia, as in many countries in the Asia Pacific region, provides for complaints made under the law to be resolved through processes which would traditionally be defined as Alternative Dispute Resolution (ADR). This paper provides an overview of the complaint resolution work of human rights institutions in the Asia Pacific, including the Australian Human Rights and Equal Opportunity Commission, and explores the defining characteristics of ADR in this context.

The paper firstly discusses the appropriate classification of such dispute resolution processes and proposes that ADR in this context is best understood as a hybrid process in which the role of the ADR practitioner can be facilitative and/or advisory in nature.

Secondly, the paper considers how apparent obligations on staff of human rights institutions to further the objectives of the law and to intervene to address power differentials between parties to disputes are reconciled with traditional notions of ADR practitioners as 'third party neutrals'.

The paper also discusses the tension between legal-rights and interest-based approaches to resolution that arise in this context and outlines key ADR practitioner knowledge and skills relevant to the effective resolution of human rights and discrimination disputes.

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1. INTRODUCTION

1.1 Clarification of terms used in this paper

While different meanings are currently ascribed to the 'A' in the acronym ADR, in this paper ADR is used as an acronym for Alternative Dispute Resolution and refers to processes other than judicial determination, in which a third person assists parties to resolve a dispute.

Where terms such as mediation, conciliation and arbitration are used in the paper they refer to processes as defined by the Australian National Alternative Dispute Resolution Advisory Council ('NADRAC') (NADRAC 2003).

The paper also uses the terms 'dispute resolution' and 'dispute settlement'. While it is acknowledged that the settlement of a dispute does not necessarily equate to resolution of the conflict underpinning the dispute, in this paper the term 'resolution' is used in a general sense to refer to the finalisation of a dispute as raised in a complaint to a human rights institution.

1.2 The complaint resolution work of National Human Rights Institutions

Numerous countries around the world, including countries in the Asia Pacific, are parties to human rights treaties such as the International Convention of Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women and the Convention for the Elimination of Racial Discrimination. As parties to these treaties, countries are required to implement the human rights standards articulated in the treaties at the national level. The establishment of National Human Rights Institutions (NHRIs) is one means by which countries seek to ensure the protection and promotion of human rights.

There are a number of NHRIs in the Asia Pacific region. Some of these have been in operation for approximately two decades for example, the Australian Human Rights and Equal Opportunity Commission, the Human Rights Commission of New Zealand and the Philippines Commission on Human Rights. Other NHRIs, such as those in Fiji, Malaysia, Sri Lanka and Thailand, have been established during the last ten years.

The operations of NHRIs are guided by the 'Paris Principles' which were endorsed by the United Nations Commission on Human Rights in 1992 (Commission on Human Rights resolution 1992/54). In general terms, NHRIs are administrative agencies with educative and advisory functions related to the promotion and protection of human rights (United Nations 1995). It is common for NHRIs to be empowered to receive and investigate complaints from individuals and groups that allege violations of human rights as defined by a country's constitution, relevant international treaties and/or other legislation. The subject matter of complaints that may be brought before NHRIs are varied and can include alleged violations of civil and political rights by government, complaints of sexual harassment in private employment and complaints regarding access to premises for people with mobility disabilities. While it is rare for NHRIs to have authority to impose legally binding outcomes in relation to complaints, the enabling legislation of the majority of NHRIs, including those in the Asia Pacific, provide for the NHRI to attempt resolution of complaints. Where attempted resolution is unsuccessful, complaints may proceed to tribunals or courts which can issue final and binding determinations. In some countries NHRIs also have the ability to pursue complaints before tribunals or courts on behalf of complainants.

The complaint handling mechanisms of NHRIs are seen to be complementary to processes for the protection of human rights offered by judicial institutions. NHRIs are described as providing an alternative means for dealing with human rights disputes that is accessible, quick and inexpensive (United Nations 1995). A range of ADR terms, for example 'conciliation', 'mediation' and 'negotiation' are included in the enabling legislation of many NHRIs and an examination of complaint practices of NHRIs reveals various forms of ADR in operation.

ADR can be seen as not only providing a more accessible process for disputes about human rights and discrimination but additionally, it can be argued that the more informal and participatory nature of ADR processes are more appropriate in light of the educative purposes of the law and the potentially value laden content of such disputes. The use of ADR in this context is not, however, without its disadvantages and authors such as Thornton (1989, 1990) and Astor and Chinkin (2002, Chapter 11) have highlighted how the use of informal and confidential ADR processes for such disputes may limit the social reforming potential of the law and work to the disadvantage of those the law aims to protect. While the debate about the appropriateness of

ADR in the human rights context will not be canvassed in detail in this paper, it provides relevant background to aspects of theory and practice discussed in the following sections.

2. CLASSIFICATIONS OF ADR IN THE HUMAN RIGHTS AND ANTI-DISCRIMINATION LAW CONTEXT

2.1 Multi-process and hybrid ADR?

ADR processes are broadly classified as facilitative, advisory or determinative processes. Facilitative processes are understood to be those in which the third party's intervention relates to the process of resolution rather than the content of the dispute or the terms of its resolution. In Australia, mediation and facilitated negotiation are often referred to as examples of facilitative processes (NADRAC 2002, pg.1). Advisory processes are understood to be those in which the dispute resolver may have an investigative role in relation to the dispute and may provide advice regarding the content of the dispute and also possible, probable and desirable outcomes. Case appraisal, early neutral evaluation and in some cases, conciliation, are referred to as examples of advisory processes (NADRAC 2002, 2003). Determinative processes are those in which the ADR practitioner has a role in investigating the dispute, which may also include the hearing of formal evidence, and determining a resolution which may be internally enforceable, externally enforceable or unenforceable. Arbitration and expert determination are referred to as examples of determinative processes (NADRAC 2002).

ADR processes may also be classified as hybrid or combined process. For example, it has been recognised that in a conciliation process, the role of the dispute resolver may include facilitative and advisory aspects (NADRAC 2003). Literature on ADR also refers to multi-process or multi-option ADR in which one institution may provide a range of processes that traverse different ADR classifications (See discussions of multi-door court systems in Sourdin, 2002 Chapter 6).

Examination of the complaint work of NHRIs indicates that opportunities for resolution may occur more than once in the complaint process with resolution at different stages reflecting different ADR classifications. Additionally, even where only one opportunity for resolution is provided, the approach to resolution may span facilitative and advisory classifications. Variations in approach will depend on variables such as when the process of resolution is attempted, the nature of the dispute and the role and functions of the specific NHRI (Ball & Raymond 2000, 2004).

A more facilitative approach to resolution is likely in situations where resolution is attempted at an early stage of the complaint process when the issues in the complaint may be ill-defined and the merit of the complaint unclear, or at latter stages when the evidence in relation to the dispute is equivocal. In contrast, a more advisory approach to resolution may be adopted where early in the process there is a strong prima facie case and relevant case precedent, or later in the process where an investigation by the NHRI has revealed evidence supportive of a breach of the law. The advisory nature of third party intervention may vary from advice about the possible application of the law and possible resolution options, to advice about what would be an appropriate outcome from the viewpoint of the NHRI. A more interventionist role in relation to the outcome of the dispute may be adopted by NHRIs that undertake detailed investigations and/or have functions to advocate on their behalf of complainants in associated courts/tribunals (Ball & Raymond 2000, 2004).

An advisory component to ADR processes in this context is considered appropriate in light of the associated complaint inquiry functions of NHRIs and their public interest role in promoting and protecting human rights.

Where facilitative and/or advisory approaches to ADR have been unsuccessful, or where a complaint is considered unsuitable to be dealt with in this manner, a NHRI may have a role to formally hear evidence and make a determination as to whether the alleged act constitutes a breach of human rights or an act of prohibited discrimination. On one view, such hearing processes may be classified as determinative ADR in that judicial trial or hearing procedures may not be strictly applied and the findings do not constitute a judicial determination. However, it is arguable that classification as a 'quasi-judicial' process may be more appropriate in light of the mandatory nature and potential legal formality of such proceedings (see NADRAC 2002).

2.2 Some comparisons across NHRIs in the Asia Pacific

2.2.1 *The Australian Human Rights & Equal Opportunity Commission (HREOC)*

Section 46PF of the *Human Rights and Equal Opportunity Commission Act, 1986* (Cth) states that the President of the Commission “...*must inquire into the complaint and attempt to conciliate the complaint.*” Conciliation is not defined in the legislation and there is provision for attendance at conciliation to be compelled. Writings on the HREOC’s conciliation practice indicate that conciliation is almost always conducted as a voluntary process and that while conciliation can occur at various stages in the process, it is more likely to take the form of a one-off attempt to resolve the complaint after some level of inquiry. The HREOC does not have a determination function in relation to the majority of complaints it receives and in these matters, if conciliation is unsuccessful, complainants may apply to have the allegations heard and determined by the Federal Court of Australia or the Federal Magistrates Court. The HREOC does not have a role to advocate for complainants in subsequent court proceedings nor does it have a role to act in relation to the enforcement of conciliation agreements (Ball & Raymond 2002).

The complaint resolution work of HREOC conciliators has been described as hybrid facilitative-advisory ADR (Ball & Raymond 2004). Conciliators are said to have a role to intervene to ensure a fair process and in relation to the content of the dispute, to provide parties with information on why conciliation is proceeding with reference to an assessment of the information before the Commission. The level of conciliator intervention in relation to the outcome of the dispute is seen to be more constrained than in some other overseas jurisdictions in light of the fact that HREOC does not have a determinative role in relation to most complaints and therefore investigation undertaken prior to conciliation is limited (see for example the discussion of the work of institutions in the United States and Canada in Ball and Raymond, 2000). Conciliator intervention into outcomes is said to generally involve providing parties with information about possible resolution options to enable them to make informed choices and ensuring that outcomes do not contravene the letter and/or spirit of the law (Ball & Raymond 2004). This description of the advisory aspect of HREOC’s conciliation process is supported by findings of a conciliator survey conducted by the HREOC in 2004 (See HREOC 2005).

2.2.2 *The New Zealand Human Rights Commission (NZHRC)*

The *Human Rights Act* (HRA) as amended in 2001 and complaint procedure information produced by the NZHRC, indicate that complaint resolution can occur at different stages in the process with a focus on resolution occurring as early as possible. Resolution assistance provided by NZHRC staff is said to include expert information provided to one or more parties and the facilitation of mediation. While mediation is not defined in the law, an information brochure describing mediation states that the mediator’s role includes providing the parties with “.....*information about the Act, examples of relevant settlements and possible resolutions*” (NZHRC, Fact Sheet #02).

Section 83 of the HRA also stipulates that at any time, if it appears to the Commission that it may be possible to reach a settlement in relation to a complaint; the Commission must use its best endeavours to assist the parties secure a settlement. Settlement is defined in section 83(3) as: “...*the agreement of the parties concerned on actions that settle the matter; which may include the payment of compensation or the tendering of an apology; and.... includes a satisfactory assurance by the person to whom the complaint relates against the repetition of the conduct that was the subject matter of the complaint or against further conduct of a similar kind.*”

Complainants also have the option of taking a complaint to the Director of the Office of Human Rights Proceedings. This office is part of the Commission but the Director is said to function independently. The Director can undertake further investigation of a complaint and attempt settlement or take the dispute to the Human Rights Review Tribunal on behalf of the complainant. The tribunal is described as an independent commission which has the powers of a court and can award damages and order other remedies. Complainants can independently take complaints to the tribunal and can also have settlement agreements enforced by the tribunal (NZHRC Fact Sheet #02).

With reference to the preceding discussion of classifications of ADR, the complaint resolution work of the NZHRC would appear to straddle facilitative and advisory classifications. The description of mediation and the definition of settlement as noted above, are suggestive of an expert advisory approach. Additionally, in light of the role of the Director of Human Rights Proceedings, it is likely that any settlement attempt undertaken at this stage of the process would be highly advisory in nature. A focus on early resolution suggests that resolution may also be attempted where the issues in the complaint are ill-defined and the merit of the matter unclear and accordingly, a more facilitative approach may be adopted in such cases.

2.2.3 The Fiji Human Rights Commission (FHRC)

Section 7(1)(j) & (k) of the *Human Rights Commission Act, 1999* (HRCA) empowers the FHRC to investigate complaints which allege a contravention of human rights and allegations of unfair discrimination and to “*resolve complaints by conciliation and ... refer unresolved complaints to the courts for decision.*”

While section 31 of the HRCA stipulates that conciliation can be conducted before, during or after investigation; a flow chart of the complaint process provided on the FHRC website (“What happens to your complaint?”) indicates that conciliation is likely to take the form of a one-off attempt to resolve the complaint after some level of investigation.

Section 34(4) of the HRCA states that where, after an investigation, the FHRC is of the view that the complaint has substance; it must act as a conciliator in relation to the complaint. The Commission may also attempt conciliation where it is of the view that the complaint does not have substance or cannot be established to have substance. Section 31(3) states that the objectives of a conciliation conference are: “... *to identify the matters at issue between the parties and to use the best endeavours of the Commission to secure a settlement between the parties....*”

Section 34 of the HRCA states that where conciliation is conducted after investigation, settlement includes: “*a satisfactory assurance by the person to whom a complaint or investigation relates against repetition of the conduct that was the subject - matter of the complaint or the investigation or against conduct of a similar kind.*”

Where a complaint is not resolved through conciliation it can be referred to the FHRC Proceedings Commissioner. Section 35(1)(c) of the HRCA indicates that if the Proceedings Commissioner is of the view that further action by the Commission is unlikely to facilitate a settlement, he or she can institute proceedings on behalf of the complainant in court. The HRCA also provides that the Proceedings Commissioner can bring proceedings in court where the terms of a settlement are not complied with and the complainant is unable to institute their own proceedings in relation to the matter.

Complaint resolution as conducted by the FHRC would appear to staddle both facilitative and advisory classifications. An advisory aspect to conciliation can be inferred from the legislative definition of ‘settlement’ and in light of the advocacy role of the Proceeding Commissioner, resolution conducted at that latter stage of the process is likely to be highly advisory in nature. A purely advisory approach to conciliation would, however, appear to be inappropriate in light of the provision for conciliation to also be conducted where complaints have been determined to be lacking in substance.

2.2.4 The National Commission on Human Rights – Indonesia (Komnas HAM)

Article 76(1) of the *Republic of Indonesia Legislation Number 39 of 1999 Concerning Human Rights* provides that the complaint functions of Komnas HAM include to mediate on human rights issues. Article 89(4) states that authorised action of the mediator includes to: “*.....arbitrate between the two parties; resolve cases through consultation, negotiation, mediation, conciliation and expert appraisal; give recommendations to the parties for resolving conflict through the court;*”

The explanatory memorandum to the legislation defines mediation as: “*...resolution of civil cases outside the courts on the agreement of the parties.*” The memorandum also stipulates that resolution of complaints is to be undertaken by a member of Komnas HAM and resolution is required to be in the form of a written agreement validated by the member. Resolution agreements are seen as legally binding and where settlement terms are not complied with, a party may submit the matter to the District Court via Komnas HAM.

Article 89(4) of the enabling law states that the Commission may also submit recommendations concerning cases of human rights violations to the government and Article 104 provides for a tribunal to hear claims of gross violations of human rights for example, complaints concerning arbitrary /extra judicial killing, torture, enforced disappearance and systemic discrimination.

In this context the term ‘mediation’ is used in a generic sense to refer to a range of ADR processes that span facilitative, advisory and determinative classifications. While minimal information is available on the manner in which resolution is undertaken, it is envisaged that variations in approach will depend on variables such as when resolution is attempted and the nature of the dispute.

3. THE 'NEUTRALITY' OF THE ADR PRACTITIONER IN THE HUMAN RIGHTS AND ANTI-DISCRIMINATION LAW CONTEXT

The concept of 'neutrality' has been described as a key component of the legitimacy of ADR in our society. In ADR processes such as mediation, which do not have the public and reviewable aspects of judicial dispute resolution, the notion of the mediator as a 'third party neutral' has traditionally been understood to be central to the fairness of the process (Astor 2000).

At a basic level, the notion of the 'third party neutral' seems difficult to reconcile with statutory dispute resolution processes in which the ADR practitioner is required to act in accordance with, and further the objectives of, a particular statute. Accordingly, the idea of the 'third party neutral' has been the basis for critiques of complaint resolution undertaken by institutions administering human rights and anti-discrimination legislation.

On one hand respondents to complaints before NHRIs may challenge the neutrality of the ADR practitioner and the fairness of the process by implications that a pro-complainant bias arises from obligations on staff to further the objectives of the law and from the legislative role of some NHRIs to pursue complaints on behalf of complainants. On the other hand, from a complainant advocacy perspective, it can be argued that a requirement on staff of NHRIs to emulate the traditional neutral third party role of ADR practitioners results in practical disadvantage for complainants. In this view the neutral third party role prevents the NHRI staff member from intervening to address inherent power differentials between complainants and respondents and leads to unfair resolution outcomes for complainants (See for example, Thornton 1989, 1990).

In seeking to articulate the theoretical framework of their practice, staff undertaking complaint resolution in NHRIs have been faced with reconciling apparent obligations to further the objectives of the law and address power differentials between parties with traditional concepts of ADR practitioner neutrality. Writings in recent years have challenged simplistic notions of mediator or conciliator neutrality and assisted ADR practitioners in this context to better define their practice. These ruminations on neutrality have questioned the feasibility of absolute neutrality and the view of neutrality as an attribute that is either present or absent. Neutrality, it is said, is best conceived as complex, contextual and contingent (Astor 2000; Astor & Chinkin 2002, pg 153).

In the human rights and anti-discrimination law context the concept of neutrality is best understood with reference to two key requirements. Firstly, the requirement that ADR practitioners should not have any personal interest in the outcome of the dispute and secondly, that the ADR practitioner must conduct proceedings in an unbiased or impartial way, that is, in a way that does not privilege one party over the other.

Possible respondent critiques of ADR as outlined above, confuse professional interest in the content and outcome of a dispute with personal bias. While requirements on staff of NHRIs to uphold the objectives of the legislation they administer and their potentially advisory role means that they are not indifferent to the outcome of a complaint, this professional interest must be differentiated from intervention which is driven by personal biases. In the human rights and anti-discrimination law context, intervention by ADR practitioners in relation to the content and outcome of a complaint would not be seen as undermining fairness where parties participate in full knowledge of the practitioner's statutory role and practitioner interventions in relation to content and outcome are based on an assessment of the information before the institution and relevant legal authority.

Complainant advocacy critiques of ADR practitioner neutrality as noted above, can also be addressed by an understanding of impartiality as entailing both negative and positive duties. In this view impartiality requires not only that the practitioner restrain from imposing personal bias, but also requires practitioner intervention to address inequity between the parties which would detract from a fair resolution process (Cobb & Rifkin 1991; Astor 2000). As such, intervention to deal with power differentials between the parties in terms of process and outcomes is legitimate where the aim is to enable substantive fairness of process and outcome by maximising the involvement and control of both parties.

This contextual understanding of neutrality can assist ADR practitioners in NHRIs to comprehend the requirements and boundaries of their role and articulate this to parties to disputes. Research undertaken by the HREOC supports a view that when appropriately understood and explained, conciliator interventions into process, content and outcome do not result in perceptions of bias and unfairness by parties to the dispute. For example, a survey conducted by HREOC in 2001 with 231 complainants and 228 respondents revealed that only 4% of parties expressed a concern about conciliator bias (Raymond & Georgalis 2002, pg.34).

4. APPROACHES TO ADR IN THE HUMAN RIGHTS AND ANTI-DISCRIMINATION LAW CONTEXT

Within ADR distinctions can be made between approaches or styles of resolution. One such distinction is between a competitive rights-based approach to resolution and an interest-based or problem-solving approach. A rights-based approach is characterised by resolution undertaken with reference to perceived rights and duties for example, as articulated in law. In contrast, an interest-based approach focuses on framing the dispute not with reference to rights, but rather in terms of the parties underlying needs and interests (Buckley 2005).

ADR in the human rights and anti-discrimination law context has a strong rights-based quality. The content of disputes brought to NHRIs are often articulated in terms of alleged violations of legal rights and where subsequent tribunal or court processes are available, the manner in which the matter may be determined provides a framework for discussion and terms of resolution. As previously noted, NHRIs have a public interest role in administering the legislation and are seen to have a legitimate function to ensure that resolution outcomes are in accordance with the law and are fair. Fairness of outcomes in a legal rights context is predominately understood with reference to decisions of tribunals or courts. Therefore, the advisory aspects of the ADR practitioner's role in this context are likely to focus on the provision of information about how the dispute may be argued at law and how similar disputes have been determined by courts or tribunals.

While the legal framework of disputes in this context and the adversarial nature of possible further proceedings must be acknowledged, a purely rights-based approach to complaint resolution has disadvantages. Firstly, a legal rights focus means that parties to the dispute and their advocates, where relevant, are more likely to mirror adversarial and formalistic approaches indicative of court determination and pre-court settlement processes. This can include competitive, adversarial negotiation techniques which can be detrimental to any ongoing relationship between the parties and can intensify and entrench conflict. A focus on legal rights also means that terms of resolution are conceptualised with reference to how a court or tribunal may provide redress. A focus on traditional legal forms of remedy such as individual compensation means that outcomes generally not available through legal forums but meaningful to the parties, including more systemic outcomes, are not explored.

It is contended that within this rights-based framework there is a place for the philosophy and skills associated with interest-based ADR.

Interest-based approaches are founded on principles of interest-based negotiation (Fisher & Ury 1981) which rose to prominence in the 1980s and formed the basis of the development of ADR processes such as mediation (Sourdin 2002). The role of the third party in an interest-based approach is characterised by interventions which elicit the needs and interests of both parties, encourage parties to understand each other's views and aim to maintain constructive dialogue through which the parties can generate creative resolution options to address mutual needs and interests. An interest-based approach to resolution is seen to contribute to maintenance of relationships, encourage an appreciation of different perspectives, educate parties about alternative ways to deal with conflict and increase the potential for resolution (Boulle 1996, pp. 51-2).

From a theoretical perspective, an interest-based approach to resolution appears to have a range of advantages in the human rights and anti-discrimination law context. Firstly, the decreased formalism and legalism of interest-based resolution can provide a more accessible process for complainants and a real alternative to judicial proceedings in terms of involvement in process and control of resolution outcomes. An interest-based approach can also facilitate the educative role of NHRIs in that it provides an environment in which respondents to complaints may be more open to understand barriers and difficulties experienced by complainants.

The language of interest-based resolution can be seen as directly relevant to some types of complaints before NHRIs where there are ongoing relationships between the parties and a shared desire to resolve the dispute. For example, the author has seen this approach successful used in disputes about educational services for children with disabilities. In such cases the parties' mutual concern for the 'best interest of the child' can form the basis for productive discussions of different perspectives and the development of mutually satisfactory outcomes. However, in other types of complaints before NHRIs, interest-based concepts of 'shared problem-solving' and 'mutual needs and interests' appear out of place. This may be due to inherent power differentials between the parties as is evident in complaints by those in custody regarding mistreatment by state officials. It may also appear inappropriate because of the attitude

of one or both parties to the complaint which demonstrates a desire to fight and win and a clear lack of interest in the needs and interests of the other party. These reservations about the broad applicability of interest-based resolution in this context are indicative of critiques of interest-based negotiation generally (Astor & Chinkin 2002, pp. 126-7).

It would appear that complaint processes of NHRIs can, and should, incorporate aspects of both rights based and interest-based approaches to ADR. This is consistent with requirements on NHRIs in resolving complaints to represent the public interest while also providing a real alternative to judicial determination. Skills associated with an interest-based approach may be highly beneficial for particular types of human rights disputes and generally, in preparing parties for resolution and dealing with impasses at different stages of the process. A focus on law and rights may be more relevant to other types of disputes and when resolution is undertaken at the later stages of a complaint process where more interest-based approaches have been unsuccessful.

5. KEY KNOWLEDGE AND SKILLS FOR ADR PRACTITIONERS IN THE HUMAN RIGHTS AND ANTI-DISCRIMINATION LAW CONTEXT

The preceding discussion has highlighted the range of subject matter in complaints before NHRIs, the different types of ADR processes that may be provided and the potential combination of rights-based and interest-based approaches to resolution required in this context. While the complaint work of NHRIs may be seen by some as merely bureaucratic process administration by public servants, there is increased recognition of the highly skilled nature of this work. For example, in referring to the conciliation work of human rights and anti-discrimination institutions in Australia, Astor and Chinkin (2002 pp.375-6) state:

“It says much for the skills of conciliators that they are able to build relationships of trust with both parties ...To overcome resistance to the legislation, to investigate a complaint and to conduct a conciliation conference whilst maintaining the trust of both complainant and respondent is a significant achievement.... The skills of conciliators are demonstrated by the fact that the majority of discrimination complaints are resolved by conciliation.”

While the general knowledge, skills and ethics identified for ADR practitioners apply to this area of ADR practice (see for example, NADRAC’s Framework for Standards for ADR Practitioners, 2001) it is evident that specific, additional knowledge and skills relevant to the human rights and anti-discrimination context are required. For example, the matters discussed in this paper highlight the need for staff of NHRIs to have:

- an understanding of various classifications of ADR and various ADR processes and how the dispute resolution work of NHRIs may span these classifications and processes;
- the ability to conduct dispute resolution processes which may involve different levels of third party intervention;
- the ability to conduct advisory ADR processes in a manner which appropriately reflects the public interest role of NHRIs while also ensuring fairness for parties to the dispute;
- expert knowledge of the law administered by the NHRI and relevant case law and dispute resolution precedents;
- an understanding of the underpinning ideology of ADR and the potential advantages and limitations of ADR in this context;
- a contextual understanding of concepts such as ‘neutrality’ and the ability to articulate the associated requirements and boundaries of their role to parties to disputes;
- knowledge and skills relevant to conducting dispute resolution with vastly diverse client groups including people in detention, people with disabilities and people from various cultural backgrounds;
- an understanding of the complexities of power as relevant to this context and the ability to facilitate resolution processes to ensure, as far as possible, that the process is fair for both parties;
- an understanding of characteristics of rights-based and interest-based approaches to dispute resolution and associated negotiation styles and an appreciation of the advantages and limitations of these approaches; and
- the ability to facilitate different approaches to resolution and adapt the resolution process with reference to the specific characteristics of a dispute.

Knowledge and skills provided by many ADR courses which focus on a mediation process model and interest-based negotiation skills while of value, do not provide the required contextual knowledge and skills outlined above. There is therefore a need for NHRIs to ensure specific training for staff undertaking complaint

resolution duties. The HREOC has, for example, developed a statutory conciliation training course which is run for HREOC staff, staff of other Australian anti-discrimination agencies and some overseas agencies. This course, which in HREOC is conducted in conjunction with an on-the-job program of observation, supervision and mentoring, aims to provide essential knowledge and skills for the conduct of conciliation in the anti-discrimination and human rights environment (Ball & Raymond 2000).

6. CONCLUSION

This paper has sought to provide an overview of the type of complaint resolution work undertaken by NHRIs in the Asia Pacific with reference to classifications, approaches and principles of ADR theory. The paper has also highlighted the challenge in this context to provide resolution processes which incorporate traditional advantages of ADR such as accessibility and party involvement while also appropriately acknowledging legal rights and the public interest role of NHRIs.

Despite the diverse political and cultural environments in which NHRIs in the Asia Pacific operate, there are strong commonalities in purpose and practice. It is hoped that this paper will encourage ongoing dialogue between NHRIs and ADR practitioners in similar statutory frameworks with a view to the expansion of specialised training programs and the development of associated practitioner standards. Advances such as these will no doubt assist in ensuring the professionalism and recognition of this important area of ADR practice.

NOTE

The views expressed in this paper are the presenter's own and do not necessarily reflect the views of the Australian Human Rights & Equal Opportunity Commission.

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