26. Including alternative dispute resolution clauses in legislation

Litigation can be expensive, time consuming, and can damage relationships. In appropriate cases the negative consequences of litigation can be reduced by providing for Alternative Dispute Resolution ("ADR") processes in a statutory scheme.

ADR is a generic term for any form of dispute resolution other than proceedings in a court or a tribunal, and usually involves an independent third party. A range of procedures are available and are discussed in more detail on pages 400 to 410 of the 2001 edition of the Guidelines.[162] The most common procedures are mediation, expert evaluation, arbitration, and adjudication. Each process has distinguishing characteristics that have to be considered before including them in a statutory ADR scheme.

ADR has a number of advantages over litigation, both in process and in outcome. It is more flexible and generally less confrontational than court proceedings, and enables the parties to have a greater say in the process. It is usually faster and cheaper than court litigation, and also has a greater scope for confidentiality. While court proceedings are generally limited to giving effect to legal rights, ADR processes may allow parties to reach settlements that meet other needs, for example by receiving an apology or explanation.

ADR processes should complement, but not exclude, the ability to bring court proceedings. They can take place before, and in some cases during, court proceedings. ADR already features in a number of New Zealand statutes. The Arbitration Act 1996[163] is one of the most prominent. It sets out a generic set of rules that apply to arbitrations in New Zealand. A number of other Acts incorporate ADR procedures into their statutory scheme to varying degrees.

Guidelines

26.1. Should the legislation contain an ADR provision?

ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR.

Not all disputes can be appropriately addressed by ADR. The resolution of criminal charges, determining points of law, or cases that require a determination of critical disputed facts will not generally be suitable for ADR. ADR will not be appropriate where important issues of public policy are at stake, the dispute relates to the content of legislation, a dispute over the meaning of legislation exists, fundamental rights or allegations of abuse of power are involved, or the outcome sought by one of the parties is outside the powers of the decision maker concerned.

[162] Available at www.lac.org.nz
[163] http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html

26.2. Which form of ADR should be used?

The form of ADR adopted should help to achieve the policy objective and be appropriate having regard to the nature of the dispute and the issues in question.

A range of forms of ADR will be appropriate, depending upon the different types of issues. The ADR processes most likely to be suitable for inclusion in legislation can be divided into three broad categories:

- **Facilitative processes (facilitation, negotiation, mediation):** Involve an impartial third person with no advisory or determinative role who provides assistance in managing the process of dispute resolution.
- **Evaluative processes (conciliation, expert evaluation, case appraisal):** Involve an impartial third person who investigates the dispute, advises on the facts and possible outcomes, and assists in its resolution.
- **Determinative processes (adjudication, arbitration, expert determination):** Involve an impartial third person who investigates the dispute and makes a determination that is legally enforceable.

Some key issues to consider, when deciding which process is appropriate for a particular scheme, are noted below.

- **The role of the third party:** Will the third party predominantly help the parties to reach mutual agreement, will they investigate the dispute and advise on potential compromises and outcomes, or will they make a legally enforceable determination?
- **Control over participation and process:** How flexible or formal should the process be? How much of the process should the parties determine? What are the consequences (if any) of refusing to engage in, or withdrawing from, the process once commenced?
- **Nature of the outcome:** Will the outcome be confidential and binding on the parties? Will the outcome be appealable to a court under certain circumstances?
- **Administration:** Who will administer the service? Will the Government provide the ADR service? Will the service be free to all parties? How will the third person and location be determined?

Further detailed discussion on selecting the appropriate form of ADR can be found on pages 400 to 410 of the 2001 edition of the Guidelines.

26.3. Which elements of the ADR scheme should be included in the legislation?

Legislation should include those elements of the ADR scheme necessary to ensure the appropriate desired outcomes and procedures are adopted.

The flexibility of ADR is one of its great strengths. However, if not properly constrained by the legislation the processes and outcomes adopted may not accord with the original policy objective and may, in some cases, undermine it. The PCO has produced model ADR clauses that should be used when designing an ADR process.[164]

Primary legislation that provides for an ADR process should:

- address the purpose and desired general outcome of the ADR process;
- describe the process clearly and consistently;
- set out sufficient safeguards to ensure that the principles of natural justice are adhered to, power imbalances are addressed, and the independence and impartiality of the third party is protected;
- identify the parties and any other bodies and people that might be consulted or involved;
- state whether the ADR process is subject to any legal privileges (such as self-incrimination), and whether the process and outcome are confidential;
- define when and in what manner the ADR process should commence, be suspended and end;
- define the role, qualifications, powers and protections of the third party (in particular, the third party should be prohibited from exercising more than one function; if a dispute is initially considered a mediation, but later turns to formal arbitration, the mediator should not also act as an arbitrator);
- state clearly whether or not the ADR process is a pre-requisite to any other dispute mechanism (including courts proceedings);
- set out the status of the resolution (for example, whether it will be legally binding or enforceable in court).

[164] http://www.pco.parliament.govt.nz/adr-model-clauses/