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Topic One – Introduction to ADR (BLUE)

What is ADR?
- Any method of dispute resolution which occurs outside a judicial setting
- Usually utilises a third party
- Three main types:
  - Facilitative: third party assists in managing the process of dispute. Includes mediation and facilitation. HELP
  - Advisory – involves a third party who investigates the dispute and provides advice on the facts and possible outcomes. Includes investigation, case appraisal and dispute counselling. ADVISE
  - Determinative – third party investigates the dispute (possibly a formal hearing) and makes a determination. Includes adjudication and arbitration. May or may not be binding. DETERMINE

- NADRAC – National Alternative Dispute Resolution Advisory Centre

Definitions and differences in process
- Differences in process can occur in response to the following:
  - Length of the process and the formality of it
  - Different elements for different processes
  - Role of a third party/ies
  - Role of the parties themselves
  - Subject of the dispute
  - Reporting and referral requirements
Objectives of the process
- Philosophical underpinnings
  - “mediation abacus” – variables relating to levels of intervention and qualifications

Why teach ADR?
- ADR is becoming an increasingly important aspect in dispute resolution. There is now a larger size and variety of cases that are being decided by ADR processes. Skills in ADR are a crucial aspect in the modern day legal profession.

- All societies, communities, organisations and interpersonal relationships experience conflict at one time or another in the process of day to day interaction. Conflict is not necessarily bad, abnormal or dysfunctional; it is a fact of life.
- We need alternative dispute resolution practitioners to acknowledge and accept that conflict is not necessarily bad, it is not abnormal and it is not dysfunctional. Conflict exists when people are in competition to achieve goals which are perceived to be or actually are incompatible.
- But, conflict may go beyond competitive behaviour and acquire the additional purpose of inflicting physical or psychological damage on an opponent, even to the point of destruction.
- Unfortunately many people in conflict are unable to develop an effective process to deal with the psychological barriers to settlement or develop integrative solutions of their own – that’s where ADR practitioners come in. They help people resolve conflict that they themselves cannot resolve.

Jeremy Gromly, Chair of NADRAC (in Sourdin Alternative Dispute Resolution)
- There is nothing wrong with dispute, it is normal.
- Just as dispute is healthy we know that unresolved disputes are costly, damaging and debilitating. They interfere with ordinary discourse. They bring productive activity to a halt. They generate animosity. They fracture otherwise good human relationships and they can interfere with any field of activity in which resolution does not occur.
- We recognise not only a right to dispute but also a need and even an obligation to resolve our disputes. Usually that is what we do. Only a tiny sliver of daily disputes find their way to the courts. Indeed only a tiny sliver of the disputes of daily life are amenable to judicial determination. Of those that are, only a small proportion have to be determined by a judge because the rest are settled by agreement between the parties. Courts are the first to recognise that and encourage parties to resolve their disputes. Courts and judges have been one of the great supporters of ADR – courts do not resolve disputes they determine them by applying the law to the facts.

- Pg 145 – ADR courses put back everything law school took out, reintegrating humanity and common sense into the dispute resolution process.
- Black letter, common law, studies removed the humanity and common sense and we should teach ADR to put that back.
- Referred to study by Nolan – knowledge of mediation enhances law students lawyering skills. Even if they never mediate in practise it enables them to think in a problem solving manner and to consider underlying needs and interests – it enhances law students lawyering skills.
The Bigger Picture

- There is a large size, variety and dimension of cases that are capable of being resolved by ADR. However there are others that are not – e.g. Channel 7 case where the judge pleaded with the parties to settle the case which was refused and a decision was given and a cost order made – the costs were reported to be in the vicinity of $100M

Case of Jaundice & Jaundice

- Testator had multiple wills – litigation ensued for many years consuming £60000-70000 in legal costs. By the time the litigation was concluded there was nothing left in the estate for distribution

P R Callaghan SC, Roles and Responsibilities of lawyers in mediation (27 July 2007)

  o [5] referring to Jaundice & Jaundice – the lawyers have twisted it into such a state of bedevilment that the original facts of the case have disappeared. It is about a will and trusts under a will, or it was, it’s about nothing but costs now.

Argyle Diamond Mine

- Provides an example of using ADR techniques to prevent dispute.
- Agreement was made between the mining company and indigenous community → participation agreement
- The agreement ensures that the mining activities will provide benefits to the indigenous people beyond the life of the mine.

Kirby J – ADR

- Kirby J used ADR to resolve a dispute.
- The dispute was set to run in a SA court for 18 months. Kirby resolved it in a week.
- Illustrates the power of ADR when the practitioner is well trained and knows what they are doing.

America is the leader in ADR, followed by Australia, followed by England

- English case of Susan Fahiti v Forstead House School Trust (2005) EWCA CIV 765
  o [27] – shudder to think of the costs of the case. As the court has settled many of the principles in stress of work cases litigants really should mediate such cases as the present. Of course mediation before trial is infinitely preferable to mediation before appeal, but it is a great pity that neither form of mediation has taken place in this case, or if it has, it has not produced a result.
  o £25000 in costs

Continuing development of ADR

- Even in crime there are moves afoot in relation to turning dispute resolution solutions to criminal issues – i.e. criminal facilitation, mediation, circle sentencing.
- ADR is used in customer complaints training – REM acronym. Respond to emotion, Explore the solutions, and move to Resolutions.
- Another example is the equine influenza outbreak – ADR was used to resolve compensation disputes.
- Live Cattle Export Scandal – currently negotiations and facilitation are being undertaken to resolve issue prior to a court hearing.

What is the A in ADR?

- The A is generally referred to as ‘alternative’ → but is this really correct?
- It has been argued by Lawrence Street ((1992) 66 ALJ 194) that it is not ‘alternative’ - the use of alternative implies that it is in competition with the judicial system which is not true. It is really an ‘additional’ branch of resolution
Has also been argued that it should be ‘assisted’
LEADR argue that it should be ‘appropriate’ dispute resolution
There is an assumption that it is ‘alternative’ dispute resolution. However the other interpretations that have been suggested are also relevant. Particularly strong is Sir Lawrence Street’s claim that it is ‘additional’.

Note – Alternative dispute resolution is an umbrella term for the processes other than judicial determination

History of ADR in Australia
Overview
- 40000BC – 1770AD ➔ Australian indigenous people practices a form of ADR
- 100BC ➔ Ancient Greeks invoked/developed laws of conciliation and arbitration
- 1697AD ➔ English Arbitration Act was passed, in 1778 when we were colonised English law was adopted i.e. the English Arbitration Act became law in NSW.
- 1901 ➔ Australian Constitution (s 51xxxv) laws of conciliation and arbitration
  - Conciliation and Arbitration Act established the Conciliation and Arbitration Commission
- 1975 ➔ Institute of Arbitrators was established.
- 1979 ➔ a pilot study of Community Justice centres was undertaken in NSW – practised mediation
- 1980 ➔ Community Justice Centre Pilot Act was passed
- 1983 ➔ Community Justice Centre Act was passed
- 1985 ➔ International Centre for Commercial Arbitration was established
- 1986 ➔ Australian Commercial Dispute Centre was established
- 1988 ➔ Sir Lawrence Street began mediating and became the unofficial father of mediation in Australia
- 1989 ➔ Lawyers engaged in ADR – LEADR – was established (now known as the association of dispute resolvers)
- 1993 ➔ National Dispute Centre opened in Sydney
- 1995 ➔ National Australian Dispute Resolution Advisory Council was established (NADRAC)
- 2008 ➔ Sir Lawrence Street visited UNE and delivered an occasional lecture
- 2010 ➔ Australian International Dispute Centre of Sydney opened.

Key aspects in the development of ADR
It is true that community justice was a significant progenitor to the present wave of development of ADR. But ADR was born into a world that already contained other examples of ‘informal justice’:

- Aboriginal dispute resolution methods
  - Resolved disputes without recourse to litigation or anything resembling it.
- Arbitration
  - Has been used in Australia since white settlement – arbitration provisions were inherited from the English law.
  - The establishment of the Institute of Arbitrators Australia in 1975 provided a professional organisation for the development of an arbitral identity and for the training of arbitrators.
  - Passing of the uniform Commercial Arbitration Acts by all states from 1984 onwards.
  - Australian Centre for International Commercial Arbitration opened in 1985
- Ombuds
  - From 1960 onwards was an international movement associated with access to justice that urged various methods for enhancing substantive justice – including greater access to the formal justice system through the creation of additional institutions such as the ombuds and administrative tribunals which increasingly draw on ADR.
• Tribunals
  o Tribunals aim at providing cheap, accessible, informal and non-adversarial justice. E.g. National Native Title Tribunal which has an especially strong focus on mediation.

• Community justice
  o Pilot program in 1979 — established three Community Justice Centres.
  o The Community Justice Centres (Pilot Project) Act was enacted in 1980 to govern the initiative.
  o Provide an effective way of dealing with ‘backyard’ disputes – the sort of cases which cause great aggravation and often lead to serious crime.

• Industrial relations dispute resolution
  o Conciliation has been used to deal with industrial relation disputes for almost a century.

• The Family Court
  o Since its inception in 1975 the Family Court has placed emphasis on the resolution of disputes by means other than litigation.
  o Mediation, conciliation and counselling are regarded as the first and predominant methods of resolving disputes, with litigation recognised as the exception rather than the norm.

• Court-annexed ADR schemes
  o Increasing number of courts at federal and state level are using ADR in various ways – e.g. settlement weeks
  o The extension of ADR schemes attached to courts is one of the most striking and significant developments in the recent history of ADR.

• Commercial dispute resolution
  o Commercial sector has always been a significant user of alternatives to the formal justice system.
  o In 1986 the Australian Commercial Disputes Centre (ACDC) was established.
  o 1993 – National Dispute Centre was opened.
  o 1990 – the Federal Government established the International Legal Services Advisory Council (ILSAC) – primarily concerned with the development of Australia’s international commercial dispute resolution expertise and services.

• NADRAC – a national policy body for ADR
  o NADRAC was established in October 1995 to provide independent advice to the federal Attorney-General on policy issues relating to ADR.

Significant developments
• A number of developments were of particular significance:
  o The establishment and development of neighbourhood justice centres – locally based and created to resolve neighbourhood disputes using mediators drawn from the community. They provide a local dispute resolution service run by ordinary people who are empowered to resolve their own disputes according to community norms.
  o Use of ADR in family disputes – family disputes were seen as uncontroversially suitable for ADR. ADR was very early incorporated into statutory schemes dealing with family law.
  o Statutory schemes that regulated rapidly developing areas of law encouraged or required the use of ADR – e.g. environmental law and anti-discrimination law, industrial disputes.
  o Increasing institutionalisation of ADR – has been extensively integrated and co-opted into the formal justice system. a very significant area of growth has been court-connected ADR.
  o Governments have promulgated policies to increase the use of ADR –
  o A greater understanding of the strengths and weaknesses of ADR has developed – it is recognised that there are some disputes not suitable for ADR.
  o Greater awareness of the problems associated with the unrestrained use of mediation in family cases – issues of unfairness and injustice because of power relationships.
Concerns over ADR

- Detrimental impact of the extensive use of ADR on the operation of the doctrine of precedent and on the skills of those in the formal justice system.
- Effect of the privatisation of disputes
- Capacity of ADR to provide effectively for the specialised needs of women and marginalised groups.

Impact of the changes in conflict resolution upon the legal system of Australia

Difficulties with litigation

Joanna Kawalski, Communication techniques to support a less adversarial trial

- Bumbling, incompetent, puzzled, frustrated, irritated, these are hardly descriptions of the state in which people do their best and adults in court can often be reduced to feeling like children. In the traditional courtroom setting judges have to gauge levels of understanding without being able to resort to their full range of human communication tools; eye contact, direct interaction and questioning are all limited by legal convention. At best judges can ask if all is clear but which adult is happy to admit aloud in the presence of others who seem at ease with what is happening that they fail to understand a process that is ostensibly about them.

Law – Profession or Occupation?

LEADR – How to become a wild lawyer (17th April 2007)

- Discusses the distinction between being in a profession or occupation
- P.29 – historically, the hallmark of a profession is that it sees itself as having a wider role in society beyond just serving the needs of its immediate clients and making money. It has been said that law started as being a profession, then became a business and now has become an insurer of last resort, an indemnity policy to claim against if the deal goes wrong. It is not surprising that it is easy to lose touch with what it means to be a professional.
  - Burger (US SC Judge) \(\rightarrow\) in the next century lawyers will be reconcilers, not warrior healers, not hired guns – how can lawyers take up their role of healers of the planed when they act as a hired gun for clients whose values they don’t share. Lawyers have a collective and individual challenge to decide who they serve and how they will do this.
- P. 30 – a traditional lawyer maintains the status quo, being cautious conservative and risk avoider ruled by a time sheet and long hours. A wild lawyer is an agent of change and allows downtime to nurture ideas and creativity. A traditional lawyer primarily serves the interests of corporations being an occupation that is a hired gun. A wild lawyer recognises a wider duty to the whole earth community connecting with the historic function of a profession
- Last paragraph – there are four rooms in my house, the mental, emotional, spiritual and physical. I will spend more time in some than others but to be healthy I must visit all rooms at least once a day. Lawyers undoubtedly spend most of their time in the mental room and if they visit others they are unlikely to do so during the working day. To become a wild lawyer we need to integrate all 4 dimensions. This is a paradigm shift in the way that lawyers function.

Forms of dispute resolution

- There are three main forms of dispute resolution
  - Reconciling interests \(\rightarrow\) identification and focus on the motivation factors behind peoples demands
  - Determination of rights \(\rightarrow\) focus on independent standard e.g. law, precedent etc.
  - Determination of who is most powerful \(\rightarrow\) imposition of costs or threats to do so on other parties, strikes, wars, intimidation etc.
Dispute resolution processes will fall within one of the three categories. ADR practitioners are concerned with reconciling interests.

The formation of disputes

- formation of a dispute – how does a dispute come about?
  - A person is aggrieved
  - Person makes a complaint – the complaint can be formal or informal, it is generally an expression of dissatisfaction or concern about goods, services, actions or inactions
  - Conflict – when the complaint does not resolve the problem refers to a disagreement about the concern that has been expressed. At this stage the dispute is no longer a unilateral action, it becomes bilateral. However, just because there is conflict that does not mean that it cannot be resolved at that level. If the conflict is not resolved it leads to a dispute.
  - Dispute – unresolved conflict.
- Conflict is an inevitable and pervasive aspect of human life. It arises and takes place between individuals, groups, organisations etc. in communities and nations. Much conflict exists in the mind and is expressed by words, or in some cases violence. Conflict can erupt suddenly or it can smoulder for years. It can focus on something trivial or concern the future of life on earth.

The resolution of disputes (A&C p. 44)

- The way in which people deal with grievances and disputes has been described diagrammatically as a pyramid.
  - Litigation is rarely used and occupies the very apex of the pyramid.
  - The rest of the body of the pyramid is occupied by other methods of dealing with disputes such as seeking advice and negotiating, ‘lumping it’ (taking no action), industry or workplace grievance or complaint mechanisms, ombuds etc.
- the different ways of handling disputes should not be seen as distinct and separate processes. Instead, the benefits of the imbrications of formal and informal processes should be recognised and deliberately used for the benefit of each.
Typical responses to conflict

- The typical responses to conflict include
  - Denial
  - Withdrawal
  - Submission
  - Displacement
  - Internalisation
  - Projection
  - Addictive behaviour
  - Drugs
  - Alcohol
  - Violence

- There is no simple formula to resolve conflict, but to resolve conflict we must first be aware of the manner in which conflict is manifested.

P R Callaghan SC, Roles and Responsibilities of lawyers in mediation (27 July 2007)

- Presents a gloomy view of the public perception of lawyers
- [6] litigation is a machine which you go into as a pig and come out as a sausage → things get mixed up in-between until they are virtually unrecognisable.
- [7]-[9]

Importance of an evaluative approach to ADR (A&C p 23 →)

- There was initially unbounded enthusiasm for ADR. However, this has now been tempered by a constructive criticism of the process
- Early enthusiasm for ADR was at times unbounded and uncritical. More recently, enthusiasm has been somewhat tempered by the experience of ADR in practice, by developing critiques of ADR and by a more realistic assessment of its potential.
- Assessment of ADR is informed by varying perceptions of power, gender, race and community relations.
- ADR has undeniable appeal to governments. It promises cheap, speedy, accessible (and even caring) methods of resolving disputes.
- ADR has both progressive and oppressive potentials
  - It may provide a desirable, appropriate and appealing method of resolution for some disputants
But if ADR is simply a way to save money and process cases as quickly as possible it is unlikely to provide justice and equity for many of those who are unfortunate enough to use it.

To ensure high quality dispute resolution it is necessary to consider carefully what constitutes quality ADR and which cares are, or are not, appropriate to be sent there

- A critical and evaluative approach to ADR
  - Asks why there has been such a growth in the provision of ADR mechanisms in recent times
  - Examines who benefits from ADR
  - Examines whose interests are protected by ADR and whose are neglected.
  - Addresses issues concerning the appropriate use of ADR and the requirement of the provision of high quality ADR services.

- Critiques of ADR can be divided into two types
  - Those which consider the place of ADR in relation to its social context
  - Those which look internally at ADR procedures and their effects on the participants.

- Abel’s argument – in reality ADR has the capacity to expand state control of disputes – A&C p. 26-28.

- An important issue raised about ADR processes concerns the capacity of ADR to conceal substantive change. ADR is represented as a procedural change. To the extent that ADR supports substantive change – change in the norms and values according to which decisions are made – ADR advances change in the direction of the values of the disputants. The neutrality of ADR has been called into question and its capacity to conceal substantive change demonstrated (particularly in family law)
  - If substantive change is made under the guise of procedural change, it is made in private and is not open to challenge or review.

- Where ADR is provided as a service to the local community (e.g. community justice centres) to resolve neighbourhood disputes it is substantially funded by the state, in accordance with government policies, rather than being governed by local needs and demands it has become institutionalised and aligned with the formal justice system.
  - Community dispute resolution centres in Australia operate relatively closely with local agencies of the formal justice system.

- ADR does have progressive potential
  - Presents something of a paradox between progressive and empowering potential and flawed reality.
  - Recently seen the development of the idea of transformational mediation – a method of mediation which is explicitly committed to personal and social development, which embraces peaceful, moral decision-making and supports tolerance, understanding of others and the embracing of diversity.

- There are critical issues that need to be considered in relation to ADR it is not a panacea, there are numerous excellent features however there are also difficulties

Use of humour, perception and hope in effectively resolving disputes

- Mark Twain noted that humour is mankind’s greatest blessing.
- Victor Bood – laughter is the shortest distance between two people.
- Humour has a role to play in mediation
- David Lammy – I can say to the right hon. Gentlemen that I have never held a slumber party or seen her in her pyjamas – example of self-deprecating humour.
- John Forrester Responding to critical moments with humour, reservation and hope
  - The best form of humour that can be used in ADR processes, particularly mediation, is self-deprecating humour. We must not use projected humour – must not project humour on the disputants.
Responding to critical moments with humour, recognition and hope
John Forester, in Negotiation Journal

Summary
- Humour can go wrong and mediators stress a necessary condition – it must be respectful, never used at the expense of a negotiating party.
- At critical moments in negotiations, humour can be an important tool, if improvised with regard to tone, timing, affect and respect.
- Explores the importance of having a sense of humour.

Key Points
- At critical moments in negotiations, having a sense of humour has very little to do with being funny, but very much to do with responding to others with understanding and importance.
- Having a sense of humour has almost nothing to do with canned, pre-packaged jokes and everything to do with perceptive and imaginative responses in the heat and flow of work.
- A sense of humour can shift the course of a conversation, change expectations and relationships and even turn suspicion and pain toward hope and action.
- Any use of humour must be respectful – it neither makes fun of others nor dismisses their concerns or makes light of what they take to be serious matters.
- Humour can contribute in a small but perhaps still important way to creating a ‘we’ of nevertheless distrusting and sceptical parties who now need to talk to one another to reframe what they see and to learn more than they need to know.
- A sense of humour can help adversaries see that they share concerns – when humour makes it possible for them to laugh together, they recognise that even though they distrust each other, they do share something. Shares spontaneous laughter can humble people together.
- In situations of suspicion, complexity, and heavy expectations, having a sense of humour can be respectful and instructive and transformative.
- Humour must be respectful to all parties.
- The use of humour can be a double edged sword – seeing the irony, ridiculousness, or downright improbability of a situation keeps us humble. However, expressing that perception may not be appreciated by others present.
- Humour can provide safety and connection – it is a leveller and a release.
- A sense of imagination and humour opens up avenues for improvisation and change – a sense of hope.
- A sense of humour helps to empower others just as it undercuts the presumptions of the mediators own power.
- A sense of humour plays an important part in levelling roles and providing safety, encouraging conversation and enabling discovery, building confidence and power which provides hope for the future.
- Humour works to flatten hierarchies between outside experts and less esteemed community members – and to connect people and build relationships.
- If you don’t have a sense of humour in practice then you are more likely to reinforce others prior suspicions and expectations of your role as an outsider, and consequently you will find it more difficult to:
  - Build trust
  - Connect collaboratively with parties
  - Improvise within shared norms or guidelines
  - Resist passivity, dependency, or passive-aggressive behaviour
  - Encourage autonomy and creativity
- Humour is not telling jokes but rather undercutting disabling expectations, reframing political relations and so unexpectedly providing multiple points of vision on topics or even relationships at hand.
- A sensitive use of humour can do substantial work.
- Self-deprecating humour → making light of yourself

Douglas & Bayly – Humour in mediation: sparkling laughter through improvisation
- Gives a good breakup of the different types of humour – takes a further step than Forester who only talks about self-deprecating humour and projecting humour
- Four types of humour are:
  - Self enhancing
  - Affilitive
  - Aggressive
  - Self-defeating

Humour in Mediation: Sparking laughter through improvisation
Kathy Douglas and Andrew Bayly in Australasian Dispute Resolution Journal

<table>
<thead>
<tr>
<th>Summary</th>
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<td>Mediators develop interventions to assist parties in the exploration of their conflict. Humour is one method of attempting to ease tension between parties and engender positive emotions in the mediation.</td>
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<td>But not all mediators are comfortable using humour in the mediation setting – learning about improvisation can assist mediators to trust their comic instincts and include humour in the interventions that they use in mediation.</td>
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<td>The article presents various games to assist mediators to develop the intervention of humour in their practice.</td>
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<td>For a skilled practitioner, there is a potential benefit to using humour as one strategy when addressing conflict. Humour presents the opportunity to transform negotiation. One way to increase the use of humour in mediation is through an understanding of the dramatic practice of improvisation.</td>
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<td>But humour must be sensitively used in mediation because laughter can add to, rather than counteract, conflict, particularly if the humour used is negative – in society humour is used to disparage and demean individuals and ostracise particular groups and thus a critique of specific humour is important to ensure that the use of humour does not veil negative behaviour.</td>
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<td>There are a number of kinds of humour including:</td>
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  - Self-enhancing – a coping mechanism to wryly comment upon life’s stresses |
  - Affilitive – the extroverted telling of jokes and funny stories |
  - Aggressive – often used to engender laughter through derision of an inferior but also can be positive use of humour |
  - Self-defeating – humour that is self-deprecating and possible endearing in an attempt to lower one’s status and achieve camaraderie and empathy with others. |
| Humour is a valuable skill to use in mediation to reduce tension and promote positive emotions |
| Positive emotions such as laughter increase connectedness amongst the parties and build rapport between the mediator and parties and also the parties themselves |
| Forester notes that humour is particularly valuable in turning points in conflict when the conversation between parties threatens to fall apart, to escalate or degenerate, or to turn toward such mutual suspicion or recrimination that all hope of mutual agreement appears lost. |
| In the context of mediation, the aim is not for a mediator to take a central role, or star role in the unfolding story of the mediation. Instead, improvisation can help the mediator be more creative and utilise collaborative storytelling skills that enable the parties to re-story conflict. |
| The kind of humour that works best in mediation is the kind that operates to shift frames relating to the conflict. Improvisation can assist with humour that highlights the unexpected, or that points to a disjuncture in what is being said or what is happening in the room. Contributions need to be sensitive, but an experienced mediator can add humour to the dialogue in the mediation without resorting to negative comments. Practice in improvisation can assist with humour that is |
professionally appropriate but that works to ease the tension in the room and adds a sense of connection between parties.

- Johnstone encourages participants to ‘over-play’ their emotion – the games quickly extend the natural range of participants, but more importantly inform participants that they already have extraordinary range in their own ability to play with behaviour in engaging, entertaining and comic ways.
- The practice of improvisation enables us to act more readily with a broader range of status, and to consciously use our status to engage with others, and to express humorously out relationship to them.
  - E.g. in building disputes a mediator can lower their status by acknowledging that they had no knowledge in the area and would like to be treated like a baby. Many parties have found that such a confession is amusing and the act of explaining technical information to the mediator results in parties having to focus on the other parties concerns.
- Improvisation can teach mediators many things about their practices
  - It can help with developing mediator skills in spontaneity, creativity and respectful collaboration.
- Games to improve improvisation include:
  - “yes and” – every piece of dialogue must begin with “yes and”
  - “yes but” – in the second round of yes and the participants must use yes but.
  - “word at a time story”
- Improvised humour (rather than set jokes) then develops out of the mediation dialogue. Being able to listen – perhaps to find the comic moments in the dialogue, but more importantly to be aware of the group’s context – is a critical skill.
- In mediation situations, perhaps mediators are too concerned with editing themselves in order to create an appropriately sombre and respectful mood – which may be self-defeating.
- Humour is a potentially powerful intervention tactic for mediators when facilitating conflict. The discipline of dramatic (comic) improvisation can help teach mediators to add appropriate spontaneous humour in mediations.

- It is important to understand when humour is being used and whether it is self-deprecating or projected. → it is very dangerous in a mediation to project humour onto the parties.

Law Society Journal 2012 – p 31

- Humour can have a serious role in the legal system. While over 2/3 if respondents who had experienced mediation said that they used humour to lighten up disputes. However, the type of use is important. To be taken seriously the use may have to be very serious. Self-deprecating humour can effectively lower the status of the mediator so the disputants feel empowered but equally the mediator must be careful not to trivialise the situation because inappropriate humour can exacerbate the differential between the mediator and the client.

- It must be remembered that when talking to clients it is important to talk with them, not to them. Talking with them places the mediator on the same level and opens more effective communication. It is necessary to be conscious of the little nuisances that build up the rapport with clients.
Topic Two – Litigation and Alternative Processes (GREEN)

Litigation as the normal dispute resolution process?

- Litigation is the form of dispute resolution that resonates through the community.
- However, despite the cultural resonance of litigation there is, and has always been, a wide variety of processes by which to resolve disputes. Less than 5% of disputes are resolved by litigation, and only a fraction of that 5% go to hearing.
- In reality neither litigation nor mediation predominates in the way ordinary citizens handle disputes.
- The institutionalisation of ADR within courts, government departments and private enterprises means that it must be viewed as part of the overall schema of dispute handling.
- ADR is now to be found within the formal justice system which has adopted it and made it its own. The institutionalisation of ADR has meant that most courts and tribunals use one or several forms of ADR.

The resolution of disputes – the dispute pyramid

- The ways in which people deal with grievances and disputes has been described diagrammatically as a pyramid. Litigation is rarely used and occupies the very apex of the pyramid. The rest of the body of the pyramid is occupied by other methods of dealing with disputes.
- The different ways of handling disputes should not be seen as distinct and separate processes. Instead the benefits of the imbrications of formal and informal processes should be recognised and deliberately used for the benefit of each.
- Parker identifies three levels of options for access to justice, layered by reference to their degree of formality
  - A broad base of indigenous ordering – families, community, public and private organisations.
  - Informal justice – a range of more institutionalised methods other than those of the formal justice system.
  - Narrow apex of formal justice.
- Each band of options overlaps those next to it in the pyramid and parties to disputes can move down as well as up through various levels in their attempts to find an appropriate process for their dispute.
- The dispute development process can also be illustrated through a pyramid.