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COMMENT

CONCILIATION IN AUSTRALIAN LAW

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The Shorter Oxford Dictionary defines "conciliate" variously as to gain goodwill by acts which induce friendly feeling or to reconcile, make accordant, sooth or placate. Such a term was certainly needed in the industrial context, where it was adopted in the 1890s or earlier. It found its place in s. 51(xxxv) of the Constitution largely as a result of the efforts of H. B. Higgins. Under the "conciliation and arbitration" power the Commonwealth Court of Conciliation, and its successors, have worked since 1904 at the sometimes thankless task of bringing about agreement between parties without the need to go to arbitration. *ARU* v. *V.R.C.* (1930) 44 C.L.R. 319.

In the last ten years the concept of conciliation has been introduced into a number of areas in the Australian legal system as an alternative or as a condition precedent to other means of adjudication. It is seen by many as a valuable alternative to the costs and delays of adversary litigation, yet little is known about the process, its level of success or the skills involved.

While the original Family Law Act, 1975 did not refer expressly to conciliation, the process of assisting parties to reach agreement has been successfully carried out within the Court for 10 years by Court Counsellors

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and Registrars. The term "conciliation" has now been introduced into the Act by section 16A, which provides that the Court and legal practitioners shall have regard to the need to direct parties to the facilities available for counselling, and the procedures available for the resolution by conciliation of matters arising in the proceedings (see also s. 14). With certain exceptions, conciliation has been made an obligatory part of custody and property proceedings. (ss. 64(1)(b), 79(9).)

The system of conciliation was seen as so successful and valuable that Family Conciliation Centres were established by the Commonwealth Attorney-General as a pilot project to provide conciliation (and mediation) services outside the Court and at the earliest possible stage.

Community Justice Centres, established under the N.S.W. Community Justice Centres Act 1983 (No. 127), provide a voluntary process of dispute resolution under which parties are encouraged to reach their own agreement with the help of a mediator, either before or after legal proceedings have been started (s. 22(2)). "Mediation" is defined by the Act to include "the undertaking of any activity for the purpose of promoting discussion and settlement of disputes", a process similar to that of conciliation.

Under the N.S.W. Anti-Discrimination Act 1977-80 the President can require a compulsory conciliation process in respect of a complaint, in an endeavour to resolve that complaint (s. 92). If the matter is not settled, it is referred to the Equal Opportunity Tribunal to hold a public inquiry. Further conciliation may then be attempted. (s. 106(6).)

Both the Commonwealth Sex Discrimination Act 1984 (s. 52(1)) and the Australian Bill of Rights Bill 1985 (cl. 11(1)(f)) provide for a compulsory conciliation process in respect of complaints. The Australian Bill of Rights Bill provides that the Commission shall, in the conciliation process concerning an alleged infringement of a right set out by the Bill, "have regard to the need to ensure that any settlement of the matter reflects a recognition of that right or freedom and the need to protect that right or freedom (cl. 30).

In the commercial field, the N.S.W. Arbitration (Civil Actions) Act 1983, s. 9 provides that the arbitrator is to endeavour to bring the parties to an acceptable settlement and to make an award giving effect to its terms.

Whilst the kinds of case which are referred to conciliation and/or mediation are diverse they all involve the intervention of a third party in an attempt to bring about the resolution of a dispute by agreement, rather than by judicial or other determination. The benefits are savings in time and expense and in the personal trauma arising from adversary litigation.

There are differences in regard to the protection of confidentiality, the degree of compulsion and the extent to which legal representation is permitted. There are also differences in the underlying goals and in the role which the conciliator plays in pursuing those goals. He/she may take the role of a neutral umpire to discussions, working at keeping open the lines of communication between the parties in the hope that they will arrive at an agreement. Alternatively the conciliator may play a more active interventionist role, working towards broader policy goals which go beyond the immediate parties and issues.

In family disputes, it is important to help parties to establish and maintain a working relationship of co-operation. Where children are

involved, the goal of the conciliator may be to work on that aspect of the problem so that the parties are freed to make their own joint decision.

For example, in Family Court conciliation, a court counsellor can call upon his/her expertise concerning family relationships and the needs of children during the process of counselling and conciliation. [Lawyers are not usually involved directly in this process, even if proceedings have been commenced.] If the parties reach agreement, or seek a consent order, their plans are not subjected to scrutiny by the Court. In most disputes over custody legal issues are not the main factor. Consistency in result is not an objective.

In property disputes, on the other hand, the registrar draws upon his/her knowledge of law and practice in the conciliation process. In this type of case it would be unwise for parties to reach a binding agreement without at least some knowledge of their legal position and of possible Court outcomes. Such knowledge can be an aid rather than a deterrent to resolution of the dispute. Analysis of the outcomes of agreements reached by this process of conciliation show a reasonable level of consistency. This is no doubt reinforced by the circumstance that if the Court is asked to approve a final agreed disposition of property it has to be satisfied that the terms are proper in the interests of both parties.

Despite these different goals, the techniques in family conciliation have much in common; many of the skills are transferrable from one situation to the other. The trend is towards joint conciliation where the parties are in dispute over both property and custody. The advent of Family Conciliation Centres opens the way for some financial disputes to be dealt with without litigation or the involvement of private lawyers. The legally trained conciliator would provide the necessary information and refer the parties to separate legal advice when necessary. (Family Law Council: Administration of Family Law in Australia, 1985, p. 68.)

The kind of responsibility exercised by the conciliator in family law is probably absent from mediation provided by Community Justice Centres or by commercial arbitrators. In the human rights and discrimination field the position is less clear. Legal representation is precluded except with leave under the N.S.W. Anti-Discrimination Act, 1977, s. 93, the Sex Discrimination Act, s. 56(4) and the Australian Bill of Rights Bill, cl. 34(1). Despite this the Anti-Discrimination Board in N.S.W. has reported an encroachment of legalism into the field, and a reluctance of parties to settle complaints through conciliation without the "benefit" of legal advice (1984 Report, p. 76).

While little information is available about the conciliation process in human rights field, it seems possible that it may be influenced by policy goals, including that of changing behaviour and attitudes, as well as resolving the issue between the parties. Certainly under the Australian Bill of Rights the conciliator is directed to ensure the recognition of rights and freedoms in any settlement. This implies at least an opinion as to how those rights should operate in a given situation.

The diverse situations now referred for conciliation and the difference in objectives which could be pursued in that process suggest that careful attention needs to be given to a number of important issues before conciliation is hailed as the panacea to the ills of confrontation in litigation. These issues include a proper definition of the goals of conciliation, and

the role of the conciliator; an understanding of when parties have a need for information and/or independent advice and how that should be provided; an examination of the skills and techniques used in conciliation and of the training needs of conciliation.