

## 3.7. Alternative dispute resolution

Alternative dispute resolution (ADR) may help to resolve a conflict and rebuild the relationship with the other party to the conflict, especially if your organisation:

- cannot terminate their contact with the person
- has considered and/or attempted other reasonable and possible management strategies to manage the dispute
- bears some responsibility for causing or exacerbating the person's conduct.

ADR is a term used to describe a wide range of different processes that can help people to settle their disputes and conflicts by means other than litigation. ADR can be facilitative, advisory, determinative or a hybrid of these approaches to suit a particular conflict or dispute. As a result, each case will need to be assessed on its own facts to determine which approach will be effective.

When using ADR in a UCC context, it is also important to ensure that the ADR process is managed by a skilled independent and impartial third party who can help you and the complainant reach a solution you can both accept in the circumstances. Having a third party as a facilitator or mediator may also minimise the likelihood for negative perceptions and imputations about bias or collusion. In cases involving UCC, it is particularly important that the facilitator is well trained and experienced in ADR processes.

### 3.7.1. The pros and cons of ADR to address unreasonable conduct

ADR may be useful to:

- Make sure the person knows they are being recognised and respected as a person with a problem, rather than just being a problem.
- Help the person to feel that they are being listened to and their matter is being taken seriously.
- Obtain information about their issues, interests and position and help both parties to understand the underlying factors contributing to the dispute.
- Encourage both parties to change from 'position based' to 'interest based' discussions.
- Permit a wider range of options for settlement than traditional court based dispute resolution processes.
- Allow both parties to convey and understand the impact of the behaviour, the dispute and interactions on each other and others.
- Permit better communication around the person's expectations about the types of things that can be achieved/possible outcomes and the organisation's capacity to fulfil these.
- Allow any emotional dimensions to the dispute and relationship to be expressed and acknowledged.
- Allow parties to gently challenge each other's perceptions and encourage them to consider a different perspective in a non-adversarial setting.
- Bring about a change in the relationship with the person – it may also be less damaging to your relationship with the person as compared to other options.

- Support the other party to consider options they may not otherwise be open to, particularly if they have a friend, advocate or support person assisting them in the process. The ADR process may be the first time these individuals become aware of the history involved and the other party's perspective. These support people can often reassure and/or gently encourage distressed people to more fully consider options put to them during the process, and may remind them of the desirability of finalising the matter – as long as they personally consider the options to be reasonable/explicable.
- Provide a more cost and time effective process, rather than allowing the conflict to continue for years and affect members of staff over a long period.
- Encourage the parties to look to the future and consider a liveable solution rather than focusing on past conflicts, behaviours and 'winning'.
- Solve the problem or establish that there is no available solution within the organisation's control.

Depending on the circumstances of each case, ADR can be ineffective in an unreasonable conduct context if:

- The other party is unwilling to participate in good faith, is uncooperative, resistant to compromise or unwilling to work towards a solution that is fair to all parties.
- The other party refuses to agree to keep confidential all matters disclosed in the process – which allows participants to feel able to fully disclose all relevant information – or one party doubts the other's commitment to or ability to comply with this. This can also limit the chances of a successful process, and may pose additional risks to the organisation.
- The person's identity may have become so enmeshed with their issue that they are no longer able to identify or accept possible options for resolution, no matter how reasonable or accommodating the options may appear.
- It could give the person false ideas about the importance of their issue.
- It is too expensive, particularly if a skilled independent third party is retained to facilitate the process. If the other party exhibits unreasonable behaviour and a complaint runs over years, significant initial preparation may be required – increasing the costs. The cost of ADR should however be balanced against the costs associated with continuing to deal with the person in other ways.
- It is too time consuming – again this should be balanced against the possibility of the conflict being ongoing and unresolved for years.

### 3.7.2. Some common ADR strategies

The following are some of the more common ADR strategies that could be used in an unreasonable conduct context.

#### Mediation

In mediation, the parties to a dispute – with the assistance of a neutral third party (the mediator) – identify the issues in dispute, develop options, consider alternatives and try to reach an agreement. The mediator has no advisory or determinative role in the content or resolution of the dispute. The role of the mediator is to help both parties to identify their interests, understand alternative views and arrive at a mutually acceptable solution. When a resolution is reached, the parties can decide to draft a mediation agreement – a document signed by all the parties agreeing to the outcome reached in the mediation.

## Facilitation

In facilitation, the participants (usually a group) – with the assistance of a dispute resolution practitioner (the facilitator) – identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to help the participants to develop options, consider alternatives and try to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

## Facilitated negotiation

In a facilitated negotiation, the participants to a dispute – who have identified the issues to be negotiated – use a dispute resolution practitioner (the facilitator) to help them negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

## Conciliation

In a conciliation, the participants – with the assistance of the dispute resolution practitioner (the conciliator) – identify the issues in dispute, develop options, consider alternatives and try to reach an agreement. A conciliator can provide advice on the matters in dispute and/or options for resolution, but will not make a determination. The conciliator is responsible for managing the conciliation process, and may have professional expertise in the subject matter in dispute.

## Conferencing

In conferencing, meetings are organised – with a conference chair or convenor – for the participants and/or their advocates to discuss the issues in dispute. Conferences are often used by organisations with a regulatory or statutory responsibility, and the conference chair or convenor may provide advice on the issues in dispute or possible options for its resolution. The term ‘conference’ is often used to refer to processes in courts, tribunals and regulatory agencies that are similar to conciliation and may sometimes be referred to as ‘conciliation conferences’.

## Conflict coaching

Although it is not formally an ADR process, conflict coaching may also be an option for dealing with conflicts with complainants – particularly internal complainants. It is a form of interactive problem-solving that involves a ‘coach’ helping a ‘coachee’ (in this case the person who made the complaint or complaint handler) to resolve their conflicts. The process encourages the coachee to reflect on and examine their conflicts and develop new and more productive strategies for managing them. The conflict coach does not provide advice to the coachee, nor do they act as an advocate, representative or mediator for the coachee. The coach also does not judge the coachee or any other party involved in the conflict.

Various negotiation training programs are available to help frontline staff to strengthen their negotiation skills when dealing with complainants.

More information about alternative dispute resolution is available at the [Commonwealth Attorney-General’s website – www.ag.gov.au](http://www.ag.gov.au).