A HEALTHIER APPROACH TO JUSTICE AND ENVIRONMENT DEVELOPMENT IN AUSTRALIAN COMMUNITIES AND BEYOND

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Abstract

This article shows that health and related environment development are at the centre of a new international governance paradigm which also raises risk management to new importance. Implementation of this paradigm requires broad administrative reform in Australia and beyond to meet the evidentiary requirements of scientific and quality management. Recommendations for the development of alternative dispute resolution systems (ADR) are made in this context. Supporting education and research into the comparative role and effectiveness of ADR and courts are also required.

Changing international and Australian perspectives on governance

The first principle of the United Nations Rio Declaration on Environment adopted in 1992 is that human beings are at the centre of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature. At the 1994 Asia Pacific Economic Cooperation (APEC) summit, national leaders agreed to create an Asia-Pacific free trade zone by 2020, and supported protection of health and the natural environment. APEC members have diverse political regimes including those of Australia, China, Japan, Indonesia and the US. Governments based on the British model have traditionally separated three principle governance powers, as in the Australian Constitution. Elected politicians, government administrators, and the judiciary are central and independent governance pillars in this model (Commonwealth of Australia 1995). In a more recent governance model, the emphasis is primarily on the necessity for clear separation of policy and administration, with the former driving competitive, transparent, service provision (Rich 1989; Hilmer 1993; Osborne and Gaebler 1993) to achieve health and sustainable development. In this management model, prosecution and dispute resolution are conceptualised as services which should provide data to assist injury prevention, rehabilitation and the future direction of sustainable development. Open, broad accountability is seen as the best guarantee of independent action in the public interest.

This emerging view regarding the appropriate roles of government and the market has developed as governments, including in Australia, have adopted the World Health Organization (WHO) holistic perspective on health as a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity. This requires much broader and better-coordinated management approaches than the earlier, medical model, which focused on treating an ailing body. In 1981, Australia committed to implementation of WHO health promotion goals in which consultation and equitable access to health were also agreed as fundamental community rights. In 1983 the Commonwealth government introduced the Medicare system of nationally guaranteed, taxpayer funded health care. In 1986, national health promotion plans were established on the basis of identification of the

major causes of death and hospitalisation and the establishment of strategies for controlling related risks. (Department of Community Services and Health 1994).

Australian state occupational health and safety (OHS) acts were also introduced during the 1980s to replace earlier, prescriptive approaches in which law often had no clear objects, but was supposed to be followed to the letter. Under state OHS acts all employers are now required to provide safe places of work as far as reasonably practicable. Employees must work safely, and sellers to the workplace are expected to provide safe products. Employers are required to undertake risk identification and control in consultation with workers who are provided with information and training (Industry Commission 1995). In NSW, which has a third of the Australian population, the WorkCover Authority administers the OHS act and the workers compensation act. WorkCover inspectors, trade union representatives and others may be approved to undertake workplace investigations and prosecutions. The insurance fund is administered by twelve insurers which collect premium, administer claims and undertake data gathering and fund investment on behalf of government and industry, which owns and therefore underwrites the fund. This structure seeks to meet the need for effective, data driven management in support of injury prevention, rehabilitation and economic stability (Industry Commission 1994).

In 1986, the WHO Ottawa Charter stated that supports for health include peace, shelter, food, income, a sustainable economic system, sustainable resources, social justice and equity. Australian governments and industries are working on this kind of broad and better-coordinated management approach to promoting health and sustainable development. In 1990 the Australian Council of Australian Governments (COAG) began review of legislation to develop national standards for health and environment protection, including related occupations and training, disability services, social security benefits and labour market programs (Premiers and Chief Ministers 1991). In 1995, following the Hilmer Report, the Competition Policy Reform Act was passed. This requires government and private sector service providers to compete on equal terms, unless another course of action appears to be in the public interest (Fels 1996). Professor Hilmer has now become Vice Chancellor at the University of NSW.

In 1994 the UN defined community-based rehabilitation as:

> A strategy within community development for the rehabilitation (CBR), equalization of opportunities and social integration of all people with disabilities. CBR is implemented through the combined efforts of disabled people themselves, their families and communities, and the appropriate health, education, vocational and social services (UN Social Development Division 2001: 1).

In 2000, Australia began a coordinated health and disability management process with the development of regional health plans based on population profiles, including socio-economic indicators and a focus on the needs of the aged (NSW Health 2000). This is the national health service context in which all related service provision, including for crime prevention may now be conceptualised. Australian governments recognize that reducing the supply of motivated offenders requires reduction in the general level of community stress.

In NSW, coordinated place management, community housing and crime prevention strategies are being implemented to achieve this (Standing Committee on Law and Justice 1998 2002).

Strang and Braithwaite (2001) have argued that the way the legal system punishes apparent breaches of the law seldom leads to outcomes that aid rehabilitation of offenders and is more likely to result in social exclusion and development of subcultures beyond the reach of moral education. They and others have called for restorative justice approaches to conflict between individuals or within communities. The UN has defined restorative justice as any process in which victims, offenders and other stakeholders participate actively in the resolution of matters arising from crime, often with the help of a fair and impartial third party. The recent NSW Young Offenders Act seeks to facilitate a less adversarial, community based approach to justice by providing for an integrated, hierarchical scheme of police warnings, cautions and youth justice conferences designed to divert offenders from formal court processes for certain offences. Circle sentencing is also being introduced in Aboriginal communities. Suitably coordinated management approaches ought, apparently, to be designed to assist prevention of injury to workers, consumers, community members and their natural environments. However, current cultural assumptions about justice and the related design and practices of courts frustrate the achievement of data driven management to achieve community health and sustainable development.

Central concepts related to the legal idea of justice

A recent federal civil justice system strategy paper (Attorney General's Dept. 2003) stated many people speak of 'justice' as being about what in their view is fair – what is 'right' as distinct from what is 'wrong'. When the public speak of 'access to justice' they usually proceed from the conception of the legal system as a service provider, addressing their particular grievance, vindicating their rights and achieving their desired outcomes. However, access to justice can only ever mean relatively equitable access to the legal process. The concept of the divine authority of the monarch appears to live on in the modern Australian state, in subordination to its Constitution, which all must follow. As Chief Justice Griffith noted:

> 'judicial power' as used in sec. 71 of the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.' (Attorney General's Dept. 2003: 150)

This appears to entail a prescientific cultural assumption that the attainment of a social purpose higher than self interest (justice) can be equated with an institution (the court) which supposedly delivers it automatically, by subordinating all scientifically derived evidence to an adversarial process ultimately driven by the word of a supreme authority.

According to Popper (1972), science aims to be objectively grounded in the outcomes of experiment and test. Although honesty is not a scientific concept, all science depends upon

it. Honesty is similarly related to the concept of truth. However, recent papers on the review of the Uniform Evidence Acts (Australian Government/Australian Law Reform Commission (AG/ ALRC2004 and AG/ALRC 2005) discuss the unfamiliar concept of 'probative value' instead. This means something akin to 'likelihood of truth'. However the meaning is unclear. This appears to be partly because the pursuit of client interest is defined as the paramount legal aim, which is normally carried out according to the particular letter of the particular law and according to particular rules of evidence. In comparison, any scientific search for truth must take a backseat. Privilege is also a central legal concept used to justify the denial of information, which is considered to outweigh the alternative benefit of having all information available to facilitate the trial process. The central assumption of the legal profession, apparently, is that the lawyer should rightfully conceal or mould what his client knows is true, in order to maximise his interest in revenge or escape from any guilty judgment and its results.

The search for truth is therefore not the primary object of legal practice. This is contrary to the expectations of any scientific or problem solving approach, including scientific or quality management approaches to provision of health related care which are discussed later. One issues paper indicates that some judges have supported the privilege against self-incrimination as exercisable on the grounds of 'human rights which protect personal freedom, privacy and human dignity' (AG/ALRC 2004, 174) and the extension of such privileges to defactos, as well as spouses, is now being recommended. From a later, scientific perspective, the concept of human rights must be essentially linked to the concept of the truth about real world conditions, if anyone is to find justice. The representative of the Law Council of Australia stated that:

> In considering evidential (sic.) rules a fundamental distinction needs to be drawn between civil and criminal proceedings. Whilst civil process is ultimately concerned to provide a forum for the settlement of disputation between citizens, criminal process involves accusations by the state against citizens for the purpose of punishment (AG/ALRC 2005: 61).

Within democracies, and from a scientific perspective, much statute law is now ideally seen as the required community standard, consultatively made by elected representatives, which all relevant citizens are expected to uphold. For example, state OHS acts are examples of civil laws which describe the generally expected standards and related practices for health and safety at work. In spite of championing legal predictability, Australian lawyers appear unable to accept any scientific approach to evidence which might treat civil and criminal jurisdictions more consistently in order to improve injury prevention and rehabilitation across the board, through more effective risk management and related treatment. How firmly are they bound by their profession or related law?

Some shortcomings of the legal paradigm

Between 1973 and 1989, ten inquiries concluded that the adversarial court system is detrimental to rehabilitation of injured workers (NSW WorkCover Review Committee 1989). There were five insurance company insolvencies in the mid eighties in NSW, when

over forty insurance companies were underwriting workers' compensation. Competition on premium price led to pricing wars and to insurer reserves running low at a time when courts were making increasing lump sum payments (NSW Government 1986). This led NSW and other state governments to introduce the current managed fund structure. Many Australian inquiries have gathered evidence that the traditional court process hinders rehabilitation, injury prevention and supporting service management. This is partly because courts and related institutions do not keep any appropriate data to assist injury prevention, rehabilitation, cost containment or general economic stability. (National Committee of Inquiry 1974; NSW Government 1986; NSW WorkCover Review Committee 1989; House of Representatives Standing Committee on Transport, Communications and Infrastructure 1992; Review of Professional Indemnity Arrangements for Health Care Professionals 1995; Standing Committee on Law and Justice 1997; Heads of Workers Compensation Authorities, 1997; Industry Commission 1997; Grellman 1997; Senate Economic References Committee 2002; The HIH Royal Commission 2003).

For example, the Senate Review of Public Liability and Professional Indemnity Insurance (2002) noted that absence of a national aggregated database of health care litigation claims made it impossible to identify where the real risks are, whether they are changing and which size claims are increasing most. It found litigation may be driven by legal advertising and no win no fee arrangements. Costs were also increased by lack of penalties for pursuing unmeritorious claims and the expectation that the insurer will settle on the assumption that courts will take a sympathetic attitude towards a victim. Insurers estimated that legal costs in personal injury cases amounted to 40% to 50% of the total costs. But nobody had any reliable data. The committee concluded that the court system provides economic incentives to litigate, without providing supports for effective rehabilitation or future management.

The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) advised health ministers to support national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints. From this perspective, dispute resolution should logically be managed as a service, like health or education provision, which aims to improve community health and related social or environmental outcomes. Risk management may be defined as a way of achieving continuous improvement in production and its outcomes. It is a logical and systematic method of identifying, analysis, treating, monitoring and communicating risks associated with any activity, function or process in a way which will enable organizations to minimise losses and maximise opportunities. It begins with the establishment of the strategic, organisational and risk management context in which action will occur. The next step is to identify and analyse risks in order to assess, prioritise and treat them. The final step is to monitor and review performance (AS/NZS 4360 – 1999).

Australian standards and codes of practice support state OHS legislation and assist risk management. People are expected to apply relevant codes at work unless the evidence is that another course of action is preferable for health reasons in the specific situation under consideration. This approach provides the legislative context for a generally more independent and informed approach to work, which can be compared with the scientific, evidence based approach, required of health workers. For example, a health worker is

ideally expected to identify a client's problem and to apply treatment after consultation and consideration of the relevant body of scientific evidence or related expert protocols. However, the treatment may vary as far as this appears to be necessary to meet the specific health needs of a specific individual or situation. The reasons for any deviation from the generally expected expert practice should be documented (Johnson 1997). Ideally, all such information can contributes to research aimed at improving the overall outcomes for particular communities and individuals, in the light of the study of a broad range of specifically grouped environments, concerns, treatments and outcomes.

Lawyers usually bill for work on the basis of how many hours it supposedly took to do. However, there is little or no systematic information in the latest Senate report on legal aid, or in earlier major reports on access to justice, about the social problems which are dealt with by the courts. This lack of comparative information about types of dispute, their treatment, and their outcomes is typical of legal practice and can be unfavourably compared with the situation in health care. The health practitioner gathers evidence of apparent problems, records a diagnosis and implements a recommended treatment. Ideally this is applied with variations the practitioner considers necessary in the light of relevant evidence about the particular case or situation. The Legal Fees Review Panel (2004) discussed task-based legal billing favourably. This is defined as reporting the cost of legal services by tasks, using billable codes to describe them. Ideally, the lawyer provides a budget in advance of performing work and may not exceed the budget without prior agreement. This form of billing appears to be more consistent with Medicare expectations and with the Casemix (diagnostically related group) funding model that ideally plays a vital part of the identification of quality and value in health service provision. Duckett (1997) found the Australian Medicare system outperformed U.S. private health care performance on service access, equity and cost, but not quality. He later called for a more effectively integrated and data driven approach to be taken to all community services (Duckett 2004).

Define ADR in context and identify related stakeholder relationships appropriately

The hypothesis is that all communities need non-adversarial dispute resolution methods aimed primarily at harm prevention, with punishment and rehabilitation conceptualised in this context. After consultation, the National Alternative Dispute Resolution Advisory Council (NADRAC 2004) advised the Commonwealth Attorney General to review potential models for a national mediator accreditation system. It defined ADR as a process, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in dispute to resolve the issues between them. It called ADR processes facilitative, advisory, determinative or, in some cases, a combination of all three. Mediation was defined as facilitative, because the practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Conciliation was called an advisory process in which the conciliator is a neutral third party who considers and appraises the dispute. Expert assistance may be sought in regard to apparent facts of the dispute, the law, possible or desirable outcomes and how these may be achieved. Arbitration, expert determination and private judging are provided as examples of determinative ADR processes (NADRAC 2001).

Mediation, conciliation and arbitration may be seen as ascending steps in an approved practitioner's degree of power to judge matters and people, on the basis of all apparently relevant evidence gathered about the major issues of concern to the key stakeholders and others. However, distinctions between mediation, conciliation and arbitration are not consistently made in Australian legislation. In the court, on the other hand, opposing lawyers drive the collection and consideration of all evidence about a matter strictly, according to fixed legal and adversarial principles, presided over by a comparatively passive judge. This is normally expected to occur in isolation from knowledge of earlier or related attempts at conflict resolution, thereby wasting time and money. The court appears to equate such comparative ignorance with lack of bias, which may seem strange to some.

In order to develop effective ADR training or accreditation, the key stakeholders in the most clearly relevant communities must be consulted first. Their members enter into dispute, and therefore are those most likely to be prepared to pay for any supporting process of dispute resolution, related training or accreditation. ADR practitioners may be broadly conceptualised as those who the key stakeholders in a relevant industry or community environment entrust to undertake an informed and effective search for evidence, in order to resolve disputes and record outcomes, so as to prevent environmental problems, of which future disputes may be symptomatic. In ADR, a range of independent advisors or umpires may be approved to assist the parties in dispute. They may gather evidence or advise on expert assistance to determine the answer to a problem from a perspective which is broadly consultative, evidence-based and appropriately balanced, in the light of all relevant legislation and related conditions in a specific situation. Many people, including government health, safety and environmental inspectors may currently act in similar, arbitration-style roles, as well as taking prosecutions. The legitimacy of judgments seems likely to be strengthened when those judging are empowered by more immediate communities, as well as by government, which may be seen by some as remote or threatening to the individual interest.

From the above perspective, the ADR practitioner's qualifications for the role should primarily reflect the knowledge requirements of the general community and the stakeholders in the environment most relevant to resolution of the question in dispute. For example, construction appears likely to be the best training ground for all ADR practitioners working in the construction industry, but good analytical, verbal and written communication ability is a vital part of the role as well as industry and related technical knowledge. If this is so, then industry and community key stakeholders should identify, train and/or approve a range of ADR practitioners who may or may not have other relevant qualifications. Such issues require further consideration and research. Essential differences between the ideal aims and practices of courts and lawyers, in comparison to those of ADR practitioners, should also be conceptualised in this context, before comparing the apparent value of their outcomes.

The Australian Council for Safety and Quality in Health Care (2002) has developed a standard on open disclosure when things go wrong with treatment. This challenges the automatic legal assumption that health workers should keep quiet about mistakes in case they incriminate themselves. The National Health and Medical Research Council will become a statutory authority in 2006. This appears to require cooperative adaptation of

collegiate goals and structures to achieve national health goals through the application of commercial disciplines unless another course of action is clearly and openly dictated. State legal and related professional and academic administrative requirements currently frustrate quality management for care improvements in many health services and related areas. (Review of Professional Indemnity Arrangements for Health Care Professions 1995; Australian Health Ministers' Advisory Council 1996; National Expert Advisory Group on Safety and Quality in Australian Health Care 1999; Review of Higher Education Financing and Policy 1997; Senate Employment, Workplace Relations, Small Business and Education References Committee 2001; Productivity Commission 2005.) The development of effective ADR processes and related education may assist resolution of these problems. However, even though clear separation of policy and administration is increasingly recognized as necessary to judge comparative outcomes of competing service provision effectively, state freedom of information legislation currently relates only to the public sector, and medico-legal information is exempt. This inhibits identification of effective services as well as ADR, and tilts the playing field further towards courts. It appears that a great deal of dysfunctional regulation currently prevents a more consultative, open and scientific approaches to achieving all service improvement.

Identify and justify the appropriate roles of courts and all related ADR

Tribunals and related forms of ADR have been set up since a British colony was established in Australia. Conciliation and arbitration acts and commissions established at the turn of the 20th century have been, perhaps, the most characteristically Australian outcome of a rejection of the traditional British adversarial approach. These presided over development of awards and agreements which outline the expected treatment of groups of people at work, rather than dealing with disputing individuals. The former vice chancellor of the University of NSW recommended appropriate tribunal integration (Niland 1989) but it is not achieved so far. The aim of ADR practitioners, apparently in contrast to that of courts, should be broadly scientific and consistent with quality management. In practice, many existing forms of ADR have their origins in courts. Operations may also be influenced by legal powers.

For example, the NSW workers' compensation commission is an independent tribunal set up in 2002 to resolve workers' compensation disputes. The compensation court closed in 2003. Arbitrators may exercise mediation and conciliation skills to settle disputes. An arbitrator works with the parties in conference-style meetings, by telephone and in person to assist them to resolve issues, or makes a determination where this is not possible. During 2003 the Commission expanded its access to approved medical specialists so that it now has 200, compared with 91 arbitrators (WorkCover 2004). They are approved by relevant government and industry representatives to make independent judgments about disability and related matters, rather than being attached by their remuneration to the expectations of opposing lawyers or the courts. The ADR process ideally enhances the scientific objectivity of all potential judgments and reduces the costs of adversarialism. However, the President of the Workers Compensation Commission pointed out that stakeholders such as lawyers, are used to the traditional courtroom approach, and require education. (WorkCover, 2004).

ADR may also be under the control of courts. For example, the Family Court has recently commenced a new children's cases program which has adopted parenting plans and a more permissive application of the legal rules of evidence (House of Representatives Standing Committee on Family and Community Affairs 2003). The most consistent finding of research into legally driven mediation is high client satisfaction, although general public awareness of mediation appears limited and uptake of voluntary mediation is low (Mack, 2003). The evidence from other jurisdictions suggests the comparatively greater efficacy of ADR processes in comparison with those of courts (Grabosky and Braithwaite 1993; Fisse and Braithwaite 1993; Strang and Braithwaite 2001; Braithwaite 2002).

Better designed, more open administrative systems and related research are necessary in order to identify those treatments and services which are apparently most effective. The relationship between courts and ADR systems should logically relate to this. Human rights may be better conceptualised in a flexible, health related light rather than through the normal court process based on the adversarial tradition. From the health and sustainable development perspective, the information on particular complaints and their resolution should provide data to help solve many related problems. For this to occur, the parties in dispute must have confidence that their concerns will be fully appreciated and treated in an unbiased fashion. Those in dispute should be able to bring someone to speak on their behalf and all people who have something to say about a matter should normally be heard. Representatives of the relevant industry or community key stakeholders may act alone as ADR practitioners, or act on ADR panels, to assist resolution or make determinations.

Education and research the comparative outcomes of all forms of dispute resolution

In Australia most post-secondary education occurs in universities which are self-accrediting institutions, or in technical and further education (TAFE) colleges. Both are public institutions but universities are a Commonwealth funding responsibility and state governments are responsible for TAFE. The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) called for a national effort to improve education of health care providers and advised that curricula for continuous quality improvement should be included in all undergraduate, postgraduate and continuing education. It is hypothesised that all dispute resolution services, like education or training, should be vocationally based, according to a broad understanding of the requirements of the industrial or other community context for which it is primarily required. This is the assumption, which has traditionally been made, for example, in state government selection of occupational health and safety inspectors. In settling workplace disputes, with or without the aid of independent experts, inspectors may be seen as conciliators or arbitrators, under another name. More flexible and effectively coordinated education provision and related research should now be promoted by key industry and community stakeholders. This may be undertaken through regional networks of inquiry-based learning at work and in communities. This should also facilitate a consultative approach to implementation of relevant health and environmental standards, and to the identification of those practices and programs which appear most necessary to improve quality of life for communities and individuals.

The effectiveness of all relevant scientific, legal and related paradigms for evidence gathering, analysis, judgment and recording require continuing, systematic analysis, in order to determine their comparative power to meet the needs of communities and their key stakeholders. Independence may be conceptualised in this context as the responsibility to make informed decisions, which can withstand public interest based scrutiny from any quarter. This emphasis on transparency is also consistent with existing academic rights to freedom of speech and related academic duties to become increasingly informed from an appropriately scientific perspective. It is hypothesised that key stakeholders in industry and other relevant communities should approve ADR providers. Ideally, this should lead to more sustainable development as a result of more data driven and health social practices and outcomes. Such hypotheses require testing through comparative research. The Health and Medical Research Strategic Review (1997) suggested that Australia should develop a focus on the prioritised creation and assessment of interventions and policy. Adopting WHO definitions it indicated that the national research effort should take three forms. Fundamental research should generate knowledge about problems of scientific significance. Strategic research should generate knowledge about specific health needs and problems. Research for development and evaluation should create and assess products, interventions and instruments of policy which seek to improve upon existing options.

In this context, the establishment of ADR systems and the comparative identification of their outcomes is a type of action research, which is also consistent with the views of Popper (1972) that all administration should be regarded as experiment. Action research is a problem focused activity proceeding in a spiral of steps, composed of planning, action and evaluation of the results of action. Community education, consultation, monitoring and outcome evaluation are also centrally necessary in action research. Ideally, it is seen as a collective, emancipatory practice for the community involved. In order to understand and change social practices, social scientists have to include relevant community based practitioners in all phases of inquiry (Kemmis and McTaggert 1990; Hart and Bond 1995). The need for community involvement in all health policy development and administration has long been acknowledged in national health service goals (Commonwealth Department of Community Services and Health 1994), if not in all professional or bureaucratic practice. The attainment of community wellbeing is also closely related to the achievement of national mental health and Aboriginal health goals. The establishment and trial of ADR models is hypothesised to be a comparatively effective process for assisting achievement of all these related aims.

Conclusion

The appropriate relationships between courts and ADR need to be reconceptualized in the light of new international governance requirements and related developments in Australia. Community demands for health and justice need to be met and delivered through appropriately designed and coordinated services which produce data to promote health and sustainable development. In order to develop effective prosecution or other dispute resolution procedures and supporting training or accreditation systems, the major dispute resolution needs must first be identified by the key stakeholders in Australian industry and community context. This must also be done in the context of knowledge of the laws or

related community standards which relevant groups of dispute resolution practitioners may normally be expected to uphold to achieve health and sustainable development goals. Research into the development of effective dispute resolution systems should be supported by related inquiry into how vocational education systems could be more effectively linked to each other and to the requirements of the relevant industries and communities which should support them.

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