National Alternative Dispute Resolution Advisory Council

ADR Terminology

Responses to NADRAC Discussion Paper

Contents

1. Introduction

ADR Terminology: a discussion paper was launched by the Attorney-General in Perth on 12 June 2002. NADRAC mailed copies were mailed to all those on its contact list, with a covering letter for the NADRAC Chair.

The paper aimed to promote discussion about definitions and descriptions of terms used within the discipline of ADR. It canvassed arguments for and against common terminology, identified current issues about particular ADR terms and suggested possible approaches for the future.

NADRAC invited responses to the paper from a wide variety of groups. Responses could address specific questions raised in the paper, deal with questions or issues overlooked in the paper, or address the issue of ADR terminology in a general way. The deadline for responses was 31 December 2002, although extensions were granted where agencies indicated that they were in the process of finalising submissions. The discussion paper, and a subsequent letter of acknowledgment letter, stipulated that, unless advised otherwise, NADRAC 'may make written responses available in whole or in part to others, or may publish responses as part of its papers'.

A total of 17 responses were received. Of these 15 constituted a formal response to the issues raised in the paper. Another two responses did not formally address the questions or issues in the paper, but generally endorsed the information contained it.

The breakdown of responses is shown in table 1 below.

Table 1 Breakdown of submissions

ACT	0
NSW	5
NT	0
QLD	1
SA	1
TAS	0
VIC	8
WA	1
Overseas (UK)	1

Individuals	4
Agencies	13

The response rate was not overwhelming, but was in line with expectations. As raised in the paper, debates about terminology may be of more interest to academic audiences than to the community at large. Informal discussion indicated that many found the issues quite difficult. There was also a divergence of views within as well as between agencies.

Section 2 of this report includes general responses received, that is, responses that did not refer to specific question listed in the paper. Section 3 of this report consolidates the responses to specific question. Section 4 provides an analysis of the responses.

The NADRAC secretariat has made minor style editing changes to the submissions. The report refers to, but does not reproduce, articles, papers or submissions referred to in the responses, but which have been previously published elsewhere or submitted to another body.

Submissions received

The Hon. Sir Laurence Street		NSW
Ms Rae Keane		WA
Carolyn Bond and Chris Field	Consumer Credit Legal Service Inc	VIC
Dr Yvonne Craig		UK
Ms Daniela Kirchlinde	Insurance Brokers Disputes Limited	VIC
Dr Carole O'Donnell	Univeristy of Sydney	NSW
Ms Vanessa Richardson	A Winning Way - Conflict Management Group	VIC
Mr Jeff Katz	Australian Family Mediation Association	VIC
Mr Gerald Raftesath	LEADR	NSW
Mr Max Wright	Family Mediation Centre	VIC
Mr Andrew Goode	Law Society of South Australia	SA
The Hon. Chief Justice M E J Black	Federal Court of Australia	VIC
Ms Susan Cibau	Federal Magisrates Service	VIC
Mr Bill O'Shea	Law Institute of Victoria	VIC
Mr Robert Benjamin	NSW Law Society	NSW

Other comments

Mr David Kerslake	Health Rights Commission	QLD
Ms Janet Cooper	Administrative Appeals Tribunal	NSW

2. General responses

Rae Keane

After attendance at the NADRAC Forum held in Perth on the 12th June 2002, attendance at similar forums and reading associated literature over the past two years, I feel compelled to offer the following comments. These comments are made in a constructive spirit and represent my personal opinion.

Over the past two years it seems to me that there has been a circular debate, re-introduced on the 12th of June, regarding:

(a) The need for clarity in ADR definitions and standards
(b) The need for state-based/national regulatory body
(c) The need for public education about ADR
(d) The need to promote public use of ADR
(e) The need to promote diversity within ADR practitioners
(f) The need for clearly defined qualifications for legal and, particularly, non legal ADR practitioners.
(g) The need to systematically gather meaningful qualitative data

It appears to me that unless there is clarity regarding ADR definitions, nothing else will follow. Therefore, I believe it is time to 'draw a line in the sand' and issue definitions of the basic ADR practices – e.g. negotiation, conciliation, mediation, arbitration with accompanying descriptions of variations of process within each particular discipline. For example in the case of mediation – facilitative, advisory and determinative **as already identified by NADRAC.** I agree wholeheartedly with the comments in the ADR Terminology Discussion paper at 1.4 that, although technical audiences benefit from comprehensive analysis and discussion of the terminology, ultimately the terms (and definitions) should serve the interests of those using the services. The development of a common and simple language for ADR would, I believe be most useful for practitioners and, perhaps more importantly, be more "user-friendly" for the potential clients we seek to attract and educate.

In talking about problems with common terminology in Section 2.2, the discussion Paper states that *A minor departure from a legally defined ADR process may invalidate the entire process and cause extra cost and inconvenience for the parties.* And later in the same section ……*Multiple meanings may co-exist. The meaning of a word, such as 'mediation', is not determined by its formal definition but arises out of the interaction between the ADR practitioner and the parties.* I believe this perceived difficulty can be overcome by identifying within the particular legislation the appropriate form of dispute resolution to be used, or providing the facility for the parties to agree on the form of the process. If facilitative mediation is prescribed there is no conflict about what this means **providing common definitions and descriptions are already in place.**

NADRAC is a nationally recognised and influential body who appear to be the ideal entity to pull together representatives of each State ADR Association (WADRA in WA) and strongly suggest each State adopt and promote NADRAC definitions as a starting point to establish State regulatory bodies. Without clear definitions, there is nothing concrete to regulate. Without a recognised regulator, ADR practices and practitioners lack credibility with the public and until such a body is in place educational and promotional activities will remain ad hoc and ineffective. The role of this regulatory body must, as a priority, address standards of practice, qualifications of practitioners and provide a vehicle to receive public complaints regarding ADR practitioners' practice.

A useful parallel could be drawn with the "battle" waged when chiropractors sought to be recognised by the public and by the medical fraternity. These people faced a similar position now surrounding ADR practitioners – no matter how well qualified they were, there was a degree of "quackery" surrounding them and, I might add, this perception was not discouraged by the medical practitioners. Non-legally qualified mediators often face a similar position. After many years, chiropractors have established a position in their own right and now (Heaven forbid) appear to be accepted by and even work in tandem with medical practitioners.

While academic debate is useful, necessary and informative, I believe there is a need to move forward in the practical application of ADR philosophies. To do this we need State and Federal regulatory bodies and before this we must have commonly accepted definitions and descriptions. To move forward in this debate I strongly believe NADRAC should use its national position to lead the way.

Sir Laurence Street

I should like to submit a response to the discussion paper on terminology. The fundamental term that needs to be brought up to date, and which has given rise to sterile, and at times misleading, debate is ADR itself.

The ADR evolution has progressed in recent decades to the point where the letters "ADR" have acquired a generic significance. In the early days the letters emerged as an acronym for Alternative Dispute Resolution. Concerns have been expressed that this not only cloaks a looseness of meaning but that it can be positively misleading.

The looseness of meaning has led to the oft-repeated question "alternative to what?" This has produced a number of suggested other "A" words aimed at identifying ADR as a dispute resolution concept in its own right and not as an alternative to some other procedures.

Where the letters can be positively misleading is in the suggestion that they appear to refer to procedures that are dispute resolution procedures alternative to what is implicitly (and erroneously) suggested to be the dispute resolution function of the adjudicative or determinative process of litigation.

In the final analysis, adjudicative or determinative processes are not dispute resolution processes. Judges do not resolve disputes coming before their courts; they decide disputes or adjudicate on them. Disputes are resolved through consensual interaction between the disputants. This is no idle play on words; the deciding of a dispute involves a fundamentally different approach by the judge from the approach of a mediator who, in promoting or facilitating resolution of the dispute by the parties themselves, does not purport to decide the issues between them.

The important distinction between deciding and resolving disputes has been masked by the use of the letters ADR and by attempts to render them meaningful. I believe that the time has now come when further debate on this topic is profitless.

In the broader community the three letters themselves are increasingly being used to describe a consensus-oriented approach to fields of human interaction. For example, in addressing a systemic approach to workplace grievances and other potential problems in the human resource field it is not uncommon to see references to such phrases and "introducing ADR to the workplace"; a wider scope is gradually being attributed to ADR than merely the end stage of resolving workplace conflicts; it extends back to the avoidance and management of such conflicts. Again, there are to be found similar developing usages in the field of customer relations; some service and goods providers are openly proclaiming a policy of adopting an ADR approach in their complaints handling systems extending to avoiding and managing the conflict potentiality of complaints. In 1996 the authors of "Designing Conflict Management Systems" (Constantino and Merchant *Designing Conflict Management Systems*, Jossey Bass. San Francisco) wrote of "designing preventive ADR methods" for inclusion in "recommendations for furtherance of systemic management of conflict".

In short, as the letters ADR are gaining a wider currency in ordinary usage, so are they gaining a broader connotation extending beyond mere dispute resolution processes. Recognising this, the letters should be seen in their own right as describing an holistic concept of a consensus-oriented approach to dealing with potential and actual disputes or conflict. The concept encompasses conflict avoidance, conflict management and conflict resolution. The over-arching element of ADR in addressing these three aspects of conflict is the consensus-oriented philosophy that pervades the newly evolving recognition that conflict avoidance, management and resolution are simply three closely related sequential approaches each of which has relevance and application within the broad field of social, commercial and personal interaction. This is inherently the province and function of ADR.

Yvonne Craig

As a British Magistrates Court Chairman for 20 years who chose ADR, and practised it for 15 years plus as a preferred form of social justice, I have always greatly admired and appreciated NADRAC's rigorous concern to legitimate mediation processes. However, just as 'law' has never been finally defined, but is subject to various jurisdictional descriptions, so ADR has multiple meanings and usages according to different cultural

and social contexts. In general, I welcome NADRAC's continuing efforts to trace and record these varying interpretations of ADR, but hope that we will all continue to value the flexibility and learning curve attributes of its many processes and practitioners, and avoid dogma, canonical approaches and hubris in trying to over define it. Nevertheless, the continuing discourse is important in clarifying our views and professional practice, the debate about ethics, values and principles is a major contribution to social justice.

Insurance Brokers Disputes Limited

The paper appears to be largely commentating on philosophical and theocratical aspects of alternative dispute resolution, rather than focusing on current market issues and problems, in particular with regards to the implementation of the new Financial Services Reform Act.

ADR procedures are already an accepted form of dispute resolution. Their objective is not to replace the legal system, but to reach solutions acceptable to all parties involved in a dispute without having to resort to costly legislation and resources.

The Terminology used in ADR processes should reflect terminology used in the relevant industry (ie bank, insurance, broking, etc).

We understand that ASIC is currently issuing guidelines to harmonise the statistics and information collected from the various disputes facilities.

We use the Australian Standard for Complaint handling AS4269-1995, which give guidelines in regards to essential elements of effective complaints handling procedures. It serves as a reference document on current best practice for handling complaints and has been recommended by ASIC.

Consumer Law Centre Victoria and the Consumer Credit Legal Service (Vic).

While Industry ADR appears to fall outside the scope of NADRAC's role, it is important to recognise this large ADR sector in ADR terminology, and include accurate and meaningful explanations of industry ADR in ADR terminology.

Industry ADR handles over 100,000 complaints and disputes per year in Australia (not including general enquiries).

Recent changes to financial services legislation has seen many financial service providers required to belong to an ADR scheme approved by Australian Securities and Investments Commission (ASIC) as a licence condition. ASIC has developed Industry ADR guidelines, based on the Federal Benchmarks, and plays an active role in monitoring Industry ADR standards.

Carol O'Donnell

I find the key distinctions between facilitative, advisory and determinative processes particularly useful for teaching purposes.

I realise one does not want to get bogged down in definitions, but I note that you have not included the United Nations backed concept of Restorative Justice in your booklet. Personally, I think this term is a better one for many purposes than ‘alternative dispute resolution’.

Alternative dispute resolution sounds a rather marginal activity undertaken by old hippies and others who can't afford the right stuff - proper, adversarial British justice, with stupid rules, incomprehensible language, wigs and juries when necessary.

Health Rights Commission (HRC).

The HRC would like to congratulate the authors of the discussion paper on terminology for the amount of work and the concise nature of the paper. On this occasion the HRC believe there is no need to make a submission as all terminology of the specific work of the HRC has been covered.

Administrative Appeals Tribunal

Although we have no specific comments on the paper, members indicated that for ease of clarity, they supported the development of consistent ADR terminology (even if it is limited to agreeing on the basic definitions).

Australian Family Mediation Association

Introduction

The Australian Family Mediation Association (AFMA) is a Melbourne-based umbrella organisation representing family mediators in a number of Australian States and Territories and concerned with the practice of family mediation generally. Its members are derived from a broad range of contexts: including practising mediators in the Court-based, community and private sectors, legal practitioners, psychologists and social workers, and academia.

This response seeks to address certain aspects of the broader issues outlined in the discussion paper regarding the use of terms within the ADR discipline in Australia. Specifically, it is confined to that area of particular interest to AFMA, namely family mediation. It addresses some of the particular concerns and interests with respect to terminology that confront family mediators, especially in the family law context. It may nonetheless have broader applicability in some instances.

This response does not purport to be an exhaustive response to the discussion paper, nor does it propose to address in any methodical manner the specific questions raised in that paper. In some respects AFMA concurs with dilemmas raised, and endorses some of the solutions proposed by NADRAC.

Confusion in Family Law

Since the commencement of the Family Law Reform Act 1995 (Commonwealth) what was formerly know as "ADR" has, in the Family Law context, been generally referred to as "PDR". PDR has been used to refer to a broad range of processes, from therapeutic counselling and transformative mediation to Court-based conciliation conferencing and arbitration.

In each case, the precise nature of the intervention has varied not only from one process to another, but in many cases from one practitioner to another engaged in ostensibly, as far as the nomenclature of the process is concerned at least, the same intervention. For example, "mediation" has been used to describe non-directive, emotionally oriented dispute resolution practices conducted by social science-trained practitioners in the community sector where the disputants have been the main protagonists. At the other extreme, it has also been used in reference to extremely directive, highly legalistic and technical processes conducted by private legal practitioners where the disputants have not had anything more than peripheral involvement. There are of course numerous variants in between. Thus it seems "mediation" has become something of a catch all term, often used interchangeably with "PDR", "counselling" or "conciliation", depending on the context.

A good example is the practice in recent years of the Family Court of Australia in referring to all its non-judicial functions, whatever their nature, as "mediation". This is regardless of the fact that it engages in a broad range of pre-determinative functions, few (if any) of which are actually "mediation" either in the popular sense, as referred to in the now rich literature on mediation (both Australian and internationally) or as defined by NADRAC. To confuse matters further, the Federal Magistrates Service, which does make a distinction in its referrals to the community sector between "mediation" and "counselling", seeks in referring for "counselling" a process approximating what the Family Court (via the Commonwealth Department of Family & Community Services) outsources as "conciliation". (We will not elaborate on this further; doubtless NADRAC is well aware of these developments.)

Consequences of confusion

These phenomena have given rise to a range of difficulties to many practitioners, and in our view (based on anecdotal discussions with clients) create an impossible dilemma for most disputants seeking non-litigious dispute resolution to inform themselves of and choose from the variety of services available.

For practitioners, the confused and imprecise usage of terms such as "mediation" gives rise to a range of difficulties, which include:

– Difficulty in effectively promoting "mediation" or enhancing public understanding as to its merits in an environment where the term is so often used to describe such a broad range of activities.

- Confusion on the part of (potential) service users as to expectations. This places an added burden on practitioners to not only be clear about the nature of the process(es) they may offer, but to dispel prevailing myths which may otherwise serve to undermine the effectiveness of the intervention.

- Confusion as to prior interventions in which a presenting couple have been involved. Particularly those who have had involvement with legal process are often unable to articulate what they have attempted, beyond the label "mediation", "counselling" etc. It would appear that potential clients often dismiss "mediation" as something that has previously failed to resolve their dispute, even though their experience, on further questioning, has often been of something quite different (eg a Court-based conciliation conference).

- Creation of a climate of lack of trust of professionals in the field.

- Confusion amongst referrers as to what services are provided by whom, leading to mistrust and a reluctance to refer.

The difficulties for users or potential users of dispute resolution services would appear to be obvious.

The family law ADR/PDR field in Australia has spent the last decade or more actively promoting public understanding and acceptance of mediation as a genuine and often preferred mode of conflict resolution for separating couples. Its advantages over litigation are well documented. This work has been supported and supplemented by Government. More specifically, since 1996 a great deal of attention has been devoted to promoting PDR services as a first port of call for separating couples. This would appear to be a prime concern of the Family Law Pathways Advisory Group, amongst others.

Allowing the current rife confusion to persist can only serve to undermine this work.

Practice standards

In many respects the question of endorsed terms for ADR processes in Australia cuts across the issues of standards, accreditation and training of practitioners. Clearly standards of practice must be guided by clear understandings of what different forms of practice are and involve. Likewise terminology must reflect the reality of practice. We note concerns about standards and accreditation are being dealt with by NADRAC and are clearly beyond the scope of this response. It is worth observing nonetheless that the simultaneous treatment of these issues is opportune.

Clarity without restricting practice

There is an inevitable tension in generating terminology sufficiently clear to overcome the confusion outlined above, and at the same time permit and promote a responsiveness and flexibility in practice so as to best serve users (and their children) and encourage

thoughtful and resilient agreements. The very flexibility that AFMA believes must be preserved can easily serve to undermine the clarity that we feel is necessary.

For example mediation in family law children's matters may well be best addressed by offering a facilitative, thoughtful, child-inclusive approach giving rise to child-centred arrangements in some cases. Yet in others the active promotion of the "best interests" of children (as mandated by the Family Law Act) may require a practitioner to adopt a far more directive, informative style. The former might be loosely considered "mediation" in accordance with the definitions in the NADRAC Definitions Paper, and the latter "conciliation". Yet elements of both forms of practice must be able to be adopted as appropriate, and in the interests of seamless service delivery without the need for recontracting with clients to offer an ostensibly different service.

Conclusion

One way of achieving this might be to adopt a multi-tiered terminological system, representing a combination of both generic and specific terms. How these are then used, in both the public and professional arenas constitutes the real challenge.

"PDR" is currently used as a fairly generic, term to describe a wide range of possible interventions in the family law context. That of itself does not constitute a difficulty, so long as all stakeholders are aware of its genericism and that it encompasses a range of different processes. Accurate, clear and differentiating terminology at the specific level is more complex. Clearly the profession has now outgrown the traditional distinctions made between "counselling", "mediation" and "conciliation" etc, yet clear and consistent distinctions are vital not just for regulatory purposes but to avoid a great many of the current problems described above.

Perhaps an effective manner of achieving this might be for a more descriptive series of specific terms, such as "family law child-related mediation" as distinct from "family law child-inclusive mediation", and "family law property mediation" as opposed to "family law property conciliation" or "family law settlement conference. Doubtless this approach could potentially give rise to a string of new complications, such as confusing those not familiar with the distinctions, and how to refer to processes which might still offer a blend of practices (for example, where both child-related mediation and property-related conciliation are used). But at least the opportunity would exist for the promotion of clear distinctions in an integrated manner.

An obvious concern for government-funded service providers would be for a definitional system allowing broad-based funding (eg for "family law PDR services") and then permitting the individual organisations and/or practitioners determine the most appropriate intervention(s) in each case.

AFMA is pleased to have had this opportunity to contribute to the important debate raised in the discussion paper. It endorses the initiative of NADRAC in putting the issues squarely on the ADR agenda in Australia and making a serious attempt to grapple with

the shortcomings of the current laisse-fare and inconsistent approach to process terminology in ADR that are ever-apparent to practitioners in the field.

Family Mediation Centre

Synopsis

Alternative Dispute Resolution (ADR) terminology and standards are inextricably linked. Given our strong commitment to ADR standards, we see the debate around ADR terminology as critical. Furthermore, definitions of terminology are seen to be more appropriate than descriptions. From our experience in family law, the NADRAC (National Alternative Dispute Resolution Advisory Council) definitions and distinctions between, in particular, mediation and conciliation have been helpful and important, and should be maintained.

Mediation and Conciliation – the FMC experience

The Family Mediation Centre (FMC) has provided mediation services in family law, and with parents/adolescents, since 1985. We have also offered a small conciliation service in property matters, through mediators who were also qualified legal practitioners.

In 2001, we successfully tendered for the provision of conciliation services in children's matters. The tender specification and our response followed the NADRAC definition of conciliation. The fact that this terminology was not reflected in the Family Law Act 1975 led to extended discussions with the Attorney-General's Department, an interim resolution, and a recognition that amendments to the legislation are required.

Nevertheless, we have endeavoured to be faithful to both the spirit and the letter of the NADRAC definitions, and the distinction between mediation and conciliation, which we see as related but different.

In practice, a generic, individual intake process is offered to all clients, during which an assessment is made as to whether ADR is appropriate, and if so, what particular form of ADR. The family law ADR options at FMC are now mediation (children and/or property), conciliation (children), or conciliation (property). The essential differences between mediation and conciliation are explained to clients, usually at intake, and are confirmed in writing before the formal process commences. Where mediation is involved, the documentation required under Regulation 63 is forwarded in advance. Where conciliation is involved, an Agreement to Conciliate is forwarded. In each case, clients give their informed consent to the particular form of ADR in which they are choosing to engage.

Rationale

Leaving aside the need for the organisation to meet its contractual funding and reporting requirements, our rationale for maintaining a distinction between mediation and conciliation is at least twofold.

Clarity – we accept the distinction between these two ADR processes, as defined by NADRAC, and are not proposing any essential change. Each process, as defined, provides direction and boundaries, and therefore clarity, both for the third party/ies, and for the parties in dispute.

This is important before, during and after the process, so that, as far as possible, expectations can be clarified, clients can give informed consent to the particular form of ADR in which they are choosing to participate, the process itself can flow more easily, and complaints based on misunderstandings of the process can be minimised.

Empowerment – at FMC, the commitment to mediation, and to the empowering dimension of mediation, has a proud history. Mediation was, and is, seen as a particularly empowering approach to dispute resolution, where the parties retain control over, and responsibility for, the content of the dispute. Any blurring of the mediation/conciliation distinction will allow a stronger, advisory role for the third party, and inevitably detract from the ownership of the conflict and its outcome, by the parties in dispute.

With the more recent introduction of conciliation services, particularly in children's matters, this commitment has been tested. The legislative difficulties have already been mentioned. Additional training has been required, both initial and ongoing, to support conciliators in their advisory roles.

It has also been argued that many parties facing the crisis and stress of separation are looking for solutions, certainty, and therefore advice, and are not too concerned about empowerment. However, even accepting this position at face value does not remove the value of maintaining a distinction between mediation and conciliation. It may mean that mediation is used less frequently. The choice for the parties, however, remains.

Standards and Definitions

More broadly, there is an essential connection between ADR terminology and standards. Without clear and consistent language it is difficult to see how standards could be agreed, let alone implemented, nor how the hopes of NADRAC to "build consistency in the quality of ADR practice", through this Discussion Paper, could be realised.

Practitioners need to clearly understand the particular ADR process which they are offering. Furthermore, as outlined in *'A Framework for ADR Standards'* (NADRAC, 2001), service providers and practitioners have an obligation both "to enable parties to make informed choices about the extent and nature of their participation in the (ADR) process, and … to determine the appropriateness of the process" (pp. 98, 99).

Referring bodies and individuals including the judiciary, legal practitioners, other professionals and members of the public, also need clarity.

Conversely, the prospect of parties having to decide not only where to go to resolve their dispute, but the particular form of ADR, which may vary according to the providers, is unnecessary and probably irresponsible.

In this context, our clear preference is for the use of definitions within the terminology, rather than descriptions. As the Discussion Paper indicates, definitions attempt "to give precise meaning and to place clear boundaries around the particular ADR process in question". With definitions, it is possible to 'test compliance', an option with which we have no difficulty, given our commitment to the implementation of standards within ADR.

Classification under the broader categories of ADR (facilitative, advisory and determinative) may be of secondary importance in practice. However, given that the conciliator 'may make suggestions for terms of settlement (and) give expert advice …', and given that the provision of such advice is a primary distinguishing characteristic, it seems to make sense to classify conciliation under 'advisory' rather than 'facilitative', as is the case at present.

Funding and Reporting Requirements

At present, funding for conciliation is separated from funding for mediation. There is a strong argument that funding be collapsed under a generic ADR (or PDR) program heading. Whether or not this occurs, funding arrangements are clearly quite different from debates around ADR terminology and practice.

In relation to reporting requirements, we are obliged to report separately on mediation and conciliation (children), to both the Department of Family and Community Services (through FaCSLink), and the Attorney-General's Department.

Aside from the intrinsic advantage associated with the clear and consistent use of language in ADR, mentioned above, the requirement to report separately on mediation and conciliation within family law has added an external discipline which has probably been helpful. There are arguments for maintaining this discipline. Not only are funding bodies informed regarding the use of public monies, but data which demonstrates statistical trends within different forms of ADR is also important for educators, researchers and the ADR field itself.

Law Institute of Victoria

"We need to be able to define and describe ADR processes with some consistency. In the process we must be careful that we do not constrain the creativity and innovation that have made ADR services so effective and popular."

(The Hon. Daryl Williams, Attorney General[1])

1. The Law Institute generally endorses NADRAC's approach towards consistency and quality in Alternative Dispute Resolution. Current literature and anecdotal discussion suggests that hundreds (if not thousands) of different practices exist in Australia under the name of "mediation" or "ADR". As a result, finding a balance between consistency and diversity is likely to be a challenge for us for many years to come.

2. The Law Institute particularly supports the following moves set out in the NADRAC paper:

   - Building consistency in the quality of ADR practice;
   - Supporting responsible innovation, flexibility and creativity in ADR practice;
   - Producing accurate information about ADR practice;
   - Developing realistic expectations about ADR processes;
   - Increasing knowledge and building confidence in ADR systems and processes generally amongst all consumers and potential consumers of ADR services;
   - Helping Courts and other referring or mandating agencies to match appropriate dispute resolution processes to specific disputes and different parties;
   - Developing a common understanding between service providers and practitioners about ADR practices and standards.

3. Before addressing the specific questions raised in the discussion paper, it may be helpful for us to set out some of the presumptions upon which our answers are based.

   - People who practice a particular sort of mediation or ADR are often of the view that the way it is practised in their segment of the market is the only correct way.
   - Practitioners in a particular segment of the market are often unaware of what their colleagues in the same market segment are doing.
   - Practitioners in a particular segment of the market are often unaware of what practitioners in other market segments are doing.
   - As a result, there is significant confusion and discrepancy in the various market places and between practitioners.

[1] VCAT Mediation Newsletter No. 6, November 2002.

- For a variety of reasons, there are also significant differences of opinion amongst academics in Australia and overseas on a variety of fundamental ADR issues.
- There are also significant differences of understanding and opinion amongst those judges called upon to adjudicate subsequently in cases where mediation or another ADR process has played some role.
- There are also significant differences of opinion amongst teachers of mediation and ADR practices.
- It is therefore hardly surprising that there is significant confusion by consumers.

Whether we achieve it by definition or description, we should be aiming for common understandings of the things we think we do understand, and common recognition of the things we do not understand.

4. This submission does not purport to be definitive. Quite the opposite. Whatever jargon we use, our members who have contributed to this submission have found the process of dealing with the issues in the NADRAC Terminology Paper very challenging and time consuming. We have reached the primary view put forward in this submission after many hours of discussion and thought, yet we still do not consider it to be "fixed in stone". Its main contributors remain flexible and open to further discussion. As you will see, at the end of this submission we have already included some alternative views from different members. Although this is not normally the Law Institute's practice, it is essential in this case since we believe strongly that further discussion about the various options is essential.

   If the general approach used in this submission is accepted, then a lot of further detailed work will need to be done to get consistency in approach at both the headline level and also at the level of the individual case.

SUGGESTED TERMINOLOGY

"ADR" One possibility is that "ADR" should be seen as a description or process name in its own right.

"ADR" should not be seen as an abbreviation for any of the words suggested at pages 8 to 11 (where the Discussion Paper discusses the "A", "D" and "R" of "ADR" under the topic "3.1 Umbrella Terms").

The suggestion is that "ADR" be used as an umbrella term to cover all activities undertaken in the field. It should be regarded as **any dispute resolving process other than judicial determination**. As such, it includes all processes, ranging from facilitation to arbitration, where an ADR practitioner:

- Assists parties to a controversy, dispute or conflict to define / discuss / better understand and / or resolve their issues;
- Assists parties to prevent or manage their own dispute (or conflict) without judicial and / or other external assistance.

ADR would therefore include the following processes enumerated in the Glossary to the Discussion Paper:

(1) ADR
(2) advisory ADR processes
(3) arbitration
(4) case appraisal
(5) Case presentation (or Mini-trial).
(6) Combined or hybrid ADR processes
(7) Co-mediation
(8) community mediation
(9) conciliation counselling
(10) conciliation
(11) consensus building
(12) decision-making for one (DMO)
(13) determinative ADR processes
(14) determinative case appraisal
(15) dispute counselling
(16) early neutral evaluation
(17) evaluative mediation
(18) expert appraisal
(19) expert determination
(20) expert mediation
(21) facilitated negotiation
(22) facilitation
(23) facilitative ADR processes
(24) fact-finding
(25) fast track arbitration
(26) hybrid processes
(27) indirect negotiation
(28) investigation
(29) judicial dispute resolution(JDR)
(30) med-arb
(31) mediation
(32) mini - trial
(33) multi-party mediation
(34) primary dispute resolution(PDR)
(35) private judging
(36) senior executive appraisal
(37) settlement mediation
(38) shuttle mediation

(39) statutory conciliation
(40) therapeutic mediation
(41) transformative mediation

"Dispute Resolution Processes" ("DRP")

The Law Institute suggests that some new jargon be adopted to cover:

- what is now understood as "ADR" and, as a separate category of activities
- DRP processes conducted in the various courts and statutory tribunal adjudication systems in Australia (including what the Discussion Paper calls "quasi-judicial bodies" at page 8). Colloquially most of these are commonly referred to as litigation.
- (Special attention is required for ADR processes, which are part of Court and Tribunal adjudicative systems.)

As far as possible, **definitions should be avoided and descriptions should be used** for ADR terminology. Many of the expressions in the Discussion Paper's glossary are definitions and we suggest that they be replaced with descriptions. Alternatively, notwithstanding that the jargon is expressed as definitions, we suggest that we commence to see the jargon as descriptive and not prescriptive.

In the Law Institute's view, it is desirable:

- to have terms that encompass all processes currently considered to be ADR processes; and
- to have terms that encompass ADR **and** judicial determinative processes.

We suggest that a common and simple language for ADR be developed. The same terminology should be used for most, or all, audiences. Unnecessarily complex language and jargon should be avoided in keeping with the trend across many professional sectors (including the legal and financial communities) towards Plain English usage.

A key issue is for all ADR practitioners to be encouraged, on grounds of transparency, to offer an adequate description of themselves and their ADR style and process, using generally accepted terminology, for consumers of services and to apply them in a consistent fashion,

For example:

- "I am a QC and I have been a barrister for 30 years. My specialties are in the areas of building and construction law and commercial disputes. I have mediated over 500 disputes since 1992. I prefer to use either or both of the settlement or evaluative

mediation techniques. When I talk about evaluate mediation I mean … When I talk about settlement mediation I mean … The processes I use commence with …"

- "I am a lawyer and an accountant. I have been an ADR practitioner and consultant for more than 15 years. I offer a range of ADR processes designed to solve parties' problems. My repertoire includes:

    (1) arbitration and expert determination - business style
    (2) mediation - using facilitative, evaluative or settlement processes
    (3) private judging and case appraisal
    (4) independent fact-finding and neutral intervention
    (5) negotiation preparation and assistance
    (6) strategic and business planning
    (7) family business conflict workouts (including mediation, problem solving and mentoring to sensitively and constructively to assist, for example, succession planning)

    "More detail of my services can be found at www.solveyourproblems.com.au, or give me a ring on 1800 999 888. At my web address I set out in descriptive language the processes I offer and what I mean when I use the shorthand language set out in this brief summary."

- "I have conducted over 100 mediations in the commercial list at VCAT, dealing mainly with smaller commercial disputes. My mediations typically take between 2 and 4 hours. I use the settlement mediation approach which means I……(here a description of the process is set out)."

- "I live and work in the Latrobe Valley. Most of the work I do as a mediator involves personal injury claims. I practice the evaluative model, which means I……(here a description of the process is set out)."

- "I have been mediating a range of commercial and property matters, as an independent professional, for over 10 years. Most of my mediations take between six and ten hours. I prefer to facilitate communications and negotiations between the parties to help them reach their own voluntary agreement regarding their dispute. My process helps each party to understand and appreciate the views, perceptions, interests and prejudices of the other party(s). I also help parties to understand the legal position adopted by the other party. If required, I provide advice to the parties (separately, or in joint sessions) in relation to their negotiations. I aim to be neutral, impartial and independent.

    "I usually conduct private "interview" sessions with each party before the first joint session. My process is very flexible and sometimes involves " shuttle negotiation". I aim to educate parties on how to negotiate when they are in joint session."

The Law Institute believes that many of the terminology problems and issues canvassed in the Paper will diminish significantly if ADR practitioners adopt standardised descriptions of their processes.

When practitioners describe their processes they should be encouraged to describe their processes, in part, according to some of the matrix of features and characteristics, including (not in order of priority):

- level of formality (Discussion Paper page 12);
- structure of process (page 13);
- statutory requirements and constraints (page 13);
- whether participation is compulsory or consensual (page 13);
- status of outcomes (ie: legal effect etc) (page 13);
- method and style for communication flows (page 13);
- mode of service delivery (page 13);
- types of disputes handled (page 13);
- practitioner qualifications;
- practitioner independence, neutrality, impartiality;
- relative level and style of intervention(s) to be expected from the practitioner (low level intervention versus high level intervention on both process and substance);
- timing expectations and time available;
- confidentiality;
- flexibility of process;
- issues covered - past, current, future; defined / expanded etc;
- sole DR practitioner or co-practitioners;
- physical location and facilities for DR process;
- intake processes;
- legal representation;
- cooling off period;
- whether DR practitioner advises / suggests solutions, or not;
- extent to which processes are without prejudice;
- multiple meetings, or single meetings;
- private meetings during process, or no private meetings;
- numbers of parties that can be involved;
- preparation and effect of heads of agreement;
- use of visual aids (eg: flipcharts and whiteboards);
- process flexibility (eg: practitioner can change hats during the process - med-arb);
- the DR practitioner's professional expertise; and
- whether the process is based on

    (1) rights, or
    (2) power, or
    (3) interests.

(This list is a guide only and does not purport to be comprehensive)

An Alternative View

As we indicated in our introductory paragraphs, members of our ADR committee (Litigation Lawyers Section) have spent many hours discussing and considering possible answers to the ADR terminology question. Nevertheless we have been unable to reach complete consensus. This is not because members hold strongly opposing views so much as because they agree on the need for flexibility in any solution. They are therefore unwilling to formulate a black and white answer to questions but have preferred to express views on the basis of ongoing dialogue about the issues raised.

The numbered paragraphs below give an example of one member's view that involves some common ground with the primary view set out in this submission but raises further issues for consideration by NADRAC.

You will see that much of the underlying reasoning is the same. The basis is that providers and consumers of dispute resolution services require mutual understanding and agreement as to contemplated processes and expected outcomes, both tangible and intangible. Shared conceptual understanding is derived, in large part, from the common starting point of a shared language base. However, from those same roots, the following alternative recommendations are grown:

1. The term "Dispute Resolution" is a plain English expression and should not be appropriated to technical jargon.

2. We should drop the "A" out of "ADR" and start using the term "Dispute Resolution" to include all processes consciously used to resolve disputes or differences – from unassisted negotiations and problem solving discussions between two people to the most formal High Court proceedings. All are connected by the same purpose.

3. We should apply and limit definitions to major generic groups of activities then, within the broad categories so defined. We should use detailed descriptions in plain English as the basis for communications between providers and consumers that will provide full understanding of the how, what, when, where and why of the proposed process. The diagram attached as "**Appendix A**" gives examples of elements that could or should be included in descriptions.

4. "Mediation", as the most widely used (and abused?) generic term for assisted, non-decisional dispute resolution, should become the catch-all term for this area of activity (as per Appendix A). It should be sub-categorised into just three functionally distinct processes, covering the range from neutral facilitation to highly directive process. This is adequate to cover all eventualities, avoids unnecessary complexity and strengthens "Mediation" per se.

5. The term “Conciliation” should be dropped from all but statutory applications. All current forms of usage can be accommodated in the proposed re-defining of “Mediation” (see paragraph 4 above).

6. Hybrid and combined processes should be included in definitions and also require additional, careful description.

The pursuit of standard terminology in the dispute resolution field has been a major quest and a continuing diversion for many involved in the dispute resolution community. The Discussion Paper itself is evidence of this pursuit. Much time has been spent debating the relative merits of the different terms and processes and the discussions have often led to new ideas, concepts and perspectives that may not have been obtained otherwise.

Too much certainty can create sterility – an unattractive prospect during these pioneer days for the field. Our members are very keen that open dialogue on these issues should continue. We would welcome the opportunity to discuss this submission and the issues generally with you further. You may like to attend one of our section meetings, or we would be happy to arrange for a representative or two to meet with you separately.

3. Responses to specific questions

Question One - Should ADR terms take the form of 'definitions' or 'descriptions'?

Yvonne Craig

Descriptions because we are still on a learning curve in which flexible thinking and fluidity is useful.

LEADR

The discussion paper does not make a clear distinction between ‘definitions’ and ‘descriptions’ (although the distinction is purportedly explained in Section 4.1 of the paper). The explanations are not adequate. Examples of definitions on the one hand and descriptions on the other may have helped make the distinction clearer.

This lack of clarity is driven home on reading the section of Professor Boulle’s text (*Mediation: Principles Process Practice*) dealing with ‘Approaches to defining mediation’, for he refers to ‘conceptualist definitions’ (such as Folberg and Taylor’s) and ‘descriptive definitions’ such as the following:

> *…a process of dispute resolution in which the disputants meet with the mediator*

> *to talk over and then attempt to settle their differences." (M Roberts), quoted at 5, Mediation: Principles Process Practice.*

If the explanations provided in Section 4.1 are considered sufficient, LEADR would prefer to see 'descriptions' used because this approach allows for diversity of practice (it is better to refer to 'what takes place in the reality of a specific ADR process') than to prescribe artificial, misleading and possibly even dangerously 'clear boundaries around the particular ADR process in question' (at 24, discussion paper).

A combination of both definitions and descriptions might be the preferred approach (suggested at 24 of the discussion paper). I assume a combination approach might be similar to that taken by Professor Boulle at 7-8 of his text, namely, provision of a value-free (but arguably superficial) definition emphasising/limited to the core features of mediation (assuming agreement as to the core features can be reached), with a description (or inventory) of some of the variable features of the process. The discussion paper provides a similar explanation of this approach, which is 'to define a limited number of key terms where consistency and compliance are essential, but to describe other terms where diversity and flexibility are more important' (at 24). The threshold issue will be: which terms are 'key terms'?

Law Society of SA

Terms should be descriptive.

Federal Magistrates Service

The FMS has jurisdiction in family law and general federal law. The development of a common consistent language would ensure that all clients were receiving consistent information about the process to which they are referred. It would also mean that federal magistrates who sit in both family law and federal law jurisdictions understood the language and could be confident about the process clients were ordered to attend.

PDR and ADR services are provided to the FMS by the Family Court of Australia (FCoA), the Federal Court of Australia (FCA) and community based organisations (CBOs). All of these organisations deliver mediation services for the FMS. However, the term 'mediation' is not used consistently in those organisations.

There is some consistency in the process described by the word 'mediation' in the Federal Court and the community organisations. However, in January 2000 the Family Court re-named its counselling services 'mediation'. The process followed in the Family Court is different from the process followed in the Federal Court and the community organisations. This has created confusion about the term 'mediation' in family law circles. From the perspective of the FMS, clients are referred to different processes that use the same term.

Further, the FMS is a purchaser of services from a number of different organisations. As public funds are used, public accountability is essential. This is difficult when different

organisations deliver different services under the same umbrella term.

Therefore, clear definitions about PDR/ADR processes would ensure that the organisation is aware of the nature of the process to which it is referring clients and the nature of the service it is purchasing.

When it was purchasing services from CBOs the FMS undertook a tender process. The definitions in the NADRAC definitions paper were useful when answering queries from tenderers.

Law Institute of Victoria

The Law Institute takes the view that only a very limited number of key terms should be defined, where consistency and compliance are essential. Where diversity and flexibility are important, it is better to have descriptive terms.

Where essential terms are drafted, it is important to avoid excluding matters that may be needed later.

Generally, plain English descriptions should be used.

NSW Law Society

As a society representing solicitors the NSW Law Society represents a variety of the interest groups referred to in 1.4 of the paper. Members include ADR practitioners, Court Officers, government policy makers and academics. At times solicitors will be the ultimate consumers of ADR. Practitioners also advocate for a variety of clients and have been described as "gatekeepers" in resolution of the disputes affecting their clients.[12] ADR will be valued for its potential to minimise legal costs, provide wins, expedite settlements, provide fair outcomes, empower the clients to maintain some control of their disputes and preserve relationships. Lawyers will not be in a position to assist clients in this regard if they do not develop a broad range of options for resolving disputes.

Traditional legal culture will value consistent and precise terminology. Nevertheless the diversity of needs within the Society's membership is dictated by complex and overlapping interests within the group influenced by factors such as legislation, the culture of the geographic area or of a specific area of practice, personality, client base, composition of firm and degree of commitment to ADR.

The Society prefers "descriptions" rather than "definitions"

A "description" can be more flexible and not over-prescriptive. If it were over-prescriptive a definition of "mediation" might inhibit and even prohibit a minor variation

[2] Bordow,S and Gibson, Jane *Evaluation of the Family Court Mediation Service*. Research Report No. 12. Family Court of Australia Research and Evaluation Unit, 1994

in the mediation process because the mediation might then cease to be a mediation under the definition and lose the protection of, for example, confidentiality under S.19N or immunity under S.19M of the Family Law Act. The Society believes that the Mediation Regulations under the Family Law Act are over-prescriptive.

Question Two - How should the needs of diverse groups be taken into account in developing terminology for ADR?

Yvonne Craig

Networking with ongoing consultations, discussions, meetings is essential, with special attention to groups that are marginalised and unprovided for. **Please note that as Australia will demographically have similar ageing problems as the UK and Europe. NADRAC might well learn from British work in this area.**

LEADR

The discussion paper points out that ADR terms 'should ultimately serve the interests of those using ADR services' (at 3).

It suggests (at 3) three options to respond or cater to the needs of different audiences:

- Develop different sets of terms for different audiences.
- Educate users of ADR services about the meaning of technical terms.
- Develop a common and simple language for ADR, which is useful for most or all audiences.

The second and third options (which, for reasons mentioned below, should be treated together) would be ideal, if we lived in an ideal world. Are these options achievable? More importantly, who would they be achieved by? The discussion paper considers this in 4.5. It is an issue that needs to be addressed.

As mentioned, the second and third options must be treated as two parts of the one activity and would occur in reverse order. It would be necessary first, to develop a common and simple language, and second, to educate users about the meaning of 'technical terms' for no matter how simple and common the terms used, they would have different connotations and shades of meaning (this is true of all/most words in the English language).

The reality is that we do not live in an ideal world. The first option is the more realistic and feasible. However, the issue of 'who' would develop different sets of terms for different audiences needs to be considered.

If the first option is pursued, it would then be up to those using ADR services to 'find out how terms are used in each particular case' (at 6 of the discussion paper).

Law Society of SA

A flexible, common and simple language would benefit all groups.

Law Institute of Victoria

The Law Institute believes that a common and simple language for ADR should be developed. The same terminology should be appropriate for most or all audiences. Unnecessarily complex language and jargon should be avoided. This is in keeping with the trend across many professional sectors (including the legal and financial communities) towards Plain English usage, which the Law Institute strongly supports.

NSW Law Society

Canadian studies have identified a conciliatory to adversarial continuum in the practice of law.[3] Moore advances that the processes for resolving conflict form a continuum, which at one extreme has avoidance and develops through direct dealings by the parties, to assistance by a third party neutral and continues through processes of increased coercion, into violence at the other extreme. [4] The terminology of NADRAC defined Dispute Resolution Processes tend to be towards the middle ground of the Moore Continuum.

The concept of a continuum may provide a useful tool for solicitors and others to identify and define ADR processes without the need for rigid definition. Rigid definition may present difficulty for non-lawyers and lawyers alike. The continuum assists service providers to rate their product and facilitates a selection process, which marries the intervention to the presenting dispute. At the same time this approach recognises the importance of individual style and appropriate lateral and flexible thinking by neutrals who deliver the myriad of ADR products in diverse models. This would also be helpful for solicitors and other neutrals working in interdisciplinary teams.

The NSW Law Society model of mediation might be taken to demonstrate an example of this approach. Generally solicitors in our State who practice mediation will be expected to adopt the definition of mediation approved by the Law Society. Within the pool of solicitor/mediators the style of practice will vary greatly. One mediator ‘A” with a very directive style might be determined at 6.1 on the continuum whereas another “B” who is more facilitative in style would be determined at, say 5.

Of course, for different disputes the process might differ, that is to say, for example in a family dispute the ranking could be 5 and for a commercial dispute the ranking might be 6.1 for mediator “A”. The criteria for ranking is the degree of coercion within the process, and of course the challenge to NADRAC is to determine the process of classification and the benchmarks to be applied.

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[3] Hotel, Carla & Brockman, Joan, *The Conciliatory-Adversarial Continuum in Family Law Practice. Canadian Journal of Family Law. V12. N1. 1994*

[4] Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict,* San Francisco: Jossey Bass, 1989.

Question Three - What, if any, problems, complaints or legal issues have arisen (or may arise) about the inconsistent use of ADR terms?

Yvonne Craig

Confront problems as already happens in medical/psychiatric/social terminology when conditions are variously interpreted. Avoid bureaucratic in-fighting.

LEADR

The discussion paper has touched upon most of the problems. The main legal issues are:

- whether or not mediators are covered by immunity provisions if their conduct is not in accordance with a particular definition;
- whether or not mediators are covered by indemnity insurance of particular organisations (eg Law Societies) and institutions (eg the Legal Aid Office) if their conduct is not in accordance with definitions adopted by those organisations and institutions.

The main problem/complaint is the consumer/user complaint – I didn't get what I expected or what I wanted!

Law Society of SA

The Family Court labels all counselling as "mediation". An overly wide description of ADR material is applied which undermines the integrity of the process. A lack of support for the process of mediation leads to uncertainty and diminishes the standing of the process.

Law Institute of Victoria

One of the core attributes of ADR is communication. Effective communication and mutual understanding are very difficult when participants have a different understanding of the meaning of the same word.

For example, parties to a mediation may expect to be involved in a settlement or evaluative mediation process, but the mediator may only practice therapeutic mediation. The parties may not get the process they want, or need or they may need to undergo an entirely different preparation to what was initially envisaged. The potential for dissatisfaction is considerable.

NSW Law Society

NADRAC recognises that solicitors and their clients experience confusion about the definitions and individual characteristics of dispute resolution processes. The confusion grows as legislation adopts varied definitions. The "water logic" underpinning ADR

suggests that it is likely that hybrid and new processes will continue to emerge and find a place at different points along the continuum.

There is a tendency amongst solicitors and others to equate ADR with mediation alone. Mediation itself will vary with the personality style of the mediator and the nature of the dispute. Legislation is not consistent and where legislation calls for ADR Courts are often reluctant to refer matters to ADR process because of uncertainty of process and the style of practice.

On 6 February 2002 in a submission to the Federal Attorney General's Department in response to the paper entitled "Raising the Standard: A Quality Framework for Primary Dispute Resolution under the Family Law Act 1975", the Society's President Kim Cull expressed the concern of Society members at the decision of the Family Court to use "Mediation" as a general term to cover counselling and mediation services provided by the Court. The Society stated in Section 4 of that submission that this was a retrograde step and should be immediately corrected as it would only confuse customers of the Court and Practitioners who may not know if the parties were attending for counselling or mediation – two entirely different processes. Since that time, the problem has been compounded because the generic term "mediation" now includes not only counselling and mediation but also "conciliation" in financial matters. The Society still believes that this decision of the Family Court is wrong and should be rectified as quickly as possible. It will cause confusion and may discourage the use of these three processes which are an essential part of Family Law.

As mentioned in our response to Question 1 above, the requirements set out for a private mediator and for the conduct of mediation under the Family Law Regulations 1984 are over-prescriptive. In the New South Wales Supreme Court Act and the District Court Act, the definition of "Mediation" is a general non-prescriptive description compared to the Family Law Regulations. That is a preferable way of dealing with it.

There is still a surprising level of confusion and misunderstanding of ADR processes amongst many lawyers particularly lawyers trained prior to 1980. Training in Dispute Resolution and negotiation should be given more attention in the education and practical training for lawyers. While ever the word "mediation" is used as a generic term to include "counselling", "conciliation" and "mediation" practitioners and clients will continue to be confused and misled and this is counter-productive to the encouragement of the use of these processes.

The Law Society is aware of one complaint that a consumer made to the effect that the process he was a party to was not what he had expected or did not fit the description that it was given. It may well be that the process promoted by some mediators is really akin to expert evaluation. It may also be the case that the success of some former judges in marketing mediation implies that this is what some parties expect of mediation. The value of lateral thinking within the process is not always shared or understood by mediators and consumers.

Question Four - What are the arguments, other than those set out in this paper, for or against consistent terminology in ADR?

Yvonne Craig

NADRAC has been comprehensive in listing these.

LEADR

The discussion paper deals with the benefits and problems of common terminology in a comprehensive manner.

However, one point that might be worth clarifying is this: the paper appears to use the terms 'common' and 'consistent' interchangeably. Is this the intention?

Does NADRAC intent the word 'consistent' to embrace:

- Consistency between service providers?
- Consistency over time?
- Both?
- Other meanings?

Law Institute of Victoria

Please refer to the comments in our introductory paragraphs of this submission.

NSW Law Society

Your paper has adequately identified the arguments for and against consistent terminology.

Legal practice relies on the development of key relationships with individuals and groups of individuals whose understanding of ADR terminology will impact on the services offered and provided by solicitors within the context of their practice and professional and personal lives. Communication will be enhanced if there is a consistent terminology which can be evaluated and adopted for the purpose of clarity within particular transactions. At the same time flexibility and creativity should underlie the engagement with ADR. However within legal practice this concept will be at odds with the adversarial model of dispute resolution within which lawyers have been trained and assessed. For more lawyers to more readily engage in ADR there needs to be profound change which will completely transform the nature of the business which solicitors undertake. Consistent terminology will reduce resistance and indifference to change arising out of misunderstanding or fears of loss by risk taking. The education of young lawyers as "problem solvers" or "dispute resolvers" with an array of processes should be a key element of their training.

Question Five - Do we need clarity on an umbrella term for the processes described in this paper? Can several umbrella terms be used? If so, what terms?

Yvonne Craig

See (1). Clarity develops as parties discuss which process they wish to use, making informal contacts about the rules they want to govern in their decision-making.

LEADR

The umbrella terms to which reference is made are:

- ADR
- A for Alternative (and its many alternative adjectives)
- D for Dispute, and
- R for Resolution.

Who is the 'we' in this question?

The first series of questions that needs to be asked and answered is: Do we need umbrella terms? Who do they benefit? Who uses them?

Practitioners, service providers, academics etc tend to be wedded to umbrella terms, but it is not so clear that this is the case with users of services, such as mediation.

The preferred approach would be to phase out use of umbrella terms and say what we mean. If we are referring to mediation, or arbitration, or whatever, then say so.

Law Society of SA

ADR is the umbrella term and covers a hybrid process.

Federal Magistrates Service

Section 21 of the Federal Magistrates Act defines primary dispute resolution processes as "procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth" including:

(a) Counselling; and
(b) Mediation; and
(c) Arbitration; and
(d) Neutral evaluation; and
(e) Case appraisal; and
(f) Conciliation.

Section 14E of the Family Law Act provides that primary dispute resolution methods means procedures and services for the resolution of disputes out of court, including:

(a) Counselling services provided by family and child counsellors; and
(b) Mediation services provided by family and child mediators; and
(c) Arbitration services provided by arbitrators.

Therefore, courts and agencies that deliver family law services are familiar with and use the umbrella term PDR.

In other contexts, the umbrella term alternate dispute resolution or ADR is used and the term is generally understood within the 'ADR community'. The ADR/PDR terminology has created some confusion in the field. The use of further umbrella terms will add to this confusion.

Law Institute of Victoria

Please refer to the comments in our introductory paragraphs of the submission. [see page 21]

NSW Law Society

While the term ADR is the common umbrella term to describe processes which are alternatives to litigation, litigation itself falls towards the extreme end of the continuum described by Moore. If lawyers were to recognise this, the adoption by them of other of these processes would present less of a quantum leap thereby gradually reshaping their thinking to accept these processes and integrate them into their existing style of practice. By a process of continuous improvement, ADR will progress beyond our current objectives and vision. The A in ADR may provide an element of risk, increasing resistance to its implementation and creating feelings of dislocation among lawyers who feel excluded from the ADR vision. It is therefore desirable that NADRAC give consideration to dropping the A from the umbrella term "ADR". The words "Dispute Resolution" are increasingly becoming recognised as a generic term encompassing ADR processes.

It is assumed that to dichotomise the umbrella term would add confusion and detract from the analysis of a continuum which in itself is a useful term in this context. The favoured term is the ***dispute resolution continuum.*** This implies a common thread of outcome through a process of debate which commences with individuals and moves towards third party intervention which becomes increasingly coercive at the extreme. This will encourage diversity and creativity in practice while providing clarity for practitioners and disputants.

Alternatively the term "Primary Dispute Resolution" as used in the 1995 amendments to the Family Law Act would be an appropriate substitute for "Alternate Dispute Resolution". The reality is that most disputes are settled by negotiation using discussion,

correspondence, meetings, mediation, conciliation, facilitation, counselling, etc. They are therefore the primary means of resolving disputes. With the cost of legal services forever increasing, in a civilized democracy the legal system should encourage parties to use these methods of primary dispute resolution before resorting to litigation or at least should use them at an early stage in the litigation process. Most legal systems in Australia seem to accept and encourage this. If all governments in Australia worked together to create a national Mediation Act or a national Primary Dispute Resolution Act, these principles with uniform definitions would promote the acceptance of Primary Dispute Resolution. A cultural change might bring about a recognition that Primary Dispute Resolution must be attempted before Court proceedings are started, except in exceptional circumstances (eg where urgent interlocutory Court relief is required.)

It has also been suggested that *Dispute Management* or DM would be a suitable umbrella term. The umbrella term 'restorative conferencing' is used in the criminal justice context and distinguishes this process from parallel ADR processes used in civil matters.

Question Six - How should the terms 'dispute' and 'resolution' be defined or described? Is the purpose of 'ADR' necessarily to 'resolve' a 'dispute'?

Yvonne Craig

See (1 & 5). The purposes of ADR are many: relationship and situation improvements for example.

LEADR

For those who contend that the purpose of 'ADR' is not necessarily to resolve disputes, there is no need to define or describe the terms 'dispute' and 'resolution' in the context of the acronym ADR, or in the context of the phrase 'Alternative Dispute Resolution", or even 'dispute resolution'.

This does not prevent individual mediators from using and defining the terms 'dispute' and 'resolution' when appropriate ie when we are in fact using mediation for the purposes of dispute resolution. (As the discussion paper mentions at 10, there are many definitions of relevant terms available in the theoretical literature. We have the means to distinguish a 'dispute' from a concern, grievance, complaint and so on and we have the means to distinguish 'resolution' from prevention, handling, management, and containment. Attached is a section from the Dispute Systems Design chapter from the Dispute Resolution Title of The Laws of Australia. It refers to some of the relevant literature and definitions. The author of this particular sub-title is Bobette Wolski. On the other hand, if mediation is being used for another purpose, for example, to assist parties to reach a decision in relation to the terms of a contract, why not say so.

Extract from Dispute Systems Design Sub-title
The Laws of Australia, 13 Dispute Resolution

[1] 'Dispute Systems Design' (DSD) is the popular term used to describe the process of designing and implementing a 'dispute resolution system'. The terms 'conflict management systems design' and 'conflict management system' are preferred by some authors[1] with the words 'conflict' and 'management' both intended to be of wider scope than 'dispute' and 'resolution'.[2] The terms 'dispute systems design' and 'dispute resolution system' are used here, not only because of their popularity, but also for simplicity and for the sake of consistency with Ury, Brett and Goldberg's book *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*,[3] which is regarded as the seminal work in this field. However the word 'dispute' is used to embrace concerns, problems, claims, and complaints (all of which have the potential to escalate into disputes when they are unsatisfied or rejected and pursued),[4] disputes, and conflict. The word 'resolution' is also used for the sake of simplicity but again, it is used in the widest sense.[5] The word 'handling' is occasionally substituted for the word 'resolution'.

1. See for example Ury W L, 'Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design' (1995) 11 *Negotiation Journal* 379 at 380; Costantino C A and Merchant C S, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (1996) Jossey-Bass Publishers, San Francisco at 62; and Rahim A M, *Managing Conflict in Organizations* (1986) Praeger Publishers, New York at 24-25.

2. See for example Tillett who notes that there is a tendency to use 'conflict' as a generic term covering the full range of forms that unresolved conflict may take: Tillett G, *Resolving Conflict: A Practical Approach* (1991) Sydney University Press, Sydney at 5; and Landa and David who use the term 'management' to encompass the concepts of prevention, settlement, resolution, containment and more: Landa D, 'Dispute Management Systems Design', paper presented at the Second International Conference in Australia on Alternative Dispute Resolution, LEADR, Sydney, 9-10 October 1993 at 4; and David J, 'Designing Dispute Resolution Systems', paper presented at the Second International Mediation Conference, Adelaide, Sth Aust, 18-20 January, 1996 at 62.

3. Ury, Brett and Goldberg coined the phrase 'dispute systems design': see Ury W L, Brett J M, and Goldberg S B, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1993) Program on Negotiation at Harvard Law School, Cambridge, Mass. at xvii. (This is a soft cover reprint of the original book, published by Jossey-Bass Publishers, San Francisco 1989.)

4. Felstiner W L F, Abel R L and Sarat A, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980-81) 15 *Law and Society Review* 631.

5. This is not to dismiss the importance of a system's 'operating definition of resolution'. Zinsser provides the following example of such a definition: 'that the initiator of the case chooses not to move it to a later level or reinitiate any options from the earlier levels': see Zinsser J W, 'Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist' (1996) 12 *Negotiation Journal* 151 at 160. The

definition chosen may make an enormous difference when it comes to evaluating system outcomes.

Law Society of SA

Yes, the purpose of 'ADR' is to resolve a dispute.

Federal Magistrates Service

Parties access courts because they have a dispute that must be resolved. Therefore, from the perspective of a court, PDR or ADR must be focused on resolving or narrowing the issues which the parties have presented to the court.

While there are a number of other benefits to PDR, from the perspective of a court, the focus must remain on resolving or narrowing disputes.

Law Institute of Victoria

"Resolution" involves achieving an end result.

ADR should not be exclusively regarded as a process aimed at resolution of disputes. The purpose of ADR is not always about resolution. Some of the skills and processes used in ADR are highly applicable to forms of creative, or managed, problem solving and forward planning, in situations where no obvious dispute exists.

A "dispute" arises where two (or more) people (or groups) perceive that their interests, needs or goals are incompatible and they seek to defend or improve their respective positions, at the expense of others.

"Dispute resolution" means bringing the dispute to an end.

"Conflict resolution" can be distinguished from "dispute resolution". It is possible to resolve a dispute without resolving the conflict. (See Gregory Tiller's book "Resolving Conflict – A Practical Approach".)

NSW Law Society

In the legal parlance of Law Society members a dispute is understood as a situation having a potential for litigation. The emphasis on the role of the Courts in determining law and interpreting statute will influence lawyers to accept the Court as the best and most logical procedure for determining disputes and in this context a dispute will be understood as a legal argument. This may belie other aspects of disputes which are presented to lawyers, such as psychological or substantive arguments. Legal arguments can be settled by reference to the law alone, however the hostility from differences between the parties will frequently remain after legal issues resolve.

Within ADR there is a recognition that lawyers think beyond the traditional approach and acquire expertise beyond the law. Broad definition of the term *dispute* will encourage that non-adversarial approach. It is therefore felt that the term *dispute* as it is commonly and widely used is an adequate general term which encapsulates the notion of *issues* which form part of any dispute and arise from the conflict which surrounds the protagonists. Some forms of ADR are not about 'resolution' of 'disputes'. In particular, conferencing in a *criminal* justice setting is not directly the resolution of a dispute (although this may be a welcome outcome where participants know each other and where the commission of an offence can be sourced to a breakdown in the prior relationship).

Similarly the term *resolution* suggests a *moving on* which is also an essential tenant of the ADR philosophy. One of our members who also practices as a mediator reports an increase in work about "facilitation of non conflict issues". There is also the concept of partnering and application of DR techniques in environmental planning. It may be that the culture is slowly approaching a system of enhanced dispute management. This reflects to dilemma of rigid definition and the need for ongoing review of terminology.

It is accepted that less than 10% of cases which start in a Court are determined by a Judge handing down a judgment after a defended hearing. In the vast majority of cases matters settle through negotiation – either by the parties directly or by their lawyers or by using conferences, mediation, conciliation or other assisted processes. Lawyers who understand and practice interest based negotiation will be more successful as "dispute resolvers" for their clients. The education of lawyers is an essential part of changing the legal culture towards interest based negotiation.

Question Seven - How should the position or role of the 'third party' or 'intervener' in ADR be defined or described?

Yvonne Craig

No definite label, as the service provider chooses own label which may vary with needs of service users ie. Ethnic groups may favour a familiar word (Muktars-Palestinians)

LEADR

Although third party is a legal term, as it is used in ADR it appears to be well understood.

However, the term in ADR could be further clarified and could be further distinguished from its legal counterpart by including words that also denote the process and the role of the third party. For instance:

– "third party advisor" could be used when the role of the third party is to advise;
– "third party facilitator" could be used when the role of the third party is to facilitate discussion or solutions;

– "third party mediator" (if mediation is defined) could be used when the role of the third party is to mediate; and
– "third party arbitrator"(if arbitration is defined and considered to be an ADR process) could be used when the role of the third party is to arbitrate.

A universal non-descriptive term which has been used is "ADR professional" - but the difficulty is that it is notable for what it does not say.

Law Society of SA

The use of 'third party' is appropriate. The third party is not necessarily an intervener in the traditional sense.

Law Institute of Victoria

The Law Institute suggests the "third party" or "intervener" should be described as an "ADR practitioner", which will develop and enhance the concept of a specific professional function and capability.

NSW Law Society

Law Society members resolve disputes daily without recourse to a third party to facilitate the negotiation. This negotiation may occur in the shadow of a third party (eg the Court). When this fails a third party will usually decide the remaining issues in dispute. The Law Society has encouraged its members to embrace mediation and evaluation. In many instances there are legislative imperatives to other more formal ADR processes such as conciliation, concilio-arbitration and arbitration. These processes all envisage a new player in the dynamic. This person whether appointed by choice of the parties or by the Court, is a dispute resolver. The terms "third party" and "intervenor" are synonymous and historically persons with these titles add layers of complexity to legal disputes. The role of the third party will depend on the point on the continuum that (s)he enters the dispute. Generally they are expected to be impartial. There is some consensus that the term "neutral" may not be appropriate because everyone is biased in some way or has some favouritism on some issues. In terms of the outcome, the third party will value neutrality depending on where (s)he sits on the continuum. Vis-a-vis the parties to the dispute the third party are invariably expected to be impartial. The Law Society has defined impartiality as "freedom from favoritism or bias in word or action." This person will control the process of dispute resolution. The term "dispute resolver" can apply equally to a judge or a mediator or any other third party that assists the disputants to resolve the dispute.

There is an alternate view that the third party should be neutral and impartial. On this view there is an overlap between the words "neutral" and "impartial" but they are virtually interchangeable. Whichever word or combination is used, the third party has to be aware of his/her own prejudices and biases and decline to mediate if that prejudice is likely to prevent them from acting in a neutral and impartial way. For the third party to

continue to act (s)he must be aware of his/her bias or preference and must make a conscious decision to be neutral and impartial and not act on his/her personal prejudice, bias or preference.

In the criminal law context, neither 'third party' nor 'intervenor' are strictly accurate descriptions applicable in 'restorative conferencing'. Generally the term 'convenor' is used to describe the neutral 'facilitator' who is also responsible for preparing the parties to the conference.

Question Eight - Is a classification system for ADR processes needed? If so, how should they be classified?

Yvonne Craig

Classification may imply hierarchical order, which should be avoided. Alphabetical listing in broad groups of process ie. non-judgemental, mandatory etc.

LEADR

The processes should be classified according to the role of the third party, ie facilitative, advisory, or (if determinative processes are included in ADR) decision-making (determinative).

Law Society of SA

No classification system is needed.

Law Institute of Victoria

The Law Institute believes that a classification system for ADR processes would be valuable to users. It should follow four broad categories:

1. Facilitative (assisted / managed);

2. Advisory;

3. Evaluation / Settlement-oriented;

4. Authoritative (involving a decision or judgment).

The status and nature of outcomes should form part of this classification system.

NSW Law Society

By adopting the approach of a continuum (see 2 and 5 above) the indicators for classification will relate to a mode of service delivery in terms of degree of formal coercion wielded by the dispute resolver. The concept takes into account all of the

possible indicators for classification. The classification equates to seismology. The key indicator is intensity. Dispute resolvers can identify their own address on the scale by relative comparison to agreed indicators (e.g. direct negotiation is at position 1; NSW Law Society mediation model is at position 5, Appeal Court at 9,) This approach will allow for diversity of product on terms of the tools of the dispute resolver such as, level of formality, expertise and statutory constraints. Consumers would also be in a position to identify the DR product or range of products available for this dispute. It will leave the door open for development of new process models and allow for quality assurance to be adapted to those taking part in dispute resolution and for ongoing modification of the culture.

Question Nine - How should ADR terminology reflect the practice of combining ADR processes?

Yvonne Craig

By indicating that the parties 'ownership' of the processes enables them to discuss with service providers the principles and practicalities of desired combinations, essentially arguing with them which is the most appropriate, ethically, legally acceptable.

Law Society of SA

Development of terms is by usage and adaptation. The aim should be to use the broadest term in use internationally.

Law Institute of Victoria

The key requirement is transparency of process for the consumer. Both the provider and the consumer need to understand the process that is being contemplated.

NSW Law Society

Combined processes will have their place on the continuum and can be adapted to suit the needs of the parties and the dispute. Provided that the third party is trained, neutral and impartial and has explained the process (s)he will use, hybrid processes can be used. It is always wise for the third party to have the prior consent of all parties to deviate from the primary model if the third party thinks it will assist the parties to resolve their dispute.

Question Ten - To what extent should Australian use of ADR terms reflect international usage?

Yvonne Craig

See (1, 2 & 5)

LEADR

Given that Australian use of ADR terms is in a state of flux we should move towards a more universal and international usage rather than away from it. International usage should be used wherever possible unless we have a better usage, in which case we should maintain its use until it receives universal application.

Law Society of SA

Consistency between international usage and Australian usage is desirable as far as possible.

Law Institute of Victoria

The Law Institute suggests that we concentrate initially on improving the terminology issues within Australia. While we acknowledge that useful lessons may be learnt from overseas models and experiences, we should not be bound by an overseas practice if an alternative is more sensible for us in the Australian context.

NSW Law Society

Given the inconsistency in definition on a global scale, Australia cannot hope to achieve terms that are internationally accepted in every case. However by recognising that there is an internationally shared vision of optional or appropriate Dispute Resolution processes, and by encouraging self evaluation in terms of the degree of persuasion exerted by the dispute resolver, overseas practitioners (and Australian dispute resolvers) will have a reference point by which to decide how the services they offer and the skills which they employ compare with those utilised by other practitioners in Australia and vice versa. This approach could bridge the gap between theory and practice.

Australia should make efforts at the highest level to achieve international consensus on terminology as quickly as possible. Ultimately someone has to agree to change. It would be a sad reflection on the mediation profession if mediators could not agree on internationally uniform terminology in an increasingly globalised business environment. As a profession, dispute resolvers should be flexible and innovative to assist disputants to resolve their dispute, taking into account the diversity of human personality and the problems they present with.

On the other hand, a hierarchical list of definitions designed to reflect international usage, may prevent the learning of new ways by raising barriers of skills and credentials which will stifle creativity and prevent change.

Question Eleven - How should the term 'conciliation' be defined or described?

Yvonne Craig

See (1 & 5)

LEADR

It should be defined in line with international usage.

Law Society of SA

It is too difficult to define conciliation separately to mediation. It is entrenched in many different ways of practice.

Federal Magistrates Service

The term conciliation should be defined so that it is clear that it a different process from mediation. It should be clearly defined or described as referring to those processes where advice is given and be distinguished from the term mediation in that way. Mediation should therefore assume that advice or evaluation is not given. This also responds to Question 12 below.

Law Institute of Victoria

The term "conciliation" adds yet another layer of complexity. The Law Institute encourages the ADR community to phase out this expression so far as possible.

Where the word arises under statute, hopefully the statute will set out what is required.

To the extent that "conciliation" as a separate concept must be retained, we support the definition contained in NADRAC's 1997 Definitions Paper, which said:

> ***Conciliation*** *is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.*

NSW Law Society

In Australia the term *conciliation* is used loosely but generally. It implies a process used

to resolve legal issues and it is a feature of legal practice in most jurisdictions although it is practiced differently in many. Definition of that term can only encapsulate the common threads, which appear to be:

- The dispute resolver is a Court Officer or a trained conciliator who is empowered to make binding directions in respect of the conciliation process, give advice, and exclude options.
- A process which is Court or tribunal based.
- Designed to resolve legal issues.
- Decision making is by consensus of the parties.
- The outcome is capable of being documented in terms that are legally binding on the parties.

Question Twelve - To what extent should the term 'mediation' assume that advice or evaluation is not given?

Yvonne Craig

No assumption possible for most services

LEADR

Mediation should always assume that advice or evaluation is not given and should explicitly state it if the mediation will be evaluative or advisory.

Law Society of SA

Parties should decide at the outset whether the mediator takes an advisory role.

Law Institute of Victoria

The Law Institute takes the view that the critical issue is transparency in any given case, not whether there is advice or evaluation.

We note that some participants in fact prefer an ADR Practitioner who will "get their hands dirty in the substance of the dispute". Practitioners should be encouraged to declare that approach, and whether they give advice or evaluate, openly and clearly.

NSW Law Society

In New South Wales the Courts Legislation (Mediation and Evaluation) Amendment Act includes definitions of Mediation and Neutral Evaluation. In response to this the Law Society has adopted models of Mediation and Neutral Evaluation. The Society recognises that its definitions are not identical to those in the relevant legislation. In our jurisdiction the evaluator reports to the Court only that an evaluation has occurred, and not the details. The model of evaluation advocated by the Law Society provides that the

evaluator hears the parties' statements and reads any relevant reports or documents any evidence and allows the parties to question and try to clarify matters and try to agree on common ground. (S)he hears submissions and then leaves the meeting to consider the matter and prepare an evaluation of what would be the outcome if the matter were heard by the Court. The evaluator then returns to the meeting without disclosing the decision. The evaluator can then with the consent of the parties, chair a discussion of settlement prospects but cannot act as a mediator or conciliator or undertake a mediation process (e.g. option generation). His or her role is strictly as Chairperson. If the matter does not settle, (s)he then hands down the Evaluation Report. This process allows the Evaluator to use a number of different sub-processes to achieve a settlement. This evaluation procedure is not widely used. Provided that the Evaluation Report is prepared before the negotiation stage begins, and the Report is, for example, placed in a sealed envelope, the Evaluator could more freely participate in the negotiations and use mediation techniques to assist the parties to reach an agreement. There are similar models of arbitration/mediation used in other jurisdictions, where the Arbitrator hears the evidence, writes his decision and places it in a sealed envelope. He then mediates the dispute and it is only if the parties fail to reach agreement that the award is disclosed.

Question Thirteen - Should courts (and other organisations) be encouraged to use terms other than 'mediation' for facilitative ADR processes conducted by their own officers?

Yvonne Craig

Court-based mediation/conciliation/ADR etc. is sufficient to indicate the source.

LEADR

It is the description of the process and the role of the third party that is important, not the setting. There is no reason to encourage courts or any other organisation to use other terms providing that the process is actually mediation. Creating new terms to describe the same processes in different settings will only create more confusion and complexity in ADR terminology.

However, there is no doubt that the courts' use of the term mediation to describe what is (and always was) more properly described as a "settlement conference", has slowed the development and progress of mediation as a process in its own right.

Many parties' perception of mediation is based on their experience with a court based mediation conducted by a quasi judicial officer (usually with the threat of a costs sanction for improper participation - *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137). The contrast between a consensual mediation with a private mediator paid for by the parties is often vast in terms of outcomes and actual process content.

Law Society of SA

The Family Court refers to everything as mediation, which can create confusion. It would desirable for the court to distinguish the process used within the court.

Chief Justice Black (Federal Court of Australia)

I am writing in response to your ADR terminology discussion paper. My response reflects the views of the Court's ADR Committee which has appreciated the opportunity to comment on the issues raised in the discussion paper.

The ADR Committee sees merit in exploring the suggestion in s 3.8 relating to court-based ADR. The *Federal Court Act 1976* (s 53A) currently refers to mediation and arbitration, as do the Federal Court Rules (Order 72). The more recent *Federal Magistrates Court Act 1999* utilises the term "Primary Dispute Resolution" in Part 4 of the Act, and in s 21 provides a list of processes covered by this terminology, including mediation, arbitration, neutral evaluation, case appraisal and conciliation.

The Federal Court sees ADR, including mediation, as part of the management of litigation. As a case management tool, these processes aim to reduce time spent by the Court in hearings and focus on those matters that require a definitive determination of fact or decisions on points of law.

The general ADR model currently adopted, and likely to continue in the near future, involves court officers undertaking confidential joint and separate discussions with parties on a without prejudice basis, to explore the issues between parties and options for resolution of the dispute. Court supervision and analysis of those matters suitable for ADR processes might be reflected more appropriately in alternative terminology such as "Court Supervised Case Resolution" or wording to that effect.

This approach to the terminology may better reflect the direction in which court based ADR processes are developing in the Court. It may however, need to be balanced against the growing awareness of litigants and the public of the term 'mediation' and the understanding of the general process suggested by the use of this more commonly accepted terminology.

Law Institute of Victoria

If the person providing the service has directive or determinative powers, that needs to be explained clearly to the consumer.

However, if in context the Court officer does not have a directive or determinative role, the term "mediation" is appropriate.

The key is again in requiring that there be a proper explanation of the process that is to be adopted.

For example:

- In the Federal Court, an appropriate title might be “Federal Court Registry Mediator”, with a description of the process explaining that the process follows the settlement approach (if appropriate).

- In the VCAT system where a mediator is also a member of the Tribunal, it should be made clear that the mediator ceases to have any involvement in the case after the mediation comes to an end. (Anecdotal evidence suggests that some consumers are confused when the discover that the same person is sometimes a “mediator” and sometimes a “Tribunal member”.)

NSW Law Society

Yes. Granted that the term *Mediation* is generic, the process is distinguished by the element of negotiation. This may pre-suppose that the disputants partaking in the process have legal capacity to enter into binding agreements. The term would therefore lend itself to legal proceedings and has been adopted into legislation as set out above. Mediation however is also distinguished by the independence of the dispute resolver and the ability of the parties to disengage from the process at any time. It may therefore be confusing for Courts and therapeutic interests to use the term loosely. If every provider were located on the *continuum* this would be less difficult.

On the other hand, the Court has considerable influence in creating community understanding. For this reason it is important that the Court has a clear understanding of the process or processes that it offers. Appropriate description may reduce confusion.

Question Fourteen - Can clear distinctions be drawn among 'mediation', 'counselling' and 'therapy'? If so, what are these distinctions?

Yvonne Craig

Counsellors and therapists are qualified in distinctive professional discipline which deal primarily with emotional and psychological problems at different depths of analysis. However, some service providers are trained in all these processes. A golden rule is that service users should be made aware, and give informed consent, to whichever process in combination of processes is being used and understand the professional qualifications/limitations of the providers.

LEADR

There are clear distinctions between these things, or at least between mediation and the other two, and the use of terminology that connects these different processes should be avoided.

If these names are used in conjunction with one another, the users of each process will be confused about the particular process they are engaging in, and the role and ethical standards to be expected of the practitioner. This situation would not be helpful to the user, the practitioner or the professions.

Therapeutic and transformative mediation

Therapeutic and transformative mediation resemble counselling or therapy as they involve the mediator skilfully leading the parties to a higher level of discussion and opening the parties up to an understanding of the perspectives of the other, and of themselves.[5] They are however particular *styles* of mediation and should not be confused with professions such as counselling and psychotherapy.

The goal of mediation is also vastly different from that of counselling or therapy. The goal of mediation is to help resolve a particular dispute between parties. It is a short-term goal for a recognizable and ostensible dispute or conflict. The goals of therapy and counselling are more long term goals for individual personal growth or behaviour modification, or for stabilising dysfunctional systems, such as a family or relationship system.

Counselling and Therapy

Counselling and therapy are the domain of psychologists and have an entirely different set of ethical and professional considerations to those of mediators. Counselling and therapeutic psychologists differ in the degree of complexity of problems they deal with and the orientation they use in the process. Both types of psychologists are taught to recognize problems and decide on their level of expertise in working with the problem.

Counselling

Counselling is a specialization in professional psychology and as such is governed by the Australian Psychological Society and the registration board and has a clear set of ethics to guide practice (6 years training plus two years registration).

Counselling psychologists are trained to work with a wide range of psychological difficulties and disorders, but counsellors usually work with the range of problems encountered in *the usual course of living* eg bereavement, relationship breakdown, adjustment to step parenting, involuntary redundancy, sexual assault, sexual abuse, release from prison etc. In the field, it is said they work with the "worried well".

The goal of counselling is usually to help a normally mentally “healthy” person through a critical period of their life. It is more an individual goal, although it is also used for family and marriage crises.

Therapy

[5] See Brenner, M et al, "What is "Transformative" Mediation?" (Aug, 2000) *Australasian Dispute Resolution Journal* 155, 155-56 for a full description of how transformative meditation works in practice.

Therapists usually have specialty training in one therapeutic approach and have years of supervision in this approach. For example a psycho-dynamic type of therapist will work with the most disturbed people, such as psychotics and those restrained involuntarily and will usually work several times a week for many years with their clients. They must have a helping profession background for example, psychology, psychiatry, or social work. Unlike most mediators and counsellors, psychodynamic therapists will have been through therapy themselves as part of their training and development.

Cognitive therapists may not work at the same depth and intensity with their clients or make the same long-term commitments as psychodynamic therapists, but their role is still to treat the individual or a dysfunction within a system such as a family or relationship system and help the individual or system function better.

Therapy can resemble mediation when working with a system, such as a family or relationship system, but the goal of therapy is not to resolve one problem within the system but to try to get to the core of the dysfunction and either modify or improve it.

Distinctions

The distinction between the three processes derives from this difference in the training and background of the practitioner, and in the goal and purpose of the process. The practitioners of each discipline would follow a different process depending on their orientation and would employ a different set of ethical standards.

Recommendation

‘Mediation’ should be used when describing the mediation, by a trained mediator, of a specific dispute or conflict with the purpose of resolving the particular dispute.

‘Counselling’ should used for the process where a trained counsellor works with an individual or family members with the purpose of assisting them to deal with problems encountered in the usual course of living or during a critical period of their lives.

‘Therapy’ should be used when a trained therapist works with individuals or a family system with the purpose of identifying and modifying a dysfunction through more long term and intensive work.

If these names are used in conjunction with one another, the danger is that each particular process (and ethical standard) will become blurred and confused with the others, which would not be helpful when people have to consider which process or practitioner they require to help them with their particular problem and whether the particular process has been successful in assisting them.

Transformative mediation is a more appropriate term to use if it is considered necessary to describe that particular style or type of mediation. The term therapeutic mediation should be avoided and the term counselling or therapy should not be used when the process is clearly mediation.

Law Society of SA

It is difficult to draw clear distinctions. The process of mediating behavioural problems can be perceived as counselling although the mediator may not have that intention.

Mediation is about getting an outcome – counselling can be a long term process for the management of issues.

Federal Magistrates Service

In 2002, the FMS surveyed the CBOs which deliver PDR services for the organisation. The overwhelming response was that clients are not comfortable with the use of the term "counselling". They are confused as to why they need "counselling". Clients who are ordered to attend "counselling" are usually referred into a mediation or conciliation process once they have completed intakes which suits their needs more appropriately than "counselling".

"Counselling" is used throughout Part VII if the Family Law Act. Section 21 of the Federal Magistrates Act and section 14 of the Family Law Act both define "counselling" in a PDR context. However, as it is causing confusion for clients, these definitions should be reconsidered.

Law Institute of Victoria

Members of the ADR committee apply the following distinctions:

- Mediators: Manage a process to resolve a dispute by mutual agreement.
- Counsellors: Address interpersonal relationship issues to adjust them.
- Therapists: Deal with personal disorders to cure them.

In the context of dispute resolution or conflict resolution, we see mediation as the appropriate tool.

Terminology should clarify that mediators, when mediating, are not counsellors or therapists. However we recognise that some mediators may choose to use their counselling or therapy skills to good effect during the mediation process.

NSW Law Society

While clear distinctions can and should be drawn, this is generally not done. Counsellors practice mediation along with other professionals. Mediation is driven by negotiation but often therapy must occur to allow the disputant to join in the decision making process. By emphasising these distinctions the benefit of moving from one process to another in the course of dispute resolution may be lost. Very often it is necessary to allow the ventilation of emotion for the mediation or conciliation to progress. This ventilation is in one sense, therapeutic. Provided that the Mediator or other third party knows what he or

she is doing, that helps the process. Often pent up emotion is the barrier to reaching a settlement. Once that barrier is removed, a resolution of the dispute is easier. In children's cases, parties are often ignorant about what is best for their child. In allowing or encouraging discussion of children's issues a Mediator will often need to take on the role of a counsellor. This distinction between mediation, counselling and therapy is clear but each of these skills must sometimes be used in all three processes. The appropriateness of the use is a matter of degree and depends on the competence and experience of the third party. As a result, the potential for dispute management by engaging appropriate intervention at the appropriate time in the history of the struggle may be eroded if appropriate referrals to other professionals are not made. The Society accepts what you say in section 3.9 and cannot improve on the distinction the authors have made amongst mediation and counselling. It is normally important for the third party intervenor to decide before (s)he starts any process whether the principal purpose is to mediate, counsel or provide therapy. There are conflicts in providing all three at once. Normally only one of the three can be competently provided at the same time as the third party has different professional responsibilities to each of the clients and to the process. Mediation, counselling and therapy can be complementary and simultaneous or separate. The key performance indicator is the resolution of some or all of the issues which give rise to the dispute but generally only one of the processes can be used at the same time. It is to be noted that a contrary view is taken by at least one of our members who responds to this question with a resounding, *yes.*

Question Fifteen - How should the different meanings of 'community mediation' be distinguished?

Yvonne Craig

In the UK community mediation is generally understood to provide services to neighbours but distinctive prefixes can be used ie. Asian/Manchester/Housing Mediation Service

LEADR

The different meanings of 'community mediation' could be distinguished in the following way:

(a) when mediators from a community panel are involved the term "community mediators" should be used;

(b) when the subject matter of the dispute being mediated is a community issue the term "community mediation" should be used;

(d) when the mediation service being provided is by a non-government or community organisation the term "community mediation service" should be used.

Law Institute of Victoria

The Law Institute has not attempted to answer this question in this submission.

NSW Law Society

The Society has no objection to NADRAC's present description of "community mediation" continuing to be used. The community mediators have played an important role as pioneers of mediation in Australia as role models and trainers. There will always be a role for them in resolving neighbourhood and community disputes.

Question Sixteen - What terms should be used to describe ADR and related processes within the criminal justice system?

Yvonne Craig

Same principles as (1 & 5) NB. Present British proposals for an Institute of Mediation and Restorative Justice will work on this. www.kcl,ac.uk/cljs (Kings College London)

LEADR

Victim-offender mediation is a well known and accepted concept. That the word victim-offender precedes the word mediation prevents the word mediation becoming associated solely with the criminal justice system.

NSW Law Society

Most criminal justice statutory processes do not use the term 'ADR', and are designed to empower those most affected by the harm caused by the crime to decide how this harm can be addressed. The terms to which paper refers (community conferencing, family group conferencing, and so on) are now widely used and generally accepted as accurate descriptions of a process that is neither mediation nor counselling.

Question Seventeen - What are the implications of emerging technologies for terms used in ADR?

Yvonne Craig

We should be open to new terms, see their consonance/resonance with ADR, incorporate what's helpful, always being a model of undogmatic peer learning, discourse and disputation (NB. Technologies of 'medieval disputation' in theology). All new genuine and authentic knowledge can only be enriching to ADR

LEADR

In terms of mediation, on-line mediation may be an impediment to the parties experiencing the full effects of mediation, namely voicing, ventilating and a sense of catharsis that can come from face to face mediation.

On the other hand, the on-line environment can also act as a shield to emotions which may or (may not) help progress the dispute resolution process.

Also a different set of communication skills are required for on-line communication and it would be difficult to assess trust, neutrality, respect etc without the advantage of assessing the body language of the decision- maker, mediator or opposing party.

Jargon words such as the term “fourth party” should be avoided.

There is a greater risk of misunderstanding arising out of unintended interpretations of written communications (eg e-mails) by working on-line.

Law Institute of Victoria

There is increasing interest in the use of communication technologies to assist in communicating – teleconferencing, videoconferencing, internet access and so on. These are natural advances.

The technology is simply a delivery mechanism and there is every reason for ADR practitioners to embrace and utilise relevant technologies if their consumers want, or need, to use it.

Unless the ADR community gets its own house in order as regards defining its processes clearly, promoters of new technology may cause increased confusion in the field by using different labels for technology-oriented versions of current services.

We should develop standard terminology to aid the development of technology-enhanced ADR processes, allowing the technological development effort to be directed solely at the delivery mechanisms.

NSW Law Society

Information technology must impact upon Dispute Resolution as with other aspects of modern life. At this time the computer, video conferencing and telecommunication are important tools for ADR.

Question Eighteen - How might future developments in ADR affect terminology?

Yvonne Craig

ADR, vis-a-vis above responses, should be equally involved in sharing its insights gained from new development with those who work in evolving terminology.

LEADR

Specialist and hybrid areas of ADR may evolve in the future, and as they evolve rather than create jargon terms it would be best to keep to the clearest plain English terms available.

When considering terminology, both present and future, plain English descriptors are preferable.

Law Institute of Victoria

As ADR processes are more widely used, new processes (both simple and complex) will be developed. If our fundamental terminology is sufficiently clear and generic at the outset, new processes will be sub-sets of mainstream processes and any new terminology required will only be incremental.

However, if our fundamental terminology is either inadequate or too prescriptive, it is conceivable that new processes will require completely new terminology.

The Law Institute suggests that the proposed descriptive / categorisation matrix approach can provide the accommodating approach necessary to avoid future problems.

Question Nineteen - In what circumstances should ADR processes be defined or described in a consistent fashion, and in what circumstances should different descriptions or definitions be used?

Yvonne Craig

Whenever the contacting parties to particular ADR discuss and agree the aims, parameters and conditions of the process they choose. This may be the result of individual, group or community decision-making

LEADR

ADR processes should be defined or described in a consistent fashion in all circumstances. Definitions may facilitate communication by providing a common language. However, specific definitions do not prescribe specific practice. The practice of ADR processes will always be dynamic. The best practice will be adaptive and flexible, often combining elements of various specific processes.

Compliance cannot or should not be tested against the definition of an ADR process, nor should definitions be adopted if the consequence would be that mediators might not be covered by immunity provisions if their conduct of the process is not in accordance with a relevant definition.

Compliance should be tested only against competency standards. Definitions should have only limited use in relation to compliance.

This does not negate the fact that definitions are important and desirable.

Law Institute of Victoria

Please see the comments in the introductory paragraphs to this submission.

NSW Law Society

As ADR evolves its structure will continue to be modified. This can cause conflict and dysfunction. As ADR finds a place in institutional structures such as Courts there needs to be a clear link between the redirection of clients and the purpose for which they came to the institution to resolve the dispute. New knowledge must be acquired. This will extend to skills and attitudes, understanding of a range of processes of dispute resolution, and rights and responsibilities. There needs to be a reference point against which to measure performance. In these circumstances tasks and responsibilities need to be clearly defined. Once the change to new methods is in place the dispute resolvers will identify with the changes, act autonomously and look for continual improvement.

Word association may help to form new attitudes and new language may help oust attitudes and objectives which are no longer desirable and help to reorient thinking. For these reasons it should be open to service providers to state their own particular vision of process. By identifying that process on the Moore continuum, disputants will find a reference point to evaluate the degree of persuasive influence of the dispute resolver they will encounter.

Question Twenty - How generic or specific should ADR terms be?

Yvonne Craig

See (19). For decision-making on this issue, the principle should be that those who wish to provide the service should discuss and agree which ADR terms and processes they will regard as generic on specific in the cost before them

LEADR

We refer to what is said in respect to Question 1 about a combination of definitions and descriptions.

Law Society of SA

The descriptions should be as generic and consistent as possible. It is important that the parties define the process they are embarking on.

Federal Magistrates Service

See concerns raised above about the different uses of the term ‘mediation’ across different service providers.

Law Institute of Victoria

Please see the comments in the introductory paragraphs to this submission. {See page 21]

NSW Law Society

By generating terms which recognise key variables a profession will emerge that develops models of practice and personal identity. Development of a list of definitions that addresses all forms of practice clearly and unambiguously, will be impossible. Presumably there will be a broad range of perceptions and understanding of any words which attempt to compartmentalise ADR practice. For these reasons generic definitions will be of greater use.

As mentioned in our response to Q. 5 above, ADR or Primary Dispute Resolution or whatever it is called could be embodied in National uniform legislation passed by the Commonwealth and State Governments setting out descriptions of PDR processes and requiring that they be used before starting civil court proceedings in Australia. NADRAC could propose this to the Australian Government as a means of promoting uniform terminology in Australia.

Question Twenty One - Which common ADR terms should be developed (a) across all areas of ADR practice; (b) at the sector level and (c) by individual ADR service providers?

Yvonne Craig

Surely it is values and principles which are common? ie. impartiality, confidentiality, equity, etc. Otherwise a single sheet of terms in current terms in current, various usage can be made available to all parties showing the wide variety of interpretations which people/authorities have. This functions as educative for participants, education is an important aspect of ADR, which aims ultimately to encourage people to manage their own disputes when possible. Hearing of the multiple ways in which this can be done can assist people to initiate towards their own ways of approaching conflict. Such information may assist in the future if not in any immediate dispute

LEADR

The development of common ADR terms is probably best confined to those terms which are relevant to all areas of ADR practice. ADR terms which are used only at the sector level or by individual providers will be best developed at those respective levels. A central source of terminology be it national or only at sector level, could help ensure consistency in the relevant areas. The usefulness of definitions will not be diminished by the fact that there may be variant usage at different levels and by individual ADR service

providers. The point of the exercise is not to eliminate difference but to broaden and clarify the common ground. The usefulness of centrally published definitions will be to provide a common language across all relevant areas of ADR practice.

Law Society of SA

Usage develops function, and not vice versa.

Law Institute of Victoria

Please see the comments elsewhere in this submission. In addition, the Law Institute takes the view that:

(a) Generic terms should be applicable across all areas of practice;

(b) Specific sectors (such as courts and tribunals, family law, industrial relations) should develop standard terminology appropriate to their needs that clearly identifies its specific application; and

(c) Individual providers should be encouraged to use common law terms to describe any specialised processes or services they may offer.

In all cases, plain English and common sense should prevail.

NSW Law Society

(a)
- The goals and objectives of ADR.

(b)
The ethical framework for ADR practitioners
The preferred practice guidelines for that sector e.g. co-mediation in Family Law

(c)
- The model or models provided
- The qualifications of the practitioner
- Personal qualities of the practitioner

Question Twenty Two - What should be the focus of attention in developing consistency in ADR terms: processes, elements in processes, roles of practitioners, services or recording/reporting?

Yvonne Craig

It will be noted that I give little energy to trying to tame variety and pluralism which is particularly valuable in the field of ADR, when all we need to enlarge our perspectives and tolerate differences. 'Legal ADR' has, of course, to use precise definitions and each jurisdiction/authority should publish clear, brief non-jargon statements of its terminology.

LEADR

The focus should be determined by what is essential to, and characteristic of, that process. In most ADR processes the elements or steps of the process vary widely between practitioners and between applications. In these circumstances, the focus of accurate terminology will be:

- the role and responsibilities of the ADR practitioner; and
- the service offered.

The elements or steps commonly involved in that process would then properly form part of an illustrative description which expands on the definition.

For example, mediation is characterised by

(a) the role of the mediator - a third party neutral; facilitative; non-determinative; non-advisory
(b) the service offered - the mediator assists the parties to negotiate in an endeavour to resolve their dispute.

The elements or steps involved in a mediation may involve the mediator assisting the parties, jointly or separately, to identify the disputed issues, develop options, consider alternatives and negotiate an agreement.

LEADR supports the endeavour to facilitate data collection by use of consistent terminology. To this end LEADR supports the development of operational terms such as those suggested in Section 4.4.

Federal Magistrates Service

The focus of attention should be on developing consistency in ADR processes. See discussion about the term 'mediation' above.

Law Institute of Victoria

The starting point for consistency should be to focus on the processes and their descriptions by the respective practitioners. Practitioners should therefore be encouraged to clearly describe the processes they adopt.

NSW Law Society

The focus of the profession of Dispute Resolvers should be to clarify terminology so that practitioners, clients, lawyers, service providers, governments and everyone else potentially to participate in ADR would know what they are talking about and can make accurate comparisons. All of the matters mentioned require consistent terminology. This is best done by a national code of descriptions. By embracing diversity rather than suppressing it, the profession will move in the same direction. Although the negative connotation is not advanced in the discussion paper, ambiguity will encourage change and development. Ambiguity will disappear as improved communication between the stakeholders reduces discrepancies. Education is a vital part of the process of encouraging the use of ADR to resolve disputes. It should be part of the primary and secondary school syllabus and should have a more prominent place in the educating and training of lawyers, teachers, and all professions generally.

Question Twenty Three - Where should ADR definitions or descriptions be found?

Yvonne Craig

NADRAC already does superb work in this area. Any service provided should give to all service inquiries a printed list of its aims, definitions and options etc

LEADR

ADR definitions and descriptions need to be readily accessible. When consensus has been arrived at as to their content all industry bodies should publicise them as the collective consensus of those involved. NADRAC and any industry peak body that might be formed could publicly acknowledge them. Modification of terminology needs to be easily achievable when consensus is arrived at. Statutory or regulatory structures are not supported.

Law Society of SA

They are found wherever they are used – it is impossible to impose them.

Law Institute of Victoria

As indicated elsewhere in this submission, definitions should be used as little as possible.

It is appropriate for descriptions to be found in:

- Legislation
- Regulations
- Codes
- Court and tribunal rules and information memoranda
- Contracts

- Australian standards
- Public information and marketing materials generally
- Institutional and provider websites

In the absence of a *Uniform Mediation Act* in Australia, descriptions developed and promulgated by a recognised body such as NADRAC are an excellent idea.

Whether or not we require a *Uniform Mediation Act* requires further study and consideration.

If dispute resolution processes are to be referred to in legislation or regulation there is a clear preference to see descriptive language being used.

NSW Law Society

These should be published by the institution or dispute resolver providing the service. As soon as possible a Uniform National Mediation or Primary Dispute Resolution Act should be passed in Australia. In the meantime Federal and State Acts Interpretation legislation could incorporate the NADRAC descriptions or definitions.

In criminal law restorative justice practices it may be useful to incorporate basic descriptions and relationships with formal court processes in legislation. (NSW has done this already through amendments to the *Criminal Justice Procedures Act 1986*, and in Part 5 of the *Young Offenders Act 1997*.)

Question Twenty Four - What alternative definitions or descriptions should be used for terms used in ADR (listed in the Glossary)?

Yvonne Craig

I like Appropriate DR, and Assisted DR

Law Institute of Victoria

Please see the comments in the introductory paragraphs to this submission.

NSW Law Society

The glossary is a comprehensive list of ADR models for those who wish to use it as a reference point. It should be regularly refreshed and reviewed.

Question Twenty Five - What terms are used in ADR, other than those described in the Glossary?

Yvonne Craig

An oblique response to this question: I have developed a model of Anti-Stress Mediation which I use in disputes between elderly people and staff, or between residents etc, in sheltered housing, care and nursing homes. It might be developed to be helpful in dealing with disputes involving people with mental health and some other forms of disability.

The great potential of mediation in peace building and healing lies in their being a model of continual learning, adaptability, adaptable growth, non-dogmatism, accessibility to all based on a service user and service provider partnership.

Question 26: What is Law?? Define it.... etc. Answer 1-25, as applied to law, not ADR.

Consumer Credit Legal Service Inc. and Consumer Law Centre Victoria

Any ADR terminology should include a definition of the commonly used term "Industry ADR". Industry ADR schemes have a number of characteristics which are unique to this type of ADR, and it is important that this is made clear. We suggest the definition should include something similar to the following:

Industry ADR: Industry specific ADR schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Schemes are usually funded by the industry but governed by an equal number of industry and consumer representatives. Some schemes are required to meet standards established by ASIC. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.

A definition of "Industry Ombudsman" should refer to the above definition.

LEADR

LEADR continues to favour the definition or description of ADR that excludes from its ambit all determinative processes. This is the only valid and useful distinction that can be drawn between categories of dispute resolution. The nature of the body dealing with the dispute viz. is it a tribunal established by the State or not, is of no intrinsic relevance. What is relevant and important and needs to be understood by the community is the nature of consensual dispute resolution with its focus on interests rather than rights. Arbitration or binding expert determination are conceptually different and must follow processes aimed at determining rights. LEADR recognises nonetheless that for many in Australia and overseas ADR simply means "non judicial resolution". The threshold for categorisation of anything as ADR would seem to be the existence of a dispute: so dispute prevention and therapeutic processes ought to be excluded.

Community mediation is a process in which the parties to a dispute, with the

> *assistance of a neutral third party (the mediator), chosen from a panel representative of the community in general, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome ..., but many advise on or determine the process of mediation whereby resolution is attempted. (NADRAC's definitions Paper)*

The definition of community mediation is not clear. Presumably what is sought to be conveyed is that the parties, not the mediator, are chosen from a panel representative of the community. What is a "panel representative of the community"?

The essential feature of a community mediation" is a mediation of community issues or a community dispute, ie. the disputing parties are not individuals in a private dispute but individuals or community groups disputing over issues which involve or impact on public interest. "A party ... chosen from a panel representative of the community in general" is not easily identified. In practice things are more ad hoc - the size, shape and nature of the individuals and groups participating in a community mediation varies widely.

Law Institute of Victoria

Please see the comments in the introductory paragraphs to this submission.

NSW Law Society

The NSW Workers Compensation commission has developed a model of Concilio-Arbitration. Many Law Society members are involved as dispute resolvers in delivering this service. The Commission could be approached to provide a definition of the model as it will affect a number of professionals and employees in this State.
