



Alternative Dispute Resolution in the Civil Justice System

Issues Paper

March 2009

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1 INTRODUCTION

1.1 The National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 as an independent body to provide the Attorney-General with policy advice on the development of ways of resolving or managing disputes without a judicial decision. NADRAC's Charter provides that it:

... is an independent advisory council charged with:

- a. providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and*
- b. promoting the use and raising the profile of alternative dispute resolution.*

1.2 NADRAC's Charter is attached (**Attachment A**).

CIVIL PROCEEDINGS REFERENCE

1.3 On 13 June 2008 the Attorney-General wrote to NADRAC requesting that it enquire into and identify strategies to remove barriers and provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process. The letter of reference also asks NADRAC to provide advice on initiatives the government might take to support the recommended strategies, including legislative action.

1.4 In particular NADRAC was directed to consider:

- whether mandatory requirements to use ADR should be introduced
- other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- whether there should be greater use of private and community based ADR services and how to ensure that such services meet appropriate standards.

1.5 NADRAC understands that the ADR recommendations arising from this inquiry will be an important contributor to the Attorney-General's access to justice agenda.

1.6 NADRAC was requested to consult broadly in conducting the inquiry and to complete its report by 30 September 2009.

1.7 A copy of the letter of reference is attached (**Attachment B**).

- 1.8 Specific issues relating to Indigenous dispute resolution are not the focus of this enquiry but have been considered by NADRAC elsewhere and are the subject of a recent report to NADRAC by the Federal Court of Australia.¹

REQUEST FOR COMMENTS

- 1.9 This paper raises a number of issues and poses a large number of specific questions in relation to them. Your comments on any or all of these issues and questions are very welcome. However, there is no need to address every issue or question.
- 1.10 In addition to your comments on the issues and questions raised, NADRAC would be grateful for any input on matters that you consider are raised by the Attorney-General's reference but which may have been omitted from this paper.
- 1.11 It would also be helpful if you would please provide some details about yourself or your organisation with your submission. NADRAC would like to know how ADR is relevant for you. For example, are you a current or former participant in an ADR process, a referrer of clients to ADR processes, an ADR practitioner, a court officer, or a non profit organisation? NADRAC would also like to know how frequently you use or participate in ADR processes.
- 1.12 At this stage, NADRAC is seeking to raise issues and options for reform. This paper is intended to facilitate discussion and does not indicate the final views or recommendations of NADRAC.
- 1.13 Comments should be addressed to Ms Serena Beresford-Wylie, Director NADRAC Secretariat by email to nadrac@ag.gov.au or by mail to:
- NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600.
- 1.14 The closing date for comments is 15 May 2009.

PRIVACY

- 1.15 It is intended that all submissions will be published on NADRAC's website. In the interests of confidentiality NADRAC can, upon request, publish your submission anonymously.
- 1.16 Also please note that, unless you request otherwise, NADRAC may make responses available in whole or part to others. NADRAC may also publish responses as part of its report or as part of related papers. If you consider any part of your response to be confidential please make this clear in your response.

2 ABOUT ADR

¹ NADRAC, *Indigenous Dispute Resolution and Conflict Management*, 2006; and J Pope and T Bauman (ed) 'Solid work you mob are doing' – *Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, 2008.

- 2.1 Understanding of ADR varies significantly both within the general community and within relevant professions, courts and governments. The following information may help to address those differences and promote consistency in comments received in response to this paper.

WHAT IS ADR?

- 2.2 NADRAC's Charter refers to ADR as 'ways of resolving or managing disputes without the need for a judicial decision'. Although its Charter focuses on justiciable disputes, NADRAC acknowledges that ADR is equally helpful in non-justiciable disputes and welcomes comments about issues relating to such disputes.
- 2.3 NADRAC also recognises that traditional settlement negotiations between lawyers have a very significant role in managing legal disputes.
- 2.4 NADRAC has described ADR as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them'.²
- 2.5 This description covers most mediation, conciliation and arbitration but also extends to other processes which may not commonly be regarded as ADR, such as the investigation and determination of complaints.
- 2.6 NADRAC interprets 'impartial' to mean unbiased and without any undisclosed conflict of interest. Questions have sometimes been raised about the applicability of the impartiality requirement to dispute resolution practitioners in some circumstances. For example, in the collaborative practice setting, a team approach is used though each of the practitioners represents a participant and may provide separate advice to them. Also, in some disputes in Indigenous and youth settings, the practitioner may have an existing role with one or more of the disputants which may make impartiality difficult to discern.
- 2.7 Even where a judicial decision is required, ADR processes can still have utility in clarifying areas of agreement and disagreement, resolving the procedural steps to be pursued and limiting the issues for judicial consideration.
- 2.8 ADR techniques can be adopted in contexts other than dispute resolution, such as receiving expert evidence, and agreeing about future action, for example in corporate planning or decision-making in environmental and other settings.

RANGE OF ADR PROCESSES

- 2.9 ADR processes can be loosely classified as facilitative, advisory, determinative and combined or hybrid:
- Facilitative processes – the dispute resolution practitioner manages the process but does not provide advice on the matters in dispute or possible outcome. They may provide factual information, but do not advise the participants. A facilitative practitioner would usually ask questions to encourage communication and assist the participants to clarify the issues in dispute and develop options for resolution. Mediation is usually seen as

² NADRAC, *Dispute Resolution Terms*, 2003, 4.

a facilitative process, although as discussed below the term ‘mediation’ is inconsistently used.

- Advisory processes – the practitioner manages the process and provides professional advice on the matters in dispute or possible outcomes or both. Advisory processes may take two forms:
 - processes, such as expert appraisal, aimed at clarifying a particular issue or issues through expert advice. A practitioner with expert knowledge investigates or assesses the facts and provides advice on those facts or the resolution of issues arising from them, or
 - processes, such as conciliation and collaborative practice, aimed at empowering participants to clarify or resolve the issues in dispute with the assistance of the practitioners’ advice.

Apart from the advice provided, these processes may be similar to facilitative processes.

- Determinative processes – the practitioner evaluates the issues in dispute, which may include hearing evidence from the participants, and makes a determination. Examples include arbitration and expert determination.
- Combined or hybrid processes – the practitioner manages a process that combines facilitative, advisory or determinative components. The most common examples are ‘med-arb’ (mediation followed by arbitration) and ‘con-arb’ (conciliation followed by arbitration). There are some distinguishing features of these processes. For example, where there is a determinative component, the facilitative or advisory component may differ from other facilitative or advisory processes because the participants are aware that the practitioner is empowered to make a decision, and this may change the dynamics of the exchanges that take place. Also, the practitioner may be privy to information at the facilitative/advisory stage of the process that would not usually be revealed to a decision-maker in a determinative process. In some models the information may not be heard by the other party if it is provided in a private session with the dispute resolution practitioner.

2.10 These categories are not clearly separated and can be thought of as a continuum from most empowering (facilitative) to most directed (determinative).

2.11 A useful distinction may also be drawn between rights based and interests based ADR processes. Rights based processes focus on the participants’ legal entitlements. Interests based processes focus on the participants’ underlying needs and concerns and outcomes that may be outside those that could be ordered by a court. In general arbitration is regarded as a rights based process that may be conducted in a similar manner to a court proceeding. Mediation on the other hand is usually interests based. However, many mediation and conciliation processes involve a mixture of rights and interests based negotiation. The closer the connection with litigation, the greater the focus on legal rights rather than interests based solutions is likely to be.

BENEFITS OF ADR

2.12 ADR processes can be beneficial relative to litigation as they may:

- enable an appropriate process to be selected for the particular dispute/disputants as there are a range of different ADR processes (court processes may be less flexible)
- empower the participants to speak for themselves and determine the outcome of their own dispute
- enable the participants to reach an outcome that better meets their needs than a judicial decision (as ADR can be interests based and allow for agreements which, although lawful, fall outside the parameters of the legally defined dispute or legal precedent)
- be informal and therefore more accommodating of direct participant involvement
- be cheaper, less stressful and quicker
- produce an agreement that is more likely to be complied with and which may be more likely to finally resolve the dispute
- be confidential, and
- help to maintain or improve personal/business relationships.

2.13 Determinative, rights based ADR processes may have few of the advantages outlined above or have different ones altogether. Processes such as arbitration may offer confidentiality and greater flexibility than court proceedings due to party autonomy over the process. However, these processes may be more formal, costly and time consuming due to legal preparation, legal advice, the taking of evidence and the advocacy involved. Further, the participants may be represented by lawyers and have less opportunity to speak or to suggest or consider options that match their needs and interests.

2.14 In any event, the extent to which any advantages of any ADR processes are realised depends on a number of criteria, including not only the type of ADR process, but also its appropriateness to the dispute, the quality of the process, the skills of the practitioner and the degree of understanding and commitment of the participants and any support persons or professional advisers.

INCONSISTENT USE OF ADR TERMS

2.15 There is little consistency in how ADR terms are used. Even when mentioned in Commonwealth legislation, ADR processes are not clearly defined.

2.16 In 2002, NADRAC released *ADR Terminology: A Discussion Paper* which led to its report *Dispute Resolution Terms* (2003). This included a *Glossary of Common Terms*. With subsequent amendments, the Glossary continues to represent NADRAC's views on appropriate terminology and can be accessed on the NADRAC website.

- 2.17 In addition, some organisations have developed their own descriptions. For example, the Administrative Appeals Tribunal has published ‘process models’ for each form of ADR available at the Tribunal, which describe how each form of ADR works in the Tribunal.³
- 2.18 The term ‘mediation’ is currently used in a variety of ways including to describe advisory processes where there may be little input by the parties.
- 2.19 NADRAC has described mediation as:
- ... a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.*⁴
- 2.20 The Australian National Mediator Accreditation System that commenced on 1 January 2008 defines mediation in a similar way noting that mediations are primarily facilitative processes.⁵ The Standards also explain that ‘blended processes’, ie processes that blend mediation with an ‘advisory’ component like expert information or advice, are more properly defined as ‘conciliation’ ‘advisory mediation’ or ‘evaluative mediation’. It is hoped that over time the Standards will encourage greater consistency in how the term mediation is used.
- 2.21 Other terms such as ‘conferencing’ and ‘conciliation’ are used in almost as many ways as ‘mediation’. Others such as ‘case presentation’ or ‘mini-trial’, ‘early neutral evaluation’, ‘case appraisal’, and ‘restorative justice’ are not generally well understood and may be used in different ways.
- 2.22 In addition, it may be that some people conceive ADR as no more than legal settlement negotiations facilitated by a third person. It would be unfortunate if this narrower conception came to be the common understanding of ADR, because such processes may not allow participants to realise the benefits offered by many other ADR processes. For example, in facilitated legal settlement negotiations the process may be more centred on law and lawyers, with less involvement of the disputants and less opportunity for them to speak for themselves. Participants might not feel able to reject settlement options or suggest options that would meet their particular interests. This kind of negotiation may not assist in addressing broader interests or in maintaining relationships, as a process like mediation could.

RATIONALE FOR CONSISTENT TERMINOLOGY

- 2.23 There are important reasons for pursuing consistent terminology. Common definitions or descriptions assist consumers, referrers, evaluators, researchers and policy makers by ensuring that they each have sufficiently consistent and accurate information.

³ See www.aat.gov.au.

⁴ NADRAC, above n 2, 9.

⁵ See Australian National Mediator Standards, Approval Standards, 4–5, available at www.nadrac.gov.au.

- 2.24 The inconsistent use of ADR terms may threaten the development of ADR. It may lead to unrealistic consumer expectations and dissatisfaction, inappropriate referrals, a lack of comparative research and evaluation and poor policy development. If common terms are used, new terms can be adopted to differentiate new ADR processes as they emerge.

2 About ADR — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal'.

- 2.1 To what extent is there a need for greater consistency in the use of ADR terms? How could this be achieved? What are the risks of greater consistency in the use of terms?
- 2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?
- 2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?

3 PROMOTING PUBLIC AWARENESS OF ADR

- 3.1 A potentially significant barrier to the use of ADR may be a widespread lack of knowledge and understanding about ADR amongst the public. It is likely that the inconsistent use of ADR terminology is both a result of, and an ongoing contributor to, this phenomenon.
- 3.2 A lack of awareness of ADR may lead to:
- a failure to consider it in many disputes
 - deeming it inappropriate when there may in fact be appropriate types of ADR available
 - under-utilisation of ADR practitioners who may find it difficult to maintain a full-time practice or gain sufficient experience to effectively maintain their skills, and
 - misconceptions about ADR.
- 3.3 As a result many disputes that might effectively be resolved through ADR will continue to end up in courts and tribunals.
- 3.4 There are many ways in which public awareness of ADR could be enhanced. Possibilities might include:
- a high profile public promotional campaign – the campaign would need to be ongoing as most users of ADR services are one-off users who may never again have a significant civil dispute
 - a promotional campaign specifically targeted at those people who are regular users of the civil justice system including federal, State and local government agencies and big business
 - creation of a central access point for information about, and assessment and referral to, appropriate ADR services including a well promoted information and referral hotline, and
 - a statutory requirement for lawyers to provide information about ADR to their clients and for courts to provide information about ADR to all prospective applicants.
- 3.5 Some issues that would need to be taken into account in this context would be:
- the need for specialised information for disadvantaged or marginalised communities including Indigenous peoples and people from other cultures
 - the need to avoid competition and confusion between federal and State initiatives – a holistic national approach would be most desirable if it could be achieved, and
 - the level of demand created for ADR by these initiatives and the capacity of the ADR workforce to meet it and maintain the quality and integrity of ADR services.

- 3.6 With respect to the last issue, it is often said that the number of trained ADR practitioners exceeds the current demand for ADR services in some areas. If that is so, there may not be a problem meeting greater demand in the medium to long term. However, many ADR practitioners may have given up their practice or had so little regular experience that their skills have diminished. Consequently, the standard of services may be a concern. It is also possible that the global financial crisis will increase the demand for ADR services, or change the market for these services in other ways. It may be appropriate to precede any public promotional initiatives with a campaign targeted at ADR practitioners encouraging them to update their skills. For example, mediators could be encouraged to seek updated accreditation under the National Mediator Accreditation System.

3 Promoting public awareness — Questions

- 3.1 To what extent is there a need to improve the understanding of ADR and its differing processes in the general community? How might this be achieved?
- 3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?

4 PROVISION OF ADR SERVICES

- 4.1 The Attorney-General's reference asks NADRAC to specifically consider 'whether there should be greater use of private and community based ADR services'. This raises the issue of whether ADR services should be provided within courts, outside the courts or both and what the correct balance of services should be.
- 4.2 In this chapter ADR 'services' are distinguished from ADR techniques used by courts to enhance their own adjudicative processes. The latter are dealt with at Chapter 7.

WHERE ARE ADR SERVICES PROVIDED?

- 4.3 Many ADR systems and services operate outside the court and tribunal system and are staffed by those who are external to courts and tribunals, for example services provided by private ADR practitioners and government funded community organisations. Other ADR services and systems operate within the courts and tribunals and are staffed by court officers or employees. For example, the Federal Court's mediation service is staffed by Federal Court Registrars.
- 4.4 Most ADR service providers are:
- private practitioners, from a range of professional backgrounds, who may or may not be accredited by or linked to some of the large ADR organisations or professional groups
 - private companies who specialise in providing for-profit ADR services
 - government agencies such as Legal Aid Commissions, the NSW Community Justice Centres, the Victorian Dispute Settlement Centres, Queensland's Dispute Resolution Centres, the Northern Territory Community Justice Centre and Western Australia's Aboriginal Alternative Dispute Resolution Service
 - government funded community organisations such as Family Relationship Centres, Relationships Australia, Anglicare, Centacare and Unifam in family disputes, and the ACT's Conflict Resolution Service and Positive Solutions (Tasmania) in more general disputes, and
 - industry/ombudsman schemes.
- 4.5 The way in which ADR services are provided varies between jurisdictions. For example in federal civil disputes (excluding family law matters), matters in which litigation has not yet been commenced are likely to be resolved by private ADR practitioners and industry ADR providers. After litigation is commenced, the majority of ADR services are provided by federal courts and tribunals, with little private sector involvement. However, in federal family disputes, most ADR services, known as family dispute resolution, are provided by government funded community organisations, Legal Aid Commissions and private ADR practitioners. In the States and Territories, it is understood that government agencies and government funded community organisations provide most of the

ADR services in family and smaller civil disputes. However, in larger civil disputes the courts and/or the private sector may provide most ADR services.

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4.6 Most disputes do not come before a court or tribunal, but are resolved privately. Of those that do enter the court or tribunal system, only a small proportion are determined by judicial decision. Increasingly matters are resolved by the use of ADR. ADR processes may be used by the parties independently, or after active referral by a court or tribunal.⁶

4.7 There are essentially five avenues for the use of ADR in resolving legal disputes:

- ADR prior to litigation, whether self-initiated or by referral, court rule or statutory stipulation
- ADR post litigation commencement which is either:
 - self-referred with or without the court's knowledge
 - referred by the court or ordered by the judge, but conducted by a practitioner who is external to the court
 - referral by the court or ordered by the judge and conducted by court officers, or
 - integrated into the court adjudication process and conducted by judicial or quasi-judicial officers.

4.8 The question of the appropriate role of courts in providing ADR services raises a number of issues including:

- how to reconcile the objective of ADR services (private consensual agreement) with a court's role of administering public justice according to law
- comparing the benefits of court provided ADR services to external services
- the possible impact of providing ADR services within the courts on the market for ADR services outside the courts, and
- the possibility that if court provided ADR services are of a higher quality or cheaper than services provided outside the court, disputants might commence legal proceedings in order to access them.

4.9 The appropriate role of courts and judicial officers needs to be considered in this context.

MULTI-DOOR COURTHOUSE

⁶ See T Sourdin, *Alternative Dispute Resolution* (3rd ed, 2008), 170.

- 4.10 The idea of the multi-door courthouse has been discussed for many years. Essentially, it describes a court as a dispute resolution centre which provides assessment and referral services, various types of ADR services as well as court processes in a ‘one-stop shop’.⁷
- 4.11 The model assumes that the various devices that exist to direct parties to ADR outside the court system are inadequate and therefore parties need guidance from the court to access the range of dispute resolution processes.⁸ The ‘one-stop shop’ character of the multi-door courthouse has been described as an advantage. However, it has also been argued that a court’s authority may be undermined if it operates as a community dispute resolution centre.
- 4.12 In democratic societies the role of the court is traditionally seen as being a public forum to which citizens can come to have their disputes decided based on their legal rights and to receive a legally enforceable decision.⁹ The court’s role is to exercise the authority of the state to determine disputes according to law, rather than to assist parties to determine their own disputes. On this view, private and confidential ADR processes which may result in interests based rather than rights based outcomes would have a limited role to play. However, an alternative view is that ADR has an integral role in the court system and should be used to a greater extent by courts and tribunals.
- 4.13 There may be other ways in which to achieve the advantage of the ‘one-stop shop’ without risking undermining the courts’ authority. For example, a ‘one-stop shop’ may be created outside the courts, providing information and advice about managing disputes, making referrals to appropriate ADR services or the courts or perhaps providing ADR services.

AGREEMENTS ON FACTS

- 4.14 Resolution of a dispute may be hindered by a lack of clarity as to which particular facts are in issue. It may be helpful for courts or tribunals to refer parties to an ADR process early on in a dispute for the purpose of producing an agreed statement of facts, and if necessary a list of facts which are still in issue.

JUDICIAL DISPUTE RESOLUTION

- 4.15 The concepts of ‘judicial dispute resolution’ (JDR) and ‘judicial mediation’ have recently grown in popularity. The Victorian Attorney-General has identified ‘judge-led mediation’ as a priority, stating that the imprimatur of a judge is the main reason judge-led mediations have a high success rate.¹⁰ Several overseas jurisdictions have trialled or implemented judicial dispute resolution, including the US, Canada, Germany, Denmark, Finland and Japan, with varying success.

⁷ For explanation and history of the concept, see the Hon Justice B Preston, ‘The Land and Environment Court of New South Wales: Moving Towards a Multi-door Courthouse – Part I’, (2008) 19 ADRJ 72; see also Australian Law Reform Commission, *Review of the Adversarial System of Litigation, ADR – its Role in Federal Dispute Resolution*, Issues Paper No 25, 1998, [5.58].

⁸ See Sourdin, above n 6, 276.

⁹ See Ibid, 18.

¹⁰ The Hon R Hulls, *Roadmap of Reform for Victoria's Justice System*, Media Release 14 October 2008, see also Victorian Law Reform Commission, *Civil Justice Review*, 2008, 248, referring to Matthew Drummond, ‘Vic push to use judges more in mediation’, *The Australian Financial Review* (Sydney), 1 February 2008, 71.

In Australia, members of the AAT can conduct mediations and conciliations, though this is primarily undertaken by conference registrars.

- 4.16 In the US and Canada, research indicates that a high percentage of lawyers believe that judicial involvement improves the chances of settlement of legal actions.¹¹ If this is true, greater judicial involvement in ADR might have benefits for litigants in terms of earlier and more efficient resolution of matters, and for the justice system generally in terms of more efficient disposal of litigation and reduced load on the court system.
- 4.17 It is unclear what the concept of JDR actually entails, and how it interacts with the traditional judicial functions. JDR has been described as ‘non-adjudicative procedures used by judges to assist settlements within [the] public justice system.’¹² The use of non-adjudicative procedures raises the question of whether such use is compatible with the traditional role of the judge. For example, if the main advantage of JDR is the judge’s seniority or standing, it may be asked whether JDR is an appropriate function for a judge. It has been argued that judicial dispute resolution or mediation has the potential to threaten public confidence in the integrity and impartiality of the court and the judge.¹³
- 4.18 It is also unclear what is meant by ‘judicial mediation’. The term has been used to generally describe court ordered mediations (as opposed to voluntary, consensual mediations). It has also been used to describe processes where retired judges are retained as mediators. More commonly, the term refers to mediations where current judges act as mediators. However, in relation to the latter two situations, it is often unclear what the ‘mediation’ comprises, ie whether facilitative processes are in fact used. In any event, if the process entails ‘mediation’ as described under the National Mediator Accreditation System, then several issues arise.
- 4.19 Judges’ inherent and highly developed skills of investigation, analysis and judgement may seem less relevant in mediation, understood as a facilitative, interests based process in which the mediator is required to foster communication and discussion of the issues and encourage the participants to reach a conclusion. A mediator is expected to suspend their personal judgement about the outcome and instead encourage the participants to consider all the options and reach their own solutions. Queries have also been raised about whether the judicial temperament is generally suited to facilitative processes like mediation.
- 4.20 On the other hand, it has been reported from jurisdictions where judicial mediation is practised that judges can quickly acquire mediation skills as an additional dispute resolution tool.¹⁴ These skills may be more readily acquired

¹¹ See D Spencer, ‘Judicial Mediators: Is the Time Right? – Part 1’ (2006) 17 ADRJ 130.

¹² The Hon H F Landerkin QC J, A J Pirie ‘Judges as Mediators: What’s the Problem With Judicial Dispute Resolution in Canada?’ (2003) 82 *Canadian Bar Review* 249, 271.

¹³ See the comments of Sir Laurence Street in a number of different forums, such as Sir L Street, ‘The Courts and Mediation – A Warning’ (1991) 2 ADRJ 203; and Sir L Street, ‘Mediation and the Judicial Institution’ (1997) 71 ALJ 794.

¹⁴ Landerkin and Pirie, above n 12, 271; and The Hon L Otis J, E H Reiter ‘Mediation by Judges: A New Phenomenon in the Transformation of Justice’ (2006) 6 *Pepperdine DRLJ* 351, 353.

in inquisitorial or hybrid judicial settings.¹⁵ It has also been suggested that a judicial officer could be in a better position to manage power imbalances than an ADR practitioner.

- 4.21 The implications of judges engaging in a confidential process such as mediation seem unclear. For example, if there is dissatisfaction about the conduct of a judge, but the process is confidential, dealing with complaints may be difficult. This may be exacerbated by the fact that where judges are immune from being sued for negligence when conducting mediation, it may leave participants with no legal remedy for inappropriate conduct. Dissatisfaction with a judges' conduct in mediation at least has the potential to reflect negatively upon the judiciary as a whole, thus effecting the public perception of, and confidence in, the judiciary.
- 4.22 Where judges are exercising the judicial power of the Commonwealth, this may also have constitutional implications. In Australia, the prevalent view appears to be that judicial mediation is not part of the exercise of the judicial power of the Commonwealth.¹⁶ As mediation may involve private sessions with the participants, a question arises as to whether this is appropriate for judges to do and whether it could cause an appearance of bias. Further, judges' conduct in mediation could affect their reputation in performing their usual judicial duties.
- 4.23 Judges may be reluctant for various reasons to act as a facilitative intermediary or take a more active or interventionist role, for example by expressing preliminary views about the issues. Judges might be unsure about how far they can go in expressing views without creating an appearance of bias.
- 4.24 A question arises as to whether JDR is an appropriate use of taxpayer funds. Judicial time is expensive, particularly if there are large numbers of high quality and relatively inexpensive ADR providers outside the courts to which parties may be referred. If judges are more successful in achieving resolutions than other practitioners, their participation in ADR may not be considered an inefficient use of resources. However, many non-judicial mediation programs are said to produce very high rates of agreement.
- 4.25 It may be that determinative ADR processes, such as arbitration or case appraisal, are a better fit with the judicial skill set and/or judicial role.¹⁷ Some advisory processes might also be a better fit with the judicial role (although some processes like conciliation or evaluative mediation may raise similar issues to mediation). There may be some types of matters that are more amenable to resolution through JDR than others.

COURT OFFICER PROVIDED ADR SERVICES

¹⁵ See N Alexander, 'Mediation on Trial: Ten Verdicts on Court-Related ADR' in T Sourdin (ed) *Alternative Dispute Resolution and the Courts*, 2004.

¹⁶ See P Tucker 'Judges as Mediators: A Chapter III Prohibition' (2000) 11 ADJR 84, 88; the Hon M Moore J 'Judges as Mediators: A Ch III Prohibition or Accommodation?' (2003) 14 ADJR 188, 194; and D Spencer 'Judicial Mediators: Is the Time Right? – Part I' (2006) 17 ADJR 130, 137–139. Concerns expressed may be met, at least in part, either if JDR did not involve any private sessions, whether with a single party or all the parties, or if JDR took place in open court.

¹⁷ See, for example, the discussion of judicial case appraisal at Chapter 8.

4.26 Court officers are currently providing ADR services. For example, registrars of the Federal Court are also Federal Court mediators, and conference registrars in the AAT commonly chair conferences and also conciliate.

4.27 Some of the issues raised above in relation to judges may also be relevant to court officers. For example:

- the impact on public perceptions of the court if court mediators were perceived as biased and/or putting pressure on the parties
- whether ADR services provided by court officers should be held to the same standards as private and community ADR services
- the impartiality of the practitioner and confidentiality of the proceedings – some parties might be reluctant to use court services for fear that they will be pressured into agreement or that information they reveal will be passed on to other court staff or a judge who may later hear the matter, and
- the reluctance of participants to complain about the conduct of a senior court officer, such as a registrar, acting as a mediator.

4.28 Consideration may also need to be given to:

- the advantages of having court staff provide ADR services as distinct from referring parties to private or community services, providing ADR within the court might make referral quicker, and therefore mean quicker resolution of disputes
- the cost implications of training court staff to undertake ADR services and diverting them from their usual duties to provide these
- whether the full cost is passed on to users, or whether court ADR services are publicly subsidised (and the relative costs of subsidising court services and government funding of community-based mediation services)
- whether courts should engage dedicated ADR practitioners, who would have no court role apart from providing ADR services, and
- what training and experience court based ADR practitioners should have.

PRIVATE, COMMUNITY BASED AND GOVERNMENT ADR SERVICES

4.29 The issues in relation to private and community based ADR services include quality, cost and access to these services. In federal civil disputes, as distinct from family law disputes, private practitioners provide most of the pre-filing ADR services. However, the standard of the services may vary considerably.

4.30 An advantage of private and community based services is that they are provided away from the court, potentially helping to preserve the integrity of both the courts as an adjudicative forum and of ADR as an alternative forum for private and consensual resolution of disputes. If high quality and inexpensive ADR services are readily available in the community, this may encourage more disputants to attempt ADR before commencing legal proceedings.

- 4.31 The cost of private and community services varies considerably. Some services are free or very low cost. Certain services funded under the Family Relationship Services Program by the Commonwealth Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs apply a sliding scale subject to a client's income. Services provided in most corporate disputes range from less than \$1,000 per day to \$15,000 per day.
- 4.32 Fees charged are not necessarily directly related to the quality of the service. Services provided by State government agencies and government funded community services for no or minimal fees may be of high quality. For many years those services have had extensive training, supervision and continuing education requirements that have exceeded requirements elsewhere in the private sector. However, the fact that they are free or low cost might actually deter some potential users. In addition, many highly competent practitioners charge quite low fees. Higher fees tend to be charged by 'persons of note', usually senior members of the bar and retired judges, and may be more of a reflection of their legal knowledge, seniority and their capacity to bring authority to bear on the disputants.

QUALITY OF ADR SERVICES

- 4.33 The quality of ADR services has been an area of longstanding work for NADRAC. Consistent with its Charter (Attachment A), NADRAC began working on the issue of standards shortly after its establishment in 1995. NADRAC has faced several challenges in doing so, including:
- a lack of clear distinctions between ADR services
 - the fear amongst ADR practitioners that the development of consistent standards may constrain practice ('let 1,000 flowers bloom'), and
 - widely different views and interests of, and rivalries between, ADR organisations and the lack of any peak representative body with a broad view.
- 4.34 NADRAC has released discussion papers and reports concerning ADR standards.¹⁸ NADRAC has recommended that standards for ADR be developed and that all ADR service providers adopt and comply with an appropriate code of practice and an appropriate system for managing complaints.
- 4.35 It is sometimes said that there are few reported complaints about ADR. This could be thought to indicate that ADR services are of a very high quality. However, the low number of complaints may not indicate that there are no problems with ADR services. NADRAC members have received anecdotal reports of unsatisfactory practice that would normally constitute grounds of complaint. These reports included:
- that participants were misled about the purpose and nature of the process
 - breach of expectations of confidentiality

¹⁸ *The Development of Standards for ADR, 2000, and A Framework for ADR Standards, 2001.*

- appointment of practitioners without any reference to their training, experience and qualifications
 - inappropriate use of ADR in cases involving violence
 - the application of duress or pressure to resolve disputes, and
 - conflicts of interest.
- 4.36 Other explanations for the low number of complaints might include lack of a national complaints procedures and low public awareness about ADR and what constitutes good practice. Also, participants generally use ADR services only once and consequently have no basis for comparison. Where users are referred to an ADR service by an authoritative institution such as a court, they may be concerned that a complaint about the ADR service may damage their interests. Further reasons might include the confidentiality of ADR processes and statutory immunity which protects some practitioners from complaints about unprofessional or negligent conduct.

ACCREDITATION SYSTEMS

- 4.37 A range of accreditation systems cover ADR practitioners in Australia. However, most are State/Territory based or imposed by particular organisations, such as courts and large membership bodies, with respect to their own employees or members. NADRAC is only aware of two statutory registration schemes, the national scheme of family dispute resolution practitioner accreditation standards under the *Family Law Act 1975* (Cth) and a scheme provided under the ACT's *Mediation Act 1997*. The National Mediator Accreditation System is a non-statutory scheme.

NATIONAL MEDIATOR ACCREDITATION SYSTEM

- 4.38 The voluntary industry National Mediator Accreditation System commenced on 1 January 2008. Some information on the development of the System is available on NADRAC's website. It is an overarching national accreditation scheme that sets a minimum level of standards for all mediators irrespective of their field of practice. Other specialist mediator accreditation schemes exist side by side with it. Those specialist schemes impose additional requirements for mediators who wish to practice in particular fields or to seek employment with or membership of a specific organisation.
- 4.39 The scheme is largely regulated by industry and government organisations. Under the National Mediator Accreditation System, ADR organisations called 'Recognised Mediator Accreditation Bodies' are responsible for accrediting individual mediators. Currently Recognised Mediator Accreditation Bodies include courts, government bodies, bar associations and law societies. Recognised Mediator Accreditation Bodies and accredited mediators must comply with the national Approval Standards and Practice Standards and meet certain other requirements.
- 4.40 A permanent national Mediator Standards Body is to be established from 2010. It will replace the existing National Mediator Accreditation Committee Inc. The

Mediator Standards Body will be responsible for reviewing and developing the Standards, monitoring compliance and promoting mediation.

- 4.41 It is hoped that the National Mediator Accreditation System will be effective in establishing minimum standards, increasing the quality of mediation services in Australia and ensuring that participants in mediation have an effective avenue for complaint. It is a voluntary scheme, there is no requirement for people providing services called 'mediation' to be accredited under it. However, some organisations, courts and governments have indicated that they will only use mediators accredited under the system, for example the Federal Court.
- 4.42 Ultimately, the success of the National Mediator Accreditation System will depend upon the level of compliance by Recognised Mediator Accreditation Bodies and the capacity of the Mediator Standards Body, courts and tribunals, private and community ADR service providers and other agencies to encourage or enforce compliance. The Mediator Standards Body will need significant resources if it is to conduct an ongoing public education campaign to promote mediation and the available complaints mechanisms. It must be expected that the System will take time to properly bed down and become fully functional.

FAMILY DISPUTE RESOLUTION PRACTITIONER ACCREDITATION

- 4.43 The Family Law Act and the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) establish a specialist accreditation and registration system for family dispute resolution practitioners. Practitioners who meet the competency-based accreditation requirements can become registered family dispute resolution practitioners and provide family dispute resolution services under the Family Law Act.¹⁹ One of the ways to meet the competency requirements is to complete a Vocational Graduate Diploma of Family Dispute Resolution. This higher education qualification was developed specifically for the new accreditation system. The system of accreditation is managed and funded by the Commonwealth Attorney-General's Department, though training is largely funded by practitioners.

PRACTITIONER EDUCATION AND TRAINING

- 4.44 Many ADR practitioners may have no more than a few days training, sometimes undertaken many years ago. If they are not accredited under the National Mediator Accreditation System, they may not be subject to any continuing education or training requirements. Other practitioners may have more training in the field and may have completed a relevant university degree.
- 4.45 Once initial training has been provided, it can be difficult to ensure that practitioners continue to provide high quality services. For example, judging the effectiveness of a mediator by success rates can be unsound. A poor mediator who uses highly manipulative or coercive tactics may have encouraged resolution of disputes but there may be problems with longer term compliance as well as disputant satisfaction. Satisfaction rates may be a better indicator, but satisfaction is a subjective criterion for judging practitioner performance. Satisfaction might merely reflect the participants' low enthusiasm or

¹⁹ There are other ways to become registered. Practitioners who have been nominated by a body designated by the Commonwealth Attorney-General, or authorised by a federal court, can be registered without meeting the accreditation requirements.

expectations of the process. Due to the different use of terminology and considerable variations in processes that may go by the same name, sound comparative data is difficult to obtain.

- 4.46 The National Mediator Accreditation System requires 5 days of initial training and education, in addition to a formal assessment and a requirement for continuing professional development. However, as noted above, the National Mediator Accreditation System is voluntary and not all those who hold themselves out as ‘mediators’ will comply.

INTEGRITY OF ADR SERVICES

- 4.47 The lack of public awareness of ADR, the inconsistent use of ADR terms, the variation in levels of education and training of ADR practitioners, referrers and helping professionals, together with the range of very different professional backgrounds from which ADR practitioners are drawn, may tend to make the quality of ADR services vary. In addition, the lack of cohesiveness in the field may mean that variations in practice take place.
- 4.48 Even slight changes to an ADR process may significantly affect its integrity. A facilitative, interests based mediation process may be used as an example. Based upon the theory of empowerment of the participants to reach an agreement that may better meet their needs and interests than might a decision according to law, participants are encouraged to tell their own story and listen to the other side tell theirs. They are encouraged to speak for themselves wherever possible. Private sessions with each participant are an opportunity for the mediator to encourage each participant to think about what will best meet their needs and interests, what might meet the other side’s needs and interests and to reality test their understanding of potential outcomes. They also set the ground for the final negotiation phase of the process.
- 4.49 It is often said that it is the ADR practitioner’s role to manage this process. However, a mediator might face pressure to adjust the process of mediation in a way that meets the demands of referrers or users, but reduces its integrity (for example pressure to allow lawyers to speak entirely for their clients).
- 4.50 This may become a problem if compulsory mediation is introduced in an ADR market where there are few standards and little definition of processes. The National Mediator Accreditation System could provide some protection against this, but perhaps only to the extent that Recognised Mediator Accreditation Bodies are willing to monitor and enforce compliance. It should also be remembered that the National Mediator Accreditation System is voluntary and that Recognised Mediator Accreditation Bodies are not necessarily accrediting all their mediators to the national standard.
- 4.51 As noted above, in the family dispute resolution area, the existence of national community organisations providing government funded family dispute resolution according to settled standards may provide a bulwark against demand for changes in the way services are provided as a consequence of the introduction of compulsory family dispute resolution.

MINIMUM STANDARDS

- 4.52 Minimum standards have already been developed for mediators through the National Mediator Accreditation System. Minimum or aspirational principles could be developed for the ADR field as a whole. Drawing on the National Mediator Accreditation System, some possibilities might be:
- an impartial ADR practitioner, with no perceived or apparent conflict of interests unless consented to by all the participants – specific consideration may need to be given to how this may be interpreted in a process like collaborative practice
 - a process that is clearly articulated
 - participants and all professional support persons and advisers have been fully informed about the process before it commences
 - a separate intake and assessment process with each side and their respective advisers/supporters before the process commences
 - agreements regarding confidentiality over information provided during the process and the outcome (so that disputants clearly understand their confidentiality obligations and the status of any information they provide)
 - confidentiality in relation to any information revealed about third parties, unless the person to whom the information relates consents to it being made public
 - no coercion or intended manipulation of the participants by the practitioner to achieve a particular outcome
 - where the process is a facilitative one, ensuring that the participants are given the opportunity to tell their own story, hear the other person's story and to meet separately with the practitioner in a private session
 - where the process is an advisory one, the practitioner must hold the necessary professional qualifications in relation to any advice given during the process, and
 - where the process is a binding determinative one, rules of procedural fairness apply unless expressly waived in writing by all the participants after the practitioner has explained the implications of waiving them.
- 4.53 There will be other issues that deserve consideration. For example, it has been suggested that it is inappropriate to convene private sessions in advisory or determinative processes as it may give rise to a perception of possible unfairness or bias. In addition, there is a question about the propriety of legal practitioners giving advice to one or other participant in a private session that is not heard by the other participant. This may give rise to a solicitor-client relationship with one participant, thereby breaching the requirement of impartiality. NADRAC understands that it is usual in the US not to permit private sessions in advisory and determinative processes (indeed they may not be used in some facilitative processes).

- 4.54 In Chapter 5 of its report *A Framework for ADR Standards*, 2001, NADRAC recommended that all ADR service providers adopt and comply with an appropriate code of practice and set out the elements/standards that should be covered (**Attachment C**).

4 Provision of ADR Services — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'

Court services

- 4.1 What are the benefits and drawbacks of court based ADR?
- 4.2 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?
- 4.3 To what extent should judges or other court staff encourage disputants to use ADR (where not required by legislation)?
- 4.4 What role should courts have in facilitating or providing ADR?
- 4.5 To what extent might low cost, efficient court ADR services be a disincentive for disputants to use other ADR services before commencing proceedings? What could be done to overcome that?
- 4.6 What are the advantages and disadvantages of requiring court provided ADR services to meet the same standards as private and community based services?

Judicial dispute resolution

- 4.7 What are the advantages and disadvantages of judges conducting ADR processes? In particular, what are the advantages and disadvantage of judges conducting mediation (as described under the National Mediator Accreditation System)? Are there particular cases where direct participation by judges in ADR is more appropriate?
- 4.8 To what extent is it an advantage of judicial involvement that it improves the chances of resolution? Why might this be the case? To what extent might this have negative consequences?
- 4.9 To what extent might the confidentiality of ADR be undermined if a judge conducts it? What reporting requirements might apply?
- 4.10 To what extent are judges' skills and experience suited to facilitative processes like mediation, advisory processes like conciliation and blended processes like con-arb? How might judges' skills differ?

4 Provision of ADR Services — Questions continued

Court officer provided ADR

- 4.11 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?
- 4.12 What are the advantages and disadvantages of courts engaging specialist ADR practitioners to provide ADR? What are the advantages and disadvantages of courts engaging ADR practitioners with particular expertise, eg accounting, engineering, psychology, etc?

Private, community and government based ADR

- 4.13 What are the advantages and disadvantages of private ADR services and those provided by industry groups?
- 4.14 What are the advantages and disadvantages of existing ADR services provided by community organisations?
- 4.15 What are the benefits and drawbacks of existing government ADR services?
- 4.16 What are the advantages and disadvantages of courts referring matters to external ADR practitioners?
- 4.17 What are the advantages and disadvantages of providing specialised assessment, referral and dispute resolution centres outside the courts? What would the functions of such bodies be? How might they be resourced?
- 4.18 What is the appropriate role of government funding in relation to private and community ADR services?
- 4.19 To what extent is there a need for more, or more highly specialised, private, community based or government ADR services?
- 4.20 To what extent is there a need to improve the quality of private, community based or government ADR services? How can quality be enhanced?
- 4.21 Are there any issues relating to the fees charged for ADR services which need to be addressed?

5 REFERRAL AND ASSESSMENT

QUALITY OF REFERRALS

- 5.1 The quality of assessment of disputes and referral to ADR is an important issue. As noted in *Legislating for Alternative Dispute Resolution - A Guide For Government Policy-Makers and Legal Drafters*, NADRAC has emphasised the need to make proper assessments about the suitability of ADR processes for different cases and client groups.²⁰
- 5.2 A referrer may not be capable of assessing a dispute for suitability for referral unless they understand the different nature of the processes available and the likely impact on the participants/dispute dynamics. Referring agencies, including federal courts and tribunals, may not currently have an adequate understanding of the processes to make appropriate referrals.
- 5.3 Further, given the inconsistent use of terminology to describe ADR processes, it may be insufficient to make referrals based on general terms such as ‘mediation’ and ‘conciliation’. Those who are being referred should be fully informed about the type of process to which they being referred, how it differs from other processes and why they are being referred to that particular process.
- 5.4 In addition to appropriate initial referral, there is a need for ADR service providers to conduct an intake and assessment process to determine whether their service is appropriate in its current form, whether it should be varied or whether the participants should be referred elsewhere. The person performing the intake and assessment function may not be the dispute resolution practitioner. Specialist intake and assessment staff may be employed for that purpose. Intake and assessment processes should identify any potential violence or power imbalance issues before the ADR process itself is commenced.
- 5.5 The Practice Standards under the National Mediator Accreditation System only require mediators to ensure that participants have been provided with an explanation of the process and have had an opportunity to reach agreement about the way in which the process is to be conducted.²¹ The Standards merely state that this may take place in an intake process, rather than requiring such a process to be conducted.

PROFESSIONAL AWARENESS OF ADR

- 5.6 The legal profession may have an even more important role than the courts in informing/referring members of the public to ADR. As with the courts, this role may best be seen as a general referral role rather than a specialist intake and assessment function. The latter may be best left to people with specialist expertise.
- 5.7 Nevertheless, to provide information and refer appropriately, legal practitioners will need a broad understanding of the range of ADR services available and their particular benefits. While ADR has recently become a popular concept, and is widely used by disputants, it is uncertain how deep the understanding of ADR

²⁰ National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution - A Guide for Government Policy-makers and Legal Drafters*, 2006, 37.

²¹ Australia National Mediator Standards, Practice Standards, 6, available at www.nadrac.gov.au.

goes within the profession. The culture of the legal profession may not be conducive to referral to ADR, and some lawyers may fear it will take business away from them.

- 5.8 Legal practitioners might be encouraged to learn more about ADR if it was strongly advocated by legal professional bodies, including law societies and bar associations. There has been an increasing amount of ADR training provided by such bodies in recent years (and uptake of that training by legal practitioners). Still, there is a question as to whether such training will give legal practitioners the tools they need to refer appropriately.
- 5.9 In addition, few law schools in Australia offer significant education about ADR as part of their core curricula for law students. This could be a significant oversight considering that many legal practitioners will need to refer their clients to ADR or to attend an ADR process with their client. Further, there are some ADR processes which require specific skills in negotiating, representing, supporting and advocating for clients. It is important for lawyers to understand the different forms of ADR, the different theories and purposes that underpin facilitative, advisory and determinative processes and what makes those processes different from adjudication in a court or tribunal. Lawyers also need an awareness of how their role in an ADR process differs from that of an advocate in court or tribunal proceedings.
- 5.10 Other professionals are regularly involved with ADR, including architects, engineers, planners, psychologists, social workers and accountants. They have an important role in referring disputes to ADR. Universities may not be adequately educating students in those areas about ADR. The education strategies that are adopted would depend upon the profession concerned and the particular information needs that they have.
- 5.11 Disputes may also be referred to ADR processes by business associations and consumer organisations.

COURT AWARENESS OF ADR

- 5.12 The courts play an important role in referring disputants to ADR. It is therefore important that court staff and judges have a very broad understanding of the range of ADR services available and their particular attributes and benefits.
- 5.13 Court staff and judges may have difficulty in developing and maintaining a sufficiently in-depth understanding of ADR processes to ensure that ADR referrals are effective. There is little empirical evidence on which courts' can rely to develop criteria to assist with this task.²² In that context it is understood that the Victorian Government is trialling an initiative of placing ADR experts from the Victorian Dispute Settlement Centres in courts to assist them in their referral role. Similarly, it may be unrealistic to expect court staff or judges to have the capacity to fully assess the disputants' or the dispute's suitability for any specific ADR process. There is an argument that the intake and assessment function for an ADR process, as distinct from referral, should be left to the ADR

²² See K Mack, *Court Referral to ADR: Criteria and Research*, Report for the National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 2003.

service provider (whether the ADR practitioner or specialised staff employed for that purpose).

5.14 Ways in which court awareness of ADR might be enhanced include:

- specific judicial ADR education programs
- more training about ADR for court staff, such as in-house court training programs, and
- secondments between courts and large ADR organisations.

5.15 To date, NADRAC's experience in advocating incorporation of more in-depth ADR information in judicial education programs has not been encouraging. There may be reluctance to do so, partly because it may be considered that judges already have a high level of awareness of ADR and partly because the judicial education program is already busy and ADR may have a lower priority. Special in-house training programs within the courts and tribunals may be more successful. Distinct programs may need to be developed to meet the specific interests and needs of court staff and the judiciary.

5 Referral and assessment — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'.

See also questions relating to referral and assessment at Chapter 4, Provision of ADR Services (re specialist referral centres) and Chapter 6, ADR and Litigation (re mandatory referral).

- 5.1 To what extent is there a need to enhance the understanding of ADR and negotiation in legal or other professions? How might the information and referral functions of professionals be enhanced? What are the advantages and disadvantages of introducing compulsory ongoing training about ADR for lawyers?
- 5.2 To what extent is there a need to enhance the understanding of ADR amongst court staff and judges? How might their information and referral functions be enhanced?
- 5.3 To what extent is there a need to increase the emphasis on ADR in university courses? In which faculties? What are the advantages and disadvantages of making ADR a compulsory subject for certain students?

6 **ADR AND LITIGATION**

6.1 In his letter of reference to NADRAC the Attorney-General said:

I am interested in the question of how to encourage greater use of alternative dispute resolution (ADR) in civil proceedings.

I am concerned about the barriers to justice that arise in the context of civil court and tribunal proceedings. It is very important to encourage parties to civil proceedings to make greater use of ADR to overcome court and tribunal barriers to justice.

6.2 ADR and direct negotiation are used to solve many disputes that might otherwise be the subject of civil proceedings. However, it may be that ADR use can be increased both in the pre-litigation context and in the context of programs and referrals that take place once a matter has been filed in a court or tribunal. This chapter considers some barriers and incentives to ADR in the civil justice system. Some of the issues raised here are dealt with in greater depth in other chapters.

BARRIERS AND INCENTIVES

BARRIERS TO ADR

6.3 Various features of the civil justice system may present barriers to the use of ADR as an alternative or an adjunct to litigation. These may include:

- legal barriers, for example possible constitutional limitations on legislative action that may be taken in the federal civil justice system
- cost of ADR services, doubts about whether these will be recoverable after proceedings and reluctance to share ADR costs
- the timing of ADR referrals and use may mean that substantial costs have already been incurred by the time ADR processes are contemplated, thus reducing their cost saving benefits
- lack of community knowledge of ADR and lack of understanding of ADR amongst some referrers, and
- the quality and availability of ADR services.

6.4 There may also be cultural barriers. For example, it is sometimes asserted that the adversarial culture of the legal profession is a barrier to greater use of ADR. The nature of the adversarial system may make parties, or their lawyers, reluctant to reveal information during an ADR process that might later compromise their case in a hearing. In some circumstances, large and comparatively well resourced parties may be tempted to choose litigation because they think they can outlast the other side.

6.5 Cultural differences between participants may also create a barrier to the use of ADR. It may be difficult for disputants from some cultural backgrounds to access ADR services.

- 6.6 Procedural or substantive rules concerning commencement of proceedings might discourage ADR before litigation is commenced. For example, most applications for judicial review in the Federal Magistrates Court and Federal Court are subject to a time limit during which an application for judicial review may be made. Even if no particular time limit is stipulated, an applicant may wish to commence proceedings quickly to avoid the possibility of relief being refused on discretionary grounds such as delay.
- 6.7 A lack of access to information may also create a barrier to use of ADR. The participants may not feel that they have access to sufficient information about the dispute to reach an agreement in ADR, or their legal advisers may not feel they have enough information to provide advice about possible litigation outcomes. By contrast, during litigation, parties have an opportunity to use court or tribunal processes to obtain necessary information.
- 6.8 Lastly, where parties are referred to ADR during the litigation process, it is possible that adjourning proceedings to allow ADR to occur, and the time taken in preparing for participation in ADR, might cause delays and increased costs for participants and publicly funded legal service providers.
- 6.9 Such barriers may apply prior to the commencement of proceedings, after commencement or both.
- 6.10 A lack of clarity about dispute resolution procedures in contracts may also create a barrier to use of ADR. Issues arising in relation to ADR clauses in contracts include:
- which forms of ADR should be covered
 - how much flexibility should be allowed as to the ADR procedure, timetable, appointment of mediator and fees
 - whether the head of any particular ADR provider should be specified as the person who will appoint the practitioner where the parties cannot agree
 - which rules should apply
 - whether there should be a contractual obligation to participate in good faith,²³ and
 - procedures to apply where one party breaches the clause by refusing to participate/participate in good faith, or by commencing court proceedings.
- 6.11 NADRAC has prepared a draft model mediation clause for use in contracts (see **Attachment D**), based on the Law Society of NSW precedent. NADRAC is interested in receiving feedback about whether this would assist parties to contract to use ADR.

INCENTIVES TO USE ADR

²³ See discussion of issues in relation to 'good faith' later in this Chapter.

- 6.12 There may be a range of possible strategies for creating incentives to use ADR, both before and after commencing legal proceedings. Some ideas are set out in more detail below. However, this list is not exhaustive and other suggestions are welcome.

CIVIL PROCEDURES AND LITIGATION PRACTICE

- 6.13 The Attorney-General's reference asks NADRAC to consider changes to civil procedure to provide incentives to use ADR. Some initiatives that have been suggested are:
- a fast-track court process could be offered for those matters in which ADR has already been attempted
 - mandatory ADR, including possible model litigant type obligations/pre-action protocols (see discussion later in this Chapter)
 - mandatory dispute management plans for government agencies, large corporations and frequent users of the justice system, and
 - education/training of court staff and the judiciary to assist them to identify disputants/ disputes that might benefit from ADR and to make effective referrals.

COURT FEES

- 6.14 Changes in the way court fees are imposed might provide incentives to use ADR. For example:
- weighted filing fees could be introduced so that commencing litigation is more expensive where ADR has not been attempted, and
 - a refund of filing fees could be offered for cases which resolve at ADR.

COSTS

- 6.15 Changes to the costs of litigation or ADR may provide financial incentives to use ADR. For example:
- a judicial discretion to take into account whether a party has attended ADR when deciding costs issues
 - judges could be empowered to recover the court's full costs of hearings
 - the costs incurred in participating in ADR could be recoverable
 - decreasing the cost of ADR, for example by making the cost of participating in ADR tax-deductible for individuals
 - increasing the relative cost of litigation, for example, by removing or limiting the tax-deductibility of litigation costs for companies, and

- extension of legal aid to cover the cost of participating in ADR, including associated legal costs, to make it easier for lower income disputants to access ADR.

LEGAL PROFESSION/OTHER PROFESSIONS

6.16 It has been suggested that some changes could be made in relation to the legal profession and possibly other professions that might help to encourage greater use of ADR. For example:

- finding ways to reward lawyers, particularly those funded by legal aid, for resolving disputes without litigation
- requiring legal representatives to certify that they have given advice on the prospects of the matter succeeding in litigation
- requiring lawyers to certify that they have provided their clients with advice about ADR²⁴ and its possible advantages
- requiring lawyers to discuss the use of ADR with the other party or their representatives
- adding an obligation to consider or advise on ADR to the ethical and professional obligations of lawyers and other relevant professionals, or strengthening such a requirement where it already exists, and
- more education/training of lawyers and other relevant professionals about ADR.

LITIGANTS

6.17 There may be some initiatives that will help to ensure that litigants themselves are aware of, and consider, the benefits of ADR. For example, there might be a requirement for litigants to certify that they have been informed by their legal practitioner of the prospects of success in litigation and that they have been informed of the range of ADR services available to assist them to resolve the matter without a judicial hearing.

6.18 More public information about ADR may also encourage litigants to take a proactive approach and to ask their lawyers/legal representatives about it.

ADR SERVICES

²⁴ Such a requirement already exists in the *Family Law Act 1975*.

- 6.19 Initiatives which improve the availability and quality of ADR services may assist, particularly if informed by improved data collection and research about the relationship between ADR and civil litigation. Evaluations of ADR services based on sound data could assist in identifying where ADR is most effective. Targeted promotion of ADR based on these evaluations could assist litigants, lawyers and the courts to make more informed and effective decisions about the choice of ADR relative to litigation.

6 Barriers and incentives — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'.

- 6.1 What are the barriers to the use of ADR before civil proceedings are commenced? To what extent, do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?
- 6.2 What are the barriers to use of ADR after civil proceedings have been commenced? To what extent do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?
- 6.3 To what extent and in what ways is the culture of the legal profession a barrier to greater use of ADR? Why? What could be done to remove this barrier?
- 6.4 To what extent and in what ways is the adversarial nature of the civil justice system a barrier to greater use of ADR? Why? What could be done to remove this barrier?
- 6.5 What changes to cost structures and civil procedures could be made to remove practical and cultural barriers to the use of ADR, both before commencing litigation and throughout the litigation process?
- 6.6 To what extent is the cost of ADR services, or inability to recover costs for ADR, a barrier to early use of ADR? What could be done to remove any barrier?
- 6.7 How might the use of the draft model mediation clause at Attachment D assist in overcoming barriers to the use of ADR? How might the use of such a clause be encouraged? Would it be helpful if such a clause were implied into all contracts?
- 6.8 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR before commencing litigation?
- 6.20 The Attorney-General has asked NADRAC to specifically consider 'whether mandatory requirements to use ADR should be introduced'.

- 6.21 Many courts have power to order parties to attend ADR. The *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999*, the *Native Title Act 1993* and the *Family Law Act* all permit judges to do so. This is discretionary and its effectiveness depends upon the knowledge and skill of the judicial officer concerned. Parties can also be directed to attend ADR in the Administrative Appeals Tribunal and the Human Rights Commission.
- 6.22 Annual reports from the federal courts indicate that only a small percentage of matters are referred to ADR processes. Possibilities for increasing the use of ADR may be to state in legislation that attendance at ADR is required before filing proceedings or that the default or usual position should be referral to ADR once proceedings are filed, unless the court or tribunal is persuaded otherwise.
- 6.23 Historically, mandatory ADR was opposed by some in the ADR sector on the basis that voluntary participation was an essential element of ADR processes and that mandating attendance could discourage resolution and damage public perceptions of ADR. There now appears to be some acceptance that mandating attendance at ADR, or at least attendance at an initial intake and assessment process, has positive outcomes and may encourage some people to attempt the process who would initially have rejected the option. The imposition of mandatory requirements about the conduct of participants in ADR, for example ‘good faith’ or ‘genuine attempt’ requirements is more controversial (see below).
- 6.24 Legislative requirements to use ADR, including requirements to participate in good faith/make a genuine attempt to resolve the dispute, already exist in a number of federal and State jurisdictions. In the federal sphere, the *Family Law Act* was recently amended to require separating parents to attempt to resolve parenting issues through family dispute resolution before they file an application for a parenting order in the Family Court or Federal Magistrates Court. There are a number of exceptions to the requirement to attend family dispute resolution.²⁵

BENEFITS OF MANDATORY ADR

- 6.25 Mandatory ADR requirements may be beneficial for disputants if they are able to resolve their disputes more cheaply and efficiently than through accessing the court system. More disputes may be resolved early on rather than progressing to court. A mandatory requirement may reduce the amount of litigation in the federal courts and tribunals, easing the strain on these public resources. For example, applications for parenting orders in the Family Court and the Federal Magistrates Court have declined since the introduction of the requirement to attempt family dispute resolution before filing an application. If the requirement applies after filing, it might help to reduce the time taken to finalise matters filed in courts and tribunals.

²⁵ For example, parties are not required to attend family dispute resolution where the matter is urgent or if the court is satisfied that there are reasonable grounds to believe that there has been family violence or child abuse by a party. When applying to the court, parties need to provide information to demonstrate that one of the exceptions applies. See Part VII of the *Family Law Act 1975*.

FORM OF MANDATORY ADR REQUIREMENTS

6.26 Possible forms of statutory ADR requirements include:

- a provision requiring mandatory consideration of ADR by litigants and/or their legal representatives
- a provision that makes attendance at ADR, or a particular form of ADR, a prerequisite to commencing legal action (eg recent amendments to the Family Law Act)
- a provision making attendance at ADR, or a particular form of ADR, a requirement after commencing legal action
- a provision which allows a court or tribunal to compel attendance at ADR, which may or may not include guidance on how the question of referral to ADR should be approached, and
- pre-action protocols – a set of provisions requiring litigants or their lawyers to take certain steps before commencing litigation, including attempting to resolve the matter through ADR or otherwise.²⁶

6.27 A statutory requirement to consider ADR, or to attempt to resolve the matter through ADR, could be achieved through a clear statutory obligation, through an overriding purpose type obligation or with a model litigant type obligation similar to that imposed on federal government agencies.²⁷ Overriding purpose obligations may be imprecise or subjective, leaving room for interpretation and avoidance. However, attempts to be more prescriptive may lead to results that are criticised as being unjust, arbitrary or ineffective. Also, it may be worth considering imposing model litigant style obligations on frequent users of the justice system rather than all users.

6.28 A statutory provision mandating ADR may require clear definitions of the process or processes to be used, based on some evidence as to the appropriateness/efficacy of that type of process in the type of dispute concerned. There may need to be clearly defined exceptions, or adjustments to the ADR process in some situations. For example, ADR may not be appropriate, or may need to be adjusted, in cases involving violence or language barriers.

6.29 Perhaps what should be mandated is participation in an assessment of *suitability* for ADR, rather than ADR itself. In this way, a trained professional would assess the dispute and disputants and determine whether a particular ADR process suitable.

GOOD FAITH REQUIREMENTS

²⁶ See the discussion of pre-action protocols in Victorian Law Reform Commission, above n 11, Chapter 2.

²⁷ See discussion of overriding obligations in Victorian Law Reform Commission, above n 11, Chapter 3.

- 6.30 Consideration could be given to whether there is a need to extend any proposal to mandate participation in ‘good faith’ or ‘make a genuine attempt’ to resolve the dispute. The definition of such conduct requirements would need to be considered. The impact on the confidentiality of ADR processes, the potential to create new satellite litigation pertaining to the parties’ conduct during ADR, and the potential for greater costs and delay as a result, would need to be considered.
- 6.31 Concerns relating to ‘good faith’ or similar requirements include:
- the subjectivity of a determination about a person’s conduct during ADR
 - a change in the role of the ADR practitioner if they are required to assess the participants’ conduct, for example they may no longer be perceived as impartial, and
 - reduction in confidentiality if the ADR practitioner or participants are required to give evidence about whether a participant acted in good faith, which could make participants and their lawyers less open during ADR.

PRE-ACTION PROTOCOLS

- 6.32 While pre-action protocols may be successful in reducing litigation and the costs of administering the courts, they have been criticised because they may ‘front-load’ the costs of litigation without reducing the overall cost to litigants.²⁸ Where a requirement to use ADR is included with a large number of other pre-action obligations such as early disclosure of information, ADR may come to be regarded as an ‘expensive’ option. Depending on the point at which requirements to provide information are imposed, they may make litigation more expensive for those matters that could have been settled without the need for greater disclosure of information. The vast majority of legal disputes are already settled prior to a court hearing and may settle before filing or disclosure of relevant information. A pre-action protocol that requires early disclosure of documents and information might increase the costs for these litigants. Greater information may support a rights based resolution based on evidence but might be unnecessary for early interests based negotiations.
- 6.33 Issues of privilege and protection of sensitive information may need to be resolved if pre-action protocols extend to disclosure of information.
- 6.34 Pre-action protocols have been suggested as a way of addressing lack of information about the dispute, which may form a barrier to use of ADR as noted above. Greater exchange of information and more use of ADR might also be encouraged by initiatives like supplementing pleadings with a statement of case which would be filed soon after commencing litigation, and requiring parties to file their submissions and lists of authorities well in advance of a hearing (rather than only a few days before the hearing, as occurs at present).

CONCERNS ABOUT MANDATORY ADR

²⁸ Ibid, 134–136.

- 6.35 Some concerns about mandatory attendance at ADR include:
- the impact of a loss of voluntariness/empowerment on ADR processes, outcomes and participants
 - the appropriateness of ADR in particular cases and the need for exceptions
 - cost sharing
 - the availability and quality of intake and assessment processes to ensure that only appropriate cases are accepted and that matters are referred to the most appropriate process
 - possible 'legalisation' or formalisation of ADR processes if they come to be seen as a procedural step before going to court – processes may become more rights based rather than interests based
 - whether the integrity of ADR processes can be maintained in the face of the likely increase in demand from potentially unwilling lawyers and litigants who may regard ADR as a hurdle to be overcome or manipulated.
- 6.36 The ADR service sector may not currently have sufficient depth and maturity to support a mandatory requirement. A mandatory requirement could significantly increase demand for such services, and there may not be sufficient appropriately skilled practitioners. In the family dispute resolution context, steps were taken to strengthen the sector prior to the introduction of a mandatory requirement to use family dispute resolution. These included long-standing government funding for community family dispute resolution services and recognising and encouraging 'primary dispute resolution' in the Family Law Act. When the requirement was introduced, a number of large national organisations were already offering government funded family dispute resolution services, within accountability and quality frameworks. Also, the Australian Institute of Family Studies has had a longstanding role in researching and evaluating family dispute resolution services. It may be useful to consider whether extending such initiatives in the ADR sector would be useful, either before introducing, or together with the introduction of, a mandatory requirement.

6 Mandatory ADR — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal'.

- 6.13 What are the advantages and disadvantages of:
- (1) requiring disputants to consider ADR
 - (2) requiring disputants to participate in an assessment of the dispute for suitability for ADR
 - (3) introducing statutory provisions requiring litigants to attend ADR before they can file civil proceedings or stating that the default or usual position should be that courts and tribunals should refer matters to ADR, unless the court is persuaded that this is not appropriate
 - (4) making attendance at ADR, or particular types of ADR processes, mandatory in federal civil proceedings
 - (5) pre-action protocols, and
 - (6) overriding purpose obligations?
- 6.14 If pre-action protocols were to be introduced, what should these include?
- 6.15 What are the advantages and disadvantages of requiring disputants to participate in ADR in good faith/make a genuine attempt to resolve the dispute? If such a requirement was introduced, what should be done to protect the confidentiality and integrity of ADR processes?
- 6.16 At what stage of the dispute should any mandatory ADR requirement apply?
- 6.17 What exceptions to a mandatory ADR requirement would be appropriate?
- 6.18 What are the advantages and disadvantages of mandating different types of ADR or having different mandatory requirements for different types of dispute? How should types of dispute be distinguished?
- 6.19 What are the characteristics of disputes for which ADR, or some forms of ADR, would not be appropriate?

6 Mandatory ADR — Questions continued

- 6.20 To what extent would it be beneficial to require ADR practitioners to undertake an intake and assessment process to assess the participants' needs, exclude inappropriate cases and refer elsewhere where appropriate?
- 6.21 If mandatory requirements are introduced, who should provide information about these and what obligations should apply? See for example requirements to provide information under the Family Law Act.
- 6.22 To what extent is the market for ADR services in the general federal civil justice system sufficiently mature to support a mandatory ADR requirement while maintaining the integrity and quality of the ADR processes provided?

7 USE OF ADR IN GOVERNMENT DISPUTES

- 7.1 The Australian Government has expressed its commitment to reducing Commonwealth spending on legal services and to freeing up court time by requiring Commonwealth agencies to pursue ways of resolving disputes without recourse to litigation.
- 7.2 On 1 July 2008, the *Legal Services Directions 2005* were amended to place a greater emphasis on ADR in government. The Legal Services Directions now require that Commonwealth agencies only start legal proceedings where they have considered ADR and are satisfied that litigation is the most suitable method of dispute resolution. In addition, agencies must keep the costs of litigation to a minimum by monitoring the progress of the litigation, and using appropriate methods of resolving the litigation, including through ADR (see **Attachment E**).
- 7.3 Some ideas have already been expressed about how to improve and extend the use of ADR by Commonwealth government agencies. First, the use of ADR in Commonwealth litigation (including multi-plaintiff claims against the Commonwealth) may be assisted by the involvement of a dispute resolution manager. This person would be independent of the agency and experienced in managing Commonwealth litigation. Their role could be to encourage the early use of ADR and ensure that the Commonwealth is upholding its obligations under the Legal Services Directions.
- 7.4 Agencies may benefit from better guidance regarding ADR and the benefits of early resolution of disputes. Senior management may issue policies or instructions that indicate management's commitment to the prevention and earlier resolution of disputes using ADR processes where appropriate. Increased education and awareness regarding ADR in government may further assist, including ongoing training in negotiation and ADR practices for Commonwealth officers involved in litigation or claims handling. Agencies could develop dispute management plans setting out the types of disputes regularly faced by the agency and any special features of those disputes that may affect the agency's choice of dispute resolution strategy. Agencies could trial pilot programs featuring particular dispute resolution strategies, collecting data about agency disputes and the efficacy of particular strategies as the basis for future evaluation of their success. Finally, sharing such information with other agencies through an inter-agency network may also be useful.
- 7.5 The interaction between the use of ADR and the requirement in Appendix C of the Legal Services Directions for settlements to be in accordance with legal principle and practice may need to be clarified. It may assist agencies if the Legal Services Directions were amended or additional guidance provided to make it clear that unless a claim is spurious, then the costs of continuing to defend or pursue a claim if settlement is not reached should be taken into account in assessing a fair settlement amount. The view has sometimes been expressed that government cannot settle matters on a 'commercial basis', ie that taking future costs into account when assessing a fair settlement amount is not in

accordance with legal principle and practice. This is not the intention of Appendix C and has the potential to undermine the use of ADR in government.

7.6 Currently, the Legal Services Directions provide that:

A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established.

The meaning of ‘meaningful prospect of liability being established’ may not be sufficiently clear and there is a risk that some agencies or their legal advisers set the bar too high, or that the advice may not leave sufficient room for negotiation. Also, difficulties can arise if, during ADR, new information comes to light that was not available when advice about the prospect of liability was given and the person representing the Commonwealth cannot agree to any proposed settlement until new advice is received.

7.7 It may be that further consideration needs to be given to the relationship between settlement of legal claims under the Legal Services Directions and resolution of complaints and claims under the Compensation for Detriment caused by Defective Administration and Act of Grace schemes. In some disputes, part of the dispute may be properly settled under the Legal Services Directions and part may be dealt with under another regime.

7.8 The selection of external legal service providers and the impact on use of ADR may also need consideration. For example, when engaging a legal services provider, how can agencies ensure that all avenues for resolution are explored prior to commencing litigation and continued to be explored if litigation is commenced? Perhaps agencies should consider the operative styles of legal services providers, their awareness of and experience in ADR processes, and appreciation of broader government policies. Consideration may also need to be given to the best way to select ADR service providers for government agencies.

7.9 There may be an imbalance of power in disputes involving government as the availability of legal assistance in civil matters does not extend to representation in ADR services which are external to proceedings. This issue may need consideration if stronger requirements to use ADR are to be imposed on government and individuals.

Use of ADR in government disputes — Questions

- 7.1 In what type of matter do/should Commonwealth agencies utilise ADR?
- 7.2 What are the characteristics of disputes where it would be inappropriate for agencies to use ADR?
- 7.3 How can agencies improve their use of ADR processes?
- 7.4 To what extent do organisational barriers or legislative provisions inappropriately limit or prevent Commonwealth agencies’ use of ADR? How can these be overcome?

Use of ADR in government disputes — Questions continued

- 7.5 To what extent would targeted guidance material or training for Commonwealth officers involved in ADR processes assist in the take-up of ADR, as well as in the quality of participation? What type of guidance material or training would be useful?
- 7.6 To what extent do Commonwealth agencies select legal representatives who are good litigators rather than skilled in the resolution of disputes? How can this be overcome?
- 7.7 How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?

8 USE OF ADR TECHNIQUES TO IMPROVE COURT/TRIBUNAL PROCEDURES

- 8.1 Chapter 5 raised issues about the provision of ADR processes by courts and tribunals that are distinct from their adjudicative procedures, for example, where ADR services provided on court and tribunal premises are intended to assist the disputants to privately resolve the matter rather than assist the court or tribunal in its core functions.
- 8.2 This Chapter considers the use of techniques developed in ADR to enhance the judicial or quasi-judicial functions of courts and tribunals.
- 8.3 As ADR develops, it is increasingly coming to be recognised that some techniques drawn from ADR can be adapted to enhance general court and tribunal hearings, for example:
- a more informal and less adversarial approach
 - the empowerment of parties to speak for themselves, rather than through their lawyers
 - providing an opportunity for each party to hear the other side's perspective on the issues
 - encouraging the parties to communicate with each other and reach agreement where possible, and
 - a focus on achieving an outcome that, whilst complying with law, best meets the needs and interests of the parties.
- 8.4 The following three examples are areas where these techniques have been applied:
- 'family consultants' in the family law jurisdiction
 - the Less Adversarial Trial in the Family Court, and
 - 'hot tubbing' of expert witnesses/requiring expert witnesses to attend mediation.
- 8.5 Further ideas that may be worth consideration are:
- judicial case appraisal
 - designating a judge as a dispute management judge, and
 - round table case management conferencing.
- 8.6 The cost implications of using techniques developed in ADR to enhance court or tribunal processes would need to be considered. For example, if using techniques developed in ADR extended hearing time, this would increase costs for participants in and impact on court resources and vice versa.

- 8.7 Family consultants are used in the federal family law jurisdiction. They are psychologists or social workers with expertise in child and family issues after separation and divorce. They may be court officers or private practitioners who are specifically appointed by a court to the role. Family consultants work with the parties to help them resolve their dispute, but also have a role of assisting and advising the court. Where a family consultant is assigned to a case, the family consultant will have an initial meeting with the parties followed by as many conferences as necessary to either resolve the case or, if that cannot be achieved, to assist to progress the matter smoothly through the court process.
- 8.8 The role of family consultants is a blend of dispute resolution practitioner and court officer. They are subject to the direction of court CEOs in the performance of their functions. Unlike family dispute resolution practitioners, communications with family consultants are not confidential and evidence of anything said or any admission made to a family consultant is admissible in court. Their role is integral to the judicial function, thus family consultants have received the same protection and immunity as judges of the Family Court.
- 8.9 The role of the family consultant is predicated on the assumption that the courts deal with the most entrenched and difficult cases, for which such specialist expertise is required, and that many parties in parenting cases already will have unsuccessfully tried confidential community based family dispute resolution in accordance with the requirements in the Family Law Act.

LESS ADVERSARIAL TRIAL

- 8.10 Changes to the Family Law Act in 2006 supported a new, less adversarial approach to hearing cases involving children. The key features of the less adversarial approach are that:
- the judge, not the lawyers, controls the trial process and its inquiry
 - a family consultant works with the parties before the trial and is in court from the first day as an expert adviser to the judge and the parties
 - the parties can speak directly to the judge to tell in their own words what the case is about and what they want to achieve, and
 - the judge will consider the evidence and may discuss it with the parties or the witnesses before making a decision.
- 8.11 A formal two-part evaluation was undertaken of the pilot program that led to the Less Adversarial Trial. Those evaluations were supportive of the initiative. The final evaluation found that it resulted in a faster court process, that the parties were generally more satisfied with the process than parties whose dispute were determined using a traditional adversarial approach and that it has the potential to encourage a more cooperative approach between the parties (in this case usually separated or divorced parents).²⁹ These evaluations were conducted in

²⁹ See JE McIntosh, *The Children's Cases Pilot Project: An Exploratory Study Of Impacts On Parenting Capacity and Child Well-Being*, Final report to the Family Court of Australia, 2006, and R Hunter, *Evaluation of the Children's Cases Pilot Program: A report to the Family Court Of Australia*, 2006.

2006 and no further evaluations have occurred since. Some issues have been raised about the cost and the length of Less Adversarial Trials and the appropriateness of this process when there is a history or risk of family violence.

EXPERT EVIDENCE

8.12 Some courts and tribunals, such as the Administrative Appeals Tribunal, have adopted a procedure for receiving evidence from multiple expert witnesses known as concurrent evidence or ‘hot tubbing’.³⁰ Rather than receiving evidence from experts one by one, these processes are more like a discussion between the experts, counsel and the judge. There are various procedures, but generally:

- the experts submit written statements prior to the hearing
- they are then sworn in at the same time and each expresses their expert opinion
- the experts then give their views about each other’s opinions
- the parties’ advocates then cross examine by asking questions of all or one of the experts, who may comment on each others’ answers,³¹ and
- the judge may ask questions.

8.13 Benefits of these techniques may include the ability to deal with all the evidence concerning a particular issue at one time, refining the areas of disagreement and the ability of experts to comment on each other’s answers.³² The time required to receive expert evidence may also be reduced.

8.14 Techniques developed in ADR may also be employed by requiring the experts to attend a conference in order to develop a joint report/statement of evidence. This conference could be similar to mediation, facilitated by an independent practitioner who assists the experts to structure the discussion and identify areas of agreement and disagreement with a view to agreeing on a joint report.

JUDICIAL CASE APPRAISAL

8.15 There are often complaints about the amount of time courts and tribunals spend dealing with cases brought by applicants who do not have a strong case but are determined to have their case heard. The ADR concept of ‘case appraisal’ (or ‘case presentation’ or ‘case evaluation’) might assist in such cases. Conferences conducted by registrars (sometimes referred to as conciliation conferences) may use this approach. However, a registrar is not a judge and a litigant may not be satisfied with their assessment, insisting on progressing their case to hearing.

³⁰ See Administrative Appeals Tribunal, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal*, 2005.

³¹ E Cheesman, ‘Hot Tubbing: Concurrent expert evidence’ (2006/2007) *Bar News* Summer 2006/2007 54, referring to Australian Law Reform Commission, *Managing Justice: A review of the Justice System*, Report No 89, 2000, [6.116].

³² *Ibid*, 57.

- 8.16 One possible approach may be to have a judge convene a short hearing soon after filing at which each of the parties would present their case for appraisal. Both written and oral presentations might be permitted, subject to very strict word and time limits. The judge could then make a determination about the applicant's likely chance of success. If the judge concluded that the applicant was unlikely to succeed, then the applicant could proceed, but would bear a significant costs burden if they were not ultimately successful. They might also be required to provide security for those costs in advance.
- 8.17 The main advantages of this approach would be to limit the court's resources to meritorious cases and to fully recover costs in unmeritorious cases. Another advantage might be to ensure that parties have their cases substantially prepared within a specified and quite short period after filing.
- 8.18 Consideration would need to be given to whether the judge who made the initial appraisal would go on to hear the matter, or whether a different judge would be assigned. Judges may be uncertain as to how far they can go in expressing preliminary views without raising an apprehension of bias.
- 8.19 It is understood that in the US, quite interventionist case appraisal is an accepted feature of the system and assists in managing case loads.

DISPUTE MANAGEMENT JUDGE

- 8.20 It might be advantageous for each court to appoint a judge with specialist ADR expertise. The judge could regularly review court procedures to see where there may be opportunities to enhance them by using techniques developed in ADR. They might ensure that judges and court staff receive sufficient training about ADR and develop guidelines to ensure that cases are appropriately referred to private ADR processes, whether provided inside or outside the court.

ROUND TABLE CASE MANAGEMENT CONFERENCING

- 8.21 It may be useful to make greater use of a round table approach in case management. This occurs in a formal way through a directions hearing. A more informal, collaborative approach could be taken, involving the parties and the judge or court officer together determining the best method of preparing a matter for trial. In the Administrative Appeals Tribunal, parties are usually required to attend a conference conducted by a tribunal member or conference registrar. The purpose of the conference is to identify issues, identify any further information that is required, assess whether the matter can be settled, and if not, to discuss future steps and prepare for the hearing.³³ Perhaps a similar approach could be adopted in other areas.

³³

See www.aat.gov.au.

8 Use of ADR techniques — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'.

- 8.1 How might a specialist role similar to that of family consultants be useful in other federal courts and tribunals/areas of civil jurisdiction?
- 8.2 How might the less adversarial trial approach be extended or have application in other jurisdictions?
- 8.3 How might concurrent evidence be further extended or applied? In what circumstances could this approach be used effectively?
- 8.4 To what extent would it be useful to introduce:
 - judicial case appraisal
 - a dispute management judge, or
 - increased use of round table case management conferencing?
- 8.5 Are there any other ways in which techniques developed in ADR could be used to enhance the adjudicative process?

9 DATA, EVALUATION AND RESEARCH

- 9.1 In approaching this reference, NADRAC was aware that its capacity to provide sound policy advice to the Attorney-General would be hampered by a lack of comparable data and comparable research findings on ADR and the civil justice system more broadly. NADRAC's Charter specifically asks it to advise on the need for data collection and research on ADR and to advise on the ongoing evaluation of ADR services and programs. Over the years, NADRAC has raised concerns about this issue.
- 9.2 Despite the fact that ADR is now considered to be a core component of our civil justice system, and is the subject of much legislation, little is known about:
- the use of and demand for ADR
 - the profile of ADR practitioners and organisations
 - the appropriateness of different forms of ADR for different disputes, and
 - the effectiveness of different ADR processes.
- 9.3 While there has been extensive research about these issues, the research may be limited by the available data, and the fact that data may be specific to a particular ADR program and incapable of being extrapolated to slightly different programs. NADRAC has expressed the view that improved research, evaluation and data collection is pivotal to the future development of ADR, including ADR standards.³⁴

CONSISTENT DATA COLLECTION

- 9.4 In its report *A Framework for ADR Standards*, NADRAC recommended that:
- the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and compatibility in ADR data collection.*³⁵
- 9.5 NADRAC further suggested that:
- ...the formulation and promotion of consistent and comparable activity and performance indicators would provide a means for determining the relative effectiveness of different practices. At the very least, operational definitions of such basic terms as 'dispute', 'case', 'termination', 'intervention', 'resolution', 'settlement', 'agreement' and 'agreement breakdown' should be commonly accepted and used across the ADR field.*³⁶
- 9.6 The emergence of new ADR practices and the ongoing growth in service providers has further complicated the situation. The development of objective standards and best practice models for ADR depends upon development of comparable performance and activity indicators across the civil justice system, particularly in relation to ADR.

³⁴ NADRAC, *A Framework for ADR Standards*, 2001, 92-93.

³⁵ Ibid, Recommendation 21.

³⁶ Ibid, 93.

- 9.7 The problem is a national one. Commonwealth courts have registries in the States and Territories which provide ADR services, and State and Territory courts can exercise Commonwealth jurisdiction. State/Territory organisations provide ADR services under funding agreements with the Commonwealth alongside services provided with funding from the States (eg the same organisations provide both family law and non-family law services). ADR practitioners regularly deal with cases that have legal implications at both the Commonwealth and State/Territory levels (eg child protection and family law).
- 9.8 National ADR providers and national ADR users may have national headquarters in one State/Territory but may provide or require the same services in a variety of locations across the nation. The growing phenomenon of online dispute resolution means that ADR services provided in one State or Territory are available to people across the nation.
- 9.9 Separate systems of performance and activity data collection amongst the Commonwealth, States and Territories could add to the costs and complexities faced by ADR service providers and, to the extent that they may eventually lead to differing practice models and regulatory systems, to public confusion. Users and funders of ADR services already find it difficult to compare and assess the costs and efficacy of the services they receive from different providers or in different locations.
- 9.10 This means that that there are few figures which can be referred to in order to inform the discussion elsewhere in the issues paper.

SERVICE AND PROGRAM EVALUATION

- 9.11 A lack of resources in the ADR sector may mean that there is minimal funding available to undertake independent service and program evaluations. Evaluations by service providers themselves may not have rigorous methodology or outcomes that are comparable with other services and programs. The results may be subjective and may not be made public. Federal courts do not seem to be undertaking regular evaluations of their services, including ADR services, or are not making the results public.
- 9.12 In the absence of consistent data that allow comparison across services and programs, even the most rigorous evaluations would be reduced in value. This could compromise the development of best practice dispute resolution techniques, in which policy makers and the broader community can have confidence.

COMPARABLE RESEARCH

- 9.13 There is a great deal of research on ADR and the civil justice system more generally. Some important knowledge has been obtained from that research. For example, research on mediation has found:
- there is a very high rate of agreement reached and mediated agreements are shown to be durable over time

- there is a high level of satisfaction with the fairness of the mediation process, the fairness of the mediated outcome and with the professional skills and impartiality of mediators
- most participants felt that they had been given a chance to have their say and believed that mediation gave them an opportunity to understand the other participant's point of view
- most women who use mediation feel that they have equal influence over the terms of the agreement and report increased confidence in their ability to stand up for themselves and handle future disagreements
- most participants in pre-trial conference and mediation felt that they had more control over the outcome of their dispute than did parties who used litigation or arbitration, and
- avoidance of the stress and trauma of a possible court hearing is one of the most frequently identified benefits of mediation.³⁷

9.14 Research about ADR use has increased in the civil context over the past five years, although this tends to be limited to particular jurisdictions and programs. In Victoria, substantial research has been conducted. The Department of Justice has published a series of Alternative Dispute Resolution in Victoria Reports and a report evaluating mediation in the Supreme and County Courts of Victoria has recently been completed.³⁸

9.15 Nevertheless, ADR research must be viewed with caution, for the following reasons:

- there can be a lack of comparable data and lack of definitional consistency over basic matters including the meaning of terms like 'mediation', 'conciliation', 'resolution' or 'agreement'
- there is little national coordination or collaboration between researchers
- some of the ADR research is international and there are considerable international differences in how ADR is practiced – for example it is understood that mediation practiced in the United States of America is often more advisory and rights based than Australian mediation
- a great deal of the Australian research relates to the family dispute resolution sector, which has been organised and resourced to support longer term and in depth research³⁹

³⁷ NADRAC, above n 34, 25–26.

³⁸ See Department of Justice, *Alternative Dispute Resolution in Victoria Reports*. <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/Dispute+Resolution/JUSTICE+-+Alternative+Dispute+Resolution+in+Victoria+Reports>, and T Sourdin, *Evaluating mediation in the Supreme and County Courts of Victoria* (Department of Justice, Victoria, University of Queensland) 2008.

³⁹ See the research work of the Australian Institute of Family Studies and large government funded community based ADR providers like Relationships Australia.

- some of the research is undertaken without use of rigorous research methodologies, resulting in methodological problems like low sample sizes, lack of control groups, lack of cross referencing of responses and subjectivity in respondents' interpretation of surveys
- much of the research is qualitative, which may not provide an overall picture of service effectiveness, and
- lack of public and professional awareness about what to expect from ADR, so that data obtained from participants and referring agencies may not be a reliable and valid measure of service quality.⁴⁰

RESEARCH AND ADR REFERRAL

9.16 In *Court Referral to ADR: Criteria and Research*, Professor Mack analysed whether empirical research could be used to establish specific criteria or identify key features of disputes, disputants, or ADR programs which indicate where ADR is likely to be successful and could therefore guide courts in making referrals. She concluded that there are very few criteria that are consistently and reliably justified by the available research available at that time.⁴¹

9.17 This outcome reflected the number and complexity of factors that affect the research and the large number of different ADR processes and consequent inability to extrapolate from one study to another. The factors above, which affect the overall validity of ADR research, are also likely to have been relevant.

9.18 The report identified a number of initiatives that could assist referral agencies to develop appropriate referral processes and criteria in the future. These are:

- studying the impact of ADR referral on unassisted lawyer negotiation, and comparing ADR with lawyer negotiation
- developing and providing reliable, specific information about local ADR programs to judicial officers and legal practitioners, including general feedback on non-confidential aspects of specific cases which have been referred
- carrying out narrowly focussed evaluation of specific programs against clearly articulated goals
- making visible and sharing the expert clinical knowledge of locally experienced, skilled effective ADR referrers and practitioners
- developing a greater understanding of effective ADR practice, and
- supporting policy research.

COMPARING ADR AND LITIGATION

⁴⁰ Some of these are set out in NADRAC, above n 34, 26.

⁴¹ Mack, above n 22, 89.

9.19 It is not possible to make a valid comparison between ADR and litigation as many of the problems that beset ADR research also apply to litigation. As Professor Mack pointed out:

Any comparison of ADR to litigation is made more difficult because of the lack of clear performance standards or quality measures for civil litigation generally, and the lack of clarity in what “litigation” comprises.⁴²

9.20 The Australian Law Reform Commission has also pointed to the lack of clearly articulated indicators of civil justice generally which could be used as benchmarks against which ADR could be measured.⁴³

9.21 Civil litigation may differ from court to court. Research could be conducted into questions like the degree of resolutions achieved in post-filing negotiations and the stage at which ADR is used and how this affects its success.

FUTURE DIRECTIONS

9.22 Some items that might assist ADR evaluation and research are:

- publishing existing data and translating it into a form that can be used by referrers, practitioners, courts/tribunals and members of the public
- development of common national performance and activity indicators for ADR services to improve quality, consistency and comparability in ADR data collection
- publication of ADR data collections, at least by government funded services and the courts
- ongoing internal evaluation of ADR services according to established and agreed criteria, and in the case of large government funded services, regular independent evaluations
- more comparable, qualitative and quantitative, longitudinal and comprehensive research on the resolution of civil disputes through ADR and the courts
- more funding and support for ADR research including the development of a national leadership and coordination role
- more opportunities for dispute resolution researchers to meet and discuss their research, including funding to convene seminars
- a public clearing house for ADR and civil litigation research
- a regular electronic bulletin for users, providers and referrers to ADR that provides commentary on the latest research and its implications.

⁴² Ibid, 3.

⁴³ Australian Law Reform Commission, above n 7, [2.50-2.68].

- 9.23 While these suggestions are proposed in the specific context of ADR, most are equally relevant to civil dispute resolution in the courts and there may be significant advantages in progressing the two areas together.
- 9.24 There are, no doubt, many different ways in which some or all of these proposals might be achieved. One comprehensive approach may be to establish a national body responsible for civil dispute resolution studies similar in nature to the Institute of Family Studies, the Institute of Criminology or the Australian Institute of Health and Welfare Studies.

9 Data, Evaluation and Research — Questions

- 9.1 To what extent is there a need to improve the quality of available national data on ADR? What steps should be taken to identify the data required and improve data collection and research?
- 9.2 To what extent is there a need to improve the quality of evaluations of ADR services? How can ADR services be evaluated, by whom and against what criteria?
- 9.3 What are the advantages and disadvantages of requiring service providers to commission independent evaluations of their services, and of requiring them to publish those evaluations?
- 9.4 What might be done to support ADR research and researchers?

ATTACHMENT A – NADRAC’S CHARTER

- 1) The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory council charged with:
 - a) providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and
 - b) promoting the use and raising the profile of alternative dispute resolution.
- 2) The issues on which NADRAC will advise on under paragraph 1(a) include:
 - a) minimum standards for the provision of ADR services
 - b) minimum training and qualification requirements for ADR practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations
 - c) appropriate professional disciplinary mechanisms
 - d) the suitability of ADR processes for particular client groups and for particular types of disputes, including restorative justice and ADR in the context of criminal offences
 - e) the quality, effectiveness and accountability of Australian Government ADR programs
 - f) ongoing evaluation of the quality, integrity, accountability and accessibility of ADR services and programs
 - g) programs to enhance community and business awareness of the availability, and benefits, of ADR services
 - h) the need for data collection and research concerning ADR and the most cost-effective methods of meeting that need, including by courts and tribunals, and
 - i) the desirability and implications of the use of ADR processes to manage case flows within courts and tribunals.
- 3) In considering the question of minimum standards, the Council will examine the following issues:
 - a) the respective responsibilities of the courts and tribunals, government and private and community sector agencies for the provision of high quality ADR services
 - b) ethical standards for practitioners
 - c) the role of lawyers and other professional advisers in ADR
 - d) legal and practical issues arising from the use of ADR services, such as the liability or immunity of practitioners, the enforceability of outcomes and the implications of confidentiality, and
 - e) the accessibility of ADR services.

- 4) In promoting the use and raising the profile of ADR under paragraph 1(b), NADRAC will, as appropriate:
 - a) participate in forums, conferences, and meetings of professional associations
 - b) facilitate ADR research and be involved in research conferences
 - c) develop and improve relationships with educational institutions involved in legal, judicial or dispute resolution training
 - d) pursue opportunities to propose improvements to ADR processes
 - e) assist Government agencies to use ADR and to encourage them to make ADR a part of their funded programs
 - f) support Australia's capacity building efforts in relation to ADR in the region, and
 - g) prepare educational materials about ADR.
- 5) The Council may make recommendations of its own motion to the Attorney-General on any matter relevant to the Council's Charter. In addition, the Attorney-General may, from time to time, refer particular issues to the Council for consideration and report.
- 6) As the Council's time and resources permit, it may provide comment on matters relevant to its Charter to any Commonwealth, State and Territory or private organisations with an interest in ADR. A copy of any such submission must be provided to the Attorney-General as soon as possible after the submission is dispatched.
- 7) In performing its functions, the Council will consult broadly with ADR organisations, service providers and practitioners, courts and tribunals, government, the legal profession, educational institutions, business, industry and consumer groups, and community organisations as well as the Family Law Council, when appropriate.
- 8) The Council will develop a forward work plan, including reporting dates, for each year and provide a copy of that work plan to the Attorney-General.
- 9) The Council will provide the Attorney-General with a report of its operations as soon as possible after 30 June each year.

ATTACHMENT B – LETTER OF REFERENCE FROM THE ATTORNEY-GENERAL TO NADRAC



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

08/9844

13 JUN 2011

The Hon Justice Murray Kellam AO
Chair
National Alternative Dispute Resolution Advisory Council
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Justice Kellam,

I am interested in the question of how to encourage greater use of alternative dispute resolution (ADR) in civil proceedings.

I am concerned about the barriers to justice that arise in the context of civil court and tribunal proceedings. It is very important to encourage parties to civil proceedings to make greater use of ADR to overcome court and tribunal barriers to justice.

I am currently in the process of considering a range of measures aimed at increasing accessibility to justice.

I would like NADRAC to enquire into and identify strategies for litigants, the legal profession, tribunals and courts to remove barriers from and provide incentives to ensure greater use of appropriate dispute resolution options as an alternative to civil proceedings and during the court or tribunal process. I also ask NADRAC to provide advice on initiatives government might take to support the recommended strategies, including legislative action.

In carrying out this reference, NADRAC should specifically consider:

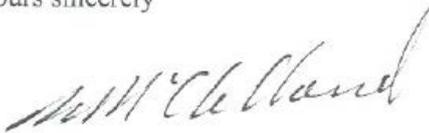
- a) whether mandatory requirements to use ADR should be introduced
- b) other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- c) the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- d) whether there should be greater use of private and community based ADR services and how to ensure that such services meet appropriate standards.

I would expect NADRAC to consult closely with appropriate agencies and organisations in conducting this inquiry as stated in its Charter, particularly the Civil Justice Division of the

Attorney-General's Department which is currently exploring a range of access to justice issues.

I would be grateful if NADRAC could complete its report by 30 September 2009. The action officer in my Department is Alison Playford on 02 62506669.

Yours sincerely

A handwritten signature in black ink, appearing to read "R McClelland". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Robert McClelland

**ATTACHMENT C - RECOMMENDATIONS FROM NADRAC,
A FRAMEWORK FOR ADR STANDARDS, 2001**

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

THAT standards for ADR be developed based on the framework described in this report, comprising guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential areas and, where applicable, the enforcement of such a code through appropriate means. That developing ADR standards be an ongoing process and recognise the diversity of ADR.

p71

RECOMMENDATION 2

THAT all ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers or associations, which takes into account the elements contained in Section 5.2 of this report.

p72

RECOMMENDATION 3

THAT ADR service providers have in place an appropriate and effective system for managing complaints. That such systems be based on appropriate complaint handling practices and take into account the elements of a code of practice, as outlined in Section 5.2 of this report.

p73

RECOMMENDATION 4

THAT ADR organisations examine the feasibility and appropriateness of establishing an ADR Industry Ombudsman or similar body, in order to provide a second tier complaints system. That this examination take place in the context of consideration of a possible peak ADR body, as outlined in Recommendation 19.

p73

RECOMMENDATION 5

That ADR organisations monitor the complaints arising from the processes described at Recommendations 3 and 4, identify any problem areas and undertake further consultation and research on the need for additional standards in such areas.

p74

RECOMMENDATION 6

THAT regulation of ADR be based primarily on self-regulation, with the need for greater or lesser regulation to be assessed on a sector by sector basis.

p76

RECOMMENDATION 7

THAT compliance by the service provider with an appropriate code of practice form part of any contract entered into by Commonwealth agencies providing for ADR.

p76

RECOMMENDATION 8

THAT State, Territory and local government agencies include compliance with an appropriate code of practice in any contracts providing for ADR. p77

RECOMMENDATION 9

THAT government, industry, professional and consumer bodies undertake consumer education activities which encourage the inclusion of an appropriate code of practice in private contracts for ADR services. p77

RECOMMENDATION 10

THAT bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR. p78

RECOMMENDATION 11

THAT Commonwealth, State and Territory Governments undertake a review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes. That this review provide recommendations on how to: (a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and (b) provide means by which consumers of ADR services can seek remedies for serious misconduct. p79

RECOMMENDATION 12

THAT the need for and nature of accreditation of ADR practitioners, organisations and programs be determined on a sector by sector basis. p83

RECOMMENDATION 13

THAT those responsible for accrediting ADR practitioners: (a) clearly define the level of competence and responsibility recognised through the accreditation; (b) use valid and reliable assessment procedures; (c) provide monitoring, review or audit processes; (d) provide fairness to those seeking accreditation; (e) ensure that accreditation processes are transparent and publicly available; and (f) provide consistency and comparability with similar accreditation regimes. p83

RECOMMENDATION 14

THAT those responsible for accrediting ADR practitioners develop processes for mutual recognition of qualifications, training and assessment. p83

RECOMMENDATION 15

THAT processes for selecting ADR practitioners be fair and transparent, and enable parties to have access to the best available practitioners. p84

RECOMMENDATION 16

THAT those engaging ADR practitioners clearly establish the knowledge, skills

and ethics required through the processes described in Chapter 5 of this report, and that tertiary qualifications not be a universal requirement for ADR practitioners. p84

RECOMMENDATION 17

THAT ADR education and training providers inform participants of the objectives and expected outcomes of the education and training program which they offer, and the extent to which the program may lead to work as an ADR practitioner. p86

RECOMMENDATION 18

THAT education, training, assessment and professional development for ADR practitioners (a) take account of the elements of an appropriate code of practice described at Section 5.2 of this report, and be informed by the knowledge, skills and ethics relevant to the area of practice, as outlined in Section 5.3; and (b) be primarily performance based, use accepted national standards for education, training, and assessment, including recognition of prior learning or recognition of current competence, adopt best practice learning strategies that integrate theoretical knowledge and practical experience and, where feasible, use a lifelong learning approach. p86

RECOMMENDATION 19

THAT ADR organisations and practitioners, and government, industry, educational and professional bodies explore the feasibility and functions of a peak body or bodies, and consider the questions concerning a peak body raised in this report. p90

RECOMMENDATION 20

THAT the resources devoted to the development of and compliance with standards be commensurate with the risks to be addressed and the benefits to be achieved. p92

RECOMMENDATION 21

THAT the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and comparability in ADR data collection. p93

ATTACHMENT D - MODEL MEDIATION CLAUSE FOR COMMENT

*DISPUTE RESOLUTION*⁴⁴

1. If a dispute arises from or in connection with this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.
2. A party to this contract claiming that a dispute has arisen from the contract (“*the Dispute*”) must give a written notice specifying the nature of the Dispute (“*the Notice*”) to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.
3. If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed in writing by them) on:
 - a. the procedures to be adopted in a mediation of the Dispute; and
 - b. the timetable for all the steps in those procedures; and
 - c. the identity and fees of the mediator; then,,
 - d. the [independent appointment body or person]⁴⁵ will appoint a mediator accredited under the National Mediator Accreditation System, determine the mediator’s fees and the parties will pay those fees equally.
4. If the mediator is appointed by [independent appointment body or person] in accordance with paragraph 3, the parties must mediate the Dispute:
 - a. in good faith; and
 - b. in accordance with the Practice Standards articulated in the National Mediator Accreditation System
5. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders by the Court in which the proceedings are commenced that:
 - a. the proceedings relating to the Dispute be referred to mediation by a mediator; and
 - b. if the parties do not agree on a mediator within seven days of the order referred to in paragraph 4.1, the mediator appointed by the [independent appointment body or person] will be deemed to have been appointed by the Court.

⁴⁴ NADRAC acknowledge the assistance of the Law Society of NSW in the drafting of this clause. The clause is based on the precedent clause prepared for the Law Society of NSW and published on their web site www.lawsociety.com.au

⁴⁵ NOTE the independent appointment body could be a Recognised Mediator Accreditation Body, for a list of such bodies see www.nadrac.gov.au.

6. If a party :
 - a. refuses to participate in a mediation of the Dispute to which it earlier agreed; or
 - b. refuses to comply with paragraph 5 of this clause, a notice having been served in accordance with paragraph 2; then,
 - i. that party shall not take any steps to recover its costs whether by way of obtaining or enforcing any order for costs, and,
 - ii. that party shall consent to an order of a Court of competent jurisdiction that it will specifically perform and carry into execution paragraph 3 and 4 of this clause.

ATTACHMENT E – LEGAL SERVICES DIRECTIONS 2005, APPENDIX B: THE COMMONWEALTH’S OBLIGATION TO ACT AS A MODEL LITIGANT

Schedule	Legal Services Directions
Appendix B	The Commonwealth’s obligation to act as a model litigant

Appendix B The Commonwealth’s obligation to act as a model litigant

The obligation

- 1 Consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

- 2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
 - (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
 - (aa) making an early assessment of:
 - (i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and
 - (ii) the Commonwealth’s potential liability in claims against the Commonwealth
 - (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
 - (c) acting consistently in the handling of claims and litigation
 - (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
 - (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true
 - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
 - (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
 - (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
 - (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1 The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2 In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

Note 3 The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

Note 4 The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5 The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

- 3 The obligation to act as a model litigant extends to agencies involved in merits review proceedings.
- 4 An agency should use its best endeavours to assist the tribunal to make its decision.

Note The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* and the explanatory memorandum to the Administrative Appeals Tribunal Amendment Bill 2005.

Alternative dispute resolution

- 5.1 The Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).
- 5.2 When participating in alternative dispute resolution, the Commonwealth and its agencies are to ensure that their representatives:
- (a) participate fully and effectively, and
 - (b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.