

National Alternative Dispute Resolution Advisory Council

DISPUTE RESOLUTION TERMS

The use of terms in (alternative) dispute resolution

Sept. 03

Contents

- INTRODUCTION*..... 1**
- Why is consistency of terms needed?..... 1
- Relationship with legislative provisions, standards, user information and regulation 2
- Dispute resolution practitioners..... 3
- Conciliation-mediation distinction 3
- Court-based dispute resolution..... 3
- GLOSSARY OF COMMON TERMS* 4**

Introduction

The purpose of this paper is to assist service users, practitioners, organisations and policy makers and to encourage greater consistency in the use and understanding of dispute resolution terms. The paper is not intended to be prescriptive or to constrain appropriate practices.

Why is consistency of terms needed?

There are many advantages in using terms consistently. However, terms should also recognise the diversity, flexibility and dynamism in dispute resolution practices and processes.

Consistent dispute resolution terms serve several important functions.

First, they ensure those who use, or make referrals to, dispute resolution services receive consistent and accurate information, and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, dispute resolution services.

Second, consistent use of terms for dispute resolution processes helps courts and others referring or mandating agencies to match processes to specific disputes and different parties. Better matching would improve outcomes from these processes.

Third, a common understanding of dispute resolution terms helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about dispute resolution services.

Fourth, common terms provide a basis for policy and programme development, data collection and evaluation.

It is important to take account of the broad contexts in which dispute resolution takes place. Different terminology has evolved in different sectors and social groups. For example, in family law, mediation and conciliation evolved out of counselling, whereas industry dispute resolution schemes evolved out of self-regulated complaint handling and compliance processes.

Therefore:

- it cannot be assumed that terms all have the same meaning to all people
- terms are often ambiguous and can refer to different settings, processes, or types of disputes, and
- terms have different meanings across cultures.

Practices are evolving and processes need to be applied flexibly. As mentioned above, there are problems with prescriptive definitions

In NADRAC's view it is usually better to 'describe' rather than 'define' dispute resolution terms. NADRAC sees 'descriptions' as an indication of how particular terms are used, whereas 'definitions' refers to essential nature or features of a specific process.

Descriptions are useful for dispute resolution practitioners, organisations, referrers and service users who have an obligation to explain to participants the nature of the process being offered and the roles and responsibilities of each person involved.

Definitions may be needed for specific purposes, such as legislation or standards. As such definitions have compliance implications, they need to be developed to suit the specific situation in which they are to be used. Indeed, in drafting legislation or standards, it may be preferable to consider the need for and nature of formal legal definitions **after** the substantive matters (eg compliance, immunity) have been determined.

Relationship with legislative provisions, standards, user information and regulation

Terminology is interwoven with other issues including:

- views about the nature and future of dispute resolution
- legislative provisions for dispute resolution
- practitioner and service standards, and
- compliance and regulation.

Terms do not exist in a vacuum and the meaning and implications of particular words depend largely on the context in which they are used. While consistent definitions and descriptions are useful, they are inadequate tools to achieve improvements to practice, law or service delivery.

For example, NADRAC prefers to see the term mediation used for processes where '... 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'. In practice, however, the term 'mediation' is often used in instances where the dispute resolution practitioner gives advice on the substance of the dispute.

These issues of practice may be better addressed through regulation or codes of practice in specific areas, rather than by a stand alone definition. Regulations or codes would clearly spell out practitioner roles and responsibilities, and the consequences associated with non-compliance.

In NADRAC's view, it is impossible and inappropriate to prescribe how dispute resolution descriptions should be used by service providers. However, it is also NADRAC's view that descriptions of the actual process used by any provider should be available in forms that are easily understood by the users of the service.

NADRAC will consider the need for guidelines on formal legal definitions at part of its review of statutory provisions concerning alternative dispute resolution. In this review international definitions, such as those in UNCITRAL model rules, will be considered. International definitions generally would be preferred where these are consistent with Australian practices.

Dispute resolution practitioners

NADRAC prefers to use the term ‘dispute resolution practitioner’ (rather than ‘third party’, ‘third party neutral’ or ‘intervener’) to describe an impartial person who assists those in disputes to resolve their differences. This term would be sufficient for most purposes unless a clear distinction is required between the roles of different participants in a dispute resolution process. Further descriptions may then be appropriate. NADRAC notes that most dispute resolution practitioners could be described as ‘impartial’, and that this term would be preferred to ‘neutral’.

Conciliation-mediation distinction

In NADRAC’s view, ‘mediation’ is a purely facilitative process, whereas ‘conciliation’ may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term ‘mediation’ should be used where the practitioner has no advisory role on the content of the dispute and the term ‘conciliation’ where the practitioner does have such a role. NADRAC notes, however, that both ‘mediation’ and ‘conciliation’ are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.

Court-based dispute resolution

In NADRAC’s view, courts and tribunals have a special responsibility for ensuring appropriate standards are maintained in the delivery of their dispute resolution services. The community will look to courts and tribunals for guidance on the meaning of terms. As courts and tribunals mandate the use of different dispute resolution procedures, it is critical that accurate terms are used. Terms other than ‘mediation’ may more accurately reflect the actual processes being offered by courts.

Glossary of Common Terms

This glossary is a resource for agencies, legislators and policy makers. It explains common usage of terms used in dispute resolution in Australia. This glossary is not intended to be as a set of definitions. Agencies, practitioner and legislators may use these terms in different ways. Readers should therefore check how terms are used in any particular situation.

This glossary supersedes NADRAC's earlier publication *Alternative Dispute Resolution Definitions* (1997).

ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. See also *PDR*.

Adjudication is a process in which the parties present arguments and evidence to a dispute resolution practitioner (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by state authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there are also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers).

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include *expert appraisal*, *case appraisal*, *case presentation*, *mini-trial* and *early neutral evaluation*.

Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

Automated dispute resolution processes are processes conducted through a computer program or other artificial intelligence, and do not involve a 'human' practitioner. See also *blind bidding* and *on-line dispute resolution*.

Automated negotiation (or **blind-bidding**) is 'a form of computer assisted negotiation in which no practitioner (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range ... they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached'. See also *automated dispute resolution processes*. (Consumers International (2000) *Disputes in Cyberspace*)

Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.

Case presentation (or **Mini-trial**) is a process in which the parties present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also *mini-trial*.

Clients are individuals or organisations that engage dispute resolution service providers in a professional capacity. A client may not necessarily be a party to a dispute, but may engage a dispute resolution service provider to assist the resolution of a dispute between others.

Combined or hybrid dispute resolution processes are processes in which the dispute resolution practitioner plays multiple roles. For example, in *conciliation* and in *conferencing*, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In *hybrid* processes, such as *med-arb*, the practitioner first uses one process (*mediation*) and then a different one (*arbitration*).

Co-mediation is a process in which the parties to a dispute, with the assistance of two dispute resolution practitioners (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Community Mediation is mediation of a community issue.

Community Mediation Service is a mediation service provided by a non-government or community organisation.

Community mediator is a mediator chosen from a panel representative of the community in general.

Conciliation counselling is a term used previously to describe some of the processes used by counsellors in the Family Court of Australia to assist parties to settle disputes concerning children. The Court now uses the term *mediation* to describe these processes.

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

Note: there are wide variations in meanings for ‘conciliation’, which may be used to refer to a range of processes used to resolve complaints and disputes including:

- Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute
- Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement’.

Conference/Conferencing is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

Consensus building is a process where parties to a dispute, with the assistance of a facilitator, identify the facts and stakeholders, settle on the issues for discussion and consider options. This allows parties to build rapport through discussions that assist in developing better communication, relationships and agreed understanding of the issues.

Counselling refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems. *Counselling* has a specific meaning under the Family Law Act, where it is included as a *Primary Dispute Resolution* process (see *PDR*).

Determinative dispute resolution processes are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are *arbitration*, *expert determination* and *private judging*.

Determinative case appraisal is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the appraiser) who makes a determination as to the most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

Dispute counselling is a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.

Dispute resolution refers to all processes that are used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be *facilitative*, *advisory* or *determinative* (see descriptions elsewhere in this glossary). Dispute resolution processes other than judicial determination are often referred to as *ADR*.

Dispute resolution practitioner is an impartial person who assists those in dispute to resolve the issues between them. A practitioner may work privately as a statutory officer or through engagement by a dispute resolution organisation. A sole practitioner is a sole trader or other individual operating alone and directly engaged by clients.

Diversionsary, victim-offender, community accountability, restorative and family group conferencing are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a meeting (conference) with the victim, others affected by the offence, family members and/or other support people. The practitioner who facilitates the conference may be part of the criminal justice system (for example, a police or corrections officer) or an independent person.

Early neutral evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

Education for self-advocacy is a process in which a party to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other, party or parties. See also *dispute counselling* and *decision-making for one*.

Evaluative mediation is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. (See also *combined processes*). Note: *evaluative mediation* may be seen as a contradiction in terms since it is inconsistent with the definition of *mediation* provided in this glossary.

Expert appraisal is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved.

Expert determination is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination.

Expert mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Facilitated negotiation is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

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

Facilitative dispute resolution processes are processes in which a *dispute resolution practitioner* assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are *mediation*, *facilitation* and *facilitated negotiation*

Fact finding is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution. See also *investigation*.

Family and child mediation is defined in the Family Law Act as ‘mediation of any dispute that could be the subject of proceedings (other than prescribed proceedings) under [the] Act and that involves (a) a parent or adoptive parent of a child; or (b) a child; or (c) a party to a marriage’ (section 4). See also *PDR*.

Fast-track arbitration is a process in which the parties to a dispute present, at an early stage in an attempt to resolve the dispute, arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.

Hybrid dispute resolution processes - see *combined dispute resolution processes*

Indigenous dispute resolution refers to wide range of processes used to resolve dispute involving Indigenous people, including the various processes described in this glossary. Other examples include elder arbitration, agreement-making and consensus-building. In the Australian context the term Indigenous (capital ‘I’) refers specifically to the Aboriginal and Torres Strait Islander peoples.

Indirect negotiation is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

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

Inter-mediation is ‘a process similar to mediation ... the ... [dispute resolution practitioner] interacts with the parties in dispute to assess all relevant material, identify key issues ... and helps to design a process that will lead to resolution of the dispute. (Commonwealth Office of Small Business 2001, *Resolving Small Business Disputes*)

Investigation is a process in which a dispute resolution practitioner (the investigator) investigates the dispute and provides advice (but not a determination) on the facts of the dispute. See also *fact finding*.

Judicial dispute resolution (or judicial ADR) is a term used to describe a range of dispute resolution processes, other than adjudication, which are conducted by judges or magistrates. An example is judicial settlement conference.

Med-arb see *Combined processes*

Mediation is a process in which the parties 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. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute’.

Mini-trial is a process in which the parties present arguments and evidence to a dispute resolution practitioner who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also *case presentation*.

Multi-party mediation is a mediation process, which involves several parties or groups of parties.

Ombudsman (or Ombud) is a person who ‘functions as a defender of the people in their dealings with government. ... In Australia, there is a Commonwealth Ombudsman as well as state and territory ombudsmen. ... In addition, a number of industry ombudsmen have been appointed, whose responsibility it is to protect citizens’ interests in their dealings with a variety of service providers, especially in industries previously owned or regulated by governments, for example telecommunications, energy, banking and insurance’.

(Commonwealth Ombudsman Home page:

http://www.ombudsman.gov.au/about_us/default.htm)

On-line dispute resolution, ODR, eADR, cyber-ADR are processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail. See also *automated dispute resolution processes*.

Partnering involves the development of a ‘charter based on the parties’ need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies.

Parties are persons or bodies who are in a dispute that is handled through a dispute resolution process.

PDR (Primary Dispute Resolution) is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The *Family Law Act 1975* (Cth) ‘encourages people to use *primary dispute resolution* mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made’ (section 14). The *Federal Magistrates Act 1999* defines *primary dispute resolution* processes as ‘procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation’ (section 21). See also *ADR*.

Private judging is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with their opinion as to what decision would be made if the matter was judicially determined.

Referrers (or **referring agencies**) are individuals and agencies that suggest, encourage, recommend or direct the use of dispute resolution (or other) services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives.

Restorative conferencing (see *diversionary conferencing*)

Senior executive appraisal is a form of case appraisal presentation or mini-trial where the facts of a case are presented to senior executives of the organisations in dispute.

Service users (or **consumers**) are those who seek, use or receive dispute resolution (or other) services. They may not necessarily be involved in a dispute, have engaged a service provider or have participated directly in dispute resolution processes, but may seek information or other assistance from the dispute resolution service provider.

Shuttle mediation is a process in which the parties 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 without being brought together. The mediator has no advisory or determinative role on 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. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process.

Statutory conciliation takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute.

Victim-offender mediation is a process in which the parties to a dispute arising from the commission by one of a crime against the other, 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 on the content of the dispute or the outcome of its resolution, but may advise on or determine the process.