



03/9165

14 April 2004

The Hon. Philip Ruddock MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

## **FEDERAL CIVIL JUSTICE SYSTEM STRATEGY PAPER**

Thank you for the invitation to comment on your Department's *Federal Civil Justice System Strategy Paper*.

I congratulate the Department for such a wide-ranging document and its well-considered recommendations. NADRAC also appreciated the opportunity to be involved in consultations as the paper was being prepared.

NADRAC strongly agrees with the key conclusion of the paper, namely for 'Government to continue to take a leadership role in facilitating the coordination of the various elements of the federal civil justice system [including ADR] and takes a holistic approach to the system when undertaking policy development'. A similar conclusion was reached by the Family Law Pathways Advisory Group. Practical strategies are needed now to foster such a coordinated and holistic approach on an ongoing basis, and to build on the goodwill developed through the consultation process. NADRAC would be happy to contribute towards the development and implementation of these strategies in conjunction with your Department and portfolio agencies.

### **General comments on the paper**

These comments concern the sections of the paper that do not contain specific recommendations. Responses to specific recommendations are included later in this submission.

### **Cultural and behavioural change (Chapter 5)**

NADRAC agrees that there is a need to 'change the adversarial mindset' and for 'individuals to take more responsibility for their situation'. It agrees that the 'Government should encourage lawyers' move towards the adoption of less adversarial approaches to dispute resolution'.

The challenge for the legal profession, however, is not simply a matter of adopting less adversarial practices and attitudes, but also being skilled in being able to move elegantly between adversarial and consensual or collaborative approaches. An adversarial approach may

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be appropriate in some disputes, or at a particular stage of a dispute. Such an approach, however, should not dominate practices throughout the lifecycle of all disputes. Skilled legal practice could involve, for example, support for the use of mediation in order to attempt to settle a dispute at an early stage, using adversarial court processes to deal with specific issues, such as violence or abuse of power, then returning to mediation to resolve ongoing issues.

Although, as the paper points out, such changes must largely be driven from within the legal profession, the Government could consider supporting a range of strategies as follows:

- Innovative dispute resolution approaches by legal practitioners could be formally evaluated to determine their efficacy and cost-effectiveness.
- Dispute resolution courses could be delivered within initial and continuing legal education. There are many such courses currently in existence and it is noted that the Parliamentary Inquiry into Child Custody Arrangements recommended inclusion of dispute resolution training for family law practitioners.
- As mentioned in NADRAC's response to recommendation 20 below, pre-action protocols developed by the courts can help to change expectations and norms of behaviour. The use of presumptive ADR mentioned in the response to recommendations 18 and 19 below also helps to build an expectation that alternative forms of dispute resolution will be fully explored prior to a court hearing.

The behaviour and attitudes of organisational representatives also contributes to an adversarial mindset and reliance on the court system. Although there is little empirical evidence on this matter, practitioners have expressed the view that many representatives of large organisations do not have an incentive, or are not given appropriate authority, to settle matters. They often feel uncomfortable about compromising and may prefer to leave difficult decisions to others, including the courts. NADRAC's 2003 conference on business use of ADR demonstrated strategies that organisations could use to empower staff to better prevent and manage disputes. The Government can take a lead in this regard by encouraging or requiring Commonwealth agencies themselves to develop less adversarial approaches and to make greater use of ADR. See NADRAC's response to recommendation 19 below.

## **Resolving disputes through ADR: the place of ADR within the civil justice system (Chapter 5)**

NADRAC supports most of the paper's observations with respect to ADR, and agrees that ADR is an integral part of the civil justice system. The way in which ADR fits into the system requires further clarification, however.

ADR is probably better described as part of a strategy for resolving disputes 'through the most appropriate process' rather than 'at the lowest appropriate level' as suggested by title of Chapter 5 and the ADR section of the paper. The latter term tends to reinforce a traditional and hierarchical view of the justice system, in which judicial determination is seen as a superior but

slow and expensive means to resolve disputes, and that, while ADR offers a cheaper and quicker process, it could be seen as an inferior form of justice. As the examples in the paper illustrate, different forms of both judicial decision-making and ADR operate at multiple levels, and each has the potential to offer a 'better' form of justice for particular disputes. For example, judicial officers themselves are increasingly applying alternative dispute resolution processes at an early stage in proceedings. Conversely, forms of ADR, such as appellate mediation and international commercial dispute resolution, operate at a relatively 'high' level, and some forms, such as multi-party facilitation, may well be protracted. Such forms of ADR, however, may offer solutions that are not readily achievable through judicial determination.

Describing the strategy as 'resolving disputes through the most appropriate process' reflects more recent thinking about designing dispute systems, namely that an array of dispute resolution options should exist, and that the system should enable the most appropriate option or options to be used at the right stage in each situation taking into account matters such as cost, timeliness, accessibility, fairness and effective and durable resolution.

### **Quality of ADR providers (Chapter 5)**

As the paper points out, the quality of ADR is central to its acceptance, efficacy and effectiveness. At its essence ADR should assist in the fair resolution of a dispute. The outcomes of, and satisfaction with, the process are pivotal issues, and, as the fairness of the process will to some extent depend on the abilities of the ADR practitioner, a determination of the practitioner's competency is vital.

The issue of accreditation of practitioners has been raised especially with respect to mediation and other facilitative processes, which rely on the skills of the practitioner to assist parties to reach their own agreement about matters in dispute. NADRAC's recently released paper on mediator accreditation will assist in carrying this matter forward. As mentioned in our letter to you about this paper, the Government may wish to give consideration as to how it can best support moves by ADR organisations to develop common standards for the accreditation of mediators.

### **Cultural factors (Chapter 5)**

NADRAC agrees with the comments made in this section of the paper.

With respect to the section on Indigenous Australians, NADRAC has now conducted three consultative forums with Indigenous people in Alice Springs, Brisbane and Melbourne. The forums have reinforced NADRAC's view that improved ADR processes and services to Indigenous Australians is a critical issue. Such improvements would need to address issues such as fairness, accessibility, effectiveness, relevance and sustainability. We will keep you advised of further developments as NADRAC's Indigenous dispute resolution project proceeds.

Cross-cultural mediation practices are of specific importance with respect to native title matters. In its December 2003 Report on the Effectiveness of the National Native Title Tribunal, the

Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund expressed the view that ‘effective mediation in native title matters requires unique and specialist skills’ (paragraph 3.48). NADRAC’s consultations with Indigenous groups would support this view and underline the importance of continuing to develop the cross-cultural skills of members of the NNTT and others involved in native title mediation. Our consultations also support the need for increased Indigenous representation on the NNTT, as recommended by the Joint Committee.

### **Judicial conduct of ADR (Chapter 5)**

NADRAC agrees that judicial ADR is a contentious topic. It recently organised a joint session with the Family Law Council to examine this issue and will maintain a close interest in the topic. NADRAC would generally support the paper’s conclusion that ‘judicial involvement in ADR needs to be managed carefully, ... is only used strategically, in cases identified as being specifically suited to judicial ADR, and that it does not become the standard feature of case management path adopted by the courts’. NADRAC would also repeat its advice with respect to the establishment of the Federal Magistrates Court, namely that a judicial officer conducting an ADR process should be appropriately skilled to conduct that process and that a judicial officer conducting ADR should be disqualified from later hearing the same case.

Related to the issue of judicial conduct in ADR is the application of ADR techniques within the traditional adjudicative role. Such techniques can include, for example, conflict analysis, re-framing, the use of non-adversarial language and facilitative processes in relation to expert witnesses. Most judicial officers would have received their training and experience within the adversarial culture mentioned in the earlier section of the paper. There is value therefore in judicial officers, as well as legal practitioners, undertaking training and education in non-adversarial approaches.

### **Maximising performance of the system (Chapter 6)**

NADRAC agrees that a need exists for good quality data collection and evaluation of the civil justice system (including ADR) to underpin performance improvement. NADRAC has for some time emphasised the need for improved and comparable data collection about ADR across courts and tribunals. It has recently provided you with a copy of a resource paper on ADR research, including a chapter on evaluating the effectiveness of ADR. For the past two years, NADRAC has produced a compendium of published statistics on ADR. NADRAC proposes this year to develop a more comprehensive statistical summary of court and tribunal use of ADR that goes beyond the statistics published in annual reports. It would welcome the assistance of your Department and portfolio agencies in undertaking this task.

## **Specific recommendations**

NADRAC's comments on specific recommendations in the paper are below.

### **Chapter 3**

**Recommendation 1: That, as part of initiatives in the development of a common civics education curriculum, greater emphasis be placed on the role and functions of the federal civil justice system, and its place in Australian society.**

**AND**

**Recommendation 2: That federal courts continue to develop information initiatives such as student resource materials and information for the general public, both on-line and in printed form, and that, where not already doing so, consider:**

- (a) participating in the development of curriculum materials, and**
- (b) engaging in community outreach activities, such as attending activities with schools and community organisations to increase awareness of the role and functions of the federal courts.**

Such educational initiatives could also be linked to the development of dispute resolution skills in school curricula. There is now a wide range of peer mediation programs in schools, and many law societies now run SCRAM (School Conflict Resolution and Mediation) competitions. In line with the conclusions of the paper that ADR is integral to the justice system, it would be useful to emphasise the place of ADR, including peer mediation, within grievance and dispute handling processes.

**Recommendation 4: That the courts continue to develop, where appropriate, uniform procedures for those areas of law in which the same jurisdiction can be exercised in more than one court.**

The continuing work of the Council of Chief Justices in developing uniform procedures for the Federal Court and State and Territory Supreme Courts is encouraged.

In this regard, NADRAC would also encourage the Council of Chief Justices to work on harmonisation of ADR referral mechanisms across the courts.

## Chapter 4

**Recommendation 6:** That federal courts work together to implement recommendations of the Family Court's Diversity Committee and the Roundtable on Cultural Diversity, to the extent that they have not already done so. This might include initiatives such as:

- (a) providing information and training for community workers about the purpose and services of the courts
- (b) developing a comprehensive information strategy on multicultural issues
- (c) developing a distribution strategy that incorporates various methods of dissemination of information, such as the use of community radio and newspapers
- (d) developing an integrated cross-cultural training program for staff
- (e) actively exploring the employment of bilingual staff and counsellors, and
- (f) providing adequate facilities for interpreters.

AND

**Recommendation 7:** That consideration be given to enhancing the availability of low cost interpreters, particularly face-to-face interpreters for Community Legal Centres and similar services that offer legal assistance to people from linguistically diverse backgrounds.

AND

**Recommendation 8:** That the federal courts take into account the needs of Indigenous Australians when considering the implementation of recommendation 6.

AND

**Recommendation 11:** That consideration be given to expanding court support networks to all federal courts, and that such expansion include liaison with appropriate representatives of people with disabilities and people from culturally and linguistically diverse backgrounds, including Aboriginal and Torres Strait Islander people, to ensure optimal levels of support and assistance to those people.

NADRAC supports these recommendations in principle and believes that they should be extended to cover alternative dispute resolution services auspiced or funded by the Commonwealth, or to which federal courts refer parties.

**Recommendation 10:** That the federal courts work together to find ways of expanding court services for people in rural, regional and remote Australia, including:

- (a) implementing or increasing regular circuit coverage**
- (b) implementing or increasing hearings in places other than purpose-built court buildings, where appropriate**
- (c) in all locations where the Federal Magistrates Court has a registry presence, implementing the ability to file both Federal Magistrates Court family law and general federal law matters, and**
- (d) increasing the use of technology, in particular:**
  - audio and video equipment to take evidence and facilitate hearings in remote areas, and**
  - telecommunications technology (for example, facsimile and e-mail) to facilitate communication with the court and the filing of court documents.**

In implementing this recommendation, the facilities for court connected alternative dispute resolution services should also be taken into account. Consideration may need to be given to, for example, video and audio-conferencing facilities, separate waiting areas, separate sound proofed interview rooms and, especially in family disputes, confidential record-keeping and appropriate arrangements to ensure the safety of parties (for example, safe exit areas).

Not operating in purpose-built courts creates its own special difficulties for courts, litigants and ADR practitioners, especially security. To bring such venues up to an appropriate standard would be very expensive and significant funding by the Commonwealth may be required.

**Recommendation 15: That the Attorney General’s Department liaise with the Legal Ethics Committee of the Law Council of Australia and other interested stakeholders regarding the development of model conduct rules designed to provide guidance to lawyers engaging in discrete task representation.**

AND

**Recommendation 16: That the courts liaise with the Attorney General’s Department, the Law Council of Australia, and other interested stakeholders regarding possible amendments to court rules designed to clarify the obligations of lawyers when they are not acting on an on going basis in litigation.**

NADRAC supports these recommendations as they would assist in clarifying the roles and responsibilities of lawyers involved in delivering ‘unbundled’ legal services. This is especially important with respect to lawyers who are representing parties involved in ADR processes.

## Chapter 5

**Recommendation 18: That the Government support amendments to the *Federal Court of Australia Act 1976* to:**

- (a) impose an obligation on the Court and legal practitioners to consider whether to advise the parties of the ADR options available to them to resolve the dispute, and**
- (b) require the Court to advise the parties to use an ADR method if the Court considers it may help the parties to resolve the dispute.**

NADRAC agrees that the obligation to advise parties about ADR options that currently apply in other jurisdictions should also apply to the *Federal Court of Australia Act 1976*.

The recommendation at 18(a) above, however, does not go far enough because ‘to consider whether to advise’ does not create an obligation to actually advise. Legal practitioners who, for whatever reason, are opposed to ADR may argue that they have considered whether to advise but formed the view that it was inappropriate. Although this may be a small minority, it is precisely these practitioners for whom an obligation to advise on ADR would be most relevant. NADRAC therefore suggests deleting the words ‘to consider whether’.

Recommendation 18(b) also is overly restrictive as it may require the court to come to an explicit conclusion that an ADR method may help the specific parties in a case. As the recent paper on court referral to ADR by NADRAC and the AIJA shows, empirical evidence identifies few clearcut predictors for the success of different forms of ADR. In the experience of NADRAC members, ADR has led to satisfactory resolution in many matters, which, on face value, would not have appeared to have been capable of settlement. NADRAC’s view is that there should be a presumption that ADR would be used except where, especially on matters of principle, a case clearly should be dealt with by judicial determination. In NADRAC’s view this recommendation would be better expressed as ‘require the Court to advise the parties to use an ADR process unless such advice is inappropriate’.

If the court requires a party to use ADR, then consideration must be given as to who pays. If there is to be a degree of compulsion, the Commonwealth must look at the funding issue (see also the comments on recommendation 21 below).

**Recommendation 19: That the Legal Services Directions governing Commonwealth legal services be amended to encourage the Commonwealth and Commonwealth agencies to use ADR in resolving disputes in appropriate cases.**

**The amendments should be settled following consultation with relevant stakeholders through the Attorney-General's Department's discussion paper on the review of the Legal Services Directions.**

NADRAC generally agrees with this recommendation and will be making a separate submission in response to the Issues Paper on the Review of the Legal Services Directions.

As mentioned earlier in this submission, the Commonwealth can take a leadership role in helping to create a less adversarial culture through promoting the use of ADR by its own agencies.

In keeping with NADRAC's response to recommendation 18 above, however, there should be a presumptive position with regard to the use of ADR, especially with disputes of a corporate or business nature. A presumptive position, that is, to use ADR 'except where inappropriate' rather than to use ADR 'where appropriate', creates a sense that using ADR is normal and avoids the possibility that initiating or accepting ADR is seen as a concession or a sign of weakness, or as indicating that there are special features about a particular case.

**Recommendation 20: That the federal courts consider the feasibility of implementing pre-action procedures to encourage parties to undertake conduct designed to facilitate settlement before proceedings are filed.**

NADRAC agrees with this recommendation. Courts play a critical role in setting the norms for negotiation and litigation, and appropriate pre-action procedures could have a significant impact on the rate and timing of settlement and the cost of court proceedings.

To encourage the use of pre-action procedures, legal practitioners need to be able to charge for such work. As recommended in NADRAC's 1999 report on the establishment of the Federal Magistrates Court, courts should have the power to make rules which allow costs charged by legal practitioners for pre-litigation work aimed at facilitating settlement of the dispute, including the costs of private ADR processes, to be allowed as costs in the litigation.

**Recommendation 21: That the mediation fees currently payable under the Federal Court of Australia Regulations 1978 and the Federal Magistrates Regulations 2000 be abolished.**

NADRAC does not necessarily disagree with this recommendation, but believes that the issue of fees for ADR needs to be considered more broadly.

NADRAC believes that the Commonwealth should develop more consistent policies with respect to fees for ADR taking into account the impact of fees on the accessibility and equity of ADR services, the need to encourage the early use of ADR, and the need to create a 'level playing field' in choosing between court-based and private or community-based ADR services.

**Recommendation 22:** That the Government support amendments to the *Federal Court of Australia Act 1976* to allow the Court to refer proceedings, or a part of them, to conciliation, case appraisal or neutral evaluation, either with or without the consent of the parties to the proceedings.

AND

**Recommendation 23:** That the Government support amendments to the *Federal Magistrates Act 1999* to allow the Court to refer proceedings, or a part of them, to case appraisal or neutral evaluation, either with or without the consent of the parties to the proceedings.

NADRAC supports these recommendations.

The issue of fees for such processes needs to be considered in conjunction with consideration of mediation fees above.

NADRAC also suggests that case appraisal or neutral evaluation be considered in the context of pre-action protocols and procedures as outlined in recommendation 20 above.

## Chapter 6

**Recommendation 26:** That the federal courts consider supplementing existing ADR processes through the increased use of information and communication technology.

NADRAC agrees with this recommendation, and re-iterates its position, contained in the paper on *Information Technology and Dispute Resolution*, that the form of communication, including technologically assisted communication, needs to match the task and situation at hand.

NADRAC also suggests that the recommendation be extended to other Commonwealth agencies that fund or auspice ADR services.

**Recommendation 31:** That the Government support amendments to the Acts governing the practice and procedure of the federal courts to provide, except in family law proceedings, that:

- (a) before an application or defence may be accepted for filing from a legally represented litigant, the legal representative must certify that there are reasonable grounds for believing on the basis of provable facts and a reasonably

**arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success**

**(b) if it appears to the court that a legal representative (whether acting from the commencement of proceedings or not) has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the legal representative who provided the services:**

**an order directing the legal representative to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,**

**an order directing the legal representative to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified, and**

**(c) a legal representative is not entitled to demand, recover or accept from their client any part of the amount which the court directs that the legal representative is to pay to, or indemnify, a client.**

NADRAC suggests that, in implementing Recommendation 31(a), consideration also be given to including certification that ‘reasonable steps have been taken to settle the dispute, including use of ADR’. Such a requirement could be considered in the context of the pre-action protocols at recommendation 20.

**Recommendation 34: That the Government support amendments to the legislation governing the practice and procedure of the federal courts to allow the courts to make rules regulating the reception of expert evidence, including the number of expert witnesses in particular fields of expertise and the subject matter upon which they are called as an expert witness. In the longer term, the Government should support similar amendments to the *Evidence Act 1995*.**

NADRAC suggests that, in implementing this recommendation, further consideration be given to supporting the use of facilitative processes to assist in narrowing and clarifying technical issues. Whilst the paper refers to joint conferences of experts, such conferences often take place on an unassisted basis. There may be advantages when they are structured and facilitated by a skilled and impartial person. Amendments to court rules and to the *Evidence Act 1995* may need to take into account these assisted processes.

A recent example of the effective use of such a process was a Federal Court native title determination application in which the court ordered that ‘the authors of any draft anthropological reports ... shall meet to confer on matters and issues about which their opinions are in agreement and about which their opinions differ’. The conference was convened by registrars of the court. As a result of the conference a report was provided to the parties, which

included a glossary of vernacular terms and recommendations for consideration by the parties. NADRAC has been informed that the conference assisted in the efficiency of the proceedings in two important respects. Firstly, it allowed the parties to refine the scope of their challenge to the expert anthropological evidence and, in particular, to focus their cross examination to issues of substantive dispute. Secondly, the areas of agreement among the experts have been assisting the parties in their consideration of the areas of facts and issues which may also be agreed. Indeed at a later directions hearing, the respondents indicated that they were in a position to make substantial concessions as to the existence of non-exclusive, non-commercial native title so that the core outstanding factual and legal issues could be the focus of the trial. There is the potential for many weeks of trial to be saved with substantial reductions in the trial time costs to the Court and to the parties and inconvenience to the parties. Whilst the process is not yet complete, the efficiency gains being appear to be attributable, at least in part, to the process.

## Chapter 7

**Recommendation 46: That the Federal Court, the Family Court and the FMC, in consultation with the Attorney-General's Department, consider ways to:**

- (a) expand the sharing of services, including in regional locations, and**
- (b) implement mechanisms that ensure that shared services adequately meet the needs of all the courts for which they are provided.**

As mentioned in the response to Recommendation 10, consideration also needs to be given to the facilities for court connected ADR services. In addition, the possibility of greater sharing of resources and facilities with State and Territory funded dispute resolution services, especially in regional locations, should also be explored.

We trust that you will find the above comments of value. NADRAC would be happy to work with your Department and portfolio agencies to further pursue these matters.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Murray Kellam', with a long horizontal flourish extending to the right.

Justice Murray Kellam  
Chair