

Appendix B

Responses to discussion paper

This appendix summarises the outcomes of consultations conducted by NADRAC on the issues of standards for ADR. These consultations involved the preparation and dissemination of a discussion paper *The Development of Standards for ADR*, public forums to discuss the paper, receipt of written submissions and informal contacts. The appendix summarises the range of views expressed on the major topics, namely the appropriateness of the approach suggested by NADRAC, objectives for ADR, the need for standards, the content of standards, principles for developing standards, development, attainment and maintenance of standards, enforcement, regulation and ways forward. The key issues, and the positions adopted in the NADRAC discussion paper in relation to those issues, are shown in the boxed text in the 'outcome of consultations' section.

Some sections from the discussion paper, especially on the provision of ADR and current standards, are incorporated in previous chapters of this report, having been updated through information received in the consultation process.

The analysis uses an interpretive rather than quantitative approach, and outlines the range of views expressed. No attempt is made to weight or prioritise responses, as each response is assumed to have equal validity. The open-ended questions used in the discussion paper encouraged a breadth of responses, not precise answers, and as a result, responses tended not to fit into clearcut categories. Moreover, the self-selection process involved in both the submissions and the forums means that it would be misleading to report numbers or percentages expressing a view.

The views expressed in the consultation process formed a major, but not exclusive, part of the information that NADRAC has used in formulating its conclusions and recommendations.

Summary of responses

- 1) NADRAC undertook an extensive consultation process on its discussion paper through a series of forums in each capital city, involving over 250 people, and consideration of more than 40 written submissions.
- 2) The framework approach proposed by NADRAC generally was seen as highly appropriate, given the diversity of the ADR field, its stage of development, and the nature of ADR service provision. However, any framework needs to take account of existing standards, models, policies and structures; the needs of particular sectors and social groups, including indigenous, rural and remote communities; and the need to clarify definitions and terminology.
- 3) There was some debate about the core objectives for ADR proposed by NADRAC, which were that ADR should resolve disputes, use a process which is considered by the parties to be fair, achieve acceptable and lasting outcomes and use resources effectively. There were questions about the validity of these objectives, and some controversy surrounding whether broader personal and societal goals applied to ADR. ADR was also seen as having value in narrowing, not just resolving, disputes.
- 4) There are strong arguments for standards as a way of ensuring continued development of the ADR field, effective consumer education, consumer protection, clarity of expectations, and better management of resources. There were concerns, however, from some quarters about the potential for standards to create a more elitist and exclusive field.
- 5) The knowledge, skills and ethics proposed by NADRAC were seen to accurately reflect the potential content of ADR standards. They could be further improved and adjusted by taking account of the breadth and specialisation of ADR practitioner roles and responsibilities; the specific needs of different parties, disputes, sectors, industries and processes; and the community, organisational and professional environments in which practitioners operate.
- 6) Many suggestions were received concerning good practice in education, training, selection, assessment and professional development. Several emphasised the need for training and selection to be performance-based. There was no consistent view about whether practitioners should be accredited and, if so, by whom. There were concerns expressed about the range and lack of consistency in current accreditation schemes, and suggestions that any accreditation needs to go beyond the service provider, and involve some external validation. Accreditation schemes were suggested

for accrediters, trainers and training programs, rather than for individual practitioners.

- 7) Responsibilities for setting, maintaining and enforcing standards depend largely on context. The need was raised for an external body to monitor and enforce standards and receive complaints. An ADR complaints body such as an ombudsman was proposed. The need for ADR processes to be covered by normal consumer safeguards also was suggested. However, differing views were received about immunity provisions covering ADR.
- 8) Most saw self-regulation as appropriate for the ADR field generally, but with a greater degree of control being exercised in particular areas of practice.
- 9) Many suggested the need for a new body or bodies to oversee standards and/or receive complaints, and processes were suggested for making progress on the future development of ADR standards.

Responses

1. Overall approach

NADRAC discussion paper position:

Because of the diversity of ADR in Australia, NADRAC believes that no single prescriptive set of standards, no matter how minimal, can cover all ADR services, and specific standards should not be determined by a single body or institution, but by service providers in consultation with all other stakeholders.

- 1 The majority of forum participants and submissions strongly supported the framework approach, as opposed to a minimalist prescriptive approach. Forum participants agreed that the diversity and complex nature of ADR meant that prescription would be unworkable, and most submissions expressed support for the framework approach due to the diversity of the ADR field, and its stage of development, for example:
 - *'We acknowledge that there are different types and levels of standards and that these cannot be applied to every type of ADR. Family mediation, for example, due to the types and combination of issues that arise may require distinctive skills and qualifications'. (Submission 29)*
 - *(ADR in Australia is at) an embryonic stage, compared to the years of development and establishment of traditions of other disciplines ... I believe it*

would be counter-productive to force ADR into established moulds or patterns of other disciplines before the ADR community itself is able to assert its own character.' (Submission 26)

- 2 There was also a suggestion from some quarters that some minimalist standards also may be required, such as in tenancy disputes where there was a need for a *'prescriptive element within the context of legislatively mandatory ADR'*. (Submission 38)
- 3 The need to include more diverse perspectives in standards, including non-legal and non-European perspectives, was raised at both the Perth and Sydney forums. Submissions also referred to the need to *'understand areas of Aboriginal contemporary, semi-traditional and traditional social cultural structures'* (Submission 28), and to integrate ADR standards with International Human Rights Standards (Submission 17).
- 4 Some other suggestions as to the overall approach that could be taken included:
 - Focussing on accrediting training courses rather than individuals. For example, *'I accept that in such a fluid field a system of government licensing of individuals would be too cumbersome. However, I would urge that there should be some accreditation of training courses'*. (Submission 4)
 - Concentrating on ends rather than means, for example, *'a desire to focus on outcomes for all the stakeholders in ADR, rather than simply the inputs which may have traditionally been considered important in the delivery of this service.'* (Submission 15)
 - The use of a national risk management approach, which, *'rather than the application of a dominant professional or adversarial paradigm, involves a multi-disciplinary, consultative, evidence based attempt to solve problems in order to minimise harm to individuals and the community'*. (Submission 3)
 - A code of conduct, rather than prescriptive 'standards', since, *'if it's a code of conduct, it can be more universally applied than standards, can focus in and provide ... flexibility'*. (Brisbane Mediation Conference forum)
 - A mixed approach comprising both core or minimalist standards, and aspirational or contextual ones, for example: *'a base set of competency standards is established; a Code of Conduct/Practice and/or legislation is developed that is linked to competency standards; and training providers are accredited to provide training consistent with these competency standards. It would be expected that specialist areas and service providers would develop*

additional requirements or qualifications appropriate to their area of practice that would refer to the base set of standards. (Submission 37).

Scope and terminology

- 5 The issue of ADR definitions and scope, and consequent impact on standards emerged in the forums and in other consultations:
- A number of submissions emphasised that ADR processes did not fit into separate categories of procedures, for example, *'a conciliation conference is only a small part, and not an inevitable part, of the procedures. The processes in place to manage complaints ... involves determination, advising and facilitating. ... ADR is often complex and protracted. This should be recognised and its implications considered.'* (Submission 22). Submission 28 also emphasised that *'The philosophy of the service is to view alternative dispute resolution as a means to treat the Aboriginal community, key stakeholders and other interested parties in a **holistic manner**'.*
 - Several submissions emphasised the need for consistent ADR terminology. *'As NADRAC well knows from its earlier work, definitions count. Clear definitions of practice are undoubtedly needed for quality assurance as well as providing a basis for funding bodies and consumers to make decisions.'* (Submission 32)
 - Several submissions drew attention to the need to address standards in statutory conciliation. Conversely, others saw mediation as the main priority, and mediation was the most common form of ADR mentioned in both the forum and the submissions. The use of the term 'mediation' also raised concerns. *'A fair amount of confusion already exists, a fact that has been recently compounded in the family and child area by the Family Court's apparent collapse of the distinction between the practices of conciliation conferences and mediation'* (submission 32). Conversely, one submission (8) challenged NADRAC's ADR definitions and saw mediation as including an advice-giving role.
 - A related issue is the extent of inter-connectedness between different ADR processes, especially facilitative vs determinative processes. For example, an issue raised in the Canberra forum concerned the extent to which 'arbitration' and 'mediation' belonged together, and could therefore feasibly be covered under the same standards framework. One submission emphasised the need that the *'three categories of ADR processes as defined by NADRAC – 'facilitative', 'advisory' and 'determinative' – be treated separately*

for the purposes of discussing and developing ethical and competency standards, appropriate ADR training and a regulatory framework.

(Submission 37)

- 6 The issue of whether ADR was a profession, an emerging profession or an industry was also raised. One participant (Perth forum) questioned whether mediation was a ‘technique’ rather than a ‘profession’, and therefore not needing standards. One submission challenged the, *‘assumed existence of an ADR community, industry or market (which) detracts from a wider consideration of ADR processes and the relevance of standards to those processes’*. (Submission 35)
- 7 Some participants felt that NADRAC’s approach – to cover all forms of ADR – was overly ambitious, and could lead to an outcome that was too broad and meaningless. *‘... if there were standards they would need to be so broad that they be almost a motherhood statements, but we also thought that for the ADR industry to move ahead we must have standards to gain things such as public trust and recognition. It is necessary to have some sort of standards’*. (Melbourne forum)
- 8 Conversely others wanted the approach to be even broader than that proposed by NADRAC. A number of forum participants and submissions suggested that ADR standards should cover family conferencing in child abuse, juvenile justice and criminal justice areas. The issue of ADR and conflict resolution as a community development approach was also raised. Some participants saw the value of ADR as a tool for communities to resolve their own problems, rather than the provision of a professional service. As a community development tool, service standards would be inappropriate. One submission similarly suggested that: *‘an opportunity would be missed if NADRAC were to omit a broader overview of Alternative Dispute Resolution and its position in societal needs. This document appears to limit Alternative Dispute Resolution to the activities of ADR professional practitioners – Arbitrators, Conciliators and Mediators, principal practitioners of the ADR ‘industry’ or ‘profession’ – it overlooks the much wider and endemic awareness and practise of skilled conflict resolution taking place within the community at all levels.’* (Submission 7)

2. Objectives of ADR

NADRAC discussion paper position:

NADRAC considered that certain 'core' objectives should inform the development of standards, namely that ADR should:

- *resolve disputes*
- *use a process which is considered by the parties to be fair*
- *achieve acceptable outcomes*
- *achieve outcomes that are lasting*
- *use resources effectively.*

- 9 Most forum participants and submissions supported the objectives for ADR suggested by NADRAC.
- 10 Two submissions questioned the overall validity of the proposed objectives because of lack of empirical evidence (submission 33), the lack of reference to community interests (submission 3), and lack of guidelines on the meaning of 'fair process', 'acceptable outcomes' or 'effective use of resources.'
- 11 A number of submissions proposed additional or modified objectives, which surrounded transformation, dispute management, and broader societal outcomes. Many of these objectives were seen as applying more to facilitative than to other forms of ADR. Examples of these follow:
- 12 **Transformative goals**
- *'Helps empower parties to act in their own interests, and to recognise the interests of others.'* (Submission 20)
 - *'An insight into relationship dynamics and transformation in understanding, relationship or behaviour '* (Submission 29)
 - *'Party empowerment (assertiveness) and recognition (empathy)'* (Submission 32)
 - *Allow parties 'to raise and canvass underlying needs and concerns, thus affording them the opportunity to resolve those concerns.'* (Submission 33)
- 13 **Dispute management goals**
- *'Resolves disputes or narrows the scope of the dispute.'* (Submission 27)
 - *'Clarifies the situation of parties as to their negotiating positions and their options should negotiations break down.'* (Submission 15)

- *‘Exchange of information in a without prejudice setting, and clarification of issues and the narrowing of those still in dispute after information exchange and clarification has taken place’* (Submission 32)
- *‘Selection of most appropriate and economic method of dispute resolution’* (Submission 40)

14 **Broader societal outcomes**

- *‘Crime prevention and community health, safety, education and employment, rehabilitation of victims and perpetrators of crime’* (Submission 3)
- *‘Social justice’* (Brisbane forum) and *‘human rights’* (Submission 17)
- *‘Promoting the needs of children’* (Submission 29, several forums)
- *‘Reinforcement of participatory democratic values’* (Submission 32)

15 There were divergent views expressed at forums and in submissions on how to define fairness and acceptability of outcomes, and the extent to which ADR should be expected to contribute to broader social goals:

- While some felt that fairness and acceptability were purely subjective and could not be defined in objective terms, others felt that an external measure of acceptability was required.
- For many the need for ADR to promote broader social goals was seen as vital. However, others felt that this was beyond the role of ADR services.

16 In relation to ‘effective use of resources’, a question was raised about whether this was an objective of ADR, or an issue of management (Submission 26). The need to address both service provider and party resources was also raised (Submission 33).

3. Need for standards

NADRAC discussion paper position:

NADRAC was of the view that the development of standards would permit promotion of the objectives of ADR, minimise dissatisfaction with its operation, promote service provider and practitioner accountability and promote the appropriate use of ADR. This approach is consistent with international developments.

- 17 Submissions and forum participants predominantly supported the need for standards, although there were diverse views about what form such standards should take.
- 18 Common reasons for supporting standards were:
- protection of consumers/parties of ADR, and protection for referrers;
 - enhancement of the credibility and legitimacy of ADR processes, services and practitioners;
 - promoting professionalism and skills development;
 - accountability;
 - consistency, quality control, and the provision of independent benchmarks to measure services.
- 19 There was a greater perceived need for standards in particular contexts such as:
- internal dispute resolution such as grievance mechanisms, due to problems of neutrality (Melbourne forum);
 - tenancy disputes (Submission 38);
 - industry schemes (Submission 31)
 - family disputes (several forums, Submissions 10, 29, 39);
 - court mandated ADR, or where there is a lack of choice (several forums).
- 20 Conversely, others saw a lesser need for standards where practitioners already belonged to an existing profession:
- *'We were wondering where the drive for standards was coming from and whether there was less of a drive from those of us who have other professions with ethical standards.'* (Perth forum)
 - *'Standards would ... provide useful guidelines for mediators who are not lawyers.'* (Submission 35)
- 21 It was acknowledged at the forums that standards have been, and are likely to continue to be, practitioner and industry driven, rather than consumer driven. An alternative suggestion raised at the Canberra forum was to start by identifying issues or problems consumers face in the quality of services, and build standards from that basis, rather than on the basis of practitioners' concern. Similarly, a participant at the Perth forum noted the predominance of ADR practitioners at the forum and raised the issue of representation and consultation. However, other participants noted that most ADR consumers were 'one-off' users, and therefore unlikely to be actively involved in discussions on ADR standards.

Evidence

- 22 Some forum participants asked whether the ADR field had been effectively enumerated and analysed, and felt that an attempt should be made to gauge the numbers of, for example, practitioners, services, or trainees, and hence the scale of the task to be undertaken in developing standards.
- 23 While it was agreed that there is not a groundswell of complaints against ADR practitioners, participants noted that this could be due to the lack of consumer awareness, and the lack of any independent body to which consumers could complain.
- 24 A number of forum participants saw the lack of research and evaluation in ADR as a constraint on the future development of ADR standards.

Timing

- 25 Many forum participants and submissions expressed the view that the time was 'right' for ADR standards. However some also felt the process should not be rushed, and that a staged, sequential approach to standards development was required:
- *'The increased awareness of ADR in the community, and use of ADR by courts, tribunals, industry and government agencies, indicates that the timing is right if not late for the development of standards for ADR.'* (Submission 37)
 - *'Discussion about standards is valuable at this time and we are of the view that moves to a system of self-regulation together with some partial government regulation are inevitable over time. We stress that the work on standards will take years and should not be hurried, due to its complexity.'* (Submission 20)

Cautions

- 26 Several submissions expressed caution about standardisation and professionalisation, which may potentially impede the development of ADR effectiveness and inclusivity:
- *'As practices become professionalised they tend to "gatekeep" and not allow public scrutiny. They also tend to develop a certain culture, one of the characteristics of which, is the derogation of their clients ... it is important to reflect on the process of professionalisation, who it excludes, and how it changes us in the process.'* (Submission 11)

- *‘Standards and accreditation have generally been used as a method of restricting the number of practitioners, and thus allowing the costs to be increased due to “closed shop” situations.’* (Submission 19)
- *‘Standardisation of ADR as a process (may lead to) the unwitting development of a standard that could be unworkable, and therefore exclude Aboriginal people from the practical use of ADR, which does not take into account cultural and social expectations.’* (Submission 28)

4. Content of standards

NADRAC discussion paper position:

NADRAC identified the following potential content of standards:

- *knowledge about conflict, culture, negotiation, communication, context, procedures, self, decision-making and matching ADR to disputes;*
- *skills in assessing a dispute for ADR, gathering and using information, defining the dispute, communication, managing the process, managing interaction between the parties, negotiation, being impartial, making a decision and concluding the ADR process;*
- *ethics in promoting services accurately, ensuring effective participation by parties, eliciting information, effectively controlling the process, exhibiting neutrality, maintaining impartiality, maintaining confidentiality, and ensuring appropriate outcomes.*

- 27 There was broad support for the categorisation, and a view by many that national core standards would be more likely to revolve around ethics, while knowledge and skills would need to vary widely according to the context of practices.
- 28 Forum participants agreed that different types of work required different types of standards:
- There were seen to be strong differences between, for example, commercial and family work.
 - Environmental and public policy dispute resolution were described as being of a different ‘genre’ from other types of ADR.
 - Social justice issues were described by some as being vital to any standards; however, this was not universally accepted.

- Dispute resolution in indigenous communities was also seen as being quite different, and requiring a broader conflict management and community development approach.
 - The need to address particular legislative or industry knowledge was raised in several submissions.
- 29 The importance of cultural knowledge and sensitivity was emphasised at several forums and submissions, one noting that, *'knowledge about culture ... (is) particularly relevant where Indigenous people are involved, and it is important that it be kept in mind as standards are developed or monitored by NADRAC'* (Submission 6).
- 30 Participants at the Perth forum recommended that any standards be in plain English, simple and to the point, and avoid technical jargon. This was especially important in relation to practitioners from Indigenous, and culturally and linguistically diverse groups.
- 31 Two submissions pointed out that in some agencies, not all practitioners would need to have all the content areas, for example:
- *'... various ... organisations providing ADR services also employ full-time intake and organising officers. This raises the issue of how such organisations are to be dealt with under any proposed standards. Will all of the skill requirements apply to anyone who conducts any part of the process?'* (Submission 33)
 - *'... the KNOWLEDGE required by a service provider does not need to be held by every person in the agency, the SKILLS could be held at a minimal level by some, with an escalating level of skill (depending upon the degree of decision making and autonomy given to each individual) through the organisation, and ETHICS/ATTITUDES to be held by all.'* (Submission 26)
- 32 Reflecting current theoretical and practical debate, the concept of, and the word 'neutrality' proved to be problematic:
- *'... intricate and pressing kinship obligations which fall to all Aboriginal people make neutrality difficult for a community mediator practicing in his or her own community.'* (Submission 28)
 - *'Neutrality refers to an innate condition, and one that is not present in human beings! All that can be promised is "exhibiting lack of bias".'* (Submission 15)
 - *'An attempt at even handedness can always be made to try and ensure the participation of all parties, but ADR practitioners cannot claim neutrality as the choices they make in the process affect the outcomes.'* (Submission 20)

- 33 Many other suggestions were made as to amendments and additions to the wording of the content of the standards, and these have been reflected in Chapter 5 of this report.

5. Principles for developing standards

NADRAC discussion paper position:

The principles underlying the development of standards include:

- *The development of standards should be through a consultative process.*
- *Standards should be developed in light of the objectives of ADR.*
- *Standards need to recognise context.*
- *Standards should balance the needs of parties, providers and broader societal interests and needs.*
- *Standards should balance theoretical knowledge and actual ADR practice.*
- *Standards should be based on a realistic appraisal of resources.*
- *ADR standards need to be supported by an appropriate balance of government regulation, professional self-regulation, public accountability, legal redress and competitive market forces.*
- *The responsibility for upholding and enforcing standards is a shared responsibility.*
- *Standards should be able to be changed and adapted over time.*

- 34 Most forum participants and submissions supported these principles, with the need for consultation particularly emphasised. One submission, however, objected to the proposal that the consultative process should be ‘acceptable to the ADR community’, noting that, ‘*such a perspective allows the erection of “standards” which have the primary function of placing protective barriers around an undertaking and those who immediately benefit from it, in this case, the ADR practitioners.*’ (Submission 3)
- 35 Other submissions raised the issue of inclusion of human rights and community standards (Submission 17), the need to involve other professional groups (Submission 21) and relevant actors and agencies (Submission 32), and the need to contextualise the principles for particular areas of work or forms of ADR (Submissions 26 & 29).

6. Development, attainment and maintenance of standards

NADRAC discussion paper position:

NADRAC was of the view that the development, attainment, and maintenance of standards should be a shared responsibility of different parties in the ADR community, particularly in the early development of ADR. The options for accrediting agencies include training or education institutions, service providers who provide (or refer to) ADR practitioners, courts and tribunals, and government. In many cases it will be the service provider that develops the standards and has a role in ensuring that the standards are maintained.

- 36 The overlap between the development, attainment and maintenance of standards was recognised by many, with the need to set standards seen as a pre-requisite for developing appropriate pathways for training and accreditation:
- *'The standards will determine the pathways, rather than the other way around.'* (Submission 29)
 - *'Only as standards are set will the following be addressed: the length and content of training and the appropriate provider of training.'* (Submission 15)
- 37 A range of models were suggested by forum participants and submissions regarding how best to address the development, attainment and maintenance of standards. Many raised the role of a possible national or peak body to oversee the development, attainment and/or maintenance of ADR standards.

Accreditation

- 38 Several forums and submissions suggested a competency model linked to the Australian Training Framework, for example:
- *'All courses purporting to train mediators should be VTAB accredited and linked to a University or RTO, and be competency based.'* (Submission 30)
 - *'The accreditation of ADR practitioners could be primarily competency based.'* (Submission 37)
 - *'The ACT Competency Standards for Mediators is an example of standards being developed for an ADR area. These now provide a reference for training courses and mediation bodies beyond the ACT.'* (Submission 39).

39 Some others (e.g., Submissions 1, 26), while supporting the concept of a competency approach, raised the problems that this may create in having to ‘fit into’ existing infrastructure and industry groupings that may not meet the needs of the ADR field.

40 Systems for the accreditation of ‘accrediting’ and/or training organisations were suggested as the most appropriate method for standards recognition:

- *‘One approach may be to consider the accreditation of trainers/training programmes, that is, accreditation of the service provider rather than the practitioners ... organisations accrediting ADR practitioners should themselves be accredited organisations.’* (Submission 35)
- *‘It is (this association’s) view that the organisations most appropriate to accrediting family mediators are those that are concerned specifically with the practice of family mediation.’* (Submission 29)
- *‘It may be useful to further develop the ACT model of agencies approved to assess and accredit.’* (Submission 26)
- *‘In the absence of a minimum qualification recognised by the DR industry, the Department is of the view that there may need to be a range of accredited organisations that reflect the specific needs and requirements of the diverse DR Industry ... what is critical in the Department’s view, is the need for some external body that can endorse the quality and standard of mediation courses and dictate some minimum core competencies for mediators. Organisations must also have the integrity to determine the selection and recruitment of mediators based on the specific requirements of that industry sector.’* (Submission 30)

41 However, others felt that it was too early for an overall accreditation scheme, and believed, *‘voluntary, rather than imposed, accreditation to be most appropriate’*. (Submission 36)

Education and training

42 The need for education and training to incorporate practical as well as theoretical content was generally supported, but there were differences concerning the need for extended academic education, for example, *‘a diversity of views (on) the ... sub committee ... one strongly supporting the need for academic credentials, and the other stressing the knowledge to be gained from experience and colleagues’*. (Submission 20)

43 Forum participants and submissions suggested a number of principles and practices for effective education and training in ADR. In general, it was felt

that training should be based on adult learning principles, use critical reflection, and provide experiential as well as didactic methods. It was also felt that trainers should have both theoretical knowledge and practical experience.

Skills recognition

44 The need to recognise current experienced and competent practitioners in the introduction of any new standards was recommended by several forum participants:

- *'(Our agency) would be concerned that experience and aptitude could be recognised alongside or instead of formal qualifications in ADR.'*
(Submission 28)
- *'... family mediators should be accredited, but that accreditation needs to be framed in such a way that it allows for the attainment of experience.'*
(Submission 29)

Means for this included processes such as 'Grandparent' clauses and 'Recognition of Prior Learning' ('RPL').

45 Mutual recognition across different accrediting agencies was seen as a desirable goal, but the absence of nationally recognised qualifications or standards was seen as a major impediment to this (submissions 26, 33, 37). Others felt that at this stage of development, it should be left to each organisation to determine its own requirements (Submission 20), or left to the marketplace to determine (submission 36).

Maintenance of standards

46 A range of methods was suggested for the maintenance of standards, with regular testing and review of practitioners seen as a critical element.

47 Methods included co-mediation, debriefing, submission of videotaped sessions, supervision, mentoring, in-service training, consultation, small group discussion, service evaluation, and record keeping. Some submissions also suggested consumer centred methods such as formulation and distribution of standards, and provision of pre-session information to parties. A code of conduct was also suggested as a means of standards maintenance, as well as (or rather than) enforcement (see section below).

48 Maintenance of standards was seen as relating to the context and type of work, for example whether a practitioner operated as a sole or a co-mediator, worked in an organisation, or worked privately.

Responsibilities

49 There were diverse views about the role of service providers in developing or maintaining standards and/or accrediting practitioners. Some saw the service providers as being in the best position, for example:

- *'... an organisation (such as this body) should have responsibility for accrediting its ADR practitioners, not an outside body.'* (Submission 34)
- *'As a mediation agency approved under the ACT Mediation Act 1997 we support that approach, ie that it should be left to mediation/ADR agencies to accredit mediators /ADR practitioners. In particular accreditation should be carried by ADR agencies.'* (Submission 25)

50 However others doubted the capacity and/or commitment of service providers to take on some or all of these roles:

- *'... (another) argument against service providers being accrediting bodies is that service providers whose priorities and resources are directed elsewhere may not give accreditation the attention required to ensure standards are maintained.'* (Submission 33)
- *'I have great concerns about service providers maintaining standards. My experience of service providers ... is that they are very inexperienced and untrained when it comes to an appropriately clear understanding of ADR practices.'* (Submission 24)
- *'Service providers should play a significant role in the setting standards. However, they are not necessarily in the "best position" to do so.'* (Submission 32)

51 Forum participants and submissions recognised the diversity of the ADR field, and the complexities this raised for standards. An issue raised in several of the forums was the 'add-on' nature of ADR, for example, one may be a lawyer, engineer or social worker first, then a mediator. *'If you are a lawyer first then maybe you have a standards section of the Law Society, if you are a land agent first then you might have a standards section of the Real Estate Institute but if you consider yourself a mediator first and then a lawyer, social worker, real estate agent second then you may be able to look at there being one body for mediators.'* (Adelaide forum)

52 The issue of maintaining professional standards therefore can be confused, as there is doubt as to whether one's main professional association is adequately equipped to deal with issues relating to one's ADR practices. The overlap between various codes of practice was also raised.

- 53 Some submissions and forum participants saw different sets of responsibilities, depending on the nature of the provider/ practitioner. A participant at the Darwin forum suggested that the ADR field could be categorised as:
- government funded or auspiced services, whose standards and quality would be monitored and enforced by the funding organisation;
 - those who practice ADR as an add-on to their professional practices, in which case maintenance and enforcement of standards would fall to the professional association;
 - those who are primarily ADR practitioners, with a qualification in dispute resolution and who practice ADR on a full-time, professional basis; this group was seen as lacking an existing professional body or association – and this may be an area of need.
- 54 The responsibilities of funding bodies for standards were questioned by a participant in the Hobart forum, who suggested that the ‘purchaser-provider’ model for service delivery required the ‘purchasers’ to distance themselves from service delivery. Funding bodies therefore may be reluctant to incur potential liability for service quality through direct involvement in standards development and maintenance.
- 55 Understanding by consumers of the ADR process they were undertaking was seen as important. For example, participants at the Adelaide forum saw the service provider as responsible for explaining the process to consumers, including the facility for consumers to walk away from the session at any time.
- 56 Many forum participants and submissions emphasised the need for a national body to accredit and/or assist bodies to maintain standards. In addition, the issue was raised of the role of existing State and Territory associations, *‘in maintaining standards, (and in developing) a code of conduct for those practitioners not employed by an organisation which has one’*. (Submission 20)

7. Enforcement

NADRAC discussion paper position:

NADRAC's view was that the enforcement of standards may be the responsibility of more than one stakeholder, including service providers, industry associations, government, practitioners and parties. An effective code of conduct could also include sanctions, and legal avenues of redress. The liability of ADR practitioners is affected by immunity and confidentiality/inadmissibility considerations.

Code of Conduct

57 A code of conduct was seen by many forum participants, and in many submissions, as an appropriate starting point for maintenance and/or enforcement of standards, for example, '(this association) *supports the use of a Code of Conduct/Practice as a means to maintain and enforce standards. The Code would include ethical guidelines and guidelines for practice and refer to a base set of competency standards required of practitioners. (This association) has supported the development of the "Let's Talk Draft Code of Conduct for Mediators"*.' (Submission 37.) Other comments on a code of conduct have been raised in previous sections on maintenance and on overall approach.

58 While the support for a code was widespread, not all agreed that a code be used as an enforcement mechanism, for example, '(this agency) *does not agree that an effective code of conduct should include sanctions and legal avenues of address as the "industry" of dispute resolution is controlled not only by the marketplace but, in most cases, is subject to legal review*.' (Submission 40)

Complaints, sanctions and consumer recourse

59 As with the issues of attaining and maintaining standards, service providers were not seen universally as the appropriate bodies to enforce standards. The government also was seen as having a limited role. While professional bodies and accrediting organisations were seen as possible appropriate bodies, there was general support for the idea that an independent body needed to be involved in compliance and complaint handling:

- There was a need to complain to someone who is NOT the provider, although complaints in the first instance could be directed to the service provider. *'There should be a credible and accessible complaints procedure to deal with allegations of misconduct. A complaints procedure that only allowed*

for informal complaints to be made to the body providing ADR I submit would be insufficient to properly deal with allegations of misconduct.'
(Submission 4)

- The possibility of an ADR Ombudsman, or similar body, was raised by a number of participants and submissions.

60 The possible use of section 52 of the *Trade Practices Act* against those misrepresenting the nature of their services (e.g., as mediators) was raised at the Sydney forum. One submission suggested that, *'for those service providers not covered by other provisions, Fair Trading Tribunals could provide at least some redress for service users'*. (Submission 26) However, some difficulties with the consumer model were also raised, for example, *'a major difficulty of relying on existing consumer protection laws is the fact that many ADR processes are part of a court process. Courts and tribunals function within a special framework of rules designed to protect against the miscarriage of justice, but are not exposed to liability rules in the same way as private agencies and government departments'*. (Submission 36)

Immunity and confidentiality

- 61 Several submissions referred to issues of immunity, some supporting the continuation of immunity provisions (Submission 9), others (e.g., Submissions 24, 36) advocating a lessening of current immunity provisions. A number drew attention to existing regulatory instruments covering immunity.
- 62 Similarly, confidentiality and inadmissibility of ADR processes, especially in facilitative ADR, was seen as important. However, it was suggested that confidentiality may be a meaningless concept in disputes involving Aboriginal people (Submission 28).
- 63 While many felt that some protection could be offered to those who complied with standards, a participant at the Sydney forum suggested that the protections of confidentiality and immunity should be treated separately. Immunity should be connected to compliance with standards, but confidentiality, which protects the parties not the practitioners, should apply regardless of whether the practitioner met any standards.

Insurance

- 64 Professional indemnity insurance was seen as having value in, *'clarifying the parameters of conduct'* (Submission 15), *'(protecting) ADR consumers and practitioners'* (Submission 27), as *'a viable alternative to immunity as a form of*

protection' (Submission 33), and in encouraging compliance with standards through the potential of reduced premiums (informal consultations).

8. Regulation

NADRAC discussion paper position:

NADRAC identified a range of options for regulatory means for implementing standards in ADR. Options ranged from:

- * no regulation*
- * self regulation*
- * quasi-regulation, through to*
- * explicit government regulation.*

Self-regulation or quasi-regulation may be more appropriate for most of the ADR community, although in the context of mandatory ADR, there may be a greater need for more explicit regulation.

65 Most forum participants and submissions supported the position put forward by NADRAC, namely that self-regulation generally was at present most appropriate for the ADR field.

66 There was however a range of views from those who advocated no regulation at present, to those who saw a need for far greater regulation than currently exists. For example:

- *'I am not persuaded that regulation is desirable at this point in time. There is much work to be done to encourage uniformity, not across areas of practice, but between like areas of practice.'* (Submission 36)
- *'I am of the view that there does need to be more regulation of ADR, in areas where few controls now exist.'* (Submission 1)
- *'Having no regulation is inappropriate. This gives no protection to clients or to other professionals. To allow market forces to determine who survives in practice would be insufficient as clients may be referred to inappropriate practitioners and even if they were dissatisfied, the confidential nature of ADR is such that this is unlikely to be publicised. Self-regulation is an important part of attaining and maintaining standards, but is not entirely sufficient.'* (Submission 39)

- 67 Little evidence was provided of the need for regulation and, as one submission pointed out, *‘there would appear to be a necessity to consider better data collection to gauge the extent of “market failure”.*’ (Submission 35). Direct evidence of market failure tended to surround provider, rather than consumer, issues. *‘Because the supply of mediation and arbitration services exceeds demand, (there are at least four organisations that provide arbitrators; nine organisations provide adjudicators for the NSW Security of Payment legislation; at least eight organisations that accredit mediators).’* (Submission 1)
- 68 There were different views about the need for such evidence. *‘There appears to be no objective evidence to support government regulation of ADR practitioners and ADR specialist providers. As far as we are aware there have been very few complaints about ADR practitioners. We therefore support self-regulation of the ADR community.’* (Submission 25). Not all saw the lack of evidence as necessarily posing a problem. Lack of consumer awareness of ADR was seen by some as an impediment to obtaining data on the need for regulation, as well as a reason to support regulation. The forum at the Brisbane mediation conference asked, *‘why wait for a problem to occur?’* One submission proposed that: *‘regulation, at least in the form of guidelines and codes of practice, combined with a registry of relevant qualifications, is now appropriate, even if there is no statistical evidence yet of serious problems. With the advent, and likely increase, of mandatory court-annexed schemes, it is becoming even more so.’* (Submission 32)
- 69 Different needs for regulation were expressed in different areas of work, which parallel the areas raised above in relation to the need for standards. The presence of existing regulation or standards in particular areas (such as industry dispute resolution schemes, or the legal profession) was seen as a relevant consideration.
- 70 Most agreed with NADRAC’s position that more explicit regulation was required where ADR was mandatory or otherwise involved less consumer choice. However the rationale for regulation in relation to mandatory ADR was questioned by one submission which was, *‘satisfied with the operation of court supervised mediation (and) confident that it is able to self-regulate adequately, even in circumstances of non-consensual mediation’.* (Submission 9)
- 71 There were differing views about whether standards could exist without some form of regulation or enforcement. Some suggested that standards could exist as independent reference points, as in the case of Standards Australia. However, others believed that standards without enforcement mechanisms would be meaningless. A further view expressed in the Adelaide forum was that regulations themselves may become standards, as in the case of the Family Law Regulations.

- 72 Forms of regulation suggested included:
- a licensing or registration system
 - specification of accreditation/entry requirements
 - voluntary accreditation
 - models similar to the *Family Law Regulations* and/or state dispute resolution schemes
 - an agency approval/voluntary regulation scheme as under the *ACT Mediation Act* (1997)
 - an approach based on the US *Draft Uniform Mediation Act*
 - a register of qualifications and/or approved courses
 - guidelines
 - codes of practice
 - self-regulated accreditation for sole practitioners
 - promotion of quality organisations
 - reliance on existing systems, such as the benchmarks for industry dispute resolution schemes.
- 73 As well as regulations for providers and practitioners, two submissions raised issues of regulating party behaviour and responsibilities, such as enforceability of dispute resolution clauses (Submission 12), consumer education and provision of information by parties prior to ADR (Submission 35).

9. Ways forward

Forum participants and submissions suggested possible ways forward for addressing the general issues raised in the discussion paper.

New bodies

- 74 Many of the forums and submissions raised the need for new bodies to develop, accredit, maintain, and/or enforce standards. Broadly, the possible types and functions of new bodies in ADR fell into the following categories:
- complaint or disciplinary bodies, such as an Ombudsman, disciplinary board, regulatory association or watchdog, or peak body to handle grievances;

- a ‘custodian’ or ‘steward’ for standards, that is, a body which served as an umbrella body for standards and promoted, for example, a code of practice;
- an accrediting body that could register or accredit practitioners, agencies or bodies, such as a central association with which sole practitioners could register;
- a facilitative body that disseminated information, provided public education, and assisted referrers or gatekeepers.

75 Despite council members making it clear that NADRAC was not a peak body or representative association, there were many who thought that NADRAC could take on this role, or at least facilitate the development of a peak body in ADR.

76 Various initiatives such as *Let's Talk Victoria* and *Let's Talk NSW* have already facilitated cooperation on standards across ADR groups, and this model was recommended as a way forward.

Processes

77 Several submissions suggested additional and/or broader consultation, and the possible circulation of draft standards for consideration. The need for additional research and data collection was also mentioned, as outlined in previous sections.

78 As outlined earlier under ‘overall approach’, a sequential approach to development was also suggested in a number of submissions and forums, indicating that the development of standards would be a long term process

79 The role of ADR associations in assisting the further development of standards was also mentioned in submissions 15 and 20. One association offered to assist in the development of standards through, *‘facilitation of discussions with service providers, education of our members, promotion of the Code of Conduct, involvement in the development of competencies and assessment criteria, the establishment of a complaints body, education for consumers, and referral to relevant services for our members such as: professional indemnity insurance, training and supervision’*. (Submission 37)

80 Several submissions emphasised the importance of ongoing information exchange as a means to develop standards. For example:

- *‘NADRAC would perform a very useful function if it published regular reports of “good practice” for ADR in different types of settings (to) encourage*

ADR service providers to compare their practices and would lead to improvement in standards over time.' (Submission 34)

- *'Information, in various forms, about ADR courses, services and the benefits of ADR; standards for services and service providers; accreditation (voluntary) of services and service providers; research into ADR methods and outcomes; conferences, seminars and other forums which promote standards.'* (Submission 41)

81 A collaborative industry and State and Territory government approach was suggested in one submission, recommending that NADRAC:

- *'establish a subcommittee and invite industry experts to assist the council with the development and drafting of DR standards; NADRAC standards should form the basis of a minimum set of competencies required to practise; an additional set of standards should be developed for training and ongoing education linked to competencies;*
- *recommend to the combined Commonwealth/ State Attorneys-General that a national association for dispute resolution practitioners be established and a seeding grant be made available to support the initial establishment of such an association;*
- *consider a further reference on the development of a core curriculum for DR practitioners, recognised by industry, academic institutions and RTOs, and this should be set as a minimum base grade qualification for DR practitioners;*
- *establish a register of organisations that comply with minimum training requirements.'* (Submission 30)

Submissions received

No	Submitted by	Organisation	State
1	Carol Dance	Individual	NSW
2	Fiona McLeod	Energy Industry Ombudsman (Victoria)	VIC
3	Carole O'Donnell	University of Sydney	NSW
4	Andrew Cannon	Individual	SA
5	Mark Tyler	Individual	QLD
6	The Hon John Herron	Minister for Aboriginal and Torres Strait Islander Affairs	ACT
7	Christine James and Stella Cornelius	Conflict Resolution Network	NSW
8	Jonathan Rothfield	Individual	VIC
9	The Hon Chief Justice Michael Black	Federal Court of Australia	VIC
10	Maurice Rooney	Individual	NSW
11	Morgan Brigg	Individual	QLD
12	Ian Lulham	Individual	VIC
13	Carolyn Bond	Consumer Credit Legal Service	VIC
14	Chris Field	Consumer Law Centre	VIC
15	Pat Marshall & Di Bretherton	International School of Conflict Resolution	VIC
16	Frances Meredith and Mark Clisby	Individual	SA
17	Dawn Trevorrow and Mary Kastanos	F.A.I.R. Service Incorporated	SA
18	Sherene Daniel	Workers Compensation Resolution Service	NSW
19	L D Lane	Individual	VIC
20	Eileen Detheridge	Victorian Association for Dispute Resolution	VIC
21	Dahlia Enoch	Individual	SA
22	Margaret Cameron	Individual	ACT
23	Vanessa Richardson	Let's Talk Victoria	VIC
24	Vanessa Richardson	Individual	VIC

continued...

No	Submitted by	Organisation	State
25	John Weingarh	Mediate Today	NSW
26	Wendy Faulkes	Individual	NSW
27	John Corcoran	Law Institute of Victoria	VIC
28	Helen Bishop and Christy Hawker	Aboriginal Alternative Dispute Resolution Advisory Service	WA
29	Winsome Thomas	Australian Family Mediation Association	VIC
30	W Grant	Attorney-General's Department	NSW
31	Alison Maynard	Insurance Enquiries and Complaints Ltd	VIC
32	Tom Fisher	Latrobe University	VIC
33	Louise Nicholls	Legal Aid, NSW	NSW
34	The Hon Justice Kellan	Victorian Civil and Administrative Tribunal	VIC
35	Stephen Connell	Law Society of South Australia	SA
36	Robyn Carroll	University of Western Australia	WA
37	Val Sinclair	Australian Dispute Resolution Association	NSW
38	Geri Kaufman	Tenants Union of NSW	NSW
39	Elizabeth Seddon	Relationships Australia	ACT
40	Peter Condliffe	Institute of Arbitrators and Mediators Australia	VIC
41	Jill Davison	Australian Association of Social Workers - NSW Branch	NSW

Forums held

City	Date	Numbers attending
Melbourne	11 April 2000	60
Hobart	4 May 2000	15
Adelaide	8 May 2000	18
Darwin	9 May 2000	20
Perth	22 May 2000	32
Sydney	6 June 2000	36
Brisbane	7 June 2000	22
Canberra	8 June 2000	26
Mediation conference	17 May 2000	24
TOTAL		253