

NADRAC Notes



Issue No. 5 January 2001

Note from the Chairperson

Since our last newsletter, NADRAC has released 'A Fair Say' (a guide to managing differences in mediation and conciliation), a discussion paper on 'The Development of Standards for ADR' and (in conjunction with the Family Law Council) a letter of advice in relation to Parenting Plans.

We have finalised submissions on ADR in the Federal Magistrates Service, and on the Franchising Code of Conduct, and commenced work on ADR in the proposed Administrative Review Tribunal.

We have undertaken research with agencies on the criteria used to refer matter to different forms of ADR, and undertaken extensive public consultations on the issue of ADR standards, including forums in each capital city.

The breadth of NADRAC's work reflects the dynamism, complexity and diversity of the ADR field.

Last year NADRAC members undertook a planning process in which challenges facing ADR were listed, and key priority areas identified in the context of NADRAC's charter.

The key priority areas identified were:

- promoting the quality of practice in ADR;
- facilitating the development of Court based ADR;
- responding to increasing diversity in the ADR field; and
- advocating for effective ADR research and evaluation.

These priority areas underpin the projects NADRAC is undertaking and is planning to undertake in the future.

This newsletter gives us a chance to draw breath, and provide an update on the projects and activities in which NADRAC is engaged.

Of course, a newsletter can only give an overview of activity; I urge you to go to our web-site, or contact the secretariat, to obtain copies of reports, papers and other publications.

Prof Laurence Boulle
Chairperson



The National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 to advise the Federal Attorney-General on high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

Standards for ADR

Since the Attorney General, Daryl Williams, launched NADRAC's discussion paper on The Development of Standards for ADR, on 31 March 2000, a great deal of work has been undertaken on this key issue.

In what may have been one of the most far-reaching national consultative processes undertaken on any aspect of modern ADR in Australia, NADRAC facilitated public forums in every capital city.

Over 250 people participated in these forums. More than 40 written submissions were also received.

Two thousand hard copies of the discussion paper were distributed, and over 6000 have been downloaded from our web-site. Overseas interest in the paper is particularly high.

Council has considered carefully the outcomes of the forums and submissions, has identified the key challenges for standards across the ADR field, and has explored a wide range of options for the future development of standards.

Council is now finalising its report to the Attorney-General, which it is hoping to submit after its next meeting in Adelaide in March 2001.

NADRAC thanks those who attended the forums or made written submissions.

Notes from each forum are available on the web-site, and printed copies can be obtained from the NADRAC secretariat.

Forums

Melbourne	11 April	60 participants
Hobart	4 May	15 participants
Adelaide	8 May	18 participants
Darwin	9 May	20 participants
Brisbane	16 May	24 participants
(mediation conference)		
Perth	29 May	32 participants
Sydney	6 June	36 participants
Brisbane	7 June	22 participants
Canberra	8 June	26 participants

Criteria for ADR

NADRAC is currently working on a project designed to assist in the development of guidelines for the Federal Magistrates' Service on whether matters are suitable for referral to ADR.

Following a literature review, Council sent out letters to 115 agencies, requesting information on the methods and criteria used to determine suitability for ADR.

Responses indicated that criteria for referral are rarely articulated within organisations beyond basic statutory requirements for eligibility.

However, a few organisations have developed relatively detailed, thoughtful criteria to determine suitability, mostly in relation to mediation and other facilitative ADR processes.

Based on these replies, and on the literature on criteria for ADR, we have compiled the following list of factors which are relevant considerations in determining the suitability or otherwise of ADR.

Some factors may relate to matters of principle, while others concern the likelihood of resolution. Also, these factors do not exist in isolation. They may interact with each other, and operate differently depending on context.

Assessment is therefore a complex process which continues through initial screening and referral, intake, first session introductions, management of the process, follow up and termination.

- Current fear or high risk of violence by or to a party.
- Allegations of child abuse.
- An unmanaged mental illness or intellectual disability without appropriate advocacy.
- A clear statement by one party that they will not participate in ADR or that they 'want their day in court.'
- A statement by the parties that they want to resolve their conflict in a non-adversarial forum.
- Bad faith bargaining, or clear likelihood of this.
- The intention of one party to use the process to harass the other.
- Over riding public interest.
- A matter which is primarily a dispute of fact.
- Parties who have major, non-negotiable value differences.
- The ability of the parties to make an informed choice to attend.
- The capacity of the parties to negotiate safely on their own behalf.
- The extent to which any power imbalance can be redressed.
- Lack of commitment by one or more of the parties to resolve the dispute.
- Any relevant court orders which make ADR difficult (eg: a restraining order).
- Cultural factors and considerations.
- Legal representation of the parties.
- The likelihood that the costs of ADR outweigh its benefits.

NADRAC wishes to emphasise that this work on the development of criteria for referral is at a very early stage, and NADRAC does not claim that that the factors listed are necessarily valid or complete.

There is little empirical evidence on the actual relationship between these factors and effectiveness of ADR.

Comments about criteria for referral for ADR, and about how they may be applied in different situations are most welcome.

Council meetings

Council has met six times since our last newsletter: September 1999 (Canberra), December 1999 (Sydney), February 2000 (Adelaide), May 2000 (Brisbane), and August 2000 (Melbourne) and December 2000 (Canberra).

Council thanks guest speakers and agencies who have made presentations at Council meeting.

These include Tim Johnstone (Chair of the Council of Approved Mediation Agencies in the ACT), Dr Jane Romeyn (Department of Employment, Workplace Relations and Small Business), Sir Laurence Street (Chair

of the International Legal Services Advisory Council), Salli Browning (Australian Commercial Dispute Centre), Andrew Cannon and Jim MacDonald (Adelaide Magistrates Court), the staff of Bowden Brompton Community Centre, Professor Rosemary Hunter (Griffith University), Adele Byrne (Federal Magistrates Service), Dr Margaret Browne (Family



Council members at the meeting (inset Barbara Filipowski absent from group)

Law and Legal Assistance Division, Attorney-General's Department), and Captain Helen Marks, Warrant Officer Rob Swanwick and Lieutenant Wendy Dowling (Australian Defence Services ADR program).

Council will next be meeting in Adelaide on 15 and 16 March 2001. On the previous evening, 14 March, it plans to hold a public forum on key ADR issues facilitated by Council members from 5pm to 7pm

at the Hilton Hotel, 2nd floor meeting room, 233 Victoria Square, Adelaide.

The forum aims:

- To provide information on NADRAC's work;
- To gain input from participants in relation to NADRAC's priority areas;
- ADR research and evaluation;
- Court based ADR;
- Review of ADR definitions;
- On-line ADR;
- Standards for ADR;
- To identify issues affecting

ADR in South Australia to be taken into account in NADRAC's future work.

Forum program

- Overview of NADRAC projects.
 - Questions and comments.
 - Small group discussion, and report back.
- Light refreshments will be provided.

On-line ADR

As ADR increases in complexity and diversity, NADRAC needs to ensure that it is aware of the policy implications of new developments.

On-line ADR is likely to grow rapidly in importance as virtual interaction transforms how we manage and construe communication.

On-line ADR has two aspects:

- the use of on-line technologies to resolve disputes; examples include video-conferencing, e-mail conferencing, computer assisted decision-making (AI), hybrid systems;
- the use of ADR to resolve on-line disputes, such as domain names, e-commerce, m-commerce, intellectual property.

Some policy issues raised by NADRAC members include:

- confidentiality, privacy and security (eg how protected are on-line communications, where/how are they stored and destroyed, how do you know the identity of a virtual party?);
- jurisdictional matters (eg what legal protections cover a virtual ADR process, with parties and practitioners in different states or even countries?);

- access and fairness (eg who can access the technology, who is excluded from services, what client groups are more likely to use on-line methods, who is more/less capable with the technology, what is the impact on power dynamics?);
 - appropriateness and limitations for different types of disputes and parties (eg it is appropriate for interpersonal disputes, multi-party disputes, family disputes?);
 - technical and logistical factors (eg what hardware and software are required, what bandwidth is required for what process; what is the cost effectiveness of different technologies?);
 - training and standards requirements for practitioners/services (eg what competencies are required of on-line ADR practitioners, what capabilities are required of on-line ADR service providers, is a special code of ethics/conduct/practice required?).
- There are no doubt many other issues and questions to be resolved.

How much is on-line ADR being used? What issues have emerged?

NADRAC has started to identify current usage of on-line ADR, and the issues raised by its usage. It would welcome any information that readers may have about on-line ADR.

Comings and goings

Richard Moss, former Deputy Secretary of the Attorney-General's Department, was ex officio representative from the Attorney-General's Department on NADRAC.

Mr Moss has been with Council almost from its inception. As he retired from the Attorney-General's Department in May 2000, he also ceased to be the ex officio departmental representative on Council. His contribution to NADRAC will be greatly missed.

The ex officio position is now filled by Ian Govey, General Manager, Civil Justice and Legal Services, Attorney-General's Department, who similarly brings a great deal of experience and expertise to Council.

Danny Ford is a new member, appointed by the Attorney-General in August. Mr Ford is Director, Aboriginal Policy, Strategy and Funding Services with Family and Children's Services in WA.

He was previously a member of the Family Services Council, and brings to NADRAC a wealth of experience in family conflict resolution and indigenous issues.

Current membership of Council is Professor Laurence Boulle (chairperson), David Bryson, Susan Gribben, Danny Ford, Barbara Filipowski, Ian Govey, Associate Professor Kathy Mack, Bernadette Rogers, Warwick Soden and John Steele.

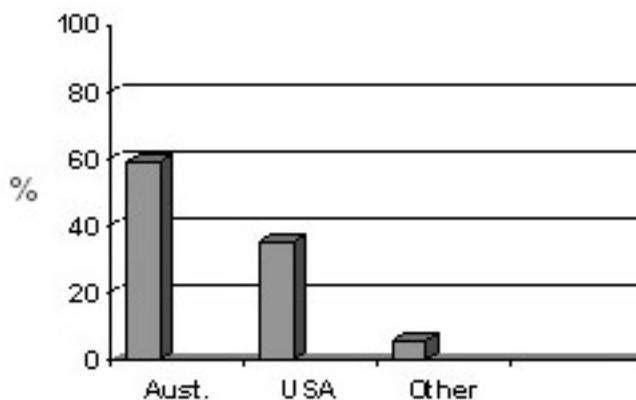
What's new?

NADRAC's web-site (www.nadrac.gov.au) has proven to be a popular means of communication.

In 1999/2000, the site had 17663 hits, an average of 48 hits per day.

There were 4934 visitor sessions, 41% of whom were international visitors, with 35% from the USA.

The usefulness of NADRAC's publications is shown by the proportion of repeat visitors (28%).



Our web-site has been re-built to improve simplicity and accessibility, especially for vision-impaired users.

Information is provided under the following headings: About NADRAC, ADR definitions, Criteria for ADR, Standards for ADR, Diversity, ADR Research, Primary Dispute Resolution, Other projects, Publications and contacts.

The 1999/2000 Annual Report is now available. Printed copies are available through the secretariat or from the NADRAC web-site. (see contact details)

Research

NADRAC's charter concerns advice to the Attorney-General on:

- ongoing evaluation of the quality, integrity, accountability and accessibility of alternative dispute resolution services and programs; and
- the need for data collection and research concerning alternative dispute resolution and the most cost-effective methods of meeting that need."

Major issues identified by NADRAC are the lack of comprehensive and comparable data collection on ADR, especially in relation to courts and tribunals, and a lack of rigorous evaluation of ADR programs.

These issues were also identified by the Australian Law Reform Commission in its review of the federal civil justice system, 'Managing Justice'. The lack of adequate data collection and evaluation limits the future development of ADR.

NADRAC has written to the Attorney-General in relation to evaluation of ADR in federal courts and tribunals. NADRAC is consulting with the Productivity Commission and the Australian Institute of Judicial Administration to develop appropriate data collection for court annexed ADR.

What constitutes success?

Particular ADR processes or programs are often described as 'successful'. However there appears to be little consistency in how success is defined and how it is measured.

NADRAC would be most interested in hearing the views of readers in relation to appropriate measures of success, and/or performance indicators for ADR.

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Publications

Title	Type	Date	html	pdf	Printed copies available
Letter of Advice to the Attorney-General on Parenting Plans	Report (joint publication with Family Law Council)	March 2000	3		3 (16pp)
Submission to the Franchising Advisory Council on Franchising Code of Conduct	Submission	March 2000	3		On request
Notes from forums on ADR standards	Working document	June 2000	3		On request
The Development of Standards for ADR	Discussion Paper	March 2000		3	3 (150pp)
A Fair Say: Managing Differences in Mediation and Conciliations	Guide	Sept 1999		3	3 (32pp)
Use of Alternative Dispute Resolution in the Federal Magistracy Part 1 Part 2 (Regulations and Rules of Court)	Report	March 1999 Dec 1999	3		On request
Issues of Fairness and Justice in Alternative Dispute Resolution	Discussion Paper	Nov 1997		3	3 (205pp)
Primary Dispute Resolution in Family Law: a Report to the Attorney-General on Part 5 of the Family Law Regulations	Report	March 1997		3	3 (78 pp)
Alternative Dispute Resolution Definitions	Guide	March 1997 re-printed March 2000	3		3 (12pp)
Annual reports	Report	1996/97 1997/98 1998/99 1999/2000		3 3 3 3	3 (20-30pp) 3 3 3

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