



21 May 2008

Mr Johan Scheffer MLC  
Chair, Law Reform Committee  
Parliament of Victoria  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Mr Scheffer,

### **INQUIRY INTO ALTERNATIVE DISPUTE RESOLUTION – REQUEST FOR NADRAC INPUT**

Thank you for your letter of 25 March 2008 inviting the National Alternative Dispute Resolution Advisory Council (NADRAC) to make further comments to the Law Reform Committee's Alternative Dispute Resolution Inquiry.

NADRAC's comments in relation to the issues raised your letter are set out below.

#### **National Mediator Accreditation System**

The National Mediator Accreditation System (NMAS) commenced on 1 January 2008. A National Mediator Accreditation Committee (NMAC) has been established to fully implement the new system and establish a new National Mediator Standards Body (NMSB) to operate from 2010.

The NMAS is underpinned by Approvals Standards and Practice Standards (the Standards) which were developed in 2007. The responsibilities of the NMAC include developing and reviewing the operation of the Standards, amending and developing new standards, developing a national register of accredited mediators, monitoring, auditing and supporting complaints handling processes and promoting mediation.

NADRAC's role is to facilitate the NMAC's operations over the next two years as resources permit. NADRAC is coordinating meeting arrangements, assisting to set agendas, providing facilitation services during meetings and assisting in developing papers and supporting information.

#### *NMAC Membership*

The NMAC has a broad representative membership including Recognised Mediator Accreditation Bodies (RMABs), training providers and representatives from government.

#### NMAC Member Organisations at 5 March 2008:

Australian Centre for Peace and Conflict Studies  
Australian Commercial Disputes Centre  
Australian Dispute Resolution Association  
Australian Government (represented by Attorney-General's Department)  
Australian Industrial Relations Commission  
Australian Institute of Family Law Arbitrators and Mediators  
Australian Mediation Association  
Bond University  
Chartered Institute of Arbitrators

Robert Garran Offices  
National Circuit BARTON ACT 2600

ph (02) 6250 6272  
fax (02) 6250 5980

e-mail [nadrac@ag.gov.au](mailto:nadrac@ag.gov.au)  
web [www.nadrac.gov.au](http://www.nadrac.gov.au)

The Hon Justice Murray Kellam AO, Chair | Professor Nadja Alexander | Mr Fabian Dixon SC | Mr Ian Govey |  
Mr Ian Hanger AM QC | Mr Greg Hansen | Ms Norah Hartnett | | Dr Gaye Sculthorpe |  
Mr Warwick Soden | Professor Tania Sourdin |

Citizens Advice Bureau of WA Inc  
Community Justice Centre New South Wales  
Community Justice Centre Northern Territory  
Conflict Resolution Service  
Creative Resolutions (ACT) Pty Limited  
Department of Defence, Fairness and Resolution Branch  
Dispute Settlement Centre of Victoria  
Federal Court of Australia  
Institute of Arbitrators & Mediators Australia  
Law Council of Australia  
Law Institute of Victoria  
Law Society of New South Wales  
Law Society of South Australia  
LEADR - Association of Dispute Resolvers  
Legal Aid Commission Australian Capital Territory  
Legal Aid Commission New South Wales  
Mawul Rom Association  
Mediate Today Pty Limited  
National Native Title Tribunal  
New South Wales Bar Association  
New South Wales Government (represented by Attorney General's Department)  
Queensland Bar Association  
Queensland Government (represented by Department of Justice and Attorney-General)  
Queensland Law Society  
Relationships Australia Canberra and Region  
Tasmanian Government (represented by Department of Justice)  
The Accord Group  
The Trillium Group  
University of Queensland  
Victorian Association for Dispute Resolution Inc  
Victorian Bar  
Victorian Government (represented by Department of Justice)

*What is the meeting schedule for the Committee over 2008–2009?*

The NMAC is to meet twice per year over 2008–2009. The inaugural meeting was held on 5 March 2008 in Canberra.

Future meetings are scheduled for:

- 9 September, Perth
- May 2009, and
- October 2009.

In addition, work will be conducted by smaller working groups between NMAC meetings. NMAC has establishing the following four working groups:

- working group on issues relating to the NMAC
- working group on issues relating to the NMSB

- working group on practice and compliance, and
- working group on complaints handling.

The meeting schedule for these working groups has not yet been set, but it is anticipated that they will meet regularly between full NMAC meetings. NADRAC will support the meeting process of these working groups as its resources permit.

*What are the key issues which have been and will be canvassed by the Committee?*

Attendees at the inaugural NMAC meeting identified key issues to be addressed by the Committee.

The highest priority issues identified at the first meeting include:

- issues relating to the NMAC itself, eg how to progress implementation work, establishing working groups, procedure between meetings, voting procedures
- purpose, constitution and structure of the NMSB to be established by NMAC
- funding and resources
- practice and compliance (both in the transitional stage and beyond)
- complaints handling processes, and
- mutual recognition of approved training and accredited mediators.

Medium and longer term issues identified at the first meeting included:

- addressing confusion between NMAC and family dispute resolution practitioner accreditation
- consistency in application of the Standards and in complaints handling processes
- compliance costs
- appeal, review and disciplinary processes
- managing the transitional period, and
- procedure for amending the Standards.

*Which bodies have identified themselves as Recognised Mediator Accreditation Bodies (RMABs)?*

The following organisations have identified themselves as qualifying for membership of the NMAC under criterion 1 (which entitles RMABs to be represented on the NMAC):

Australian Dispute Resolution Association  
 Australian Industrial Relations Commission  
 Australian Institute of Family Law Arbitrators and Mediators  
 Chartered Institute of Arbitrators and Mediators  
 Australian Mediation Association  
 Citizens Advice Bureau of WA Inc  
 Community Justice Centre NSW  
 Department of Defence (Fairness and Resolution Branch)

Dispute Settlement Centre of Victoria  
Federal Court of Australia  
Institute of Arbitrators & Mediators Australia  
LEADR  
Law Institute of Victoria  
Law Society of New South Wales  
Law Society of South Australia  
Legal Aid Commission ACT  
Mediate Today Pty Limited  
Mawul Rom Association  
National Native Title Tribunal  
NSW Bar Association  
Queensland Bar Association  
Queensland Law Society  
Royal Institution of Chartered Surveyors Oceania  
The Accord Group  
Victorian Association for Dispute Resolution Inc  
Victorian Bar

A transitional period has been set until 1 August 2008 for intending RMABs to become 'fully functional'. After that time organisations that are not fully functioning RMABs will forfeit their membership of the NMAC under criterion 1 and their continued membership will depend upon their eligibility under any other applicable criteria.

*How many mediators are currently accredited under the system?*

It is not NADRAC's role to keep a register of accredited mediators. However, NADRAC will maintain a list of RMABs on its website. Consumers can then approach individual RMABs in order to locate an accredited mediator. The RMABs listed above could be contacted directly to ascertain the number of mediators that have been accredited by those organisations.

*Concerns regarding number of RMABs*

NADRAC anticipates that some mediation provider organisations may amalgamate as a result of the introduction of the NMAC. Consistency in the application of the Standards between RMABs was one of the important issues identified at the first NMAC meeting and will be addressed by NMAC during the implementation of the new system. It is likely that common forms for accreditation of mediators and guidelines for their operation will be developed. From 2010, the National Mediator Standards Body that will be established by NMAC will take on the role of ensuring consistency.

*Expansion of a NMAC-Style System to Other Areas of ADR*

The current Practice Standards and Approval Standards which underpin the NMAC have some application to conciliators. They refer to 'blended processes' in which the mediator also has an advice giving function, such as evaluative mediation or conciliation. These should be distinguished from facilitative processes in which the mediator does not provide advice (see 'advisory ADR processes' and other definitions in NADRAC's Glossary of ADR terms, contained within *ADR Terminology: A Discussion Paper*, NADRAC, 2002, available from NADRAC's website at [www.nadrac.gov.au](http://www.nadrac.gov.au)).

Under the Approval Standards, mediators who provide blended processes are required to have qualification, experience and membership of a relevant professional body within a particular area of expertise. Under the Practice Standards, if the mediator uses a blended process upon request, 'this

process must be the subject of clear consent normally through the use of the mediation or similar agreement'. Mediators must provide information about their specialist qualifications upon request.

NADRAC would be keen to see the adoption of national industry standards in other areas of ADR practice including areas such as restorative justice services. NADRAC has not fully considered the issue but does not initially consider that industry self-regulation would be inappropriate in other areas of ADR, except where compulsory statutory schemes already exist.

### **Consumer Experiences with ADR**

NADRAC has not undertaken research in this area. However, other organisations have done some research in the area. In particular, NADRAC notes that the Victorian Department of Justice has released a community survey on attitudes to and experiences of ADR services. The *Alternative Dispute Resolution in Victoria - Community Survey 2007 Report* can be accessed from the Department of Justice's website.

### **Empowering Victorians to Resolve Disputes**

*What does NADRAC think can be done to empower Victorians to better resolve disputes themselves without having to resort to formal ADR or court processes?*

This issue is outside the scope of matters upon which NADRAC advises the Attorney-General.

However, initiatives aimed at improving communication and relationship skills may be useful in empowering members of the public to resolve disputes. For example, the Schools Conflict Resolution and Mediation (SCRAM) Competition provides students with an opportunity to develop communication skills and resolve problems together without violence or bullying (see <http://www.scram.business.ecu.edu.au/index.htm>, <http://lawsociety.com.au/page.asp?partID=6552>). NADRAC considers the SCRAM program to be a worthwhile initiative.

### **Collaborative Promotional Campaigns**

NADRAC has not specifically considered the format or design of a collaborative promotional campaign in relation to ADR.

### **ADR and Marginalised Communities**

*How can ADR services be made more accessible to marginalised individuals and communities, including Indigenous and culturally and linguistically diverse communities?*

NADRAC addressed issues relating to marginalised communities and vulnerable people in its report *Indigenous Dispute Resolution and Conflict Management*, January 2006, its Discussion Paper *Issues of Fairness and Justice in Alternative Dispute Resolution*, November 1997, and its subsequent guide *A Fair Say: Managing Differences in Mediation and Conciliation*, 1999. These publications are available from the NADRAC website.

Appropriately trained and experienced ADR practitioners will be capable of identifying vulnerabilities and adjusting the ADR process to address them or, where that is impossible, referring the person to a different process that is designed to deal with the issue or to legal advice. There are a large number of different ADR processes and some are better adapted to dealing with power imbalances or vulnerabilities than others. It should not be assumed that simply obtaining legal advice or being represented by a lawyer is sufficient protection for vulnerable participants. Power imbalances may arise

from a range of different issues, for example social, economic or personal factors that may not be readily apparent to others, including lawyers. Quality ADR processes will have thorough intake and assessment procedures designed to identify those issues. Most ADR providers will advise clients who are involved in legal disputes to seek legal advice and many welcome the involvement of lawyers in the process.

*The Committee has received conflicting evidence about ADR and marginalised communities. Some stakeholders have stated that it increases access to justice and offers mechanisms that are akin to some cultures dispute resolution mechanisms. Others have said that ADR processes may decrease access to justice and fail to protect vulnerable people, for example where legal advice and/or representation are absent. What is NADRAC's view on these matters?*

NADRAC is aware of a range of Gateway to Justice initiatives that are designed to support greater access to ADR services and to support referral options. Such initiatives include the Neighbourhood Justice Centre in Collingwood.

While ADR processes should be fair, care should be exercised in referring to them as offering 'access to justice' if what is meant by 'access to justice' is a decision according to law or a legal process with all its inherent procedural protections. Not all ADR processes necessarily provide that, which is why they are very often faster and less costly than legal processes. That does not imply that those ADR processes are not fair. Please refer to NADRAC's publications *Issues of Fairness and Justice in Alternative Dispute Resolution* and *A Fair Say*. The flexibility of ADR processes means that they can be adapted to meet the needs of the participants, including protecting vulnerable people where necessary. The emphasis in ADR on voluntary participation and/or voluntary agreement means that there is no compulsion on the participants to agree to a proposed outcome. Further, the outcome of many ADR processes are not binding until the participants take further steps to make it so, eg by applying for a consent order or entering into a contractual agreement. This feature of ADR processes gives vulnerable participants who feel they were pressured into the agreement an option not to make it binding. NADRAC has some reservations about compulsory processes where decisions are binding on the participants but where participants are not necessarily offered the same procedural protections as in a court, eg some compulsory arbitration. This is an area that would warrant a more thorough review.

NADRAC's 1997 Discussion Paper *Issues of Fairness and Justice in Alternative Dispute Resolution* suggests that where minority cultural groups are involved, ADR practitioners need to consider the impact of this upon the proceedings in terms of acceptable and realistic outcomes and any necessary procedural adjustments. In 2003, Associate Professor Kathy Mack produced a report entitled *Court Referral to ADR: Criteria and Research* for NADRAC and the Australian Institute of Judicial Administration, available from NADRAC's website. This report investigated whether it is possible to establish specific, empirically supported criteria to indicate whether ADR success is likely, and therefore when courts should refer a matter to ADR. Professor Mack noted that some research indicates that communication and prejudice in ADR are of concern to participants who speak a language other than English at home.

In its feedback to the Attorney-General's Department on the *Consultative Draft Indigenous Law and Justice Strategy, 2007*, NADRAC identified a need to provide early intervention actions and measures aimed at supporting family and social relationships and preventing the causes of violence and crime amongst Indigenous Australians. Early intervention ADR programs, such as culturally appropriate mediation, may help Indigenous communities to resolve disputes and conflicts at an early stage and

avoid escalation of disputes and the crime and violence which may sometimes result. This may be particularly true in the area of family disputes.

The questions relating to vulnerable parties and legal advice/representation are considered below under Collaborative Law.

### **Awareness and Understanding of ADR Processes amongst Lawyers and the Judiciary**

*Do lawyers and the judiciary currently have sufficient understanding of ADR processes and utilise/refer to them appropriately? What is the best way to ensure that ADR processes and services are well understood by lawyers and judges and that they make referrals to ADR processes where appropriate?*

NADRAC's view is that it is desirable for people who refer parties to ADR processes to have an understanding of the different processes available and their suitability in different types of disputes. In addition to lawyers and the judiciary, this may include court staff as they may also have responsibility for referring parties to ADR or recommending appropriate ADR services.

NADRAC has undertaken no research to gauge the level of awareness and understanding of ADR processes amongst lawyers and the judiciary. Nor is it aware of any such research having been undertaken. It would be useful to undertake a survey to measure awareness and understanding of ADR processes and, consequently, capacity to make appropriate referrals to ADR. NADRAC does not have the resources for a significant quantitative study of that kind.

### **Suitability of ADR in Different Types of Disputes**

*Are there any types of disputes that NADRAC considers unsuitable for ADR processes? Are there some parties for whom ADR processes are not suitable?*

Some disputes are not suitable for ADR because of issues such as severe power imbalance, safety or control. Subject to the factors outlined below, NADRAC considers it is appropriate for the determination of whether or not a dispute is suitable to be made by the dispute resolution practitioner. NADRAC does not consider it helpful to identify particular types of disputes and to apply blanket exemptions to them. A wide range of factors will affect whether any particular dispute is or is not suitable for ADR. This includes disputes in which violence is a factor.

NADRAC's view on this issue is subject to certain provisos. In order for the use of ADR to be appropriate, is important for the following measures to be in place:

- appropriate training – the staff involved in the dispute resolution process (including intake officers and ADR practitioners) should have adequate training in matters such as the dynamics of power and violence, the roles and functions of support persons, lawyers and other professionals and the different forms of ADR that may be appropriate for particular disputes, eg gender balanced co-mediation and shuttle mediation
- thorough, evidence-based screening and assessment processes<sup>1</sup> – these should include separate consultations with all participants to assess their willingness, capacity or readiness to participate and to identify the process that is most suitable to their circumstances
- suitable ADR process – the process used is suitable for the particular dispute, eg gender balanced co-mediation or shuttle mediation

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<sup>1</sup> See for example, the Attorney-General's Department *Framework for Screening, Assessment and Referrals in Family Relationships Centres and the Family Relationship Advice Line*, January 2008

- informed consent to participate in the ADR process– the participants should have had the process fully explained to them and should understand their right to terminate the process if they consider it necessary
- voluntary and informed agreement to the outcome of the ADR process– the dispute resolution practitioner should ensure that each participant fully understands the proposed outcome and is exercising their free will in agreeing to it
- safety protocols – where violence or potential violence is an issue, either to one of the participants or another person, the dispute resolution practitioner must be alert to that issue , proceed with caution and ensure that procedures are in place to protect the safety of all involved, eg not contacting a person who may be at risk at their home address, ensuring that the participants arrive and leave at different times, etc
- management of power imbalances – throughout the process the dispute resolution practitioner should be alert to issues such as control and intimidation and take steps to manage the process accordingly, including terminating it where necessary
- recognition of cultural factors or other vulnerabilities – the dispute resolution practitioner should take into account cultural differences or the interests of vulnerable participants and stakeholders, ensure that the process is fair in the circumstances and help the participants to assess the feasibility and practicality of any proposed outcome
- availability of support persons – where a dispute resolution practitioner has identified any potential power imbalances or other vulnerabilities, the practitioner should encourage the participants to use the services of appropriate support persons, and
- professional advice on proposed agreement – the dispute resolution practitioner should encourage the participants to seek independent legal advice before entering into any binding agreement.

Many of the issues raised above are addressed in the national Practice Standards under the NMAS. It is expected that as the NMAS matures, the requirements in the Practice Standards will be further fleshed out and guidelines will be developed to assist practitioners.

NADRAC is aware that the view has been expressed that managing power imbalances is inconsistent with the neutrality of the dispute resolution practitioner and even that dispute resolution practitioners should abandon traditional notions of neutrality.<sup>2</sup> NADRAC does not agree. The fact that a dispute resolution practitioner acts to provide a fair process and to manage power imbalances does not imply that the practitioner is partial to or biased in favour of one of the participants or the outcome. This is also recognised in the Practice Standards under the NMAS which require practitioners to be impartial but also require them to manage power imbalances and safety issues. In NADRAC's view departing from the principle of neutrality would significantly undermine the advantages of ADR and may put participants in dispute resolution at greater risk, e.g. if a participant believes that the ADR practitioner is biased, it may generate feelings of helplessness, suppressed or open rage.

NADRAC considers that it is not appropriate for compulsory ADR requirements to be applied to matters involving violence. In this context, NADRAC notes that from 1 July 2008 it will be compulsory for participants in family disputes concerning children to attempt Family Dispute Resolution before initiating court proceedings. However, there are several exceptions to this requirement, including where the Family Court is satisfied that there has been family violence by one of the parties to the proceedings,

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<sup>2</sup> See for example Domestic Violence and Incest Resource Centre (DVRC) *Behind Closed Doors Family Dispute Resolution and Family Violence* (2007)

or there is the risk of such violence. Subject to further consideration, NADRAC would not necessarily exclude the possibility of referral for compulsory screening and assessment in appropriate cases.

NADRAC considers there is a need for more research about these issues as there is a significant lack of helpful empirical data regarding the management of power imbalances in ADR, the protection of vulnerable participants and dealing with issues of violence. In particular, it would be useful to have some long term research comparing outcomes for victims of violence who choose to use a dispute resolution process and those who proceed down the litigation pathway.

### **Online dispute resolution**

*Is there the potential for online dispute resolution to be better utilised? If so, how could this be achieved?*

NADRAC's view is that there is potential for online ADR to be better utilised. NADRAC canvassed issues relating to online ADR in its background paper titled *Online ADR*, January 2001. The purpose of this paper was to 'scope and prioritise issues associated with online ADR'. NADRAC also prepared a *Report on Dispute Resolution and Information Technology: Principles for Good Practice (Draft)*, March 2002. As practice has been moving very fast in this area, NADRAC has not produced a 'final' report on this issue. Some of the views expressed and the terminology used in these publications may now have been overtaken.

NADRAC notes that some governments have been investing in online dispute resolution services, for example in 2002-2003 the Victorian Government funded the development of online dispute resolution tools. Subsequently, the Victorian Department of Justice has commissioned a report into online dispute resolution, see

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/Mediation/JUSTICE++Online+Alternative+Dispute+Resolution>.

Online ADR has potential advantages such as ability to cover physical distance, time for reflection before responding that is provided by email communication (though not by real time communication), speed and convenience of e-mail and ability to transfer large amounts of information. Disadvantages include the cost of high quality technologies, risks to confidentiality and loss of communication via body language. The loss of interpersonal interaction could have benefits by distancing participants from emotive issues and reducing any threat of physical violence.

The *Report on Dispute Resolution and Information Technology: Principles for Good Practice (Draft)* noted that there may be social, cultural and psychological barriers to acceptance of online ADR among consumers. Suggestions for addressing these barriers were provided. For example, quality accreditation processes could be developed for online service providers in order to enhance consumer confidence. The Draft Report also canvassed strategies for managing technological imbalances and for making telecommunications in ADR as effective as possible. It considered specific issues that arise in relation to standard-setting for use of online technologies in ADR.

The Background Paper concluded that the greatest potential for online technology appeared to be for intake into ADR processes. The use of e-mail seemed most appropriate for determinative processes and shuttle mediation. The Draft Report noted that information technology has the potential to be very useful in promoting ADR generally and in enabling students and practitioners to participate in training and professional development.

NADRAC has also made a *Submission on ADR in E-commerce*, December 2001, in response to a discussion paper released by Treasury's Consumer Affairs Division in conjunction with the Expert Group on Electronic Commerce. The submission recommended that '*a range of communication channels should be available for dispute resolution in e-commerce, and the technology matched to the needs of the dispute and parties*'. This may involve using different communication channels for different stages of the ADR process.

NADRAC considers that there is an urgent need for further research into existing online dispute resolution programs, with the objective of determining best practice for different types of disputes and different client profiles.

### **Restorative Justice**

NADRAC's Charter provides that it is charged with:

providing the Australian Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision. . .

The issues upon which NADRAC may provide advice under this paragraph include:

the suitability of ADR processes for particular client groups and for particular types of disputes, including restorative justice and ADR in the context of criminal offences.

To date, NADRAC has not undertaken any research projects specifically relating to restorative justice. However, NADRAC considered the issue of Indigenous restorative justice, in the context of its *Indigenous Dispute Resolution and Conflict Management* report and feedback to the Attorney-General's Department on the *Consultative Draft Indigenous Law and Justice Strategy*, 2007. NADRAC has identified a need to provide Indigenous people with greater access to evidence based and culturally appropriate Indigenous ADR programs, including restorative justice programs. Restorative justice programs may help to divert offenders from the criminal justice system and reduce levels of recidivism while ensuring that the victim and local community feel that the offence has been dealt with appropriately. In *Indigenous Dispute Resolution and Conflict Management*, NADRAC recommended that Australian governments evaluate an existing proposal to establish a national network of Indigenous dispute resolution practitioners and consider how to involve this consultative network in relevant services such as restorative justice programs.

*Is there a need for Australian jurisdictions to be better coordinated in their approach to restorative justice policy, procedure and practice? If so, how could this be achieved?*

NADRAC's view is that currently issues in restorative justice are being addressed in different jurisdictions and greater inter-governmental collaboration in this area in order to develop some consistent national principles would be desirable.

### **Collaborative Law**

NADRAC's view is that collaborative law does fall within the definition of ADR, though it is not specifically mentioned in NADRAC's Glossary. Significant developments have occurred in the ADR field since the Glossary was last reviewed in 2003. NADRAC is supportive of the promotion of collaborative law, but notes that it should not be promoted to the exclusion of other forms of ADR. It is important to select the appropriate procedure for the particular dispute.

NADRAC understands that to date the collaborative law process has been used mainly in family law disputes. There may be potential to expand the process to other types of disputes including commercial disputes.

NADRAC was consulted in the preparation of the report *Collaborative Practice in Family Law*, Family Law Council, December 2006. Chapter 9 of this report notes some limitations of collaborative practice. For example, collaborative law may not be suitable for all family law disputes, particularly those involving extreme hostility, violence or mental illness. As collaborative practice involves retaining lawyers to assist clients and attend meetings, it may not be less expensive than litigation. Further, power imbalances may cause problems even though the participants are assisted by lawyers.

*The Committee has received evidence which suggests that compelling people to utilise ADR without providing them with legal advice fails to protect vulnerable parties. Could collaborative law play a part in addressing this issue? If so, how could this be done?*

It is sometimes asserted that the provision of legal advice or allowing parties to be legally represented during ADR proceedings will protect vulnerable participants. The term 'represented' is used loosely in this context given that ADR is not a legal proceeding and is aimed at empowering the participants to reach their own agreement which may differ from a litigated outcome.

Collaborative law is a useful form of ADR particularly for complex legal disputes. To be informed, the participants need to know what their alternatives are, including the likely outcome of litigation. However, it is a fundamental principle of most ADR processes<sup>3</sup>, particularly mediation, that competent and informed participants can reach an agreement which may differ from litigated outcomes.<sup>4</sup>

It is noted that the Committee has 'received evidence which suggests that compelling people to utilise ADR without providing them with legal advice fails to protect vulnerable parties'. NADRAC considers that there is insufficient evidence available at present to support the assertion that access to legal advice is a necessary or a sufficient protection for vulnerable participants in ADR. There is a need for further research in this area. Factors that are likely to be relevant include the nature of the vulnerability concerned, the knowledge and skills of the legal practitioner, the availability and use of other specialist expertise (eg in social, cultural and emotional issues), the knowledge and expertise of the ADR practitioner and the quality of the ADR process.

For all these reasons, NADRAC considers that all of the factors that it has raised above under the heading 'Suitability of ADR in different types of disputes' should apply equally to collaborative law processes.

Thank you for providing the opportunity for NADRAC to comment on these important matters. I hope that the Law Reform Committee finds NADRAC's comments helpful. NADRAC would be very happy to clarify any of the comments made above if required.

Yours sincerely

Justice Murray Kellam AO  
Chair

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<sup>3</sup> Some determinative processes such as arbitration which occur in the context of legal disputes are an exception.

<sup>4</sup> See NMAS National Practice Standards Part 9 'Procedural Fairness', para 7