NADRAC
National Alternative Dispute Resolution Advisory Council

29 November 2007

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 – CALL FOR SUBMISSIONS

Thank you for your letter of 13 September 2007 inviting the National Alternative Dispute Resolution Advisory Council (NADRAC) to make a submission to the Law Reform Committee's Alternative Dispute Resolution Inquiry. I understand that in a telephone conversation with the Director of the NADRAC Secretariat on 30 October, Ms Helen Ross-Soden of the Law Reform Committee Secretariat offered NADRAC an extension until 30 November 2007. I would like to express NADRAC's gratitude for the Committee's consideration in doing so.

NADRAC is an independent council charged with:

a) 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, and

b) promoting the use and raising the profile of alternative dispute resolution.

NADRAC's Charter includes specific matters on which the Council may advise and things that it will, as appropriate, do in promoting the use and raising the profile of alternative dispute resolution (ADR).

NADRAC's primary role is, as indicated above, to advise the Australian Attorney-General and promote ADR. However, NADRAC's Charter also specifically empowers the Council, as time and resources permit, to provide comment on matters relevant to its Charter to any Commonwealth, State and Territory or private organisations with an interest in ADR (paragraph 6). The Law Reform Committee's Alternative Dispute Resolution Discussion Paper largely addresses the same matters covered in NADRAC's Charter.

Robert Garran Offices
National Circuit BARTON ACT 2600
ph (02) 6250 6272
fax (02) 6250 5980
e-mail nadrac@ag.gov.au
web www.nadrac.gov.au

In some cases, NADRAC has already provided advice on the questions raised in the Discussion Paper which is appropriately referred to in the Discussion Paper. NADRAC considers there is no need for it to say more on such matters. Some Discussion Paper questions raise issues which NADRAC has not yet considered in any depth although those issues are included in NADRAC's Charter (eg issues relating to 'restorative justice and alternative dispute resolution in the context of criminal offences'). For that reason, NADRAC does not consider it would be appropriate to comment on such issues. However, the questions in the Discussion Paper raise some issues which are covered by, or are closely related to, issues on which NADRAC has previously expressed views and on which the Council considers it may be helpful to provide some further input. NADRAC's comments in relation to those issues are set out below.

Data collection for ADR
(Questions 2, 4, 29, 30, 31, 33, 34, 35, 39(d) & 40)
In its report *A Framework for ADR Standards* (April 2001) NADRAC recommended that 'the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and compatibility in ADR data collection' (Recommendation 21). NADRAC commented that very little is known about:

- the use of and demand for ADR
- the profile of ADR practitioners and organisations
- the appropriateness of alternative forms of ADR for different disputes, and
- the effectiveness of different ADR processes (page 92).

Further NADRAC pointed out that 'improved research, evaluation and data collection is pivotal to the future development of ADR, including ADR standards.' The Council suggested that 'the formulation and promotion of consistent and comparable activity and performance indicators would provide a means for determining the relative effectiveness of different practices. At the very least, operational definitions of such basic terms as 'dispute', 'case', 'termination', 'intervention', 'resolution', 'settlement', 'agreement', and 'agreement breakdown' should be commonly accepted and used across the ADR field.'

Little has changed since NADRAC's report in 2001. If anything, the emergence of new ADR practices and the ongoing growth in service providers has further complicated the situation. NADRAC continues to believe that there is an urgent need to develop common performance and activity indicators in all areas of ADR practice including the civil jurisdiction, restorative justice, and interventions for marginalised communities. Comparative program and outcome evaluations are meaningless in the absence of common/consistent data. The development of best practice dispute resolution techniques, in which policy makers and the broader community can have confidence, will not be possible without them.

NADRAC would be concerned if the Commonwealth and each State and Territory approached the question of consistent performance and activity data in isolation. The problem is a national

one. Strict divisions can now no longer be drawn, if ever they could, between Commonwealth and State and Territory ADR services. Commonwealth courts operate in Victoria and provide ADR services to Victorian citizens and State courts deal with cases that relate to Commonwealth law. Victorian organisations provide ADR services under funding agreements with both the Commonwealth and the States (eg organisations provide both family law and non-family law services) and ADR services deal with cases which have legal implications at both the Commonwealth and State levels (eg child protection and family law).

In addition to the difficulty of drawing inter-jurisdictional distinctions, there is also a lack of geographic clarity in the delivery of ADR services. National ADR providers and national ADR users such as industry ombudsmen and insurers may have national headquarters based in one state or territory but provide or require the same services in a variety of locations across the nation. Further, the growing phenomenon of online dispute resolution means that ADR services provided from one state or territory are used by people in other states and territories.

Separate systems of performance and activity data collection add to the costs and complexities faced by ADR service providers and, to the extent that they may eventually lead to differing best practice models and regulatory systems, to public confusion. National users and funders of ADR services find it difficult if not impossible to accurately compare and assess the costs and efficacy of the services they receive in one jurisdiction relative to the services provided in another.

The issues in relation to consistent data collection need to be addressed nationally by the Australian Government together with all the States and Territories.

One of NADRAC's recommendations in *A Framework for ADR Standards* was that Commonwealth, State and Territory Governments undertake a joint review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes (see Recommendation 11). NADRAC is of the view that the issue of common performance and activity indicators should be added to the list of matters for jurisdictions to consider. However, in saying this NADRAC is not suggesting that any national or state/territory regulation is required. Instead the agreed common indicators could be applied by each jurisdiction through its own administrative processes and funding programs. Private ADR providers that are not funded by government could be encouraged to collect data using the same indicators.

Increasing awareness of, and accessibility to, ADR services
(Questions 9, 10, 38 and 39)

NADRAC agrees that there is limited consumer awareness and understanding of both ADR processes and the organisations that provide them and that this is a significant barrier to achieving greater community use of ADR services at the earliest possible opportunity (ie before

litigation is commenced). Marginalised communities, particularly Indigenous people[1], are likely to have particular difficulties in accessing information about alternative dispute resolution and therefore to be less likely to use ADR services. In addition, although Australian courts are significant referrers to ADR services, a lack of community knowledge about ADR processes may mean that people's expectations are not met or that they are unable to participate appropriately or to adequately assess the quality of the service that is delivered. These issues are not confined to Victoria.

The Australian Attorney-General expanded NADRAC's Charter in October 2006 to include 'promoting the use and raising the profile of alternative dispute resolution'. However, NADRAC is not in a position to undertake the sort of high profile promotional campaign that would be necessary to significantly increase community awareness of and access to ADR services.

NADRAC agrees that governments can play a very helpful role in promoting or funding the promotion of ADR. However, if each Australian government were to undertake separate promotional campaigns based on differing understandings of the range of ADR services, the benefits of ADR, or that promote different models of ADR, the result is likely to be a level of national confusion (for similar reasons to those already outlined above). Accordingly, NADRAC would strongly encourage Australian governments considering undertaking campaigns to promote ADR services to collaborate with other governments to ensure a consistent national message is sent.

It is NADRAC's understanding that there are many more trained ADR practitioners than there are people to use their services. For that reason, the increased demand for services created by promotional campaigns may not be a significant problem in the medium to long term. In the short term many of those who have already trained as ADR practitioners may have given up or ceased to practice and may not meet the new National Mediator Accreditation Scheme standards, proposed to commence in 2008. From that perspective it may be appropriate for governments to match any public promotional campaign, with a campaign targeted at professionals which encourages people who have been trained in ADR provision to update their skills in accordance with the National Mediator Accreditation Scheme.

NADRAC supports the concept of a central access point to information about ADR to make it easier for members of the public to identify and access high quality[2] ADR services. Given the integration between Victorian ADR services and national ADR services mentioned above, NADRAC would encourage Victoria to make any such service an holistic one capable of referring members of the public to the full range of services available to Victorians irrespective

---

1 See the comments that NADRAC made in its Report *Indigenous Dispute Resolution and Conflict Management* (January 2006)

2 Referral to quality alternative dispute resolution services will be particularly important for a government provided gateway. Determining what services are of sufficient quality given the wide variety of service standards in the alternative dispute resolution sector. In the mediation sector, compliance with the new standards under the National Mediator Accreditation Scheme could be one measure.

of whether the services are provided by the Commonwealth, in another State/Territory (eg in cross-boundary disputes) or online from another State/Territory.

A plethora of government and industry gateways that refer only to certain services, have inconsistent referral protocols and have significant gaps will be a poor public policy outcome likely to entrench misunderstandings and confusion about ADR services. For that reason, NADRAC suggests that, if the Victorian Government proposes to establish such a gateway, it consult with other governments and with existing services of a similar nature, whether inside or outside Victoria (eg Family Relationships Advice Line, Family Relationships Online, Financial Industry Complaints Service Inc, Dispute Info) to ensure the new service is integrated with them and that the services cross-refer wherever appropriate.

Referral to ADR
(Questions11, 12, 13, 17, 25, 26 and 48)
A number of issues related to referral to ADR are covered in previous NADRAC advice. Much of that advice is already appropriately referenced in the Discussion Paper. However, it is worth emphasising that when State entities such as governments and courts refer members of the public to ADR services they should take a level of responsibility for the quality of the services to which they are referring. This is, of course, particularly the case where the referral is mandatory. In *A Framework for ADR Standards,* NADRAC recommended that 'bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR.'

The proposed new industry National Mediator Accreditation Scheme will assist referrers to identify mediators who voluntarily comply with minimum practice standards.

However, an additional challenge is presented by the inconsistent use by ADR service providers of terms to describe ADR processes. The term 'mediation', for example, is used to refer to:

- facilitative processes that emphasise empowerment of the participants in which the participants speak for themselves (although third parties such as lawyers may be present to advise and support the participants)

- processes in which the ADR practitioner provides professional advice on the content of the dispute or potential outcomes (which might more accurately be termed conciliation), and

- processes in which the participants are legally represented, the ADR practitioner strongly advocates or presses settlement and the ADR practitioner meets separately with the legal representatives to nut out the details of the agreement (a process which might better be referred to as facilitated negotiation or possibly even a facilitated settlement conference).

Each of these processes may have a place depending upon the type of dispute and/or the dynamics between the participants. However, the participants' experience of each process is likely to differ widely particularly if they had different expectations of the process (perhaps

based on a previous experience of 'mediation' or on what they have been told they should expect about 'mediation').

As NADRAC pointed out in *Legislating for alternative dispute resolution A guide for policy-makers and legal drafters* 'NADRAC has consistently emphasised the need to make proper assessments about the suitability of ADR processes for different cases and client groups' (p 37). It would be impossible to do that unless the referrer has a very good understanding of the different nature of the processes available and their likely impact on the participants/dispute dynamics. It is doubtful whether many referring agencies currently have an adequate understanding of the processes to make appropriate referrals. In the current environment, reliance upon generic descriptions of processes such as 'mediation' and 'conciliation' is not sufficient. Furthermore, the participants should be fully informed of the type of process to which they are being referred, how it may differ from other processes (particularly others that may go by the same name) and why they are being referred to that particular process.

This brings NADRAC to the question posed in the Discussion Paper as to whether ADR processes require standard definitions or descriptions (Q 48). In *ADR terminology: a discussion paper* NADRAC outlined some of the important functions served by consistent terminology. Amongst other things NADRAC indicated that:

> *common definitions or descriptions of ADR processes ensure that those who use, or make referrals to, ADR services receive consistent and accurate information, and have realistic and accurate expectations about the processes they are undertaking* and
>
> *consistent use of terms for ADR processes helps courts and other referring or mandating agencies to match dispute resolution processes to specific disputes and different parties.* (p 5)

While there are some potential problems with common terminology, as outlined in NADRAC's discussion paper (p 6), NADRAC considers that those problems do not negate the value of consistent terminology and that it should be possible to achieve more consistent descriptions of ADR processes whilst also addressing the potential problems of doing so.

ADR standards and regulation
(Questions 46, 47, 49, 50, 51, 52, 53, 54, 57, 58, 60, 61, 62, 63 and 64
NADRAC's view is that ADR sector self-regulation is to be preferred to government regulation. NADRAC has been a consistent advocate for the development of voluntary, industry accreditation standards for mediators and is very pleased to see this coming to fruition in the form of the new National Mediator Accreditation Scheme. It would like to see similar national initiatives in other areas of ADR practice (eg restorative justice).

At the same time, NADRAC recognises the need for greater consistency and clarity relating to existing and proposed statutory provisions. Accordingly, NADRAC called in 2001 for a joint Commonwealth, State and Territory review of statutory provisions concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and

agreements (Recommendation 11, *A Framework for ADR Standards).* As far as NADRAC is aware such a review has not been undertaken. To assist in achieving greater clarity and consistency NADRAC has produced *Legislating for alternative dispute resolution A guide for government policy-makers and legal drafters* in 2006 (a living document which NADRAC proposes to regularly review and update). NADRAC continues to believe that greater communication, collaboration and coordination of ADR policy and legislative initiatives is needed at an inter-governmental level.

NADRAC doubts whether Commonwealth generalist legislation (Q 63) could address the regulatory issues outlined in the Committee's Discussion Paper as many ADR issues are issues within State jurisdiction. While a referral of powers from all the States and Territories may be possible, it does not seem to be at all probable (particularly given the involvement of many State/Territory courts and tribunals in providing ADR services). By the same token, the large number of existing Commonwealth, State/Territory statutory provisions relating to ADR is undesirable. The development of generalist, and hopefully umbrella, legislation in each State/Territory would reduce the number of provisions but would not necessarily address the need for greater national consistency in approaches to ADR regulation. NADRAC considers that the most desirable option is for joint Commonwealth, State and Territory cooperation on the development of future ADR policy. This could result in greater national consistency in both ADR policy and legislation and a reduction in the large number of existing legislative provisions.

In relation to the Committee's proposals for an ADR industry council and ADR ombudsman, NADRAC notes that the proposed new National Mediator Accreditation Scheme anticipates the establishment of a new national mediator standards body for the scheme. The new body will play a central role in:

- developing and reviewing the operation of the standards
- developing a national register
- monitoring, auditing and supporting complaints handling processes, and
- promoting mediation.

The new National Mediator Accreditation Committee, largely comprising mediation providers and mediation training organisations, is expected to commence meeting next year with the objective of establishing the new standards body.

Confidentiality and immunity
(Questions 18, 55 and 56)

NADRAC has expressed views on these issues elsewhere. They remain vexed issues for the ADR sector. NADRAC has noted that confidentiality assists ADR practitioners in the performance of their functions but indicated that it should be an ethical obligation rather than a statutory one. NADRAC's view is that the issue of immunity should be considered on a case by case basis, noting:

- any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy, and

- consistent with the common law position as to judicial immunity, there is justification for extending immunity to ADR practitioners whose work is closely integrated with judicial proceedings.

Conclusion

Over the last 20 to 30 years Australian jurisdictions have embraced ADR to assist members of the public to resolve disputes both in the justice system and in the broader community. To progress further, and ensure that ADR services across Australia are high quality ones, NADRAC believes that Australian governments need to communicate effectively with each other on ADR issues and work towards a consistent national approach (albeit progressed on a jurisdiction by jurisdiction basis).

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