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Ms Serena Beresford-Wylie
Director
NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
Barton, ACT, 2600

27th May 2009

Dear Ms Beresford-Wylie,

Re: NADRAC Enquiry into ADR and Civil Proceedings
NLA submission

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight State and Territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

The commissions work co-operatively with the other main legal aid service providers in Australia to maximise access to justice for people. At a national level this co-operation is facilitated through the Australian Legal Assistance Forum (ALAF) comprising representatives of the Aboriginal and Torres Strait Islander Legal Services, the Community Legal Centres, the Law Council of Australia and NLA.

Each of the Commissions provides primary dispute resolution services in family law. As well, each of the commissions provides some level of legal aid assistance to people with civil law disputes although the type/extent of assistance varies between commissions.

NLA is happy to make this submission which is based on the feedback from commissions about the issues raised in the Issues Paper "Alternative Dispute Resolution in the Civil Justice System" released by the National Alternative Dispute Resolution Advisory Council (NADRAC).

Some general comments

Firstly, the discussion contained in the Issues Paper does not accurately represent the situation in relation to civil disputes for many legal aid clients. Australia currently has several schemes that are effective, cost efficient and that work well for legal aid clients. For example, the External Dispute Resolution (EDR) schemes in the financial services sector (credit, life and general insurance products) have resolved a significant number of disputes. Court case management systems can benefit greatly from the current Alternative Dispute Resolution (ADR) models, particularly in the area of EDR schemes which are quite sophisticated dispute resolution bodies and deal with a high volume of disputes involving complex issues.

Examples of these schemes are:

- The financial services sector EDR model (arbitration focus with elements of conciliation via a panel system or Ombudsman system where the consumer retains their rights to go to court even if they lose).
- The telecommunications sector EDR model (arbitration focus with elements of conciliation (via Ombudsman model) where the consumer has all their rights to go to Court to resolve the dispute even if they lose).
- The energy sector EDR model (arbitration focus with elements of conciliation (via Ombudsman model) the consumer has all their rights even if they lose and can go to Court to resolve).
- The current pre-trial mediation/arbitration schemes available in state civil jurisdiction – with a mediation focus (private or Registrar).

The establishment of any scheme of ADR for civil disputes in the federal jurisdiction needs to acknowledge and work in with these existing schemes that are free, and that work well for consumers.

Secondly, it needs to be an acknowledged that different ADR procedures and techniques will be necessary for different types of disputes. It is important that ADR processes are tailored to suit the type of dispute resolution that needs to occur. For example, there is some strength in the view that for financial service disputes, conciliation and mediation are most effective when they operate in the context of a broader decision-making model (ie arbitration or judicial decision making). That is, parties are more likely to resolve at mediation/conciliation financial disputes when there is a commercial risk that an independent decision-maker will make a decision against their interests. On the other hand, some disputes are better conciliated/mediated. Some neighbourhood disputes would be an example.

Thirdly, it needs to be acknowledged that there can be an inherent power imbalance in ADR processes, particularly in mediation and conciliation when an unrepresented litigant is asked to negotiate with a litigant more familiar with the legal system. In the financial services context, for example, it is not uncommon to see mediation/conciliation sometimes in respect of significant sums, between an experienced Internal Dispute Resolution officer from a large insurance company or bank in dispute with an unrepresented consumer. It is our submission that unrepresented litigants who are socially or economically disadvantaged should have the benefit of legal representation from a legal aid commission or community legal centre to represent their interests. In the context of proposed changes to Financial Ombudsman Service Terms of Reference to improve mediation/conciliation focus, it may be appropriate to consider particular funding for legal aid offices to represent disadvantaged consumers.

Fourthly, there needs to be recognition and acknowledgment that access to justice, especially for disadvantaged people, often in fact means access to an adjudicated decision. Thus, the assumption that putting in place ADR procedures will always facilitate cheaper, easier dispute resolution is not true.

For example, to consider putting in place mandatory pre-litigation ADR procedures to a consumer who has had their house burnt down, has nowhere to live and is faced with an insurer who is denying liability, is both unnecessary and unfair because the consumer will have already made request to customer service operator to review decision to refuse claim, made a request to IDR Manager to have refused claim reviewed and made a request to FOS to have their refused claim reviewed. [ASIC RG 139 and 165]

Fifth, in the context of possession list matters where consumers are at risk of losing their residential home, it may be appropriate to consider mandatory pre-litigation procedures. An example of such a model has been developed by Consumer Credit Legal Centre, NSW as attached.

Chapter 2 "About ADR"

There needs to be consistency across Australia in relation to ADR and in particular in relation to the terminology used as it can be confusing. The inconsistent use of ADR affects consumers and referrals by courts and lawyers because of an uncertainty as to what will be involved in the processes, confidentiality provisions, the outcomes and the role of the ADR practitioner.

NLA believes that the definitions and terminology of ADR used by NADRAC are sufficient.

A distinction exists between the common overarching processes that apply to all ADR and the need to differentiate/modify ADR processes across jurisdictions. For example, the steps in the process and participants should vary according to the dispute. Key steps should differ across legal jurisdictions, areas of dispute and whether the process is court annexed or in the community sector.

All ADR processes should have core elements which include:

- Education/information provision to participants.
- Empowerment of parties to participate in negotiation and decision making to the maximum of their capacity.
- Appropriate power balancing activities built into the process and role of the ADR practitioner.
- Disclosure of all relevant information.
- Access to legal advice before, during and after the ADR process as required.
- Assessment for suitability and safety issues to assess appropriateness for ADR and the need for safe and effective formats for the ADR process. i.e. shuttle or face to face, support persons etc.
- Impartiality of the ADR practitioner & lack of coercion.
- Separate determination for mediation.
- A degree of confidentiality and inadmissibility defined under legislation and/or signed agreements between the participants.
- Background and information gathering.

- Defining and clarifying the issues in dispute & agenda setting.
- Discovering the underlying needs and concerns of the parties.
- Option generation.
- Negotiation.
- Writing down agreement reached.
- Receiving legal advice prior to making legally binding decisions.
- Follow up ADR if required.
- Compulsory training of the ADR practitioners and a form of accreditation.

Other ADR processes must be appropriately modified, to fit the needs of the jurisdiction and subject matter in dispute etc. Areas that may alter include:

- Who attends the process. i.e. Extended family, legal representatives.
- Whether one of the parties is a statutory authority or where all are private parties. This may alter power balance.
- Is there a clear victim & perpetrator or are there issues of perception of fairness.
- Are there clear legal parameters that modify what outcomes are possible or are the areas of potential settlement more subjective in potential remedies.
- Whether the parties are voluntary or attend on a compulsory basis.
- Whether there are 'bottom line' protective issues i.e.: criminal cases or child protection, that need to be addressed in ADR.
- Who is the mediator? Subject matter expert or generalist, private or publicly funded, In house employee or an ADR panel contractor etc.
- Authoritative nature of the ADR practitioner. Does the ADR practitioner simply facilitate and remain neutral or take a conciliation stance and suggest and possibly advocate certain alternatives?
- Post litigation or pre-litigation.
- Compulsory or court ordered ADR.
- Different legislative context.
- Nature and capacity of the parties to enter into ADR individually or with appropriate supports.

Regardless of what tailored ADR approaches are utilised, it is critical that all participants, including any legal representatives, are provided information about the process both verbally and in writing.

It is recommended that the government require some core aspects of ADR to be present in all ADR processes but leave lots of flexibility for each jurisdiction to tailor its model. This could include cross disciplinary working groups with key stakeholders, including the legal profession, to further develop and/or improve appropriate models of ADR that are tailored to meet the needs of all players.

Chapter 3 "Promoting public awareness of ADR"

NLA believes that the introduction of any ADR processes into federal civil jurisdictions needs to be accompanied by an improved understanding of ADR and its different processes within the general community. This should include, where possible, the use of consistent terminology. This community education should include "train the trainer" programs to service providers in vulnerable communities including legal aid commissions and community legal centres.

Other jurisdictions
In the family law jurisdiction, the Government has invested heavily in promoting Family Relationship Centres (FRCs) and other Family Dispute Resolution (FDR) support organisations. It is recommended that the experience in public campaigns such as in family law, be used to promote ADR in the civil law sector.

Role of legal practitioners
There will be a need for some legal practitioners to be extensively trained in the use of and skills needed for ADR so that they can provide expert advice and refer appropriately to ADR. Statutory requirements for lawyers to provide information about ADR to their clients could be supported by other incentives and collaboration with the professional bodies. This could include the development of promotional materials and information packages to the public in collaboration with representative state peak bodies such as the law societies, bar associations and courts administrations.

Such an approach needs to be in tandem with the collaborative ADR model developmental approach recommended above, to devise appropriate tailored models of practice and cross disciplinary training in ADR.

Consumers are only interested in ADR as and when it affects their lives personally, and as such, it will be more effective to 'train the trainers' than try to educate consumers generally.

Chapter 4 "Provision of ADR services"
NLA supports standards for ADR both for service providers and ADR schemes. Court based services should also have standards.

The benefits of court based ADR is that the courts can impose it as a pre-condition to the litigation process. These schemes have been used successfully in many state based courts.

Judicial mediation model

NLA considers that not all judicial officers will be suitable for this type of work – they may not have the skill base for conducting ADR. ADR is a specialist skill. Judge led mediation, can be an expensive and authoritative style of ADR. The most beneficial Court appointed mediators are people with the kind of skill and experienced background who can authoritatively say to the parties with some confidence (based on their past experience) "I think a Court in your case may take the following approach to deciding your matter". It could be beneficial to encourage former judges to go into the field of mediation for this reason.

There are positive examples of the appropriate use of judge-led ADR processes, both nationally and internationally. It is recommended that such models be applied in a targeted manner and not as a general approach in all court matters.

The judicial mediation model would ideally include:

- A small number of judicial officers in each appropriate Court who have been selected on interest and aptitude for ADR.
- A clear distinction is drawn between an 'inquisitorial' style of case management versus an ADR model.
- Specific training in the ADR model and ADR techniques.
- An authoritative mediation/arbitration style of ADR.

- The ability to provide non-binding arbitration on key issues to assist the parties move forward.
- Specific matters requiring authority be triaged/referred to judicial mediation. Such matters may include: complex law, intractable repeat players, Court Ordered and not voluntary participants.
- The boundaries of inadmissibility should be clear. There may be some models however, where certain information such as the ADR Judge's/mediator's recommendations, options discussed and party/lawyer behaviour that may be fed back to the Court in a prescribed format and then taken into account, in later judgements.

If this model is adopted, then it is essential that the judge who conducts the ADR process must be separate from the litigation Judge, should the matter proceed to Court. The disadvantages of one judge mediating and deciding a case are that it:

- Might affect the ability of the parties to have a full and frank discussion.
- Leave the Court open to a claim of actual or apprehended bias.

Costs
Another consideration is cost. Costs are often prohibitive with some service providers costing a large sum of money. Unless a client is legally aided (and very few in civil cases are) it is outside the realms of the average litigant to afford ADR. If court based ADR was free of charge or with minimal charge, this may redress the imbalance.

Confidentiality
ADR needs to be generally confidential and inadmissible, with legislative protection or the parties are likely to behave in a more adversarial manner. There may be prescribed limited exceptions to confidentiality as set out above.

Success factors
It is our casework experience that the single most important factor in determining why disputes resolve before final hearings is the risk that a final arbiter of the dispute might decide against them.

Chapter 5 "Referral and Assessment

NLA agrees that legal practitioners should be encouraged to learn more about ADR and ADR should be strongly advocated by peak legal bodies. It is our casework experience that there is a distinct lack of awareness amongst lawyers of EDR schemes including Financial Ombudsman Scheme (FOS) and the Credit Ombudsman Service Limited (COSL). A greater awareness and usage amongst lawyers and Courts of EDR services would dramatically reduce the cost and expense of need to litigate.

As well, courts play an important part in referring applicants to ADR and there should be encouragement by courts and judges to broaden the understanding of ADR services available and ensure that appropriate cases are referred.

ADR should be emphasised in university courses in particular the law courses. There are some very good examples of integrating ADR as a core part of legal training at Australian universities. Perhaps some national benchmarks can be developed for incorporating significant ADR training for lawyers. This education could be supplemented through compulsory legal education training for lawyers.

Cross disciplinary & collaborative training opportunities may be more systematically implemented, which will assist in changing the culture and acceptance of ADR as a central plank of lawyers practice.

Chapter 6 "Barriers and incentives"

NLA believes that there are cultural barriers within the legal system to the widespread uptake of ADR.

Barriers

One major barrier to people using ADR is the fees. The combination of court filing fees, ADR fees and legal representation costs are so high that the average member of the public cannot afford to gain access. These costs are also a deterrent when there can be no guarantee of success and parties may face litigation costs in addition to ADR.

Where a consumer is attempting to recover money, compulsory ADR including pre-litigation ADR is a barrier to access to justice. For example, compulsory pre-litigation ADR in insurance matters is a barrier to consumer's right to access their legal rights.

Legal advice

It is recommended that legal representatives be required to advise clients prior to ADR on the 'negotiation range', to assist clients to negotiate within the range. The range should also take into account, an estimate of the relative costs (if any) of litigated and ADR settlement pathways.

Some areas of dispute are more amenable to this type of advice, such as financial or commercial disputes, whereas other areas of dispute, such as neighbourhood disputes, may have less clear parameters. Nevertheless the provision of clear advice outlining the risks and opportunities by lawyers prior to ADR remains appropriate.

If practitioners are required to provide this advice, it should be furnished with a disclaimer that it is provided on the basis of the information currently to hand, and may be subject to revision as the negotiations proceed during ADR. Such required provision of advice on the options for the range for settlement is only possible in ADR models that require full disclosure and exchange of relevant information and documentation well prior to the commencement of ADR.

Good faith negotiations

The idea in making 'good faith' negotiation mandatory is a difficult issue. Good faith, and what this constitutes, is a subjective matter and may leave the ADR practitioner open to perceptions of bias and may confer unnecessary power to coerce parties.

The family law scheme has adopted the test of making a 'genuine attempt' - it is a compulsory requirement and is reported on by FDR practitioners when a FDR Certificate is provided to the participants. The reality in family law practice however, is that few ADR practitioners assess parties as 'not making a genuine attempt to negotiate' due to concerns of the subjective and arbitrary nature of this judgement and perceived coercive elements. ADR practitioners generally hold strong values related to empowerment and self determination, which run counter to such judgements and possible elements of 'social control'.

It is recommended that where court ordered ADR occurs, that there is some prescribed feedback to the Court in relation to the behaviour of parties and/or their legal representatives, where there are abusive and/or clearly obstructive approaches that undermine the objectives of ADR.

Mandatory ADR has proved viable and successful in other areas of law including the Children's Court and Family Courts and AAT. However there may be some areas of law that may not be amenable to ADR. These include:

- Where an area of law needs clarification and determination
- possession list matters (with the appropriate caveats)
- Where it is unsafe or the power imbalances are too great to include parties in direct or indirect ADR.
- Migration matters
- Social security administrative decisions.
- Where there are a multitude of small matters that do not require the time and resources of ADR to resolve. Examples may be smaller tenancy issues or Social Security decisions.

It is recommended that each jurisdiction be required by government to review its ADR processes with relevant stakeholders, to determine the parameters of which matters may be referred to ADR. Once the objective criteria are established, then compulsory ADR may be introduced in legislation in key jurisdictions, where this is not already the case.

The Federal Government has spent significant resources to promote, and pay for ADR services in the courts and community sectors to support Compulsory ADR in Family Law. This shows that great care needs to be taken where ADR is not pinned onto existing structures, because setting up alternate structures solely as the basis for ADR mechanisms can be very expensive and could wind up negating the supposed benefit achieved by ADR.

The provision of free or substantially subsidised ADR is the key to the public up taking ADR and must proceed hand in hand with any promotion and/or compulsion to attend ADR.

Chapter 7 "Use of ADR in government disputes"

The Government should be a model litigant. This should encourage use of ADR to be consistent with other policy directions of the Government. However, as stated earlier there are a number of areas in which government departments litigate where ADR is not appropriate, such as migration matters and questions of law and public interest that go to the Federal Court.

Where possible and appropriate, the Government should be looking at ADR processes to be more fully utilised. It will ultimately be a cost saving for the government if matters can be mediated and solved at an early time. However for ADR to be effective at the government level, there needs to be an acceptance that cases have to be 'settled' by negotiation where possible. Often there is an intrinsic belief that once a government agency has made a decision, this is the 'correct decision' and this attitude can then stop negotiations.

Chapter 8 "Use of ADR techniques"

Judicial appraisals

Judicial appraisal in the AAT works well. This is usually done by a different judicial officer to the final decision maker, who is also not aware of the contents of the judicial appraisal.

Case conferences

Integrating ADR into the case management processes of the Court has been highly successful in the AAT, Family Court, Children's Court, and other Courts. Case Conferences prior to a hearing and strategically timed, have been shown to reduce the number of matters requiring judicial determination and also provide a better quality of outcome for some clients where individually tailored settlements can be negotiated, costs reduced and parties can maintain relationships where advantageous.

These formats work where one court officer actually 'minds the case' from beginning to end, including attempted settlement negotiations. This could be introduced in a number of jurisdictions.

It is recommended that where case conferences and ADR approaches are scheduled as a regular court event, that there is sufficient preparation time for litigants to make the process meaningful and able to produce good settlements. Experience has shown that if courts do not resource and place emphasis on these ADR processes then they are seen by some lawyers as a 'hurdle' or 'fishing expedition' before the final hearing.

Chapter 9 "Data evaluation and research
Questions 9.1 – 9.4

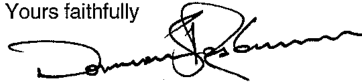
It is agreed that any introduction of a system of ADR will need to be evaluated and researched across Australia to ensure that it is achieving the results required. This will need to include robust data collection such as numbers of cases settled, longevity of settlements, what the costs are, relevant issues and complaints that arise. This research will enhance service provision in this area.

As well, it is believed that NADRAC should consult further with the current ADR schemes which resolve a high number disputes on a daily basis prior to releasing a report on its Issues Paper.

Conclusion

NLA thanks you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours faithfully



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