

**AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (ADRA)
RESPONSE TO THE DEVELOPMENT OF STANDARDS FOR ADR
NADRAC'S DISCUSSION PAPER MARCH 2000**

JULY 2000

1. GENERAL COMMENTS

Firstly, ADRA would like to take the opportunity to congratulate NADRAC on a comprehensive, timely and well-informed paper. The paper appears to identify the majority of key issues and provides a thorough and meaningful discussion of each issue.

We consider that NADRAC's general approach is appropriate for the consideration of the development of standards for ADR practice in Australia. However ADRA would like to propose that from this point on that the three categories of ADR processes as defined by NADRAC – 'facilitative', 'advisory' and 'determinative' be treated separately for the purposes of discussing and developing ethical and competency standards, appropriate ADR training and a regulatory framework.

The reasoning for this proposal is that there is a fundamental difference between a consensual outcome and an imposed outcome, as well as significant differences between a facilitative role and an advisory one. We believe that these differences impact significantly on all areas raised for discussion in the paper. That is: context; objectives; knowledge, skills and ethics of standards; education; training, enforcement of standards, complaints mechanisms and regulation.

We believe that the separation of the three processes will assist the clarity of discussion and lead to more appropriate action taken with respect to each process in the areas identified in the paper.

In addition, we would like to mention that the three categories that have been identified are appropriate and meaningful. However, we would also like to propose a fourth category - that of 'Statutory Conciliation'. We are conscious of making the definitions overly complex, however many Statutory Conciliation processes do not fit under the facilitative umbrella and indeed are a combination of some of the other processes identified. Statutory Conciliation in the majority has different imperatives and features that set it apart from the other categories. Some of these include: powers afforded to Conciliators in conjunction with the conduct of a facilitative process, eg. powers to direct evidence and some decision-making powers; differing procedural issues, eg. time constrictions; differing administrative environments, eg. numbers of matters and investigative process leading up to the facilitative process; and frameworks that are centred around being an advocate for the particular legislation and therefore conducting a rights based process with respect to the legislation, eg. rights with respect to discrimination or rights with respect to Workers Compensation.

As an overview, ADRA supports an ADR environment whereby: a base set of competency standards are established; a Code of Conduct/Practice and/or legislation is developed that is linked to competency standards; and training providers are accredited to provide training consistent with these competency standards. It would be expected that specialist areas and service providers would develop additional requirements or qualifications appropriate to their area of practice that would refer to the base set of standards.

Please note that the following comments apply to 'facilitative' dispute resolution processes only. The ADRA Board would like to focus specific comments on the following key areas:

2. STANDARDS

2.1 *Development of Standards*

The increased awareness of ADR in the community and use of ADR by courts, tribunals, industry and government agencies indicates that the timing is right if not late for the development of standards for ADR.

The ADRA Board supports the development of a base set of standards for ADR for the following reasons:

Consumer protection

Currently there are not consistent, established means for a consumer to determine the competency of a mediator and there are no benchmarks for training or practice standards.

The current inconsistency in standards, training courses and mediation practices has resulted in confusion for consumers and a lack of protection from incompetent, inexperienced and unethical practitioners.

Quality control

It is envisaged that the quality of service provision and the credibility and accountability of service providers would be improved with the implementation of standards.

Industry confusion about objectives and frameworks for practice

There currently exists a great deal of confusion as to the frameworks being used in practice that appear to fall under the same ADR process. These frameworks are given the same name but often differ greatly in objectives, methods of practice and outcomes. This presents much confusion with respect to the expectations of consumers.

2.2 Considerations when developing standards

The Board also notes the following considerations when developing standards:

- That initial standards would be a base set of acceptable standards for ADR practice in general. These standards would form the basis upon which specialist areas of ADR and service providers could then develop additional standards for specific areas of practice as necessary;
- That consumers need to be aware of the type of process, (including framework) that a practitioner is using;
- If a practitioner considers it appropriate to move to another process during a matter, that the standards developed for that process then apply, eg. from facilitative mediation to evaluation of merits of case in court, or to an advisory process.

Generally the lists of knowledge, skills, ethics and principles relating to standards that have been outlined in the paper are comprehensive. The ADRA Board has chosen to comment on a more macro level at this stage, but would welcome the opportunity to contribute on a micro level in fine-tuning the list during the process of developing standards.

3. EDUCATION AND TRAINING

3.1 Accreditation of Training Providers

The ADRA Board suggests that ADR training providers should be accredited to provide training based on set criteria consistent with a base set of standards. The criteria would include: established course content (broad topics not methods); appropriately qualified and/or experienced trainers and appropriate assessment processes.

3.2 Training content

The ADRA Board suggests that ADR training could be separated into:

- (a) Education about principles, objectives, theory and skills required for ADR processes; and
- (b) Training to practice ADR.

Contents of courses could include the following:

- Understanding of the principles of ADR
- Understanding of philosophy of ADR – eg. risks and benefits, its position in comparison to other dispute resolution frameworks, social objectives etc.
- Understanding of theoretical underpinnings

- Understanding of objectives of framework, eg. Transformative/change agent or agreement focussed (or both). Rights based or interest based.
- Knowledge of conflict theory
- Knowledge of human behaviour theory
- Knowledge of one or more ADR practice models/framework
- Knowledge and practice of key communication skills
- Knowledge and practice of interest based negotiation principles and skills
- Role play simulations practice
- Self-knowledge eg. Impact of self on process - values, attitudes, biases, triggers, maintaining personal boundaries, impartiality and neutrality
- Legal and ethical issues
- Subject area knowledge, including legal context
- Intake Assessment and Case Management processes
- Conflict diagnosis

3.3 *Appropriate Assessment*

For Education courses as stated above, the appropriate assessment would involve assessing understanding of principles and key theoretical concepts.

For training courses to practice ADR as stated above the appropriate assessment would involve (not in order of importance):

Theory and knowledge:

- knowledge of theory and concepts as listed above
- knowledge of relevant legal context;
- relevant subject area knowledge, eg. Trade Practices, Family Law;
- knowledge of components of ADR model(s) and understanding of objectives of model and application of model;
- understanding of ethical issues and management of ethical dilemmas;
- awareness of self; and
- understanding of principles of interest based negotiation;

Competency to Practice would include the ability to demonstrate:

- communication skills in practice;
- appropriate/effective interventions
- self awareness in practice;
- impartiality and neutrality in practice;
- management of process; and
- the variety of other competencies that have been documented in the list of skills.

3.4 *Appropriate Teaching Methods*

Teaching methods could include the following:

- Presentation (theory)
- Presentation of practice models
- Demonstration of practice models, live or audio/visual
- Experiential learning with role plays and other skills exercises
- Interactive group discussion
- Group work to develop analytical ability
- Observation/role modelling
- Co-mediation with experienced mediator
- Practice placement with supervision during placement
- Ongoing supervision

3.5 *Scope for ADR organizations to allow practitioners, accredited by another organization, to practise with them*

- If national or state competency standards were set there would be consistent criteria for organisations to assess the competency of practitioners accredited by other organisations.
- without consistent standards, an organisation should set their own standards and assessment criteria for their ADR practitioners and then assess whether the other organisation's accreditation meets the standards and criteria set.

3.6 *Appropriate qualifications for trainers*

ADRA suggests that the following qualifications would be appropriate for trainers of ADR theory and practice:

Either one of the following:

- Workplace Training Institute Accreditation; 'Train the Trainer'; adult education/education qualifications (or equivalent); or recognition of prior learning in training course development, design and delivery;

As well as any of the following depending upon the area of practice:-

- ADR qualifications, conflict resolution qualifications, social science, counselling, psychology, therapeutic and legal; and
- Extensive ADR practice experience to deliver skills based courses.

3.7 *Selection process for ADR trainees*

ADRA believes that attendance at a basic mediation skills training course should not require a selection process however assessment of competency must be carried out before the trainee can move onwards to attend higher level courses and to practice mediation.

3.8 Accreditation of ADR practitioners

The accreditation of ADR practitioners could be primarily competency based. ADR practitioners could be **assessed for competency** after they have:

- Undergone an established duration and standard of training;
- Gained practical experience to an established level (eg. number of mediations);
- Received supervision;
- Met the practice requirements for specialist areas of practice, (eg. Family Law Act requirements).

4. ENFORCEMENT OF STANDARDS/COMPLAINTS MECHANISMS

4.1 Code of Conduct

ADRA supports the use of a Code of Conduct/Practice as a means to maintain and enforce standards. The Code would include ethical guidelines and guidelines for practice and refer to a base set of competency standards required of practitioners.

ADRA has supported the development of the "Lets Talk Draft Code of Conduct for Mediators" (a copy has been forwarded to NADRAC).

4.2 Complaints handling mechanisms

ADRA suggests that the sequence for referral of consumer complaints and breaches of Code of Conduct could be as follows:

- (a) If the complainant feels it appropriate the complaint should be firstly taken up with the practitioner to explore remedies;
- (b) If the complainant does not feel it appropriate to refer back to the practitioner in the first instance, they may refer complaint to the service provider involved if relevant (see further as to service providers having systems in place for managing complaints);
- (c) (i) If there was no service provider involved then the matter could be referred to an independent complaints body; or
(ii) if previous attempts to resolve the matter as outlined have not been successful, the matter could be referred to an independent complaints body.

These processes would be carried out on a 'without prejudice' basis.

4.3 Enforcement of standards

Service Providers

Service Providers should have in place:

- Code of Conduct for practitioners;
- Case management procedures;
- Complaints mechanism which would include procedure for handling complaints, specified sanctions if complaint not mediated and an appeal mechanism;
- Ongoing monitoring/supervision and evaluation of mediators and mediations.

Complaints Body

ADRA is currently facilitating the unification of like organisations in other states to form a national ADR body. This may be one option for an independent organization that could receive complaints from each state (ie. State jurisdiction of complaints).

Other options include a government agency such as Fair Trading.

4.4 Liability for ADR Practitioners

The issue of ADR practitioner immunity should be dealt with on a principle level rather than be managed by practitioners having adequate Professional Indemnity insurance.

Facilitative mediators should be immune from legal action with regard to the outcome of a mediation, however this may not be extended to some aspects of the management of the process, eg. serious misconduct.

4.5 Confidentiality in ADR

The common law without prejudice principle should be upheld; therefore things said or done in mediations should be inadmissible in any other dispute resolution forum. Exceptions to this are matters revealed with the permission of the parties, statutory exceptions and information that is publicly known prior to the mediation.

Practitioners should be bound by confidentiality of mediation with respect to substantive matters, however it is appropriate to reveal matters of process.

Parties should be bound by confidentiality depending on the particular context.

5. REGULATION

The ADRA Board agrees that in view of the mandatory nature of ADR for some sections of the ADR community that there is a need for more than self-regulation. ADRA proposes that the ACT model of government legislation the "Mediation Act 1997" could be adopted as a national model for regulation of a base set of ethical and competency standards. These standards would be used to register mediators.

Specialist areas and service providers would also be able to develop requirements additional to the base set of standards for their particular area of practice or organization as necessary.

We suggest that the ACT legislation is a viable starting point but should also include criteria for determining an 'approved agency' to register practitioners and criteria for determining an 'approved training provider' to deliver ADR training.

6. ADRA'S ROLE

ADRA as an ADR representative body is prepared to assist in the development of standards in any of the following ways:

- Facilitation of discussions with service providers
- Education of our members
- Promotion of the Code of Conduct
- Involvement in the development of competencies and assessment criteria
- The establishment of a Complaints Body
- Education for consumers
- Referral to relevant services for our members such as:
 - (i) Professional Indemnity Insurance
 - (ii) Training and Supervision