

Voluntariness  
Pre-mediation  
- willingness

→ NADRAC  
guide

President  
ADRA  
PO Box 189  
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Dear Louise,

In response to your notes on the upcoming presentation to NADRAC I find I agree with most points raised. There is one point, however, that is my 'line in the sand'. The issue of voluntariness is one that I find most troublesome.

The ethos of mediation, as it has evolved from the early days of the San Francisco Boards, is one of voluntary participation. This voluntariness serve as a core value of mediation - in fact, it is the bedrock of what mediation is supposed to be - namely a voluntary and private means to resolve disputes. The only reason voluntariness has even been called into question is because governments are unwilling to provide regulatory relief in how justice is administered. Agreeing to remove voluntariness from the core of mediation is simply to see mediation as something to be moulded by the state.

At the core, the law's interest in mediation is a self-interested one, mediation helps to extend laws legitimacy in the shadow of increasing costs and rising inefficiency. By removing voluntariness from mediation it transmogrifies mediation into an adjunct of the law.

I think some in mediation get so desperate to mediate that like Faust they are willing to do anything for that one moment of bliss.

In presenting ADRA's interests to NADRAC I believe we should acknowledge the critical role voluntariness plays in mediation. I think we should acknowledge that it is not a commercial value, but an ethical one. Furthermore, I think ADRA ought to acknowledge that if voluntariness is removed from mediation there will be far more mediations conducted, but that our interests in mediation go beyond simple commercial interests.

I would appreciate Louise if you could share these comments with others.

Sincerely



Alan C. Tidwell



ALAN C. TIDWELL A&S  
Senior Lecturer in Management

4 February, 1999

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Louise Roseman  
President  
ADRA  
PO Box 189  
Helensburgh 2508

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Total pages  
(including this page) ..... 5 .....

Date ..... 5.2.99 .....

Time ..... 9:20 am .....

To Facsimile Number ..... 02 4294 3259 .....

Attention/Reference ..... house Rosemann .....

From/Reference ..... Paul Lewis .....

RE: ..... NADRAC submission .....

Message:

Dear house, my suggested changes & additions to your draft follow.

If anything is illegible or you want to discuss something, please call.

Regards, Paul

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DRAFT

ISSUES OF FAIRNESS AND JUSTICE IN ALTERNATIVE DISPUTE RESOLUTION

The NADRAC Discussion Paper "Issues of Fairness and Justice in Alternative Dispute Resolution", published in November 1997, identifies a number of strategies designed to address barriers to fairness and justice in ADR and invites comment.

On a global level, the breadth and scope of the paper makes a concise response seem simplistic. The discussion below, therefore, focuses on strategies which are considered to be critical to broadening community access, enhancing professional standards and development issues for ADR practitioners.

The following comments express the views of the writer, and are not necessarily endorsed by the Board of Management or the membership of the Australian Dispute Resolution Association Inc.

ACCESS TO ADR

**Cost of Justice**

*of court services and inadequate legal aid funding*  
As we draw to the end of this century the cost of justice is increasingly beyond the resources of a significant proportion of the community. In part this arises from ~~reduced public funding, for example of Legal Aid.~~ There are significant impediments to the reform of the justice system, and reform will take time to achieve.

ADR methodologies provide an option for the community to resolve disputes and achieve 'justice' within the existing framework of the legal system. Educating the legal profession, the judiciary and perhaps most importantly 'front line' staff in the legal system, government and public servants, is critical to expanding the access of the community to 'private justice' in those circumstances where 'public justice' is unavailable, unsuitable, ~~not an exclusive option or automatic requirement.~~

**Voluntariness**

One of the 'corner stones' of 'pure' mediation is voluntariness. ~~In the context of the increasing demands on the justice system "something has to give".~~ Voluntariness, while desirable in many and even most circumstances, need not be a requirement of an effective ADR model.

Court ordered or court referred ADR, with appropriate safeguards, can meet the needs of individuals and the community. NADRAC should consider developing and promulgating guidelines or recommendations for public sector services providing 'compulsory' mediation on ensuring equity and fairness in the provision of services in the absence of voluntariness.

*the option of mandatory mediation must be relaxed.*

*the suitability of the dispute to the various ADR options*

**Obligations of Solicitors To Advise Clients**

Currently, the obligations of <sup>legal practitioners</sup> solicitors to advise their clients about their options for resolution of disputes, i.e. ADR alternatives, are too weak.

There should be a positive obligation <sup>on lawyers</sup> to provide information on <sup>ADR</sup> the options; and <sup>written</sup> the range of outcomes of various alternatives, including ADR. This could arguably be <sup>advice about</sup> considered as consistent with a solicitor's duty of care to their client. The Law Foundation, Law Society etc. could be approached to develop an advice to solicitors to assist them in informing their clients about ADR options in various circumstances.

**Community Education**

*(public & private)*

While considerable resources have been employed in training mediators/ADR practitioners nationally, there has been limited resources applied to community education to generate an awareness of the options available to individuals and organisations involved in disputes.

There is a saying that <sup>knowledge</sup> information is power, and ~~focusing on greater education of the community will lead to the empowerment of individuals and organisations who are currently unaware of the options available to them.~~ People can only take responsibility for managing their own disputes if they have the knowledge to enable them to do so.

*one of the mantras that we have to abandon*

Therefore, accepting that the point made at 10.31 that "many groups do not have they need to make an informed decision as to how best to deal with a dispute" cannot be challenged, points 10.32, 10.33 and 10.35 automatically follow. However, if fairness and equity are to be achieved the community needs impartial and unbiased information.

NADRAC should consider developing 'model' materials and authorising their reprinting with acknowledgment for community education purposes, in order to ensure that, consistent with the principles of ADR, neutral and impartial sources of information are available to the <sup>public</sup> community via a plethora of <sup>media</sup> sources.

**Referral Resources**

At present, referrals to ADR/mediation services are often ad hoc or self-referrals. There are community advice and referral services in a number of settings (ie associated with various government departments). An education and training program, including an information kit and referral information, would be invaluable in educating such services (ie Fair Trading Centres, Women's Information Service, community centres, legal aid offices etc.)

A different and more innovative approach would be to support the implementation of a 'one-stop shop' model such as is being developed in Tasmania. Based on a Canadian model, Tasmania is planning to create centralised service/information centres providing a range of local, state and federal government and private sector services in one location. This assists the community by making it easier to readily access services which they might not have known existed, in a cost-effective and

*Thus will require be the education of the legal profession and equally the development of the concept of core ADR options in specific practice areas, eg. for family law, counselling, mediation, arbitration etc*

efficient way. Implementation of an alternative model of centralised information is being undertaken in Victoria via computer terminals in shopping centres.

ADR information would be more readily available to the community if provided in conjunction with such a 'one-stop shop' model of information and service delivery. An internet site providing general information and advice and facilitating links to service providers would also be an effective way of reaching a broad audience.

### PROFESSIONAL STANDARDS AND DEVELOPMENT

#### **Practice Guide**

The issue of accreditation and standards has been the subject of considerable debate and consultation in the ADR community over the last decade. There are a range of options from the 'do nothing', and minimalist options, through to the maximalist options, effectively 'professionalisation' encompassing such structures as Colleges or Boards of Accreditation. This issue is strangely

The Discussion Paper provides a range of guidelines on enhancing the effectiveness of mediation/ADR practice when working with clients with a range of different needs and circumstances.

In the absence of any other national standards or guidelines, NADRAC is encouraged to extract the practical guidelines and compile them in a "Practice Guide", to be made widely available to practitioners and those undertaking training in mediation. Organisations such as ADRA could be invited to contribute to or comment on a draft document. A ~~more~~ formal 'endorsement' by various organisations and associations might also be considered.

A "Practice Guide" specifically targeted at issues of relevance to organisations and agencies providing dispute resolution services (as opposed to individual practitioners) could encompass guidelines relevant to systems design, training, public education and data collection (as outlined in chapter 10). More detailed guidelines on such subjects as the sensitive issue of bringing to public attention trends or patterns evident in the ADR practitioners or agencies' work is required.

also

#### **Training**

The strategies identified in the Discussion Paper involving training and development are strongly supported. The challenge will be to design nationally relevant and accredited training packages which can be accessed by ADR practitioners/mediators in a variety of settings (including in isolated rural communities).

Of particular importance, given the issues raised in the paper, and the currently ~~available~~ training available (in NSW at least) are:

- intake and assessment principles and techniques

- process flexibility and design options to suit the parties and manage power *imbalances* *differentials*
- client education (providing appropriate and effective information to potential and *actual clients*)
- cultural/cross-cultural awareness

### Code of Conduct

An informal 'discussion group' comprising representatives of *an* range of ADR organisations in Sydney has met and discussed the concept of a voluntary Code of Conduct for mediators. A draft is currently being developed based on research of the codes in place *for a range of occupations*. NADRAC, by supporting the project and facilitating broader consultation on and promulgation of the Code, once it is developed by the group, would contribute to the achievement of equity and fairness in the practice of mediation. Community awareness of the existence and content of such a Code would be a mechanism to enhance community confidence in selecting mediation as a dispute resolution method.

*service providers & representative bodies.*

### National Competency Standards

The availability of an objective measure of a training course is of value both to potential employers and to those seeking training. NADRAC is ideally placed to initiate and support the development of National Competency Standards for mediators. These could be modeled on the ACT Competency Standards already published.

Alternatively, a set of standards of ~~a general nature~~, specifying minimum requirements for process and practice could be developed. Such standards ~~could stand alone or be accompanied by specific competencies appropriate to~~ *would* ADR/mediation in particular settings (ie Family Law Act matters, where parties are from Non-English Speaking Background, Aboriginal parties, etc.)

*need to include*  
 A lesser option is that *alternatively*, NADRAC could provide guidelines or recommendations for training providers on competencies and possible topics to be addressed in mediation training. Training providers should be encouraged to provide participants with a statement of competency outlining the subject matter encompassed to enhance the recognition of skills and knowledge *and aid employers in identifying training needs.*

*result in widespread support for their adoption & ongoing revision in the yrs ahead.*

*Based on ADRA's ~~from~~ experience over 12 years, we suggest that*

*Louise Rosemann formulation of National Competency Standards should be ~~over~~ be approached by using a*

*range of consultative processes ~~to gain~~ to gain broad input into their development over a reasonable period of time. The ADR community is marked by its ~~community~~ community consists of*

*a plurality of interests & many of its members of this diverse community ~~would be~~ would be sceptical of bureaucratically imposed national standards for a variety of reasons. It is*