

# Challenges for mediation practice in Australia: Standards for ADR: the balancing act

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ADR practitioners are hardly strangers to the notion of balance. In Australia and no doubt elsewhere, there are competing considerations and needs to be addressed in the development of effective ADR practices. This paper examines how the National Alternative Dispute Resolution Advisory Council (NADRAC) has attempted this balance with respect to the development of ADR standards.

## About NADRAC

The National Alternative Dispute Resolution Advisory Council is a key policy body on ADR. Established in 1995, its charter is to provide 'consistent and coordinated advice to the Attorney-General on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision'. NADRAC is an independent body comprising ADR experts from a range of fields including commercial ADR, family and community ADR, courts and academia.

NADRAC's key priorities are promoting the quality of ADR practice, addressing issues of court based ADR, responding to increasing diversity in ADR, and promoting effective ADR research, evaluation and data collection. Its more recent projects have included the development of criteria for court referral of matters to ADR, the consolidation of general principles for court ADR, ADR definitions, on-line ADR, and improved ADR research and data collection.

One of its key reports was launched by the Attorney-General in June this year. *A Framework for ADR Standards* provides an analysis of the current situation in relation to standards, offers an overall approach for the development of ADR standards, and makes 21 recommendations for action. The challenges faced by NADRAC in its consideration of ADR standards include:

- How can we balance diversity with consistency?
- What is the appropriate focus for standards?
- What are the risk and benefits of standards?
- What is the appropriate regulatory environment for ADR?
- What can be done in the short term and in the long term?

## Diversity and consistency

Standards need to balance the diversity of ADR with the need to promote consistent practice.

ADR takes many forms and is practiced in a huge range of settings. ADR is provided through community agencies, the private sector, courts and tribunals, government and statutory agencies and industry bodies. Parties could be neighbours, family members, work colleagues, businesses, consumers, organisations and communities. The ways in which ADR services are delivered vary widely. In some cases, ADR is one of a number of internal processes within an agency. In other cases, ADR is a service offered by a practitioner or by an organisation. There is no consensus as to how to describe ADR, both as it is now, and how it should develop in the future. Should ADR be seen as a profession? An industry? A social movement? Or a set of processes and techniques? Each of these has implications for the development of standards:

A profession would control who is admitted and recognised, often in conjunction with higher education bodies.

An industry may wish to look at skills acquisition and recognition, and the development of competencies, possibly tied to industrial arrangements.

A social movement would be interested in the development of capacities across the whole community, rather than assessing and recognising the competence of individual practitioners.

A set of processes and techniques would not belong to any particular industry or profession. Instead they may be included as an add on to professions, industries or social movements.

Despite different views about ADR, there is enormous support for the development of some consistent standards. Such standards are seen as necessary both to protect consumers and to increase consumer and community confidence in ADR services.

Because of the diversity of ADR, a singular and prescriptive approach to standards would be neither feasible nor desirable. Instead, NADRAC's suggests a framework through which standards can be developed to suit the particular context of service delivery, but which takes into account some essential elements. These elements concern informed and effective participation by parties, the appropriateness of the dispute for the ADR process, accessibility, fairness in procedure, termination of the ADR process, and maintenance of confidentiality. In addition, ADR service providers need to establish the appropriate level of practitioner competence, ensure the quality of the ADR process and develop processes for compliance and complaints.

### **The focus for standards**

To whom or to what should standards apply?

Standards could apply to what practitioners and service providers actually do, that is, the practices they employ. For example, standards could be expressed as codes, benchmarks or models of best practice.

The standards could apply to the attributes and qualifications of the individual practitioners who conduct ADR. For example, standards could specify a particular level of competency, academic qualifications or years of experience.

Or standards could apply to the organisations or agencies which provide services. Quality assurance is an example of this approach.

These approaches are complementary, and each may be especially useful in particular contexts. However, the practices approach has the greatest applicability across the whole ADR field, and the essential standards required for consumer protection and community confidence would be best expressed through codes of practice.

### **A proportionate response: weighing up the risks, benefits and costs**

While there is overwhelming support for standards, it is a recurring challenge to show that the problems and risk associated with ADR justify the effort and expense of setting additional standards.

We all have heard horror stories of ADR services, first, second or third hand, but there are very few documented complaints. This lack of complaints may relate as much to the lack of consumer awareness and the lack of effective complaints processes as to the lack of anything to complain about. While studies seem to show that parties involved in ADR are generally pretty happy with the process and services they receive, there are particular risks and problems in some areas.

The approach to standards needs to be proportionate to the problem and risks associated with service delivery. There are many grand schemes that could be put into place for ADR standards. For example, a national ADR quality accreditation system could be established, as with health care or education. Or professional registration structures could be developed, as with psychologists or

lawyers. Before embarking on any of these schemes, though, it is essential to ensure that their benefits outweigh their costs.

In its report NADRAC opted for several modest and achievable recommendations, which did not involve additional infrastructure or costly compliance processes. In the longer term, however, some more ambitious schemes could be considered.

### **Regulatory environment**

As NADRAC is an advisory body to Government, it needs to identify and balance the respective roles of Government and non-Government agencies, and to take into account regulatory reform principles adopted by the Council of Australia Governments. These principles favour a free market approach or self-regulation; government regulation is generally seen as the last resort. The lack of data indicating a high level of dissatisfaction with ADR makes it difficult to sustain a case for government intervention across all areas of ADR practice. However, there is a strong public interest in promoting ADR, and a purely free market approach would be unlikely to manage the risks associated with ADR or to enhance community confidence in ADR.

NADRAC favours a self-regulation approach in which standards would be developed primarily by ADR associations and service providers. However, the Commonwealth Government can take a leadership role by requiring the ADR services it funds or engages to adopt and comply with an appropriate code of practice.

### **Short term or long term**

Then final challenge is to balance what we can do now vs how we would like things to be in the future. There have been many excellent suggestions for the development of ADR standards, but also huge obstacles. Obstacles include the absence of a single, universally recognised ADR body, the diffusion of responsibility for standards, the competing interests of relevant professional groups, and the lack of available funding. NADRAC suggests feasible, low cost options that can be readily implemented, but also suggests future directions that require exploration and consideration in the longer term.

The balancing act for standards will be a long term challenge for all those involved in mediation and ADR generally. There is no single solution or magical approach, and the challenge is an international one. NADRAC's recommendations are now being considered by government agencies, ADR associations, practitioners and service providers. NADRAC also will be setting up a virtual bulletin board on ADR standards so that information can be exchanged on new developments. We will look with interest at how others meet the challenges of ADR standards.

NADRAC's report and other information are available on our website: [www.nadrac.gov.au](http://www.nadrac.gov.au)