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Policy development in ADR

A framework for ADR standards: questions and answers on NADRAC's report

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The report on ADR standards by the National Alternative Dispute Resolution Advisory Committee (NADRAC) was released in Brisbane on 13 June 2001. The report follows extensive consultation on NADRAC's earlier discussion paper *The Development of Standards for ADR* (March 2000). This article answers some of the key questions which arise in relation to the report and its recommendations.

Copies of the NADRAC report *A Framework for ADR Standards* are available from the NADRAC website <www.nadrac.gov.au>.

Why does NADRAC believe we need standards in ADR?

NADRAC's research and consultations indicate that while client satisfaction with ADR is generally high, there are specific problems and risks associated with ADR service delivery. Standards need to address some issues in particular. These include 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. ADR service providers need to establish the appropriate level of practitioner competence, ensure the quality of the ADR process and develop systems for compliance and complaints.

Standards also have benefits for the ADR service providers and practitioners, particularly at this stage of the development of the ADR field. The success of early pioneering work has lead to a great expansion in ADR programs, but there is a risk of fragmentation and professional rivalry. Standards will help to develop the quality of ADR practice, improve the credibility of ADR and build capacity and coherence in the ADR field.

What standards has NADRAC recommended?

NADRAC's framework has three inter-related components for ADR standards.

Guidelines

First, NADRAC proposes guidelines for ADR service providers for developing standards, which take into account:

- the context of service provision;
- the needs to be addressed in developing the standards;
- the appropriateness of existing or comparable standards;
- the roles and responsibilities of the service providers and practitioners;
- the standards of practice that service providers should adopt;

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- the standards that should apply to practitioners;
- other considerations to ensure service quality; and
- how to review and evaluate the standards.

Elements of a code of practice

Second, NADRAC describes elements of an appropriate code of practice, including the following.

- *Process:*
  - — ADR process or processes to be covered by the code, including the roles of all participants in the process;
  - — how and when the ADR process may or should be terminated; and
  - — service providers' and practitioners' obligations after the process is concluded.
- *Informed participation:*
  - — service providers' and practitioners' obligations to enable parties to make informed choices about the extent and nature of their participation in the process;
  - — service providers' and practitioners' obligations with respect to advertising and promotion of themselves, their service and the ADR process; and
  - — how and when parties will be informed of the standards that apply to the service provider and practitioners.
- *Access and fairness:*
  - — service providers' and practitioners' obligations to determine the appropriateness of the process for the particular dispute and for the parties to the dispute;
  - — service providers' and practitioners' obligations to ensure the accessibility of the service and the process to parties with diverse needs;
  - — service providers' and practitioners' oblig-ations to achieve fairness in procedure, including neutrality and impartiality; and
  - — service providers' and practitioners' obligations to maintain confidentiality and to inform the parties of confidentiality requirements.
- *Service quality:*
  - — the knowledge, skills and ethics that are required by practitioners; and
  - — service providers' and practitioners' obligations to ensure the quality of the ADR processes.
- *Complaints and compliance:*
  - — service providers' and practitioners' obligations to handle complaints appropriately; and
  - — service providers' and practitioners' obligations to comply with the code.

Knowledge, skills and ethics

Third, NADRAC provides a description of the knowledge, skills and ethics which individual ADR practitioners may require. These would be determined according to the context of service provision and the roles and responsibilities of practitioners, and would be described in a service providers' code of practice.

NADRAC identifies the areas of knowledge which the practitioner may require as including conflict, culture, negotiation, communication, context, procedures, self, decision-making and ADR.

Skills include assessing a dispute for ADR, gathering and using information, defining the dispute, communication, managing the process, managing interaction between the parties, negotiation, being impartial, making a decision and concluding the ADR process.

Ethics include promoting services accurately, ensuring effective participation by parties, eliciting information, managing continuation or termination of the process, exhibiting lack of bias, maintaining impartiality, maintaining confidentiality and ensuring appropriate outcomes.

What does the future hold?

How does NADRAC envisage its framework for ADR standards developing the practice of ADR in Australia in the future? If this discussion was taking place in two to three years' time, how would the issues be different to now?

It is envisaged that NADRAC's framework will improve practice in ADR. Consumers would be given clear information on the process into which they were entering, and be in a better position to decide how they were going to participate in the process. There would be greater consistency in the quality of services provided and improved complaints procedures in the case of unsatisfactory service. Selection processes, training courses and qualifications would be more closely linked to the functions required of ADR practitioners, and greater emphasis would be placed on actual performance, rather than on 'threshold' requirements such as academic qualifications. There would be ongoing co-operation between ADR service providers and associations to develop common codes and benchmarks, while at the same time the ADR field would continue to grow in diversity and creativity.

In two to three years' time, it is likely that the need for specific standards in particular areas of ADR practice will be clearer. That is, while the overall framework will remain relevant, the focus of attention may shift to areas where problems or risks have been identified. As ADR develops further there may also be potential to revisit some of the options considered in NADRAC's report, such as quality accreditation schemes for organisations or national qualifications structures for practitioners.

Why self-regulation rather than a government regulatory scheme?

All the information available to NADRAC indicates that self-regulation is the most appropriate form of regulation for ADR. There is insufficient evidence to justify explicit government regulation across the entire ADR field, given the Council of Australian Governments' principles on regulatory reform. There is, nevertheless, a significant public interest in promoting ADR and ensuring a degree of consistency in what consumers could expect from ADR services. This consistency could not be achieved by a purely market driven approach.

While there may be a need for explicit government regulatory measures to deal with clearly identified risks and problems, such measures need to be considered on a sector by sector (or jurisdiction by jurisdiction) basis. Some areas of ADR practice are currently subject to explicit government regulation, which may need to be reviewed (note NADRAC's 1997 report *Primary Dispute Resolution in Family Law*).

It is true that some practitioners and organisations may decide not to comply with self-regulated standards. However, direct ➢

➢ government regulation would be neither practical nor effective in dealing with this. A more effective strategy is to encourage compliance through, for example, the granting of preferred supplier status, statutory protections and favourable professional indemnity insurance conditions to those with an appropriate code of practice in place.

How will standards reduce or eliminate poor practice by some practitioners?

Although there is limited hard data, there is some anecdotal information of poor and unethical ADR practice. However, there are rarely effective avenues for consumer complaints or recourse and, where such avenues exist, there are seldom standards against which such conduct could be assessed.

Standards provide a point of reference for consumers of services, referral agencies and courts, purchasers and funding agencies, accrediting agencies, trainers and educators. They underpin supervision, contracting, complaints and compliance mechanisms. They serve to reduce the incidence of poor practice and enable more effective remedial action where poor practice does occur.

'Standards provide a point of reference for consumers of services, referral agencies and courts, purchasers and funding agencies, accrediting agencies, trainers and educators.'

Why a code?

A central recommendation by NADRAC is a code of practice — why has this approach been taken when NADRAC has always emphasised the importance of ADR diversity? How does such a code relate to other standards or to existing codes?

The requirement for a code of practice is not contradictory to NADRAC's earlier position, but does represent a change in emphasis. NADRAC has not prescribed the wording and content for any code, and is still stressing the need for ADR service providers and associations to develop their own codes to suit their particular contexts. Nevertheless, NADRAC's research and consultation does indicate the need to have a degree of consistency in what consumers can expect from ADR service providers.

A code of practice refers to other standards that a service provider may have in place. For example, a code may describe the competencies of practitioners, supervision processes and the support facilities provided.

A code does not replace overarching standards already in place. While NADRAC has used the phrase 'code of practice', other forms of standards such as benchmarks, service charters or quality criteria may have the same effect. Such standards do not need to be re-named 'codes of practice'. However, they should take account of the elements listed on the previous page.

Who is going to administer compliance with standards?

Compliance is the responsibility of both the service provider and of those engaging, mandating or purchasing ADR services. A service providers' code of practice should describe its quality control system (including practitioner standards) and its compliance and complaints procedures. NADRAC recommends that the Commonwealth and other government and non-government agencies include the requirement for compliance with an appropriate code in any agreement for the provision of ADR services. There is also potential for ADR associations to play a compliance role, especially in relation to sole practitioners.

Why has NADRAC not recommended an accreditation scheme for ADR practitioners?

At present the required infrastructure for a national accreditation scheme does not exist. There is no body or organisation, generally accepted by ADR practitioners and organisations, which could conduct such accreditation and no nationally accepted benchmarks or criteria for accreditation. It may be that a broad based accreditation scheme could be considered in the future as the ADR field evolves further. Instead of an overall accreditation scheme, NADRAC has proposed a set of core principles for accreditation so that, at least in the short term, a greater level of consistency in the processes used for accreditation is achieved.

Did NADRAC consider the benefits of a competency model for ADR standards?

There are a number of advantages and disadvantages of a competency model for ADR standards. While a competency approach would work well with some parts of the ADR field, it has a number of ➢

➢ problems. First, competencies apply to individual practitioners and not to services. The quality of ADR service goes beyond individual practitioner competency to include such considerations as physical facilities, support structures, complaints and compliance mechanisms. Second, the development of competencies requires appropriate industry infrastructure. ADR does not appear to have a natural 'home' in any of the current industry groupings, and ADR cannot readily be described as an 'occupation', 'industry' or 'sector'. Third, competencies apply to the Vocation Education and Training (VET) systems, and are not necessarily used in the higher education sector. By contrast, knowledge, skills and ethics can apply in all education sectors and may be included within any competencies developed in the VET system.

Does NADRAC support a peak body or ADR ombudsman?

The creation of a peak body should take place from within the ADR field, rather than through government action. While a peak body would have the potential to undertake very valuable work with respect to ADR standards, it raises as many questions and problems as it resolves. Issues such as function, representation and funding need continued consideration by ADR organisations and associations.

An ADR Ombudsman is also an attractive concept and may address many of the issues raised in NADRAC's report. There are, however, practical and structural issues associated with the establishment of such a body. ADR service providers ideally should have a second tier complaint system, so that those with a complaint about a service which could not be resolved directly with the provider could approach a second person or body. It may be that an ADR Ombudsman or similar body becomes an increasingly viable option as service providers consider means for introducing these second tier complaint processes.

What response is NADRAC expecting from ADR service providers, practitioners, educators and professional associations?

NADRAC expects that the report will be seen as balanced and realistic. Some may have wanted NADRAC to take a more prescriptive approach, while others may see the framework suggested by NADRAC as already too prescriptive. Similarly, some may have wanted to see additional regulation and others may have wanted no regulation at all. Many of those responding to NADRAC's discussion paper made excellent suggestions for such things as peak bodies and accreditation schemes, and may be disappointed that NADRAC has not made specific recommendations in relation to these. On the other hand, NADRAC's report will be seen as offering realistic and achievable short term actions, while also providing a framework for the long term development of ADR standards.

NADRAC hopes that the report becomes an important reference point for discussion and development of ADR standards in Australia. NADRAC will watch with interest the response to the report, and may revisit the standards issue in the future. ●

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