

10-1-2002

## Fools rush in where angels ...

Rae Kean

Joe Kuypers

---

### Recommended Citation

Kean, Rae and Kuypers, Joe (2002) "Fools rush in where angels ...," *ADR Bulletin*: Vol. 5: No. 5, Article 3.  
Available at: <http://epublications.bond.edu.au/adr/vol5/iss5/3>

This Article is brought to you by [epublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [epublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

## Conversations in ADR

## Fools rush in where angels ...

Rae Kean and Joe Kuypers

**Snatches of conversation between two practising mediators**

*Rae Kean:* The NADRAC forum held in Perth in June this year raised a series of issues that appear to me to have been debated many times and I felt somewhat frustrated by the process. I'm not sure where the debate is heading, or, more particularly, if it is heading anywhere. There appears to me to be a circular debate on many issues, such as the need for:

- clarity in ADR definitions and standards;
- public education about ADR;
- promoting the public use of ADR;
- promoting diversity within ADR practitioners;
- clearly defined qualifications for legal and, particularly, non-legal ADR practitioners; and

- the systematic collection of meaningful qualitative data.

I believe that unless there is clarity regarding ADR definitions, nothing else will follow. Surely it is time for all States to accept the NADRAC definitions of basic ADR practices, with accompanying descriptions of various processes within each particular discipline, for example, facilitative, advisory and determinative models. These have already been identified by NADRAC.

*Joe Kuypers:* There are many overlapping issues involved in this general discussion. I was not at the NADRAC forum and so I am not sure what the driving force behind it was, although I have read the discussion paper on ADR terminology that NADRAC prepared. What impressed me, as a kind of academic exercise, was

the complexity of the definitional discussion: whether to define or describe, whether to define by type of dispute, by mode of delivery or by structure, and so forth. It was also instructive to see that there are many projects under way to help inform the Attorney-General's Department. This all seems well framed and carefully prepared.

However, I too had some disquiet and I would like to raise two questions. What is driving this discussion? And why has the NADRAC work to date not focused on the question of training and education?

In broad stroke it appears that here in Australia we are midway in the apparently inevitable process towards greater professionalisation in the mediation field. Perhaps there is also an inevitable circularity in the issues raised, since they relate to, and fold



back on, each other. Have we defined enough? Should we push on to other practical matters related to professionalisation? Are both happening, but in different places and with different audiences?

On the question you raise about definition, I am quite content with a broad brush set of definitions, and I think NADRAC has provided these. It appears to me that there are very different needs for precision or generality in definitions, so asking anyone to accept a single taxonomy may not work. I would prefer to accept that NADRAC is providing a language for all of us that can be used in very different ways and for different purposes. If legislation requires more specificity or uniformity, NADRAC's work can be extended for that purpose. If training courses need to look at the issues raised by variations in definitions, so too will NADRAC's work be helpful.

My guess, Rae, is that you are ready to move on. You would like to see some organisational development but instead you were engaged, yet again, in a discussion of basic concepts.

*Rae:* I think what is really concerning me is that while it is necessary to come to terms with the implications of definitions or descriptions and all the terminology used, this process should not impede progress in all other areas necessary for the professionalisation and development of ADR practices. I suspect that this debate about terminology will be an evolutionary one that will be sustained for many years. Meanwhile, if we all adopt the most simple and user friendly terms that NADRAC has already identified we could, as a body, move on to organise appropriate training standards and accreditation procedures, among other things.

*Joe:* I'd like to pick up on your mention of training standards. It is curious to me that NADRAC does not have a project on this issue. It seems to me that they have left out one, if not the most important, element in the factors that play towards creating and maintaining high levels of practice — that is, education.

I would propose that NADRAC establish such a project to look at education and training with the ultimate goal of establishing a scheme

to accredit training programs. The concern is for allowing the public to make an informed choice about mediation and assuring that the level of competence of mediators is of a standard where the consumer need not worry about whether the mediator is qualified or not. We don't expect a person with a toothache to evaluate whether the dentist is qualified or whether they are really doing dentistry or what brand of dentistry they are doing. The public accepts that a person who calls themselves a dentist is one, and that false representation on this matter is grounds for action.

*Rae:* I certainly agree with the need, Joe, but NADRAC's role as an advisory body would of course preclude them from organising the training. However, they could certainly assist greatly by raising this issue for debate.

Joe, you just said that the public accepts that if someone called themselves a dentist, and wasn't one, there are grounds for action. Currently anyone can say, 'I am a mediator.' Where would a member of the public go if they had a complaint about the way a mediation was carried out, or about the actions of a mediator? Where would they take action?

*Joe:* This is a serious issue, I agree. How is the public to know that a person who calls themselves a mediator has a recognised level of training? Where do they go if such practice is suspect? The task is to create a mechanism that accredits the training process and then requires that people who call themselves mediators have such training.

Many models come to mind. One option (pardon the mediation jargon) is to accredit training packages and then register those who have completed the training. Social work in Canada has used this model for years. A second model is to accredit the training and award certification or licensing on the basis of some further competence evaluation and/or knowledge testing. Many professions follow this model, such as medicine, law or physiotherapy. A third model is to allow a *laissez faire* approach to training but to require certification only after successful completion of competence and knowledge examinations. This model has been used in architecture in the US for many years.



But who will make the choices in this area, Rae? We can easily think up options, but who has the authority and legitimacy to lead us to decisions?

*Rae:* The whole concept of accreditation certainly brings some problems that must be confronted, but I don't believe these are insurmountable. Thinking only in terms of mediation and training standards for a moment, I have in mind an association, a State mediation association, whose members are mediators engaged in workplace, commercial, community, family law and public service mediation. These members would pay a fee for membership which would provide them with certain benefits. The Association would provide training, evaluation, general and specialist certification; for example, certification to work as a community mediator, family law mediator, commercial mediator or workplace mediator, as the case may be. The evaluation offered by the Association would be based on competency testing.

The Association would also offer members access to research, facilitate appropriate conferences, provide accreditation for agencies providing training and would act as a lobbying voice in all matters of concern to mediators. Other important functions of this Association would be to receive and act on complaints from the public and to be actively engaged in educating the public about the merits of mediation.

If all mediators were subject to accreditation based on criteria determined by this body and could be held responsible for their actions, the field of mediation would immediately gain credibility in the eyes of the general public. I believe this would accommodate some of the concerns you have just raised and, at the same time, could accommodate the need for diversity of practitioners, a goal that we both agree is necessary for the health of the mediation 'profession'.

I believe this model would work well as an isolated State based association and, if established in all States, eventually representatives of each State body would combine effectively as a national association for mediators.

*Joe:* This is a great vision, Rae, and on first examination appears to have a convincing logic. But why hasn't it

happened already? Is it that there are too many disparate interests that they cannot unify under one banner? Is it that all emerging professions must experience a certain disjointed incrementalism as they organise? Are you seeing a vision, Rae, that *will* happen, in one form or another, and we simply need to appreciate how we are located on the unfolding path? Patience in all things?

*Rae:* Joe, while I appreciate what you are saying, and particularly that patience is wise counsel, I believe the mediation 'environment' is developing around us and forcing confrontation in some of these issues. Courts are encouraging mediation both within the court system and outside it, and State and federal laws are adopting mediation clauses as a first step in conflict resolution. These two 'trends' alone will create more interest in mediation and, at the same time, will create norms and standards in each environment. This creates an ideal situation for the promotion of the philosophy of mediation, but if we don't have agreed definitions and descriptions the principle promoted may well be only more confusion. I believe we need simple, user friendly terms.

If someone wants to sell and promote cheese they are doing themselves a disservice if they attempt to promote it as 'a dairy product, fermented in hygienic conditions, produced from healthy animals in accordance with all the relevant health standards'. Similarly, with mediation, if we adopt a simple definition that is user friendly, the public will understand what we are offering. Practitioners, on the other hand, need to have a much greater depth of knowledge to choose and use appropriate forms of mediation dependent on the circumstances. This gets back to your point about certification through training.

I think you are absolutely right and we agree about the need to focus on training, but before we can have any meaningful discussion we all have to be talking about the same things, and to do that we need a common language — that is, agreed definitions that everyone understands. From where I sit we have them in place already with the NADRAC definitions.

*Joe:* OK, let's assume for a minute that 'we' accept the NADRAC

definitions, leaving aside for the moment the question of who the 'we' is. Will this free up some energy to work towards the creation of a national organisation or not? I am dubious about this, Rae. It is not clear to me who will step up to the table to take this on. I am mindful of Alan Campbell's claim that this idea has emerged many times before, but with no real or practical results. It may be that circumstances are more propitious now for such organisational development. Time will tell. To that end, though, I suggest that we need to rely on local talent and energy to make the national organisation happen. Specifically, we need to entice State based groups to take on the issue, but, to avoid a number of variations on a theme, we also need central guidance on what to work towards. Perhaps NADRAC can play a part in this by framing a vision or structure of what an organisation would look like and by proposing plans towards implementation. Further, I would guess that if sufficient funds (proffered by whom?) were available to launch such work, then groups would come forward and make things happen. Vision plus resources equal results? Dreams? Nightmares? What do you think, Rae?

*Rae:* I'm not sure if accepting the NADRAC definitions would create a resurgence of energy, but acceptance could clear the way for the 'next steps' to be taken, whatever those next steps are. Incidentally, although you mention a national organisation, I believe State based organisations would be most effective and would, over time, lead to the establishment of a national body. I agree with you that NADRAC could play an important role by facilitating discussions about the shape and function of State bodies. Funding presents another problem entirely. Joe, you spoke about relying on local talent and energy. How are your lamington making skills? ●

*Rae Kean and Joe Kuypers are both Family Law Mediators who work for Relationships Australia. They can be contacted at [rae@ca.com.au](mailto:rae@ca.com.au) and [mediation@wa.relationships.com.au](mailto:mediation@wa.relationships.com.au) respectively. Further voices in this conversation are welcome — please contact the General Editor.*