



LEADR Response to the Victorian  
Parliament Law Reform  
Committee ADR Discussion Paper  
September 2007

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# 1. Introduction

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## *Preamble*

LEADR is very pleased to respond to the Alternative Dispute Resolution Discussion Paper that is part of the review currently being conducted by the Law Reform Committee of the Parliament of Victoria. We believe that this review is timely because of:

- The level of maturity and diversity in the practice of ADR both within Australia and internationally
- The recent introduction of the Australian National Mediator Standards for mediators and registration of Family Dispute Resolution Practitioners
- Legislative changes, particularly in family law, and
- Community interest and acceptance of ADR.

## *Scope of LEADR's Response*

LEADR's historical expertise is in mediation and conciliation. We have more recent experience in adjudication as a result of being an Authorised Nominating Authority for the building security of payments schemes operating in Queensland, NSW and Victoria. While mediation and conciliation remain central for LEADR, increasingly LEADR's members are applying their dispute resolution skills in restorative justice, complaints management, community engagement, dispute resolution systems design, conflict resolution training and conflict coaching.

Our responses will reflect primarily our historical expertise and where appropriate our emerging understandings in other areas of dispute resolution. Our comments will also reflect our knowledge of trends and issues in ADR across Australia (and indeed beyond) rather than with the particular provisions within Victoria.

The structure of LEADR's response mirrors that of the chapter structure of the Discussion Paper. LEADR has responded to the major themes identified in each chapter and how the issues raised impact on the role of ADR in:

- improving access to justice
- improving outcomes in civil and criminal court jurisdictions, and
- reducing contact with the court system, particularly for marginalised communities.

## 2. About LEADR

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### *Background*

LEADR is a not-for-profit membership organisation that promotes and facilitates the development and use of alternative dispute resolution. LEADR currently has 1600 members spread across all states and territories of Australia, across New Zealand and in many countries in the Asia-Pacific region, including Indonesia, Malaysia, India, Tonga, Samoa and Micronesia. Most of our members are engaged primarily in mediation. Increasingly they are also engaged in other ADR processes such as adjudication, arbitration, facilitation, conciliation and conflict coaching. Members are drawn from an increasingly wide range of professional backgrounds including law, psychology, human resources, social work, education, finance, accounting, management/business, architecture and engineering.

On a day to day basis LEADR focuses primarily on:

- Delivering training both as public workshops and in house programs in mediation and associated dispute resolution topics
- Accrediting mediators under the LEADR Scheme for Accreditation and now to the new Australian National Mediator Standards
- Providing services to LEADR members such as a regular newsletter, continuing professional development opportunities and professional networking
- Responding to client requests with referrals of suitably qualified dispute resolution practitioners
- Responding to inquiries from across the community about ADR
- Promoting the practice of ADR in a wide range of settings and applications including for government, business, industry and individuals in commercial, industrial, workplace, community and family matters.

### *Contact details*

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### **3. The current reach and use of ADR schemes in Victoria (Chapter 3)**

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#### ***Use of the term ADR***

The Discussion Paper notes the problematic nature of the term ADR. LEADR believes that ‘alternative’ is “inaccurate and focuses on the primacy of litigation” (Discussion Paper page 6). LEADR now describes itself as an Association of Dispute Resolvers. LEADR favours descriptions of dispute resolution which are more indicative of the type of process being used such as facilitative, consensual, determinative, curial or non curial. Nonetheless LEADR finds itself needing to use the acronym ADR at times because it is relatively well known. In this Response, LEADR has used ADR as it has been used in the Discussion Paper.

#### ***ADR provision in Victoria***

The listing in the Discussion Paper lists the major ADR Suppliers in Victoria. As the paper notes “the current civil ADR landscape is diverse and complex”. As is to be expected, there are more providers than listed, both public and private. An incomplete inventory is likely to continue in underestimating ADR services. As well, the listing under private supply provides broad groupings rather than detailed identification. This could lead to an interpretation that private provision is less significant than it actually is. Finally, the public/private distinction masks the frequent practice of statutory schemes relying on services delivered by private providers.

#### ***Data collection***

LEADR believes that there is an urgent need for more extensive data collection across the full spectrum of ADR processes and referral methods including from courts and tribunals, from legal representatives, by government agencies and local councils that provide dispute resolution services, and from and within workplaces, community agencies and by participants themselves. Some of these latter, more informal referrals may be extraordinarily important in providing people with access to locally based justice and preventing escalation to more formal dispute resolution services.

LEADR believes that we need detailed information on:

- Numbers and types of matters that are referred to ADR
- Stages at which matters go to ADR
- Why people choose ADR and why they do not
- Outcomes from ADR – both at the conclusion of a matter and at a distance.  
For example:

- To what extent have agreements been implemented and been adhered to?
- What impact has there been on the relationships between participants?
- How satisfied are participants with the process?
- What likelihood would there be that participants would use a similar or different ADR process in the future?

It would be most informative for the largely quantitative data to be collected nationally on an ongoing basis coordinated by government with appropriate consultation with and ongoing input and assistance from ADR providers. The qualitative data provided might be more appropriately the focus of specially commissioned research conducted by a university or similar body with either public or private funding.

## 4. ADR and access to justice (Chapter 4)

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### *Diversity of providers*

LEADR believes that, in general, the diversity of providers has a positive effect on providing access to ADR. An approach that promotes diversity enables specialised services to develop, encourages the emergence of tailored processes and contributes to increasing access to ADR services.

LEADR recognises that issues related to diversity include diversity in the way that ADR processes are described (which can lead to consumer confusion) and in quality control of ADR practice. LEADR believes that these two issues can be addressed through appropriate regulation (see 7. Regulation of ADR).

### *Complaints mechanisms*

LEADR endorses the requirement of the Australian National Mediator Standards that service providers must be able to provide access through their membership association to a complaints handling system that “meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute” (Australian National Mediator Standards, *Approval Standards*, page 6). LEADR would welcome this as a requirement for all ADR providers.

LEADR believes that effective complaints handling can competently deal with many complaints; LEADR is also conscious that confidentiality agreements may inhibit participants from making certain types of complaints and may constrain resolution. This is an issue which LEADR anticipates will be a significant focus for discussion within the National Mediator Standards Implementation Committee.

### *Time and cost factors*

LEADR is persuaded that overall ADR increases access to justice by reducing the cost and time required to resolve disputes. LEADR nonetheless is concerned that where time limits are prescribed and strictly enforced (usually because of funding and case management constraints) the quality of outcomes for participants may be compromised.

LEADR is comfortable with a user pays approach, provided there is a generous safety net for those who cannot afford to pay. This safety net needs to include support to access both the ADR service itself and the legal and other professional advice participants need in order to participate fully in the process.

LEADR believes that the time taken to resolve civil disputes using ADR processes could be further reduced by earlier referral of matters to ADR.

## Consumer Awareness

As a result of both inquiries from consumers and more significantly from members' comments, LEADR believes that there is considerable scope for increasing awareness of ADR and what it offers, particularly as an alternative to litigation.

The Discussion Paper raises the question of whether Victorians could be helped to resolve disputes themselves. LEADR believes that significant strides have already been made in enabling people to resolve their own disputes. For example:

- Many government agencies and commercial organisations such as banks, insurance, large retail and telecommunications companies have established complaints handling mechanisms and spent considerable resources in training staff to resolve complaints.
- Government agencies responsible for compliance frequently require their officers to achieve this compliance through education and negotiation, not just through the imposition of penalties.
- Workplace, school and personal development education in how to resolve interpersonal conflict has become well established during the past twenty years.
- In schools the SCRAM (Schools Conflict Resolution and Mediation) competition means that students are being educated in the process and skills of mediation and schools are increasingly exploring restorative justice principles and processes for dealing with disciplinary issues.

These practices should be encouraged. As well as enabling individuals to resolve many of their own disputes, they also prepare them to participate more constructively in ADR processes when these are required.

The Discussion Paper raises the concept of a central gateway. LEADR believes that this would be most appropriately provided as a government service. Important features of such a gateway could include that it provide:

- user friendly information about the benefits of ADR and a high level overview of different types of process
- Links to ADR services (because it will be difficult to keep this up to date, this should be complemented by suggestions on other sources of information about ADR services).

## Referral

LEADR believes that currently many suitable cases are not referred to mediation. As has already been mentioned, this is because both consumers and professionals do not have an adequate understanding of ADR.

LEADR believes that the primary target for change currently should be legal advisors. This presents significant challenges as legal advisors have to balance both the provision of appropriate legal services with business imperatives, including delivering shareholder value. For some law firms this becomes an issue of service mix which can include appropriate ADR referral. For others, ADR referral may be perceived as a less profitable legal service or indeed as unwanted competition.

To increase referrals from legal advisors, LEADR believes that:

- There should be a pre-filing statutory obligation to use ADR in a much wider range of civil disputes. LEADR believes that there would need to be very few exclusions of types of civil disputes. The design of the ADR process would take account of the circumstances of specific disputes.
- There should be sanctions applied for non- participation in mandatory ADR. These sanctions could include increased costs and time delays.
- university law courses should include compulsory core units in ADR.
- continuing professional development in ADR should contribute to legal advisors' ongoing learning.

LEADR believes that in general court referrals should be made to external providers. An important feature of ADR processes is the real and perceived impartiality of ADR practitioners. On the whole, the literature supports the view that external providers are perceived to be impartial. As well external providers may actually be more impartial because they can focus on process entirely not needing to demonstrate the content expertise and judgement that the community requires of the judiciary.

The Discussion Paper asks whether increased referral to ADR could result in reduced access to the Courts for some groups in the community. LEADR believes that this can be avoided through appropriate legislation particularly if exemptions are clearly defined.

### ***Suitability of matters for ADR***

The Discussion Paper raises concerns about the suitability of matters for ADR referral. LEADR believes that it is the responsibility of skilled ADR practitioners to make these assessments and to design processes that suit the particular circumstances. Appropriate process design and implementation allows ADR practitioners to respond to the particular needs of participants and to distress, anxiety, power imbalance and diversity issues.

### ***Online ADR***

LEADR believes that there will be greater potential for online ADR in the future when consumers and professionals are more familiar with ADR processes generally. Except for simple transactional disputes, it is likely that there will be specific on-line components of broader ADR processes. While it can be anticipated that templates for this will emerge, skillful ADR process design will determine the most appropriate components and the extent of on-line interaction.

## 5. Measuring the outcomes of ADR (Chapter 5)

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### *Measuring outcomes*

LEADR believes that measuring outcomes from civil ADR is essential.

LEADR also believes that because ADR is and should be seen to be an intrinsic component of the justice system, the accountability for measurement and reporting rests with government. Of course, ADR providers both public and private will need to provide data.

Aspects of ADR that need to be measured include:

- Access to and use of ADR by participants from different:
  - Socio economic backgrounds
  - Genders
  - Ethnic, cultural and religious backgrounds
  - Marginalised groups
  - Locations – city, suburban, regional and remote
- Numbers and quality of agreements reached
- Durability of agreements
- Numbers and types of matters where agreement is not reached that proceed to court
- The extent to which disputes are resolved
- The extent to which participants learn new skills through participating in an ADR process
- Levels of satisfaction by all participants with different ADR processes
- Costs of ADR including breakdown by process or combination of processes
- Time spent in ADR, again both generally and by process
- Impact on the courts.

Collecting and analysing this data requires specific research expertise.

### *Benefits*

Comparing data collected about the practice of ADR with similar data from disputes dealt with through litigation and the courts would, we presume, further substantiate current claims about the benefits of ADR which include:

- Cost and time savings for both disputing parties and the broader community which increases accessibility to justice
- Ownership by participants of process and outcomes

- Increased feelings of ease and comfort in resolving the dispute (formal legal proceedings are frequently confusing and intimidating for participants)
- The potential, frequently realised, for:
  - resolution not just settlement
  - participants to learn new skills that can be generalised to future disputes
  - satisfaction and a sense of achievement by participants
- More timely access to courts when needed
- Greater cost effectiveness of the justice system as a whole.

## 6. **ADR and marginalised communities (Chapter 6)**

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### ***Access to ADR***

LEADR believes that marginalised groups need the range of support and services to access ADR that are usually required for them to access a range of other legal, health, educational and community services.

These include:

- Culturally adapted and sensitive service and process design
- Interpreters
- Support people
- ADR practitioners with appropriate training
- ADR practitioners appropriately trained drawn from the marginalised communities.

### ***Advantages and disadvantages of ADR for marginalised groups***

The importance of the benefits listed in the previous section is likely to be even more significant for marginalised groups. Often marginalised groups face educational and financial disadvantage, so the lower costs and more informal features of ADR processes are particularly attractive.

Where the effects of marginalisation have resulted in people having:

- a lack of skill and/or confidence in their own decision making, ADR processes, when appropriately designed and implemented, can guide people through a decision making process and assist them to feel more empowered;
- inadequate access to appropriate professional advice, there needs to be provision for them to access such advice through specially provided services or funding subsidies;
- a belief that court is the only “proper” way of resolving disputes, they need to be provided with the information that shows how ADR is not second class dispute resolution, but that it is used in a broad variety of disputes; that it is often a much more satisfying process that facilitates them to make agreements that truly reflect their interests; and that by participating in mediation they are not excluded from court, if that is found to be the more appropriate way to resolve their particular dispute.

### ***Particular barriers to ADR for marginalised groups***

Earlier in this Response we indicated that there is considerable scope for increased community awareness. This is particularly true for marginalised groups. The challenges of providing information in accessible ways for such groups are well known and the expertise of community educators and marketing experts should be drawn upon to respond to these challenges. Though there are marginalised groups from particular cultural backgrounds where ADR quite strongly echoes traditional dispute resolution processes. This has become evident in our work with Indigenous Australians and more recently in the Pacific.

It is likely that a communication strategy for reaching marginalised communities will include:

- Information provided in a variety of media and in a range of languages
- Engaging the assistance of leaders and networks within these groups
- Using services to disseminate information with which members of these groups are already in contact. (This requires an increasingly coordinated approach between legal, health, education and community services across all tiers of government and the not-for-profit sector.)

Lack of financial resources may not apply to all marginalised groups. For those for whom it does, we have earlier in this Response noted the need for a generous financial safety net.

## 7. Regulation of ADR (Chapter 7)

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### *Definitions of ADR processes*

Standard definitions of major ADR processes are helpful. LEADR, in general finds the NADRAC definitions appropriate.

LEADR also notes that standard definitions are unlikely ever to be comprehensive because new, hybrid and combination processes will continue to emerge. As well, ADR is a flexible process that can and should be adapted to particular needs, issues and circumstances.

Therefore published definitions should always note the flexibility of the process and the responsibility for consumers to seek, and ADR practitioners to provide information about the particular ADR process that is being used.

### *Confidentiality*

Confidentiality is a complex issue. LEADR believes that confidentiality needs to be applied differently in different circumstances. Always it is the responsibility of the ADR practitioner to assist parties to establish and clarify appropriate confidentiality agreements within any relevant legislative, organisational or structural requirements.

As already noted, complaints management is also made more problematic by the constraints of confidentiality.

### *Regulation and standards for ADR practitioners*

LEADR has championed the introduction of national standards for mediators. LEADR has participated actively in the discussion and formulation of the current Standards, with LEADR's previous CEO having chaired the first implementation committee from mid 2006-07. With the implementation of the Standards from the beginning of 2008, LEADR has been keen to set up procedures to accredit members and other non-member mediators to the Standards as soon as possible. At the time of writing we have approximately 50 mediators nationally accredited.

Under the National Mediator Standards, practitioners are accredited. In this way, practitioners rather than the process are regulated. The Standard gives a broad definition of what is meant by mediation, both facilitative and advisory, and then requires that practitioners communicate the details of the process to participants. This supports practitioners designing and adapting the process to particular circumstances.

LEADR believes that it is appropriate to accredit practitioners of other ADR processes, although we are cautious about a proliferation of accreditation standards. Not-for-profit organisations, such as IAMA, have been grading and certifying

arbitrators for many years. Mediation and arbitration, both forms of ADR, require distinctive skills sets, so separate accreditation protocols seem appropriate.

But would separate standards be appropriate for conciliation and adjudication, for example?

LEADR does not yet have a clear stance on this issue but is aware of issues associated with accreditation such as:

- cost for practitioners of training and accreditation in a range of processes
- costs of developing and then administering accreditation schemes
- the risk of inhibiting flexible process design and emerging processes
- the risk that a process may cease to be used or evolve in such a way that it is no longer recognisable as the process the individual was trained and accredited in
- duplication of skills assessment for different processes when the skill sets required may be very similar.

On the other side is the professional and consumer requirement to be sure that particular practitioners are skilled in the processes that they are conducting.

LEADR believes that this issue needs further consideration.

LEADR believes that ADR practitioners generally should have a tertiary education. The particular requirements for tertiary education need to be considered in relation to the requirements of a particular process (eg determinative processes may require specialised content expertise; facilitative processes, in contrast, generally do not rely on specific content expertise, but a tertiary education nonetheless provides a discipline for thinking, analysis and problem solving). LEADR also recognises that there is significant value in, for example, having mediators with varied demographic profiles, particularly including those from marginalised groups. In these cases, it may be appropriate to waive then requirement for tertiary training.

Where a standard for accreditation is established LEADR believes that it should include the following elements (all in the current National Mediator Standards):

- threshold training of prescribed length, covering core topics with an appropriate balance of theoretical and practical/experiential components
- competency assessment
- ethical framework
- requirement for professional indemnity insurance
- good character reference
- continuing re-accreditation requirements that include both practice and professional development (with sufficient alternatives to allow for semi retired, part time or full time practitioners, practitioners who are also engaged in other ADR work such as academic research and teaching, etc)

LEADR believes that oversight of accreditation should be by accrediting bodies that meet particular criteria. The National Mediator Standards denotes these as Recognised Mediator Accreditation Bodies (RMABs). LEADR favours restricting the number of such bodies by imposing stringent criteria. (LEADR believes that there is a risk under the National Mediator Standard of there being so many RMABs that it could prove difficult to maintain consistency in the application of the Standard.)

LEADR would prefer standards to be national and also considers that accreditation should not be organisationally specific. Both these features give practitioners flexibility, enable organisations to meet the needs of consumers more effectively and help control the costs associated with accreditation.

### **Regulatory body**

Whether there needs to be an over arching regulatory body is a question with which the Implementation Committee of the National Mediator Standards will have to grapple. LEADR believes that it is likely that the Implementation Committee will support the formation of such a body. LEADR at this stage favours an industry council as we believe that this would best use the wealth of expertise of existing ADR bodies and reflect the diversity of approaches and ADR contexts.

### **Complaints management**

As has already been noted, under the National Standard, ADR practitioners must belong to an organisation that has a complaints handling system that “meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute” (Australian National Mediator Standards, *Approval Standards*, page 6).

Apart from the issues relating to confidentiality already noted, LEADR believes that many issues can be effectively and quickly resolved by appropriate and timely responses when complaints are made. LEADR is also conscious that there may be occasions when a complainant exhausts the avenues of an organisations’ complaint handling system or when the nature of a complaint is extremely serious particularly in the area of professional misconduct, so they seek intervention from an independent body. Again this is likely to be an issue that the National Mediator Standard Implementation Committee will consider. Initial informal discussion with other ADR bodies has raised the notion of an Ombudsman. Questions include whether this would be the most desirable structure, whether a dedicated ombudsman would be required or whether dealing with complaints against ADR practitioners could be dealt with by an ombudsman with a larger ambit.

LEADR believes that the credibility and the accountability of the ADR profession requires that an appropriate mechanism for handling complaints of a serious nature, particularly of misconduct, needs to be established not just for the National Mediator Standards, but also for ADR in general.