



LEADR Response to the NADRAC
*Issues Paper on
Alternative Dispute Resolution in
the Civil Justice System*
May 2009

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Introduction

Preamble

LEADR is very pleased to respond to the NADRAC *Issues Paper: Alternative Dispute Resolution in the Civil Justice System*. NADRAC's paper was prepared in response to the Civil Proceedings Reference issued by the Federal Attorney-General. The Attorney General requested that NADRAC identify incentives that would encourage greater use of Alternative Dispute Resolution (ADR) in Federal civil proceedings, and suggest ways of removing the practical and cultural barriers that currently or might inhibit such usage.

To respond to the Reference requires consideration of how ADR services could further enhance the court and tribunal processes; necessary changes to civil procedure and costs structures, such as a possible increase in mandatory ADR; and the further use of private and community-based ADR services, in a way which maintains the quality of those services.

Scope of response by LEADR

Historically, the expertise of LEADR is in mediation and conciliation, and includes the training of practitioners and provision by members of these services. LEADR is also an Authorised Nominating Authority for the Building Security of Payments Schemes operating in Queensland, NSW and Victoria. LEADR members increasingly apply their dispute resolution skills in restorative justice, collaborative practice, complaints management, community engagement, dispute resolution system design, conflict resolution training and conflict coaching.

The LEADR response to this inquiry will focus on those ADR processes most frequently associated with the civil justice system and will reflect primarily our historical expertise and where appropriate, emerging understandings in other relevant areas of dispute resolution.

The structure of LEADR's response mirrors that of the chapter structure of the *Issues Paper*. LEADR has responded to the major themes identified in each chapter and in particular on the role of ADR in:

- improving access to justice in the civil courts and tribunals
- improving the efficiency of the civil justice system
- enhancing or supplementing the role of the civil courts and tribunals, both before the commencement of litigation and throughout the litigation process

About LEADR

LEADR is a not-for-profit membership organisation that:

- promotes and facilitates the development and use of alternative dispute resolution
- provides member benefits in a vibrant ADR environment to
- promotes and supports best practice in ADR

LEADR currently has about 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. LEADR members are engaged primarily in mediation. Increasingly, however, they also practise 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:

- delivers training both as public workshops and in-house programs in mediation and associated dispute resolution topics
- accredits mediators under the LEADR Scheme for Accreditation and now to the new Australian National Mediator Standards
- provides services to LEADR members such as a regular newsletter, continuing professional development opportunities and professional networking
- responds to client requests with referrals of suitably qualified dispute resolution practitioners
- responds to inquiries from across the community about ADR
- promotes 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

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1. Summary points

The following are the major points that LEADR makes in this response to the *Issues Paper*

About ADR

- The word “alternative”, in alternative dispute resolution, should be removed or replaced
- Both practitioners and consumers benefit from ADR definitions as these contribute to transparency, creating realistic expectations and delivering satisfaction
- Standard, rather than statutory definitions, allow for more timely revision and addition to definitions
- NADRAC should continue to take a leadership role in defining ADR processes
- A body or number of bodies such as that envisaged in the Mediator Standards Body (MSB) under the NMAS need to be established as a practical way of supporting and encouraging practitioners to offer and label processes that align with accepted definitions
- Practitioners should be encouraged to provide detailed information about the processes they offer, so that participants understand, can agree to and are prepared for the particulars and variations of the ADR process in which they are engaging (eg interests based, narrative or transformative mediation etc)

Promoting Public Awareness of ADR

- Government should provide a web portal, information or referral hotline, and/or other initiatives to disseminate information to the end users of ADR processes
- Education and marketing is most appropriately developed and delivered in response to culturally appropriate needs at the time of need
- Targeted campaigns should be developed by those with specific expertise in this area including community educators and marketing professionals
- Information about ADR should be provided by all courts and tribunals, both on location, electronically and in any mail outs
- Consideration should be given to creating the position of ‘duty mediator’ at all courts and tribunals
- Professionals, such as lawyers, psychologists, social workers and others, who deal with people in conflict or those with a dispute, need information on the range and application of ADR processes and training in how to screen for suitability for ADR referral

Provision of ADR Services

- Referral to ADR should occur as early as possible during a dispute and preferably before it reaches court. If a matter does reach a court or tribunal, mechanisms should be established to refer to ADR whenever it becomes evident that such referral would be appropriate and helpful in resolving the dispute
- In general, courts should make referrals to external ADR providers to ensure real and perceived impartiality
- Judges should be retained in their primary role in making determinations
- Judicial expertise is very different and not necessarily compatible with ADR expertise
- Good faith participation may be inhibited by judicial involvement in ADR
- Consumers expectations about the role of a judge may lead to confusion about the nature and conduct of ADR processes
- Increased rates of settlement are only one an indicator of the value of ADR processes and do not provide sufficient reason for judicial ADR
- Private sessions are of particular concern in judicial ADR as they mitigate against transparency and consumer confidence in the process
- Judicial ADR is not a cost effective use of resources
- In general, courts and tribunals should make ADR referrals to external providers to ensure real and perceived impartiality
- Whatever the involvement of Registrars and court officers in the provision of ADR, LEADR regards ongoing provision of and participation in clinical consultation (often known as ‘supervision’) which includes mentoring, training, defusing, debriefing and maintenance of standards, as essential
- Creative ways to make ADR more affordable such as suitable insurance arrangements, subsidy or tax deduction should be explored
- Diversity of ADR providers should be encouraged as it supports the provision of ADR services at primary, secondary and tertiary levels. As well, it enables specialised services to develop, encourages the emergence of tailored processes and contributes to increasing access to ADR services
- The development of ADR practitioner accreditation systems should be encouraged as these require ADR practitioners to maintain and develop their skills in order to retain accreditation

Referral and Assessment

To increase referrals from legal advisers, there should be a range of strategies introduced including:

- Training legal advisers in how to screen for suitability for ADR
- Pre-filing statutory obligations
- Sanctions for non participation in mandatory ADR
- Inclusion of ADR units in university law and social science courses and as part of ongoing professional development

ADR and litigation

See earlier chapters

- The range of incentives and compliance mechanisms suggested in the *Issues Paper* (p 32) to encourage legal advisers to make greater use of ADR should be explored, in consultation with the legal profession
- The financial and expedited process incentives identified of the *Issues Paper* (p 31 and 32) should be further explored and thoroughly evaluated for their likely effectiveness in increasing the use of ADR
- That consideration be given to making inclusion of an ADR clause a requirement for all contracts
- Mandatory requirements to participate in ADR should be directed to the early stages of disputes
- Mandatory assessment of suitability for ADR may encourage participants to attempt ADR, who had at first been unwilling to do so
- The suggestions listed in the *Issues Paper* (p 35) that place requirements on litigants to consider ADR and/or to make attendance at ADR a pre-requisite to commencing legal action should be further explored
- There is sufficient maturity and depth in ADR and in mediation in particular, especially since the implementation of the NMAS, to support mandatory ADR
- Only those forms of ADR described by NADRAC, which are supported by standards, should be included in mandatory provisions
- Specific requirements associated with mandatory ADR in civil matters that ADR practitioners need to meet, should have realistic timeframes and include recognition of existing competency and experience

Use of ADR in government disputes

- Decision makers within government should be given more information about the different types of ADR processes, their application to a range of disputes and the likely benefits
- Consideration should be given to the creation of the role of an independent dispute resolution manager to encourage the early use of ADR and adherence to the Legal Services Directions by commonwealth agencies
- Government agencies through the Legal Services Direction should be encouraged to use legal services providers who have experience in ADR and to appoint ADR practitioners who have recognised accreditation and/or training

Use of ADR techniques to improve court/tribunal procedures

- ADR techniques should be used in courts and tribunals to foster a more informal and less adversarial approach, in methods such as the less adversarial trial and round table case management conferences

- Clinical experts should be employed in federal courts and tribunals to fulfil a role similar to that of family consultants
- Case appraisal is a useful technique that can best be offered by service providers outside courts. If a judge completes an initial case appraisal, a different judge should be appointed to hear the case

Data, evaluation and research

- There is an urgent need for more extensive data collection across the full spectrum of ADR processes and referral methods
- It would be best for quantitative data to be collected nationally, on an ongoing basis coordinated by government, with appropriate consultation with stakeholders, and ongoing input and assistance from ADR providers. The next NADRAC Research Forum could contribute significantly to this area by making it a focus of the Forum to identify the data required and develop workable strategies for improving data collection and research
- It is important to evaluate ADR services to support and encourage ongoing quality improvement
- To support providers in undertaking evaluation, data collection tools should be developed, standardised and made available to these providers
- It is also important to evaluate the claims made about the value of ADR by comparing data from the practice of ADR with similar data from disputes dealt with through litigation and the courts
- Urgent consideration should be given to strategies to support and encourage ADR research and researchers

2. About ADR

Use of the term ADR

Throughout the *Issues Paper*, the term ADR is used. LEADR believes that ‘alternative’ is inaccurate and implies the primacy of litigation. 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 *Issues Paper*.

Summary point

- That the word “alternative”, in alternative dispute resolution, should be removed or replaced

Consistency in definitions of ADR

LEADR believes that definitions of major ADR processes are helpful to both consumers and professionals. LEADR favours standard definitions rather than statutory, as this provides capacity to revise and add to definitions in an authoritative, responsive and timely way.

New, hybrid and combination processes will continue to emerge. Those defined prematurely may inappropriately validate a fly by night process, while those defined belatedly, may become so amorphous that it becomes difficult to define them adequately.

LEADR supports the comment made in the *Issues Paper* at 2.24 “that without consistency, there is likely to be “unrealistic consumer expectation and dissatisfaction, inappropriate referrals, a lack of comparative research and evaluation and poor policy development”.

Definitions need to capture core process elements and yet be sufficiently broad to cover a range of models and to allow flexibility to adapt to particular needs, issues and circumstances. In keeping with the principle of self-determination, LEADR recommends that preambles to ADR definitions include the responsibility for consumers to seek, and ADR practitioners to provide, information about the particular ADR service being provided.

LEADR in general, finds the NADRAC definitions appropriate and valuable for enabling communication regarding ADR. LEADR believes, however, that the definition of mediation could be strengthened by including a reference to the opportunity for parties to be heard by the other and for exploration of issues.

LEADR is keen for NADRAC to continue to take a leadership role as the need for new and revised definitions arises.

Summary points

- Both practitioners and consumers benefit from ADR definitions as these contribute to transparency, creating realistic expectations and delivering satisfaction
- Standard, rather than statutory definitions, allow for more timely revision and addition to definitions
- NADRAC should continue to take a leadership role in defining ADR processes

Adherence to definitions

LEADR values and adheres to the NADRAC definitions of standard ADR processes. We also note that these definitions are available on a public website. In addition, together with numerous texts which define a range of ADR processes most organisations that provide training in ADR also provide definitions.

Despite the range of definitions from authoritative sources, there appear to be processes offered which either do not adhere to any of these definitions, or are labeled incorrectly.

For example, there are many anecdotes of private practitioners offering a service identified as “mediation” without qualifying that they are going to provide a “blended” process (which the NMAS identifies as one which includes providing advice) or a shuttle style settlement process. As well, as the *Issues Paper* indicates, various courts and tribunals have developed their own descriptions of processes used, many of which do not conform to the definitions identified above. The term “mediation”, for example, is used in various quasi-adversarial settings, when few of the principles (eg self-determination) or stages of a mediation process (eg exploration of issues) or mediation style interventions (eg open questions) are evident.

For consumers, this may mean that each time they participate in what they believe will be the process they have participated in previously, they may experience something quite different. As has already been noted, this can lead to unmet expectations and dissatisfaction, may inhibit consumers being able to transfer their learning from one occasion to the next and possibly increases the incidence of complaints.

So once standard definitions are established, it is important to encourage practitioners to label the processes they are offering in accordance with these definitions. To do this, there will need to be a body or bodies with coordinating responsibilities such as that envisaged in the Mediator Standards Body (MSB) under the NMAS. In order to consolidate and extend the work of the Federal government, through NADRAC, it will be essential that the MSB is provided with seed funding to maximise its success in developing this nascent profession. This may then become an example to be emulated within other areas of ADR.

Summary point

- A body or number of bodies such as that envisaged in the Mediator Standards Body (MSB) under the NMAS is a practical way of supporting and encouraging practitioners to offer and label processes that align with accepted definitions

Clarifying the process to be provided

Even with standard definitions and their wide acceptance, there will continue to be diversity in the processes ADR practitioners provide. For example, within facilitative mediation, there will be those who use or draw on narrative or transformative interventions, or use a “blended process” as described above.

Consumers generally rely on their legal advisors, psychologists or other professional supports for information about the processes available. Once consumers have been referred to an ADR practitioner, particularly if the practitioner has high standing and/or reputation, they may assume that what the practitioner provides is in accordance with accepted understandings and professional practice.

This possibility provides further support for practitioners being encouraged to label the process they offer in line with standard definitions. As well, practitioners can further manage parties' expectations regarding the process, by providing clear explanations of what is likely to happen and the type of variations that could occur in the process. As long as this is provided with care, practitioners can retain the flexibility required to incorporate suitable variations to meet the needs of participants and/or the nature of the case.

Many practitioners rely on an "ADR Agreement" as the basis of the service that they provide to consumers. Frequently such agreements provide a broad description of the process to be provided. Practitioners should be encouraged to provide more explanation in these agreements or to attach a more comprehensive description of the process in a separate document.

In addition to NADRAC continuing to develop standard definitions, additional resources listing a range of more detailed process descriptors could be useful. Such resources could be targeted and published to meet the needs of different groups. Appropriately prepared ADR practitioners could select from lists of detailed process descriptors to provide more information about the service they are offering and ADR consumers could be more informed about the questions that they ask.

Summary point

- Practitioners should be encouraged to provide detailed information about the processes they offer, so that participants understand, can agree to and are prepared for the particular style or variation of the ADR process in which they are engaging (eg interests based, narrative or transformative mediation etc)

3. Promoting Public Awareness of ADR

Improving understanding of ADR in the general community

LEADR believes that significant strides have already been made in improving understanding within the broad community about collaborative and interest based approaches to resolving 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 recognised ADR processes when these are required.

With regard to specific ADR processes, consumers often only become interested in these once they have a dispute and/or are facing imminent court proceedings. Before that, many consumers may have little interest in ADR and therefore may not be very responsive to a public awareness campaign. This suggests that timely provision of relevant information about ADR is required, preferably at the time when a consumer is first confronted with the need to resolve a dispute.

Anecdotally, LEADR hears that many of its members receive word of mouth referrals suggesting that consumers seek recommendations from their professional and friendship networks. While this is helpful, it does not necessarily encourage consumers to consider ADR processes beyond those known and used by associates.

Many ADR providers offer accurate, comprehensive information about ADR and promote their services through both electronic and print media. However a novice user of ADR may not receive the full benefit of using these resources because of limitations of internet searches or the difficulty of selecting from the range of ADR providers on offer.

LEADR believes that in addition to these resources, it would be helpful for there to be a web portal where consumers can obtain:

- information about their choices for resolving and/or settling a dispute
- explanations about how ADR fits into the overall civil justice system
- a self- assessment tool for guiding them to the ADR process that best suits their needs
- information about their options for finding ADR practitioners suitable for resolving their particular disputes
- links to Recognised Mediation Accreditation Bodies (RMABs) and other ADR referral services

Information such as this is already available to some extent, on the NADRAC and other websites, including LEADR's. The audience for each of these websites however, is largely practitioners and referrers. Complementing these resources by targeting consumers and featuring very user friendly navigation and content, in a way similar to *Family Relationships Online*, would remove one of the significant barriers to the use of ADR in civil proceedings.

In addition the *Issues Paper* identifies the possibility of a well promoted information and referral hotline. This could sit in parallel to a web portal and may be an appropriately adapted legal version, of the recently launched health information telephone service, "*healthdirectAustralia*", the joint initiative of the Federal and State governments.

LEADR believes that these facilities are most appropriately provided by government either federally or as a joint initiative by federal and state governments, with assistance from the Mediator Standards Body and other professional ADR organisations.

Summary points

- Government should provide a web portal, information or referral hotline, and/or other initiatives to disseminate information to the end users of ADR processes
- Support should be given to programs such as SCRAM, which has shown its ability to influence dispute resolution within families

Tailored campaigns for consumers

As highlighted above, LEADR believes that campaigns to raise public awareness of ADR will be most effective when they are of high relevance to those towards whom such campaigns are targeted. One way in which this can be done is to target specific categories of dispute to capture the interest of potential litigants. This has been done effectively in relation to building security of payments in several states.

In addition, LEADR believes that carefully targeted campaigns are relevant for:

- people who are most likely to be considering litigation in the immediate future; and
- marginalised groups including those:

- suffering disadvantage from economic, educational, general health or mental health circumstances,
- from Aboriginal and Torres Strait Islands communities and
- from other cultural, language and ethnic groups who may not be able to gain access to general information

The challenges of providing information in accessible ways for marginalised groups are well known and the expertise of community educators and marketing experts should be drawn upon to respond to these challenges.

Summary point

- Education and marketing is most appropriately developed and delivered in response to culturally appropriate needs at the time of need
- Targeted campaigns should be developed by those with specific expertise in this area including community educators and marketing professionals

ADR information at courts and tribunals

As many litigants are increasingly appearing in person in civil matters, handouts, pamphlets and DVDs directing them to appropriate ADR services could be available in the Court precincts or Registry, and on their websites.

A duty mediator, based on the model of a duty lawyer, would be a significant asset in courts. The role of the duty mediator would include assisting potential parties to shift from an adversarial mindset to a mediation mindset, undertaking a preliminary assessment of suitability for mediation, making referrals, arranging support.

Summary points

- Information about ADR should be provided by all courts and tribunals, both on location, electronically and in any mail outs
- Consideration should be given to creating the position of ‘duty mediator’ at all courts and tribunals

Raising professional awareness of ADR

Lawyers are among the professionals who first deal with potential litigants; psychologists, social workers and others are among the professionals who first deal with people in conflict. Lawyers in particular are likely to be familiar with a range of ADR options; other professional groups, who might be part of a referral network, may also have a threshold awareness of processes such as mediation.

Many of these professionals are very thorough in assisting their clients to consider a range of dispute resolution options. Others would benefit from information on the range of ADR processes available and a broader understanding of the value and application of ADR to a wide range of civil disputes particularly in the early stages of the dispute. In particular, judges, court staff and lawyers could be supported by

better information about and training in screening matters for referral, for supporting clients in ADR and finalising deeds and orders that result from ADR. Similarly other professionals would benefit from training in how to screen for suitability for ADR, referral to the appropriate ADR practitioner, how to support their clients during ADR and to assist them with emotional closure after ADR.

As the intention of government to promote ADR becomes increasingly clear and accompanied by legislative and systemic changes, it is likely that this will provide an incentive for membership bodies, university faculties (particularly law faculties) and continuing professional development organisations to provide education, training and resources to promote the appropriate use of ADR.

Summary point

- Professionals, such as lawyers, psychologists, social workers and others, who deal with people in conflict or those with a dispute, need information on the range and application of ADR processes and training in how to screen for suitability for ADR referral

ADR awareness within government agencies

See Chapter 8.

4. Provision of ADR Services

Court provided ADR services

The *Issues Paper* canvasses many of the benefits and drawbacks of court provided ADR services, including the concept of a multi-door courthouse.

The *Issues Paper* notes that courts traditionally have been a public forum in which participants can have their disputes decided based on their legal rights and receive a legally enforceable decision. LEADR believes that this should continue to be the primary role of the courts. For this reason, LEADR favours consumers being screened and referred to ADR as far as possible before they reach the courthouse. As already noted, strategies to achieve this include educating and encouraging lawyers and other professionals to refer consumers to ADR and the provision of information services through a web portal. Of course, LEADR also supports referrals to ADR at any time that it becomes evident that a matter is suitable for ADR such as prior to the initiation of court proceedings in the various interlocutory stages through to the final stages of the hearing. If, for example, it becomes clear to a judge that a matter is suitable and now ready for ADR, s/he should consider the possibility of referring it to ADR, provided, of course, that this does not result in unjustified delay or further expenditure.

As noted above it may also be useful to consider the appointment to the courts of an ADR consultant, (a ‘duty mediator’) who would undertake a preliminary assessment of whether a matter is suitable for ADR, and then make the appropriate referral. Suitable protections and immunities for the ADR consultant, and an obligation to maintain confidentiality, may be required through legislative amendments.

It would be important that any such ADR consultant had a working knowledge of the suitability of the different forms of ADR to different types of dispute and for different participants. Appropriate accreditation under the NMAS and other relevant qualifications would be essential. It may be possible to draw the ADR consultant from a panel of ADR practitioners available on a roster basis to provide this assistance to the courts, rather than have the position entrenched as part of the court public service administration.

Summary points

- Referral to ADR should occur as early as possible during a dispute and preferably before it reaches court. If a matter does reach a court or tribunal, mechanisms should be established to refer to ADR whenever it becomes evident that such referral would be appropriate and helpful in resolving the dispute
- Information about ADR should be provided by all courts and tribunals, both on location, electronically and in any mail outs

Judicial ADR

In recent times there has been considerable debate about the efficacy of judicial mediation. LEADR continues to favour limiting the involvement of judges in ADR, possibly to include case management, prior to trial, to narrow the issues as a matter is being prepared for trial. Generally speaking LEADR prefers the clear distinction of the judicial role from all other dispute resolution roles. LEADR also acknowledges that there is scope for exploring models of less adversarial trials, in which judges will play a key role.

LEADR will be very keen to examine the outcomes of the judge-led mediation scheme that is being piloted in Victoria in its higher courts in which a considerable sum will be expended over four years to improve the availability of ADR in the courts, and a judge, support staff and an ADR coordinator have been appointed to both the Supreme and County Courts as part of the two-year pilot.

With regard to judicial ADR, LEADR believes that there are a range of significant issues to be considered.

Judicial role

The *Issues Paper* identifies what LEADR considers to be a valid question about the compatibility of non-adjudicative procedures with the traditional role of the judge. Litigation can be characterised by the public enforcement of rights, claims made resulting from past behaviour, imposition of norms based in law and on precedents, due process of law, formality and reliance on facts in a hierarchical, adversarial setting. In contrast, ADR can be characterised by the private accommodation of parties' mutual interests; decisions made by parties regarding their own future behaviour, and informality in a process which is flexible.¹ LEADR believes that the very important role that judges play in the determination of legal cases should be retained, and should also be clearly separate from other forms of dispute resolution.

Judicial expertise

LEADR considers that judicial and ADR settings produce sets of distinct judicial and ADR practitioner competencies which are significantly different from each other. Judicial officers have expertise refined from their knowledge, skills and attitudes to address matters of policy, pure legal questions and circumstances which require fact-finding and urgent matters among others. ADR practitioners, on the other hand, have the expertise, refined from a different set of knowledge, skills and attitudes, to address matters which many different criteria including where there will be a continuing relationship, where parties have the ability and resources to participate, where privacy is accepted. While judges are engaged on a day-to-day basis with determining disputes in an adversarial trial, they may be inhibited from developing the nuanced skills required to resolve matters using ADR processes such as mediation.

Good faith participation in ADR

A significant contributor to the success of ADR processes is that they take place in the 'context of the law' sometimes referred to as the 'shadow of law'. While LEADR

¹ Boulle, L (2005) *Mediation principles process and practice of Butterworths* p. 145

supports above, mandatory assessment of suitability of ADR, and that parties, having participated in ADR in good faith, and/or having made a 'genuine effort', have expedited access to the court system. LEADR contends that it is ADR parties' knowledge of the availability of this very different process that often assists them to come to a resolution in ADR. That is, both the process and the likely outcomes of the court system provide a 'reality test' of the process and the possible outcomes of ADR processes. For judges to mediate could remove, at least in perception, and possibly in actuality, the opportunity for parties to participate voluntarily and in good faith in ADR, in the knowledge that there is a separate and quite different process available to them, should they need it.

Clarity for consumers

LEADR continues to be concerned about clarity for consumers. Consumers perceive the role of judges to be to make determinations for parties who either cannot or will not reach agreement through ADR. Consumers perceive, or will come to perceive the role of ADR practitioners is to assist parties to reach agreement. If judges conduct ADR processes, it is possible that consumers' expectation of the role of the judge may impact on consumers' expectations about facilitative ADR processes, even when these are being conducted by a practitioner who is not a judge.

Increased chances of settlement

The *Issues Paper* notes the view that judicial involvement in mediation improves the chances of success of settlement. LEADR would support research into this proposition in which constructs such as durability of settlement and party self-determination among others are measured. If indeed judges or ex-judges have higher settlement rates, hypotheses to explore include whether this results from judges applying a blended form of mediation, in which they provide some or even a high level of advice or possibly from participants feeling a pressure to settle because of the gravitas and/or seniority of the judge that they may not have felt with a non judicial mediator.

While achieving settlement is valuable, it is important to distinguish settlement from resolution. The benefit of mediation is that it facilitates resolution by supporting the parties to negotiate in terms of their underlying needs and interests, instead of their strict legal entitlements. Hence it is often possible for outcomes to be achieved which are beyond the capability of any court-determined process to order. LEADR believes that it is important to retain and foster the potential for resolution (as distinct from settlement) that mediation offers.

Appropriateness of private sessions

With regard to judicial mediation, LEADR has particular reservations about confidential private sessions with the parties in the absence of the other parties. Were the judge to then proceed to determine a matter judicially after such private sessions there could be concerns that one party was uninformed about all the matters which the judge may have considered, and was unable therefore to answer or challenge them. Unless there is good reason for court proceedings to be held in camera they are normally public, and the procedure and reasoning of decisions transparent. It is a fundamental principle of justice that parties are entitled to be heard and to hear their opponent's allegations or defence. Private sessions where these matters could be aired with a judge would undermine that principle. We understand that for these and

other reasons, in the Victorian pilot, judges are likely not to engage in private confidential sessions, or will do so only in the later stages of mediation.

Cost effective use of resources

The *Issues Paper* notes that judicial time is expensive. While LEADR believes that the reasons described above are sufficient to be cautious about judicial mediation, the need to allocate resources prudently and the availability of highly skilled specialist ADR practitioners provides another very practical reason for judges to be retained in their primary role within the courtroom.

Summary points

- Judges should be retained in their primary role in making determinations
- Judicial expertise is very different and not necessarily compatible with ADR expertise
- Good faith participation may be inhibited by judicial involvement in ADR
- Consumers' expectations about the role of a judge may lead to confusion about the nature and conduct of ADR processes
- Increased rates of settlement are only one an indicator of the value of ADR processes and do not provide sufficient reason for judicial ADR
- Private sessions are of particular concern in judicial ADR as they mitigate against transparency and consumer confidence in the process
- Judicial ADR is not a cost effective use of resources

Court officer provided ADR

The *Issues Paper* has referred to some of the advantages and disadvantages of Registrars and court officers providing ADR, in particular, the 'latitude' with regard to the term 'mediation'. Sometimes a Registrar may merely chair a settlement conference, and on other occasions a form of conciliation may be used, in which the Registrar or court officer may provide some advice to the parties as to the possible outcome of the dispute. In specialised tribunals this may be of some assistance, by providing guidelines for the parties as to whether or not they should not proceed further. In many other instances it may be preferable for the parties to have access to an interest-based form of ADR.

LEADR believes that in general court referrals should be made to external providers for the reasons expressed above in the discussion of judicial mediation. 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. "In-house" mediators are seen to experience conflicts of interest and to be perceived to have conflicts of interest, compromising the real and perceived procedural fairness of the ADR process.

LEADR believes that members of the public, unfamiliar with such matters, may be unable to distinguish between the roles of judge and registrar and may even fear a leakage of information between court officials and the judiciary based on a perception that the Registrar may be too closely associated with the court process. This could have an impact on the parties' willingness to disclose confidential information at a settlement conference.

Court officers have a role in screening matters for suitability to ADR and in which ADR process is appropriate. If court officers undertake this process it is important for them to be properly trained in ADR, and informed of the available ADR options, and where the parties might go for such ADR services.

Whatever the involvement of Registrars and court officers in the provision of ADR, LEADR regards ongoing provision of and participation in clinical consultation (often known as ‘supervision’) which includes mentoring, training, defusing, debriefing and maintenance of standards, as essential.

Summary point

- In general, courts and tribunals should make ADR referrals to external providers to ensure real and perceived impartiality
- Whatever the involvement of Registrars and court officers in the provision of ADR, LEADR regards ongoing provision of and participation in clinical consultation (often known as ‘supervision’) which includes mentoring, training, defusing, debriefing and maintenance of standards, as essential

Costs of private ADR

If the parties are referred to private ADR, they will usually need to bear the costs of themselves. In general, LEADR is comfortable with a user pays approach. We believe that it would be possible to think creatively about how this could be more easily affordable for participants through suitable insurance arrangements, subsidy or tax deduction. As well, LEADR believes that there needs to be 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.

Summary point

- Creative ways to make ADR more affordable such as suitable insurance arrangements, subsidy or tax deduction should be explored

Private, community and government based ADR

A useful way of conceptualising ADR is as ‘primary’, ‘secondary’ and ‘tertiary’.

- ‘primary’ DR would include preventative measures and be available at minimum cost and maximum convenience
- ‘secondary’ DR would include early intervention, without legal assistance, and be available at low cost and maximum convenience
- ‘tertiary’ DR would include late intervention and/or intervention with legal assistance, and be available at close to cost recovery and at the convenience of the service provider

Litigation is the fourth tier in the system.

Diversity of providers facilitates ADR being offered at each of these levels and 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.

Those ADR practitioners employed by government or community organisations acquire expertise in resolving particular types of disputes in that environment. There is, however, concern that they may be less independent than private ADR practitioners, particularly when the organisation by whom they have been appointed has prescribed particular procedures and formats, and reporting requirements, for the handling of any dispute. It is also a concern that many ADR practitioners have relatively low remuneration in these positions; hence these positions may have limited appeal to professionals with ADR training who could earn far more elsewhere in their original professional field.

The *Issues Paper* at 3.6 identifies that there may be currently an over supply of ADR practitioners, particularly mediators. LEADR's experience is that many professionals who undertake ADR training with one of the reputable training organisations, and become accredited, cannot rely on a steady stream of ADR work as their sole income source. Many rely on government panels, being paid a standard fee for ADR work on a sessional basis. Others may undertake ADR services as an adjunct to other professional work, such as legal services, training, counselling and coaching. LEADR anticipates that the problem of oversupply will be ameliorated as ADR is encouraged and mandated throughout the gamut of civil proceedings.

As noted in the *Issues Paper* in the absence of regular work practitioners may not maintain their skills. This is a reason to encourage the implementation of accreditation systems for ADR processes such as the National Mediator Accreditation System. Under such a system, practitioners have practice and professional development requirements to meet in order to retain accreditation. This creates a demand for services such as professional supervision, mentoring, coaching and ongoing training to be delivered in a range of affordable packages.

Summary points

- Diversity of ADR providers should be encouraged as it supports the provision of ADR services at primary, secondary and tertiary levels. As well, it enables specialised services to develop, encourages the emergence of tailored processes and contributes to increasing access to ADR services
- The development of ADR practitioner accreditation systems should be encouraged as these require ADR practitioners to maintain and develop their skills in order to retain accreditation

5. Referral and Assessment

Referral

LEADR believes that more cases could be referred to mediation. As has already been mentioned, consumers might seek such referrals if they were able to access more comprehensive information about their options at the time that they had a dispute looming. As well, we have identified the need for a range of professionals to be better informed about the variety of processes available, how to screen matters for suitability for ADR and how to make the appropriate referral.

LEADR acknowledges that one of the main groups of referrers is 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 that 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:

- legal advisers should be trained in screening of matters for suitability for ADR, in the range of ADR processes available and in referral to appropriate ADR providers; and
- there should be a pre-filing statutory obligation to use ADR in a much wider range of civil disputes similar to that in family law. LEADR believes that there would need to be very few exclusions of types of civil disputes and that matters such as immigration could be included. 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 and social science courses should include ADR studies as necessary components. In law courses, ADR should also be a component in the practical application aspects of most law subjects
- continuing professional development in ADR should contribute to the continuing professional development of legal advisors, psychologists, social workers, mental health workers and other professional groups

Further, LEADR believes that in general court referrals should be made to external providers for the reasons expressed above in the discussion of judicial mediation.

Summary points

To increase referrals from legal advisers, there should be a range of strategies introduced including:

- Training legal advisers in how to screen for suitability for ADR
- Pre-filing statutory obligations
- Sanctions for non participation in mandatory ADR

- Inclusion of ADR units in university law and social science courses and as part of ongoing professional development

Suitability of matters for ADR

LEADR believes that it is the responsibility of ADR practitioners to make comprehensive assessments as to suitability for ADR and to design processes that suit the particular circumstances. Appropriate process design and implementation allows ADR practitioners to take account of the particular needs of participants and to respond to distress, anxiety, power imbalance and diversity issues. In addition and already indicated, LEADR believes that a range of professionals need skills in screening for suitability of matters for ADR

LEADR believes that the vast majority of civil matters are suited to ADR and that this can be established through mandatory assessment of suitability. The flexibility provided within the definition of various ADR processes allows for refinements and adjustments to be made while maintaining the integrity of the particular ADR process.

However, particularly with regard to intractable power dynamics, extending possibly to violence, and to other urgent matters, LEADR recommends exceptions to assessment for suitability of ADR.

Summary points

- Comprehensive assessments for suitability for ADR needs to be made by ADR practitioners, so that they can design processes that suit the particular circumstances
- Most civil matters are appropriate for mandatory assessment for suitability for ADR. Those with intractable power dynamics or violence should normally be excluded

Court based screening for ADR

See *Chapter 4 Court Officer Provided ADR*:

“Court officers have a role in screening matters for suitability to ADR and in which ADR process is appropriate. If court officers undertake this process it is important for them to be properly trained in ADR, and informed of the available ADR options, and where the parties might go for such ADR services.”

6. ADR and Litigation

The legal profession and ADR

LEADR regards the legal profession as indispensable to justice in Australian society. LEADR considers that the current strength of ADR processes is due to the crucible in which they continue to develop: the crucible of rights. In order to participate in good faith in interest based ADR processes, parties need to know that they have a robust system of enforcement of rights, to which to turn, if necessary. That is, without the legal system, ADR processes and outcomes would be impotent.

Lawyers are educated with knowledge, skills and attitudes of the rights-based methods of negotiating settlements in litigation in court. Their training equips them to effectively negotiate the best legal result for their clients often before going to court. Sometimes however this process can be stressful for both lawyers and their clients, costly and time-consuming, particularly if settlement only occurs at the door of the court, and often does not address other aspects of terms of parties' needs such as for maintaining and improving business relationships.

In this submission, we have already identified the need for universities to include ADR as a necessary component of legal courses. ADR could also be incorporated in each of the particular subjects as an integral part of resolution of disputes in that area. Without this, graduates from law schools will perceive that most legal matters are settled through litigation or at least through rights based processes. For ADR to become an integral part of the practice of law, it is important that it is part of the formative training of legal practitioners.

LEADR favours encouraging legal advisers to explore with their clients all the options for resolving a dispute when the client first seeks legal advice. LEADR recognises that if large numbers of clients choose ADR processes in the early stages of a matter, this could have financial consequences for law firms which will require these firms to consider their service mix and cost structures to maintain their businesses. The *Issues Paper* suggests a range of incentives and compliance mechanisms that could be applied to encourage legal advisers to make greater use of ADR. LEADR supports such options being considered in consultation with the legal profession and, if appropriate, introduced over time to allow law firms to make the necessary adjustments to their business structures, practice and service mix.

Summary point

- The range of incentives and compliance mechanisms suggested in the *Issues Paper* (p32) to encourage legal advisers to make greater use of ADR should be explored, in consultation with the legal profession

Barriers to use of ADR

The *Issues Paper* identifies a number of barriers to the use of ADR within the civil justice system. Similarly this *Response* has highlighted in previous chapters what we consider to be significant barriers as follows:

- lack of identity of the product/service (See Chapter 2 of this *Response* for the discussion about the need for standard definitions)
- lack of referral from a range of professionals, including lawyers, psychologists, social workers, mental health workers and more before civil proceedings commence (See Chapter 4 of this *Response*)
- lack of consumer awareness of ADR. We note, however, that awareness is not sufficient for latent and potential litigants to choose ADR. Potential participants need both motivation and incentives to use ADR. Having used ADR, their awareness will be raised and they will in turn raise the awareness of others by word-of-mouth
- the cost of ADR. While significantly lower cost than litigation, costs still represent a barrier to many, particularly to those unfamiliar with the benefits of ADR

LEADR also believes that the adversarial nature of the civil justice system, together with the institutions developed to accommodate the present civil justice system represents a barrier. ADR requires both professionals and participants to understand and feel confident in a dispute resolution process that is very different to the inherent win-lose nature of adversarial determination. So for example, participants in ADR may be reluctant to reveal information that they perceive might disadvantage them if their case later went to court.

LEADR also notes and supports what the *Issues Paper* has identified as a lack of clarity about dispute resolution procedures in contracts. LEADR has had some experience of individuals approaching us seeking assistance in using an ADR clause in a contract, and finding that the ADR clause is so poorly drafted and so unclear about when it should be used and how, that it is essentially ineffective.

To address these barriers, LEADR again refers to earlier chapters in this *Response* in which we have suggested that the use of ADR would be encouraged by:

- the development of standard definitions
- education of referring and potentially referring professionals to identify when ADR will help their clients
- education and training of court staff and the judiciary to make referrals to ADR
- education campaigns targeted at specific groups particularly at the time of need
- the provision of a web portal, information or referral hotline, and/or other initiatives to disseminate information to the end users of ADR processes
- exploring creative ways to make ADR more affordable such as suitable insurance arrangements, subsidy or tax deduction should be explored

In addition, LEADR believes that incentives need to be offered in line with those identified by the *Issues Paper* (p31 and 32). LEADR believes that many of these incentives would be attractive as they offer expedited court processes and cost relief to those who have attempted ADR. LEADR also believes that requiring legal professionals to give advice on the likely success of the case if it is handled by litigation and the ADR options that could be explored are important measures in helping consumers make informed choices that, we believe, are likely to result in increased use of ADR.

In addition, LEADR believes that the concepts exemplified in the draft model mediation clause at Attachment D of the *Issues Paper* could also encourage the use of ADR. LEADR believes that such a clause, drafted in plain English or one tailor-made to suit particular circumstances, while maintaining identified criteria, should be a requirement for all contracts.

Summary points

See earlier chapters

- The financial and expedited process incentives identified on pages 31 and 32 of the *Issues Paper* should be further explored and thoroughly evaluated for their likely effectiveness in increasing the use of ADR
- That consideration be given to making inclusion of an ADR clause a requirement for all contracts

Mandatory ADR

LEADR believes that most civil matters are appropriate for mandatory assessment for ADR. In some cases even compulsory ADR may be appropriate, as is already provided for in some of the rules of court. Although this was initially criticised as being against the spirit of a voluntary mediation, experience and time has shown that sometimes even the most trenchant litigants, when they are obliged to use ADR, in fact, manage to resolve their differences. Given the opportunity to participate in an initial intake and assessment, participants may shift from an adversarial to a more cooperative mindset or may even feel persuaded to attempt ADR even if they had initially rejected it.

If mandatory assessment is combined with other cost and expedited process incentives (as described in the *Issues Paper*) ADR could indeed become a much more attractive option for potential litigants. This in turn would decrease the amount of litigation in courts and tribunals at considerable cost saving on public resources.

LEADR notes that if a matter is assessed as unsuitable to ADR, this is more likely to be on the basis of the interpersonal relationships than the nature of the dispute. In

Chapter 5 we have already noted that matters with intractable power dynamics, extending possibly to violence should normally be excluded from ADR.

LEADR believes that mandatory requirements for participation in ADR or at least assessment for ADR should be directed as far as possible to the early stages of a dispute. It is well before the pre-filing stage, while there is some optimism remaining among potential litigants, that ADR has most to offer. It is at this stage that a resolution, which genuinely aspires to meeting the needs of all parties involved, is most achievable. After proceedings have been commenced, ADR is more likely to result in a compromise, which by definition, is not able to meet the majority of the needs of each of the parties.

Therefore LEADR supports in particular those suggestions in the *Issues Paper* that place requirements on litigants to consider ADR and/or to make attendance at ADR a pre-requisite to commencing legal action. LEADR believes that pre-action protocols would result in greater use of ADR. The *Issues Paper* reports a concern that pre-action protocols might 'front-load' the costs of litigation. This is difficult to predict; however, LEADR believes that even if this happens it may be part of the transition from the primarily rights-based approach of litigation to the more interests based approach of ADR. Both participants and legal representatives, as has already been noted, will need to gain confidence in ADR in order to embrace it and participate in it in the most constructive and cost effective ways. LEADR reiterates its support of the incentives earlier referred to, as an important means of facilitating this transition.

The *Issues Paper* suggests that the ADR service sector "may not currently have sufficient depth and maturity to support a mandatory requirement." LEADR does not consider this to be a significant barrier to introducing mandatory requirements. LEADR believes that mediation in particular, especially since the implementation of the NMAS, is sufficiently mature to support mandatory ADR. LEADR believes further, that only those forms of ADR described by NADRAC, which are supported by standards, should be included in mandatory provisions. New and emerging forms of ADR should be included only after standards have been established, endorsed and applied.

We note that there has been a high level of interest by ADR practitioners to meet the requirements to become Family Dispute Resolution Practitioners. LEADR believes that if it is decided that there are specific requirements associated with mandatory ADR in other civil matters, practitioners will be willing to meet these if there are realistic timeframes established and recognition given to existing competency and experience. These should be worked out through consultation with bodies like the Mediator Standards body and other relevant ADR organisations.

Summary points

- Mandatory requirements to participate in ADR should be directed to the early stages of disputes
- Mandatory assessment of suitability for ADR may encourage participants to attempt ADR, who had at first been unwilling to do so
- The suggestions listed in the *Issues Paper* (p35) that place requirements on litigants to consider ADR and/or to make attendance at ADR a pre-requisite to commencing legal action should be further explored

- There is sufficient maturity and depth in ADR and mediation in particular, especially since the implementation of the NMAS, to support mandatory ADR
- Only those forms of ADR described by NADRAC, which are supported by standards, should be included in mandatory provisions
- Specific requirements associated with mandatory ADR in civil matters that ADR practitioners need to meet, should have realistic timeframes and include recognition of existing competency and experience

7. Use of ADR in Government Disputes

ADR Expert Assistance

The *Issues Paper* points to the amendment in 2005 to the Legal Services Directions to place greater emphasis on ADR in government, including the requirement to consider ADR before commencing litigation and keeping litigation costs as low as possible.

Even with this direction, there continues to be considerable scope to expand the use of ADR by government agencies.

LEADR believes that those responsible for making decisions about how to resolve disputes require more information about the different types of ADR processes, their application to a range of disputes and the likely benefits.

The *Issues Paper* suggests the use of an independent dispute resolution manager whose role it would be to encourage the early use of ADR and adherence to the Legal Services Directions by commonwealth agencies. LEADR believes that access to a person with ADR expertise and responsibility aids referral to ADR in many settings, so is supportive of this suggestion being explored further.

An ADR Manager would also be able to overcome what appears to be a continuing reticence to settle on a “commercial” basis. An ADR Manager with detailed working knowledge of the Legal Services Direction could clarify the meaning and intention of the Directions which are seen too often to prevent these types of settlement.

Summary points

- Decision makers within government should be given more information about the different types of ADR processes, their application to a range of disputes and the likely benefits
- Consideration should be given to the creation of the role of an independent dispute resolution manager to encourage the early use of ADR and adherence to the Legal Services Directions by commonwealth agencies

Selection of legal service providers and ADR practitioners

When considering the engagement of external lawyers and Counsel, it would be beneficial to include in the Legal Services Directions a preference to select those who have some working experience and understanding of ADR as well as knowledge of government policies. As we have already highlighted in this Response, there are many legal services providers who assist their clients to consider a range of options for dispute resolution, so it would be possible for government agencies to use these as preferred suppliers.

When engaging ADR practitioners, LEADR supports government agencies and others using practitioners with recognised accreditation and/or training. In the case of mediation, the appropriate standard is accreditation under the NMAS.

Summary point

- Government agencies through the Legal Services Direction should be encouraged to use legal services providers who have experience in ADR and to appoint ADR practitioners who have recognised accreditation and/or training

8. Use of ADR Techniques to Improve Court/Tribunal Procedures

LEADR believes that ADR techniques can be used to good effect in court and tribunal processes. In general, LEADR supports a more informal and less adversarial approach, participants being given the opportunity to speak for themselves and to hear the other side's perspective and where possible to reach agreement that both complies with the law and takes account of their interests.

To this end, LEADR believes that the less adversarial trial approach has considerable potential and can be developed along principles which, while protecting the rights of parties and providing the expertise they need, empowers them to understand step-by-step the process in which they are involved.

LEADR believes it is essential that clinical experts employed in a similar role to that of family consultants, are available in federal courts and tribunals. Such consultants would be experts in their substantive fields, as well as in ADR, most likely in mediation at first. The consultants would have the roles of mentor, provider of clinical supervision, debriefing, defusing, training and training coordinator. LEADR has already expressed the view in this *Response* that the time and energy of the judiciary is best focused in current judicial roles. However, we believe that a dispute management judge, who has a deep commitment to an understanding of ADR, would play a significant role in ensuring that the need for disputants to participate in adversarial processes is respectfully challenged and that courts and tribunals stay up to date on developments regarding ADR.

LEADR believes that case appraisal is a useful process for providing information to potential litigants about the likely success of their case. And we believe that this is a specialty area that could be better provided outside the courts rather than by a sitting judge, for reasons of real and perceived impartiality, clarity of process and roles and cost effectiveness. We believe that if an initial case appraisal was made by one judge, it would be preferable to have a different judge assigned to hear the case. This would prevent the risk of bias or perceived bias that could result from having been privy to confidential admissible information and allegations which may be unfounded by the evidence which is eventually admitted in the court proceedings.

LEADR also supports increased use of round table conferencing, as a useful tool in case management. Involving participants and the judge or court officer in considering the best method of preparing a matter for trial, encourages a more collaborative mindset that supports appropriate referral to ADR and/or effective participation in a less adversarial trial.

Summary points

- ADR techniques should be used in courts and tribunals to foster a more informal and less adversarial approach, in methods such as the less adversarial trial and round table case management conferences

- Clinical experts should be employed in federal courts and tribunals to fulfil a role similar to that of family consultants
- Case appraisal is a useful technique that can be best offered by service providers outside courts. If a judge completes an initial case appraisal, a different judge should be appointed to hear the case

9. Data, Evaluation and Research

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, legal representatives, government agencies and local councils that provide dispute resolution services, and from and within workplaces, community agencies and participants themselves.

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; and
- 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/conflict resolution learning between participants?
 - What likelihood would there be that participants would use a similar or different ADR process in the future?

It would be best for quantitative data to be collected nationally, on an ongoing basis coordinated by government, with appropriate consultation with stakeholders, and ongoing input and assistance from ADR providers. Specially commissioned research conducted by a university or similar body with either public or private funding would also provide qualitative and quantitative data.

Regardless, of the research body, any collection of data and research should be professionally undertaken and appropriately funded. Inappropriate ADR policies developed and then implemented based on unsound data or research may run the risk of adversely undermining the public's confidence in ADR itself

LEADR believes that the next NADRAC Research Forum could contribute significantly to this area by making it a focus of the Forum to identify the data required and develop workable strategies for improving data collection and research.

Summary points

- There is an urgent need for more extensive data collection across the full spectrum of ADR processes and referral methods
- It would be best for quantitative data to be collected nationally, on an ongoing basis coordinated by government, with appropriate consultation with stakeholders, and ongoing input and assistance from ADR providers. The next

NADRAC Research Forum could contribute significantly to this area by making it a focus of the Forum to identify the data required and develop workable strategies for improving data collection and research

Evaluation of ADR services

LEADR believes there is a compelling need to improve the quality of evaluations of ADR services. Mediation services for example, could be evaluated under the auspices of the soon-to-be established Mediator Standards Body against criteria derived from the competencies of mediation practice. LEADR suggests that other forms of ADR would follow suit after mediation processes are established.

LEADR notes that transparency is one of the fundamental tenets of ADR and therefore that providers of ADR should be demonstrably transparent in their evaluations. Legal Aid, regularly commissions independent evaluations of its services and makes those evaluations available to the public. LEADR supports ADR service providers being required to do the same. To support providers in doing this, data collection tools should be developed, standardised and made available to providers.

LEADR also believes that comparing data collected about the practice of ADR with similar data from disputes dealt with through litigation and the courts would establish whether the current claims about the benefits of ADR are substantiated, including whether:

- cost and time savings for both disputing parties and the broader community increases accessibility to justice;
- ownership by participants of process and outcomes occurs;
- there is an increased feeling of ease and comfort in resolving the dispute (formal legal proceedings are frequently confusing and intimidating for participants);
- there is potential 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;
- there is a more timely access to courts when needed; and
- there is a greater cost effectiveness of the justice system as a whole

Summary points

- It is important to evaluate ADR services to support and encourage ongoing quality improvement
- To support providers in undertaking evaluation, data collection tools should be developed, standardised and made available to these providers
- It is also important to evaluate the claims made about the value of ADR by comparing data from the practice of ADR with similar data from disputes dealt with through litigation and the courts

Supporting ADR research

LEADR notes with concern that a number of leading ADR academics have left and/or are in the process of leaving academia, and/or Australia. LEADR does not profess to have expertise in this area however, suggests the following options for consideration:

- NADRAC could conduct an enquiry to identify, what might be going to support ADR research and researchers.
- Investigating ways to locating ADR research in a variety of university faculties and schools, including law, psychology, communication, social work, behavioural science etc
- Offering government scholarships
- Sourcing funding for Professorial Chairs in ADR

Summary point

- Consideration should be given to strategies to support and encourage ADR research and researchers

10. Conclusion

LEADR is pleased to have had the opportunity to provide this Response to the NADRAC *Issues Paper on Alternative Dispute Resolution in the Civil Justice System*.

LEADR believes that greater use of ADR in civil proceedings will result long term in significant cost savings for disputants and for courts and tribunals. LEADR also believes that greater use of ADR will significantly contribute to access and delivery of justice and to greater satisfaction by participants with the process and outcomes from disputes. This is primarily because ADR has the potential to address participants' broad interests, not just a set of legally enforceable rights.

LEADR is also optimistic that with clarity about process through standard definitions, appropriate incentives and compliance mechanisms, education for relevant professional groups and targeted consumer awareness campaigns, that there will be significant willingness to engage in ADR. Of course, as with any process of change, there will need to be sensitivity and understanding about competing interests and concerns and realistic timeframes for implementation.

LEADR affirms its continued willingness to engage in discussions and to respond to future papers and proposals.