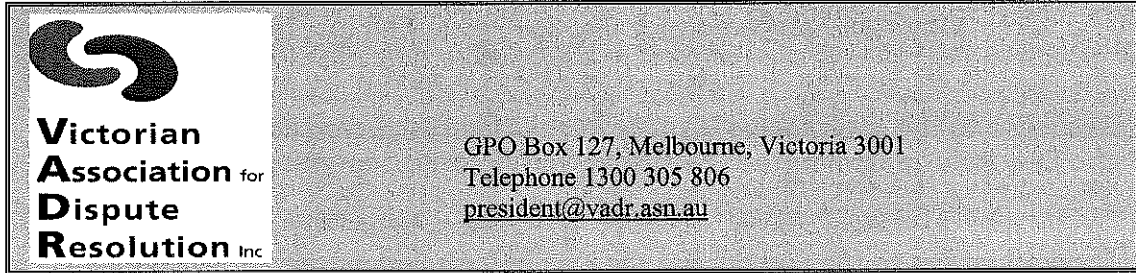


Submission No. ADR/10

Received 12/11/2007

Law Reform Committee



Response by the Victorian Association for Dispute Resolution Inc

-to the —

Victorian Parliament Law Reform Committee

Inquiry Into Alternative Dispute Resolution

November 2007

Victorian Association for Dispute Resolution Inc. (VADR)

Response to the *Alternative Dispute Resolution Discussion Paper* produced by the Law Reform Committee, Parliament of Victoria, September 2007.

Congratulations to the authors and the Law Reform Committee for an excellent background paper, well researched and accessible.

VADR is a not-for-profit interest group established in 1986, open to anyone interested in Alternative Dispute Resolution (ADR). Members have all levels of training and involvement in ADR. VADR encourages the promotion, exchange of ideas, education, training, research and good practice in ADR at all levels and in a range of contexts. VADR arranges events to support these aims, but does not provide training courses in ADR.

Synopsis

Most of our response concentrates on the regulatory issues of chapter 7, where we support a stronger regulatory framework for ADR. As we believe that clear communication is central to this work, we argue for clarity of language. The definitions of various ADR processes must be as clear and simple as possible, including the respective differences between mediation, conciliation and arbitration - alongside some common elements. From these distinctions flow different (additional) requirements in terms of threshold educational requirements, and ongoing training.

In terms of a strategic way forward, we agree that 'developing a national accreditation system for ADR is a challenging task' (p. 108), and respectfully suggest a staged response. One approach could be to begin with the mediation element of Alternative Dispute Resolution (ADR), and build on the work recently undertaken by the National Mediation Conference Ltd.¹ An appropriately structured and resourced national structure, integrated with a Victorian model and structure, which addresses accreditation and standards, and which has an initial focus on mediation, would be a major step forward for the field of ADR. Over time, the terms of reference of the relevant bodies at both a national and state level could be expanded to include other elements of ADR - in particular: conciliation, arbitration and (restorative justice) conferencing. To ensure rigour, consistency and effective accountability, it is expected that legislation at both national and state levels would be required.

Chapter 3

Q. 2

We support the collection of de-identified and strictly anonymous data, and consider it could provide a useful guide to the kinds of outcomes reached. The data could include: outcome of process; name, age, gender and other demographic details (voluntarily provided); details of any agreement(s) reached.

¹ *Australian National Mediator Accreditation System. Report on Project.* Professor Tania Sourdin September 2007.

Non-identifying data could be reported as a public record of decisions reached through ADR. Such a process could go some of the way to addressing concerns about the lack of public scrutiny of ADR.

Further consideration would need to be given to the body responsible for gathering the data, and the means to be used. Methodologies could range from sampling to routine reporting, and from written surveys to on-line responses.

Chapter 7

Questions 43-45

The discussion generally captures the extent of civil ADR in Victoria, although the list of providers is not exhaustive. Note for example the omission of the Victorian Equal Opportunity and Human Rights Commission from the relevant table.

Overall, we consider that the disadvantages of the current system of civil ADR regulation in Victoria outweigh the advantages. In particular, there is insufficient information available to consumers about the range and quality of services available, and the accountability mechanisms for ADR providers are inadequate. As a consequence, we consider that the establishment of an appropriate regulatory framework will support the development and maintenance of consistent standards of ADR practice, in which the public can have confidence.

Q. 46

We consider that government at both state and national levels could play a significant role in increasing the simplicity and transparency of the ADR regulatory landscape. Broadly, both levels of government could assist with legislation, resources, and coordination of the establishment of appropriate structures and processes. Financial resources would also be supplemented through membership fees from accredited ADR providers. Refer below for further detail (Q. 57 ff)

Q. 47

For the purposes of regulation within ADR, we would include mediation, conciliation, arbitration and (restorative justice) conferencing. We would exclude information provision, facilitation, negotiation and complaint handling - which is not to say that (for example) information provision, and facilitation are not critical aspects of these ADR processes.

Q. 48

ADR processes certainly require standard definitions. These definitions ought to apply generally to all services in which the processes are used. In terms of mediation and conciliation, for example, we are comfortable with the definitions produced by the National Alternative Dispute Resolution Advisory Council (NADRAC). We do not support the inclusion of advisory and evaluative elements within mediation.

Clearly such elements are valid aspects of ADR, and are commonly practiced. However we see the provision of advice on the content of the dispute, and any evaluation of the content of the dispute, as falling within conciliation. These distinctions are important - to ensure clarity for the parties before and during the process; to assist when dealing with complaints about ADR; and when determining appropriate qualifications and training for respective ADR practitioners. These definitions ought to be contained in approval (accreditation) standards, supported by legislation, and reflected in codes of practice and training.

Q. 49

We consider there should be common minimum standards for ADR service provision, reflected in both educational requirements and practice standards. The core for these common minimum standards could be those required for mediation. Additional educational requirements, and specified practice standards, would be required for other elements of ADR, such as conciliation and arbitration.

Qns. 50 & 51

VADR has strengthened its position on prerequisites. In light of changes in the ADR field, and increasing expectations from the public, we consider that there ought to be an educational prerequisite to undertake ADR training, probably at Certificate IV level, or above - subject to there being an appropriate structure and process to deal with exceptions. Such a requirement provides some minimum assurance to the public that prospective ADR practitioners possess a certain level of conceptual ability to at least undertake and complete the relevant training.

Provision needs to be made for a competent and transparent mechanism to grant exemptions to the above - for example where cultural factors, or the practicalities associated with rural and remote communities, may outweigh the merits of an educational prerequisite.

Training for ADR practitioners must be comprehensive enough to ensure a standard sufficient to meet:

- educational requirements for accreditation (see Q. 53 below), which in turn equip practitioners to provide professional and independent services;
- community expectations of accredited practitioners, given the range of situations, and professional referral contexts, in which practitioners operate.

Trained and accredited practitioners need to be sufficiently:

- educated in theory;
- trained in process and techniques;
- practiced in a range of scenarios and skills; and
- prepared for the complexities commonly encountered in independent practice

to enable them to competently and consistently conduct all aspects of an ADR intervention, without direct supervision.

We suggest that the core elements for ADR training focus on mediation, with additional components being added for conciliation etc.. For mediation, where the educational prerequisite is satisfied, we propose a training program of a minimum of 60 hours duration, excluding the assessment process. Where the educational prerequisite has not been satisfied, and an exemption has been granted, we propose a program with a minimum of 140 hours, excluding the assessment process. We appreciate the costs associated with training. Nevertheless, we consider that these proposals, which build on current course requirements in the mediation field, will result in:

- a higher standard of mediators;
- a higher benchmark, and more valued qualification for those seeking accreditation;
- more confidence for members of the public seeking to engage the services of a professional mediator.

Ongoing training ought to be a requirement for accreditation of ADR practitioners, with a process to ensure compliance prior to re-accreditation.

Conciliators and arbitrators would be required to demonstrate expertise in the field in which they were practising, through specialised education, training and experience as appropriate.

Qns. 53 & 54

We strongly support the accreditation of ADR practitioners. We suggest that this process commence with mediators, and be undertaken in conjunction with the Australian National Mediator Accreditation Scheme (ANMAS). Furthermore, we see the Victorian initiative as an opportunity to strengthen the national scheme, with the introduction of supporting legislation, and the establishment of an adequately resourced national body with authority to administer the scheme (refer below). Similarly, we see Practice Standards as an appropriate tool in the initial and ongoing accreditation of ADR practitioners. Reference is made in this regard to the *Practice Standards* prepared as part of the ANMAS.

Q.57

Given the jurisdictional realities of our federal system, cooperation between the state and national governments regarding standards in ADR is essential. We support the establishment of a working party of the Standing Committee of Attorneys-General (SCAG), as a means to progress this initiative. In the absence of initial consensus across all states, we are hopeful that a model involving at least the Commonwealth and Victoria (and perhaps the ACT) could be established, with the possibility for other states and territories to opt in at a later point. At a national level, NADRAC could play a critical role with SCAG in facilitating the integration of the Victorian initiative with ANMAS.

We would not support unilateral action by Victoria in isolation from the ANMAS developments.

Qns. 58 & 59

Self regulation of ADR practitioners is effectively what we have at present, and from

our perspective it is not working well, for the reasons outlined above.

The establishment of a register of approved (accredited) practitioners would be part of the accreditation process, which is supported.

Q. 60

We do not consider the ADR field to be sufficiently coherent or 'professional' at present as to constitute a profession or 'industry'. As a consequence, consideration of the formation of an industry council is seen to be premature. This situation may well change in the future.

Q. 61

We consider that overarching legislation regulating ADR in Victoria ought to be enacted, provided it is done so in cooperation with the Commonwealth Government and in keeping with complementary national legislation, as argued above. Legislation is seen to be necessary in order to provide legitimacy and authority to the bodies responsible for accreditation, re-accreditation and de-accreditation.

Q. 62

Breaches of practice standards, and other forms of misconduct in ADR, ought to be dealt with in the context of accreditation, and its removal where necessary. A

national body, with legitimacy, authority, access to expertise, and a modest secretariat, is seen as essential for any accreditation process to be effective. The SCAG working party mentioned earlier (Q. 57) could examine and advise on the most appropriate complementary structures and models which should be established at both national and state levels, to ensure the interests of both levels of government, as well as other stakeholders, are met.

In this context, whilst there need to be mechanisms to respond to complaints, and apply sanctions where necessary, the body (or bodies) we envisage would have a broader role than that usually associated with an ombudsman.

The ANMAS a National Mediator Standards body, effective from 2010, and preceded by a National Mediator Accreditation Committee to operate from 2008. Under the ANMAS, "Recognised Mediation Accreditation Bodies" (RMAB's) will be initially "self recognizing", from January 2008. VADR has submitted that, for any accreditation system to earn respect and credibility, it must be both uniform and rigorous.

Uniformity can be achieved with a national, legitimated structure, integrated with a complementary state model. Rigour can be achieved by the development of an accreditation process which includes a national code of ethics, and a complaints system. Further, VADR considers that, as part of this process, RMAB's would need to become subject to approval and oversight by the proposed national structure, which itself would be supported by enabling legislation and limited resources.

VADR supports the establishment of an overarching national body that would authorise and audit the bodies that carry out training and accreditation; audit the registers of accredited ADR practitioners; respond to complaints not resolved locally; apply sanctions; and from time to time set standards in consultation with the ADR field. This Victorian initiative could integrate well with such an approach.

The Committee
Victorian Association for Dispute Resolution Inc
2 November 2007

* * *



**Victorian
Association** for
**Dispute
Resolution** Inc

GPO Box 127, Melbourne, Victoria 3001
Telephone 1300 305 806
president@vadr.asn.au

7 November 2007

The Executive Officer
Victorian Parliament Law Reform committee
Parliament House
Spring St
EAST MELBOURNE
VIC 3002

Dear Sir

Re: Inquiry into Alternative Dispute Resolution

Please find enclosed our response to the discussion paper in relation to the above inquiry.
We congratulate the authors and the Law Reform Committee for an excellent background paper, well researched and accessible.

Yours sincerely

Carole Grace
President
VADR Inc