

Northern Territory Law Reform Committee

ALTERNATIVE DISPUTE RESOLUTION AND CIVIL DISPUTES

FINAL REPORT

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SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee endorses the annexed paper, *Community Mediation Centres: A discussion paper* (February 1999) prepared by Mr Tony Fitzgerald for the Northern Territory Attorney-General's Department, in particular the general proposal for the establishment of a government funded Community Mediation Centre in Darwin.

Recommendation 2

While the Committee recognises that no one set of training standards will necessarily be sufficient for all types of mediation, the mediator must be sufficiently well trained to gain the confidence and maintain the respect of the parties, to assist them in the flow of their own communication.

Recommendation 3

In the context of mediation, the Committee recommends the adoption of the accreditation structure under the *Mediation Act 1997* (ACT), providing for applications for registration to be made to approved agencies, which may only grant registration on fulfillment of certain preconditions, in particular that the applicant has achieved the prescribed standards of competency.

Recommendation 4

The Committee recommends that standards for mediators be developed capable of enforcement by appropriate sanctions.

Recommendation 5

The Committee recommends that standards developed address the following matters:

- * A definition of the ADR process to which the standard applies;
- * The role or function of the ADR neutral;
- * The conduct of the ADR process, in particular addressing procedural issues. These may vary significantly in the context of different ADR processes;
- * The ADR neutral's responsibility to the parties, including the duty to maintain impartiality, neutrality, confidentiality and to avoid conflicts of interest;
- * The ADR neutral's responsibility to other ADR practitioners;
- * The ADR neutral's responsibility to the organisation providing the ADR service; and

- * The responsibilities of the parties to each other and to the process, such as confidentiality.

Recommendation 6

The Committee considers that the mediation process warrants consideration at all stages and a court should not be restricted in its ability to refer the parties to mediation, if in the opinion of the court it is appropriate.

Recommendation 7

The Committee supports the use in appropriate cases of compulsorily imposed ADR processes by courts but also strongly encourages access to a Dispute Resolution Centre by members of the public before court proceedings.

Recommendation 8

The Committee recommends that legislation providing for court-annexed ADR should not provide for judicial officers and registrars to mediate in a matter, even where the person will have no further involvement in the dispute should the matter fail to resolve. (Note that a contrary view is supported by some members of the Committee).

Recommendation 9

The Committee recommends that minimum levels of protection of confidentiality in all mediation processes should be provided for to the following effect:

Admissibility of evidence

Except with the consent of the parties, evidence of admissions made to mediators for the purposes of and within a mediation should be privileged and not admissible in any court, whether Commonwealth, State or Territory, or in any proceedings authorised by a law of the Territory or of a State or the Commonwealth or by the consent of the parties, to hear evidence. Specifically for the Northern Territory provision should be made similar to that contained in the Victorian Supreme Court rules Order 50.07(6).

Secrecy

Other than as required by law or with the consent of the parties, a mediator should be prohibited from disclosing any information obtained in a mediation unless the mediator believes on reasonable grounds that:-

- (i) the disclosure is necessary in order to prevent or lessen a serious and imminent threat to a person's life, health or property; or
- (ii) the disclosure is necessary in order to report to the appropriate authority the commission of an offence or prevent the likely commission of an

offence involving violence, or the threat of violence, to a person, or intentional damage to property or the threat of such damage.

Recommendation 10

While the Committee accepts that a case may be made for a statutory immunity from liability for court officials serving in a mediation, it does not support such an immunity in relation to private mediators.

Recommendation 11

The Committee recommends that there should be a consistent legislative approach to ADR, to be departed from only where justification for the departure can be shown.

Recommendation 12

While the Committee acknowledges that ultimately funding options for ADR processes will vary according to the type of ADR program to be utilised, it recommends that where compulsory referral by a court or tribunal is provided for the parties should not be required to bear the administrative cost of the process.

TABLE OF ABBREVIATIONS

ALRC Adversarial Review	Australian Law Reform Commission, <i>Review of the adversarial system of litigation: ADR - its role in federal dispute resolution</i> Issues Paper 25 (June 1998)
Astor & Chinkin	Astor, H. and Chinkin, C., <i>Dispute Resolution in Australia</i> (Sydney, Butterworths, 1992)
Boulle	Boulle, L., <i>Mediation: Principles, Process, Practice</i> (Sydney, Butterworths, 1996)
LBC Dispute Resolution	<i>The Laws of Australia: Dispute Resolution</i> (vol.13) (Sydney, LBC Information Services, loose-leaf).
LRC (WA)	Law Reform Commission of Western Australia, <i>Review of the Civil and Criminal Justice System: The Use of Court-Based or Community Alternative Dispute Resolution Schemes and Alternative Forums for Adjudication</i> Consultation Draft (Project No.92, 30 November 1998)
Massachusetts Report	Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, <i>Report to the Legislature on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court</i> (2 February 1998) (http://www.lawyersweekly.com/matreas/adrcomm.htm).
NADRAC	National Alternative Dispute Resolution Advisory Council
NTLRC Administrative	Northern Territory Law Reform Committee, <i>Report on Appeals from Administrative Decisions</i> Report No. 14 (June 1991)
NTLRC Family	Northern Territory Law Reform Committee, <i>Alternative Dispute Resolution in the context of Family and Other Domestic Disputes</i> (Report No.17B, May 1997)

- Sordo Sordo, B., "Australian Mediation Initiatives to Resolve Matters Awaiting Trial" (1994) *ADRJ* 62-74
- Street Street, L., "Mediation and the Judicial Institution" (1997) *71 ALJ* 794-796

TERMS OF REFERENCE

On 24 June 1991, the Attorney-General referred to the Northern Territory Law Reform Committee for examination and reports the following questions:

1. Is there a need to introduce reforms providing for the use of alternative dispute resolution in the Northern Territory -
 - in relation to civil issues;
 - in relation to criminal issues;
 - both?
2. If so, what are the reforms?
3. If so, what will the reforms require as regards -
 - infrastructure;
 - personnel;
 - training?
4. If so, what will be the estimated cost of these reforms?
5. If so, what are possible sources of funding for these reforms having regard to the sections of the community who will have the benefit of the reforms?

In considering these Terms of Reference and when making its recommendations, the Committee is asked to bear in mind the role of these reforms in Aboriginal communities in the Northern Territory and also the Territory's isolation and distance problems.

The Committee is also asked to bear in mind that the Northern Territory Government, in considering the Committee's recommendations, will have regard to the costs of implementation of any recommendations of the Committee and whether these costs will effectively be justified in meeting the needs of all citizens of the Northern Territory.

REVIEW OF THE REFERENCE

In undertaking the reference, the Law Reform Committee advertised in the *Northern Territory News* and the *Centralian Advocate* asking members of the public to contact the Committee if they were interested in participating in Sub-committees, or in making submissions on the reference or any aspect of it. The Committee subsequently established four Sub-committees comprising Committee members and members of the public to address the reference:

- * civil disputes (including commercial disputes and disputes relating to human rights);
- * disputes involving the criminal law;
- * family and other domestic disputes; and
- * disputes occurring in Aboriginal communities.

The work of these Sub-committees has already resulted in the provision by the Committee of three reports:

Mediation and the Criminal Justice System (Report No. 17A, March 1996);

Alternative Dispute Resolution in the context of Family and Other Domestic Disputes (Report No.17B, May 1997); and

Alternative Dispute Resolution in Aboriginal Communities (December 1997)

This report deals with the remaining issue of alternative dispute resolution in the context of civil disputes.

The Civil Disputes Sub-committee commenced work in 1992. It initially circulated a questionnaire to interstate bodies/organisations involved in ADR, which in 1994 in a revised form was circulated to bodies/organisations in the Territory involved in ADR. In addition, it undertook other consultation and research, but for various reasons its report was delayed. Members of the Sub-committee who prepared the original Report are: Tom Stodulka (Chair), Jenni Daniel-Yee, Tony Fitzgerald, Donald

Hudson, Elizabeth Leahy, Pat McIntyre and Michael Spargo. This Report was further reviewed by Law Reform Committee and some changes made.

In the period since the reference was given there have been substantive developments concerning alternate dispute resolution ('ADR'). These developments represent a commitment by all three arms of Territory Government, namely the Executive, the Judiciary and the Legislature, to the use of alternate dispute resolution methods and structures as part of the processes for resolving civil disputes.

These developments indicate that Government has in many respects resolved its position in relation to a number of the issues on which the Attorney-General originally sought report. The Committee considers that its completion of the remaining element of its reference, that of civil disputes, is best oriented towards an assessment of the qualitative and quantitative outcomes of developments, both within the Territory and elsewhere, of the use of ADR in civil disputes. The Committee notes that its ability to assess these outcomes in the Territory is limited given that it does not have the resources to conduct the necessary qualitative and quantitative research and that, in any event, such an assessment may be premature given the short period within which these reforms have been operating.

Particular issues addressed by the Committee include:

- * identifying possible extension of current ADR processes;
- * clarifying whether persons who conduct ADR should have prescribed qualifications and, if so, the nature of those qualifications and responsibility for their regulation; and
- * the need for community dispute resolution centres.

DEFINITION OF ADR

Although originally ADR was treated as an acronym for Alternative Dispute Resolution, there has been a drift away from this acronym, in that it suggests too strongly that there is a mainstream model of dispute resolution to which it is alternative.¹ Related terms such as Additional, Assisted or Appropriate Dispute Resolution have been used, such that ADR has come to stand not as an acronym but a term in its own right to describe processes for dispute resolution other than litigation.²

It cannot be said that there are any “universally accepted” definitions of ADR or its various emanations.³ However, consistent with the approach of the National Alternative Dispute Resolution Advisory Council (‘NADRAC’), the Committee has considered those processes which seek to resolve disputes which might otherwise be judicially determined, and which nevertheless also involve the intervention of a third party.⁴

NADRAC has categorised such alternative dispute processes as encompassing processes which are facilitative, advisory or determinative:⁵

- * *Facilitative processes* involve the assistance of a third party, generally having no advisory or determinative role. These processes comprise mediation, conciliation and facilitation.

In mediation, a neutral third party (the mediator) will normally attempt to assist the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. Although having no ⁵advisory or determinative role as to the content of the dispute or the outcome

¹ See Mack, K. & Boulle, L., *Overview of Dispute Resolution* (vol.13.1 at 3) in LBC Dispute Resolution; Astor & Chinkin at 69.

² See Mack, K. & Boulle, L., *Overview of Dispute Resolution* (vol.13.1 at 3) in LBC Dispute Resolution.

³ Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 1) in LBC Dispute Resolution.

⁴ NADRAC, *Alternative Dispute Resolution Definitions* (Canberra, March 1997).

⁵ Much of the classification and the description of these processes which follows is drawn from NADRAC, *Alternative Dispute Resolution Definitions* (Canberra, March 1997).

of its resolution, the mediator may advise on or determine the mediation process itself. The nature of mediation may generally be characterised as variously therapeutic, community, co-, shuttle, victim-offender or expert, or by reference to the agency within which the mediation is being undertaken (for example, the Family Court). The functions of a conciliator are similar, although they may also extend to an advisory role on the content of the dispute or the outcome of its resolution. Conciliation is often referred to where the facilitative process arises in a statutory context. The position of a facilitator is also similar to that of a mediator, although the facilitator, having assisted the parties to identify the problems and disputed issues to be resolved, will less commonly become involved in relation to options and alternatives for resolution.

- * *Advisory processes* involve a third party providing advice as to the facts of the dispute, and, on occasion, possible, probable and desirable outcomes and the means of achieving these. These processes encompass investigation, expert appraisal, case appraisal, case presentation, mini-trial and dispute counselling.
- * *Determinative processes* involve a third party who is investigating the dispute making a determination as to its resolution. In some cases, this determination may be enforceable (either internally, by the person or agency making the determination, or externally). Processes involving external enforcement include arbitration, expert determination and private judging. Fact finding, determinative case appraisal and early neutral evaluation are examples of non-enforceable determinative processes.

Any one or more of these processes may be employed in the resolution of a particular dispute. For example, under the *Anti-Discrimination Act* (NT) (Part 6) provision is made for investigation by the Discrimination Commissioner (Divn 2), which may then proceed to conciliation (Divn 3) and perhaps to a hearing by the Commissioner as an enforceable determinative process (Divn 4).

GROWTH OF ADR

Responses to the Committee's questionnaire circulated in 1992 to interstate bodies and organisations involved in ADR indicated that there was a real and growing demand for the provision of these services. In its three previous reports in relation to ADR, the Committee has broadly supported the continuing growth of these processes in the Northern Territory.

This is part of a phenomenon that arose in Australia in the 1980s, and a decade earlier in the United States.⁶ While these processes have enjoyed a popular resurgence in recent years, ADR processes have a long history in our common law system, the *Arbitration Act 1697* (UK) providing a useful example.⁷

However, as interest in the application of ADR continues to grow,⁸ the area remains in a state of flux.⁹ In 1995 the Commonwealth established NADRAC as a mechanism to help coordinate developments in this field.¹⁰ Attempts have also been made to formalise ADR processes through the creation and growth of professional organisations; such as Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Australian Commercial Disputes Centre (ACDC), the Australian Dispute Resolution Association (ADRA) and the Institute of Family Law Arbitrators and Mediators (AIFLAM).¹¹

Growth in interest in the area has also been reflected in the establishment in a number of universities, such as Bond University and the University of Technology Sydney, of special centres concerned with dispute resolution.¹² Legal professional

⁶ Noted in Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 1) in LBC Dispute Resolution.

⁷ See further Astor & Chinkin at 5-6.

⁸ NADRAC, *Annual Report 1997-98* at 1.

⁹ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 6) in LBC Dispute Resolution.

¹⁰ Noted in Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 6) in LBC Dispute Resolution.

¹¹ See, e.g., Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 6) in LBC Dispute Resolution; ALRC Adversarial Review 2.7-2.8.

¹² Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 6) in LBC Dispute Resolution.

bodies around Australia have also sought to foster ADR processes,¹³ including in the Northern Territory through the Access to Justice Committee of the Law Society.¹⁴

Within the Territory, the Institute of Arbitrators also operates a branch and LEADR a chapter¹⁵, while the Mediation Association of the Northern Territory Inc. has been established for the purpose of accreditation and limited self-regulation of mediators and others practising ADR.

ADR is now also widely recognised in formal legislative contexts;¹⁶ in the Northern Territory examples include the *Local Court Act* (s.16), *Work Health Act* (s.91B) and *Lands and Mining Tribunal Act* (s.36). Acceptance of ADR has proceeded to a point where questions about its use are today more concerned with the most effective and appropriate models, than with the use of ADR itself.

¹³ See ALRC Adversarial Review at 2.8.

¹⁴ Increased use of ADR is part of the Law Society's Mission Statement (28 January 1999)

¹⁵ See *LEADR Brief* (1999) (1) at 14.

¹⁶ For example, see a summary of Queensland legislation containing ADR provisions in Wade, J., "Current Trends and Models in Dispute Resolution: Part II" (1998) 9 *Australian Dispute Resolution Journal* 113-128 at 119-122.

CURRENT USE OF ADR IN CIVIL DISPUTES

While ADR processes may be community driven through private professional and community organisations, they are now also in many cases court-annexed. The question arises “whether the introduction of ADR programs would be most effective in the long term, as State run programmes, through the courts or as community driven programs through professional organisations”¹⁷, or as a combination of both.

USE OF ADR IN COURTS

Within the last 10 years, ADR in its many forms has become annexed to court practice in most courts throughout Australia.¹⁸ Court annexed mediation refers to “any situation in which the parties to a dispute are ordered, encouraged or voluntarily referred to mediation by court personnel before their matter proceeds to a hearing”.¹⁹ These processes are often part of the court’s case flow management system.²⁰ They may be offered by the judicial officers themselves, or by court staff or external professionals. While they may take a variety of forms, it is thought that the use of “settlement weeks”, in which ADR is emphasised while regular court sittings are suspended, is unlikely to be continued by the various jurisdictions which have utilised the concept,²¹ given the introduction of other forms of court-annexed mediation.²²

NORTHERN TERRITORY COURTS

Supreme Court

Order 48 of the Supreme Court Rules was amended in 1994 to provide for a more efficient method of case-flow management. In particular, Order 48 .14(2) provides that a settlement conference is to be held before the Master as mediator or before a

¹⁷ Sordo at 73.

¹⁸ See the detailed discussion in Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 22ff) in LBC Dispute Resolution; Boule at 186ff; Sordo.

¹⁹ Boule at 186.

²⁰ See Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 22) in LBC Dispute Resolution.

²¹ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 31) in LBC Dispute Resolution.

²² Boule at 195.

mediator appointed by the Judge or the Master. Under order 48.14(9), the Master is required to keep a list of suitably qualified (although the nature of this qualification is not specified) persons willing to act as mediators. Except with the parties' consent, evidence of matters discussed at a settlement conference are not admissible (other than to prove a settlement) in a court (Order 48.14(8)) and their confidentiality must be respected by the mediator (Order 48.14(13)).

The Supreme Court is also involved in other statutory ADR processes. For example, in proceedings involving a co-operative, the Court may give directions about the conduct of the proceedings, including requiring mediation (*Co-operatives Act* (NT), s.99(1)(b)).

Local Court

The *Local Court Act* provides for the Court to order referral of a proceeding to a pre-hearing, mediation or arbitration conference (s.16(1)).

The Local Court Rules provides for the Court at a conciliation conference (Order 32.04(2)) or pre-hearing conference (Order 34.06(2)) to conciliate between the parties or refer the parties to a mediation conference. It is compulsory for the parties to participate in the mediation (Order 32.07(3)). The mediation is conducted by an officer of the Court (eg Registrar or Judicial Registrar) or by a mediator from a list of mediators maintained by the Court (Order 32.07(2)). Except with the parties' consent, evidence of matters discussed at a mediation conference are not admissible (other than to prove a settlement) in a court and their confidentiality must be respected by the mediator (Order 32.11).

The Local Court is also involved in other statutory ADR processes. For example, in an application with respect to the *Cullen Bay Marina Act* (NT), the Court may attempt to settle the proceedings between the parties by the processes of mediation and arbitration (s.12E(2)(a)).²³

²³ See also, e.g., *Unit Titles Act* (NT), s.106(4)(a).

Small Claims Court

The Small Claims Rules provide that at a prehearing conference, the Court may arbitrate the dispute, conciliate or mediate between the parties, or refer the parties to a mediation conference (rule 18.04). Except with the parties' consent, evidence of matters discussed in the course of conciliation or mediation during a prehearing conference are not admissible (other than to prove a settlement) in a court (rule 18.08).

Work Health Court

In the context of claims for compensation under the *Work Health Act* (NT), the Work Health Court must before proceeding to hear a matter hold a conference with the parties (s.106), at which it shall attempt to resolve the matter and questions at issue by conciliation (s.107).

There is further provision under the *Work Health Act* for the appointment of mediation officers (s.91B(1)). A worker aggrieved by the decision of his or her employer (either to dispute liability for compensation claimed by the worker, or to cancel or reduce compensation being paid to the worker) may apply to a mediation officer to mediate in the dispute (s.91B(2)). Matters arising in the mediation are not admissible in any other proceedings under the Act (S.91B(4)).

This provision was introduced in 1994 as a result of recommendations made by the Work Health Dispute Resolution Review Committee established by the Minister for Work Health and Territory Insurance. It is intended to provide for the mediation of disputes between workers and employers (represented by the employer's insurance company). A survey of participants carried out by the Work Health Authority after 12 months of operation of the provision suggested that the program was operating successfully.

It may be noted that provision for the use of ADR has not uniformly been made in relation to all Territory courts. For example, no such provision is made in relation proceedings before the Family Matters Court (established under the *Community Welfare Act* (NT)) or a warden's court (established under the *Mining Act* (NT)). The

Committee has previously made recommendations about the use of ADR in the context of the *Community Welfare Act* (NT), including that the Act be amended so that participative case management and family group conferencing are recognised as the preferred approach.²⁴

NON-COURT ANNEXED ADR

ADR is used in a range of non-court annexed environments. Government agencies, tribunals, and private professional and community organisations offer ADR in a variety of non-court contexts.

GOVERNMENT AGENCIES AND TRIBUNALS

Significant advances in consumer protection, particularly since the 1980s have resulted in a series of major changes in approaches to administrative review. As reflected in the Territory, these reforms have included the establishment of bodies such as the Ombudsman, the Anti-Discrimination Commissioner and administrative review tribunals, e.g. Lands and Mining Tribunal. Consistent with the Committee's recommendation in its *Report on Appeals from Administrative Decisions* that procedures be included in a system of administrative review to enable parties to come together to arrive at their own solutions,²⁵ more recent systems for review tend to rely more heavily on mediation/conciliation approaches and may have these specifically laid down as a formal part of the system.

The *Lands and Mining Tribunal Act* (NT), for example, makes specific provision for the appointment by the Tribunal of a mediator (s.36). Many statutory tribunals around Australia are allowed or required to use mediation or conciliation processes in dispute resolution.²⁶ These processes were introduced into the Commonwealth Administrative Appeals Tribunal, for example, as early as 1991.²⁷ Indeed, mediation

²⁴ NTLRC Family (esp. at 23).

²⁵ NTLRC Administrative at 29 (Recommendation No. 29).

²⁶ Boule at 206.

²⁷ ALRC Adversarial Review at 3.63.

is the primary process by which the National Native Title Tribunal resolves disputes.²⁸

Statutory provision for the use of mediation (and other ADR processes) is not limited to court- or tribunal- annexed structures. It has already been noted, for example, that under the *Anti-Discrimination Act* (NT) (Part 6) provision is made for investigation by the Discrimination Commissioner (Divn 2), which may then proceed to conciliation (Divn 3) and perhaps to a hearing by the Commissioner as an enforceable determinative process (Divn 4).²⁹

Other areas of government also utilise ADR under statutory processes. Provision is made, for example, under the *Adoption of Children Act* (NT) for the Minister to provide counselling or mediation for the purposes of resolving access or information disputes at the request of either the relinquishing or adoptive parents (s.86).

OTHER STATUTORY ADR PROCESSES

Nor is statutory provision for non-court annexed ADR limited only to the processes of government agencies and tribunals. Under the *Commercial Arbitration Act* (NT), the parties to an arbitration agreement may (before or after proceeding to arbitration, and whether or not continuing with the arbitration) seek settlement of a dispute between them by mediation, conciliation or similar means, or may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire) (s.27(1)).³⁰

These processes under the *Commercial Arbitration Act* (NT) are voluntary. However, in some cases, the provision is compulsory. For example, under the *Merlin Project Agreement Ratification Act 1999* (NT), a party shall not commence court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute concerning the Agreement unless the parties have first attempted to resolve the dispute or agree on a process to resolve it without court proceedings

²⁸ ALRC Adversarial Review at 3.62.

²⁹ See also, e.g., the use of conciliation by the Dental Board under the *Dental Act* (NT), s.29(1)(b) and the Review Board under the *Northern Territory Employment and Training Authority Act* (NT), s.73(b)(i).

³⁰ See also, e.g., the use of conciliation by the Law Society under the *Legal Practitioners Act* (NT), s.47(1)(b).

(for example, through arbitration, mediation, conciliation, executive appraisal or independent expert determination)(s.17(4)).

OTHER NON-STATUTORY ADR PROCESSES

In many cases, ADR processes are adopted in the absence of statutory provision. Some of these industry and community schemes operate throughout Australia, such as the Telecommunications Industry Ombudsman, the Life Insurance Complaints Service, the General Insurance Enquiries and Complaints Scheme and the Australian Banking Industry Ombudsman.³¹ Other contexts in which ADR processes are being applied in a non-statutory context include:

- * family disputes, especially in the context of mediation. This has already been dealt with by the Committee in an earlier report;³²
- * commercial disputes (in particular in the building and construction industry), through private bodies such as the Australian Commercial Dispute Centre and the Institute of Arbitrators Australia;
- * personal injury disputes; and
- * neighbour and more broad community-based disputes.

Commercial disputes

While alternatives to litigation in commercial disputes have had a long history, there has been a growing push to introduce options beyond arbitration (which has become perceived to be highly judicialised and increasingly expensive and complex).³³ This has also been reflected in the building and construction industry,³⁴ which has resulted in a greater emphasis on dispute avoidance by such processes as partnering and codes of practice.³⁵

³¹ See a fuller consideration of this issue in ALRC Adversarial Review at 5.8ff.

³² NTLRC Family.

³³ Boule at 214. See also Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 33) in LBC Dispute Resolution.

³⁴ Boule at 215.

³⁵ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 34) in LBC Dispute Resolution.

Personal injury disputes

Personal injury disputes may be viewed as unlikely vehicles for ADR, commonly having features such as:³⁶

- * an inequality of bargaining power between the injured party and the insurer;
- * no continuing relationship between the parties;
- * concerning only a single issue, damages;³⁷ and
- * where liability is in issue, there being questions of law and evidence to be adjudicated.³⁸

Nevertheless, in practice personal injury disputes appear to be often considered suitable for the application of ADR³⁹ and, in both court-annexed and institutionalised mediation schemes, "a relatively high proportion of mediated cases are personal injury disputes".⁴⁰ This interest may flow from delays in the litigation and concerns about the unpredictability of its outcome.⁴¹

Community dispute resolution

In 1993, the Committee found that 88% of respondents to a questionnaire it circulated to persons and organisations in the Northern Territory with some involvement or interest in ADR felt that there was scope for an extended role for ADR in the Territory. In particular, respondents supported the establishment of an ADR service to deal with minor civil disputes. While there have been significant advances in the use of ADR processes in the Territory since that time, it is in this area of minor dispute resolution that there is most scope for further development of ADR processes. The most substantial differences between the ADR services provided in

³⁶ See generally Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 35) in LBC Dispute Resolution.

³⁷ These first three factors appear in the context of mediation in Boule at 216.

³⁸ This factor appears in the context of mediation in Steer, L., "Personal Injury Mediation: Implications for the Application of Formal Mediation Techniques" (1997) 8 *ADRJ* 125-132 at 129.

³⁹ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 35) in LBC Dispute Resolution

⁴⁰ Boule at 216.

⁴¹ Boule at 216. See further Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 35) in LBC Dispute Resolution.

the Northern Territory and in other jurisdictions is in the context of community dispute resolution.

Community dispute resolution centres offering mediation services have been established in every State in Australia and in the ACT,⁴² although they do not in all cases enjoy a legislative foundation⁴³ and do not presently exist at all in the Northern Territory. These centres focus particularly on neighbourhood disputes,⁴⁴ although broader neighbourhood issues and activities with respect to schools and other community organisations have also been the subject of mediation.⁴⁵ They usually rely on referrals from bodies such as the police, courts and legal aid.⁴⁶

It may be said that the centres have two distinct roles:⁴⁷

- (i) improving relationships - by providing a process to encourage citizens to take responsibility for their own interactions with each other and particularly neighbours, thus reducing the need for formal police or other legal intervention; and
- (ii) empowering people - by maximising the possibilities for resolving disputes in ways of their own choosing some of which might not otherwise be formally available from the legal system itself.

While these centres may be cynically attacked as merely a means by which the State can avoid the provision of traditional community services (such as the courts),⁴⁸ they have been widely and successfully used.⁴⁹ They are relatively cheaper than traditional forms of litigation and being locally-based are readily accessible.⁵⁰ Moreover, while there is at present in the Northern Territory no co-ordinated service clearly identifiable to the community as available for dispute resolution through

⁴² See Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁴³ Cf. *Community Justice Centres Act 1983* (NSW); *Dispute Resolution Centres Act 1990* (Qld). There is also specific evidential provision in some cases: see, e.g., *Evidence Act 1958* (Vic), Part 1, Divn 8.

⁴⁴ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁴⁵ Boule at 222.

⁴⁶ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁴⁷ Noted in Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁴⁸ Noted in Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁴⁹ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

⁵⁰ Mack, K. & Boule, L., *Overview of Dispute Resolution* (vol.13.1 at 37) in LBC Dispute Resolution.

mediation, there are various community organisations interested in providing a mediation service to members of the public.

The need for and appropriateness of establishing community mediation centres in the Northern Territory has been recently explored in a paper, *Community Mediation Centres: A discussion paper* (February 1999) (annexed to this report), prepared by Mr Tony Fitzgerald for the Northern Territory Attorney-General's Department. Mr Fitzgerald, Senior Mediator/Co-ordinator, Resolve, is a member of the Committee's Sub-committee which considered the use of alternative dispute resolution in the context of civil disputes. The Committee endorses all aspects of that paper and its recommendations, in particular the general proposal for the establishment of a government funded Community Mediation Centre in Darwin. These recommendations address issues of infrastructure, personnel and training, as well as the estimated costs and sources of funding for this reform.

Recommendation 1

The Committee endorses the annexed paper, *Community Mediation Centres: A discussion paper* (February 1999) prepared by Mr Tony Fitzgerald for the Northern Territory Attorney-General's Department, in particular the general proposal for the establishment of a government funded Community Mediation Centre in Darwin.

Without seeking to limit the range of disputes which might be mediated, the Committee also suggests the following as suitable:

- Cultural differences;
- Children or children's behaviour;
- Fences and boundaries;
- Debts;
- Harassment;
- Landlord and tenant;

Planning and environmental disputes. A statutorily-mandated mediation scheme is proposed in the planning appeals process as part of the current review of the *Planning Act*;⁵¹

Strata title disputes;

De-facto relationship property disputes; and

Consumer affairs disputes, involving retailers or suppliers and buyers.

⁵¹ Ministerial Statement by the Minister for Lands, Planning and Environment (Hansard, N.T. Legislative Assembly, 3 December 1998). On the appropriateness of ADR in the planning context, see Tow, D. and Stubbs, M., "The Effectiveness of Alternative Dispute resolution Methods in Planning Disputes" (1997) 8 *ADRJ* 267-281.

EVALUATION OF CURRENT ADR PROCESSES

Any evaluation of the impact of current Territory ADR processes and likely benefits of further development in the use of ADR can only be undertaken against some criteria for success or failure. The Australian Law Reform Commission has recently commented that there are two principal reasons for incorporating ADR into the litigation system:⁵²

- * to enhance access and participation in appropriate dispute resolution services; and
- * to reduce costs and delays in court and tribunal proceedings.

As noted by the Commission,⁵³ the first objective is concerned with the general use of ADR for dispute resolution, the second focuses more specifically on the use of ADR to enhance court and tribunal based dispute resolution.

The evaluation of ADR processes may differ according to the emphasis placed on each of these objectives. In particular, it has been argued that the objectives of ADR are not (as are judicial processes) about achieving substantive justice as between the parties. It is a "social mechanism for the resolution of disputes, ... it is not an exercise in the administration of justice".⁵⁴ On the other hand, there is a concern that ADR processes should be "capable of providing fair and appropriate outcomes for all user groups".⁵⁵ This tension makes it difficult to clearly identify appropriate measures of success for ADR.

Other difficulties in attempting an evaluation of the success of ADR processes include that:

- * an assessment of the use of ADR in the Territory may be premature given the short period within which these reforms have been operating;

⁵² As stated in the ALRC Adversarial Review at 2.51.

⁵³ ALRC Adversarial Review at 2.52.

⁵⁴ Street, L., "Mediation and the Judicial Institution" (1997) 71 *ALJ* 794-796 at 795.

⁵⁵ NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution* Discussion Paper (Canberra, November 1997) at 2. See further Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 80-1) in LBC Dispute Resolution.

- * even nationally, baseline information necessary for quantitative assessments of matters such as user rates or settlement/resolution rates are either inadequate or non-existent;⁵⁶ and
- * since some of the claimed benefits of ADR are intangible, they are not readily susceptible of empirical measurement.⁵⁷

What empirical evaluation has been undertaken has been described as "inconclusive".⁵⁸ Indeed, in one recent U.S. study of mediation and neutral evaluation programs, it was merely concluded that while they "are not a panacea for perceived problems of cost and delay, .. neither do they appear to be detrimental".⁵⁹ The study concluded that its finding that ADR has no significant effect on time or cost is generally consistent with the results of prior empirical research on court-related ADR.⁶⁰ On the other hand, another recent study in the U.S. (Massachusetts), having comprehensively reviewed the numerous studies done in the past 20 years of the impact of court-connected ADR, reached the following conclusions:-⁶¹

ADR PRODUCES HIGH USER SATISFACTION

The Massachusetts Review found that the "studies and evaluations that have been conducted provide overwhelming support for the finding that participants in ADR are comfortable and satisfied with the process compared with litigation".⁶² The Review noted that "parties often choose ADR because it gives them greater control over the outcome of the dispute and find that outcomes of ADR are uniquely satisfactory because they are tailored to the complex interests underlying the dispute".⁶³

⁵⁶ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 78) in LBC Dispute Resolution.

⁵⁷ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 79) in LBC Dispute Resolution.

⁵⁸ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 77) in LBC Dispute Resolution. A recent summary of evaluations of ADR processes appears in ALRC Adversarial Review at Appendix D. See also Hensler, D., "Does ADR Really Save Money? The Jury's Still Out?" (11 April 1994) *National Law Journal* C2-C3, C5.

⁵⁹ Kakalik, J et al, Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (internet: www.rand.org/publications/MR/MR800/index.html).(1996) ch.5.

⁶⁰ Kakalik, J et al, Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (internet: www.rand.org/publications/MR/MR800/index.html).(1996) ch.5.

⁶¹ Massachusetts Report.

⁶² Massachusetts Report.

⁶³ Massachusetts Report.

On the other hand, although it is generally accepted that evaluation in the context of mediation has shown generally high levels of satisfaction and settlement rates,⁶⁴ reservations have been expressed about the Australian studies in this area.⁶⁵ A particular concern is that "[s]atisfaction is not ... an adequate measure of the substantive fairness of outcomes" as parties "may be unaware of the assets or choices available or their legal entitlements".⁶⁶ This concern is enlivened by the "consensual nature of mediation and the neutral role of the mediator" which "can create a danger that the outcome of a mediation will simply reflect any imbalance in the power relationship between the parties".⁶⁷

On the other hand, the Committee agrees with the view that "[l]itigant satisfaction is, arguably, the only relevant and certainly the only practical criterion by which the *quality* of non-adjudicated outcomes can be evaluated".⁶⁸ In that regard, the Committee considers it relevant that responses to its questionnaire circulated in 1992 indicated that participants in ADR processes were generally very satisfied with the result and the process and, as a result of their participation, developed and/or enhanced their problem solving skills, enabling them to better deal with future conflicts.

ADR IMPROVES PACE OF LITIGATION

The Massachusetts Review found that the "studies and evaluations reviewed ... support the view that ADR can improve the pace of litigation".⁶⁹

⁶⁴ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 77) in LBC Dispute Resolution; Boule at 256-7. See, e.g., Delaney, M. & Wright, T, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation* (Justice Research Centre, January 1997).

⁶⁵ Noted in Boule at 257-8 and see an assessment of satisfaction as a measure of ADR success in Singer, R., "The Rolling Stones Revisited: Exploring the Concept of User Satisfaction as a Measure of Success in Alternative Dispute Resolution" (1995) 6 *ADRJ* 77-92.

⁶⁶ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 79) in LBC Dispute Resolution.

⁶⁷ ALRC Adversarial Review at 4.66.

⁶⁸ Delaney, M. & Wright, T, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation* (Justice Research Centre, January 1997) at 6.

⁶⁹ Massachusetts Report.

ADR PRODUCES HIGH SETTLEMENT RATES

The Massachusetts Review also found that "across all types of ADR programs, high settlement rates are consistently reported", with the only exception being mediation in the context of medical malpractice.⁷⁰

ADR PRODUCES MORE STABLE AGREEMENTS OVER TIME

Another desirable effect of ADR found by the Massachusetts Review is the "production of agreements and settlements that will be more stable over time compared with litigated settlements" - "parties often find that agreements reached through consensual ADR processes (such as mediation, conciliation and case evaluation) are more durable and result in greater compliance than agreements imposed by a judge".⁷¹ That mediation may promote compliance and more durable settlements⁷² may be due to the empowering nature of the process, designed particularly to ensure parties negotiate between themselves.

The Australian Law Reform Commission has commented that if this is in fact so, mediated resolutions might result in a reduction in directions and orders seeking writs and garnishment notices.⁷³ This might also suggest that mediation is particularly suited where there are litigants in person, in disputed debt matters, guarantee cases (where quantum is the primary issue) and other contractual disputes,⁷⁴ or in cases involving a conflict in an ongoing relationship (such as cases involving families, landlords and tenants, neighbors and business associates).⁷⁵

On the other hand, there is a view that ADR processes would not be appropriate where "there is a need for public sanctioning of conduct, a public declaration of rights, or the establishment of precedent; when repetitive violations need to be dealt with collectively and uniformly; or when a party or parties are not able to negotiate

⁷⁰ Massachusetts Report.

⁷¹ Massachusetts Report.

⁷² ALRC Adversarial Review at 2.56.

⁷³ ALRC Adversarial Review at 2.57.

⁷⁴ ALRC Adversarial Review at 2.58.

⁷⁵ Massachusetts Report.

effectively because of a power imbalance or for any other reason".⁷⁶ Other factors which the Australian Law Reform Commission has suggested may indicate that ADR processes are not suitable in resolving a dispute include:⁷⁷

- * when the matter significantly affects persons or organisations who are not parties to the ADR process; and in family law matters, where there has been a history of family violence.

For further discussion the Committee refers to the NADRAC Reports of:

March 1997 (Primary Dispute Resolution in Family Law) and March 2000 (Development of Standards for ADR – Discussion Paper).

ADR MAY REDUCE COURT WORKLOAD

The Massachusetts Review found that not only are findings "generally mixed regarding reducing court workload", but in any event "evaluations may have overstated reductions in court costs and workloads".⁷⁸ On the other hand, there is some evidence of appreciable savings in the context of small claims.⁷⁹

ADR MAY REDUCE LITIGANT COSTS

While acknowledging the difficulties of quantitatively assessing reductions in litigant costs, the Massachusetts Review found that studies which have surveyed lawyers and litigants as to whether ADR saved money have found a cost saving to litigants.⁸⁰ The Australia Law Reform Commission, on the other hand, has concluded that while ADR can be less expensive than litigation where agreement is reached, in the absence of agreement ADR can actually make dispute resolution more expensive if the matter is then litigated.⁸¹

Of course, the use of ADR may have the effect of increasing the number of cases which do settle. A recent U.S. study concluded that a plausible explanation for the

⁷⁶ Massachusetts Report. On considerations relevant to the development of guidelines about whether a dispute is best suited to ADR, see further LRC (WA) at 9-10.

⁷⁷ ALRC Adversarial Review at 5.6. See further Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 74) in LBC Dispute Resolution.

⁷⁸ Massachusetts Report.

⁷⁹ Massachusetts Report.

⁸⁰ Massachusetts Report.

⁸¹ ALRC Adversarial Review at 2.68.

fact that mediation programs appear to increase the likelihood of a monetary settlement was that the mediation process increases the number of cases that settle rather than being dropped or decided by a judge on the basis of motions: "[w]hen parties reach an agreement and settle the case, that disposition is likely to involve a monetary outcome."⁸²

While ADR may achieve cost savings in a particular dispute successfully resolved, it does not follow that this will necessarily result in cost savings to the community generally in dispute resolution. It has been commented that assuming ADR achieves reductions in delays and costs, it can be expected that there would be a consequent increase in the utilisation of dispute resolution processes in the community.⁸³ This may actually increase the total community costs of dispute resolution, offset by the fact that the resolution of these further disputes would not previously have been sought for want of an appropriate mechanism and forum.⁸⁴

The Massachusetts Review concluded that:

"most of the compelling reasons for providing court-connected ADR are qualitative. In addition to these reasons, however, there is some evidence that, as part of an integrated case management system, ADR can and does save time and money for the public and can help the courts to operate more efficiently."⁸⁵

The Committee notes its own findings in responses to its questionnaire circulated in 1992 that mediation can provide quicker, more efficient, less costly and more satisfactory resolution of a wide range of disputes.

Moreover, although the Australian Law Reform Commission has recently allowed that "there is no conclusive evidence about the costs and benefits of court related ADR", it has also concluded that studies suggest that there are significant benefits for

⁸² Kakalik, J et al, Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (internet: www.rand.org/publications/MR/MR800/index.html).(1996) ch.5.

⁸³ Innes, P., "Price Isn't Everything" (December 1997) 17(11) *Proctor* 12-13 at 13, quoting Professor Ted Wright, Director, Justice Research Centre, Sydney.

⁸⁴ See Hensler, D., "Does ADR Really Save Money? The Jury's Still Out" (11 April 1994) *National Law Journal* C2-C3, C5 at C3.

⁸⁵ Massachusetts Report.

some types of disputes.⁸⁶ The Commission also found that ADR may be better suited and a more cost effective alternative in certain types of cases, for example where the case is large and factually complex.⁸⁷ On the other hand, it has been argued that in the context at least of construction industry disputes, litigation may actually be preferred to arbitration in larger, more complex disputes.⁸⁸

Professor John Wade, Director of the Dispute Resolution Centre at Bond University, has concluded that many surveys in Australia and the United States have consistently shown that:

"highly trained, debriefed, *problem-solving* mediation services (especially in family and workers compensation disputes), staffed by well-paid mediators, who use an intake process, are consistently successful in that they have moderate to very high

- (a) levels of settlement;
- (b) durability of settlement (the 'stickability' factor);
- (c) customer satisfaction in that the customers would use these services again and would refer friends;
- (d) customer satisfaction in that the customers say: 'I was listened to', 'I had a sense of control'. ...
- (e) numbers of settlements which were in the range of objective outcomes as advised by the parties' lawyers; and
- (f) preservation (and even restoration) of the disputants' ability to talk to one another in the future".⁸⁹

⁸⁶ ALRC Adversarial Review at 2.66.

⁸⁷ ALRC Adversarial Review at 2.67.

⁸⁸ Palser, D., "Arbitration v Litigation" (April 1996) 47 ACLN 4-5.

⁸⁹ Wade, J., "Current Trends and Models in Dispute Resolution: Part II" (1998) 9 *Australian Dispute Resolution Journal* 113-128 at 115.

OPPORTUNITIES FOR FURTHER DEVELOPMENT AND REFORM

In the context of its endorsing the recommendations in Mr Fitzgerald's annexed paper for the establishment of a government funded Community Mediation Centre in Darwin, the Committee has addressed issues of infrastructure; personnel and training, as well as the estimated costs and sources of funding for this reform. The Committee makes a number of further recommendations of a more general nature about the appropriate use of ADR in the context of civil disputes.

STANDARDS AND ACCOUNTABILITY

Standards and accountability are an important current issue in ADR. They may be promoted by a variety of means, ranging from self-regulation and consumer education through to strict government statutory regulation. In industry generally, government has in recent years fostered de-regulation and ultimate self-regulation wherever practicable. Improved consumer awareness and access to justice are but two of many developments that have supported these reforms. The perceived community benefits of ADR, reflected in its ongoing growth over the past decade, is arguably another. The Committee considers that any proposals for the regulation of ADR itself should also be developed within this broader framework.

The Committee has previously recommended that mediators and conciliators in the area of family and domestic disputes require training additional to the training of other mediators in that they require particular knowledge of the problems relating to family as opposed to other disputes and a knowledge of the legal issues which occur in this area.⁹⁰ The Committee left open on that occasion what should be appropriate requirements generally for the regulation, accreditation and training of mediators.⁹¹ These issues in the context of mediators and other "ADR neutrals"⁹² have been the subject of a number of reports and recommendations over the years.⁹³ The focus of these past examinations has been upon mediation.⁹⁴ Although the Committee

⁹⁰ NTLRC Family, rec. 14.

⁹¹ NTLRC Family at 35.

⁹² As termed in the ALRC Adversarial Review.

⁹³ These are detailed in ALRC Adversarial Review at 7.1 (fn1).

⁹⁴ Noted in ALRC Adversarial Review at 7.2.

acknowledges that there are other ADR processes, it has adopted a similar focus given the significance of mediation in the ADR context.

ACCREDITATION AND TRAINING

The key, identified by Professor Wade earlier in this paper, to the success of mediation is the training possessed by the mediator - "there are many anecdotes that untrained lawyer-mediators, with a few notable exceptions, who use a settlement or evaluative model of mediation have low levels of customer satisfaction".⁹⁵ Indeed, insofar as ADR operates in an interest (rather than rights) based environment, legal qualifications should not necessarily be required.⁹⁶

In the U.S. context, it has been suggested that:

"No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful neutrals come from many different backgrounds. Research has shown that the optimal way to qualify mediators is on the basis of performance, knowledge and skills, rather than by degree-based criteria".⁹⁷

In this regard, consistent with its recommendation in the context of family disputes that any mediators used by the Family Matters Court be qualified not only as mediators but also have special training in family group conferencing,⁹⁸ the Committee considers that no one set of training standards will necessarily be sufficient for all types of mediation or other ADR process. The mediator must be sufficiently well trained to gain the confidence and maintain the respect of the parties, to assist them in the flow of their own communication and in particular to reframe barbed comments, to isolate the issues, to reality test solutions, and above all to maintain impartiality and an unbiased position in relation to the dispute.

⁹⁵ Wade, J., "Current Trends and Models in Dispute Resolution: Part II" (1998) 9 *Australian Dispute Resolution Journal* 113-128 at 115.

⁹⁶ See further LRC (WA) at 44.

⁹⁷ Alaska Judicial Council, *Alternative Dispute Resolution in the Alaska Court System* (December 1997) (<http://www.ajc.state.ak.us/Reports/adrmmain.htm>).

⁹⁸ NTLRC Family, rec.10.

Recommendation 2

While the Committee recognises that no one set of training standards will necessarily be sufficient for all types of mediation, the mediator must be sufficiently well trained to gain the confidence and maintain the respect of the parties, to assist them in the flow of their own communication

The other side of the training coin is accreditation. "Accreditation" has been described as an indication that "an occupational group or public body recognises that an individual has successfully completed a prescribed course of education or training and meets certain levels of performance".⁹⁹

There is some degree of statutory accreditation of mediators in Australia. For example, statutory provision is made for the accreditation of mediators employed by community justice and dispute resolution centres in both Queensland and New South Wales respectively.¹⁰⁰ However, private mediators are currently only regulated where they are also members of some professional organisation that has established a regulatory scheme for its members offering mediation services.¹⁰¹ This reflects the position with respect to ADR neutrals generally.¹⁰² Moreover, while many professional organisations maintain panels of mediators trained and accredited under their own schemes, the schemes differ significantly¹⁰³ with no national system having yet been established¹⁰⁴ or national body to oversee standards development.¹⁰⁵

The continuing growth in the use of ADR processes calls for minimum training and accreditation standards.¹⁰⁶ In so far as these processes are statutorily mandated, the need is even more pressing.

In the context of mediation, the Committee recommends the structure adopted under the recently enacted *Mediation Act 1997 (ACT)*. Under that Act, applications for

⁹⁹ Boule at 232.

¹⁰⁰ *Community Justice Centres Act 1983 (NSW)*, s.11; *Dispute Resolution Centres Act 1990 (Qld)*, s.19.

¹⁰¹ Boule at 226.

¹⁰² ALRC Adversarial Review at 7.5.

¹⁰³ ALRC Adversarial Review at 7.21. Ad description of a number of schemes appears at 7.22ff.

¹⁰⁴ Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 41) in LBC Dispute Resolution; Boule at 232.

¹⁰⁵ ALRC Adversarial Review at 7.10.

¹⁰⁶ A similar point appears in ALRC Adversarial Review at 7.9.

registration may be made to any body or organisation declared by the regulations to be an approved agency for the purposes of this Act (ss.3, 5). LEADR, for example, has been granted such approved agency status as one of a small number of authorised accrediting bodies under the Act.¹⁰⁷ An approved agency may only grant registration on fulfillment of certain preconditions, in particular that it is satisfied that the applicant has achieved the prescribed standards of competency (s.5(2)(b)). Registration will normally run for a period of only 3 years (s.6) but may be renewed (s.7).

Recommendation 3

In the context of mediation, the Committee recommends the adoption of the accreditation structure under the *Mediation Act 1997* (ACT), providing for applications for registration to be made to approved agencies, which may only grant registration on fulfillment of certain preconditions, in particular that the applicant has achieved the prescribed standards of competency.

STANDARDS

As mentioned earlier, Australian governments have so far generally preferred industry self-regulation of mediation (through codes of conduct and general guidelines) to direct statutory regulation.¹⁰⁸ But the continuing trend in recent years towards the development of codes of conduct and guidelines for mediators¹⁰⁹ reflects the growing “professionalisation” of mediation.¹¹⁰ Nevertheless, there are no national standards in respect of mediation or other ADR processes.¹¹¹

These codes of conduct normally have only a guiding status, although one form of (indirect) sanction is a liability not to be re-accredited (or registration renewed) in the absence of compliance with the code.¹¹² Legal practitioners, practising as mediators,

¹⁰⁷ Noted in *LEADR Brief* (1999) 9(1) at 1.

¹⁰⁸ Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 47) in LBC Dispute Resolution.

¹⁰⁹ See these discussed in Boule at 236-7; Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 47ff) in LBC Dispute Resolution.

¹¹⁰ Boule at 236.

¹¹¹ ALRC Adversarial Review at 8.8.

¹¹² Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 48) in LBC Dispute Resolution. 112a NADAMS – “the Development of Standards for ADR – Discussion Paper – March 2000 – pp 23-28

still come under the discipline of their professional bodies. It would be unsatisfactory if there were not ultimately standards applying to all mediators.

The Committee is of the view that there is now clearly a need to develop standards applicable to all mediators and enforceable by appropriate sanctions.

In March 2000 a NADRAC Discussion Paper set out the pros and cons of the need for standards in ADR and concluded:

“NADRAC is of the view that the development of standards would permit promotion of the objectivew of ADR, minimise dissatisfaction with its operation, promote service provider and practitioner accountability and promote the appropriate use of ADR”^{112a}

Recommendation 4

The Committee recommends that standards for mediators be developed capable of enforcement by appropriate sanctions.

The Committee also recommends that any standards developed address the following matters identified by the Australian Law Reform Commission as common to most standards developed in the context of ADR:¹¹³

- * a definition of the ADR process to which the standard applies;
- * the role or function of the ADR neutral;
- * the conduct of the ADR process, in particular addressing procedural issues. These may vary significantly in the context of different ADR processes;
- * the ADR neutral's responsibility to the parties, including the duty to maintain impartiality, neutrality, confidentiality and to avoid conflicts of interest;
- * the ADR neutral's responsibility to other ADR practitioners;

^{112a} NADAMS – “the Development of Standards for ADR – Discussion Paper – March 2000 – pp 23-28

¹¹³ ALRC Adversarial Review at 8.11.

- * the ADR neutral's responsibility to the organisation providing the ADR service; and
- * the responsibilities of the parties to each other and to the process, such as confidentiality.

Recommendation 5

The Committee recommends that standards developed address the following matters:

- * a definition of the ADR process to which the standard applies;
- * the role or function of the ADR neutral;
- * the conduct of the ADR process, in particular addressing procedural issues. These may vary significantly in the context of different ADR processes;
- * the ADR neutral's responsibility to the parties, including the duty to maintain impartiality, neutrality, confidentiality and to avoid conflicts of interest;
- * the ADR neutral's responsibility to other ADR practitioners;
- * the ADR neutral's responsibility to the organisation providing the ADR service; and
- * the responsibilities of the parties to each other and to the process, such as confidentiality.

The Committee notes that NADRAC is developing a framework to establish minimum standards for the provision of ADR services generally.¹¹⁴ It is noted that this is not directed solely towards mediators and will also address issues of training and qualification, accreditation, registration and complaints handling. The Committee considers that the framework being developed by this body will provide a much needed nationally consistent focus for these issues and should be carefully considered with a view to its adoption in the Territory.

¹¹⁴ "Standards Project" (November 1998) 3 *NADRAC Notes* 4.

PROCEDURAL REFORMS

WHEN ADR MAY BE APPROPRIATE

The Committee has previously concluded that it is consistent with an approach which accepts mediation and conciliation as primary processes in dispute resolution (although ideally placed before disputes are created, and certainly before they become entrenched through the adversarial process) that such processes nevertheless warrant consideration at all stages.¹¹⁵ On this view, the Committee affirms its earlier conclusion (in the context of the Family Matters Court) that there seems no fundamental reason why a court should be restricted in its ability to refer the parties to mediation, if in the opinion of the court it is appropriate.¹¹⁶

Recommendation 6

The Committee considers that the mediation process warrants consideration at all stages and a court should not be restricted in its ability to refer the parties to mediation, if in the opinion of the court it is appropriate.

WHETHER ADR SHOULD BE COMPULSORY IN THE LITIGATION PROCESS

In some cases, court-annexed ADR processes operate by compulsion in the Territory. For example, the Local Court Rules provides for the Court at a conciliation conference (Order 32.04(2)) or pre-hearing conference (Order 34.06(2)) to conciliate between the parties or refer the parties to a mediation conference. It is compulsory for the parties to participate in the mediation (Order 32.07(3)).

The Committee recognises that voluntary involvement in ADR processes, in demonstrating the commitment of the parties to the exercise, may be more likely to lead to a resolution of the dispute.¹¹⁷ On the other hand, it agrees with the view expressed by the LRC (WA) that (unless the dispute is not one appropriate for resolution through ADR, as discussed earlier in this paper) "when parties seek the resources of the state to assist them with the resolution of a dispute, it should be

¹¹⁵ NTLRC Family at 26.

¹¹⁶ See NTLRC Family at 26.

¹¹⁷ See further Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 62, 65) in LBC Dispute Resolution.

possible for the state to insist that the parties attempt to resolve the dispute by an appropriate method".¹¹⁸ Indeed, "[i]t is increasingly common for courts and tribunals to assess and refer cases to ADR processes whether or not the parties consent".¹¹⁹

Consistent with the view it has previously expressed that the *Community Welfare Act* be amended to allow the Family Matters Court to order parties to attend a mediation in certain circumstances,¹²⁰ the Committee supports the use of compulsorily imposed ADR processes by courts unless the dispute is not one appropriate for resolution through ADR. The Committee particularly draws attention to the value to parties in initial dispute to attending a Dispute Resolution Centre before instituting court proceedings.

Recommendation 7

The Committee supports the use in appropriate cases of compulsorily imposed ADR processes by courts but also strongly encourages access to a Dispute Resolution Centre by members of the public before court proceedings.

JUDICIAL OFFICERS AS "ADR NEUTRALS"

A somewhat controversial issue is whether legislation providing for court-annexed ADR should result in judicial officers themselves mediating in the matter. In some cases, this practice has occurred in Australia in circumstances providing that the judicial officer will have no further involvement in the dispute should the matter fail to resolve.¹²² It may occur in the Northern Territory and apparently without such a protection - for example, Order 48 .14(2) of the Supreme Court Rules provides that a settlement conference may be held before the Master as mediator.

¹¹⁸ LRC (WA) at 24. See further, e.g., Klug, M., "ADR: Trends and Directions in Commercial Disputes (1997) 8 ADRJ 172-176 at 174.

¹¹⁹ ALRC Adversarial Review at 5.55 but cf. at 5.69-5.70 as to non-mandatory schemes.

¹²⁰ NTLRC Family, rec.7.

¹²² For example, in the Federal Court and the Administrative Appeals Tribunal: noted in ALRC Adversarial Review at 3.88.

The practice has been criticised by Sir Laurence Street as "forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded".¹²³ Even where the judicial officer has no further connection with the case if not settled, Sir Laurence cautions that the "public sees a court as an integrated institution".¹²⁴ His concern extends even to the provision of such mediation by a registrar of the court,¹²⁵ a practice also contemplated under existing Territory legislation. The Australian Law Reform Commission has concluded that "these functions could be inconsistent with the duties of these court officers" and that "[i]ssues about bias can also be raised".¹²⁶

The majority of the Committee shares these concerns¹²⁷ and considers that it emphasises the need to recognise that mediation stands on a "different footing" from the conventional settlement or pre-trial conference conducted in open court in the presence of all parties.¹²⁸ The Committee considers that these concerns are exacerbated where judges and registrars, experienced in the processes of dispute resolution through litigation, engage in court-annexed ADR only infrequently and without a consequent opportunity to develop a particular expertise in the ADR environment.

However some members of the Committee do not agree and support the submission of Ms Tanya Fong Lim, Judicial Registrar of the Local Court. Ms Fong Lim submits:

"There were some members of the committee who were concerned to maintain the present system of court annexed ADR being presided over by a judicial officer or registrar of the Court. While in a perfect ADR world it may not be desirable to have these officers functioning as mediator/conciliators, for reasons set out above, such a system has been operating in the Local and Small Claims Court since 1998 with high rates of resolution. To omit this process from the court system would be to take away another opportunity to resolve

¹²³ Street at 796. See further Staugas, J., "State of Mediation in SA" (1999) 9(1) *LEADR Brief* 7-8 at 8; Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 75) in LBC Dispute Resolution.

¹²⁴ Street at 796.

¹²⁵ Street at 796.

¹²⁶ ALRC Adversarial Review at 3.96.

¹²⁷ Arguments for and against involvement by court officials are canvassed in LRC (WA) at 32-33.

¹²⁸ Street at 795-6.

matters before they become entrenched in the expensive litigation process. The suggestion that this step can be totally catered for by the establishment of a Community Justice Center cannot be sustained. It is intended that there will be a charge for that service. The court provides this service free of charge and therefore it is conceivable that if this service is taken away then some members of the public will not be able to avail themselves of the service without paying. Further, even if a matter is dealt with by a Community Justice Center and then comes to the court there is no reason why the court should not have another attempt at a conciliated settlement without further litigation.”

Recommendation 8

The Committee recommends that legislation providing for court-annexed ADR should not provide for judicial officers and registrars to mediate in a matter, even where the person will have no further involvement in the dispute should the matter fail to resolve. (Note that a contrary view is supported by some members of the Committee.)

LEGAL ISSUES

CONFIDENTIALITY OF ADMISSIONS MADE TO MEDIATORS

The Committee has previously concluded in the context of family and other domestic disputes that the success of the mediation process is dependent upon the complete confidentiality of what is said by the parties and to the mediator in caucus.¹²⁹ The Committee's recommendations on that occasion¹³⁰ are of wider import. This is consistent with the existence of provisions in all Australian jurisdictions protecting confidentiality in mediation.¹³¹

The Committee is pleased that this policy has been given effect in certain legislation implementing mediation processes within the Territory.¹³² However, such legislative provision should be made in relation to all mediation processes.

The Committee reiterates its recommendations about confidentiality of admissions made to mediators (previously made in the context in the context of family and other domestic disputes) and, having regard to the recently enacted provisions to this effect in the *Mediation Act 1977 (ACT)*, ss.9, 10, does so in the following terms:

Admissibility of evidence

Except with the consent of the parties, evidence of admissions made to mediators for the purposes of and within a mediation should be privileged and not admissible in any court, whether Commonwealth, State or Territory, or in any proceedings authorised by a law of the Territory or of a State or the Commonwealth or by the consent of the parties, to hear evidence.

¹²⁹ NTLRC Family at 35. The committee acknowledges that there may be some negative consequences: see, e.g., Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 70) in LBC Dispute Resolution.

¹³⁰ NTLRC Family, recs.15 & 16.

¹³¹ Noted in Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 56) in LBC Dispute Resolution. See further Boule at 290-1. A useful summary of "without prejudice" privilege can be found in the publication of the Law Institute of Victoria – "Mediation – a Guide for Victorian Solicitors" – 1995 p41

¹³² See, e.g., Supreme Court Rules, Order 48.14(8), (13); *Work Health Act*, s.91B(4). Possible concerns about the future effectiveness of confidentiality protections are raised in Hughes, G., "The Institutionalisation of Mediation: Fashion, Fad or Future?" (1997) 8 ADRJ 288-294 at 291.

The Victorian Supreme Court Rules, however, recognise that the prosecution ought not to be limited strictly to Admissions. Order 50.07(6) provides:

“Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation”

This Committee recommends this as the appropriate rule for the Territory, although expressing the view that such rules should ultimately be adopted nationally.

Secrecy

Other than as required by law or with the consent of the parties, a mediator should be prohibited from disclosing any information obtained in a mediation unless the mediator believes on reasonable grounds that:-

- (i) the disclosure is necessary in order to prevent or lessen a serious and imminent threat to a person's life, health or property; or
- (ii) the disclosure is necessary in order to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence involving violence, or the threat of violence, to a person, or intentional damage to property or the threat of such damage.

Recommendation 9

The Committee recommends that minimum levels of protection of confidentiality in all mediations processes should be provided for to the following effect:

Admissibility of evidence

Except with the consent of the parties, evidence of admissions made to mediators for the purposes of and within a mediation should be privileged and not admissible in any court, whether Commonwealth, State or Territory, or in any proceedings authorised by a law of the Territory or of a State or the Commonwealth or by the consent of the parties, to hear evidence. Specifically for the Northern Territory provision should be made similar to that contained in the Victorian Supreme Court Rules Order 50.07(6).

Secrecy

Other than as required by law or with the consent of the parties, a mediator should be prohibited from disclosing any information obtained in a mediation unless the mediator believes on reasonable grounds that:-

(i) the disclosure is necessary in order to prevent or lessen a serious and imminent threat to a person's life, health or property; or

(ii) the disclosure is necessary in order to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence involving violence, or the threat of violence, to a person, or intentional damage to property or the threat of such damage.

IMMUNITY FROM LIABILITY FOR MEDIATORS

At the outset, the Committee notes that it is not aware of any proceedings having been brought in Australia against mediators for breach of contract or fiduciary duty, tortious liability or liability for substantive outcomes,¹³³ and it has previously noted the view that liability in negligence for a mediator would be extremely rare.¹³⁴

The Committee also recognises that in any event the parties to a dispute may by written agreement provide for immunity from civil liability of the assisting ADR neutral. However, the Committee has previously questioned why private mediators should benefit from a statutory immunity from liability, even if a case may be made for such exemption for court officials serving in such a capacity.¹³⁵ Having considered arguments in favour of and against immunity presented by NADRAC in its *Report on Primary Dispute Resolution in Family Law*,¹³⁶ the Committee has affirmed its previous conclusion. In particular, the Committee notes that while the work of

¹³³ See also Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 66) in LBC Dispute Resolution; ALRC Adversarial Review at 6.12.

¹³⁴ NTLRC Family at 38, referring to Lynch, A., "Can I Sue My Mediator?" - Finding the Key to Mediator Liability" (1995) 6 *ADRJ* 113-126.

¹³⁵ NTLRC Family at 37.

¹³⁶ NADRAC, *Primary Dispute Resolution in Family Law* (Canberra, 1997) at 29-31. See further Boulle at 247, 254-5.

counsellors may be very similar to that of mediators, they enjoy no statutory immunity from suit.¹³⁷

Nevertheless, the Committee acknowledges that there is legislative provision around Australia extending immunity against civil liability not only to mediators in court-annexed ADR and government agencies,¹³⁸ but also more broadly.¹³⁹ Moreover, the Committee is aware that this represents a general trend towards mediator immunity,¹⁴⁰ a recent expression of this trend being the enactment in the Australian Capital Territory of the *Mediation Act 1997* (ACT), ss.11, 12. It is to be hoped that in the future at least some modest threat of mediator liability is established.¹⁴¹

The Committee notes, for example, that under the *Commercial Arbitration Act* (NT), while arbitrators are not liable for negligence in respect of anything done or omitted to be done as an arbitrator, they nevertheless remain liable for fraud (s.51). This form of exemption reflects the fact that arbitrators are, like judges, decision-makers, albeit in an essentially private capacity.¹⁴² Mediators have no adjudicatory or decision-making function.¹⁴³ Yet, it appears that the "trend towards mediator immunity assumes that the role of mediators in dispute settlement is of such a nature that the judicial/arbitral immunity should be extended to them".¹⁴⁴ A recent example is the *Mediation Act 1997* (ACT):

"The same privilege with respect to defamation as exists in relation to judicial proceedings exists in relation to-

- (a) a mediation session; or
- (b) a document or other material-
 - (i) produced at a mediation session; or
 - (ii) given to a registered mediator for the purpose of arranging or conducting a mediation session." (s.11)

¹³⁷ Noted in NADRAC, *Primary Dispute Resolution in Family Law* (Canberra, 1997) at 29.

¹³⁸ On which see, e.g., Boule at 254.

¹³⁹ Detailed consideration appears in Dewdney, M., *Mediation and Conciliation* (vol.13.2 at 64) in LBC Dispute Resolution.

¹⁴⁰ Noted in Boule at 255.

¹⁴¹ See a similar view expressed in Boule at 255.

¹⁴² Boule at 255.

¹⁴³ This argument is noted in Boule at 255.

¹⁴⁴ Boule at 255.

"A registered mediator has, in the performance in good faith of his or her functions as mediator, the same protection and immunity as a judge of the Supreme Court." (s.12)

The Committee is of the view that there is no justification for such analogous immunity. Professional indemnity insurance is an appropriate mechanism for addressing any consequent risk. It has been suggested that there is evidence that private mediators are increasingly negotiating indemnity coverage with the major insurers.¹⁴⁵

¹⁴⁵ Boule at 255.

Recommendation 10

While the Committee accepts that a case may be made for a statutory immunity from liability for court officials serving in a mediation, it does not support such an immunity in relation to private mediators.

NEED FOR CONSISTENCY IN LEGISLATIVE PROVISION

There should be a consistent legislative approach to ADR, to be departed from only where justification for the departure can be shown. This does not appear to be the case at present.¹⁴⁶ For example, even the most cursory examination reveals extremely open-ended provisions, as in the *Co-operatives Act* (NT), s.99(1)(b), which can be contrasted with those enumerated in more detail, as in the *Work Health Act*, s.91B. The most detailed provisions appear in the various court rules.

Recommendation 11

The Committee recommends that there should be a consistent legislative approach to ADR, to be departed from only where justification for the departure can be shown.

Where legislative provision for the use of ADR processes is made, at a minimum there should be a sufficient level of detail to identify the particular ADR process to be applied, whether its operation is compulsory, the appropriate standards/accreditation requirements to be met for the appointment of an ADR neutral and the requirements of confidentiality and privilege that are to attach to the process. Other matters that should be dealt with include the ADR neutral's liability, implementation procedures for resulting agreements and the role of legal representatives. In this regard, the Committee affirms its previous recommendation in the context of family disputes that a court should be able to determine which parties should be represented in the ADR process.¹⁴⁷

¹⁴⁶ See a similar view expressed about the New South Wales legislative environment in Altobelli, T., "New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination" (1997) 8 *ADRJ* 200-207.

¹⁴⁷ NTLRC Family, rec.8.

FUNDING

The Australian Law Reform Commission has identified the following (non-exhaustive) list of funding options:¹⁴⁸

- * State funding (for employment of or service contracts with providers);
- * Mediation fees (similar to court fees) payable to the court to cover any services provided;
- * Full or partial funding of parties utilising ADR on a means test basis, as with legal aid;
- * Settling providers' fees in regulations, with payment from the State; and
- * Funding support for providers, such as, subsidised training, regulation and the monitoring of professional standards.

In considering an appropriate funding structure, the LRC (WA) has proposed in its Consultation Paper that the State should bear the cost of compulsory ADR pre-litigation, but that the costs of private mediation during the course of litigation should be borne by the parties, equally.¹⁴⁹ On the other hand, it has been commented that:

“[I]t seems hard to justify public funding for parties who are compulsorily referred after coming to court but to exclude parties who wish to take up the option without coming to court. Funding would appear to be a reward for refusing to compromise earlier”.¹⁵⁰

However, the Committee agrees with the Australian Law Reform Commission that “[w]here mandatory referral takes place it may be unduly onerous to require the disputants to pay for an additional dispute resolution process, particularly after court filing fees may have already been paid”.¹⁵¹ It is also noted that court-based

¹⁴⁸ ALRC Adversarial Review at 5.91.

¹⁴⁹ LRC (WA) at 31. See also ALRC Adversarial Review at 5.93.

¹⁵⁰ ALRC Adversarial Review at 5.92, quoting Courts Consultative Committee, *Discussion Paper - Court referral to alternative dispute resolution: A proposal to extend the use of alternative dispute resolution in civil cases* (Department of Justice, Wellington, January 1997) at 35.

¹⁵¹ ALRC Adversarial Review at 5.93.

ADR processes, including those connected with Federal courts (and tribunals),¹⁵² are generally provided at nominal or no cost to the parties where court staff are utilised.¹⁵³ Subject to these specific comments, the Committee acknowledges that ultimately the “funding options vary according to the type of ADR program provided.”¹⁵⁴

Recommendation 12

While the Committee acknowledges that ultimately funding options for ADR processes will vary according to the type of ADR program to be utilised, it recommends that where compulsory referral by a court or tribunal is provided for the parties should not be required to bear the administrative cost of the process.

¹⁵² ALRC Adversarial Review at 5.88.

¹⁵³ Mack, K, *Overview of Dispute Resolution* (vol.13.1 at 61) in LBC Dispute Resolution.

¹⁵⁴ ALRC Adversarial Review at 5.92.