

***National Alternative Dispute Resolution Advisory Council***

***ADR terminology: a discussion paper***

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The National ADR Advisory Council (NADRAC) is an independent body, which provides advice on ADR to the Commonwealth Attorney-General. Its reports and publications cover standards for ADR, diversity, ADR in courts and tribunals, family law PDR, ADR and small business and on-line ADR.

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# ADR terminology: a discussion paper

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## Responding to this paper

The purpose of this paper is to stimulate discussion on terminology in ADR, to seek information about how terms are being used in ADR and to invite those with an interest in ADR to suggest future directions for ADR terminology.

NADRAC welcomes responses from a wide variety of groups. Responses may address specific questions raised in the paper, deal with questions or issues overlooked in the paper, or address the issue of ADR terminology in a general way.

Responses to the paper may be sent to:

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The deadline for responses is 31 December 2002.

Please note that, unless you advise otherwise, NADRAC may make written responses available in whole or in part to others. NADRAC may also publish responses as part of its papers. If you consider any part of your response to be commercial in confidence or confidential in any other way, please make this clear in your response.

# Contents

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Responding to this paper .....	<b>Error! Bookmark not defined.</b>
List of questions .....	vi
<b>1 INTRODUCTION .....</b>	<b>2</b>
1.1 About this paper.....	2
1.2 NADRAC's interest in terminology.....	2
1.3 NADRAC's Definitions Paper.....	3
1.4 Diverse needs .....	4
<b>2 COMMON TERMS: BENEFITS AND PROBLEMS .....</b>	<b>6</b>
2.1 Benefits of common terms .....	6
2.2 Problems with common terminology.....	7
<b>3 THE ISSUES .....</b>	<b>9</b>
3.1 Umbrella terms.....	9
The 'A' in ADR.....	9
The 'D' in ADR.....	10
The 'R' in ADR.....	12
3.2 Who is the third party?.....	12
3.3 How should ADR processes be classified? .....	13
3.4 Hybrid and combined processes .....	15
3.5 International usage .....	16
3.6 Is conciliation a facilitative process? .....	17
3.7 Is mediation purely 'facilitative' in nature? .....	18
3.8 Court based and in-house mediation.....	19
3.9 Mediation and counselling.....	19
3.10 Community mediation .....	20
3.11 Victim-offender mediation and diversionary conferencing.....	21
3.12 Emerging technology .....	22
3.13 Future trends in ADR .....	22

<b>4 POSSIBLE APPROACHES .....</b>	<b>24</b>
<b>4.1 Definitions or descriptions? .....</b>	<b>24</b>
<b>4.2 Generic or specific terms? .....</b>	<b>25</b>
<b>4.3 At what level is consistency needed? .....</b>	<b>25</b>
<b>4.4 What should be described or defined? .....</b>	<b>26</b>
<b>4.5 Where should you find definitions or descriptions?.....</b>	<b>27</b>
 <b>GLOSSARY</b>	 <b>29</b>

## List of questions

- Question 1* Should ADR terms take the form of ‘definitions’ or ‘descriptions’?
- Question 2* How should the needs of diverse groups be taken into account in developing terminology for ADR?
- Question 3* What, if any, problems, complaints or legal issues have arisen (or may arise) about the inconsistent use of ADR terms?
- Question 4* What are the arguments, other than those set out in this paper, for or against consistent terminology in ADR?
- Question 5* Do we need clarity on an umbrella term for the processes described in this paper? Can several umbrella terms be used? If so, what terms?
- Question 6* How should the terms ‘dispute’ and ‘resolution’ be defined or described? Is the purpose of ‘ADR’ necessarily to ‘resolve’ a ‘dispute’?
- Question 7* How should the position or role of the ‘third party’ or ‘intervener’ in ADR be defined or described?
- Question 8* Is a classification system for ADR processes needed? If so, how should they be classified?
- Question 9* How should ADR terminology reflect the practice of combining ADR processes?
- Question 10* To what extent should Australian use of ADR terms reflect international usage?
- Question 11* How should the term ‘conciliation’ be defined or described?
- Question 12* To what extent should the term ‘mediation’ assume that advice or evaluation is not given?
- Question 13* Should courts (and other organisations) be encouraged to use terms other than ‘mediation’ for facilitative ADR processes conducted by their own officers?
- Question 14* Can clear distinctions be drawn among ‘mediation’, ‘counselling’ and ‘therapy’? If so, what are these distinctions?
- Question 15* How should the different meanings of ‘community mediation’ be distinguished?
- Question 16* What terms should be used to describe ADR and related processes within the criminal justice system?
- Question 17* What are the implications of emerging technologies for terms used in ADR?

- Question 18* How might future developments in ADR affect terminology?
- Question 19* In what circumstances should ADR processes be defined or described in a consistent fashion, and in what circumstances should different descriptions or definitions be used?
- Question 20* How generic or specific should ADR terms be?
- Question 21* Which common ADR terms should be developed (a) across all areas of ADR practice; (b) at the sector level and (c) by individual ADR service providers?
- Question 22* What should be the focus of attention in developing consistency in ADR terms: processes, elements in processes, roles of practitioners, services or recording/reporting?
- Question 23* Where should ADR definitions or descriptions be found?
- Question 24* What alternative definitions or descriptions should be used for terms used in ADR (listed in the Glossary)?
- Question 25* What terms are used in ADR, other than those described in the Glossary?

# 1. Introduction

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## 1.1 About this paper

This paper aims to promote discussion about the terms used within the discipline of ADR. It canvasses arguments for and against common terms, identifies current issues about the use of particular ADR terms and suggests possible approaches for the future.

The National Alternative Dispute Resolution Advisory Council (NADRAC) hopes that this paper will help to build consistency in the quality of ADR practice, while supporting innovation, flexibility and creativity in ADR. The paper aims to achieve a balance between consistency and diversity, and asks open-ended questions about the use of ADR terms.

In 1997 NADRAC produced a set of definitions for ADR processes that have been used by many organisations and practitioners. While this paper raises questions about these definitions, it continues to use them as a starting point for discussion. The appendix provides a glossary of the terms used in this and previous NADRAC publications.

There are potential weaknesses with these definitions. The meanings of many ADR terms are disputed. Innovative ADR processes do not always fit into existing definitions. The general public may not understand the complex language associated with some ADR terms.

NADRAC wishes to find out how to improve definitions or descriptions for ADR and welcomes the views and suggestions of diverse groups on the questions raised in this paper and on ADR terminology in general.

## 1.2 NADRAC's interest in terminology

NADRAC's role is to provide policy advice on ADR to the Commonwealth Attorney-General.

ADR terminology has been central to NADRAC's consideration of each of the issues it has examined. NADRAC has provided advice on ADR standards, ADR in the Federal Magistrates Service, criteria for referral to ADR, diversity in ADR, ADR in small business, the use of technology in ADR and ADR research. NADRAC is currently examining statutory provisions for ADR, ADR referral practices, Indigenous use of ADR, strategies to promote the effective use of ADR and ADR data collection. NADRAC is also taking part in a review by the Attorney-General's Department of the primary dispute resolution provisions in the *Family Law Act 1975* (Cth).

A clearer understanding of how ADR terms are used, and how people feel they should be used, will assist NADRAC's work in these areas. NADRAC also hopes that such an understanding will be of benefit to others who have an interest in ADR.

Of particular interest to NADRAC is whether ADR processes or practices should be 'defined' or 'described'. Throughout this paper both possibilities are mentioned. (The distinction between 'definitions' and 'descriptions' is explained in Section 4.1.)

### 1.3 NADRAC's Definitions Paper

NADRAC examined ADR definitions shortly after its establishment. In 1997 it released a paper entitled *Alternative Dispute Resolution Definitions* (the 'Definitions Paper'). Council members felt that, if they were to provide effective and consistent advice to the Attorney-General, they needed a common understanding of the ADR processes under consideration. Members anticipated that this work might also be of more general use. NADRAC did not seek to impose definitions of ADR processes on any other organisation and recognised the value of flexibility and diversity in the practice of dispute resolution.

Since the release of the Definitions Paper, rapid growth in the use and diversity of ADR has led to further controversies over terms.

In February 2000 NADRAC decided to review the Definitions Paper. This review evaluated the usage of the definitions and the need for any changes to the paper. Also during 2000 NADRAC undertook extensive consultation about its discussion paper, *The Development of Standards for ADR* (March 2000) (the 'Standards Discussion Paper'). Many responses to the discussion paper raised the issue of ADR definitions and reinforced the need to review the original paper. NADRAC's final report, *A Framework for ADR Standards* (April 2001) (the 'Standards Report') contains a summary of these responses.

NADRAC's review showed widespread adoption of, and support for, its definitions. However, responses also suggested that:

- The paper should be more user-friendly and more widely distributed.
- Conversely, the paper needed greater detail for education, training and case management purposes.
- It would be inappropriate for organisations bound by specific legislation to use the NADRAC definitions.
- While the categories of ADR processes used in the Definitions Paper (facilitative, advisory and determinative) were useful, some organisations would prefer to see a distinction only between determinative and non-determinative processes.
- Non-binding determinative processes could be more accurately described as advisory processes.
- Processes used by many organisations do not fit neatly into one category or the other.
- Similar ADR processes should be included under a single heading.

NADRAC decided that a revised paper on ADR terms needed to explain the purpose of definitions or descriptions, and describe, and give possible definitions of, combined ADR processes.

As it would be difficult to produce a short and user-friendly document that addressed the complex policy and practice issues associated with ADR terms, NADRAC decided to both:

- produce a short brochure on ADR terms, and
- conduct continuing consultation on the broader issues associated with ADR terminology.

In March 2002 NADRAC released a brochure entitled *What is ADR?*. The brochure simplified the earlier paper and made several substantive changes that took account of the concerns raised.

The brochure preserved the distinctions among facilitative, advisory and determinative processes, and added a new category of combined processes. The brochure did not define specific ADR processes. Instead, it provided examples of each category. The brochure recognised that ADR service providers need to provide more detailed information to those using ADR services.

Commentators in Australia and overseas have for many years raised other issues about the use of ADR terms. This current discussion paper summarises these issues and provides a basis for further consultation.

## **1.4 Diverse needs**

Many groups have an interest in developing ADR terms. These groups include the users of ADR services; ADR practitioners and service providers; researchers; academics and students; lawyers; courts and tribunals; government, community and private agencies; standards setting bodies; consumer bodies; policy makers and legislators.

The issues canvassed in this paper may be of most interest to technical audiences such as practitioners, courts, academics and legislators, who might benefit from comprehensive analysis and discussion of terminology.

Terms for ADR, however, should ultimately serve the interests of those using ADR services. Most service users have little awareness of ADR generally, let alone the fine distinctions among particular ADR processes such as facilitation, mediation, conciliation and conciliation counselling.<sup>1</sup> The terms used by ADR practitioners and academics may not always make sense to people of diverse languages and cultures<sup>2</sup>, including Indigenous groups<sup>3</sup>. The complex language used in many ADR publications, including some of NADRAC's own papers and reports, requires a high level of comprehension.

The needs of different audiences suggest three options:

- Develop different sets of terms for different audiences.
- Educate users of ADR services about the meaning of technical terms.
- Develop a common and simple language for ADR, which is useful for most or all audiences.

*Question 2*

How should the needs of diverse groups be taken into account in developing terminology for ADR?

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<sup>1</sup> Family Court of Australia (2000) *Submission to Family Law Pathways Advisory Group*; Family Law Pathways Advisory Group, op. cit; McNair (September 1995) *Family Mediation National Poll*, Canberra, Commonwealth of Australia; Hunter R. (2002) 'Through the looking glass: Clients' perceptions and experiences of Family Law litigation', *Australian Journal of Family Law*, 16 no. 1, April, pp. 7–26.

<sup>2</sup> See NADRAC (1997) *Issues of Fairness and Justice in ADR*, Canberra, Commonwealth of Australia.

<sup>3</sup> Aboriginal Alternative Dispute Resolution (2000) – submission to NADRAC in response to discussion paper on 'The Development of Standards for ADR'.

## 2. Common terms: benefits and problems

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### 2.1 Benefits of common terms

Consistent ADR terminology serves several important functions.

First, common definitions or descriptions of ADR processes ensure those who use, or make referrals to, ADR services receive consistent and accurate information, and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, ADR services.

Second, consistent use of terms for ADR processes helps courts and other referring or mandating agencies to match dispute resolution processes to specific disputes and different parties. Better matching would improve outcomes from ADR processes.

Third, a common understanding of ADR terms helps ADR service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about ADR services.

Fourth, common terms provide a basis for policy and programme development, data collection and evaluation.

Many commentators have called for greater consistency in ADR terminology, for example:

... ADR and non-ADR terminology and practices should be made consistent, where appropriate, across all major complaints handling, investigation and dispute resolution services, including courts and tribunals. (Response to NADRAC's Standards Discussion Paper)

... definitions count. Clear definitions of practice are undoubtedly needed for quality assurance as well as providing a basis for funding bodies and consumers to make decisions. (Response to NADRAC's Standards Discussion Paper)

There is greater awareness of ADR at the moment, but ... consistency and conciseness in terminology is needed.<sup>1</sup>

The Family Law Pathways Advisory Group has recommended:

that definitions of primary dispute resolution methods be developed, adopted across the family law system and published in language which accurately and clearly describes what is available.<sup>2</sup>

Contradictory information on ADR processes may lead to confusion among parties, practitioners, legal representatives and referrers. Inconsistent use of ADR terms may create doubt about legal rights and inhibit communication by parties who may be unclear about the confidentiality of the process. Parties and legal representatives may be ill-prepared for the ADR process in which they are taking part. The obligations of practitioners to comply with

particular standards may be unclear. Questions may also arise over immunity provisions and coverage of professional indemnity insurance. Costs associated with the delivery of ADR services may therefore increase.

These benefits suggest the need for common definitions or descriptions of ADR processes.

## 2.2 Problems with common terminology

There are several possible problems with the development of common terminology for ADR processes, especially if these terms were to take the form of rigid definitions. Such definitions could limit the creativity, diversity and flexibility in ADR practice. For example:

[while there needs to be agreement on the basic definitions] strict legal definitions could lead to the loss of flexibility and lateral thinking in ADR.<sup>3</sup>

Strict definitions may create artificial distinctions and reduce complex processes to separate and discrete procedures. They may reduce the ability of courts and practitioners to make commonsense interpretations of particular provisions. A minor departure from a legally defined ADR process may invalidate the entire process and cause extra cost and inconvenience for the parties.

A common set of terms may also limit the capacity of ADR service providers to market their services to particular target groups and to tailor their information to the needs of those using their services. For example, a particular word or phrase may be more acceptable to a specific group even though its use may not match its strict definition.

While consistency may be desirable, the controversies over the use of ADR terms and the lack of consistency in current use, may make this an impossible goal. It may be better to accept the inconsistencies and avoid creating the impression that terms for ADR have any universal currency. That is, those using ADR services should find out how terms are used in each particular case.

A further view is that consistency is impossible at the theoretical level. Meanings are localised and arise out of the social context in which words are used. Multiple meanings may co-exist. The meaning of a word, such as 'mediation', is not determined by its formal definition but arises out of the interaction between the ADR practitioner and the parties.

These problems suggest that common definitions or descriptions of ADR processes may be neither feasible nor desirable.

<i>Question 3</i>	What, if any, problems, complaints or legal issues have arisen (or may arise) about the inconsistent use of ADR terms?
<i>Question 4</i>	What are the arguments, other than those set out in this paper, for or against consistent terminology in ADR?

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<sup>1</sup> The Hon. Jerrold Cripps QC cited in Devine C (2001) 'Is Environmental Mediation on the Way Up or the Way Out?' Law Society Journal 39 (5) June pp 72–75.

<sup>2</sup> Family Law Pathways Advisory Group (2001) *Out of the Maze: pathways to the future for families experiencing separation*, Canberra, Commonwealth of Australia, recommendation 10.6.

<sup>3</sup> Sourdin T., cited in Devine C (2001) op cit.

## 3. The issues

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### 3.1 Umbrella terms

#### The 'A' in ADR

The term 'alternative' dispute resolution raises fundamental issues that have been canvassed extensively in the literature<sup>1</sup>. First, the term raises the question, 'alternative to what?'. Secondly, the adjective 'alternative' may not reflect how ADR processes are used in practice.

NADRAC's Definitions Paper refers to ADR as an alternative to judicial determination. For some parties and for some disputes this is an accurate description. However, not all parties would choose, or have access to, the court process and for them ADR is not an alternative to judicial determination. From this perspective, ADR provides an alternative to otherwise unsatisfactory options such as tolerating or withdrawing from the conflict, or to taking more dramatic action such as violence or industrial action. In this context ADR processes may not be 'alternatives' at all, but the only realistic options available for dispute resolution.

Many processes aim to resolve a dispute or problem without a judge or magistrate making a decision. These processes are not always seen as forms of ADR. Examples are:

#### *Quasi-judicial bodies*

Quasi-judicial processes are used by tribunals and other statutory bodies that investigate and decide on issues, and by industry-based adjudicators that interpret and apply a code of conduct. As in court processes, quasi-judicial processes do not provide individual parties with choices about the process, the practitioner or the outcome. Although quasi-judicial are alternatives to judicial determination, they are not ordinarily regarded as part of ADR.

#### *Administrative determination*

Administrative procedures may also provide alternatives to court. For example, a predetermined formula may be used to settle liabilities or credit card charge-back arrangements may enable credit providers to resolve issues between suppliers and purchasers.

#### *Practical solutions*

Service providers may provide direct and practical support to help parties to resolve their dispute. For example, a community mediation service may arrange advice on gardening or pet management to help in settling disputes between neighbours.

#### *Implementing agreements*

A range of facilities are available that enable parties to implement an agreement reached. For example, electronic deal rooms enable agreements reached through e-mail to be digitally signed and validated, and escrow arrangements enable a third person or entity to act as custodian of written agreements or bonds.

### ***Diversionsary processes in the criminal justice system***

Diversionsary programmes in the criminal justice system aim to steer an offender away from a hearing in court. Examples are treatment programmes, police cautioning, diversionsary conferencing and victim-offender mediation. (See also Section 3.11)

### ***One on one processes***

ADR service providers may assist one party to consider options for resolving or managing the dispute, such as when the second party declines to attend. These forms of support have been described as dispute counselling, decision-making for one or education for self-advocacy (see Glossary).

The word ‘alternative’ in ADR is sometimes seen as referring to ‘interest-based’ dispute resolution processes and as an alternative to ‘rights-based’ processes. Interest-based processes are concerned with finding solutions that meet the needs and interests of the parties involved. Rights-based processes are concerned with determining outcomes based on rights, rules and law.<sup>2</sup> Binding determinative processes, such as arbitration, would fall outside this meaning of ADR<sup>3</sup>.

Conversely, ADR may refer more broadly to a range of interest-based and rights-based processes used to manage and settle disputes in both court and non-court settings. On this basis, ‘alternative’ may be a misleading term since it implies an exceptional process separate from routine case management procedures. To avoid this, the Federal Court of Australia and the Commonwealth Administrative Appeals Tribunal use the term ‘assisted’ dispute resolution. The adjectives ‘additional’ or ‘appropriate’ have also been suggested.<sup>4</sup> A further option is to drop the adjective and refer simply to ‘dispute resolution’.

The term ‘primary dispute resolution (PDR)’ has been used in family law since 1996 to describe a similar set of processes to ADR and has also been adopted by the Federal Magistrates Service (see Glossary). The word ‘primary’ stresses that most family law disputes are resolved firstly by processes such as counselling, conciliation, mediation and arbitration, and that judicial determination is usually the last resort. The terms ‘ADR’ and ‘PDR’ are often used interchangeably, but it is unclear whether their meanings are identical.

The acronym ‘ADR’ may also be used as a term in its own right, not as an acronym. This avoids the problems associated with the ‘A’ in ADR but gives little guidance either to legislators or to service users.

## **The ‘D’ in ADR**

A ‘dispute’ may be regarded as an essential element of the concept of ADR.

In some areas of ADR practice, the existence of a dispute is a condition for referring or accepting a matter for ADR<sup>5</sup>. For example, the *Community Justice Centres Act 1983* (NSW) provides for mediation to deal with disputes and states simply that:

... persons may be treated as being in dispute on any matter if they are not in agreement on the matter [Section 22(3)].

Processes commonly described as ADR, however, may be used where no dispute exists or where a dispute or conflict is a secondary issue. For example, mediation may aid fact-finding, problem-solving or interest-based negotiations even where the parties may not see themselves as being in dispute with each other. (See also Section 3.11 in relation to the use of ADR with ‘offences’).

Merits review legislation, such as the *Administrative Appeals Tribunal Act 1975* (Cth), refers to processes such as ‘mediation’ and ‘conferencing’ in the context of conducting merits review. Generally, the function of a merits review body is to make the correct and preferable decision, rather than to resolve a ‘dispute’ between an applicant for review and the original decision-maker. It could therefore be argued that the term alternative ‘dispute’ resolution should not be applied to primary merits review. Processes included within the umbrella concept of ADR may nevertheless be helpful in resolving issues raised in applications for merits review.

Native title matters raise similar issues. The *Native Title Act 1993* (Cth) provides for the recognition of native title and requires the Federal Court to consider mediation by the National Native Title Tribunal as a way of reaching agreement about native title. Native title is essentially a recognition of traditional Indigenous rights in land and waters. In many instances, these rights will co-exist with the rights and interests of others. A claim for native title may be made without any history of past relations or dispute between the claimants and other persons with interests in the area claimed. The mediation process aims at reaching agreement between parties about a number of specific matters. These matters include whether native title exists and, if so, who holds native title; what the native title rights and interests are; and the relationship between those rights and interests and any other interests in relation to an area of land or waters. If agreement cannot be reached, these matters are determined by the Federal Court. The mediation does not necessarily involve the resolution of a particular matter in dispute and may include the consideration of matters of practical workability, for example, how native title rights will be exercised in the future consistently with the rights of others. The involvement of different interests and groups, however, means that native title claims may, and often do, give rise to disputes. The term ‘ADR’ could therefore be seen as limited to particular aspects of the native title recognition process.

The use of ADR in complaint handling schemes also raises issues about the use of terms. The Benchmarks for Industry Dispute Resolution Schemes<sup>6</sup> recommend that:

[dispute resolution schemes] ...use appropriate [non-adversarial] techniques including conciliation, mediation and negotiation in attempting to settle *complaints*.

Theoretical literature<sup>7</sup> and procedural documents<sup>8</sup> make distinctions among the terms ‘disputes’, ‘complaints’ and ‘grievances’. A dispute usually refers to an unresolved complaint or grievance, for example, where a request to remedy a situation has been rejected or ignored (sometimes within set time-lines). Precise definitions would suggest that ADR processes would not be used until a complaint (or grievance) reached the dispute stage. As outlined below, however, ‘ADR’ can also be given a far broader meaning.

## The ‘R’ in ADR

Does the term ‘ADR’ necessarily denote that a dispute needs to be ‘resolved’ or does it have a wider connotation? Responses to NADRAC’s Standards Discussion Paper suggest that ADR may have other objectives apart from resolution of a dispute, for example:

- Narrowing the scope of the dispute.
- Clarifying the situation of parties as to their negotiating positions and their options should negotiations break down.
- Exchanging of information in a without prejudice setting.
- Selecting of the most appropriate and economic method of dispute resolution.
- Helping to empower parties to act in their own interests and to recognise the interests of others.
- Providing insight into relationship dynamics.
- Transforming understanding, relationships or behaviour.

‘ADR’ is commonly used as an umbrella term for practices that go beyond the resolution of specific disputes between parties. Such practices include the management of grievances and complaints, consensus-building, interest-based approaches (see above), collaborative decision-making, dispute avoidance, dispute prevention, dispute system design, peace-making and conflict management. That is, ‘ADR’ may refer not so much to specific processes, but rather to a shared set of methods, goals, assumptions or values<sup>9</sup>.

<i>Question 5</i>	Do we need clarity on an umbrella term for the processes described in this paper? Can several umbrella terms be used? If so, what terms?
<i>Question 6</i>	How should the terms ‘dispute’ and ‘resolution’ be defined or described? Is the purpose of ‘ADR’ necessarily to ‘resolve’ a ‘dispute’?

### 3.2 Who is the third party?

Commentators have struggled to find suitable words to describe the ‘third party’ in ADR.

The term ‘third party neutral’ (‘TPN’) is often used, particularly overseas<sup>10</sup>, to describe diverse ADR practitioners. The word ‘neutral’ has come under criticism.<sup>11</sup> ‘Neutral’ may imply that the ADR practitioner’s behaviour is passive and disengaged, which may not promote fairness. ‘Neutrality’ may also imply that the ADR practitioner has no interest in the outcome, whereas in ADR processes such as statutory conciliation (see Glossary), ADR practitioners have a clear interest in ensuring that outcomes comply with certain requirements.

The term ‘impartial’, which refers to even-handed behaviour by the practitioner, may be more widely applicable. NADRAC’s brochure *What is ADR?* referred to the ADR practitioner as an ‘impartial’ person who helps those in a dispute to resolve the issues between them. Other

terms, such as ‘independent’, ‘non-aligned’ or ‘non-partisan’ third party, could also be considered. The term ‘mutually acceptable’ third party may be suitable in community, public policy and international disputes, but would not cover statutory ADR processes where the parties do not choose the ADR practitioner.

Some commentators would not describe ADR practitioners as ‘third parties’ at all, since they are not, in fact, parties to the dispute. A different term, such as ‘intervener’, may therefore be more appropriate. Despite such concerns, this paper continues to use the term ‘third party’ for editorial purposes.

Could ADR also cover situation in which the professional interveners act as advocates for the parties? Settlement negotiations between lawyers are sometimes described as ADR but are not conducted by neutral (or impartial) third parties. Direct negotiations between the parties themselves may also be referred to as ADR. Practitioners may support direct negotiation, such as by providing clients with training, coaching or personal advice. Are these also forms of ADR?

Negotiations that are aided by information technology raise new difficulties in describing the role of the ‘third’ (or ‘fourth’) party in ADR (see Section 3.12).

<i>Question 7</i>	How should the position or role of the ‘third party’ or ‘intervener’ in ADR be defined or described?
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### 3.3 How should ADR processes be classified?

There are many ways to classify ADR processes, which could relate to the role of the third party, or to the nature of the process or its outcome.

#### *Role of the third party*

***ADR processes may be classified according to the role of the third party. NADRAC’s Definitions Paper divided ADR processes into facilitative (where the third party facilitated resolution), advisory (where the third party made an evaluation or provided advice) or determinative (where the third party made a decision). As outlined in Section 1.3, facilitative and advisory categories could be further classified together as non-determinative or consensual processes.***

Using suffixes (such as -ative and -ory) creates long and complex words. A suggested plain English approach is to use assisted, advised or determined instead of facilitative, advisory or determinative processes. Alternatively, definitions or descriptions could avoid referring to processes and simply classify ADR practitioners into those who facilitate, advise or decide.

#### *Level of formality*

ADR processes may be classified according to their level of formality. Formal processes involve procedures such as a detailed written contract with the ADR service provider or formal rules of evidence. Informal processes may involve an oral agreement to meet together and few, if any, formal rules. This form of classification is illustrated in the table in Section 3.5.

### ***Structure***

ADR processes may be classified according to their degree of structure. Structured processes follow a predetermined plan, while unstructured processes evolve as each session proceeds.

### ***Statutory constraints***

ADR processes may be classified according to any statutory constraints that may apply. Some ADR processes are constrained by statutory requirements covering the rights and obligations of the parties or practitioners, and the scope and nature of any decisions made. Other processes have no direct statutory constraints.

### ***Degree of compulsion***

ADR processes may be classified according to the degree to which parties are compelled to participate in them. In purely voluntary processes, parties are free to choose whether to attend or participate in ADR, without any negative consequences if they elect not to. At the other extreme, parties may be compelled to attend (such as by court order or contract) and risk a penalty if they fail to comply. Options between these two extremes are more common. For example, an authority may encourage parties to use ADR without penalising a failure to attend.

### ***Status of outcomes***

ADR processes may be classified according to the status of the outcome of the process. The outcome may be consensual or imposed, binding or non-binding, enforceable or non-enforceable. Enforcement may be effected through the person or agency conducting the ADR process itself, or through recourse to an external process (see NADRAC's Definitions Paper).

### ***Communication flow***

ADR processes may be classified according to the communication flow among the parties and practitioners. Parties may meet face-to-face and all sessions may include both parties. Alternatively the third party may relay messages and offers without the parties meeting face-to-face (for example, in shuttle mediation and blind bidding). Processes may also use a mixture of face-to-face and separate sessions (for example, mediation with joint and private sessions).

### ***Mode of service delivery***

ADR processes may be classified according to the nature of the practitioner and the mode of service delivery used. Examples include co-mediation, expert mediation, judicial dispute resolution (JDR) and community mediation.

### ***Types of disputes***

ADR may also be classified according to the types of disputes dealt with, for example, commercial, consumer, business, environmental, public policy, multi-party, family, neighbourhood, victim-offender or workplace.

Question 8

Is a classification system for ADR processes needed? If so, how should they be classified?

### 3.4 Hybrid and combined processes

NADRAC's Definitions Paper described discrete ADR processes and noted that practitioners may move from one process to another. There is, however, an increasing trend towards combining two or more processes into one.

Discrete ADR processes can be combined in a structured way. For example, in hybrid processes such as med-arb a practitioner may conduct a mediation process, then, if no agreement is reached, formally move to an arbitration process. In conferencing schemes conducted in legal aid commissions, an ADR practitioner may facilitate discussions (a mediation type process) and then prepare a report and recommendations (through an evaluative process).

Combined processes, however, may not have discrete stages and may use various approaches in a fluid way, as the following feedback suggests:

- The terms facilitative, advisory and determinative used to describe the range of practices within ADR are very useful. They are indicative of the range of procedures used, which is not conveyed by the commonly used terms of mediation, arbitration and conciliation. However, the debate about ADR often occurs by narrowly defining the procedures that are undertaken. A case dealt with in ADR may involve facilitating, advising and making a determination. (Response to NADRAC's Standards Discussion Paper)
- While the matters at the [agency] do involve a neutral third party, processes used there do not fit easily into any of the categories described in [NADRAC's Definitions Paper]. (Comment received in review of Definitions Paper)
- The philosophy of the service is to view alternative dispute resolution as a means to treat the (specified) community, key stakeholders and other interested parties in a *holistic manner*. ... The two main features of this model are:

An intake process which focuses on developing a holistic understanding of a core dispute which (usually) has many mitigating or 'satellite' issues requiring attention before there is potential for a realistic and therefore lasting agreement to be mediated.

A flexibility in the selection and application of ADR processes (negotiation, conciliation, mediation, arbitration) to mesh with various and diverse cultural considerations. (Response to NADRAC's Standards Discussion Paper)

The practice of combining different ADR processes expands the choices available to ADR practitioners and service users. ADR terms may need to reflect *which* processes are combined and *how* they are combined.

Question 9

How should ADR terminology reflect the practice of combining ADR processes?

### 3.5 International usage

Lack of consistency in ADR terms is not unique to Australia. While terms such as ‘arbitration’ appear to have consistent meanings in international statutes and treaties, it is not clear whether all ADR terms are used consistently in other countries.

In particular, the terms ‘conciliation’ and ‘mediation’ are used in diverse ways.<sup>12</sup> For example:

Primary dispute resolution services in Australia have developed in parallel with the development of similar services in the United States. Whereas the terms ‘conciliation’ and ‘counselling’ have long since disappeared from the literature in reference to dispute resolution services in the United States and elsewhere, these terms have remained enshrined in Australian family law, with ‘mediation’ grafted on as a separate dispute resolution service in 1991. (Submission by the Family Court of Australia to the Family Law Pathways Advisory Group)<sup>13</sup>

Conversely, policy papers in countries such as Japan<sup>14</sup>, have used the term ‘conciliation’ rather than ‘mediation’ for these processes.

Documents produced by international organisations make a clear distinction between ‘conciliation’ and ‘mediation’ (although this distinction may not be the same as that contained in NADRAC’s Definitions Paper). According to the OECD Working Party on Information Security and Privacy and the Committee on Consumer Policy, conciliation is at the less formal end of the spectrum, while mediation is at the more formal end (see table below).

**Main ADR Forms and Processes (OECD)** <sup>15</sup>

<i>Corporate complaint services</i>	<i>Assisted negotiation</i>	<i>Mediation</i>	<i>Arbitration</i>	<i>Litigation</i>
	<ul style="list-style-type: none"> <li>– Facilitation</li> <li>– Conciliation</li> </ul>	<ul style="list-style-type: none"> <li>– Automated, or not</li> <li>– More or less active guidance by the neutral</li> <li>– Voluntary or mandatory participation</li> <li>– No obligation on the parties to agree, before entering ADR, that the outcome will be binding</li> <li>– Agreed upon outcome</li> </ul>	<ul style="list-style-type: none"> <li>– Voluntary or mandatory submission</li> <li>– Automated or not</li> <li>– Final and binding</li> </ul>	
<p>➔➔➔➔➔➔➔➔➔➔</p> <p>Informal to formal ADR</p>				

By contrast, the *Conciliation Rules* of the United Nations Commission on International Trade Law (UNCITRAL) suggest that a ‘conciliator’ has an active role and proposes solutions, a role similar to that outlined in NADRAC’s Definitions Paper:

**Article 7**

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute...

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute ...

It seems, therefore, that the confusion over the terms ‘conciliation’ and ‘mediation’, which is explored in the next sections, is not unique to Australia.

<i>Question 10</i>	To what extent should Australian use of ADR terms reflect international usage?
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### 3.6 Is conciliation a facilitative process?

It has been a moot point for some time as to whether conciliation, especially statutory conciliation, is a facilitative process. Conciliation is often a process in which a practitioner plays multiple roles within external requirements and constraints. The following comments bear this out:

Many Statutory Conciliation processes do not fit under the facilitative umbrella and indeed are a combination of some of the other processes identified. Statutory Conciliation ... has different imperatives and features that set it apart from the other categories. Some of these include: powers afforded to Conciliators in conjunction with the conduct of a facilitative process, eg. powers to direct evidence and some decision-making powers; differing procedural issues, eg. time constrictions; differing administrative environments, eg. numbers of matters and investigative process leading up to the facilitative process; and frameworks that are centred around being an advocate for the particular legislation and therefore conducting a rights-based process with respect to the legislation. (Response to NADRAC’s Standards Discussion Paper)

... under the ... act, conciliation has a very ‘hands on’ meaning. Conciliation is compulsory under the act, and conciliators may make determinations with the assistance of advice from approved experts, who, according to the NADRAC definitions, are presumably undertaking ‘advisory ADR processes’ when they do health examinations. Other investigations undertaken in such a context would, presumably, be considered by NADRAC to be an aspect of ‘advisory ADR processes’. (Response to NADRAC’s Standards Discussion Paper)

The term ‘conciliation’ is used in diverse ways both in Australia and overseas<sup>16</sup>. It has been used to describe the role of a go-between who transmits offers and proposals between the parties, informal processes with relatively low levels of third party intervention and more formal processes within statutory settings with high levels of third party intervention.

‘Conciliation’ often refers to rights-based processes, while ‘mediation’ often refers to interest-based processes. However, as the next section shows, ‘evaluative mediation’ may also refer to rights-based processes.

<p><i>Question 11</i>                      How should the term ‘conciliation’ be defined or described?</p>
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### 3.7 Is mediation purely ‘facilitative’ in nature?

In the context of ADR the term ‘content’ is sometimes used to refer to ‘what is discussed’ while the term ‘process’ is used to refer to ‘how’ the ADR process takes place.<sup>17</sup>

According to NADRAC’s Definitions Paper, a ‘mediator’ is a facilitator of the process and:

has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

An alternative view is that a mediator can (and should) evaluate the content of the dispute<sup>18</sup>, and that it is quite appropriate for a mediator to give advice. For example:

No matter what mediators say, participants perceive that they give advice. It is therefore time to abandon definitions which purport to indicate mediators do not give advice. In my view, the ‘silent sentence’ which should be added to each of the mediation definitions is *The Mediator may advise the parties in their negotiations.* (Response to NADRAC’s Standards Discussion Paper)

In evaluative mediation, the mediator has a role in ensuring that ‘settlement is in accordance with ... right and entitlements ... and possible court outcomes’<sup>19</sup>. Those who view mediation purely as process facilitation, however, regard ‘evaluative mediation’ as a contradiction in terms.<sup>20</sup>

The distinction between assistance or advice on content and assistance or advice on process is not always clear. For example, the current emphasis on child-centred practice in family mediation suggests that mediators need to evaluate:

[in] which situations direct child consultation would assist the child and the outcome of the parents’ counselling or mediation.<sup>21</sup>

Current practices indicate that mediators may be involved in the content of disputes in various ways, such as providing information, making assessments, suggesting options or expressing an opinion, through to giving advice on the facts, the law or possible outcomes. At what point does such involvement mean that the process is no longer ‘mediation’?

<p><i>Question 12</i>                      To what extent should the term ‘mediation’ assume that advice or evaluation is not given?</p>
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### 3.8 Court based and in-house mediation

To what extent should ‘mediators’ and ‘mediations’ be structurally isolated from, and independent of, decision-making processes?

Some argue that, as a matter of definition, ‘mediation’ cannot be provided by court officers as they are perceived to be part of the decision-making process of the court. Rules of natural justice may constrain court officers from conducting some of the procedures commonly involved in mediation, such as holding private sessions with each party.<sup>22</sup> On the other hand, many argue that court-based ADR practitioners are independent of the decision-making process and can therefore be regarded as ‘mediators’.

In practice the term ‘mediation’ is used frequently for ADR processes conducted by court officers. For example:

From 1 January, 2000, the Family Court re-positioned its counselling, conciliation and mediation services and as a consequence all its dispute resolution services are now referred to as ‘mediation’. ...What has developed both here and overseas is a range of mediation models which vary in terms of being facilitative or evaluative and in terms of the extent to which they change behaviour. The difference is that the Australian legislation uses different, and often confusing, terminology for similar dispute resolution processes, which essentially all fit within the definition of ‘mediation’ (Submission by the Family Court of Australia to the Family Law Pathways Advisory Group – 2000)

Many other Australian courts also provide services that they refer to as ‘mediation’. Most of these mediations are conducted in-house by their own officers.<sup>23</sup>

A similar argument applies to internal dispute handling processes within organisations. For example, a manager may facilitate a resolution in a dispute between employees. Since the manager has formal decision-making powers with respect to the employees, there may be constraints on the discussions. Such constraints would not apply to mediation conducted by an external service provider.

While courts and internal grievance handlers commonly use the term ‘mediation’, there may be a case for encouraging court-based and internal providers to use terms such as ‘conciliation’ or ‘facilitation’ to describe their (non-determinative) ADR processes.

*Question 13*                      Should courts (and other organisations) be encouraged to use terms other than ‘mediation’ for facilitative ADR processes conducted by their own officers?

### 3.9 Mediation and counselling

‘Counselling’ has been described as a therapeutic process designed to deal with individual and interpersonal difficulties, while ‘mediation’ and ‘conciliation’ focus on the practical dimensions of disputes<sup>24</sup>. Various forms of ADR, such as therapeutic mediation, conciliation counselling and dispute counselling show that this distinction is not always clear.

Like mediation, counselling itself can take many forms. The difference between therapy and counselling is not always clear. ‘Therapy’ is more commonly used to describe treatment of a clinically diagnosed disorder, while ‘counselling’ is more commonly used to describe support to people experiencing normal problems, stresses or crises.

Although mediation, counselling and therapy may share techniques or procedures, there may be more fundamental differences about:

- the nature of the assistance sought (for example, mediation could be seen as dealing with a dispute, counselling with a problem and therapy with a disorder)
- the goal of the intervention (for example, mediation could aim for agreement, counselling for adjustment and therapy for cure).

‘Therapeutic mediation’ could refer to a combination of therapy (or counselling) and mediation (that is, a hybrid process), or could describe mediation conducted by a therapist (or counsellor). ‘Therapeutic mediation’ could also refer to models of mediation that emphasise the human and interpersonal aspects of a dispute, in contrast to models, such as ‘settlement mediation’, which emphasise compromise and positional bargaining. ‘Transformative mediation’ may be a more appropriate term for this intended meaning of ‘therapeutic mediation’.

*Question 14*

Can clear distinctions be drawn among ‘mediation’, ‘counselling’ and ‘therapy’? If so, what are these distinctions?

### **3.10 Community mediation**

In its Definitions Paper, NADRAC described ‘community mediation’ in terms of the manner of mediator selection, namely as:

a [mediation] process in which [the mediator is] chosen from a panel representative of the community in general.

State and Territory Governments in Australia have funded mediation schemes that select mediators from a community panel. In several jurisdictions, legislation provides for the formal accreditation or gazettal of community mediators. Similar schemes exist throughout the world. Although the schemes have used different approaches, they commonly involve sessional mediators and use a co-mediation approach. This form of service delivery has often been described as the ‘community mediation model’.

‘Community mediation’ may also refer to the subject matter of the dispute, that is, the mediation of community disputes, such as neighbourhood conflict, disputes within community organisations and disputes involving local governance issues (as community mediation services described above specialise in such disputes, these meanings often merge).

Alternatively, ‘community mediation’ could refer to the nature of the organisation providing the service. In recent years the term ‘community mediation services’ has been used to describe family and child mediation services provided by non-government organisations approved and funded through the Commonwealth Government. These services employ

professional staff and do not use mediators drawn from a representative community panel. Under the Family Law Act and Regulations, a community mediator is a mediator employed by a family and child mediation organisation that has been approved by the Commonwealth Attorney-General<sup>25</sup>. As a result, a mediator accredited under a State- or Territory-funded community mediation scheme (as described above) may be a 'private mediator' under the Family Law Act.

<i>Question 15</i>	How should the different meanings of 'community mediation' be distinguished?
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### 3.11 Victim-offender mediation and diversionary conferencing

In its report on standards, NADRAC noted that:

There may be difficulties in setting clear boundaries around ADR and other processes. For example ... criminal justice matters may involve a conflict between individuals, and between the individual and society at large, represented by the state. Criminal matters may co-exist with, follow or lead to civil disputes.

Diversionary conferencing and restorative justice schemes operate in several Australian jurisdictions. These schemes generally bring together victims, offenders and support people in an attempt to resolve issues arising out of the offence. They may be alternatives to formal charging and processing by courts.<sup>26</sup> Police and other justice authorities run such schemes, sometimes in conjunction with community programs.

In addition, State- and Territory-funded community mediation schemes have provided victim-offender mediation services in which mediators facilitate discussions between victims and offenders. Such mediations may take place at different stages of the formal justice system. According to NADRAC's Definitions Paper, 'victim-offender mediation' is:

... a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

While there are similarities between victim-offender mediation and diversionary conferencing, the goals and assumptions of these processes may differ. Diversionary programs address social policy goals apart from agreement (or understanding or restitution) between the victim and offender. These considerations include administration of prescribed penalties, deterrence and rehabilitation of the offender. That is, in diversionary conferencing, the state plays a more active role in defining the issues and determining outcomes.

These issues raise complex questions about the relationship between the civil and criminal justice systems, the role of the state and the difference between a 'dispute' and an 'offence'.

*Question 16*

What terms should be used to describe ADR and related processes within the criminal justice system?

### 3.12 Emerging technology

Information technology (IT) presents an emerging challenge for ADR terminology.<sup>27</sup> Various terms have been used to describe ADR processes conducted with the assistance of IT. These terms include 'on-line ADR', 'ODR' (on-line dispute resolution), 'eADR' (electronic ADR), 'virtual ADR', 'cyber mediation/ADR', and 'techno-ADR'.

The digital age has seen the emergence of a new abbreviated language, suited to electronic text, which may lead to new terms for ADR processes. For example, services provided on-line to assist in resolving electronic commerce disputes between businesses and consumers could be referred to as 'ODR 4 eB2C' (on-line dispute resolution for electronic business to consumer).

IT assisted processes may resemble the procedures that would occur in face-to-face interaction. For example, on-line arbitration follows a similar process to face-to-face arbitration and on-line (text based) mediation resembles shuttle mediation. A video-conference is similar to a face-to-face meeting. Automated processes such as blind-bidding, however, have been developed specifically for the on-line environment and do not resemble traditional face-to-face processes.<sup>28</sup>

Professional literature now refers to technology as the 'fourth party' assisting the ADR practitioner.<sup>29</sup> Artificial intelligence may lead to sophisticated automated processes that enable complex ADR processes to be conducted entirely through a computer program. When that happens, the program would no longer be the fourth party. Instead the program itself could be seen as the ADR practitioner or third party.

*Question 17*

What are the implications of emerging technologies for terms used in ADR?

### 3.13 Future trends in ADR

Changes in ADR practices have brought about the need to review ADR terms. Terms will also need to take account of possible future trends in ADR, such as:

- increased use of court based ADR
- greater integration of ADR into the formal internal processes of organisations
- the spread of industry based schemes, such as industry ombudsman schemes, and self-regulated or co-regulated codes of conduct
- greater awareness of ADR among parties and referring agencies and increased sophistication in referral practices

- increased global competition and competitive tendering for the delivery of ADR services
- a push towards greater cost-effectiveness in the delivery of ADR services and increased use of performance and outcome measures
- increased use of information technology and virtual communications
- greater coordination in standards, accreditation, education and training in ADR
- increased professionalisation and institutionalisation.

These trends may create competing pressures. As a wider range of cases is referred to ADR, ADR service providers may need to offer more diverse and flexible services. They may need to tailor interventions to meet the specific needs of individual disputes and parties. This could lead to a greater emphasis on holistic service delivery and less emphasis on discrete ADR processes.

At the same time, increased sophistication and competition may lead ADR service providers to place greater emphasis on specialisation and product differentiation to establish niche markets. Specific terms may then evolve around each area of practice and may make common standards more difficult to achieve.

**Question 18**

How might future developments in ADR affect terminology?

<sup>1</sup> See, for example, Sourdin T. (2002) *Alternative Dispute Resolution*, Sydney, Lawbook Company; Street L. (1992) 'The Language of Alternative Dispute Resolution' *Australian Law Journal*, Vol. 66, pp 194–198.

<sup>2</sup> For an analysis of rights- v interest-based approaches, see Ury W, Brett J. & Goldberg S. (1988) *Getting Disputes Resolved*, New York, Jossey Bass.

<sup>3</sup> Comments in forums on NADRAC's standards paper (2000).

<sup>4</sup> Sourdin T. (2002) op. cit.

<sup>5</sup> Responses to NADRAC's survey on criteria for referral to ADR (project conducted during 2000).

<sup>6</sup> Department of the Treasury *Benchmarks for Customer Dispute Resolution Schemes*, Canberra.

<sup>7</sup> For example, Felstiner W., Abel R. & Sarat A. (1980) 'The emergence and transformation of disputes: naming, blaming and claiming', *Law and Society Review*, Vol. 15, No3–4, p. 631.

<sup>8</sup> See, for example, Australian Commercial Disputes Centre: <http://www.austlii.edu.au/au/other/acdc/#Clauses>; Energy and Water Ombudsman (Victoria) Annual Report 2001.

<sup>9</sup> See for example, Foreword by Street L. in Sourdin T. (2002), and NADRAC (2001) *A Framework of ADR Standards*, Section 2.3.

<sup>10</sup> For example, American Bar Association Code of Ethics; United Kingdom's Lord Chancellor's Department discussion paper (1999) *Alternative Dispute Resolution*, at <http://www.open.gov.uk/lcd/consult/civ-just/adr/indexfr.htm>.

<sup>11</sup> Astor H. (2000) Address to National Mediation Conference, Brisbane, May 2000.

<sup>12</sup> Jagtenberg R. & de Roo A. (2001) 'The "New" Mediation: Flower of the East in a Harvard Bouquet', *Asia Pacific Law Review*, Vol 9 No 1, pp 63–82.

<sup>13</sup> Family Court of Australia website: [www.familycourt.gov.au](http://www.familycourt.gov.au).

<sup>14</sup> Justice System Reform Council (2001) *Recommendations for a Justice System to Support Japan in the 21st Century*, [www.kantei.go.jp/foreign/judiciary/2001/0612report.html](http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html).

<sup>15</sup> ADR Conference Orientation Document [DSTI/ICCP/REG/CP(2000)1].

<sup>16</sup> Jagtenberg R. & de Roo A. (2001) op. cit.

<sup>17</sup> Cornelius H. & Faire S. (1989) *Everyone Can Win*, Australia, Schuster.

<sup>18</sup> Lowry L. (2000) 'To evaluate or not; that is not the question', *Family and Conciliation Courts Review*, Vol. 38, no. 1, Jan., pp 48–61.

<sup>19</sup> Boulle L. (1996) *Mediation: Principles, Process, Practice*, Australia, Butterworths, p. 29.

<sup>20</sup> Lowry L. (2000) op cit.

<sup>21</sup> Australian Institute for Primary Care (2002) *Children in Focus*, brochure on professional development program auspiced by the Attorney-General's Department.

<sup>22</sup> Street L. (1992) op cit.

<sup>23</sup> See NADRAC (2002) *Summary of Published ADR Statistics* at [www.nadrac.gov.au](http://www.nadrac.gov.au).

<sup>24</sup> Family Law Council (1992) *Mediation*, Canberra, AGPS.

<sup>25</sup> Note that the Attorney-General's Department has released a consultation paper on a quality framework for PDR services. The paper examines options for amending this approval process.

<sup>26</sup> Strang H. (2001) *Restorative Justice Programs in Australia*, Canberra, Australian Institute of Criminology, <http://www.aic.gov.au/crc/reports/strang/index.html>.

<sup>27</sup> See, for example, American Bar Association (2002) *Addressing Disputes in Electronic Commerce*.

<sup>28</sup> Consumers International (2000) *Disputes in Cyberspace*.

<sup>29</sup> Rifkin J. (2001) 'Online Dispute Resolution: Theory and Practice of the Fourth Party', *Conflict Resolution Quarterly* 19(1) Fall pp 117–124.

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## 4. Possible approaches

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### 4.1 Definitions or descriptions?

As outlined in Section 1.2, the terminology issues in ADR could be dealt with through definitions, descriptions or a combination of both.

A 'definition' attempts to give precise meaning and to place clear boundaries around the particular ADR process in question. It is possible to test compliance against the definition of an ADR process if that were desirable or necessary. For example a mediator may not be covered by immunity provisions if their conduct of the process is not in accordance with a relevant definition.

A 'description' refers to what takes place in the reality of a specific ADR process, such as mediation, without attempting to prescribe what should occur. Descriptions change as practices change and issues of compliance may be irrelevant. However a description in a legislative instrument may have the same effect as a definition. This raises the question of the extent to which descriptions of like ADR processes should be uniform where they are used in legislation.

A possible approach is to define a limited number of key terms where consistency and compliance are essential, but to describe other terms where diversity and flexibility are more important.

<b>Question 19</b>	In what circumstances should ADR processes be defined or described in a consistent fashion, and in what circumstances should different descriptions or definitions be used?
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## 4.2 Generic or specific terms?

Terms for ADR processes could be generic or specific.

The generic approach uses umbrella terms to describe a range of similar processes, for example the term ‘mediation’ could refer to all non-determinative processes. Generic terms allow for flexibility and discretion by the ADR service provider and support integrated or holistic service delivery. They avoid overwhelming service users with confusing terms and complex choices but place greater responsibility on the ADR service provider to match the particular process to the needs of the parties.

The specific approach makes a number of differentiations among similar processes, for example mediation could be distinguished from conciliation and counselling and be described as ‘evaluative’, ‘facilitative’ or ‘transformative’. This approach provides service users with clearer choices about particular ADR processes. The use of specific terms also enables ADR processes to be planned and sequenced in a strategic way, and allows the level of formality or direction to be escalated (or ‘ratcheted up’) where earlier methods have failed. For example, parties who state that they have ‘tried mediation’ and found that it ‘didn’t work’ may be willing to try a more formal or directive process such as conciliation.

*Question 20*

How generic or specific should ADR terms be?

## 4.3 At what level is consistency needed?

Consistent terms for ADR could be apply to each service provider, each area of practice or across all areas of practice.

At the first level, each ADR service provider could be expected to describe or define its processes to service users and to apply them in a consistent fashion, as suggested in NADRAC’s Standards Report.

Beyond the individual provider level, each sector, jurisdiction or area of practice could adopt consistent terms. For example, different sets of definitions or descriptions covering ADR could be developed for commercial matters, for consumer disputes and for family law matters.

A more ambitious goal would be to adopt and maintain a common set of ADR definitions and descriptions across all areas of ADR practice.

A mixed approach would involve a common set of general terms across all areas of ADR practice, with more specific terms applying at the sectoral and service provider level.

*Question 21*

Which common ADR terms should be developed (a) across all areas of ADR practice; (b) at the sector level and (c) by individual ADR service providers?

## 4.4 What should be described or defined?

NADRAC's Definitions Paper covered ADR processes. Definitions (or descriptions) could, however, focus on:

### *Elements or steps in processes*

This approach reduces processes into their individual components or building blocks, such as investigation, fact-finding, issue identification, negotiation, option generation, reaching agreement and decision-making. ADR processes could then combine these sub-processes in various ways.

### *The roles and responsibilities of the ADR practitioner*

This approach would not attempt to define or describe processes but would describe the activities of the practitioner. For example:

an 'expert appraiser' investigates a dispute and provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

The Family Law Act and Regulations do not define particular primary dispute resolution processes, but refer to different categories of practitioners, such as family and child mediator, community mediator and court mediator and outline some of their duties and obligations.

### *Services*

This approach would describe the service offered by a particular provider, rather than the individual process conducted. For example:

[Organisation X] is a 'mediation service' that aims to assist parties to reach agreement through facilitation, advice and practical assistance.

### *Data collection*

One submission to NADRAC suggests that definitions should now focus on how activities and outcomes are recorded and reported:

... there needs to be further work done on definitions. The NADRAC Definitions provided the first common language for the ADR community. This needs to be extended so that meaningful comparisons can be made. A useful next step would be for similar organisations to adopt common record keeping. (Response to NADRAC's Standards Discussion Paper)

ADR service providers could be encouraged to use consistent definitions for statistical collection, for example, activity and performance indicators. Operational definitions would then need to be developed for terms such as 'parties', 'cases', 'disputes', 'sessions', 'agreements', 'resolution' or 'decision'.

*Question 22*

What should be the focus of attention in developing consistency in ADR terms: processes, elements in processes, roles of practitioners, services or recording/reporting?

## **4.5 Where should you find definitions or descriptions?**

Definitions and descriptions covering ADR are currently located in legislative instruments, administrative directions, codes, contracts, standards, public information and marketing materials.

In suggesting appropriate places for various ADR definitions and descriptions, a balance needs to be struck between certainty and transparency on one hand and flexibility on the other. For example, legislative instruments, especially principal acts, provide clarity about the use of ADR terms. They are transparent and enable the public to provide comment through democratic processes. They are, however, difficult to amend and may create legal problems where a practitioner does not follow strictly the provisions contained in the legislation (see Section 4.1 above). By contrast, administrative directions are open to interpretation and may be changed readily to address issues as they emerge. Administrative directions, however, are not always publicly accessible.

Options for the location of ADR terms are outlined below:

### ***Legislation***

Legislation includes principal acts and related instruments such as regulations, rules and schedules. Definitions or descriptions could be located in any of these instruments or within explanatory memoranda accompanying them. In Australia, ADR processes are rarely defined comprehensively in legislation. Legislators have used different approaches depending on the particular piece of legislation under consideration.

Does inconsistency across separate pieces of legislation create confusion about the obligations and right of parties and practitioners? If so, one option could be to develop a model statute that contained definitions or descriptions of ADR terms. The USA has taken this approach through the Uniform Mediation Act (US) (2001). Alternatively, individual legislative instruments could refer to a common set of definitions or descriptions developed and promulgated by a recognised body. Acts Interpretation legislation could also include ADR definitions or descriptions where they are not contained in the principal Act.

Legislative instruments may empower bodies to develop administrative directions and may also refer to other types of documents, for example, standards, codes or information material.

### ***Administrative directions***

Administrative directions include practice directions issued by courts, tribunals and statutory agencies that interpret and give effect to governing legislation. Administrative directions also include formal instructions issued by line management in line with corporate policy

directives. Such administrative directions could use, or refer to, common definitions or descriptions for ADR.

### ***Codes***

ADR definitions or descriptions could be incorporated into professional or industry codes of practice, which provide for referral to ADR. In its report on standards, NADRAC recommended that ADR service providers adopt and comply with a code of practice that, among other things, describes the processes offered.

### ***Contracts***

Definitions or descriptions could also be contained in contracts or agreements for the delivery of ADR services. Such agreements could be ongoing contracts between funding bodies and service providers, or one off contracts between individual parties and practitioners.

### ***Standards***

Accreditation standards could incorporate definitions or descriptions for ADR processes. For example, quality standards used by accrediting bodies could specify the range of processes for which accreditation is granted. Competency standards for ADR practitioners could incorporate definitions or descriptions into their range of variables and training packages could include definitions or descriptions in their assessment guidelines.

### ***Public information and marketing materials***

Definitions or descriptions may also be contained in information materials provided to prospective clients or to the public. ADR service providers could develop their own materials or work together to produce consistent materials. Alternatively a central body could develop guidelines on ADR information materials. Information materials also could be regulated formally. For example, the Family Law Regulations require family and child mediators to provide a written statement to parties that refers to particular features of the mediation process.

*Question 23*

Where should ADR definitions or descriptions be found?

# Glossary

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This glossary aims to aid discussion about the meaning of specific ADR terms mentioned in this and previous NADRAC papers. It is not a prescriptive set of definitions and will be reviewed in the light of responses to the paper.

As far as possible, the glossary uses descriptions or definitions contained in previous NADRAC publications. It uses and cites other sources where appropriate.

<i>Question 24</i>	What alternative definitions or descriptions should be used for terms used in ADR (listed in the Glossary)?
<i>Question 25</i>	What terms are used in ADR, other than those described in the Glossary?

**Adjudication** is a process in which the parties present arguments and evidence to a neutral third party (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by state authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there are also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers). (NADRAC's Definitions Paper).

**ADR** refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. See also *PDR*. (NADRAC's brochure: *What is ADR?*)

**ADR organisations** are formally constituted entities, whether government, statutory, or non-government, which are involved in defined activities. These activities may comprise service provision, training, accreditation and professional membership services associated with ADR service providers. (NADRAC's Standards Report)

**ADR practitioners** are the individuals directly involved in the delivery of ADR services. They may work privately or through engagement by an ADR organisation. A sole practitioner is a sole trader or other individual operating alone and directly engaged by clients. (NADRAC's Standards Report)

**ADR programmes** are planned sets of activities in which ADR is used to meet defined objectives. A program could involve a number of service providers under a government funding arrangement or could represent a series of projects and activities undertaken by a particular service provider. (NADRAC's Standards Report)

**ADR schemes** are systematic and planned arrangements for the provision of ADR. (NADRAC's Standards Report)

**ADR service providers** are the entities responsible for the actual delivery of ADR services. The term *service provider* includes both organisations and sole practitioners, but does not include organisations that have no service provision function. (NADRAC's Standards Report)

**ADR services** are the particular forms of assistance provided by ADR service providers. (NADRAC's Standards Report)

**Advisory ADR processes** are processes in which an ADR practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include *expert appraisal, case appraisal, case presentation, mini-trial* and *early neutral evaluation*. (NADRAC's brochure: *What is ADR?*)

**Arbitration** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination. (NADRAC's Definitions Paper)

**Automated ADR processes** are processes conducted through a computer program or other artificial intelligence, and do not involve a 'human' third party. See also *blind bidding* and *on-line ADR*.

**Automated negotiation** (or *blind-bidding*) is 'a form of computer assisted negotiation in which no third party (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range ... they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached'. See also *automated ADR processes*. (Consumers International (2000) *Disputes in Cyberspace*)

**Case appraisal** is a process in which a third party (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved. (NADRAC's Definitions Paper)

**Case presentation** (or *Mini-trial*) is a process in which the parties present their evidence and arguments to a third party who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also *mini-trial*. (NADRAC's Definitions Paper)

**Clients** are individuals or organisations that engage ADR service providers in a professional capacity. A client may not necessarily be a party to a dispute, but may engage an ADR service provider to assist the resolution of a dispute between others. (NADRAC's Standards Report)

**Combined or hybrid ADR processes** are processes in which the ADR practitioner plays multiple roles. For example, in *conciliation* and in *conferencing*, the ADR practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In *hybrid* processes, such as *med-arb*, the practitioner first uses one process (*mediation*) and then a different one (*arbitration*). (NADRAC's brochure: *What is ADR?*)

**Co-mediation** is a process in which the parties to a dispute, with the assistance of two neutral third parties (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. (NADRAC's Definitions Paper)

**Community mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), chosen from a panel representative of the community in general, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. (NADRAC's Definitions Paper)

**Conciliation counselling** is a term used previously to describe some of the processes used by counsellors in the Family Court of Australia to assist parties to settle disputes concerning children. The Court now uses the term *mediation* to describe these processes.

**Conciliation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement. (NADRAC's Definitions Paper)

**Conference/Conferencing** is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory ADR processes.

**Consensus building** is a process where parties to a dispute, with the assistance of a facilitator, identify the facts and stakeholders, settle on the issues for discussion and consider options. This allows parties to build rapport, through discussions that assists in developing better communication and relationships.

**Counselling** refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems. *Counselling* has a specific meaning under the Family Law Act, where it is included as a *Primary Dispute Resolution* process (see *PDR*).

**Decision-making for One (DMO)** is a process where the ADR practitioner assists 'one party who wishes to explore options and the other party declines to attend'. (Submission by Relationships Australia in response to NADRAC's Standards Discussion Paper)

**Determinative ADR processes** are process in which an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative ADR processes are *arbitration*, *expert determination* and *private judging*. (NADRAC's brochure: *What is ADR?*)

**Determinative case appraisal** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the appraiser) who makes a determination as to the most

effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute. (NADRAC's Definitions Paper)

**Dispute counselling** is a process in which a third party (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved. (NADRAC's Definitions Paper)

**Diversionsary, victim-offender, community accountability and family group conferencing** are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a meeting (conference) with the victim, others affected by the offence, family members and/or other support people. A third party facilitates the conference. The third party may be part of the criminal justice system (for example, a police or corrections officer) or an independent practitioner.

**Early neutral evaluation** is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a neutral third party. That third party makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute. (NADRAC's Definitions Paper)

**Education for self-advocacy** is a process in which a party to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other, party or parties. See also *dispute counselling* and *decision-making for one*.

**Evaluative mediation** is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. (See also *combined processes*). Note: *evaluative mediation* may be seen as a contradiction in terms since it is inconsistent with the definition of *mediation* provided in this glossary.

**Expert appraisal** is a process in which a third party, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved. (NADRAC's Definitions Paper)

**Expert determination** is a process in which the parties to a dispute present arguments and evidence to a neutral third party, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination. (NADRAC's Definitions Paper)

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. (NADRAC's Definitions Paper)

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a neutral third party (the facilitator), to

negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation. (NADRAC's Definitions Paper)

**Facilitation** is a process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation. (NADRAC's Definitions Paper)

**Facilitative ADR processes** are processes in which an ADR *practitioner* assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are *mediation*, *facilitation* and *facilitated negotiation*. (NADRAC's brochure: *What is ADR?*)

**Fact finding** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution. See also *investigation*. (NADRAC's Definitions Paper)

**Family and child mediation** is defined in the Family Law Act as 'mediation of any dispute that could be the subject of proceedings (other than prescribed proceedings) under [the] Act and that involves (a) a parent or adoptive parent of a child; or (b) a child; or (c) a party to a marriage' (section 4). See also *PDR*.

**Fast-track arbitration** is a process in which the parties to a dispute present, at an early stage in an attempt to resolve the dispute, arguments and evidence to a neutral third party (the arbitrator) who makes a determination on the most important and most immediate issues in dispute. (NADRAC's Definitions Paper)

**Hybrid ADR processes** - see *combined ADR processes*

**Indirect negotiation** is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a neutral third party (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation. (NADRAC's Definitions Paper)

**Industry Ombudsman** (see *Ombudsman*)

**Investigation** is a process in which a third party (the investigator) investigates the dispute and provides advice (but not a determination) on the facts of the dispute. See also *fact finding*. (NADRAC's Definitions Paper)

**Judicial dispute resolution (JDR)** is a term used to describe a range of dispute resolution processes, other than adjudication, which are conducted by judges or magistrates. An example is judicial settlement conference.

**Med-arb** see *Combined processes*

**Mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement. (NADRAC's Definitions Paper)

**Mini-trial** is a process in which the parties present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also *case presentation*. (NADRAC's Definitions Paper)

**Multi-party mediation** is a mediation process, which involves several parties or groups of parties. (NADRAC's brochure: *What is ADR?*)

**Ombudsman** is a body which 'functions as a defender of the people in their dealings with government ... In Australia, there is a Commonwealth Ombudsman as well as state and territory ombudsmen. ... In addition, a number of industry ombudsmen have been appointed, whose responsibility it is to protect citizens' interests in their dealings with a variety of service providers, especially in industries previously owned or regulated by governments, for example telecommunications, energy, banking and insurance'. (Commonwealth Ombudsman Home page: [http://www.ombudsman.gov.au/about\\_us/default.htm](http://www.ombudsman.gov.au/about_us/default.htm))

**On-line ADR, ODR, eADR, cyber-ADR** are processes where a substantial part, or all, of the communication in the ADR process takes place electronically, especially via e-mail. See also *automated ADR processes*.

**Parties** are persons or bodies who are in a dispute that is handled through an ADR processes. (NADRAC's Standards Report)

**PDR (Primary Dispute Resolution)** is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The Family Law Act 'encourages people to use *primary dispute resolution* mechanisms (such as counselling, mediation, arbitration or other mean of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made' (Section 14). The *Federal Magistrates Act 1999* defines *primary dispute resolution* processes as 'procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation' (section 21). See also *ADR*.

**Private judging** is a process in which the parties to a dispute present arguments and evidence to a neutral third party chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with their opinion as to what

decision would be made if the matter was judicially determined. (NADRAC's Definitions Paper)

**Referrers** (or **referring agencies**) are individuals and agencies that suggest, encourage, recommend or direct the use of ADR (or other) services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives. (NADRAC's Standards Report)

**Senior executive appraisal** is a form of case appraisal presentation or mini-trial where the facts of a case are presented to senior executives of the organisations in dispute. (Street L. [1989] 'Senior Executive Appraisal' *Australian Construction Law Newsletter*, 6.)

**Service users** (or **consumers**) are those who seek, use or receive ADR (or other) services. They may not necessarily be involved in a dispute, have engaged a service provider or have participated directly in ADR processes, but may seek information or other assistance from the ADR service provider. (NADRAC's Standards Report)

**Settlement mediation** is a process in which the parties to a dispute, with the assistance of a *mediator*, endeavour to reach a compromise between their respective positions through a positional bargaining process.

**Shuttle mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process. (NADRAC's Definitions Paper)

**Statutory conciliation** takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute. (NADRAC's Definitions Paper)

**Therapeutic mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement, and in this process seek also to resolve intra-personal and inter-personal difficulties in their relationship. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. See also *transformative mediation*. (NADRAC's Definitions Paper)

**Transformative mediation** is a mediation process in which the mediator aims to enhance relationships and promote understanding between the parties. See also *therapeutic mediation*. (NADRAC's brochure: *What is ADR?*)

**Victim-offender mediation** is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the

## ADR Terminology

content of the dispute or the outcome of its resolution, but may advise on or determine the process. (NADRAC's Definitions Paper)