NADRAC Issues Paper Alternative Dispute Resolution in the Civil Justice System March 2009

Comments of NSW Bar Association

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1 INTRODUCTION

NSW Bar Association

The NSW Bar Association has a strong commitment to alternative dispute resolution. In 2000, the Bar Council introduced the following rule into The *New South Wales Barristers' Rules* in order to ensure that clients and solicitors have an understanding of the alternatives to fully contested litigation:

> *17A. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.*

The Bar Association has for some years provided panels of mediators to assist the NSW Supreme and District Courts and required those mediators to have undertaken external training courses and to also have experience of at least four mediations. On 22 May 2008, the Bar Council declared the Association to be an RMAB, adopted the National Standards, and instituted an annual accreditation scheme in compliance with the Standards. Only those barristers who are accredited under the National Standards are considered for appointment to the District Court and Supreme Court mediators' panels.

In addition to the minimum requirement of compliance with the Standards, the Bar Association requires accredited mediators to hold practising certificates, to have a minimum of five years' experience as a legal practitioner and, in the case of those barristers who wish to qualify for accreditation as 'new' mediators, to have the experience of at least four mediations required in the past for inclusion on the court panels. Sixty seven barristers were accredited in the Association's first accreditation process in October 2008. A second accreditation process will occur in October 2009.

Lists of accredited mediators and mediators on the respective court panels are displayed on the Association's website to assist the public, and may be downloaded.

The Association is committed to ADR and holds several continuing professional development seminars each year, including compulsory ADR sessions for Readers (barristers in their first year of practice). In 2008, it provided approximately 20 hours of ADR seminars, including a high level all day workshop attended by 107 barristers, and will provide at least the same number of hours in 2009 as well as an all day advanced mediation workshop. In addition, in 2008, it set up a mentoring scheme for barrister mediators.

The Association has for many years operated a Legal Assistance Referral Scheme (LARS) through which pro bono legal assistance is provided by barristers. In early 2009, that scheme was extended to cover pro bono work by barristers acting as mediators or as representatives of parties in mediations.

This submission adopts the same numbered headings as NADRAC's Issues Paper and sets out the numbered questions posed by the Issues Paper using the same numbering.

2 ABOUT ADR

2.1 To what extent is there a need for greater consistency in the use of ADR terms? How could this be achieved? What are the risks of greater consistency in the use of terms?

The Association agrees with NADRAC that there is little consistency in how ADR terms are used. It would not be possible to have complete consistency. However, consistency as to the types of ADR processes identified in legislation and the rules or practice notes of courts and tribunals would be very useful, at least at the Commonwealth level. It would also be useful if ADR organisations or providers used consistent terminology.

An example of inconsistency in Commonwealth legislation is the *Federal Magistrates Act 1999* ("FMA") which defines "dispute resolution processes" in s 21 as including (a) counselling; (b) mediation; (c) arbitration; (d) neutral evaluation; (e) case appraisal; and (f) conciliation whereas the *Administrative Appeals Tribunal Act 1975*, the *Copyright Act 1968*, and the *Workplace Relations Act 1996* all define the processes as (a) conferencing; (b) mediation; (c) neutral evaluation; d) case appraisal; and (e) conciliation; but specifically exclude (g) arbitration. The FMA also differs from the other legislation by including "counselling", but not "conferencing".

The Association believes that it would be helpful if ADR organisations adopted standard definitions set by NADRAC for the various ADR processes but does not believe that such definitions should be enshrined in legislation (see 2.3 below).

2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?

The Association is not aware of any specific demonstrated effect but believes that inconsistent use of ADR terms is likely to result in lower use of some ADR forms because of a lack of understanding, particularly forms such as conciliation, conferencing and expert determination, case appraisal and neutral evaluation.

2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?

The Association does not believe that there are any disadvantages in adopting standard definitions or statutory definitions of "dispute resolution processes" but is concerned that if statutory definitions were to extend to defining the content or procedures for the forms themselves, this may give rise to disputes over the conduct of or the nature of the ADR process undertaken or to be undertaken and also may inhibit development of new forms of ADR or hybrid forms.

3 PROMOTING PUBLIC AWARENESS OF ADR

3.1 To what extent is there a need to improve the understanding of ADR and its differing processes in the general community? How might this be achieved?

The Association believes that ADR in all of its forms is under-utilised in Australia, and that it is not considered in many disputes because of a lack of understanding or knowledge about its nature and appropriateness. The Association believes that public awareness of ADR could be enhanced by public and ongoing promotional campaigns, including campaigns specifically targeted at regular users of the civil justice system including federal, state and local government agencies and large corporations. These could be undertaken by commercial ADR organisations and government agencies.

With respect to the proposal that courts provide information about ADR to all prospective applicants, the Association believes that the NSW Supreme Court and the Federal Court both currently provide information about mediation on their websites and that other courts not already doing this should do so.

The Association does not believe that it is necessary to create a central access point for information about, and assessment and referral to, appropriate ADR services including a well promoted information and referral hotline. In light of the very different types of users of ADR in Australia and the level of use of ADR, this would be premature and incur unnecessary costs. Further, disputants should have as much flexibility and choice as possible in their use of ADR and it may not be possible for a centralised agency to assist. A central access point or agency within Australia also assumes that ADR services originating in Australia are only provided domestically when in reality, they are increasingly provided internationally.

3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?

The Association believes that greater awareness and understanding by judges and court registrars about ADR and its benefits would assist considerably in increasing the willingness of litigants and their legal representatives to mediate or engage in other forms of ADR.

With respect to the proposal that there be statutory requirements for lawyers to provide information about ADR to their clients, the Association has referred under Section 1 above to Barristers' Rule 17A above which requires barristers in NSW to advise clients and solicitors of ADR processes. The Association believes that it is sufficient that the requirement be contained in the Barristers Rules, with which all NSW barristers must comply.

If, however, there was such a similar statutory requirement, it should be consistent at Federal and State levels.

4 PROVISION OF ADR SERVICES

Court services

4.1 What are the benefits and drawbacks of court-based ADR?

The Association supports court-based mediation in matters where straightforward money claims, particularly smaller money claims, are involved and there is a greater imperative to control costs, for example in Family Provision Act cases. It supports mediation and conciliation in Family Court matters. It believes, however, that it is important to distinguish between the role of courts and ADR processes, and does not support court-based ADR generally.

The Association is not aware of any court offering dispute resolution services other than mediation and conciliation. If parties wish to take advantage of court-based mediation merely because the facility is available or because it is cheaper, this may inhibit the use of other ADR processes which may be more

appropriate or useful in a particular case, for example, expert determination, med-arb, or co-mediation. Some matters may be better mediated by an industry expert or co-mediated by an industry expert or a lawyer and an experienced mediator. The court-based mediation services do not generally permit co-mediation.

It is recognised that exceptions exist particularly involving specialist issues such as parenting and other areas, although even there the importance and utility of external service providers is widely recognised. As a general principle, the Bar Association does not support court-annexed mediation, particularly in complex matters. The separation between the judiciary and ADR service providers assists with public clarity of their functions within the legal process.

4.2 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?

The Association believes that court-based mediation services can be effective but that they are often if not usually used at a late stage in the litigation. By this time, substantial costs have been incurred, the parties have prepared for a hearing, and disputes may be more difficult to settle, particularly where one or other party expects the settlement sum to cover their legal costs. To this end, the Association believes that it is only appropriate to use court-based mediation services, if at all, in smaller and simpler matters where short blocks of the court's time can be allocated towards them.

4.3 To what extent should judges or other court staff encourage disputants to use ADR (where not required by legislation)?

Judges and other court staff should encourage disputants to use ADR in all matters.

4.4 What role should courts have in facilitating or providing ADR?

The courts should encourage parties to make more use of ADR where appropriate and facilitate ADR by referring disputes to ADR, including disputes on procedural issues and interlocutory disputes such as discovery, experts' statements, choice of experts, statements of agreed facts etc. The Association does not believe that the courts are or should be dispute resolution centres which provide assessment and referral services and various types of ADR services as well as court processes in a 'one-stop shop'.

The Association supports referral by courts of matters to mediation under the powers they presently have, but it believes that the parties who prefer another ADR process such as expert determination should be able to make their own choice rather than have it imposed upon them by a court. The court's primary focus should be to get the parties to undertake an ADR process rather than dictating the type that should be undertaken.

<u>Judicial dispute resolution</u>

4.7 What are the advantages and disadvantages of judges conducting ADR processes? In particular, what are the advantages and disadvantage of judges conducting mediation (as described under the National Mediator Accreditation System)? Are there particular cases where direct participation by judges in ADR is more appropriate?

While an understanding of ADR processes is important for judges, it is not necessary for them to participate in them. The role of judges should be to case manage and to refer matters to ADR conducted by external ADR practitioners.

The Association believes that ADR is not compatible with the traditional adjudicative role of the judge. ADR is intended to be facilitative, and the ADR practitioner's role is to encourage the parties to consider the options and to find a solution, not to reach a personal judgment about the outcome.

Permitting sitting judges to mediate may undermine public confidence in the judiciary and in the impartiality of judges. The familiarity and informality of mediation may affect the standing of judges

when they are sitting, and the court process generally. The judge's conduct in private sessions may come into question, and could cause an appearance of bias. Members of the public may be concerned that judge-mediators work with or work in close proximity to other judges who adjudicate cases that did not settle at mediation. Judges' conduct in mediation could therefore affect their reputations in performing their usual judicial duties.

Other ADR processes which require a form of adjudication, such as expert determination, case appraisal or early neutral evaluation, similarly do not fit with the adjudicative role. Those processes require the ADR practitioner to form a view in many cases on the basis of limited information and almost always without the benefit of cross-examination. Again, if judges embark on this type of ADR, there is a risk that it may affect their standing and that of the court.

Judicial time and facilities are expensive and the use of judges as ADR practitioners will reduce the flexibility of listing practices in a court as there will be a smaller pool of available judges to call on to hear a matter that did not settle at mediation. Those who have mediated could not sit on the cases they have mediated, or related cases and those who have conducted another type of ADR process which required them to form a view could not sit because of perceived bias.

4.8 To what extent is it an advantage of judicial involvement that it improves the chances of resolution? Why might this be the case? To what extent might this have negative consequences?

The results of research in the US and Canada may not be reflected in settlement of cases in Australia. Even if it were, the risk that the standing of the courts and judges will be diminished is an important countervailing factor.

As stated above, the Association believes that there should be more focus on case management by the courts. The more case management, the more likely it is that parties and their legal representatives will focus at earlier stages of litigation on possibilities for settlement and the use of ADR processes.

4.9 To what extent might the confidentiality of ADR be undermined if a judge conducts it? What reporting requirements might apply?

The courts and judges are experienced at keeping documents confidential. There is not likely to be any actual risk that a judge-mediator will disclose information to another judge who is adjudicating a case that did not settle. The public, however, may perceive that there is a risk.

<u>Court officer provided ADR services</u>

4.11 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?

The Association's comments in relation to judicial dispute resolution apply generally to court officer provided ADR services save that, as stated above, the Association supports court-based mediation in matters where straightforward money claims, particularly smaller money claims, are involved and there is a greater imperative to control costs, for example in Family Provision Act cases. It supports mediation and conciliation in Family Court matters. Otherwise, the role of court officers should be to refer matters to mediation or other forms of ADR by external ADR practitioners.

4.12 What are the advantages and disadvantages of courts engaging specialist ADR practitioners to provide ADR? What are the advantages and disadvantages of courts engaging ADR practitioners with particular expertise, eg accounting, engineering, psychology, etc?

The Association believes that the courts should not themselves engage ADR practitioners but should instead refer matters to ADR, leaving the choice to the parties as to the expertise of the ADR practitioner.

Private, community and government based ADR

4.13 What are the advantages and disadvantages of private ADR services and those provided by industry groups?

The existence of private ADR services and services provided by industry groups is important in that it provides choice and flexibility for the parties in choice of the type of ADR process, the timing, venue and cost of the process, and the expertise and experience of the practitioner or practitioners conducting the service. For example, the parties would be able to appoint a mediator with special expertise in the relevant area, or co-mediators with different expertise or of different genders. The existence of private ADR services also helps to preserve the integrity of the courts. A further advantage of private ADR services is the ability for those services to assist new or prospective ADR practitioners in gaining experience.

4.16 What are the advantages and disadvantages of courts referring matters to external ADR practitioners?

As stated above, the Association believes that the courts should refer most matters to external ADR practitioners.

4.17 What are the advantages and disadvantages of providing specialised assessment, referral and dispute resolution centres outside the courts? What would the functions of such bodies be? How might they be resourced?

The Association does not believe that there are any advantages in providing specialised assessment, and referral centres. The Association is of the view that there are more advantages to be gained through diversification.

4.19 To what extent is there a need for more, or more highly specialised, private, community based or government ADR services?

The Association believes that there will be a natural growth of ADR services in Australia and that no pro-active measures are required. As demand increases in Australia for ADR services, that demand will be met by private ADR service providers.

The Association notes the suggestion in the Issues Paper that:

> *Higher fees tend to be charged by 'persons of note', usually senior members of the bar and retired judges, and may be more of a reflection of their legal knowledge, seniority and their capacity to bring authority to bear on the disputants.*

Barrister mediators charge a range of fees which compare favourably with and are often lower than those of other types of mediators. As noted in section 1 above, the Association has a Legal Assistance Referral Scheme which covers mediation. Under the LARS scheme, barristers who are accredited under the National Standards provide their services as mediators on a pro bono basis for a minimum of four hours for a mediation.

5.1 To what extent is there a need to enhance the understanding of ADR and negotiation in legal or other professions? How might the information and referral functions of professionals be enhanced? What are the advantages and disadvantages of introducing compulsory ongoing training about ADR for lawyers?

Professional awareness of ADR

The Association agrees that the legal profession has an important role in informing members of the public about ADR and believes that the courts have an equally important role in this regard.

As noted above, NSW barristers must comply with Rule 17A of the Bar Rules by informing clients (including solicitors) about the appropriateness of ADR. The Association is committed to ADR and provides continuing professional development in this area, including seminars on different types of ADR and advocacy and preparation for ADR processes.

The Association does not agree that "the culture of the legal profession may not be conducive to referral to ADR, and some lawyers may fear it will take business away from them". The Association believes that barristers have embraced ADR and that is an important part of legal practice. This has been facilitated by the existence of Rule 17A, and also by Rule 74 of the Bar Rules which includes forms of ADR in the definition of "Barristers' Work", involving representing parties or as an ADR practitioner. The Association strongly advocates ADR and believes that the ADR training it offers gives barristers the tools they need to refer matters to ADR appropriately.

However, the Association does not support compulsory ADR training across the profession as it believes this would impose an unnecessary level of regulation. For example, some barristers may never practice in ADR but there are always ADR seminars and courses promoted and available should they wish to increase their knowledge in this area. However, if a lawyer wishes to become accredited as say a mediator, the National Standards would then require them to undergo training and maintain that training on an annual basis.

5.2 To what extent is there a need to enhance the understanding of ADR amongst court staff and judicial officers? How might their information and referral functions be enhanced?

As stated in 3.2 above, the Association believes that greater awareness and understanding by judges and court registrars about ADR and its benefits would assist considerably in increasing the willingness of litigants and their legal representatives to mediate or engage in other forms of ADR.

While the Association supports referral by courts of matters to mediation under the powers they presently have, it believes that the parties who prefer another ADR process such as expert determination should be able to make their own choice rather than have it imposed upon them by a court. The court's primary focus should be to get the parties to undertake an ADR process rather than dictating the type that should be undertaken.

Barriers and incentives

6.1 What are the barriers to the use of ADR before civil proceedings are commenced? To what extent, do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?

Barriers to the use of ADR before civil proceedings are commenced are primarily lack of knowledge and education about the effectiveness of ADR, its advantages, and its different forms. For example, expert determination is a useful and cost-effective means of resolving a dispute before litigation but is under-utilised in Australia.

The timing of an ADR process is important, as using ADR late in the dispute may mean that substantial costs have already been incurred, thus reducing cost saving benefits and also, in some cases, making settlement more difficult. Early ADR, either before litigation or in its early stages, is not always possible and the appropriateness of its timing varies from case to case. Some disputes can be resolved early and some cannot. In some cases, the parties will not have sufficient information about the facts and/or issues in the dispute to be able to undertake an ADR process that they believe is useful. The type of case will often determine whether early resolution is possible. For example, building disputes can often be resolved relatively quickly through the engagement of an expert determiner whilst medical negligence cases are difficult to resolve early as they usually require the completion of a number of complex medical and other expert reports.

The Association does not agree that the culture of the legal profession is adversarial or that the culture is a barrier to greater use of ADR. The collective experience of the Association is that the profession is increasingly involved in ADR and actively promotes ADR.

The Association agrees that cultural differences between participants may create a barrier to the use of ADR and that it may be difficult for disputants from some cultural backgrounds to access ADR services and this may be remedied by education and community services. As noted above, clients who retain barristers are to be advised in relation to ADR processes.

The Issues Paper suggests that features of the civil justice system may present barriers to the use of ADR as an alternative or an adjunct to litigation, either prior to the commencement of proceedings or after commencement or both, including the fact that applications for judicial review are subject to a time limits. The Association believes that this is a minor issue.

The Issues Paper suggests that a lack of clarity about dispute resolution procedures in contracts may also create a barrier to an appropriate use of ADR. The Association believes that decisions about what forms of ADR should be covered in contracts and the content of ADR clauses are a matter for the contracting parties and their advisers.

The Association believes that even if a matter does not settle at mediation, it often achieves a heightened sense of settlement.

6.2 What are the barriers to use of ADR after civil proceedings have been commenced? To what extent do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?

The Association believes that adjournment of proceedings to enable the parties to undertake mediation does not usually lead to any significant delay. The time taken in preparing for the mediation is rarely wasted as it is often also preparation for the hearing and the matter generally. If the dispute does not settle, there is if often a refining of the issues, the parties gain a greater understanding of their own and the other party's case, and it is often possible to agree upon certain other matters previously in dispute.

6.3 To what extent and in what ways is the culture of the legal profession a barrier to greater use of ADR? Why? What could be done to remove this barrier?

The Association does not believe that the culture of the legal profession is a barrier to the greater use of ADR. The role of barristers is to assist their clients and to find the best method of resolving disputes for their clients. Rule 17A and the Bar's activities in relation to ADR have bee noted above. There is a strong awareness and appreciation of ADR amongst NSW barristers.

6.4 To what extent and in what ways is the adversarial nature of the civil justice system a barrier to greater use of ADR? Why? What could be done to remove this barrier?

The adversarial nature of the civil justice system is not a barrier to greater use of ADR. It is one reason why there is increasing interest in ADR. The mere existence of an adversarial system does not preclude the use of ADR – they are not mutually exclusive forms of dispute resolution. The courts should actively encourage parties to engage in ADR.

6.5 What changes to cost structures and civil procedures could be made to remove practical and cultural barriers to the use of ADR, both before commencing litigation and throughout the litigation process?

There are no specific cost structures which impede the use of ADR but lawyers regularly and as a part of their professional obligations must advise their clients in relation to costs. Judges have discretion to make orders in relation to costs and procedures in appropriate cases and should be encouraged to exercise their discretion in both of these matters.

6.6 To what extent is the cost of ADR services, or inability to recover costs for ADR, a barrier to early use of ADR? What could be done to remove any barrier?

The cost of ADR services is not a barrier to early use of ADR. If ADR is used early, it merely requires work to be done earlier rather than later. If the ADR process is not successful in settling the dispute, it is likely that the parties will have a greater understanding of their own and the other party's case, the issues may be narrowed down or procedural matters such as discovery and timetables may be agreed upon. ADR agreements can and should cover how, when and in what proportions the parties are to pay costs. The Association believes that flexibility is important and that it is a matter for the parties to negotiate and agree on costs.

6.7 How might the use of the draft model mediation clause at Attachment D assist in overcoming barriers to the use of ADR? How might the use of such a clause be encouraged? Would it be helpful if such a clause were implied into all contracts?

Model ADR clauses are useful and a number are readily available on the internet. Organisations and individuals could be encouraged to consider model clauses. The Association does not believe, however, that such a clause should be incorporated or statutorily implied into all contracts. The type of clause used should be left to the parties to determine in order to provide maximum choice and flexibility for different types of cases.

6.8 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR before commencing litigation?

As noted above, Bar Rule 17A requires NSW barristers to advise their clients (including solicitors) in relation to ADR and the Association offers substantial continuing professional development in relation to ADR.

The Association does not support pre-action protocols requiring ADR to have been undertaken before commencing litigation, and notes that the United Kingdom pre-action protocols (which relate to certain types of cases only) merely require parties to consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, to endeavour to agree which

form to adopt. The UK protocol notes that the parties may be required by the court to provide evidence that they had considered ADR and that, if the protocol is not followed, the court will have regard to such conduct when determining costs. Similar protocols may be useful in specific types of cases.

Courts could generally follow the practice of the Commercial List and Technology and Construction List of the NSW Supreme Court. Practice Note SC Eq 3, which relates to those lists, requires pleadings to set out a statement whether the parties have attempted to mediate and whether the party filing is willing to proceed to mediation at an appropriate time (paragraphs 8 and 10).

In relation to the suggestion that legal representatives be required to certify that they have given advice on the prospects of succeeding in litigation, the Association believes that the current practice of some courts in requiring certificates from legal practitioners upon the filing of an originating process that there are reasonable grounds for commencing the action, is sufficient. Lawyers should not have to certify at any stage that they have given advice on the prospects of the matter succeeding in litigation. If they were required to certify that at the commencement of proceedings, this would create difficulty as the prospects of success are generally not known until after all of the evidence has been filed and this would create additional costs for the parties. The existing system of certification at the commencement of proceedings that there are reasonable grounds for commencing the action is preferable. Those courts which do not require this type of certificate should do so.

6.9 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR during litigation?

As noted above, NSW barristers are required to advise clients and/or solicitors in relation to ADR. The Association believes that further incentives should come from the courts.

The Association notes that the courts have the power to make costs orders in relation to mediations in appropriate circumstances and that, in a recent case, a costs order was made against a party who decided to cancel the mediation. In *Al Mousawy bht Khamis v JA Byatt Pty Ltd & Ors* [2008] NSWSC 264, the parties were referred to mediation under s 26 of the *Civil Procedure Act 2005 (NSW)*. The day before mediation, the fourth defendant sent a facsimile to the other parties purporting to cancel the mediation. The plaintiff and the other defendants all sought costs thrown away by the cancelled mediation. Hoeben J held that it was appropriate to make a costs order as the fourth defendant had been unwilling to participate in the mediation without a satisfactory explanation.

In *Tranchita v Danehill Nominees Pty Ltd [No 3]* [2009] WASC 49, Hoeben J expressed the view at [7] that it was regrettable that the current scale of costs discouraged the desirable practice of mediation by not making an appropriate allowance for counsel to attend mediations and that the inadequacy in the scale should be addressed by the Legal Costs Committee. He ordered the scale limit to be lifted and that the taxing officer make an allowance for preparation and attendance by both senior counsel and an instructing solicitor on behalf of the relevant party.

The Association believes that courts should be encouraged to exercise this discretion.

The Association is of the view that there should be more education and training in courts in relation to ADR in order to assist judges and court staff to determine whether cases should be referred to ADR, but that, in general, the parties should be able to decide which form of ADR they wish to pursue.

With respect to legal aid covering the cost of participating in ADR, including associated legal costs, to make it easier for lower income disputants to access ADR, the Association's pro bono LARS scheme provides both mediators (for at least 4 hours) and legal representatives in mediations for eligible parties.

6.10 What are the advantages and disadvantages of creating costs consequences for parties who do not attempt ADR? What form might these take? (See also discussion of mandatory ADR below).

As noted above, the courts have a discretion to make costs orders in this regard. The Association believes that this should be dealt with on a case by case basis, permitting the court to make orders appropriate to the particular case.

6.11 What are the advantages and disadvantages of requiring the courts or the legal profession to inform people and organisations in dispute about the ADR services that are available?

As noted above, NSW barristers must comply with Bar Rule 17A and inform clients (including solicitors) about the availability of ADR. Some courts already provide information about mediation on their websites. Some Courts or Judges either formally require or routinely raise the issue of whether ADR is being considered or has been the subject of advice.

6.12 Would it be helpful to include any of these measures in legislation, court rules or other subsidiary legislation?

Mandatory ADR

The Association strongly supports ADR but does not believe that it should be mandatory in all cases. The Association supports a broad power for the courts to order mediation but believes that an overriding judicial discretion should always remain in order to protect parties in the small number of cases where mediation would be inappropriate. Courts in NSW have the power to order mediation without the consent of the parties and have frequently exercised that power.

A recent example is *Sellar v Lasotav Pty Ltd* [2008] FCA 1766, an oppression matter, where Foster J, after deciding the primary issue in the application, considered of his own accord whether the proceedings should be referred to mediation. He noted that there had already been several interlocutory applications made in the proceedings, all of which had been hard fought and that the parties would have to expend significant amounts of money on legal fees if they were prosecuted to finality. He considered that it was appropriate that attempts be made to assist the parties to resolve their differences as soon as possible and before further significant sums were spent on legal costs, and that the proceedings were at a sufficiently advanced stage for the parties to be well aware of their respective cases. He ordered the proceedings to compulsory mediation pursuant to s 53A of the *Federal Court of Australia Act 1976 (Cth)* and Order 72 of the *Federal Court Rules*.

Other examples of a court exercising its power in this way are *Waterhouse v Perkins* [2001] NSWSC 13, *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 and *Dickenson v Brown* [2001] NSWSC 714. The Association believes that courts should be encouraged to exercise the power in appropriate cases but that it is necessary, in order to protect the parties' interests, for the discretion to be exercised rather than mediation being a mandatory requirement. This would permit flexibility in the timing and appropriateness of mediation to meet the needs of the particular case.

While the Association believes that the courts should have the power to order the parties to ADR generally, it does not believe that they should have the power to order the parties to undertake specific forms of ADR other than mediation. The choice of other forms of ADR should be left to the parties and the parties should be free to propose to a judge that they wish to undertake a form of ADR other than mediation.

Good faith requirements

The Association notes that s 27 of the *Civil Procedure Act 2005 (NSW)* requires parties to proceedings that have been referred to mediation to participate in the mediation in good faith. Mediation agreements for private mediations usually contain a term to that effect.

Good faith is already implicit in ADR processes. The Association believes that this should not be mandated in private mediations as it would be difficult to determine in many cases whether or not a party participated in good faith or had made a genuine attempt to resolve the dispute. Establishing either of these would in most cases require the ADR practitioner to give evidence before a court or tribunal and such a requirement is likely to increase related litigation.

7 USE OF ADR IN GOVERNMENT DISPUTES

7.5 How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?

The Association's website lists barristers who are accredited as mediators under the National Standards and who have been appointed to the NSW Supreme Court and District Court mediation panels. The Association's online 'find a barrister' facility will be able to be used in the very near future to identify accredited mediators with experience in particular areas of law. The Law Society of NSW and some commercial ADR providers also provide panels of mediators to the NSW Supreme Court and District Court. The Association is willing to assist government agencies in finding mediators and to hold information sessions for them in this regard.

8 USE OF ADR TECHNIQUES TO IMPROVE COURT/TRIBUNAL PROCEDURES

8.1 How might a specialist role similar to that of family consultants be useful in other federal courts and tribunals/areas of civil jurisdiction?

Family consultants have a unique and specific role which is not easily translated into other areas of litigation. It is difficult to see how this highly specialised role could be modelled usefully in other practice areas.

8.4 To what extent would it be useful to introduce:

- **judicial case appraisal**
- **a dispute management judge, or**
- **increased use of round table case management conferencing?**

The Association supports increased case management but believes that the introduction of judicial case appraisal or a dispute management judge would raise the same problems has noted above in paras 4.7 and 4.9.

8.5 Are there any other ways in which techniques developed in ADR could be used to enhance the adjudicative process?

The Association believes that there is limited scope for using ADR techniques within the adjudicative process, possibly other than to use ADR to resolve procedural disputes, and that the parties should be encouraged to use ADR to resolve their disputes outside of the adjudicative process.

Proceedings in the Family Court are a very specific exception to litigation generally as they have more relationship issues than most other types of cases, involve many non-legal issues and there are strong policy reasons for encouraging non-adversarial solutions to deal with issues such as custody within the court process. The Less Adversarial Trial is designed to encourage the parties to focus on arrangements that are in the best interests of the children, which is a desirable outcome. Few other types of cases involve analogous interests. It is difficult to see how these techniques could be applied generally to litigation.

Court practice notes already provide for 'hot tubbing' of expert witnesses (eg see the NSW Supreme Court Commercial List Practice Note). Requiring expert witnesses to attend a conference similar to mediation, facilitated by an independent practitioner who assists the experts to structure the discussion and identify areas of agreement and disagreement with a view to agreeing on a joint report would add an unnecessary layer of costs and delay to proceedings than otherwise.

With respect to judicial case appraisal and the appointment of dispute management judges, the Association has expressed its concerns above about the integrity of the court if judges are involved in ADR processes. (see paragraphs 4.7, 4.9 and 8.4)

9 DATA, EVALUATION AND RESEARCH

9.1 To what extent is there a need to improve the quality of available national data on ADR? What steps should be taken to identify the data required and improve data collection and research?

The Association believes that data collection should be undertaken where possible, noting though that there are many difficulties, including the fact that a substantial number of ADR processes are undertaken privately. The Association notes that courts keep statistics where matters are referred to court-employed mediators but that no statistics are kept on matters that are referred to mediation (by consent or otherwise) to private mediators. Where court matters are settled at a private mediation, the parties must terminate the proceeding by filing consent orders or a notice of discontinuance. They could be required to state when filing those documents whether the matter had settled as a result of a private mediation.