



SUBMISSION OF THE HEALTH SERVICES COMMISSIONER, VICTORIA, TO THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL (NADRAC) REGARDING THE ATTORNEY-GENERAL'S REFERENCE ON THE INTEGRITY OF ADR PROCESSES.

DATE: 19 FEBRUARY 2010

Thank you for the opportunity of providing comments on how best to protect the integrity of ADR processes. You are seeking responses to issues related to confidentiality, non-admissibility, conduct obligations and immunity of ADR practitioners.

The Office of the Health Services Commissioner (HSC) was established under the *Health Services (Conciliation and Review) Act 1987* and exists to receive and resolve complaints from users of health services, about health service providers in Victoria. Mediation and conciliation are the processes used to achieve this. Confidentiality has been an important factor in building confidence in our processes with all major stakeholders.

CONFIDENTIALITY

What should be the source of confidentiality?

Ideally confidentiality will be statute based. At the HSC, health complaints are mediated in the first instance and, if this is not successful, or it is more appropriate, they are referred to conciliation. Conciliation is carried out by specially qualified officers and confidentiality obligations apply to the parties involved in the conciliation process and also to the conciliator. Mediation is also confidential and the difference between mediation and conciliation is that conciliation is also privileged.

Should all ADR processes be subject to confidentiality requirements? If not, which ones should not be subject to confidentiality requirements and why not? Should confidentiality requirements be customised to suit different processes and if so, how?

ADR processes should be subject to confidentiality requirements, however this is not necessarily so in all cases. A dispute about a neighbourhood fence is very different from one involving intimate health information acquired in the course of a conciliation. It may be the parties have no objection to details of their mediation in the fence case being public but they may be very sensitive about their health information. In relation to the question about which ones should be subject to confidentiality requirements these would be those that involve sensitive issues such as health information, Family Court matters or ADRs dealing with children. I do believe there is room for confidentiality requirements to be customised to suit different processes. This could be done legislatively where appropriate or, in guidelines

What exceptions may be required?

Exceptions to confidentiality could include where serious criminal offences are revealed or where information comes forward which puts members of the public at risk and it is necessary to disclose to reduce that risk.

To whom should confidentiality belong, including:

- ***Should the participants be able to waive confidentiality?***
- ***Should the ADR practitioners have a right to veto the waiver?***

There could be many circumstances where participants might wish to waive confidentiality and where it would be in the interests of all to do so. There would need to be agreement of all the parties. ADR practitioners may need a right to veto the waiver if it is decided there is a power imbalance or it is not in the interests of the participants as a third party to do so.

Should there be processes or circumstances in which a waiver is prohibited?

A waiver should not be allowed where there is a serious risk to a participant or a third party.

Should the law specify who is bound by the waiver?

Usually the legislation specifies that the parties to the ADR and the ADR practitioners are bound by the waiver. This will generally be the case except where the parties come to a different agreement and the ADR practitioner agrees.

Sections 20(14) and 32 of the *Health Services (Conciliation and Review) Act 1987* (HSCR Act) and section 62 and 90 of the *Health Records Act 2001* (HRA) provide strict confidentiality and secrecy provisions in relation to the conciliation process.

The legislative requirement for confidentiality in the conciliation process is a long standing principle in ADR practice which allows for open and frank discussions to occur between parties in dispute fostering better opportunities for resolution. Fear by parties of the possibility that discussions or documents may later be produced in a public domain such as a court, means they may be less willing to make admissions and apologies during conciliation.

Under the HRA the requirement for confidentiality can be waived if all parties to the conciliation agree. This Office sees merit in such an exception existing more broadly in ADR processes to allow participants in mediation processes to waive the confidentiality requirements.

As to whether ADR practitioners should have the right to veto this waiver, given the mediation process is largely one between the parties in dispute and the ADR practitioner's role is facilitative and centred around impartiality, it would be difficult to argue the appropriateness for a right of veto to lie with the ADR practitioner. However, if the practitioner has concerns about the safety of a party or other people, or if the confidentiality of third parties is at risk, then a veto may be appropriate.

NON-ADMISSIBILITY

Both the HSCR Act and the HRA contain provisions in relation to the non-admissibility of evidence outside the conciliation process. However, as stated above under the HRA the parties can agree to the admission of material obtained in conciliation as evidence in proceedings outside the conciliation process. It appears that the inclusion of this in the HRA is in line with other pieces of legislation enacted in more recent times.

It is difficult to comment further on whether ADR processes outside the conciliation process of this Office provide sufficient non-admissibility provisions. This Office can only reiterate the importance of providing participants in ADR processes with the forum of open discussions without fear of those discussions being used in subsequent proceedings.

There may be instances where evidence of what occurred during ADR proceedings should be adduced in court proceedings. These would be where the parties or the practitioners own conduct is being questioned by, for example, the Ombudsman or the Auditor-General.

Are the current non-admissibility provisions sufficient to encourage greater use of ADR in the civil justice system?

They are sufficient in the legislation under which HSC operates.

Should all ADR processes be subject to non-admissibility? If not, which ones should not be subject to non-admissibility and why not? Should non-admissibility be customised to suit different processes and if so, how?

In general ADR processes should be subject to non-admissibility to promote free and frank exchanges of information. However, there may be instances in which non-admissibility should not apply. This could occur in some civil matters which do not involve sensitive issues or where there are law enforcement issues such as revelations in ADR of serious crime or terrorism. Non-admissibility may well be customised to suit difference processes. This could be done through a code of conduct or some kind of guidelines.

Are exceptions needed and, if so, what kind of exceptions?

See above.

Should parties be allowed to agree to the admissibility of things said or done, or admissions made in the course of ADR proceedings?

While non-admissibility will generally be paramount, there may well be situations where it is in the interest of all parties to agree to the admissibility of certain disclosures in ADR proceedings. So yes, this should be allowed.

If so, do ADR practitioners need special protection from being compelled to give evidence?

If non-admissibility is to be waived, then ADR practitioners should be given special protection from being compelled to give evidence. This could occur in the legislation they operate under or in court rules.

What effect should the parties' agreement to allow into evidence things said or done in the course of ADR proceedings have on the ADR practitioner?

The ADR practitioner could find themselves in a very awkward position having to be a witness in court which would impact on their ability to get on with their work. It might also damage their image as confidential ADR practitioners so that future clients may lose faith in them.

CONDUCT OBLIGATIONS

The discussion in Schedule 2 of NADRAC's report, *The Resolve to Resolve* provided a balanced and thorough analysis of the issues surrounding whether conduct obligations should be included in ADR processes.

With regard to this Office's conciliation process currently there are no legislated conduct obligations for participants in conciliation. The process is a voluntary one and either party at any point in time can withdraw from conciliation. The role of the conciliator would be to discuss with the party the reasons for withdrawal and to ensure there is no scope for resolution.

Once the conciliation process is underway, any conduct issues relating to, for example the behaviour of a party during a conciliation meeting would be managed by the conciliator who is highly skilled in ensuring the conciliation process is utilised with all best endeavours to work towards resolution.

The discussion in NADRAC's report, *The Resolve to Resolve* regarding conduct issues of legal practitioners participating in ADR processes is well understood. Under the HSCR Act, legal representation in conciliation is not automatic. Section 18 of the Act states parties cannot be represented 'unless in the Commissioner's opinion the process will not work effectively without that representation'.

Although merit may exist for conduct obligations existing in court ordered mediations, it is difficult to see how introducing such obligations into a conciliation process governed by statute such as this Office's would work in practice without chipping away at the core of the voluntary, confidential and impartial nature of the process.

IMMUNITY OF ADR PRACTITIONERS

This Office supports the notion that ADR practitioners not annexed to court processes or complaint handling organisations should not be subject to immunity.

In relation to complaint handling bodies established under statute, the individual mediator/conciliator must have immunity from suit.

Concerns regarding the conduct of conciliation staff can be raised either with the Commissioner or the Victorian Ombudsman's office (subject to confidentiality provisions). Performing the work of a conciliator in a statutory body such as this Office requires all conciliators to comply with the Code of Conduct of the Victorian public sector employees of special bodies and accordingly any conduct issues relating to a conciliator's performance could be dealt with as an employment issue.



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