

**Views and comments on the A-G's reference to NADRAC on the Integrity of ADR
Processes**

Robyn Carroll, Associate Professor, Law School, UWA

February 2010

The stated aim of the inquiry is to identify whether there are *“legislative changes required to protect the integrity of different ADR processes including issues of confidentiality, non-admissibility, conduct obligations for participants and ADR practitioners and the need, if any, for ADR practitioners to have the benefit of statutory immunity.*

These comments aim to assist with this inquiry but are not comprehensive. The writer is currently working on a jointly authored paper with Ms Lisa Jarvis, Notre Dame University, on Confidentiality in Family Dispute Resolution which we hope will be complete by June. The paper will consider some of the issues raised by the reference. We will forward a copy of our paper by way of submission to the NADRAC reference once it is completed.

I agree with the view expressed at page 171 of the NADRAC *Resolve to Resolve Report* (2009) (“the Resolve Report”) that it is appropriate to have statutory confidentiality and non-disclosure provisions apply to ADR processes, with appropriate exceptions. This protection is warranted particularly for admissions and apologies made in ADR processes. This aims to ensure that parties will be encouraged to participate in the process knowing that these communications will not be used against them in subsequent proceedings.

Central to this NADRAC inquiry appears to be the view that ‘the conduct of some participants in ADR processes, often legal practitioners, leaves much to be desired’ (p171) and that full protection should not be afforded to participants in ADR processes in respect of such conduct. Further, that barriers to reporting mediator misconduct need to be lowered (p171). These key concerns raise two difficulties for this submission and the reference overall. First, it is difficult to address the need to remove barriers to disclosure, admission of evidence and immunity from suit in respect of conduct during the mediation without examining the legal principles applied to disclosure and non-admissibility of evidence more

generally. Although NADRAC has published its views on admissibility of some types of evidence (admissions and apologies) and on immunity, there remain uncertainties and inconsistencies about the limits of confidentiality generally, that have wider application than conduct that impacts on the process.

Second, it is difficult to give a clear answer to the question what conduct obligations should be imposed on parties and the need for reporting of mediator misconduct without being specific about what constitutes the conduct of concern and the extent to which the law as it stands does or does not allow for disclosure or evidence to be admitted.

As a general comment, I note that the ACT has operated a *Mediation Act* since 1997. The Act provides for the registration of mediators who, once registered, are able to invoke the provisions relating to admissibility of evidence (s9), protection from defamation (s11) and immunity from civil suit (s12). Mediators are also bound not to disclose information obtained in a mediation session other than in prescribed circumstances. It would be instructive to know whether the Act is seen by mediators and lawyers in the ACT to have supported the growth of mediation in that jurisdiction in contrast to other Australian States where mediators practising outside court based and statutory mediation schemes often operate without these or similar legal provisions.

To summarise the comments that follow, I submit:

- The confidentiality of ADR processes should be achieved through continued use of contractual agreements, the common law of confidential information and statutory provisions that impose of a duty of confidentiality on ADR practitioners that is permissive of disclosure in specified circumstances.
- It would be of benefit to ADR to develop model legislation that establishes confidentiality, circumstances of permissible disclosure, non-admissibility of mediation communications and exceptions. My view at this point in time is that the exceptions should include evidence admitted by consent of the parties and provide for the circumstances in which evidence can be admitted for the purpose of establishing misconduct (which needs to be defined or at least described) by participants in the process (which includes the ADR practitioner).

- In respect of conduct, and the concerns that conduct of ADR practitioners, parties and other participants are affecting the integrity of the process, that there is a need for:
 - Further data relevant to these concerns,
 - Greater clarity about the nature of the ‘misconduct’ and the ways in which it harms the integrity of the process (‘process misconduct’), in order to identify the ‘gaps’ that need to be addressed by legislation that permits disclosure and/or creates exceptions to general non-admissibility provisions,
 - Consideration of ways (if there are any) that other jurisdictions (overseas) protect the integrity of ADR processes within the constraints that are necessarily created by confidentiality, non-admissibility and immunity.
- In the absence of this information, it is difficult to determine whether imposing conduct obligations that go beyond what already exists is warranted.
- To the extent that disclosure and admissibility are shown to be necessary to deal with process misconduct, there should be a legislative mechanism for reporting misconduct by parties or their legal representatives or others attending the ADR process and for complaints to be made and investigated. (I make this submission mindful that I have not addressed the question who would receive and investigate the complaint and what consequences would follow are question). It will be essential to make clear what constitutes ‘misconduct’ for these purposes. The need for these mechanisms arguably have greater application to court based mediation (because there can be costs consequences of the conduct) and where attendance at mediation is a pre-filing requirement or a mandatory process (because parties are under pressure to participate).
- If express provision is going to made for disclosure and admissibility of evidence relating to process ‘misconduct’, consideration needs to be given at the same time to making express provision for admissibility of evidence in proceedings where it is alleged that conduct has occurred that would be grounds for setting aside an agreement reached by the parties or that would establish an independent grounds of civil or criminal liability (eg fraud), ie ‘legal misconduct’.
- Consideration needs to be given to achieving uniformity in the statutory provisions that relate to (a) confidentiality and allowable disclosure and (b) non-admissibility of evidence. The variations that exists across the areas in which ADR processes are used are not presently rationalised or consistent.

- There does not appear to be any pressing need to confer immunity on ADR practitioners in the community and private sectors. Where statutory immunity is conferred on ADR practitioners, in particular non-judicial officers within court and tribunal systems, it should be qualified by a good faith requirement. Arguably statutory non-admissibility provisions are, by implication, subject to an exception to admit evidence of what took place in the process that goes to the question of good faith. This exception could be made express by legislation.

Confidentiality

As noted on page 165 of the Resolve Report there are already confidentiality obligations in ADR processes even though these arise from a variety of sources. The first question is whether the fact that there is no general source of confidentiality is a problem. In my view the problems are lack of clarity and inconsistency in the levels of protection of confidentiality and parties who believe they need or are compellable to make disclosures, moreso than multiple sources. The statement is made at page 167 of the Report that ‘there may be arguments for some national guidance on confidentiality’. This can only anticipate model provisions of course as each legislature has jurisdiction to legislate the legal framework of their own ADR processes. In my view there would be benefits of a model provisions, possibly in the form of a ‘default’ statutory provision of confidentiality (ie opt out) but there is no imperative to have only one source of confidentiality (eg statute). Contractual agreements about the ADR process are an important aspect of party self determination. In any event, it would be helpful to have some guidance, possibly in the form of a NADRAC publication, about the aims and justification for confidentiality and limits to confidentiality.

Confidentiality is an overlapping but distinct concept from non-admissibility. In my view there are strong arguments in favour of non-admissibility of communications made during ADR processes. These are much stronger than arguments in favour of a general duty on the parties to treat everything said or done in mediation as confidential. This is not only impractical but it affords a protection to information that is not afforded by the law more generally. (In other words, although the process is private, not everything said in an ADR process should be treated as confidential). Parties should be able to protect themselves by using confidentiality agreements but these should be realistic and reflect the nature of the dispute.

At the same time, there are good reasons to impose statutory duties of non-disclosure on ADR professionals but with provision for allowable disclosure, as, for example, in s10H of the *Family Law Act*, which applies to family dispute resolution. What amounts to appropriate circumstances to justify disclosure needs to be considered in the context of the area in which the ADR process is being applied.

I refer NADRAC to my 2002 published article on “Trends in Mediation Legislation” for the discussion of the different ways of categorising ADR legislation. This categorisation draws on a variety of reports and legislative examples and provides a framework for discussing the aims and rationale of legislation and law reform. In particular it identifies the objectives of ‘regulatory’, ‘beneficial’ and ‘procedural’ legislation.

I support the introduction of confidentiality and non-admissibility provisions as ‘beneficial’ provisions in a model ADR Act of general application that can be strengthened by specific legislative provisions where required.

In the writer’s view an argument can be made for a non-admissibility provision of general application to ADR processes in line with s131 of the *Evidence Act 1995* (Cth) to be adopted. A number of issues would still need to be addressed:

- (a) whether the common law limitation that only negotiations ‘in good faith’ are non-admissible.
- (b) Whether model legislation should aim to replace legislation that applies to court-ordered mediation and other ADR processes.
- (c) Whether there should be any other exceptions
- (d) Whether there are sound policy grounds for excluding particular exceptions, eg consent, as is the case in s10J(2) of the *Family Law Act 1975* (Cth).

Parties should be able to continue to create contractual obligations to maintain confidentiality. Because this might

- (a) extend the protection conferred by the general legislation
- (b) clarify who is party to the confidentiality obligation
- (c) reinforce the importance of confidentiality to the parties.

There may be benefits of investigating the extent to which efforts to create uniform confidentiality rules for mediation have been successful in the US. The writer has not updated her research on this since publishing her Trends in Mediation Legislation article in 2002 but wonders whether there have been helpful lessons learned there.

Non-admissibility

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

I am not aware of any research that points to the extent to which non-admissibility of mediation communications is a significant factor in choice of ADR process. One expects that it would be a positive factor. Of themselves, the current provisions are not likely to encourage *greater* use of ADR. But greater certainty and clarity about the circumstances of non-admissibility would be beneficial to people proposing to use ADR processes.

I assume that parties can see benefits of non-admissibility, but that they would also expect there to be exceptions and, possibly, the ability to waive non-admissibility.

- 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 my view it is appropriate to have a general statutory principle of non-admissibility in order to encourage parties to engage in open and frank discussion about potential terms of agreement without concern that the terms of their negotiations will not be admitted as evidence in subsequent legal proceedings. There is a long history of principles, common law (for example privilege of settlement communications made “without prejudice”), and statutory, (for example the *Evidence Act 1995* (Cth)), that aim to create a legal environment conducive to parties making disclosures and offers. This is also consistent with the rules that support the finality and bindingness of settlement agreements.

The extent to which it would be feasible to rely on a model or general statutory provision will depend on the degree of ‘customisation’ that can be achieved and still suit (a) different ADR processes and (b) appropriate exceptions in a particular jurisdictions.

- (a) different ADR processes. I am not sufficiently experienced with processes other than mediation to comment generally on non-admissibility. My guess would be however, that the range of exceptions needs to vary depending on the process. Advisory processes assist parties to assess their decision making about how to proceed with a complaint or dispute. It is not difficult to see the benefits of applying non-admissibility of communications to these processes. Where private determinative processes are employed it is more difficult to see the need or rationale for non-admissibility because the process is not a negotiation. Determinative processes are likely to include some form of review or appeal in which case it will surely serve the parties interests for evidence to be admissible.
- (b) My expertise is not sufficiently broad for me to comment on the merits of non-admissibility for all areas in which ADR and mediation may be used. Prima facie though I would expect that the policy reasons for providing exemptions to the non-admissibility rule would be consistent across all areas of mediation. This appears to be borne out by the following provision of the *Mediation Act 1997* (ACT), which adopts the same exceptions to non-admissibility as s131 of the *Evidence Act 1995* (Cth).

MEDIATION ACT 1997 ACT - SECT 9

Admissibility of evidence

Evidence of—

- (a) a communication made in a mediation session; or
- (b) a document, whether delivered or not, prepared—
 - (i) for the purposes of; or
 - (ii) in the course of; or
 - (iii) pursuant to a decision taken or undertaking given in;

a mediation session;

is not admissible in any proceedings except in accordance with the *Evidence Act 1995* (Cwlth), section 131 .

The approach taken in this statute is not the same as the approach taken in two Federal statutes however, the *Family Law Act 1975* and the *Federal Court Act 1976*. It is evident that further consideration needs to be given to the applicable exceptions to non-admissibility if there is to be any ‘uniform’ provision. The most obvious example is the need to allow for admissions and disclosures during an ADR process indicates that people or property are at risk of harm, which is the subject of an exception in the *Family Law Act 1975* (Cth), s10H(2).

- Are exceptions needed and if so, what kinds of exceptions?

The exceptions to s131 *Evidence Act 1995* (Cth) provide a starting point as they are of general application. It will be necessary to survey other statutes to see what other exceptions might be applicable to ADR processes, particularly mediation, to determine whether they can be justified on the grounds of supporting settlement negotiations or other identified public interests, eg to avoid risk or harm to personal safety of parties and/or third parties and property. There are objectives behind supporting the confidentiality of ADR processes that might support a higher level of confidentiality than settlement negotiations.

Another exception that needs to be clarified by statute relates to admissibility of evidence that goes to the question of misconduct by parties to the ADR process and the third party neutral conducting the process. General support for a provision to this effect can be gleaned from s126D of the *Evidence Act 1995* (Cth) but closer consideration needs to be given to the questions raised in the following section of this submission relating to the nature of the conduct, the nature of the anticipated harm from the wrongdoing and the nature of the sanction or other remedy that might flow from a process or proceedings in which the evidence of the offending conduct is admitted. I am not in a position to make detailed submissions on how this exception would be worded without reviewing the existing Australian legislation and comparing legislation that may have been developed in overseas jurisdictions. I do submit that a distinction needs to be drawn between the following situations:

- (a) where the admission relates to misconduct which amount to a fraud, an offence or an act that may result in a civil penalty. Section 131(j) of the *Evidence Act 1995* has a bearing on this and it provides for admissibility where “the communication was made,

- or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty”;
- (b) where the admission amounts to conduct that one party may seek to adduce in proceedings against another party to set aside or obtain other forms of civil relief in respect of the settlement agreement or where a remedy is sought against the ADR third party neutral (legal misconduct); and,
- (c) where the conduct is related to the process (process misconduct) and might be the basis of a subsequent complaint either by a party about the conduct of the ADR third party neutral, by a party against a legal representative or other advisor or by the third party neutral against a party and/or their advisor. I note that NADRAC has previously recommended that there be an exception to non-admissibility provisions to allow complaints against mediators to be made and for mediators to defend those complaints, NADRAC Legislating for alternative dispute resolution: A guide for government policy makers and legal drafters (Canberra, November 2006) [10.27]. I support that recommendation.

It is important to note that there are policy arguments that support legislation that confers non-admissibility on specific types of admissions, in particular apologies. I have discussed there in “Apologising ‘Safely’ in Mediation” (2005) Australian Dispute Resolution Journal, 40-53. I submit that any exception that provides for admissibility of evidence for wrongdoing or misconduct should be subject to statutory provisions protecting apologies

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

The *Evidence Act* s131(2)(a) provides for communications during settlement negotiations to be admitted if the persons in dispute consent to the evidence being adduced in the proceeding concerned. In contrast, consent is not provided expressly as an exception to non-admissibility under s10J(2) of the *Family Law Act 1975* (Cth) nor under s53B of the *Federal Court Act 1976* (Cth).

In considering whether consent should generally be an exception to non-admissibility it is helpful to look at how closely the ADR process resembles the process to which s131 applies. Section 131 applies to settlement negotiations. It makes sense that parties can agree after an agreement has been made to the admission of evidence relating to their negotiation. (Note: it

may not be in the interest of the administration of justice that parties can revisit their dispute). In ADR processes, however, there is another party involved who may have good reasons for not wanting to give evidence as to what took place before them. There are interests at stake other than the parties interest, particularly the extent to which the process is viewed as confidential.

If the decision is made to introduce a consent exception to non-admissibility (contrary to the current position under the *Family Law Act* and the *Federal Law Act*), it may be useful to refer to existing statutory provisions such as the following:

Supreme Court Act 1935 (WA)

72. Confidentiality

(1) Subject to subsection (2), a mediator must not disclose any information obtained in the course of or for the purpose of carrying out mediation under direction.

(2) Subsection (1) does not apply if:

(a) the disclosure is made for the purpose of reporting under the rules of court on any failure of a party to cooperate in a mediation;

(b) the disclosure is made with the consent of the parties;

(c) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to any person or damage to any property; or

(d) the disclosure is authorised by law or the disclosure is required by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

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

There is a fine balance to be achieved between, on the one hand, protecting the confidentiality of the mediation process by not compelling mediators to give evidence (or in any other way to make disclosures other than to discharge a statutory duty of disclosure) and on the other hand, ensuring that the best possible evidence relevant to proceedings before a court are available to the court. This tension is well illustrated by the English case *Farm Assist v DEFRA* (No2) [2009] EWHC 1102 [TCC]. Even if a mediator or other ADR practitioner is susceptible to subpoena, it remains for the court to determine whether they

should be called in any particular case, whether the evidence is available in some other way and whether and what weight will be attached to the mediator's evidence.

On balance, I would argue that it is preferable that an ADR practitioner be able to give evidence where the parties consent and that they be compellable where, taking into account the importance of maintaining the confidentiality of the ADR process, the overall interests of justice supports the evidence being before the court.

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

The ADR practitioner should take this into account in weighing up the reasons why they would or would not agree to give evidence.

Conduct Obligations

The reference is principally focussed on conduct that is injurious to the ADR process (process misconduct) as distinct from causing harm to the parties themselves (legal misconduct). In my view it is not easy to distinguish these and at times the distinction is not entirely clear in the reference and discussion in Schedule 2 of the Resolve Report. It is of equal concern (in fact greater concern) to me that confidentiality and non-admissibility can be applied to exclude evidence that goes to the question whether a party or mediator has engaged in, for example, duress, undue influence or misleading or deceptive conduct (legal misconduct) than there be mechanisms for reviewing process conduct in ADR processes. There is considerable uncertainty about non-admissibility in the former context and inconsistency in the statutory provisions that apply. In my view this is an area for review with the aim of achieving consistency and clarity.

So far as legal misconduct is concerned, all ADR practitioners are already subject to legal obligations that create a legal standard of conduct. Aside from contractual obligations undertaken, express and implied, there are implied statutory warranties that apply to individuals and organisation who provide services to consumers under the federal Trade Practices Act and state Fair Trading Acts. In addition, there are other legal obligations and statutory remedies that have application to the provision of ADR services, in particular the action for misleading or deceptive conduct.

In respect of legal misconduct the key difficulty appears not to be an absence of legal obligations, but the difficulty of applying these to novel services (eg what is the standard of care owed by a mediator). This difficulty is not easily (or appropriately in my view) addressed by legislation. Another key problem with seeing effective enforcement of the existing legal obligations is the private nature of the process and the non-admissibility of evidence about what was said in the mediation of ADR process .

To address the specific questions raised by the Attorney-General's reference to NADRAC

- Who should be the subject of a conduct obligation? The difficulty with answering this question is the fact that parties, legal representatives and others, including the third party neutral, have different roles and responsibilities. Further attention is needed to
 - The role of each
 - the particular type of conduct and
 - the harm that is likely to result from the conduct

There is no obligation on parties to reach agreement, so they cannot be in breach of any duty in failing to do so. Delay and lack of good faith or genuine effort raise other issues – costs issues perhaps, and professional conduct issues but of themselves they should not attract liability for any legal wrongdoing. There are a number of liability issues that can arise for the various parties however, eg misleading or deceptive conduct (eg inducing a settlement agreement through misleading or deceiving a party, misleading the third party neutral), failing to exercise a duty of care (eg the duty owed by an adviser or representative to their client), fraud, duress, unconscionability in inducing a settlement agreement. The contractual relationship between the parties may have a bearing on liability, eg a client might sign a contract that contains a disclaimer of liability by their adviser. There are legal limits on the parties' ability to rely on these. It is difficult to see how a person attending in a supporting role could attract any liability through their conduct other than through assault, defamation etc.

To the extent that ‘conduct’ refers to ‘behaviour’ generally, then it is something better made the subject of agreements (eg the terms on which supporters will be able to be involved in the process, and other ground rules.)

- What should be the ambit of the obligations? The examples given indicate that the ‘conduct’ that is the subject of this reference extends is focussed on conduct that is perceived as harmful to the process and that goes beyond conduct that attracts legal liability, although there is reference to misleading or deceptive conduct which gives rise to a statutory remedy. Failure to attend etc may attract sanctions but they do not create liability (ie something for which damages can be sought). I suggest a useful starting point is to create a list of concerning ‘conduct’ and then look at which of these is already the subject of legal obligations or existing sanctions in other forms, eg costs orders.
- How should any conduct obligations be framed. There is clearly a need for rationalising the different duties that have been developed by the common law and created by statute, eg good faith and genuine effort. These questions are raised squarely by the discussion in Schedule 2 of the Resolve Report but I am not attempting to address them in these comments. Doubts about applicability of existing obligations of this nature these to ADR processes means that legislation will be needed. A decision needs to be made about which type of ‘obligation’ meets the needs of the particular situation. For example, Hilary Astor in her AJFL article sets out reasons which might explain why there is a genuine effort s60I Certificates in the Family Law Act rather than a good faith requirement. The fact that there are different obligations applied to different areas of ADR practice is not necessarily a problem. It is only a problem if different obligations are imposed on people who are in the same situations. Eg, would it make sense to impose a duty to act in good faith in mediation but not in conciliation or in some types of statutory mediation but not others? Despite this, there are existing inconsistencies, largely because the common law and statutory provisions have developed piecemeal. To overcome the inconsistencies would probably need a default set of obligations that apply to ADR processes in a state or federal jurisdiction in the form of an ADR Act or the like. Specific Acts could then be drafted to strengthen or reduce/remove the ‘default’ rule. The reference asks should the framing differ according to who is subject to it? The answer to this is yes and no. If this is asking whether the duties of people in different roles are different then the answer is

yes and the conduct obligations will be framed differently. If it is referring to different fields of mediation, then again the answer might be yes. For example there might be an argument for different duties in different contexts, eg a less onerous obligation to attempt mediation on parties to a family law dispute than in native title for example. But there should be no variation on a subjective basis, that is all adults in the same circumstances are expected to meet the same conduct standards, even if they have varying degrees of knowledge, experience, education etc.

- Should conduct obligations differ according to the ADR process? Again, this cannot be answered without reference to the specific conduct. Some obligations will be the same whatever the ADR process, eg the common law duty not to deceive others and the duty of a legal advisor to exercise reasonable care. But other obligations can be expected to be different, eg the obligation to attend court based mediation can be expected to be different to the obligation to participate in court based arbitration because the consequences for the parties and potential harm are different.
- Are conduct obligations appropriate in entirely private processes and when should they commence? Again, it depends what the conduct is as to whether it is something that is appropriate as being 'outside' the law. To the extent that conduct involves legal misconduct there is no difference if it is private or not, except to the extent that the parties are free to contract out of liability for that particular obligation. The simple answer is yes, conduct obligations are appropriate in entirely private processes because parties to private processes cannot oust the jurisdiction of the courts. Eg they cannot contract out of obligations not to engage in criminal behaviour or to certain torts, eg deceit, either expressly or impliedly by participating in a private process. That said, there are differences between private settlement processes and court processes and one would expect that there would be different levels of regulation of participant conduct in court and other forms of statutory mediation than where the parties determine for themselves the terms of the process, when it can be terminated and whether they will reach an agreement.

In summary, there are dangers and difficulties in trying to prescribe duties, other than general duties which are then filled out by the factual context, eg the duty to exercise reasonable skill

and care. Mandatory processes throw up particular issues that need to be considered in the context of the policy and legislative aims of mandating the process. It will be helpful to tease out the different types of ‘conduct’ that the inquiry is addressing, eg is it harmful to the process, is it also harmful to other parties, is it harmful to clients...) and the different ways that these ‘harms’ can be addressed.

There may be common elements of ADR ‘conduct’ that could be regulated generally, eg duty to exercise reasonable care, to act in good faith when participating in an ADR process, for example, and even creating legal duties on advisers that extend beyond their duty to their client, but the context of the particular process will remain significant as will other contextual factors. There are significant implications of mandated and court based processes that require that expectations be made clear and sanctions for not meeting those expectations, which are not necessary in voluntary processes. In the latter the existing law is sufficient – (even though there are multiple shortfalls in the law as a means to ensure acceptable standards of conduct).

The essential issue raised by the reference concerns what conduct obligations should be applied to ADR processes. Increasing it appears that the challenge that is faced is how to achieve a fair balance between voluntariness and participation in mandated processes. If this is the case then some of the ‘conduct’ issues referred to in the reference, for example misleading or deceptive conduct, undue pressure and duties of care needs to be put to one side and the focus to be on conduct that does not affect the legal rights of others but that affects the process. This will be relevant to addressing the question of sanctions and penalties and what might be appropriate in particular circumstances.

A final comment: the development of sanctions and penalties should be based on clear data to indicate that there is a problem of sufficient magnitude to warrant a punitive response. Participation rates in mediation or other processes might increase where there are penalties for not participating but it is uncertain that this will lead to better conduct and a better process. The increased rate will not necessarily reflect any greater voluntariness or willing participation. Very close attention will need to be paid to the danger of silencing party concerns about participating in the process where those fears are based on family violence, threats and other more subtle methods of control and intimidation. The low rate of ‘lack of

genuine effort' s60I certificates under the *Family Law Act* suggests that there are perceived difficulties with these assessments of the parties conduct..

Immunity of ADR Practitioners

I am attaching to this submission an article I have published on immunity of mediators subsequent to NADRAC's joint letter of advice to the Federal A-G, "An End to Legal Immunity for Family and Child Mediators – How and Why?", ADR Bulletin (2006) Vol 8(8), 145 -150. In it I set out a number of reasons for and against immunity for mediators and other ADR professionals. While many of these reasons are also referred to by NADRAC in support of its previously expressed views I have noted additional reasons which can be taken into account. The following comments in this submission are based on research undertaken to write this article and a previously published article "Mediator Immunity in Australia", (2001) 23 Sydney Law Review 185 -221.

- What impact does immunity have on users of ADR services?

I am unable to comment on this. I doubt that there is any data on the particular question that is asked, that is 'particularly where ADR practitioners are negligent or engage in improper conduct'. There is scant empirical data about views on immunity. There is certainly no data of the views of persons who allege negligence or improper conduct. The question is clearly intended as hypothetical – would knowledge that an ADR practitioner would be immune from suit even where they are later found to have acted negligently or improperly cause a potential user of ADR to choose a different service or process? At first glance one might expect the answer to be yes. But once it was explained to the user that there are other reasons why it might be difficult to succeed in a civil action they might appreciate that immunity on its own is not a reason to choose an alternative process. (This is putting aside the facts that an increasing number of ADR users have no choice as to the process they need to participate in).

This reference is concerned with the question of how ADR practitioners can be held accountable for process misconduct (referred to in the reference as negligence and misconduct), moreso than whether it is appropriate to confer immunity on ADR practitioners. This is understandable given the previously expressed views of NADRAC on immunity of mediators.

The questions that need to be answered now are:

(a) which ADR practitioners, if any, should have immunity. This is framed in terms of need but it also requires a decision, as a matter of principle, whether immunity is appropriate.

(b) if immunity is conferred, how can evidence of negligence and misconduct still be brought into proceedings where an issue has arisen about the mediators conduct.

- Is broad immunity from suit appropriate or at least in relation to some ADR processes?

The meaning of ‘broad’ immunity needs to be clarified. The terminology used in my articles and by other legal commentators is ‘absolute’ immunity and ‘qualified’ immunity (see page 201 of Sydney Law Review article). Qualified immunity usually confers immunity from suit for acts done in good faith. (Other qualifications could be created by legislation, eg limited immunity to mediators who are accredited). There are arguments that can be made for conferring both levels of immunity on ADR practitioners in varying circumstances.

My view as to whether mediators should have immunity coincide generally with the views of NADRAC as reported at [6.78] of the Resolve Report. In summary, an argument can be made for conferring either absolute or qualified statutory immunity on a mediator engaged in court-based or statutory mediation. The same argument can be made in relation to conciliators in statutory conciliation schemes. I would argue in favour of qualified rather than absolute immunity in these circumstances, ie the immunity is dependent upon showing that the practitioner has acted in good faith.

Protection from liability for mediators acting in a private capacity is available through contractual terms and indemnity insurance and therefore the argument for immunity is weak.

- Does the principle that mediators should not have immunity apply equally to advisory and determinative processes and if not what principle should apply?

The rationale behind conferring immunity on judicial officers and other practitioners within court processes (eg referees, family consultants) does not extend to ADR practitioners undertaking an advisory role outside court processes. One would expect contractual terms of limitation of exclusion of liability to be used, (though their effectiveness would be subject to statutory consumer protection provisions that either render to terms void or ineffective.)

The rationale behind conferring immunity on judicial officers and other practitioners within court processes does support conferring immunity of ADR practitioners who undertake a determinative role, eg as arbitrator. In determinative processes there will be avenues of appeal or review that can balance concerns that the negligence or misconduct of the ADR practitioner may adversely affect the outcome of the process.

- Can ADR practitioners adequately limit their risks through indemnity insurance?

I cannot comment on this on a practical level. In principle, it is hard to imagine that it is any more difficult for an ADR practitioner to limit their risk through indemnity insurance than it would be for any other professional service provider. For facilitative process ADR practitioners it is highly unlikely that negligence or misconduct will be shown to have caused loss or harm for which indemnity might be sought.

- How does immunity interact with non-admissibility?

Non-admissibility has a similar effect to immunity in that it creates a legal barrier to suit against a person who has participated in a process. The barrier in the case of non-admissibility is the inability to submit evidence in subsequent proceedings of what was said or done in the ADR process as evidence in support of the grounds of the suit. Absolute immunity prevents an action being brought in the first place. Qualified immunity requires the person bringing the suit to establish that the protected person has acted in good faith. The two barriers would interact if evidence that goes to the question of good faith is not admissible in subsequent proceedings.

- Where there is immunity can there be sufficient scrutiny of ADR practitioners?

If immunity is absolute there is no opportunity for scrutiny through actions that allege misconduct. Drawing as it does on the rationale of judicial immunity, statutory immunity relies on the checks and balances provided by appeal and review of decision making. Where immunity is qualified, there is expressly or impliedly a basis to scrutinise the conduct to determine whether the exception applies.

For this reason, immunity should only be conferred by statute where it is based on an assessment that participants in the process are protected in other ways and that the statutory

role of the ADR practitioner and administration of justice considerations warrant immunity from suit. Protection is traditionally assumed to flow from the appointment of appropriately qualified personnel, ethical and accreditation standards and adequate ongoing training.

- If there is immunity how can there be adequate protection for ADR consumers?

The same points apply as to the previous question. Where appeal or review of the process is available this presumably overcomes unreasonable or improper decision making process. However for mediation or other ADR practitioners protected by statutory immunity, there needs to be effective monitoring of standards with the potential for review where there are allegations of conduct amounting to bad faith.

Publications by R Carroll referred to in or relevant to this submission.

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“Mediator Immunity in Australia”, (2001) 23 Sydney Law Review 185 -221.