



Shoalcoast Community Legal Centre Inc

Legal Advice & Advocacy

ABN 85 989 128 796

Your Ref:

Our Ref: NADRAC/0210

5 March 2010

NADRAC Secretariat
Robert Garran Offices
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Dear Secretariat

We write to make a submission to the **NADRAC Reference regarding Integrity of ADR Processes**. We thank you for the extension to allow us to make this submission to you by Friday 5 March 2010.

Shoalcoast Community Legal Centre is a community-based non-profit organisation providing free legal services to disadvantaged residents of the Shoalhaven, Eurobodalla and Bega local government areas of the New South Wales South Coast. We are a 'generalist' Community Legal Centre, as distinct from the 'specialist' Legal Centres which act in one specific field of law. The Legal Centre has been in operation for over ten years, and has assisted many thousands of people in that time with legal advice, legal casework and representation and delivery of community legal education. We work in communities with high levels of unemployment as well as large Indigenous populations with 20% of our clients currently being Indigenous. We regularly engage in law reform activities, often in conjunction with, or as part of the peak body Community Legal Centres NSW (CLCNSW).

Whilst the majority of Shoalcoast Community Legal Centre clients have legal matters which are being dealt with by NSW Courts and Tribunals we do support clients to participate in Federal Courts and Tribunals dealing with civil and family law matters such as the Federal Magistrates Court and Social Security Appeals Tribunal.

The majority of our clients initially make contact with our service through our free phone advice lines which operate 2 mornings a week. We offer face to face appointments to people with more complex legal matters and when deemed necessary we do represent clients in legal proceedings.

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We also make contact with many clients through our outreach legal clinics operating across the South Coast to Aboriginal and other isolated communities including: Waminda Aboriginal Women's Health Service Nowra, Jerrinja Aboriginal Community, Wreck Bay Aboriginal Community, Ulladulla, Batemans Bay, Moruya, Bega, Eden and Wallaga Lake Aboriginal Community.

A. Confidentiality and Non- Admissibility in ADR

Whilst our Centre is supportive of the availability of ADR we do not believe it provides a universal solution. As the majority of our clients suffer from disadvantage they have multiple barriers to accessing legal services including ADR. For example they may live on very low incomes, have low literacy levels or English as a second language, are Indigenous and living in isolated communities, have limited access to or skills to use IT and/or have a disability affecting their physical or mental health. Therefore we believe it is vital that ADR have effective ways of assisting participants who are living with disadvantage or disability. To maintain integrity of ADR processes they must be ready and resourced to assist disadvantaged participants to progress their complaint. This includes mediators having appropriate training.

The key principles of confidentiality and non-admissibility underpinning ADR processes are essential as one way of reducing barriers for disadvantaged people. Our solicitors have training in how ADR processes work and when giving advice about accessing ADR they ensure clients are fully informed and reassured about both confidentiality and non-admissibility (explained in plain English terms of course). Thus taking away any fears associated with possibly saying the wrong thing and therefore not being totally honest in the mediation, thus impacting on their legal matter being addressed to their long term satisfaction.

The issue of confidentiality needs to clearly extend to the mediators involved in the process not just the parties to the dispute, except where issues of safety become apparent, such as domestic violence issues.

Even if there was a shift to more lawyer assisted mediation in Federal court and tribunal jurisdictions, thus giving clients access to advice before and during mediation, we believe these principles are essential to the success of ADR.

- 1. We recommend that ADR processes must be ready and resourced to assist disadvantaged participants to progress their complaint.**
- 2. We recommend confidentiality and non-admissibility in ADR be maintained as core principles to reduce barriers to participation by disadvantaged people in ADR and increase prospects of long term outcomes to legal matters.**

B. Conduct obligations for participants and ADR practitioners

Based on our experiences many if not most jurisdictions currently require mediation to occur before court proceedings. Therefore we believe a key issue to ensure the integrity of ADR processes is access and equity policies, procedures and training for ADR practitioners. Barriers to effective participation must always be considered and addressed to ensure any legislative changes in regards to enforced participation in ADR by parties and the requirement of legal advice prior to and during ADR does not further disadvantage individuals or isolated communities. In particular we are concerned that a 'one size fits all' approach is not the result of proposed legislative change. Any systems developed need to be flexible and responsive taking into account safety issues such as domestic violence and power imbalances which often exist between parties in conflict situations we deal with.

Shoalcoast Community Legal Centre is currently participating in a Partnership Pilot Project, funded by the Federal Attorney Generals Department, with our local Family Relationship Centre delivering family law information seminars and providing legal advice to FRC clients. Therefore we are aware of the issues around how much intervention has been required to ensure family dispute resolution centres identify domestic violence and power imbalances and how much training is now mandatory for mediators working within the Family Law Act.

We note that the NADRAC Report *The Resolve to Resolve — Embracing ADR to improve Access to Justice in the Federal Jurisdiction* recommends that legislation governing federal courts and tribunals require genuine steps by prospective parties to resolve disputes prior to commencement of court or tribunal proceedings. And, that the above applies unless 'impracticable'. Also that the factors that 'may' be taken into account by prospective litigants in determining the application of the guidelines as including:

- Urgency
- Undue prejudice
- Safety
- Security
- The subject matter of the dispute
- Public interest factors
- Whether the matter is the same as has been before the court/tribunal previously

3. We recommend the Community Legal Sector be consulted further to develop guidelines which take into account access and equity needs of disadvantaged people and isolated communities with respect to:

- **What will be considered 'Impracticable';**

- **What are defined as 'safety issues';**
- **The 'subject matter of the dispute'.**

4. We recommend that training provided to FRC mediators regarding identifying safety issues and power imbalances be extended to all mediators.

5. We recommend that if legal advice prior to and during mediation is introduced through legislation then mandatory training regarding ADR processes especially non-adversarial approaches be required for legal practitioners to ensure ADR processes are not compromised.

Further we note from the NADRAC Report *The Resolve to Resolve — Embracing ADR to improve Access to Justice in the Federal Jurisdiction* report comments on the *Woolf* reforms in the UK and criticism of the 'pre-action' protocols regarding concerns that the costs for litigants have actually increased because of the 'front loading' of costs as solicitors are involved at early stages. Also that perhaps the most benefit from ADR is derived from Government and services such as Courts - for example, it may reduce the number of people going to court - it doesn't appear yet that there is confirmation that more people 'settle disputes' or that there is a less conflicted community.

Therefore we are concerned that any reforms to the ADR system must not be allowed to create a two tiered justice system where the wealthy have access to the judicial system and those less resourced do not. We uphold the fundamental right of all people to have access to the courts. To the extent that resources, affordability of lawyers and legal complexity are barriers to access, these barriers must be attacked head on. This is a key role for Community Legal Centres, Legal Aid and pro-bono Legal Services.

6. We recommend that there needs to be consideration about the additional resources which will be required by the Community Legal sector to be able to support legislative changes with our client groups. In particular funding to train staff, educate our client groups and local agencies through the provision of Community Legal Education as well as to meet the demand for additional legal advice as a result.

Yours faithfully



Glenda Stares
Acting Principal Solicitor
Shoalcoast Community Legal Centre Inc.