

26 February 2010

NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Also by email: nadrac@ag.gov.au

Dear Sir/Madam,

Submission from Top End Women's Legal Service

Thank you for the opportunity to make a submission as part of the National Alternative Dispute Resolution Advisory Council (NADRAC) review on legislative changes required to protect the integrity of ADR processes.

Who we are

Top End Women's Legal Service Inc (TEWLS) is a community legal centre, fully funded by the Commonwealth Attorney-General's Department to provide legal advice, referral and representation to women in the Top End of the Northern Territory. TEWLS is also a member of the National Association of Community Legal Centres. TEWLS was established in 1996 following a recommendation of the Australian Law Reform Commission for the establishment of a network of women's legal services. This recommendation was in response to the particular legal needs of women and the situation where traditional legal services and the legal system did not meet the needs of women.

Our submission

TEWLS provides referrals, legal advice and ongoing casework in a number of areas of law including domestic violence, sexual assault, family law, compensation for victims of crime, discrimination, credit and debt, welfare rights, and other civil matters. In a number of the areas in which we advise or act, our clients are required to go through an alternative dispute resolution (ADR) before their matter can be determined by a court.

The aim of this submission is to provide our comments on a few issues raised in your review, ie immunity for practitioners and confidentiality, on which we had a view. This submission does not purport to be a comprehensive coverage of the issues raised in the review.

Immunity for ADR Practitioners

We believe it is important that ADR Practitioners are not immune from suit. ADR Practitioners have a significant impact on ADR processes, which in turn have a

significant impact on people's experiences and access to justice. Our clients are often going through a difficult time in their lives, eg relationship break down, when they are involved with ADR processes, and are particularly vulnerable. It is therefore very important that the ADR practitioner, given their influence, is accountable for their actions. As immunity significantly reduces this accountability, we are of the view that immunity is not beneficial to good ADR.

Practitioner immunity is particularly problematic in smaller towns, such as Darwin, where there are fewer ADR Practitioners to choose from. When there is a smaller pool of people from which practitioners are drawn, normal market forces, which might result in a bad practitioner not getting work, are less useful in regulating behaviour. This is further exacerbated if the ADR Practitioner is a contractor, and is not subject to the usual controls and reviews an employer can have over behaviour. In such cases, the fact that a Practitioner can be sued may be one of the only forces regulating them.

We also wish to highlight that many ADR practitioners have a legal background – they are working as solicitors or have previously worked as solicitors. A key benefit of ADR is that it does not operate in the technical and adversarial style of traditional legal processes. It is important that attitudes and practices from the legal industry are not imported into the process. We believe that in order to promote the integrity ADR, it is important for ADR practitioners to receive on-going training in ADR to ensure conformity with its essential elements by practitioners, and to avoid the application of norms and standards from legal backgrounds. It has been our experience that some ADR practitioners with legal backgrounds may confuse the two roles. This compromises their ability to manage power imbalances and to properly support effective communication and fair and open negotiations.

Confidentiality

TEWLS submits that it is important for the ADR Practitioner generally to be bound by confidentiality, barring the usual exceptions. Practitioners should obtain parties' consent to convey anything discussed in mediation to a third party. This enables parties to have confidence in the Practitioner and ADR process. This is particularly important in smaller towns. However, we consider it appropriate for the parties to have a right to choose the degree of confidentiality to apply to proceedings and a blanket rule may not be appropriate when it is counter to both parties' wishes. Confidentiality should be an issue open for negotiation between the parties themselves. ADR is about parties having control over outcome, and confidentiality can be included in the options to be considered.

If you would like further information on the above matters, please do not hesitate to contact me on (08) 8982 3000, 1800 234 441 or tbalgi@tewls.org.au.

Yours sincerely
Top End Women's Legal Service

Teena Balgi
Principal Solicitor and Coordinator