



Resolution  
Institute

Response to  
*Access to Justice Review*  
*Background Paper – Alternative*  
*Dispute Resolution*

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# Introduction

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## Preamble

Resolution Institute is pleased to respond to the Department of Justice and Regulation's *Access to Justice Review Background Paper (the "paper")* on Alternative Dispute Resolution.

Resolution Institute consents to the publication of this *Response* and would be pleased to discuss the matters raised in the paper and Resolution Institute's *Response* if this would be of assistance to the Department of Justice and Regulation.

## About Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution professionals in Australasia. Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission ("ACNC") as a not-for-profit organisation. Resolution Institute has a membership base of over 4,000 DR professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality dispute resolution services.

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## General comments

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Resolution Institute has considered the six questions posed by the Department of Justice and Regulation.

## Key questions

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### **Question one: Are there circumstances where it would be appropriate to expand the use of ADR in Victoria? If so, how should it be done?**

Resolution Institute considers that there is scope for the expansion of the use of ADR in Victoria. Resolution Institute considers that, where possible, people in dispute should be assisted and encouraged to resolve their disputes before commencing legal proceedings. It would be helpful to have the processes reformed such that the need to file in court occurs only when matters are still not resolved after participants have taken genuine or reasonable steps to resolve the matter. Resolution Institute considers that attempts to resolve matters should be the default for all disputes, as it encourages behaviours sufficiently cooperative to resolve disputes and is a more efficient use of resources both of which contribute to sustainable justice. Referral to ADR by a court or tribunal after filing means that participants have already embarked upon an adversarial pathway and is an inefficient use of the expensive resources of the formal legal system. The introduction of the *Civil Dispute Resolution Act 2011* (Cth) for matters that go to Commonwealth courts has been a significant exemplar in this regard.

In addition, wherever possible courts and tribunals should be encouraged to refer matters to a triage or intake process for design of appropriate ADR, including identification of which among the ADR processes is appropriate. Those conducting triage must be appropriately skilled through suitable training and must have triage systems or proformas that ensure effective and consistent decision making. Private practitioners conduct their own triage.

There are many existing targeted referral and ADR processes including, most notably, Family Dispute Resolution and services offered by both Commonwealth and state based administrative tribunals and small business commissions, as well as various state DR services in health and disability, discrimination and human rights, retail tenancy, strata, workers compensation and farm debt schemes. Resolution Institute considers that there is ongoing potential for expanding the use of ADR in Victoria's court and tribunal processes and in government and private disputes beyond these existing schemes.

Like health issues, disputes should reach the 'hospital' level in the minority of situations. Like health care, people should be encouraged to take responsibility for

their choices in the government, NGO and private sectors before they consider surgery.

The Victorian Government may find the National Principles for ADR developed by the former NADRAC, still available online to be a useful resource to guide further expansion of DR services in Victoria.

### **Question two: What could be done to improve ADR, including mechanisms to address the power imbalance that may exist in some situations?**

Resolution Institute comments on two ways, amongst many, through which ADR could be improved.

The first of these is to insist on accreditation. The standards of ADR can be improved by using only appropriately accredited or graded dispute resolution practitioners. Reputable accreditation schemes require practitioners to have undertaken appropriate training and assessment, to provide references as to good character and to comply with other requirements such as to adhere to a code of practice, to be a member of an appropriate DR organisation and to hold suitable insurance(s). To retain accreditation, practitioners are required to engage in ongoing professional learning.

The question specifically refers to power imbalances. Power in a relationship is complex, dynamic and paradoxical. In addition, it is invisible to the uninformed eye. Resolution Institute is firmly of the opinion that accredited, skilled DR professionals can design mediation and restorative processes to keep people safe and self-determining. When people reach their own decisions they take account of a multitude of factors including relationship dynamics. Within a dispute resolution process, the need to address power dynamics may occur most frequently during mediation. Mediators accredited under the National Mediator Accreditation System, are required to be competent in responding to the power dynamics of a dispute.

In other forms of DR, such as arbitration and adjudication, accreditation and/or grading plays a significant role in ensuring that practitioners have detailed knowledge of applicable legislation, and skills including in analysis of complex arguments and in writing determinations/awards. Arbitration is being used increasingly to resolve international matters. Resolution Institute is also seeking to increase domestic arbitration as a process that will once again be considered a favourable alternative to litigation. Revision of rules to encourage time efficiency and cost capping have already been initiated. Current attention is being given to increasing rigour and transparency in education and accreditation processes.

The second of the ways in which ADR can be improved is systemic. Resolution Institute supports government playing a role in developing and/or offering schemes that are relatively low cost and time efficient. An effective example is that established under the *Building and Construction Industry Security of Payment Act 2002* (VIC) which applies to Building and Construction payment disputes which usually occur between larger builders and smaller subcontractors (usually with less

than 10 employees). This statutory procedure systemically addresses any perceived issues with power imbalances between the parties. For smaller claimants, the process of adjudication is empowering in that it is efficient, affordable and allows them to address claims in an informal and accessible way. In contrast litigation is usually drawn out over time and often priced in a way that makes pursuing the claim an unwise business decision as the cost of litigation may be equal (or even greater than) the amount claimed.

Victoria also has a range of statutory schemes to which parties can be referred for conciliation. These offer accessible, affordable and relatively time efficient processes for people to resolve a range of civil matters.

Resolution Institute encourages the Victorian government to maintain commitment to these schemes and to maintaining standards through national accreditation. Commitment requires adequate resource allocation to ensure ongoing professional development of practitioners and caseloads that result in consumers receiving a quality ADR service. In cases where conciliators only have a matter of minutes on each case as they juggle a number of cases simultaneously, consumers receive little of the benefit of being facilitated to make their own decisions. While there is a short term benefit in completing many cases in a short timeframe, consumers' perception of justice that sustains may be eroded and their potential learning about ways to resolve disputes better in future is significantly compromised.

Throughout Australia state governments have supported the development of numerous DR schemes and interventions. Resolution Institute considers that these offer efficient transfer between various states. Western Australia, for example, has an Aboriginal Mediation Service and Victim offender mediation yet does not offer mediation in Community Justice Centres as Victoria, New South Wales and Queensland do.

Resolution Institute considers that there is scope for the Government to expand the range of low cost and time efficient schemes delivered with adequate resourcing.

Resolution Institute also considers that government can make provisions within appropriate legislation for disputes to be resolved by ADR. Suitable legislation relates, for example, to land tenure, water access and resource extraction. Provisions can include a tiered approach which may include negotiation, mediation and then arbitration to provide the opportunity for cooperative and mutual decision making with the certainty that if agreement is not reached through mediation, a determination through arbitration will bring the contentious matter to a close.

### **Question three: What can be done to improve knowledge and awareness of the availability and benefits of ADR?**

Resolution Institute notes that people in dispute, and their advisers, may not be aware of the wide availability and range of potential benefits of ADR and as a result may not seriously consider it or dismiss it too readily. Importantly, referrers and

people in dispute are not aware of the qualifications now available to some sectors of the profession and developments in other sectors including arbitration.

Usage of pre-filing protocols as described in response to Question 1 would contribute to potential litigants' and advisers' knowledge about ADR methodologies.

Resolution Institute notes that frequently, discussions about promoting greater use of ADR focus on education of lawyers and of law students. Resolution Institute believes that other faculties should be encouraged to incorporate ADR components into their courses. For example, architects may be well served by understanding the potential of Dispute Resolution Boards in preventing disputes and in mediation helping to get projects back on track; psychologists and social workers may find it directly useful in their roles to learn mediation skills and to be aware of dispute resolution options for clients; and doctors may anticipate the value of mediation for assisting families in making difficult decisions about their loved ones and for resolving complaints that arise about medical care. Resolution Institute notes with interest anecdotal reports that unpublished NADRAC data indicates that engineering faculties throughout Australia teach ADR more commonly than any other faculty other than law.

With reference to legal education, Resolution Institute endorses the views expressed by NADRAC in its publication *Teaching Alternative Dispute Resolution in Australian Law Schools 2012*:

*"It is NADRAC's view that the amount of ADR teaching that currently occurs in the majority of Australian law schools is not sufficient in light of the increasing role that lawyers will play in advising clients about and assisting them in ADR processes. Clients, professional bodies and courts/tribunals expect that lawyers will be knowledgeable about ADR options and will also understand interest based negotiation."*

*"NADRAC considers that teaching law students ADR knowledge and skills is important not just for those who go on to practise law, but also for those who seek employment in other areas. Conflict management and resolution knowledge and skills are critical in many professional roles. Teaching ADR knowledge and skills to law students will assist them to handle conflict and disputes in all aspects of their life, such as preventing and managing disputes that arise in the workplace and in the commercial sector." p12*

In addition to the reasons described above for including ADR in legal education, Resolution Institute notes that there is also some evidence that the psychological distress of law students can be ameliorated by undertaking ADR studies.<sup>1</sup> Resolution Institute is curious about whether promoting their wellbeing may help to encourage those graduates most aligned with collaborative rather than adversarial approaches to dispute resolution to continue to the practice of law.

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<sup>1</sup> Field, Rachael M. & Duffy, James (2012) Law student psychological distress, ADR and sweet-minded, sweet-eyed hope. *Australasian Dispute Resolution Journal*, 23(3), pp. 195-203.

A major source of information about services available is provided to potential clients by those professionals with whom clients engage, so it is the strategies above that will be most effective in increasing broader community awareness about options available to them for resolving disputes. In cases where specific educational materials are being developed to be made available to the broader community, Resolution Institute considers that they must, among other things, be written in a way that is accessible to the target audience. Resolution Institute commends the work of NADRAC in producing their *Guide to Dispute Resolution* (2012) and suggests that this is an existing resource that could be widely promoted and used as a reference for developing organisational specific ADR materials.

#### **Question four: How could the resolution of disputes with government agencies be improved?**

Resolution Institute suggests that steps can be taken with relation to regulations and policies relating to government agencies to emphasise further the benefits of ADR in resolving disputes with government agencies. Resolution Institute notes that the *Legal Services Directions 2005* (including amendments) prescribe the use of ADR wherever possible as part of commonwealth agencies' obligations to be model litigants. Resolution Institute would prefer that these obligations required agencies to be "model dispute resolvers" rather than model litigants. This would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort.

Resolution Institute believes that this intent could be strengthened by recommending that when providing or engaging in ADR, government agencies be required to use practitioners with current accreditation under reputable ADR training and accrediting agencies, such as Resolution Institute, and in the instance of mediators, the National Mediator Accreditation System (NMAS).

Resolution Institute encourages the Victorian Government to consider issuing its own directions to all Victorian government agencies and departments. Victorian government directions could be modelled on, and/or referenced to, the Commonwealth *Legal Services Directions 2005*. As well, Dispute Management Plans-proformas have been developed by the former NADRAC and continue to be available online. These proformas would be a useful resource for developing Victorian Government directions.

#### **Question five: Are there opportunities to expand the use of ADR mechanisms by employing online technologies?**

There is scope to trial further online technologies to expand the use of ADR. There has been an increasing usage of online mediations which reduce the cost and time involved in the process, especially for preliminary conferences with participants or when multiple participants from different locations are involved in the dispute. For example, for smaller claim disputes where a party may be located in a rural area or the cost of travel outweighs the cost of the dispute, participants may explore

options relating to online mediation. Resolution Institute believes that there is still much to be learnt and explored within this area.

Another avenue to expand the use of online technologies is the way in which documents are served and received so that real time updates can be provided to acknowledge sent or read emails. For example, this could be helpful in adjudication matters where the timing of sent or received documents is critical or bound by legislative requirements.

**Question six: What resources or supports would be required to assist people who may face barriers accessing an online dispute resolution process?**

Resolution Institute believes that this question needs to be addressed in the broader context of how to provide improved access to a range of online services relating to health, education, housing and employment, social and legal services. Availability through accessible hubs such as libraries and community centres needs to be encouraged and expanded. A particular barrier is the opening hours of such hubs. Most commonly, community hubs are available during business hours and/or for a short time beyond business hours. This short time may conflict with commuting and domestic responsibilities, presenting a practical barrier to people's access and use of these.

## Conclusion

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Resolution Institute would be very pleased to provide additional information on this response and/or to engage in a further consultation process.