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Dispute resolution: frameworks in New South Wales - submission by the Anti-Discrimination Board

The Anti-Discrimination Board of New South Wales (the **Board**) thanks the New South Wales Law Reform Commission (**LRC**) for the opportunity to make submissions in response to the LRC's consultation paper 16, "Dispute resolution' frameworks in New South Wales".

The Role of the Board in New South Wales

The Anti-Discrimination Board of NSW was established under the *Anti-Discrimination Act 1977* (**ADA**) to promote anti-discrimination and equal opportunity principles and policies throughout NSW and to administer the ADA.

The Board has three main functions:

1. *Handling complaints of discrimination*:-The Board provides an enquiry service for people who want to know about their rights or responsibilities under anti-discrimination law. We accept formal complaints of discrimination, investigate complaints and conciliate complaints when appropriate.

2. *Preventing discrimination from occurring by providing education and community consultation*:- The Board informs people of New South Wales about their rights and responsibilities under anti-discrimination laws and explain how they can prevent and deal with discrimination. The Board does this through consultations, education programs, seminars, talks, participation in community functions and the production and distribution of written information and our website.

3. *Advising the New South Wales Government*:- The Board advises the Government on discrimination legislation, reform and any other matter that has potential discriminatory effects. It also makes

recommendations to the Attorney General on some applications for exemption from the operation of the ADA.

The Board's Submission

This submission does not attempt to answer all of the specific questions raised in the consultation paper, but will instead address those areas of relevance to the Board.

This submission will address:

- the use of ADR by the Board;
- the difficulty of classifying types of dispute;
- terminology, and how to define conciliation;
- the need for a flexible approach;
- appointment, accreditation and regulation;
- specialisation.

Context: the use of ADR by the Anti-Discrimination Board

As identified in the consultation paper, the ADA provides for the use of ADR. Part 9, division 2, subdivision 3 refers to the 'Investigation and conciliation of complaints'

Section 91A provides a discretion for the President of the Board to endeavour to resolve a complaint by conciliation if the President is of the opinion that the complaint may be so resolved (s. 91A(1)). The President may require the parties to attend conciliation (s. 91A(2)), and penalties apply for failure to comply (s. 91A(3)). Parties may only be represented with leave of the President (s. 91B).

The ADA stipulates that anything said or done during conciliation is inadmissible in any subsequent proceedings relating to the complaint (s. 91A(4)). This stipulation is in addition to a specific secrecy provision in the ADA, which makes it an offence for an officer of the Board to disclose information obtained in the course of exercising functions under the ADA and renders that information inadmissible in court (s. 126A). The ADA also provides a mechanism for parties to record the agreement reached (s. 91A(5)) and, in the event of non-compliance, a party to the agreement may apply to the Tribunal to register certain provisions of the agreement within 6 months after the date of the agreement (s. 91A(6)-(8)). Provisions that are registered are taken to be orders of the Tribunal and can be enforced accordingly (s. 91A(9)).

Complaints can be declined at any stage of the investigation for reasons which include that they are frivolous, vexatious, misconceived, lacking in substance or do not disclose the contravention of a provision of the ADA (92). If the President is of the opinion that a complaint cannot be resolved by

conciliation, or has unsuccessfully endeavored to resolve a compliant by conciliation, the President is to refer the complaint to the Tribunal (s. 93C) for a hearing. The ADA is silent on the practice and procedure of conciliation

The Board's complaint-handling process has a dual role which is implicit in its legislation. It is not only about conciliating a complaint but also about educating the parties. There is an underlying assumption that discriminatory acts or vilification may result from ignorance. Therefore the Board's conciliation processes aim to educate the parties, and in particular respondents, on the operation of the ADA and, importantly, on the impact of discrimination on those affected by it.

Complaints handled by the Board include allegations of discrimination on the ground of race, age, disability, sex (including pregnancy and breastfeeding), sexual harassment, transgender status, marital or domestic status, homosexuality and carer's responsibilities. Vilification on the grounds of a person's race, transgender status, homosexuality or HIV/AIDS status are also unlawful under the ADA. Thus the complaints we handle involve immutable personal attributes which means that disputes are often deeply personal and sensitive in nature, and participants are frequently highly emotional or vulnerable. The Board's conciliators are specialised in dealing with these types of complaints and are also specialists in their subject area, providing advice about the provisions of the ADA, or examples of previous disputes resolved by the Board or determined by the Tribunal.

The Board employs Conciliation Officers and Assistant Conciliation Officers who conduct the investigation and resolution of complaints. They deal personally with the parties to a dispute to ensure a flexible approach to conciliation, adapting their approach to the requirements of a particular case. In many instances the Board's conciliators will arrange conciliation conferences involving a combination of individual discussions between the conciliator and each of the parties and facilitated face-to-face discussions. However in other situations, the Board might conduct conciliation conferences by telephone, or by shuttle arrangement (with the conciliator acting as a relay between the parties, who remain separate), or facilitate a resolution through exchange of correspondence. Conferences are often held at the Board's offices in Sydney, Newcastle and Wollongong, or conciliators may travel to regional locations to accommodate the needs and requirements of participants.

A further characteristic of the complaints handled by the Board is that there is frequently an ongoing relationship between the parties. Complaints of discrimination in employment, education, the provision of accommodation and registered clubs often require a resolution involving ongoing contact between colleagues, club members, students, or landlords and tenants. Successful resolution must therefore enable the parties to repair and rebuild their relationship to the maximum extent possible.

Categorising disputes

It is extremely difficult to categorise the wide variety of "disputes" to which ADR processes apply. The vastly different regimes and environments in which ADR is practiced in NSW mean that attempts to classify the types of dispute encounter significant difficulties from the outset.

The consultation paper asks whether there is a case for adapting the ADR provisions to the type of dispute, thereby achieving a level of consistency within each of the broad categories. It requests that this issue be considered in answering the questions raised throughout the paper.

The Board is concerned to ensure that any attempts to apply standard terminology and to categorise dispute types do not lead to generalisations and assumptions about the nature and purpose of specific disputes.

The consultation paper divides disputes into four broad categories: court-connected disputes; disputes about rights, entitlements or obligations under particular statutes; complaints; unspecified disputes.

Whilst acknowledging that these categories sometimes overlap, the consultation paper states (at 3.37) that certain disputes will "*never end in litigation, such as minor consumer disputes or complaints*".

The categories identified by the LRC do overlap. A dispute may change over time, or may encompass one or more categories. There is a risk that applying particular ADR provisions to pre-determined categories of dispute may lead to a rigid, inflexible approach.

The Board handles disputes about rights, entitlements or obligations under the ADA. These are referred to in the ADA as complaints. Complaints that fail to resolve through conciliation may be referred to the Tribunal and may, therefore result in litigation.

The Board feels it is important not to impose rigid categories or classification of disputes. Some disputes may initially appear to fall within one category, but may have characteristics of other categories. For example, the Board may receive a complaint which about the breach of an internal code of conduct within an organisation. Such a breach could however also amount to a breach of anti-discrimination law.

Terminology

Question 3.2 asks when standard terminology and definitions for ADR processes would be desirable, and when in would be better to use a broader, more flexible term.

The consultation paper (at 3.29) refers to NADRAC's identification of inconsistent terminology as a significant issue of concern, leading to problems including:

- participants having unrealistic expectations of certain processes;
- inappropriate referral of some disputes; and
- meaningful research and evaluation being impeded.

The first two of these problems can largely be avoided through effective communication and a transparent process. ADR practitioners and referring agencies can manage the expectations of participants by providing accurate, accessible and timely information about the process. Similarly, accurate and meaningful information between agencies and their clients should help to prevent inappropriate referral of disputes.

Definition of conciliation - question 3.4

NADRAC describes conciliation as "*a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement*[1]".

This description of conciliation accurately describes the work handled by the Board. Conciliators have expertise in the area of the Board's jurisdiction and may advise on the content of the dispute by providing information about the ADA, or examples of previous disputes resolved by the Board or determined by the Tribunal. He or she may make suggestions for terms of settlement, give advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

The process of conciliation within a statutory framework often also has an educative function that goes beyond the generally accepted definitions of ADR terms. It is therefore implicit in the ADA that parties to a conciliation should gain an improved understanding of their rights and responsibilities under discrimination law.

Consistency vs flexibility

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[1] National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms: The use of terms in (alternative) dispute resolution (2003) 9.

The Board agrees with the statement (at 3.31) that there is a tension between the need for consistent and accurate information about ADR processes and the need to preserve desirable flexibility.

Agencies deal with a vast array of disputes, and even within an individual agency's remit, the range and variety of individual complaints often requires a diverse and flexible approach to dispute resolution. For example, the ADA is silent in relation to the practice and procedure of conciliation, which allows its conciliators the maximum flexibility in attempting to resolve discrimination complaints. In our view the need for flexibility in conciliation is paramount, and should not be sacrificed for the sake of trying to achieve consistency between agencies handling varied and often-specialised disputes.

The Board is of the view that any potential disadvantage that may arise from the use of different or inconsistent ADR practices between agencies can and should be rectified by the provision of accurate and accessible information to participants about what to expect in the particular circumstances of their case.

Appointment and accreditation

As the Board's conciliators are employees, the selection and suitability of these practitioners is managed through the merit selection process used in their appointment to the role. All conciliators receive initial and ongoing training in relation to the ADA, relevant case law and the Board's approach to conciliation and the needs and requirements of the Board's clientele. External training is also used where appropriate. Complaints are allocated to staff with an appropriate level of expertise, and may be reallocated where necessary, and staff have access to ongoing support from management and peer groups to discuss areas of concern. Initially less experienced staff will co-conciliate alongside a more experienced colleague, and this remains an option at any time, should the individual conciliator feel it appropriate in the circumstances.

In this way the Board ensures that its conciliators are appropriately skilled, trained and supported to become specialists in their field.

Specialisation of ADB conciliators

The ADA enables complaints only in relation to specific areas covered by the legislation, and the ADR practitioners and processes employed by the Board, are consequently highly specialised. The Board acknowledges that the approach and the systems it uses may not be appropriate to other types of dispute; there is no "one size fits all" model that will be suitable to all circumstances. The Board would not want to be compelled to follow a particular model, being of the view that a diversified and flexible approach to dispute resolution offers the most likelihood of successful resolution.

Should any proposal be made to standardise or codify dispute resolution practices, or to apply or enforce accreditation, regulation or practice standards

to ADR practitioners in NSW, the Board requests that it is consulted and provided the opportunity to make further submissions and representations in this area.

The Board thanks LRC for the opportunity to contribute to this important area of law reform. If you require any further information or assistance with the Board's submission please contact Jackie Lyne on [redacted].

Yours sincerely,

Stepan Kerkyasharian AO
President
Anti-Discrimination Board of New South Wales

Dated: 19 June 2014.