NSW GOVERNMENT Justice & Attorney General

ADR Blueprint

Draft Recommendations Report 1: Pre-Action Protocols & Standards

August 2009

Introduction:

On 7 May 2009 the New South Wales Attorney General, the Hon. John Hatzistergos MLC, released the *ADR Blueprint* Discussion Paper for public consultation. The *ADR Blueprint* contains 19 proposals to increase and better integrate Alternative Dispute Resolution ("ADR") across the New South Wales civil justice system.

The *ADR Blueprint* states that there are three key strategies to developing a less adversarial and litigious culture in NSW: (p. 8)

1 Encourage people to use other appropriate dispute resolution strategies.
2 Change the culture of the legal profession, so it becomes less focused on running cases and more focused on solving problems.
3 Structure the civil justice system so that, when litigation is contemplated or commenced, the way the system works increases the likelihood that the dispute will be settled quickly.

In response to the comments received on the *ADR Blueprint* proposals through the public consultation process, a number of *ADR Blueprint Draft Recommendations Reports* are now being produced. Each *ADR Blueprint Draft Recommendations Report* concentrates on particular *ADR Blueprint* proposals, revising and refining those proposals to take into account stakeholder feedback, and setting out more detailed draft recommendations for reform.

The first *ADR Blueprint Draft Recommendations Report* is the '*ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols & Standards.'* Interested stakeholders and members of the public have the opportunity to comment on the draft recommendations contained in this *Draft Recommendations Report* before they are finalised and implemented.

Which ADR Blueprint proposals are covered in this Draft Recommendations Report ?

This *Draft Recommendations Report* covers proposals 4, 6, 9 and 15 of the *ADR Blueprint*.

Proposal 4: Place a legislative obligation on legal practitioners to provide information to their clients about ADR.

Proposal 6: Enact 'guiding principles for the conduct of civil disputes', which parties would be encouraged to honour. A court would take compliance with the principles into account should it ultimately be asked to adjudicate a civil dispute. Serious failure to comply with the principles could result in adverse cost orders.

Proposal 9: Incorporate the main elements of pre-action protocols as 'best practice standards' in the 'guiding principles for the conduct of civil disputes' (see Proposal 6). If a dispute is subsequently litigated the court could take the extent of compliance into account, when determining costs (including indemnity costs) (see Proposal 15). Alternatively, practice directions could be issued mandating specific steps that must be taken before certain types of cases commence.

Proposal 15: Provide that the court is to take into account parties' attempts to engage in ADR when making orders as to costs.

This *Draft Recommendations Report* makes four Draft Recommendations for reform:

DRAFT RECOMMENDATION 1

Extend the *Civil Procedure Act* to pre-action conduct, complementing s 56 so that:

- People in a civil dispute are required to take all reasonable steps (such as negotiation, mediation, and other ADR processes) to resolve the dispute without litigation;
- If litigation is necessary, before proceedings are commenced the parties are to take all reasonable steps to agree on the real issues required to be determined by the court;
- Lawyers and other persons who assist or fund a person in dispute must not, by their conduct, cause that person to breach these obligations; and
- Failure to comply with these obligations may be taken into account by the court or tribunal in relation to costs, case management, and hearing and other fees.

DRAFT RECOMMENDATION 2

The Department of Justice and Attorney General, in consultation with the public and other stakeholders, develop a Guide for People in Civil Disputes. The Guide would assist people in understanding their rights and obligations and in highlighting the options for ADR.

DRAFT RECOMMENDATION 3

The ADR Directorate, in conjunction with the ADR Blueprint Steering Committee and other relevant stakeholder and industry groups:

(i) develop appropriate pre-action protocols for introduction in family provision disputes; and

(ii) identify other types of disputes appropriate for pre-action protocols, and develop appropriate pre-action protocols for these.

DRAFT RECOMMENDATION 4

Courts and tribunals review their rules and practice notes to ensure that ADR is considered as early as possible, by requiring parties to advise the court or tribunal, at the first opportunity:

(i) whether they have attempted ADR; and

(ii) whether they are now ready to do so.

Comments invited:

If you would like to comment on these Draft Recommendations before they are finalised and implemented, please send your comments by **Wednesday 30 September 2009** to:

ADR Directorate, Department of Justice and Attorney General
Locked Bag 5111, Parramatta NSW 2124
Email: Natasha_Mann@agd.nsw.gov.au, Tel: (02) 8688 7451

A legislative requirement for solicitors and barristers to inform their clients about ADR

In response to Proposal 4 of the *ADR Blueprint,* stakeholders generally submitted that the existing obligations on legal practitioners (in Rule 17A of the NSW *Barristers' Rules*, and Rule 23 A.17A of the NSW *Solicitors' Rules*) were sufficient and that it was unnecessary to introduce a new *legislative* requirement.

Rule 17A of the Barristers' Rules provides that:

A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Rule 23 A.17A of the Solicitors' Rules provides that:

A practitioner must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

The *Legal Profession Act 2004* (Part 7.5) requires lawyers to comply with the professional rules.

A breach of the professional rules is capable of being "unsatisfactory professional conduct" or "professional misconduct" (section 498(1)(a)), and could lead to disciplinary action against the lawyer. "Consumer disputes"[1] about lawyers are generally handled by Mediation and Investigation Officers of the Office of Legal Services Commissioner.

Some stakeholders, however, submitted that the requirements should be moved from the rules made by the professional bodies, to legislation made by Parliament. If obligations similar to those in the professional rules were to be introduced into a piece of legislation, this may to some extent help to increase awareness of the crucial role of lawyers in assisting clients to resolve disputes, and to promote the cultural change in both the legal profession and the community discussed in the *ADR Blueprint*.

On balance, however, it is regarded as insufficient simply to impose additional statutory obligations on lawyers. A broader approach is required. This approach is discussed below and set out in Recommendation 1.

[1] A "consumer dispute" is a dispute about the conduct of a lawyer not involving an issue of unsatisfactory professional conduct or professional misconduct: section 514 of the *Legal Profession Act 2004*.

Obligations of people in dispute

Statutory obligations

In response to Proposals 6, 9 and 15 of the *ADR Blueprint*, some stakeholders submitted that the 'overriding purpose' provision in section 56 of the *Civil Procedure Act* already provides sufficiently comprehensive guiding principles for the conduct of persons in dispute.

The *Civil Procedure Act* applies to most civil proceedings in NSW courts,[2] regulating the procedures and the case management powers of courts in civil proceedings.

Section 56 of the *Civil Procedure Act* states:

> ***"56 Overriding purpose***
>
> *(cf SCR Part 1, rule 3)*
>
> *(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*
>
> *(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.*
>
> *(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.*
>
> *(4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).*
>
> *(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs."*

The 'overriding purpose' provision in section 56 is an important provision that has been a feature of the *Civil Procedure Act* since its inception. It contains a powerful and succinct statement of the obligations of parties and their lawyers during civil proceedings. The duty for parties and their legal representatives to assist the court to further the overriding purpose of the "just, quick and cheap resolution of the real issues in the proceedings" is entirely consistent with the greater use of ADR.

Compared to other Australian jurisdictions that are only now beginning to introduce 'overriding purpose' provisions into their legislation[3], New South Wales is significantly advanced in this area.

---

2 With the exception of the Dust Diseases Tribunal, the *Civil Procedure Act* does not apply to tribunal proceedings (section 4 and Schedule 1 of the Act).

3 For example the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009,* introduced into Federal Parliament on 22 June 2009, incorporates an 'overarching purpose' principle into the *Federal Court of Australia Act 1976.* The Bill provides that the overarching principle is to facilitate the just resolution of disputes according to the law as quickly, inexpensively and efficiently as possible.

Responses to the *ADR Blueprint* did not point to any need to amend section 56 or to introduce a more expansive statement of obligations of parties to civil proceedings. It is therefore not proposed that there be an additional legislative statement about the obligations of parties **once proceedings have commenced** under the *Civil Procedure Act*.

It is significant, however, that the duty on parties imposed by section 56 of the *Civil Procedure Act* is **owed to the court**. It appears that section 56 only applies **once proceedings have been commenced,** and **does not cover pre-action conduct**.

It is accordingly recommended that the *Civil Procedure Act* be amended to extend to pre-action conduct, by including a new provision setting out the obligations of people in civil disputes to attempt to resolve their disputes without the need for litigation.

The new section would complement section 56 by providing that:

1. People in a civil dispute[4] are required to take all reasonable steps to resolve the dispute without litigation;
2. If litigation is necessary, before proceedings are commenced the parties are to take all reasonable steps to agree on the real issues required to be determined by the court; and
3. A court may take a failure to comply with these obligations into account in relation to costs, case management, and hearing and other fees.

Reasonable steps

Requiring parties to a civil dispute to take reasonable steps to resolve the dispute without litigation should - particularly when combined with the other proposals in the *ADR Blueprint* - emphasise the central role of ADR as a primary way to resolve disputes.

It highlights the fact that in many circumstances it will be unreasonable for claimants to bring proceedings as a first resort, without first having made proper attempts to resolve the dispute by ADR. Similarly, it highlights the fact that in many instances it will be unreasonable for respondents to a dispute or civil claim to refuse to agree to participate in ADR.

What steps are reasonable will of course depend on the circumstances. Reasonable steps would include mediation, conciliation, early neutral evaluation, arbitration, external dispute resolution schemes, negotiation, and any other ADR processes. [5]

The requirement of reasonableness should also make it clear that there may be some circumstances where it would not be practicable or appropriate for the parties to attempt to resolve the dispute without litigation.

---

[4] There may be some matters where the provision would not apply, for example where there is a fear of violence or the dispute may involve an application for an apprehended violence order.

[5] See the discussion of definitions of ADR in the *ADR Blueprint* at p. 5.

The section could, for example, specify some of the matters which a court may take into account in determining whether particular steps were or would have been *reasonable*. These matters could include:

- the importance and complexity of the dispute[6];
- the capacity of parties to participate safely or effectively in any dispute resolution attempts[7];
- the expected costs of any dispute resolution attempts; and
- the expected costs (perhaps both to the parties and to the State) should the matter be determined by litigation.

Non-compliance

The new provision would enable a court to make an adverse costs order in a clear or obvious case of non-compliance with these obligations. If the court did not have any ability to penalise non-compliance the standards may become a "toothless tiger".

On the other hand, it is important that the new requirements do not generate unnecessary "satellite" litigation concerning the rights and wrongs of pre-trial behaviour.[8]

Although the current proposal is for an amendment to the *Civil Procedure Act* – which would not affect tribunals[9] - it may be that similar statutory obligations to take reasonable steps to resolve disputes could be included in other statutes relating to tribunal proceedings.

The new provision would also provide that lawyers and other persons who assist or fund a person in dispute must not, by their conduct, cause that person to breach these obligations. This wording is equivalent to that in section 56(4) of the *Civil*

---

6 Compare s. 60 of the *CPA*, which provides:

> "In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute."

7 Factors relevant to this criterion may include:

- current fear of violence by a party;
- an unmanaged mental illness or intellectual disability;
- any power imbalance and the extent to which it can be redressed; and
- any relevant court orders (such as restraining orders) which may make ADR difficult.

This criterion is based on a suggestion of the National Alternative Dispute Resolution Advisory Council ("NADRAC") of one of the factors to be taken into account when considering whether to refer a matter to mediation. See NADRAC *Legislation for alternative dispute resolution: A guide for government policy-makers and legal drafters* (2006) at [5.25] p. 36. The Guide is available on the NADRAC website http://www.nadrac.gov.au.

8 One possibility may be to require a court to grant leave before hearing any application for a costs order based on a breach of the standards. On the other hand, however, this may not be necessary because courts have sufficient powers to deal swiftly with unmeritorious applications, and would only be likely to make adverse costs orders in clear cases of non-compliance with the standards.

It is not proposed that there be any change to laws relating to the admissibility of "without prejudice" negotiations or to sections 30-31 of the *Civil Procedure Act* (privilege and confidentiality relating to court-referred mediations).

9 See note 2 above.

Procedure Act, except that it would not be limited to lawyers. Extending this obligation to other persons who assist or fund a person in dispute would recognise that agents or advisers, or those providing financial backing, may have a major influence on the conduct of people involved in civil disputes.

DRAFT RECOMMENDATION 1:

Extend the *Civil Procedure Act* to pre-action conduct complementing s 56, so that:

- People in a civil dispute are required to take all reasonable steps (such as negotiation, mediation, and other ADR processes) to resolve the dispute without litigation;
- If litigation is necessary, before proceedings are commenced the parties are to take all reasonable steps to agree on the real issues required to be determined by the court;
- Lawyers and other persons who assist or fund a person in dispute must not, by their conduct, cause that person to breach these obligations; and
- Failure to comply with these obligations may be taken into account by the court or tribunal in relation to costs, case management, and hearing and other fees.

A Guide for People in Dispute

If Recommendation 1 is implemented it would constitute a clear statement of principle by Parliament that people in a civil dispute take all reasonable steps to resolve their dispute before going to court.

It may well also be desirable if there was a guide for people involved in civil disputes to provide some further guidance and assistance. A guide could assist people in understanding their rights and obligations and in highlighting the options for ADR.

The Guide for People in Civil Dispute would not have any direct legal effect, nor would it constitute legal advice. It would, however, be intended to complement the new statutory provision in Recommendation 1 by providing some further guidance on the practical effect of those requirements.

The Guide could be developed by the Department of Attorney General and Justice, in consultation with the public and other stakeholders.

The Guide would be made widely available, including to courts and tribunals where it could be given to people enquiring about how to start legal proceedings. In particular, it could be promoted and distributed by Law Access.

This would be part of implementing Proposal 2 of the *ADR Blueprint*: to provide better information to consumers about non-court options to resolve disputes, and to position LawAccess as a "one stop shop" for information about dispute resolution services for consumers and business.

DRAFT RECOMMENDATION 2:

The Department of Justice and Attorney General, in consultation with the public and other stakeholders, develop a Guide for People in Civil Disputes. The Guide would assist people in understanding their rights and obligations and in highlighting the options for ADR.

Pre-action protocols: A requirement for parties to attempt ADR before commencing certain types of legal proceedings

In response to Proposal 9 of the *ADR Blueprint*, some stakeholders expressed concern about introducing prescriptive pre-action protocols, particularly a "one size fits all" approach. The concerns included that costs may be unnecessarily increased at the early stages of a dispute or may be disproportionate for low-value claims; that claimants and self-represented litigants may be disadvantaged; and that there may be additional "satellite" costs litigation. These concerns were also acknowledged in the *ADR Blueprint* (pp. 13, 16).

It should be noted, however, that there are already at least four types of matters in NSW where participation in ADR is required **before** proceedings in a court or tribunal **can be commenced**.

Pre-action requirements in NSW

Farm debt mediation

Under the *Farm Debt Mediation Act 1994* a farmer has a right to request a mediation before a creditor can take possession of the farm or other enforcement action under a farm mortgage. Mediators are accredited by the New South Wales Rural Assistance Authority.

Enforcement action cannot occur until the Authority has issued a certificate. The Authority cannot issue a certificate unless it is satisfied that satisfactory mediation has taken place; the farmer has declined to mediate; or three months has passed since the creditor gave the required notice and the creditor has, throughout that period, attempted to mediate in good faith (section 11).

Retail tenancy disputes

There are similar requirements for mediation before proceedings can be brought under the *Retail Leases Act 1994*.

Proceedings relating to a "retail tenancy dispute" may not be brought before any court or tribunal unless the Registrar of Retail Tenancy Disputes has certified that mediation under the Act has failed to resolve the dispute, or the court or tribunal is satisfied that mediation is unlikely to resolve the dispute (section 68).

Strata disputes

Strata scheme disputes under the *Strata Schemes Management Act 1996* are another example. Applications to Adjudicators or to the Consumer, Trader and Tenancy Tribunal for orders in particular types of strata disputes must be made to the Registrar of the Tribunal.

The Registrar must not accept an application unless mediation under the Act has been attempted but was unsuccessful, or the Registrar considers that mediation is unnecessary or inappropriate in the circumstances (section 125).

Common law work injury damages claims

The *Workplace Injury Management and Workers Compensation Act 1998* (section 318A) requires "mediation" before court proceedings for common law work injury damages[10] can be brought.

A defendant can only decline to participate in mediation if the defendant wholly disputes liability. Mediators are appointed by the President of the Workers Compensation Commission of NSW; are subject to the general control and direction of the Registrar; must use their best endeavours to bring parties to an agreement; and have certain powers of the Commission including to require information and documents.

Pre-action requirements in other jurisdictions

In addition, there are numerous pre-action requirements in other jurisdictions.

Family law

Extensive pre-action procedures exist in the Family Court, including requiring participation in dispute resolution. In parenting matters, the Court will not (with some exceptions) hear a matter unless the parties have made a "genuine effort" to resolve the dispute by family dispute resolution. An applicant is required to file a certificate from a family dispute resolution practitioner certifying whether the parties attended family dispute resolution and whether they made a genuine effort to resolve the issues.[11]

Pre-action procedures also apply to financial cases (property settlement and maintenance). The requirements include that each prospective party to a case make a genuine effort to resolve the dispute before starting the case, including by participating in dispute resolution, such as negotiation, family counselling and arbitration.[12]

---

10 Where the degree of permanent impairment is sufficient for an award of damages.

11 *Family Law Act 1975* (Cth) section 60I.

12 *Family Law Rules 2004* rule. 1.05 and Sch 1.

Queensland personal injury matters

An extensive regime of pre-action procedures applies for personal injury matters in Queensland, under the *Personal Injuries Proceedings Act 2002* (Qld). The pre-action requirements include that parties must attend a compulsory conference, which may be a mediation, to attempt to resolve the matter.

Further scope

There are clearly other types of civil disputes in NSW where it would be appropriate to develop pre-action procedures requiring ADR. Disputes over the allocation of deceased estates appear to be a good example. The Supreme Court of NSW is now required to refer all applications for family provision orders for mediation before considering the application, unless there are special reasons not to: section 98 of the *Succession Act 2006*.[13]

The Court has recently issued a Practice Note (SC Eq 7) confirming the procedures for mandatory mediation in these matters. It is understood that the vast majority of such matters are currently being referred to mediation, and that many of the referrals are to court-annexed mediation conducted by a Registrar.

The Supreme Court has commented in a number of recent judgments in family provision matters that the legal costs incurred were excessive and out of any proportion to the size of the estate. In *Tobin v Ezekiel – Ezekial Estate* [2008] NSWSC 1108, for example, the Court noted that a contest over an estate worth $1.7 million would consume costs of at least $645,000. In *Mannix and Nudd v Mannix* [2008] NSWSC 1228, for example, the total costs of all parties in two related proceedings heard together were in the order of $192,000, whilst the value of the estate was $415,182. [14]

If in certain types of disputes such as family provision matters, courts and tribunals are - as a matter of course - referring parties to ADR at an early opportunity, this may suggest it would be better for parties to have been required to attempt ADR before proceedings can be brought.

There are of course overwhelming benefits for parties, particularly in family-related disputes such as family provision applications, if matters can be resolved without the very considerable stress likely to result from legal proceedings.

The additional costs of ADR may be expected to be significantly less than the total costs to the parties of having to prepare for and commence legal proceedings, attend the court or tribunal, and take any other steps in the proceedings before matters are referred for mediation.

---

13 This provision was inserted by the *Succession Amendment (Family Provision) Act 2008* which commenced on 1 March 2009, as part of the process of implementing the recommendations of the uniform succession laws project of the Standing Committee of Attorneys-General.

14 See also *Abrego v Simpson* [2008] NSWSC 215, where the plaintiff's costs of $60,000 (estate worth $618,029) were regarded (at [4]) as an "extraordinary amount"; and *Fricano v Lagana* [2009] NSWSC 840, where the total costs were approximately $154,000 and the value of the estate $265,000.

DRAFT RECOMMENDATION 3:

The ADR Directorate, in conjunction with the ADR Blueprint Steering Committee and other relevant stakeholder and industry groups:

(i) develop appropriate pre-action protocols for introduction in family provision disputes; and

(ii) identify other types of disputes appropriate for pre-action protocols, and develop appropriate pre-action protocols for these.

Requiring parties to advise the court whether they are willing to attempt ADR

The objectives of the *ADR Blueprint* suggest that, if litigation is commenced, both the parties and the court or tribunal should consider whether ADR would be appropriate at the earliest opportunity.

Procedures developed by the Supreme Court of NSW, in its Commercial List and the Technology and Construction List, and by the Land and Environment Court of NSW, appear very promising and potentially have a broader application.

Supreme Court

The Supreme Court's Practice Note for both the Commercial List and the Technology and Construction Lists (Equity Division, SC Eq 3) requires the plaintiff to file, with the Summons commencing the proceedings, a statement setting out a number of matters in summary form[15]. This must include a statement "as to whether the parties have attempted to mediate ***and*** whether the plaintiff is willing to proceed to mediation at an appropriate time"[16].

The defendant is required to file a response to these matters, including a statement whether the parties have attempted to mediate and whether the defendant is willing to proceed to mediation at an appropriate time (paragraph 10).

The Practice Note also states that it is expected that, prior to the commencement of proceedings in the Lists, the parties will have considered referral of their disputes to mediation. It is also expected that on the first return date of the Summons the parties or their lawyers will be able to advise whether they have attempted mediation, and

---

15 The other matters required to be included in the statement are:
- the nature of the dispute;
- the issues which the plaintiff believes are likely to arise;
- the plaintiff's contentions; and
- the questions (if any) the plaintiff considers are appropriate to be referred to a referee for inquiry or report.

16 At paragraph 8; original emphasis.

whether they are willing to proceed to mediation at an appropriate time (paragraph [60]).

Land and Environment Court

The Land and Environment Court has a long history of developing a wide range of procedures encourage parties to resolve their disputes by ADR.[17]

The Court's Practice Note for Class 3 Valuation Objection matters, for example, requires the parties to file at the first directions hearing a valuation objections information sheet (paragraph 14). The questions that the sheet requires the parties to answer include: (Schedule A)

> "3. Have the parties sought to resolve their dispute by mediation? Yes/No
>
> [Give details of the steps taken to resolve the dispute:]
>
> 4. Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act* 1979? If so, provide reasons [point form only]."

(A conference under s. 34 is a conciliation conference presided over by a Commissioner.)

The Court's Practice Note for Class 3 Compensation Claims requires (paragraph 42) that consideration be given throughout the proceedings to whether the proceedings or any questions are appropriate for mediation or neutral evaluation or for reference to a referee. The Practice Note also states (paragraph 43) that it is expected that legal practitioners, or litigants if not legally represented, will be in a position to advise the Court at any directions hearing or mention:

(a) whether the parties have attempted mediation or neutral evaluation; and
(b) whether the parties are willing to proceed to mediation or neutral evaluation at an appropriate time.

Recommendation

Requiring parties, both when proceedings are commenced and on the first date the matter is before the court or tribunal, to advise whether they have attempted ADR and whether they are willing to proceed to ADR would seem to have many benefits. In particular, it may focus the attention of both the parties and the court or tribunal on the suitability of ADR at the first available opportunity.

The particular form in which parties would be required to advise the court or tribunal whether they have attempted, or are willing to attempt, mediation could vary depending upon the existing procedures for commencing the matter in the court or tribunal.

---

[17] See the Honourable Brian Preston, "The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse", (2008) 19 *Alternative Dispute Resolution Journal* 72 [Part 1] and 144 [Part 2].

Parties would not of course be required to reveal the content of any "without prejudice" negotiations or other attempts to resolve the dispute.

DRAFT RECOMMENDATION 4:

Courts and tribunals review their rules and practice notes to ensure that ADR is considered as early as possible, by requiring parties to advise the court or tribunal, at the first opportunity:

(i) whether they have attempted ADR; and

(ii) whether they are now ready to do so.