

Bond University

Dispute Resolution Review

Volume 1 Issue 1

2021

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RESISTING THE VAGUE: CREATING CLEAR STANDARDS FOR NEW ZEALAND'S DISPUTE RESOLUTION REGIMES

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Abstract

New Zealand is in the process of formulating and implementing standards for government-provided dispute resolution regimes. This article provides the draft standards for this process. The emphasis is on clear, accessible and brief standards. This article analyses different sets of standards from New Zealand and other jurisdictions. In particular, the Australian and ISO examples provide helpful models but need refining to suit the unique New Zealand context. Nine standards are articulated and justified. There will never be a perfect set of standards, but we can still strive for standards that are robust and based on careful consideration of overseas models. If these standards also happen to challenge the status quo, then this should be welcomed.

I INTRODUCTION

Dispute resolution (DR) in New Zealand has developed in an ad hoc fashion.¹ While it has been led by government initiatives, the nature of this leadership has been reactive and inconsistent. Evidence of this ad hoc approach to the development of DR is most pronounced in regulatory regimes. The number of DR regimes continues to increase, providing regulation in different areas of New Zealand's society and economy.

The establishment of the Government Centre for Dispute Resolution ('GCDR') provides a golden opportunity to transform the development of DR from ad hoc into systematic, reactive into proactive, and inconsistent into consistent.² Reforming the development of DR in this way will be a challenging,

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¹ Grant Morris and Annabel Shaw, *Mediation in New Zealand* (Thomson Reuters, 2018), ch 3.

² The Government Centre for Dispute Resolution was established as a pilot project in 2014 and then made permanent in 2016. It is housed in the Ministry of Business, Innovation and Employment (MBIE). The GCDR has four main aims: lead advisor to government on DR matters, development of best practice DR guidance, helping agencies analyse DR approaches, and promoting improvement to the government DR system. 'Government Centre for Dispute Resolution', *Ministry of Business, Innovation & Employment* (Webpage)

long-term project but it can be done. The first step is to formulate overarching standards for government-provided DR schemes.

The proposed standards will be aspirational at first but can be used as a more definite criteria over time. Consultation and collaboration are vital to the success of this project. DR organisations should be included as integral stakeholders from the outset rather than having standards involuntarily imposed upon them. It will be important to regularly review both the standards and how different DR regimes are implementing and meeting them. If the initial benchmarks are set too high or too low, these can be revised in light of feedback from participating organisations.

There has been comprehensive discussion about the standards applied in training and accrediting mediators.³ These standards primarily relate to individual practitioners rather than DR schemes. It is one thing to make sure that individual DR practitioners are working to clear standards, but this is undermined if those individuals are working within practice regimes which do not implement any standards clearly.

During 2019, the GCDR organised the development of model standards for the NZ DR system. I formulated the draft standards for consultation with relevant stakeholders.⁴ This article is based on my analysis and recommendations. As at the end of 2021, the standards have been revised and confirmed.⁵ The process is now at the implementation stage. The concerns of this article are both theoretical and practical. My approach was unashamedly academic. The standards should be supported by appropriate DR scholarship and literature. However, the recommendations also had to be pragmatic to have any chance of sector support and ultimate implementation.

This article will begin by defining the term 'standards' and arguing for the importance of standards in DR. The discussion includes suggestions as to what should be covered by the standards. In an effort to avoid 'reinventing the wheel', this article will canvas examples of DR standards in New Zealand and overseas. As no overarching standards exist in New Zealand, the domestic examples will relate to individual practitioners and specific regimes. There are

<www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution>.

³ In Australasia, this discussion has been led by organisations such as NADRAC/ADRAC, the Mediator Standards Board, the Resolution Institute and AMINZ. The National Mediator Accreditation System (NMAS) was established in 2008 as an industry-based scheme administered by the Mediator Standards Board. The Resolution Institute is one of a number of recognised mediator accreditation bodies (RMABs) which accredit Australian and NZ mediators under the NMAS. While NMAS has a strong focus on practice standards it also has responsibilities relating to member organisations and complaints handling.

⁴ The standards were distributed to stakeholders in the GCDR's 'Model Standards for the Dispute Resolution System: Consultation Document' (MBIE, Wellington, November 2019) 1-50. The deadline for submissions was 13 Dec 2019. Consultation continued throughout 2020, albeit with delays due to the Covid-19 pandemic.

⁵ The draft standards received 22 submissions from stakeholders. This article reflects my original contribution to this process. The standards have been revised by the GCDR in light of feedback but remain very similar to my suggestions. Thus, this article features my specific contribution to the process rather than the confirmed, revised final outcome.

examples of overarching standards from overseas jurisdictions, in particular Australia and the United States. The National Australian Dispute Resolution Advisory Council ('NADRAC') effectively carried out early work on standards for Australian mediators in 2001 and continually researched standards and principles until the disestablishment of NADRAC in 2013. The background analysis will provide the basis for recommending standards. The standards recommended are succinct but more specific than most of those found in overseas jurisdictions, hence the title of this article. The literature on DR standards is often vague with the result that statements of standards can be so generic as to be of limited practical guidance. We should attempt to avoid this situation in New Zealand.

II WHAT DO WE MEAN BY 'STANDARDS'?

It makes sense to begin by defining what we mean by 'standards'. Interestingly, this is not a particularly common approach in DR standards scholarship. The lack of attention to definitions has resulted in the following terms being used as synonyms for standards: principles, benchmarks, best practice, performance indicators, codes, guidelines and values. If it was simply a case of synonyms this would not be a major problem ie, we could still know what we are talking about. Unfortunately, it is not always clear that these terms are being used as synonyms. Sometimes we see the term standards being used in conjunction with a term such as principles. For example, in 2001 NADRAC published its research on overarching standards.⁶ A decade later in 2011, it published a set of principles.⁷ The principles are not a direct update of the standards and constitute a separate and different list. NADRAC used the following working definition for standards:⁸

Standards may operate at the level of practice, such as codes, guidelines or benchmarks, at the level of the individual practitioner, such as qualifications, competencies or other credentials, or at the organisational level, such as quality management. The appropriate form of standards varies from context to context. Standards for practices (such as a code of practice) are more widely applicable across the whole ADR field, while practitioner and organisational models may suit specialist professionals and service delivery organisations respectively.

This raises an important question: what is the difference between a standard and a principle? A standard and a benchmark? A principle and a benchmark? All three of these terms could be used to describe what is being proposed in this article. Each recommended standard is something that a DR regime should 'be'. For example, if the standard is 'accessible for all citizens' then that is a standard/benchmark to meet and a principle/value to guide behaviour. It is also best practice and a helpful performance indicator.

⁶ NADRAC, 'A Framework for ADR Standards' (Research Paper, 2001).

⁷ NADRAC, 'National Principles for Resolution of Disputes: Interim Report to the Attorney-General' (Research Report, 2011).

⁸ NADRAC, (n 6) xi.

An interdisciplinary approach can assist with our definitions for this project. Standards scholarship from related areas such as education is well-developed and can provide possible directions.⁹

This article primarily uses the term 'standard' but will also use the terms 'principle' and 'benchmark' as synonyms where these have been used in overseas jurisdictions. Where there is a conceptual distinction being made between a standard and a principle or benchmark, this will be noted. For example, distinctions can be made between quality standards (scalable where performance can be at different levels of quality) and benchmark standards (you either meet the standard or breach it, for example, codes of conduct).

It is arguable that the term 'principle' could be used for overarching guidance and 'standard' for more specific measurables. However, this can result in a small number of vague principles each followed by a long list of specific standards. This has the advantage of being comprehensive but does not achieve our aim of creating clear overarching terms to guide DR systems.

Much of the literature relating to standards focuses on individual practitioners. This is of particular importance to professional DR organisations such as the Arbitrators' and Mediators' Institute of NZ (AMINZ) and the Resolution Institute (RI). However, it is of less relevance to the government. For example, an RI member is bound by the RI Code of Ethics.¹⁰ Members are accredited by the Institute in its role as a Recognised Mediator Accreditation Body (RMAB) under the National Mediator Accreditation System (NMAS).¹¹ The RI Code of Ethics includes 25 clauses which effectively act as professional standards. This extensive provision of professional standards is welcome, but it does not guarantee best practice in the systems in which these practitioners work. There need to be clear standards governing the DR systems themselves. Some of the necessary standards for a system will differ from those designed for an individual. For example, the RI standard of acting with professional and personal integrity relates to the individual, not the system. A more comprehensive and holistic approach involves providing standards for the system in addition to those governing individual practitioners, that is, a 'whole of DR', systemic approach.¹²

It should be noted that DR standards are just one example of discipline-specific standards. Standards are prevalent throughout the professions in

⁹ See, for example, Professional Standards Councils, 'Policy Statement on Complaints and Discipline Systems' (2020).

¹⁰ Resolution Institute, *Code of Ethics* (Web Page, 2015) <<https://www.resolution.institute/resources/code-of-ethics>>.

¹¹ National Mediator Accreditation System (NMAS), *Approval and Practice Standards* (Web Page) <<https://msb.org.au>>.

¹² An excellent discussion of mediation standards can be found in Dorcas Quek Anderson, 'A Matter of Interpretation? Understanding and Applying Mediation Standards for the Cross-Border Enforcement of Mediated Settlement Agreements' (2020) 38(1) *Conflict Resolution Quarterly* 27, 31 where Anderson refers to 'the multiple functions of mediation standards, ranging from regulatory to education purposes'.

different jurisdictions, including New Zealand.¹³ The focus of this article is on an analysis of the development of DR standards in New Zealand but with an awareness of the wider world of standards informing this analysis in important ways.

III EXAMPLES FROM NEW ZEALAND

We do not currently have a version of the kind of national standards discussed in section 4 below (overseas examples) that is specific to New Zealand. Hence the reason for this project. However, we do have standards, principles and benchmarks that are related and can be helpful.

A Government Centre for Dispute Resolution (GCDR) Best Practice Principles

It is important to start with the GCDR's own best practice principles. These can be seen as an early attempt to draft standards for DR regimes and organisations. The principles 'can provide a framework for assessing whether a scheme is fit for purpose and consistent with best practice'. The 5 principles are 1) User focussed and accessible; 2) Independent and fair; 3) Efficient; 4) Effective; and 5) Accountable.

This is really 7 principles with 'user focussed', 'accessible', 'independent' and 'fair' all being conceptually distinct and used separately in the overseas examples discussed in section 4. As discussed earlier, this article will avoid using 'efficient' and 'effective' as standards. 'Fair' is also too vague to be useful in practice. Thus, I would revise the GCDR principles as: 1) User focussed; 2) Accessible, 3) Independent; and 4) Accountable.

The GCDR principles are described as 'a high-level guidance tool, rather than a detailed and comprehensive technical review'.¹⁴ This is a helpful beginning, and a lot of substantive detail is provided under each principle. In fact, 5 pages are used to provide descriptions of the principles. These descriptions provide guidance for the articulation of a final set of recommended standards. There are actually other terms that could be considered standards included in the descriptions:

- Awareness and promotion (under 'User focussed and accessible')
- Privacy and confidentiality (under 'Independent and fair')
- Timeliness (under 'Efficient')

¹³ Perhaps the best-known NZ example is the National Standards regime in the education sector: <<https://assessment.tki.org.nz/Using-evidence-for-learning/Working-with-data/Concepts/Standards-based-assessment>>. A good discussion of this approach to standards is found in Peter Rawlins et al, 'Standards-Based Assessment in the Senior Secondary School: A Review of the Literature' (2005) 2(2) *NZ Journal of Teachers' Work* 107.

¹⁴ GCDR, *Best Practice Guidance on Dispute Resolution: Assessing a Dispute Resolution scheme* (Web Page) <<https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/best-practice-guidance-on-dispute-resolution/assessing-a-dispute-resolution-scheme>>.

- Monitoring, evaluation and reporting (all under 'Accountable')

This article extends upon the GCDR principles research rather than replacing it.

B *Ministry of Business, Innovation and Employment Regulatory Stewardship Standards*

The GCDR sits within the Ministry of Business, Innovation and Employment ('MBIE'). MBIE has extensive regulatory responsibilities including overseeing the regulation of 16 different economic areas. DR standards fit within general regulatory policy, especially where the standards relate to government DR regimes. In the field of mediation, the only truly private regime in New Zealand is commercial mediation.

MBIE is currently formulating key standards to achieve its aim of becoming a world-leading regulatory steward.¹⁵ These 6 standards are: Information, Regulatory impact analysis, Compliance, Role clarity, Agility and connectedness, and People and systems.

These standards are obviously different to DR standards, but we can make comparisons with the ISO standards, and this is done in section 4. It is also important to note that any confirmed GCDR standards will operate in the context of the MBIE regulatory standards.

C *Fairway Resolution Customer Charter*

When researching New Zealand standards, it is important to note the nature of the DR landscape. If we are looking at consensual third-party DR, in particular mediation, then there are 4 major organisations. These organisations are MBIE, Fairway Resolution, RI, and AMINZ.

The RI and AMINZ are professional organisations set up for, and funded by, their practitioner memberships. Their standards are specific to individual practitioners (as noted above). MBIE's approach to standards was discussed in the section above. This leaves Fairway Resolution to be discussed. Fairway Resolution developed from the DR unit within the Accident Compensation Corporation ('ACC'). It became a Crown-Owned Company and then a private, employee-owned, company in 2017. Fairway Resolution has a Customer Charter which resembles a set of overriding standards/principles.¹⁶

These 11 standards/principles revolve around the core principles of accessibility, communication, flexibility, independence, transparency, fairness, timeliness and confidentiality. Some of the standards/principles are too broad to be particularly helpful but impartiality, timeliness, accurate information and confidentiality are specific enough that Fairway Resolution's performance

¹⁵ MBIE, *Regulatory Stewardship Objectives and Draft Standards* (Research Report, September 2018).

¹⁶ Fairway Resolution, *Customer Service Charter* (Web Page) <<https://www.fairwayresolution.com/resources/policies-and-procedures/customer-service-charter>>.

in these areas could be accurately measured. The Fairway Resolution charter could cover its substantive areas in about 5-6 aims by being more specific and avoiding repetition. Despite these limitations, the Charter is a good example of the private sector voluntarily introducing standards rather than having standards imposed on them by government. While private sector organisations might find the government's finalised DR standards helpful, the standards should only directly apply to DR regimes with clear governmental links. In Fairway Resolution's case, this would include its ACC¹⁷ and Telecommunications DR services as these are government contracts or industry-funded compulsory schemes established by statute. Such an approach will respect the division between public and private markets and prevent complete government control of DR in New Zealand.

D *Looking within Specific DR Regimes*

We can look at examples within New Zealand's statutory DR regimes to find evidence of standards and principles. Many of these quasi-standards relate to individual practitioners and would need to be adapted to relate to DR regimes. The six examples of standards/principles below are the most useful for our purposes. The governing statute is provided in brackets.

1 *ACC Dispute Resolution (Accident Compensation Act 2001)*

The first example relates to DR occurring under our no-fault accident compensation scheme.

Section 138: A reviewer must act independently when conducting a review.

Section 140: A reviewer must follow the relevant law, including the principles of natural justice. The reviewer must conduct the review in a timely manner.

The expectations of independence and natural justice appear in many of the DR statutory regimes. Indeed, many of the sections have been transposed from earlier Acts such as the *Employment Relations Act 2000*. ACC also has specific performance measures, formulated by Fairway Resolution, but these do not easily translate into overarching standards.¹⁸

2 *Telecommunications DR (Telecommunications Act 2001)*

New Zealand's telco DR regime is also run by Fairway Resolution. The terms of reference refer to educating the industry as one key purpose. The concept of 'education' could be helpful in formulating standards. The overall scheme lists the following principles: Accessibility; Independence; Fairness; Accountability;

¹⁷ Fairway Resolution, 'ACC Reviews and Dispute Resolution', *Fair Way* (Web Page) <www.fairwayresolution.com/got-a-dispute/acc-dispute-resolution>.

¹⁸ Fairway Resolution, 'Guidelines for ACC Reviews', *Fair Way* (Web Page, 2017) <https://www.fairwayresolution.com/sites/default/files/ACC%20Review%20Guidelines%20-%20June%202017_8.pdf>.

Efficiency; and Effectiveness.¹⁹ These 6 principles reflect the most common and predictable of those found in overseas jurisdictions.

3 *Weathertight Homes DR (Weathertight Homes Resolution Services Act 2006)*

The Weathertight Homes DR process was established to assist with New Zealand's 'leaky home' crisis ie, the widespread construction of leaky buildings during the 1990s and early 2000s.²⁰ Two key objectives of this statutory regime are 'early intervention' and 'professional collaboration'. Early intervention has real potential as a national standard. It is specific, new and forward-looking. Likewise, collaboration could be reframed as a standard ie, the expectation that DR organisations and regimes will work with others in the DR community to achieve their objectives.

4 *Employment DR (Employment Relations Act 2000)*

Employment mediation is by far the most common form of mediation in NZ.²¹ The Employment Relations Authority is required to abide by the principles of natural justice and promote good faith behaviour (*Employment Relations Act* 2000, s157) and mediators must be impartial and maintain strict confidentiality (MBIE Mediator Code of Ethics).²² This pervasive regime focuses on legal requirements and standards for individual mediators.

5 *Utilities DR (Electricity Industry Act 2010/Gas Act 1992)*

Utilities Disputes Ltd (formerly the Electricity and Gas Complaints Commissioner) provides some general principles in dealing with complaints. The most relevant for our purposes are to resolve complaints 'in a cooperative, fair, efficient, and timely way', to 'be as transparent as possible, while also acting in accordance with his or her confidentiality and privacy obligations' and to 'act in accordance with the founding principles of accessibility, independence, fairness, accountability, efficiency, effectiveness, and the rules of natural justice'.²³

These founding principles are common to many lists of standards. It is impressive to see an organisation with principles that can be used to monitor performance. The founding principles are definitely towards the generalised end of the standards spectrum, and we again see terms such as fairness, efficiency and effectiveness, which are very difficult to define.

¹⁹ Telecommunications Dispute Resolution, *How TDR Works* (Web Page) <www.tdr.org.nz/scheme-information/about-the-scheme>.

²⁰ Steve Alexander et al, *The Leaky Buildings Crisis: Understanding the Issues* (Brookers, 2011).

²¹ Morris and Shaw, (n 1) ch 10.

²² MBIE, *Mediator Code of Ethics* (Web Page) <www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/38e4557c8f/Code-of-ethics-for-Employment-mediators.pdf>.

²³ Utilities Disputes Ltd, *The General and Scheme Rules for the Energy Complaints Scheme* (April 2019) 2.

6 *Financial Services DR (Financial Service Providers (Registration and Dispute Resolution) Act 2008)*

There are four providers of financial services DR under this Act.²⁴ Section 52(2) of the Act lists the six guiding principles for DR conducted under these regimes. It should be: Accessible, Independent, Fair, Accountable, Efficient and Effective. While it is helpful and encouraging to have standards/principles listed in an Act, these are classic examples of vague principles that could mean different things to different people. Without more specificity or detailed explanations, they are of limited use. The four providers are presumably expected to provide this further detail.

All four providers include the six guiding principles in terms for reference and mission statements. There are good examples of organisations going further. For example, Fairway Resolution's Financial Dispute Resolution Service links to the Australian Treasury's 'Benchmarks for Industry-based Customer Dispute Resolution', mentioned in Section 4. The Financial Services Complaints Ltd scheme provides information on how it will collect and record information to show adherence to the principles.²⁵ The FSCL principles are very similar to those of Utilities Disputes and ACC. The Banking Ombudsman makes an attempt to elaborate on the six principles in a 'values' list, for example, 'We give clear *accountable* reasons for each decision we make. We publish information about both the numbers and types of complaints, and we also publish our case notes'.²⁶

These New Zealand examples are of limited assistance in helping develop national standards for our DR regimes. To find more relevant models we need to look overseas, and, in particular, to those jurisdictions with similar legal systems.²⁷

IV EXAMPLES FROM OUTSIDE NEW ZEALAND

A *NADRAC Standards 2001*²⁸ / *Principles 2011*²⁹

The best examples of overarching standards come from Australia and the United States. Both jurisdictions have been DR leaders since the 1980s and

²⁴ Financial Services Complaints Ltd, Financial Dispute Resolution Service, Insurance and Financial Services Ombudsman, Banking Ombudsman.

²⁵ 'Terms of Reference', *Financial Services Complaints Ltd* (Web Page, January 2019) 21.1 <www.fscl.org.nz/sites/all/files/FSCL%20Terms%20of%20Reference%201%20January%202019.pdf>.

²⁶ 'Values', *Banking Ombudsman Scheme* (Web Page) <www.bankomb.org.nz/about-us/values>.

²⁷ The focus for this article is on DR related standards and principles but it is also important to see this analysis in the context of wider regulatory scholarship, for example, Cary Coglianese, *Listening, Learning, Leading: A Framework for Regulatory Excellence* (University of Pennsylvania, 2015) and in NZ see Susy Frankel (ed), *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, 2011).

²⁸ NADRAC (n 6).

²⁹ NADRAC (n 7).

have a more mature and sophisticated DR culture than New Zealand. While New Zealand's mediators are arguably just as effective as their Australian and American counterparts, we lag behind in government and academic contributions to the DR community.³⁰ The current GCDR project of researching, analysing and establishing standards for the New Zealand DR community follows 20 years after a similar project began in Australia. The NADRAC standards framework and principles cannot be simply transposed to NZ. However, the NADRAC work is the most exhaustive foreign example of this kind of project. We are fortunate that the world leading example happened in our closest jurisdiction and in a legal and political culture similar to our own.

NADRAC was established by the Keating Federal Australian Government in 1995. It lasted for 18 years during which it produced many research reports. It was successful in bringing together private practitioners, government officials and leading academics. It could serve as a model for the GCDR in the future.

In the late 1990s, NADRAC began working towards the establishment of overarching standards. A framework was completed in 2001, based on extensive research and consultation. However, the final product was somewhat disappointing. NADRAC decided not to recommend any specific standards:

NADRAC has formed the view that it is not possible to develop and propose a single prescriptive set of standards which will cover all ADR service provision even in the most general and minimal way. Further, while it is both possible and desirable for standards to be developed for particular ADR processes, NADRAC is of the view that specific standards should not be determined by a single body or institution, such as NADRAC. Rather such development should involve the service providers and wide consultation with all other stakeholders.³¹

When NADRAC mentions standards, it is often in relation to individual practitioners rather than DR regimes and organisations. As discussed above, this raises the question of how quality standards (which can be at different levels of quality) can be differentiated from benchmark/standards such as codes of conduct (which are either adhered to or not). The advantages of quality standards include the ability to provide more nuance and guidance to those following the standards. Quality standards effectively convey more feedback. However, the benchmarking approach has the benefit of greater simplicity ie, you either meet the benchmark or not. This can make the whole process more accessible and encourage greater uptake. System designers need to assess the nature of the regimes involved and make a judgement as to which approach is more appropriate.

NADRAC argued that standards should be developed in a particular way:³²

- Through consultative processes

³⁰ Morris and Shaw (n 1) ch 2.

³¹ NADRAC, *The Development of Standards for ADR* (Discussion Paper, 2000) 5.

³² NADRAC, (n 31) 51-2.

- In light of ADR philosophy
- Be adaptable to particular circumstances
- Be responsive to broader societal interests
- Backed up by theory and practice
- Based on realistic appraisal of available resources
- Shared responsibility for upholding and enforcing standards
- Changed and adapted over time, hopefully raising standards.

In New Zealand, we are already attempting to follow this process. NADRAC does provide helpful information on monitoring and enforcing standards.³³ In its 2001 confirmed report, NADRAC listed the following 'objectives' for ADR. These could be seen as overarching standards/principles: ADR should 1) resolve or limit disputes in an effective and efficient way; 2) provide fairness in procedure; and 3) achieve outcomes that are broadly consistent with public and party interests.³⁴

These 'objectives' are quite vague, however they probably inspired the principles that came later in 2011. In 2011, NADRAC provided an interim report to the Attorney-General entitled 'National Principles for Resolution of Disputes'.³⁵ The seven principles are worded in a way to include individuals, organisations and regimes. The following themes can be seen in these seven principles: Cost effectiveness, Early resolution, Commitment to process, Provision of information, Voluntary agreement and Accessibility. Principle 7 'consistent use of DR terms' is particularly appealing to an academic but is a bit too esoteric to include in my proposed NZ standards. While NADRAC stated that it would not devise specific standards, the 2011 principles represent something resembling those standards.

B *International Organization for Standardization (ISO) Standards 2018*

Perhaps the most well-known standards are those set by the ISO. Established in 1947 and based in Switzerland, this iconic body is responsible for setting standards across a wide range of industrial and commercial spheres. It is made up of 164 contributing nations and has strong links to the United Nations. The voluntary standards are designed by expert committees and made available for purchase. The purpose of the ISO standards is to provide standardisation and quality assurance and ensure the safety, efficiency and consistency of products, services and systems.

The most relevant standard for this project is ISO 10003: 2018 Quality management: Customer satisfaction: Guidelines for dispute resolution external to organizations. This 36-page document is the updated version of the original 2007 standard. Those hoping for a clear blueprint to follow will be disappointed. The standards are vague and could apply to any number of

³³ Ibid, chs 10 and 11.

³⁴ NADRAC, (n 6) 13-14.

³⁵ NADRAC, (n 7).

different fields beyond DR. This could be a result of 'design by committee' and/or a lack of focus in devising standards specific to DR. The phrase 'effective and efficient' is used 15 times. Interestingly, the terms are never used separately. This suggests a 'go to' phrase which can mean virtually anything to anybody.

Despite their limitations, the ISO standards may be the single most useful source in our task to create overarching standards for NZDR. There is a list of 16 'guiding principles' which could assist in choosing standards for the NZ system.³⁶ I have listed these below and provided a brief description for each (in brackets).

1. Commitment (to defining and implementing a DR process)
2. Responsiveness (to customers' needs and expectations re DR)
3. Information integrity (DR information is accurate)
4. Accountability (for the decisions and actions taken re DR, including reporting these)
5. Consent to participate (is voluntary and based on full understanding of the DR process)
6. Accessibility (DR processes is easy to find and use)
7. Suitability (the DR method and remedies is suitable for the dispute)
8. Fairness (a good faith provision stressing impartiality and objectivity)
9. Competence (Dispute resolvers have the necessary training and experience to carry out their roles)
10. Timeliness (delivery of DR is speedy but with a big disclaimer re feasibility)
11. Confidentiality (personally identifiable information is confidential insofar as the law allows)
12. Transparency (information about the process and provider is provided to users)
13. Agreement (parties agree to the DR process)
14. Capacity (the DR process is resourced properly)
15. Improvement (the DR process is continually improved)
16. Customer-focused approach (basically being open to feedback)

The most useful of these standards will appear, in modified form, in section 5 of this article (the recommendations). However, most of the 16 standards are obvious enough that they could be assumed in any process run by a professional organisation. Some of the 16 standards overlap, for example, Consent to participate and Agreement. Some are interdependent, for example, Timeliness will be a direct result of Capacity. Competence is a helpful standard but in practice will mainly relate to individual practitioners. The key here is to take the best of these standards and make them more specific. The more

³⁶ ISO 10003:2018 Quality management: Customer satisfaction: Guidelines for dispute resolution external to organizations, 4-6.

vague the standard, the more difficult it is to accurately hold the DR regime to that standard. To be fair to the ISO, annexes C-I provide more details on 'guiding principles' 5-12. However, if a standard/principle needs its own annex to make sense, then the standard/principle is arguably too vague.

ISO 10003: 2018 is supposed to relate to DR 'external to organisations'. However, the standards are so broad that most could relate to any DR process, internal or external. ISO 10002: 2018 Quality Management: Customer Satisfaction: Guidelines for Complaints Handling in Organisations, is another relevant publication, though not as relevant as 10003. The presumption is that organisations will use 10002 (complaint handling) and then only use 10003 (dispute resolution) if 10002 fails.³⁷

ISO 10002 has 14 'guiding principles', sharing 12 of these with 10003. The only ones missing are Consent to participate, Suitability, Fairness and Agreement. The only additions are Objectivity and Charges (the process is free for the complainant).³⁸ Objectivity replaces Fairness. While objectivity is not a direct synonym it does provide more direction than fairness. As argued throughout this paper, the choice of terminology is key to providing a clear set of standards that can be followed. Suitability is so vague that it is unnecessary. Consent to participate/Agreement is the only interesting difference. This may be absent as parties can agree to engage in DR but a complaint is either made or not made. Ultimately the two sets of 'guiding principles' are almost identical, although ISO 10002 manages to use 'effective and efficient' (including variations) 22 times.

C *Australian Standards 1999³⁹/2004/2014⁴¹*

In addition to the international ISO DR standards, we can analyse Standards Australia's attempt. In some respects, the Australian version may be more relevant for New Zealand, given the similarities between the two nations and their legal systems. One of Australasia's leading DR standards experts, Professor Tania Sourdin, served on the committee (Committee MB/3, DR) that formulated and then revised these standards. Sourdin also worked on the NADRAC standards/principles and therefore had perhaps the most influence on this project that played out from the late 1990s until the early 2010s.⁴²

³⁷ International Organisation for Standardization, *ISO 10002:2018 Quality Management: Customer Satisfaction: Guidelines for Complaints Handling in Organisations Flowchart* (International Organisation for Standardization, 2018) 14.

³⁸ ISO 10003 takes a modified approach to 'Charges': 'Providing dispute resolution to customers at no cost, or at a cost that is reasonable given the value of the dispute, should result in an affordable process.'

³⁹ Standards Australia, *AS4608:1999 Guide to the Prevention, Handling and Resolution of Disputes* (Standards Australia, 1999).

⁴⁰ Standards Australia, *AS4608:2004 Dispute Management Systems* (Standards Australia, 2004).

⁴¹ Standards Australia, *AS/NZS 10002:2014 Guidelines for Complaint Management in Organizations* (Standards Australia, 2014).

⁴² For a comprehensive introduction to Sourdin's scholarship see Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020). For discussion of standards see Chapters 9 and 13.

The Australian standards come in two editions. The first is AS4608:1999 Guide to the Prevention, Handling and Resolution of Disputes. The second edition is updated and renamed as AS4608:2004 Dispute Management Systems. The 1999 version predates the ISO standards discussed in this paper. It is difficult to discern whether the Australian standards influenced ISO as 10003 only mentions its own publications in the bibliography. The 1999 edition of AS4608 provides a list of 'essential principles of effective dispute prevention, handling and resolution'⁴³ (as opposed to the ISO 'guiding principles' for organisations). The 1999 Australian Standards approach focuses on the hallmarks of good working relationships.⁴⁴ The elements usually begin with 'parties should' This is relevant to standards by which DR regimes can be judged but is not as helpful to our project as the ISO approach.

The second edition of AS4608 takes a somewhat different approach and one closer to ISO. It provides 'essential elements' rather than 'essential principles' and usually begins with 'organizations should'⁴⁵

Structural elements:

- Commitment (see 'Commitment' ISO 10003)
- Skills and resources (see 'Capacity' ISO 10003)
- Management responsibility
- Dispute management policy
- Continuous improvement (see 'Improvement' ISO 10003)

Operational elements:

- Dispute prevention strategies
- Dispute management process
- Record-keeping (see 'Information integrity' ISO 10003)
- Analysis, identification and rectification
- Reporting of serious and systemic issues

Maintenance elements:

- Education and training (see 'Competence' ISO 10003)
- Visibility and communication (see 'Accessibility' and 'Transparency' ISO 10003)
- Monitoring and review
- Accountability (see 'Accountability' ISO 10003)

The lists above show the overlap between the ISO and Australian standards. While this provides an indication of the most popular standards it does not solve the problem of vagueness. We could take the following three standards as the most popular: Commitment, Improvement and Transparency. These three standards appear in all four documents (ISO 10003, ISO 10002, AS4608:

⁴³ Standards Australia, (n 39) 6-7.

⁴⁴ In the 1999 version 'effective' is mentioned 22 times but 'efficient' only once and the two terms are not used together. In the 2004 version 'effective' is used 31 times.

⁴⁵ Standards Australia, (n 40) 7-8.

1999 and 2004). Organisations should be committed to DR which includes continually reviewing processes to improve. These processes should be clearly communicated to users. We need more than this to guide NZ's DR regimes and organisations. It is arguable that the standards of 'Commitment' and 'Improvement' are already being met by most, if not all, NZ DR regimes. This is not necessarily the case with 'Transparency'.

It is worthwhile looking at an Australasian attempt in a related field. AS/NZS 10002:2014 is the work of Standards Australia and Standards NZ in the area of complaint management. It is a variation on ISO 10002 but also includes important differences. While there is NZ influence, it is placed in this overseas section of the article as it ultimately flows from the preceding Standards Australia version. As the title suggests, it is focused on complaint management rather than DR per se. I have argued that the specifically DR standards (ISO 10003 and AS4608) are the most useful for this study but we can also gain insights from 10002 (both the ISO and AS/NZS versions). Four NZ organisations were involved in formulating AS/NZS 10002:2014: ACC, the NZ Law Society, the NZ Ombudsman and the Electricity and Gas Complaints Commissioner (now Utilities Disputes). Nine Australian organisations were involved.

AS/NZS 10002:2014 formulated a long list of guiding principles.⁴⁶ Some of these are particular to more transactional complaints handling but some can easily be applied to more complex DR such as mediation and conciliation: 1) People focus; 2) Ensuring no detriment to complainant; 3) Visibility and transparency; 4) Accessibility; 5) No charges; 6) Responsiveness; 7) Objectivity and fairness; 8) Equity; 9) Privacy and disclosure; 10) Communication; 11) Conduct of parties; 12) Work health and safety; 13) Complaint involving multiple parties; 14) Empowerment of staff; 15) Accountability; 16) Continuous improvement; and, 17) Prevention of ongoing disputes.

These principles/standards echo earlier versions but provide some perceptive rewording, for example, 'continuous improvement'. For our standards, this 'continuous improvement' will flow from robust research-based monitoring and analysis. Some of the standards combine two related concepts, for example, 'Visibility and transparency'. Linking more than one idea in one standard can create confusion. In this instance, if the two ideas are synonyms, then only one is needed. If the ideas are conceptually different, albeit related, they should be separated. Others act more as topic headings than guiding principles, for example, 'Complaint involving multiple parties' ie, the reader needs to read the accompanying explanation to find the actual principle related to multiple parties. We can see many of the most popular standards in this list including 'accessibility', 'fairness', 'communication', 'accountability'.

However, popularity or rate of usage of particular standards do not necessarily provide us with the *best* standards. As noted throughout this paper, 'effective' and 'efficient' are two of the most common terms used but

⁴⁶ AS/NZS 10002:2014 Guidelines for complaint management in organizations, 6-9.

also two of the vaguest. The ISO and AS/NZS standards/principles do provide a starting point, but we need to go further.

D *International Council for Online Dispute Resolution (ODR) Standards*

One of the most well-known lists of standards comes from the field of ODR. These have been formulated by the International Council for Online Dispute Resolution ('ICODR')⁴⁷ following earlier work from the National Center for Technology and Dispute Resolution ('NCDTR').⁴⁸ The standards are targeted at ODR regimes (rather than individual practitioners) so make a good fit for our project. While the standards are supposed to reflect digital communication, they can easily be adapted and applied to in-person DR. Some of the 9 standards overlap with the ISO standards; 1) Accessible (also ISO); 2) Accountable (ISO); 3) Competent (ISO); 4) Confidential (ISO); 5) Equal; 6) Fair/Impartial/Neutral (ISO 'Fairness'); 7) Legal; 8) Secure; and 9) Transparent (ISO).

'Equal' and 'Legal' are interesting additions while 'Secure' relates specifically to storage of digital data. 'Equal' is defined as 'ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard and ensure that offline privileges and disadvantages are not replicated in the ODR process'.⁴⁹ This ambitious goal is clearly aspirational as it would be impossible to fully achieve the second sentence in practice. ODR can definitely be used to help marginalised voices, but no process can make an unequal world equal. Expecting complete 'equality' is unfair on those operating under these standards as it cannot be achieved. While it is refreshing to see a new, even revolutionary, standard, it is undermined by its utopianism. If the goal is to increase the participation of marginalized people, then this is better achieved through the standard of 'accessibility'.

'Legal' is defined as 'ODR must abide by and uphold the laws in all relevant jurisdictions'. While simple and predictable, this is an important standard and probably should be included in the ISO list. By now we can start to see a trend emerging. Similar standards are used in all of our examples. These standards are generally vague and only fully make sense when one reads the further details. The 'gold standard' in formulating standards should be to word a standard so it can make sense without having to provide any further information. I have attempted to achieve this with my 9 suggested standards in Section 5 of this paper. However, it should be noted that achieving this 'gold standard' is a very difficult task and readers will be able to judge the success, or otherwise, of my efforts.

⁴⁷ International Council for Online Dispute Resolution, 'Standards', *International Council for Online Dispute Resolution* (Web Page) <<https://icodr.org/standards>>.

⁴⁸ National Center for Technology and Dispute Resolution, 'Principles', *The National Centre for Technology & Dispute Resolution* (Web Page, 2016) <<http://odr.info/ethics-and-odr/>>.

⁴⁹ International Council for Online Dispute Resolution, (n 47).

The 9 ICODR standards represent a pared down version of the 17 NCDTR 'principles'. It is interesting to analyse the NCDTR principles/standards to see what an ambitious, but probably unmanageable, list of standards looks like: 1) Accessibility; 2) Accountability; 3) Competence; 4) Confidentiality; 5) Empowerment; 6) Equality; 7) Fairness; 8) Honesty; 9) Impartiality; 10) Informed Participation; 11) Innovation; 12) Integration; 13) Legal Obligation; 14) Neutrality; 15) Protection from Harm; 16) Security; and, 17) Transparency.

The most ambitious principles are 'Empowerment', 'Equality', 'Innovation' and 'Protection from Harm'. The author of these principles is Leah Wing, Director of the Social Justice Mediation Institute.⁵⁰ The principles have a strong political, social justice slant but this is reflective of the philosophical underpinning of the modern DR movement, and especially mediation. However, it is not clear that it is the job of DR regimes, organisations or individual practitioners to try to 'equalise' society. In fact, it seems that some of Wing's principles contradict each other. Can a neutral and impartial DR regime overtly, or even subtly, take the side of marginalised parties?⁵¹ Taking a side is very different to making a system more accessible.

However, most of the NCDTR principles are predictable. This raises the question of whether it is too difficult and risky to pursue more revolutionary principles/standards. It is no doubt easier to stick with the more achievable standards. There is a middle ground, that is, workable, ambitious standards that make sense. The aim of this article is to suggest 9 standards of this type.

E *Australian Industry-Based Customer Dispute Resolution Standards*

In February 2015, the Australian Treasury produced its latest list of standards for industry-based consumer DR.⁵² These standards were initially established in 1997. In the foreword, Minister for Small Business, Bruce Billson, states that: 'the CDR Benchmarks have proven to be timeless ideals for DR services in general'.⁵³ The standards are: 1) Accessibility; 2) Independence; 3) Fairness; 4) Accountability; 5) Efficiency; and 6) Effectiveness.

As seen in Section 3, these CDR Benchmarks have influenced several NZ regimes. RMABs must comply with the CDR benchmarks in their own complaints handling processes in order to gain accreditation under the NMAS. The CDR Benchmarks are the most generic of all the examples provided in this article, to the extent that 'efficiency' and 'effectiveness' make the list and place next to each other. As with the ISO standards, more details are provided for each benchmark/principle. The 'gold standard' is to be short but specific. For example, 'independence' has a clearer meaning than 'effectiveness'.

⁵⁰ Social Justice Mediation Institute, 'About' (Web Page) <<http://www.sjmediation.org/about>>.

⁵¹ Discussed further in Section 5 under Standards 1 and 2.

⁵² Australian Treasury, 'Key Practices for Industry-based Customer Dispute Resolution' (Web Page, 2015) <https://treasury.gov.au/sites/default/files/2019-3/key_pract_ind_cust_dispute_resol.pdf>.

⁵³ Australian Treasury, (n 52) 3.

F SPIDR Standards

We have looked at international and Australian organisations. It is also important to see what standards have developed in the United States. While the ICODR is incorporated in the US it is an international organisation. The Society of Professionals in Dispute Resolution ('SPIDR') was the most well-known peak professional body in the US and now forms part of the Association for Conflict Resolvers ('ACR'). SPIDR formulated 8 DR standards for organisations. This formed part of SPIDR's Workplace Initiative and some of the standards clearly reflect an employment law focus: 1) Voluntariness; 2) Protection of privacy and confidentiality; 3) Impartiality of neutrals; 4) Qualifications and training of neutrals (Competence in ISO 10003); 5) Diversity and accessibility; 6) Prohibition of reprisal and retaliation; 7) Respect for the role of collective bargaining agents; and 8) Non-preclusion of statutory and workplace rights ('Legal' in other lists).⁵⁴

Again, we can see clear trends with some rewording and a few additional surprises, for example, 'prohibition of reprisal and retaliation'.

The number of standards per list ranges from 6 to 17 with an average of 12.5 and median of 14. Thus, the lists tend to be lengthy. This article argues for a shorter list, that is, 9 standards. This prioritises the most important goals and avoids these being watered down in a lengthy list. We should also avoid bunching two related but separate standards as the same standard. This is seen in the SPIDR standards with 'Diversity and accessibility'.

V THE RECOMMENDED STANDARDS FOR NEW ZEALAND

We have now seen the range of possible domestic and foreign standards/principles. The range includes a variety: bland, predictable, inventive, impracticable and robust. As noted above, the ideal list of standards should be short but specific. Below is a possible list of nine overarching standards which should govern all DR regimes and processes.

DR regimes and processes should be:

17. Accessible to all potential users, particularly those from marginalised communities.
18. Impartial.
19. Independent.
20. Consistent with Treaty of Waitangi principles.
21. Properly resourced to carry out the service.
22. Confidential, where applicable and insofar as the law allows.
23. Timely.
24. Accountable through monitoring and record-keeping.
25. Prioritise early intervention.

⁵⁴ SPIDR, *Guidelines for the Design of Integrated Conflict Management Systems Within Organizations* (Web Page, 2001) <<https://www.mediate.com/articles/spidrtrack1.cfm>>.

Hopefully these standards should be clear without further explanation. However, for the purposes of this article, I will proceed to provide a justification for each and explain its wording.

A *Standard 1: Accessible to All Potential Users, Particularly those from Marginalised Communities*

Accessibility is one of the most commonly used DR standards. It is vital to a successful regime or organisation and reflects one of the modern DR movement's most cherished ideals, namely, empowerment. Accessibility can include promotion of the DR process and minimising costs to the user. If the GCDR wants to concentrate specifically on making government-linked schemes more accessible to marginalised communities, then this should be openly stated. It is important to have the first part of the sentence confirming that accessibility is important for all users but that does not prevent the second part of the sentence adding specificity. Standard 2 makes it very clear that this focus on accessibility for marginalised groups does not imply preferential treatment in relation to process and outcome. The process must be impartial (which is a key element of natural justice) and this is part of being a competent DR practitioner. The focus on marginalised groups relates to accessibility, for example, communicating the existence of the DR process to these groups and making sure that the process is flexible enough to cater for different backgrounds.

For example, the Human Rights Commission has recently been trying to make its DR processes more accessible to Pasifika peoples. This followed feedback and research showing that Pasifika people were not comfortable using the human rights DR processes.⁵⁵ The Commission can now look to promote its services to Pasifika more effectively and also adapt its processes to meet different cultural expectations. This does not need to affect impartiality in any way. In a mediation between a Pasifika and non-Pasifika person, the mediator can run a culturally sensitive process without siding with the Pasifika party. Accessibility is not partiality. Criticisms have also been made relating to financial DR providers.⁵⁶

B *Standard 2: Impartial*

This standard is vital to give the public faith in the DR regime or organisations. It is commonly used and fundamental to DR best practice. It needs to be read in conjunction with Standard 1 (as discussed above). The organisation, process and practitioners must all be impartial. There is a huge amount of scholarship

⁵⁵ Laura Tupou, 'Human Rights Commission told it lacks 'cultural awareness'', *Radio NZ* (online, 3 April 2017) <<https://www.rnz.co.nz/news/national/328019/human-rights-commission-told-it-lacks-'cultural-awareness'>>.

⁵⁶ Rob Stock, 'Financial disputes schemes failing Maori and Pasifika', *Stuff* (online, 12 May 2019) <<https://www.stuff.co.nz/business/money/112528545/financial-disputes-schemes-failing-maori-and-pasifika>>.

on neutrality, objectivity and impartiality in DR, especially mediation.⁵⁷ While it is generally recognised that no one can be completely impartial, we can strive to be as impartial as possible. In this respect, I disagree with leading DR writer, Kenneth Cloke, who argues that we should accept that impartiality is a futile pursuit and instead adopt 'omnipartiality'.⁵⁸ The GCDR represents government, and it would be unacceptable for government organisations and DR programmes to consciously embrace partiality. Very few, if any, potential users would want to enter a process where the third party is given official permission to favour the other side.

C *Standard 3: Independent*

It is debatable whether 'independent' should be included as a separate standard or included in Standard 2. The advantage of adding 'independent' is that many of these regimes are run by government or powerful private organisations. It is vital that potential users know the DR processes are independent from these power dynamics. While the independence might not be complete it should be distinct enough to avoid any perception of conflict of interest. This judgement should be able to be made objectively ie, whether the degree of proximity of the decision-maker to the parties is acceptable or not. For example, government employees will not want to mediate a personal grievance if the mediation service is not independent of government. Electricity and gas consumers will not want to use the Utilities DR process if it is controlled and staffed by the major electricity and gas companies. In conclusion, independence is probably necessary as a separate standard.

D *Standard 4: Consistent with Treaty of Waitangi Principles*

This is clearly a standard unique to New Zealand. There is no international equivalent or comparator. The Treaty principles have developed since first being incorporated into the *Treaty of Waitangi Act* 1975.⁵⁹ These principles can be defined as: Partnership, including acting reasonably and in good faith towards each other, active protection of the Māori people (by the Crown), the right of redress in event of a treaty breach, the right of the Crown to govern and recognition of Māori rangatiratanga over Māori land and culture.

⁵⁷ For example, in a NZ context see Daniel Becker, 'The Controversy over Mediator Neutrality: Input from New Zealand Mediators' (LLM Thesis, The University of Otago, 2013). In Australia, the problems with impartiality have been comprehensively analysed by Rachael Field and Jonathan Crowe, 'The Empty Idea of Mediator Impartiality' (2019) 29(4) *Australasian Dispute Resolution Journal* 273 and Rachael Field and Jonathan Crowe, *Mediation Ethics: From Theory to Practice* (Edward Elgar, 2020).

⁵⁸ Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass, 2001)

⁵⁹ My phrasing is based on the seminal Court of Appeal decision in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.

DR regimes should be consistent with these five principles.⁶⁰ This is particularly relevant to government-run and funded regimes which form part of the 'Crown' and therefore one of the two Treaty partners. The principles should be considered in the design and operation of DR regimes. For example, DR regimes should be capable of providing culturally appropriate services to Māori users. This will include engagement with tikanga, use of Te Reo and appreciation of Te Ao Māori. There are obvious links to Standard 1 where Māori constitute a marginalised community due to the legacy of colonialism and continuing socio-economic disadvantage.

In 2017, amendments were proposed for *Te Ture Whenua Maori Act* 1993. This included a new DR regime and the creation of a new DR role, the kaitakawaenga. I have previously analysed the cultural challenges and opportunities involved in this proposed regime, including how it relates to Treaty of Waitangi commitments.⁶¹ Ultimately the proposed amendments were dropped in late 2017 by the incoming Labour-NZ First coalition government.

E *Standard 5: Properly Resourced to Carry Out the Service*⁶²

Adequate resourcing is a known problem. This includes funding, capability and competence. If Family Dispute Resolution had been properly resourced at its inception the regime may have avoided many of its current problems.⁶³ There have also been capacity concerns around restructuring of employment mediators.⁶⁴ The proposed changes to the *Te Ture Whenua Maori Act* would have created the new role of kaitakawaenga but there was a clear lack of DR specialists with the requisite tikanga knowledge and Te Reo skills.⁶⁵ This standard could focus the attention of government and major industry DR funders. Some of the NZ regimes are adequately funded but others are not. However, my suggested standards are chosen based on their importance rather than whether they are currently a pervasive problem. The importance

⁶⁰ As should all NZ regulation as per Chapter 7 'The Treaty of Waitangi in regulatory design and practice' in NZ Productivity Commission, *Regulatory Institutions and Practices* (Research Report, 2014) 156-183.

⁶¹ Morris and Shaw, (n 1) ch 6 and Grant Morris and Katie Alexander, 'Inclusiveness or Tokenism: Culture and Mediation in New Zealand's Dispute Resolution Statutory Regimes' (2017) 28(2) *Australasian Dispute Resolution Journal* 170.

⁶² I had originally included 'Competent to carry out the service' but this standard is too vague and therefore breached my criteria. It is also very obvious and, in relation to practitioner competence, seems to be happening in practice (whereas accessibility is a known problem). If we see competence as including resourcing, then resourcing is a more helpful standard.

⁶³ Independent Panel, *Te Korowai Ture a-Whanau: Final Report from the Independent Panel Examining the 2014 Family Justice Reforms* (Ministry of Justice, May 2019) <<https://www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/#final-report>>.

⁶⁴ NZ Council of Trade Unions, *Submission to the Ministry of Business, Innovation and Employment on the Employment Mediation Services Change Proposal* (January 2015) <<http://www.union.org.nz/wp-content/uploads/2017/10/160121-Mediation-Services-Restructuring-Proposal.pdf>>.

⁶⁵ Morris and Shaw, (n 1) 98-9.

should remain consistent through time whereas specific problems will come and go.

Funding directly affects accessibility, timeliness and monitoring/record keeping. We could use 'Competent and properly resourced to carry out the service' but this risks combining two standards into one and would be a breach of my criteria for robust standards.

F *Standard 6: Confidential, Where Applicable and Insofar as the Law Allows*

This standard is commonly used and reflects one of the fundamental principles of alternative DR, that is, the presumption that the process will be confidential. This confidentiality is not absolute. Thus, it is important to include the disclaimer, 'insofar as the law allows'.⁶⁶ While this disclaimer potentially weakens the standard, it is the legal reality. Deleting the disclaimer could result in misleading information and potentially expose the DR regime to legal action. In most regimes, potential users expect confidentiality and will be unlikely to voluntarily enter the process unless this can be guaranteed. Confidentiality relates to both the process and the outcome. Unless there is a very strong public interest argument as to why the outcome should be publicly reported, both should be confidential. The aims of Standard 8 (monitoring and record-keeping) can still be achieved following ethical research processes ie, quantitative and qualitative empirical research can preserve confidentiality.

This standard makes sense in a conventional, mediation-type regime. However, in some DR regimes confidentiality is not prioritised to the same degree. For example, there may be a requirement to publicly release the outcomes of DR. This standard received the most critical feedback and raised questions about our definition of 'alternative or consensual dispute resolution'. Many of the organisations uncomfortable with the standard had strong adjudicatory functions. The GCDR standards process clearly includes processes based on mediation and conciliation but excludes arbitration and litigation. However, some stakeholders arguably fit in the space between these two groupings. This creates significant problems when designing overarching standards. To be relevant to this middle grouping, the standards either need to be broader (or vaguer) or this middle grouping should potentially have a different list of standards.

G *Standard 7: Timely*

This standard is more than just a 'nice to have' aspiration. It is vital to the integrity of any DR system. In the litigation context we talk about justice delayed being justice denied. This is just as true in alternative DR.

⁶⁶ This is specifically suggested by Nina Khouri on the basis of her research in DR confidentiality and privilege. Nina Khouri, 'Should You "Lay Bare Your Soul"? The Shifting Landscape of Mediation Privilege in New Zealand' (2016) 27(2) *Australasian Dispute Resolution Journal* 111, 116.

Unreasonable delays will be fatal to any DR regime. This standard links to 'accessibility' and 'resourcing' but is also conceptually distinct. A system can be free, well promoted, and adapted to meet the needs of a wide range of people while still having unacceptable delays. 'Timeliness' features in a number of the examples listed in sections 3 and 4 but should arguably feature in all of them.

H *Standard 8: Accountable Through Monitoring and Record-Keeping*

This suggested standard is a more specific version of the commonly used 'accountability'. We need to be clear as to *how* DR regimes and organisations will be held accountable. The most important aim is to make sure regimes and organisations are collecting data that can then be analysed to improve performance. Most NZ DR regimes do not keep comprehensive records.⁶⁷ In some cases, hardly any data at all is recorded making it almost impossible to monitor and analyse the success of the regime and/or organisation. Most importantly for this project, it makes it almost impossible to conclude whether the other standards are being met. Without this key standard, the other standards are basically redundant. Organisations and regimes need to be resourced to meet this standard and therefore it links in with Standard 5.

The aim is accountability, and the means is monitoring and analysis. Accountability includes using feedback and insights to improve performance. To successfully monitor and analyse a DR regime, high quality data is needed, both quantitative and qualitative. This monitoring and analysis should be regularly reported. This standard involves a clear research dimension. DR researchers rely on data from government regimes. Where that data is absent it is impossible to carry out robust empirical research and we end up with anecdotes, or worse, inaccurate conclusions.

I *Standard 9: Prioritise Early Intervention*

By including this standard as one of the 9 standards we can encourage organisations and regimes to focus more on early intervention to resolve disputes, rather than waiting until the disputes grow in magnitude before intervening. Early intervention needs to be more than just one priority amongst many. Arguably it needs to be the main priority. Along with Standard 1's focus on marginalised groups, Standard 9 brings a fresh approach to the overall standards conversation. While mentioned in the Weathertight Homes regime's aims, 'prioritise early intervention' does not exist in any of the formal standards lists analysed in this report.

Early intervention can be challenging as proactive measures are required rather than just reactive ones. Insights gained through Standard 8 will assist regimes in meeting this standard. Early resolution requires specialised skills and therefore links to Standard 5 ie, having staff to carry out this work.

⁶⁷ This problem is discussed throughout Morris and Shaw (n 1) and caused numerous challenges in completing the book.

What about the standards that did not make the top 9? This is a matter of prioritisation and ranking. The more standards we include, the more unwieldy the list becomes. The following three standards were considered for inclusion in a top 12:

10. Consistent with relevant law and natural justice
11. Transparency
12. Voluntary to participate

As noted above, number 10 can be presumed. The alternative is for government-linked regimes to act illegally. This is not a viable alternative and there is no evidence of this occurring in practice. 'Transparency' is a commonly used standard but begs the question 'transparency' of what? Standards 1, 2 and 8 cover the obvious areas related to transparency. There is also the issue of transparency clashing with Standard 6 ie, a system which prioritises confidentiality will never be completely transparent. Therefore, transparency ends up taking a more narrow meaning. Number 12 is not applicable to NZ's statutory regimes as many are de facto mandatory. One usually cannot access the Employment Relations Authority without attempting mediation first, or the Tenancy Tribunal, or the Family Court for custody matters, or the Human Rights Review Tribunal, or the Environment Court.⁶⁸ There are of course exceptions to this de facto mandatory approach but the presumption in these regimes is that applicants will attempt mediation before having access to tribunals and courts.

Once the standards have been confirmed the process can move to implementation and measuring. My assumption is that each regime would be responsible for analysing the extent to which it meets each standard and reporting on this but there may be a supporting role for the GCDR. The analysis will include a report which notes where standards have been met and where work is needed to meet the standards. This should also include suggestions as to how the standards will be met.

In many cases, regimes will already meet these standards, or come very close. In some cases, this is also being monitored. In other cases, regimes will not meet the standards and the government, through the GCDR, can provide advice on how to remedy this. Implementation and measuring should follow a research-based process. For example, Standard 1 will require an analysis of users. This will include the total numbers of users, demographic breakdown, costs to users, and other potential barriers. If this analysis reveals a lack of accessibility, then advice can be provided on how to make the regimes more accessible. This advice will be based on best practice and robust scholarship.

Each standard will require a range of research methods. This will include analysis of the relevant statute and case law, policy documents, academic scholarship, media reports, surveys/interviews of practitioners and users and

⁶⁸ *Employment Relations Act 2000* ss 159 and 188, *Residential Tenancies Act 1986* s99, *Care of Children Act 2004* s46E, *Human Rights Act 1993* s92D, *Resource Management Act 1991* s268 and 268A.

any relevant administrative data. This is one reason why Standard 8 is so important. Without the comprehensive collection of data, implementation and measuring will not work properly.

It is vital that this does not become a generic, tick-box exercise. Vague standards can easily be ticked off as it is difficult to know what is being measured. This is one reason to make sure we have clear standards. If we take Standard 1 as an example, a regime with only 5% of users from Maori and Pasifika backgrounds may well fall short on Standard 1, given that these ethnic groups comprise approximately 25.5% of New Zealanders.⁶⁹ A regime which has waiting lists of several months will clearly fall short of Standard 5 ie it is not properly resourced to carry out the service. These examples show how measuring can occur.

VI CONCLUSION - WHERE TO FROM HERE?

Now we have some suggested standards, how best to proceed? As seen through this article, there are many different variations on best practice standards for DR. There will not be universal agreement from stakeholders. The suggested standards are ambitious yet pragmatic. They will require more concrete action by government and other DR organisations, especially around improving accessibility, increasing data collection/analysis, reducing wait times, and prioritising early intervention. This will probably require either more resourcing or better targeted resourcing (as per Standard 5).

The title of this report is 'Resisting the Vague'. I recommend avoiding the following standards: Efficient; Effective (and especially when these two terms are combined); Fairness; Equality; and, Diversity. It is difficult to disagree with the intent behind these standards but it also very hard to know what they mean. In fact, I suggest that they are sometimes included *because* they are vague and can mean different things to different people. They are more likely to pass through consultation unchallenged, but not likely to produce better DR in the long term. If we want DR to be quicker, then we should state this clearly. If we want better accessibility for marginalised groups, then we should state this clearly rather than just mentioning diversity, which could range from token efforts through to strict quota systems.

It is arguable that the inclusion of 'particularly marginalised groups' in Standard 1 undermines 'Impartiality' in Standard 2 and that 'resourcing' in Standard 5 will require the government/taxpayer/organisations to spend more money on DR. I have addressed these potential criticisms in Section 5. Stakeholders might also argue that these standards are already being met. My mediation research over the past decade suggests otherwise.⁷⁰ Regardless, standards should exist whether they are being currently met or not.

⁶⁹ Statistics NZ, 2018 *Census Ethnic Group Summaries* (Web Page) <www.stats.govt.nz/tools/2018-census-ethnic-group-summaries>.

⁷⁰ Morris and Shaw, (n 1).

The current NZ government is focused on 'well-being' as a concept.⁷¹ Well-being is very hard to define and is therefore difficult to deal with in an article devoted to 'Resisting the Vague'. I suggest that all 9 proposed standards will lead to greater well-being if they lead to best practice DR. The strengths of alternative DR are well-known. I do not recommend having well-being as a standard until such time as it is fully researched and clearly defined in a New Zealand DR context.

There will never be a perfect set of standards. Interested parties will disagree over what to prioritise and how it should be worded. We should endeavour to formulate clear and robust standards that suit our New Zealand context. These standards should be informed, but not determined, by internationally recognised standards from other jurisdictions. We can utilise the strengths of overseas examples while resisting the vague approach taken in some existing frameworks. If our New Zealand DR standards also happen to challenge the status quo, then this should be welcomed.

⁷¹ Jacinda Ardern, 'Wellbeing Budget Speech' (Webpage, 30 May 2019) <www.beehive.govt.nz/speech/prime-minister-jacinda-ardern%E2%80%99s-wellbeing-budget-speech>.