Improving Access to Justice through Alternative Dispute Resolution: The Role of Community Legal Centres in Victoria, Australia

Research Report

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Funded by Faculty of Law and Management, La Trobe University, Australia

September 2010.
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Acknowledgements:

The author wishes to thank Assoc. Prof. Mary Anne Noone for her contributions to this research and Ms Kate Digney for excellent research assistance.

Funding for this research was provided by the Faculty of Law and Management, La Trobe University, Australia through its Faculty Small Grant Program.

Sincere thanks to all participating Community Legal Centres and staff members interviewed.
1. Executive Summary

This report focuses on the use of Alternative Dispute Resolution (ADR) by Community Legal Centres (CLCs) to improve access to justice for disadvantaged members of the community whom they service. The aim of the research was to investigate CLCs’ use of ADR and ADR services; perception of CLC lawyers of ADR and the recent expansion of ADR within the justice system both in Victoria and at the Commonwealth level. The following are a summary of the research findings and recommendations.

1.1. Definition of ADR

The research found inconsistencies amongst participating CLCs in definitions of ADR. Whether CLCs considered themselves as providing ADR services depended on how they defined ADR. There were diverging views about what constitutes ADR and processes that have been widely accepted as ADR were not considered ADR by some participating CLCs.

1.2. Awareness of ADR services and processes

The research found participating CLCs were aware of Alternative Dispute Resolution (ADR) services and processes, but level of awareness differed amongst the participating CLCs and staff.

1.3. Relevance of ADR to work of CLCs and Access to Justice

There were varying views between CLCs and within CLCs on the relevance/importance of ADR to the work of CLCs. Some participating CLCs felt ADR was very important while others felt they had very limited relevance to the work of CLCs. Participating CLCs raised issues including power imbalance between disputing parties; limited availability of legal assistance to ADR disputants where required; lack of knowledge of the law on the part of ADR facilitators; and the impact of ADR processes on public interest litigation and test cases as issues that may impede ADR processes from improving access to justice.

1.4. ADR, CLC Lawyers and CLC Clients’ best interest

Those participating CLC staff who felt ADR processes were relevant to their work felt CLC clients often experience difficulties including: dealing with legal issues on their own; negotiating agreements in their own best interests; and effectively participating in a mediation or negotiation process. They believe further that these difficulties are further compounded by power disparity between parties. Thus CLCs lawyers are either reluctant about sending their clients to an ADR
process or would rather act in an ADR process on behalf of their clients in line with legal practitioners’ obligations toward their clients.

1.5. Mandatory ADR

The research found participating CLCs were of the view that the move towards mandatory or compulsory ADR would compromise traditional goals of ADR which were to give disputants a voluntary, no cost choice of dispute resolution processes.

1.6. Quality and standard of ADR services

Concerns were raised about the quality of ADR services, including application of different standards by different ADR providers. Participating CLCs were of the opinion that differing standards result in inconsistencies in approach and outcomes and ultimately negatively affect ADR’s potential to deliver justice. The possible failure of ADR to deliver justice makes it an unattractive process considering the stringent justice goals of CLCs.

1.7. Collaboration between CLCs and ADR services

Some CLCs were positive about collaboration between ADR service providers and CLCs but were of the view that co-locating ADR services with CLCs and provision of ADR services by CLCs might result in conflict of interests. However, there were diverging views on the gravity and significance of such conflict of interests.

Most CLCs welcomed the opportunity to partner with ADR service providers but were of the view that the expansion of ADR should proceed with caution. Emphasis was placed on the need to work out detail of such partnerships in a manner that accommodates the ethical requirements of various professions involved; the traditional role of CLCs; and the traditional elements of some ADR processes and practices.

1.8. The Expansion of ADR

In relation to the expansion of ADR, most participating CLCs welcomed the expansion as they would prefer clients, particularly in civil matters, to resolve their disputes using ADR processes (non-adversarial processes). However, many interviewees raised issues with ADR’s ability to deliver justice (as mentioned in 1.3). Some also queried the governments’ motivations for expansion of ADR. They were of the opinion that the expansion of ADR is driven by associated cost-savings on the part of the government rather than the need to provide justice for disadvantaged members of the community. Some queried whether impacts of the
expansion, including necessary systemic and structural requirements, have been adequately considered.

1.9. Role of CLCs in expansion of ADR

There were diverging views on the role CLCs might play in the expansion of ADR. Some CLCs were of the opinion that CLCs had no role in the expansion whilst others saw CLCs as having a major role in relation to educating clients about ADR processes. This education will include information about ADR and what is expected of clients in an ADR process and providing legal advice to clients pre- and post-ADR sessions. Provision of legal advice/assistance to clients throughout the ADR session was also seen as critical to the protection of clients’ interests. Some CLCs even saw a greater role for CLCs through provision of assistance to unrepresented clients appearing before magistrates to resolve their matters through an ADR process. For this to happen, magistrates would be required to refer unrepresented litigants in civil matters to CLCs. This was considered to be an important aspect of protecting the interests and rights of disadvantaged members of the community who often cannot afford legal representation and for whom adversarial processes may result in further injustice and alienation.

1.10. Summary of Recommendations:

• ADR stakeholders should develop training for CLC staff on ADR processes to create an awareness of ADR processes and potential benefits for CLC clients;
• ADR service providers should ensure that information of parties’ legal rights are provided to them prior to the process and that parties (particularly vulnerable parties) are allowed legal representation during ADR processes;
• Both the Commonwealth and Victoria governments should provide more funding to support research into and roundtable discussions on the involvement of CLCs in the expansion of ADR;
• More research is also required into the justice quality of ADR particularly for disadvantaged members of the community;
• Collaboration between CLCs and ADR stakeholders should be encouraged and/or strengthened in order to improve access to ADR services for community members;
• Collaboration and co-location should involve discussion around the interests and obligations of each profession/field involved to ensure those interests and obligations are adequately catered for;
• A co-location pilot should be funded to determine whether perceived benefits of co-location of ADR and CLC services would materialise to improve access to justice for disadvantaged members of the community.
2. Introduction

Australian research reveals many barriers to accessing the legal system, particularly for disadvantaged members of the community. While there is currently no evidence on nation-wide legal needs in Australia, there are state-specific studies and findings. The Access to Justice and Legal Needs research program survey, conducted in NSW in 2003, identified that of those survey participants who sought assistance for legal issues only 25.6 percent sought assistance from a legal adviser. An overwhelming 74.4 percent sought non-legal assistance. Barriers limiting access to the justice system are a concern for both State and Commonwealth governments.

In 2008, the Australian Federal Attorney General requested the National Alternative Dispute Resolution Advisory Council (NADRAC) to look into increasing the use of Alternative or Appropriate Dispute Resolution (ADR) to improve access to justice:

It is very important to encourage parties to civil proceedings to make greater use of ADR to overcome court and tribunal barriers to justice ...

I would like NADRAC to enquire into and identify strategies for litigants, the legal profession, tribunals and courts to remove barriers from and provide incentives to ensure greater use of appropriate dispute resolution options as an alternative to civil proceedings and during the court or tribunal process.3

NADRAC has since released a report which, amongst other things, details its recommendation for greater use of ADR through the introduction of legislation which would ‘impose an obligation on prospective litigants to take genuine steps to resolve disputes before court’.5 ADR is now an accepted part of the legal system in Australia. ADR processes are viewed as a way of improving access to justice for members of the public, particularly, those disadvantaged by the legal

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1 This is currently being conducted by the Law and Justice Foundation of NSW and National Legal Aid and Victoria Legal Aid.

2 Law and Justice Foundation of New South Wales, Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas, 2006 at 102 – 103.

3 Federal Attorney General, Australia, “Terms of Reference to the National Alternative Dispute Resolution Advisory Council (NADRAC) on ADR and the Civil Justice System” Federal Attorney-General’s Department, Canberra, 2008.


5 Above n 4 at 2. See also p. 35. This
system. ADR services are provided through the courts, various ombudsmen services, community (neighbourhood) justice centres, departments of justice, as well as the private sector.

Another integral part of improving access to justice in Australia are Community Legal Centres (CLCs). CLCs are independent organisations providing free legal services to disadvantaged members of the public who would otherwise have no means of accessing mainstream legal services because of associated costs, lack of relevant information and other barriers. CLCs share a common goal with ADR; that of improving access to justice and addressing the legal needs of disadvantaged members of the public. Despite the fact that CLCs are regarded as the first port of call (or ‘desperate port of call’) for disadvantaged members of the community seeking legal assistance, to date, there is no empirical data on the use of ADR by CLCs. In addition, while there are significant government initiatives to create awareness of and expand the use of ADR, there is no corresponding move to have CLCs take on a more significant role in the expansion of ADR.

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3. **Research Aims and Methodology**

3.1. **Project aim and objectives:**

The overall aim of the project was to investigate the use of ADR by Community Legal Centres (CLCs). The objectives were as follows:

- To investigate whether CLCs provide information about ADR to members of the community who access their services and if so, what type of information is provided.
- To investigate the practice of CLCs in relation to ADR by seeking information on:
  - whether CLCs use ADR or consider ADR as an effective access to justice mechanism;
  - referrals to ADR services provided by CLCs to members of the community;
  - whether CLCs encourage dispute resolution through ADR processes;
  - whether ADR services and CLCs services are co-located; and/or whether, and to what extent, CLCs work in conjunction with ADR service providers

3.2. **Methodology**

A detailed literature review of access to justice, history of CLCs and ADR and the relationship between ADR and CLCs and ADR and access to justice was conducted. In addition, series of semi-structured interviews with staff members of CLCs was conducted to gather data on: CLCs and the provision of ADR processes; referral practice to ADR services and the provision of onsite ADR services; the attitude of CLCs to the current expansion of ADR at both levels of government.

The aim was to limit the project to five CLCs as the research was considered a pilot which, based on findings, could be extended to other CLCs and other issues relating ADR and CLCs. The five participating CLCs are:

- Footscray Community Legal Centre Inc
- West Heidelberg Community Legal Service
- Fitzroy Legal Service Inc
- Peninsula Community Legal Centre Inc
- Loddon Campaspe Community Legal Centre
Ethics approval was sought from the La Trobe University, Faculty of Law and Management Human Ethics Committee prior to data collection. The Committee reviewed all aspects of the project including: the aim and objectives of the research; research methodology; project timeline; participant recruitment procedure and instruments, including Participant Information Sheet, Consent and Withdrawal of Consent forms; storage of data; and issues relating to confidentiality.

A minimum of two staff members were interviewed at each CLC. Each interview lasted between 30 mins to 1 hour 30 mins over a period of 3 months, from December 2009 to February 2010. Data collected from the interviews were transcribed using the Nvivo qualitative research software and checked for accuracy. The Nvivo research software was also used for thematic analysis and identification of recurring themes.
4. Conceptual, Historical and Practice Background

4.1. Access to Justice

Defining access to justice is particularly significant as definitions impact on policies which in turn determine funding and availability of services. Access to justice has been defined in various ways. Cappelletti and Garth refer to it as a 'system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state'. It consists of guaranteeing equal access and achieving just outcomes. It could also simply refer to 'mechanisms by which an individual may seek legal assistance'.

Access to justice requires guaranteeing the right of access and making available gateways to access. In Australia, the right of access to justice is undisputed. All persons have a right to access the justice system but avenues through which the right of access may be exercised have been the subject of access to justice reforms. How do disadvantaged persons or groups including women, migrants, the poor, persons with a disability, indigenous Australians, fair in accessing justice? Is there sufficient public information about available services? How do associated costs affect access? Are available services suitable to perceived needs?

Access to justice is considered a crucial element of the rule of law. Federal Attorney General, Robert McClelland in 2009 said:

> Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is as an essential precondition to social inclusion and a critical element of a well-functioning democracy.

Access to justice is linked with liberal democracy, and particularly values such as equality, liberty, human rights and justice which underlie access to information, access to courts, access to legal representation, equality before the law with a particular focus on meeting the needs of disadvantaged members of the society.

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9 Above n 8 at 6.


Notable research has been conducted on access to justice particularly in the UK, Australia, and Canada. In Australia, major research into access to justice include the Federal Government’s inquiry into Poverty in 1975 and significantly, the report of the Advisory Committee on Access to Justice titled Access to Justice – An Action Plan 1994. The most current research was carried out by the Attorney General’s Department’s Access to Justice Taskforce with report released in September 2009.

The 1994 report construed access to justice very broadly to include equality of access to legal services, national equity in terms of access to the legal services market and equality before the law. In addressing equality of access to legal services, the committee considered access to justice as including access to ‘effective dispute resolution mechanisms necessary to protect ... rights and interests’ and not only to the formal justice system. Thus, access to justice goes beyond access to courts and strictly legal services. The narrow focus of earlier definitions was noted by Bottomley and Bronnit:

> ... access to “justice” is usually taken to mean access to formally constructed, political impartial courts and administrative agencies.

The narrow focus in the construction of access to justice is based on a legal ideology which excludes other means of resolving disputes or addressing social problems. The definition of access to justice provided in ”Access to Justice – An Action Plan” takes access to justice beyond this so called ‘legal ideology’ to alternative means of resolving disputes and addressing legal needs.

also Bottomley, S., and Bronnit, S., Law in Context, Annandale, N.S.W.: Federation Press at 80.


15 See http://www.acjnet.org/napubliclegaled/research.aspx for details of access to justice research in Canada.


18 Bottomley, S., and Bronnit, S., Law in Context, Annandale, N.S.W.: Federation Press at 83.

19 Above n 18 at 83.
This wide definition of access to justice remains the basis of access to justice initiatives in Australia. The most recent work on access to justice by the Federal Attorney General’s Department uses even, a much wider construction. The Report referred to ‘waves’ of access to justice reform identified earlier by Cappelletti and Garth. Wave 1 equates access to justice with access to legal services; Wave 2 equates access to justice with ‘correcting structural inequalities within the justice system’; Wave 3 equates access to justice with ‘informal justice and its importance in preventing disputes from occurring and escalating – including greater use of non-adversarial alternatives to legal justice’; and Wave 4 is about ‘[I]mproving access to justice by focusing on competition policy’, particularly, reform of legal profession rules to reduce the cost of legal services.

Furthermore, access to justice is:

\[n\]ot only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve ‘everyday justice’; the justice quality of people’s social, civic and economic relations. This means giving people choice and providing appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible – whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution or tribunals).

And:

Improving access to justice requires improving access to formal and informal justice mechanisms and improving the justice quality of daily life.

More importantly, the report recognises the need for various institutions to work together to achieve the goal of improving access to justice:

Improving access to justice requires a broad examination of how the system and its various institutions influence each other and work together to support or limit people’s capacity to address legal problems and resolve disputes.

Access to justice thus defined should have the ultimate goal of affecting peoples’ everyday experience of justice. Where the right of access is guaranteed, the avenue through which it will be exercised must also provide justice and the overall result should be improved quality of everyday justice for all members of the community.

For the purpose of this project, a broad construction of access to justice is adopted, but the main focus is on the relationship between access to justice and


\[21\] Above n 20 at 3.

\[22\] Above n 20 at p 4.

\[23\] Above n 20 at 4.

\[24\] Above n 20 at 4.
alternative dispute resolution. While not limiting the wide ramifications of access to justice, the project focuses on provision of alternative dispute resolution services by community legal centres in order to improve access to justice.

4.2. Alternative (Appropriate) Dispute Resolution

ADR comprises of various processes of resolving disputes. It has been defined by the National Alternative Dispute Resolution Advisory Council as:

…an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.25

This definition addresses issues raised in regards to the use of the word ‘alternative’ which has been argued connotes ADR processes are ‘alternative’ to court processes. It has also been argued that ‘alternative dispute resolution’ “sounds a rather marginal activity undertaken by old hippies”26 Sir Lawrence Street recognises the debate on the meaning of ‘ADR’ and in particular what ‘A’ in ADR stands for but argues that ADR describes:

…an holistic concept of a consensus-oriented approach to dealing with potential and actual disputes or conflict. The concept encompasses conflict avoidance, conflict management and conflict resolution. The over-arching element of ADR in addressing these three aspects of conflict is the consensus-oriented philosophy that pervades the newly evolving recognition that conflict avoidance, management and resolution are simply three closely related sequential approaches each of which has relevance and application within the broad field of social, commercial and personal interaction. This is inherently the province and function of ADR.27

ADR is viewed as an all encompassing process of dispute or conflict management, avoidance and resolution and processes may fall into three categories: facilitative, advisory and determinative. Processes from two categories when combined are known as hybrid processes.Facilitative processes include:

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... mediation, [where] the ADR practitioner assists parties to identify the issues and reach an agreement about the dispute. Advisory processes, such as conciliation or expert appraisal, employ a practitioner to advise the parties about the issues and/or possible outcomes. Determinative processes, such as arbitration, involve a decision being made by the third party. There are also other types of ADR such as collaborative practice.28

4.3. History of ADR in Australia

The history of ADR in Australia dates back to the 70’s with steady growth from the 80s.29 According to Sourdin, advisory and determinative processes were popular prior to the 70s, and afterwards came non-determinative processes in the late 70s and early 80s.30 Various explanations have been provided for the exponential growth of ADR, the institutionalisation of ADR within the justice system being a major factor.31 Other factors include low cost, faster and more efficient proceedings, flexibility, outcomes which reflect parties’ perceptions of justice or fairness, empowerment of parties and voluntariness.32 Regardless of the positive comments on ADR, it has been criticised as providing a form of ‘second-class justice’ which diminishes the traditional justice system, and in certain circumstances, entrenches power imbalance which exists between the parties.33 It appears though that the benefits of ADR are perceived to outweigh the criticisms and ADR has overcome initial reluctance, particularly, of members of the legal profession to embrace it and view it as an important part of the legal system.34

4.4. Access to Justice and Alternative Dispute Resolution

As noted above, ADR developed in the 70’s partly as a result of frustration with the formal justice system. According to Sourdin, ADR processes were introduced into the courts as part of case management procedures ‘to reduce delays and

28 Above n 25 at 4.


33 Above n 32 at 94 -95.

costs in court proceedings’. This indicates recognition and acceptance of ADR as improving ‘access, participation and satisfaction in court proceedings’.

Government involvement in ADR in Australia began with the Community Justice Centres (Pilot Project) Act 1980 (NSW). The Act provided for the establishment of Community Justice Centres (CJCs) to provide dispute resolution services to the public. CJCs became a permanent feature of the NSW justice system in 1983 and it now operates as a part of the Attorney-General’s department. CJCs’ connection to access to justice is evident in the second reading speech by the then NSW Attorney-General and Minister for Justice:

...services offered by a Community Justice Centre will be available to anyone who seeks to avoid the expense and frustration of court proceedings, or who is simply searching or a way to resolve a dispute, even of an inter-family nature, without suffering the embarrassment of confiding in friends, relatives, or the impersonal countenance of the legal profession.

CJCs are said to have kept the flame of ADR alive. Williams stated:

CJCs are unique in their accessibility. Services are provided on request to any person or organisation. There are no waiting lists, no means test and no cost to the participants. If necessary, interpreters are provided. Time and venue are flexible. Services are provided across NSW including geographically isolated places. Partnerships with organisations ensure access for disadvantaged persons. CJCs have a particular awareness of multicultural and Indigenous issues and are active in developing greater access for people with disabilities.

As discussed earlier, the Access to Justice Advisory Committee (AJAC) was commissioned in 1994 ‘... to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective’. In its report, the Committee made the following recommendation:

All Australians regardless of means should have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.

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35 Above n 30 at 16.
36 Above n 30 at 16.
38 NSW Parliamentary Debates (Hansard), Legislative Assembly, 19 November 1980 at 3147.
40 Above n 17 at xxiii.
41 Above n 17 at 7.
In referring to dispute resolution mechanisms, the Committee, no doubt, had ADR in mind recommending ‘continued development of ADR programs in Australia.’\textsuperscript{42} ADR was seen as relevant to providing access to justice and defined as ‘the process of resolving disputes through agreement between the parties themselves, facilitated by a neutral third party, who has no power to compel settlement’.\textsuperscript{43} The Committee recognised some advantages of ADR, including providing broader remedies and less-costly and less-formal processes:

ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes ... the outcomes are those which the parties themselves have decided and are not imposed on them.\textsuperscript{44}

The committee also expressed concerns about ADR, including disadvantages which may flow from power imbalance. ADR was recommended on condition that power-imbalance issues are addressed and periodical evaluation of services carried out.\textsuperscript{45} The Committee recommended establishment of a non-statutory body to advise the Commonwealth Attorney-General on ADR. This led to the establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995.\textsuperscript{46}

NADRAC has since been vigorously performing its functions. An area of impact of NADRAC’s work relates to the relationship between ADR and access to justice. If ADR is seen as part of the access to justice movement, what type of justice could it be said to provide? As noted above, access to justice extends beyond access to legal services or courts. In a discussion paper on fairness and justice released in 1997, NADRAC opined ‘that fairness and justice in ADR need not necessarily equate with justice under the formal legal system’ but there is a need to maintain procedural justice in providing ADR services particularly for the benefit of disadvantaged members of the community, including women, minority cultural groups, people with disabilities, people living in rural and remote communities and people with low socio-economic power.\textsuperscript{47} NADRAC noted that in certain instances, ‘giving control to the parties rather than a third party decision maker ... may do grave injustice to one of the participants, or fail to take into account the interests of vulnerable third parties or of matters of public interest’ and as such, certain measures must be put in place to address injustices that may result from use of ADR processes.

\textsuperscript{42} Above n 17 at 300.
\textsuperscript{43} Above n 17 at xxxix.
\textsuperscript{44} Above n 17 at 278.
\textsuperscript{45} Above n 17 at 279.
\textsuperscript{47} National Alternative Dispute Resolution Council, “Issues of Fairness and Justice in ADR” discussion Paper, 1997 at par. 10.02
With the growing reliance on ADR, there is a corresponding and urgent need to ensure that ADR processes are capable of providing fair and appropriate outcomes for all user groups in Australia.48

The quality of justice delivered by ADR was also the focus of the Australian Law Reform Commission (ALRC) in Managing Justice: Review of the Federal Civil Justice System. It was acknowledged that ADR processes may deliver ‘individualised justice’ characterised by a sense of attentiveness, impartiality and fairness.49 Access to justice was viewed as procedural justice, in terms of having a fair process, and distributive justice in that the process must be proportionate to the ‘complexity and importance of each dispute’.50

Whilst the ALRC acknowledged the benefits of ADR processes, it argued, in the context of the terms of reference, that ADR should not be seen as ‘the’ solution to the shortfalls of the civil justice system. Some of the concerns raised include lack of concrete evidence that ADR reduces court workload and provides ‘a satisfying form of justice’.51 Other concerns relate to the efficiency and suitability of ADR processes and the replacement of lawyers with ADR practitioners who may be unable to, because of the requirement of neutrality, provide legal advice to the parties. Lack of advice may mean that parties enter the process without knowledge of their legal rights and as a result become disadvantaged or end up with a ‘lesser justice’. The Commission recommended empirical evaluation of the effectiveness of ADR within the justice system52 and more generally, a holistic approach to the reform of the justice system which acknowledges the importance of contributions of various legal and quasi-legal service providers and institutions.

In promoting the justice quality of ADR, NADRAC prepared a guide titled “A Fair Say” for users of ADR processes, in particular, mediation and conciliation.53 The guide addresses issues that may be of concern to disadvantaged members of the community identified in discussion paper, “Issues of Fairness and Justice in ADR” discussed above. The guide explains the processes of mediation and conciliation including what is expected of parties and how they should prepare for ADR sessions. Preparation may involve several things: discussing concerns (including perceptions of relative power) with dispute resolution practitioners and how

48 Above n 47 at 2.


50 Above n 49 at par. 1.82, 1.91 – 1.96.

51 Above n 49 at par. 6.59 – 6.60.

52 Above n 49 at par. 6.61.

those concerns will be addressed. The onus is on the practitioner to identify concerns where not voiced. The ability of the practitioner to identify those issues is thus very crucial to the ‘justice’ of the process. A problem will arise where the practitioner is oblivious of those concerns or does not consider them real issues or matters that could result in injustice. This raises the issue of the quality of training received by practitioners and the personal qualities of the practitioner involved.

NADRAC has noted ‘care should be exercised in referring to [ADR processes] as offering ‘access to justice’ where it implies having ‘a decision according to law or a legal process with all its inherent procedural protections’. However, NADRAC acknowledged that ADR processes are fair and also emphasised the need for practitioners to be skilled in identifying and addressing power imbalance issues. NADRAC stated matters involving ‘severe power imbalance, safety and control’ are not suitable for ADR but family violence should not automatically exclude a matter from ADR.

Another complexity in relation to evaluating the justice quality of ADR is the diversity of ADR processes. Even with mediation, one of the processes of ADR, there are many models requiring different steps and practice skills. Diversified processes and practice make it difficult to determine what works in terms of providing justice and what does not. Noone, in relation to transformative mediation said:

The approach taken by a transformative mediator could be construed as amoral or insensitive to issues of discrimination and bias.

... The flaw ...is that it assumes parties have the capacity, are informed, can communicate with each other and have the requisite knowledge to make just and reasonable agreements.

In a bid to combat perceived disadvantages which may accrue as a result of diversified practice of ADR, a set of practice and approval standards have been agreed on nationally to standardise mediation practice. It is still a voluntary accreditation process through the National Mediator Accreditation System

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54 National Alternative Dispute Resolution Advisory Council, Submission to the Victorian Law Reform Committee on Inquiry into Alternative Dispute Resolution, May 2008 at 6.

55 Above n 54 at 6-7.


(NMAS). Practitioners seeking accreditation must meet certain criteria and possess minimum qualifications and training. Accredited mediators must also comply with certain practice standards. NADRAC, in its 2009 report to the Federal Attorney General on the use of ADR in federal courts, recommended ‘as a general rule, federal courts, tribunals and other bodies should now only use or refer matters to mediators who meet the NMAS standards.

**VICTORIA**

The development of ADR in Victoria was facilitated by the then Legal Aid Commission's establishment of a Dispute Resolution Project Committee to look into the use of ADR for neighbourhood disputes to prevent these disputes from being litigated. The work of the Committee led to the establishment of four dispute resolution centres as a pilot project with the aim of providing an alternative to the formal justice system for the resolution of neighbourhood disputes. By 1989, there were seven (7) dispute resolution centres in Victoria. In 1993, a centralised system of administration was introduced to administer mediation services throughout the State under the auspices of the Department of Justice through the Dispute Settlement Centre of Victoria (DSCV). The DSCV has since trained indigenous and CALD (Culturally and Linguistically Diverse) mediators and has been involved in providing mediation services in the Magistrate Courts. Developments have also seen the commencement of community mediation services through the Neighbourhood Justice Centres.

The Dispute Settlement Centre Victoria (DSCV) is an arm of the Victorian Justice Department which provides ADR services to members of the community free of charge. The DSCV administers ADR services throughout Victoria. Its role includes:

- Providing 'informal, impartial, accessible, low cost dispute resolution service to all communities in Victoria';
- Assisting people to resolve their conflicts;
- Providing an alternative method of dispute resolution apart from litigation; and
- Educating and providing information to the public on appropriate dispute resolution.

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60 Above n 4 at 4.


62 Above n 61.
ADR has since been growing exponentially in Victoria.

In 2004, the Victorian government through the Justice Department released ‘Justice Statement 2004’ on future reform in the Victorian justice system. According to the Justice Statement, major reforms to be carried out by 2014 include:

- Providing dispute resolution procedures which de-emphasise court based processes
- Improving access to justice by providing fair and cost effective dispute resolution processes

To achieve the above ends, the government spent $3.5 million on alternative dispute resolution and trained 110 mediators.63

As a follow up to ‘Justice Statement 2004’, the Victorian government through the Justice Department released ‘Justice Statement 2’. Attorney General, Rob Hulls stated that more could be done in the area of equal opportunity in terms of ‘addressing systemic discrimination’ with a focus on the cost of justice, ADR, the civil justice system and the court system.64 Major reforms sought include expanding ADR in Victoria for the benefit of the community, businesses and industries. ‘Mediation in the community will be encouraged and, if people need to go to court, the courts will actively seek out ways to identify the core issues in dispute and resolve them using ADR techniques’.65 It was also mentioned that the government will seek to provide incentives to encourage parties to resolve disputes outside the courts.66 It was acknowledged ADR is a means of increasing access to justice for members of the community experiencing financial difficulties. It can also reduce the costs to the courts and to the government’. It is important to note that the Victorian Government’s justice initiatives in regards to meeting the legal needs of the disadvantaged focuses mainly on the criminal justice system although there is acknowledgement of need for assistance where protection of rights is an issue.67

Part of the access to justice initiatives in Justice Statement 2 was to establish an ADR Directorate, pass legislation introducing judge-led ADR and referral of intervention order applications to ADR. About $17 million was allocated to these initiatives including expansion of community-based ADR, and ADR research. The Courts Legislation Amendment (Judicial Resolution Conference) Act 2009 (Vic)


65 Above n 64 at 39.

66 Above n 64 at 9.

67 Above n 64 at 39.
now confers power on judges, associate judges and magistrates to conduct judicial resolution conferences. The Act also provides for grant of judicial immunity to judges, associate judges and magistrates when carrying out judicial resolution conference functions. The Act does not limit judicial resolution to mediation and conciliation; it includes other forms of ADR. An ADR Directorate has also been established to implement the government’s ADR initiatives.

The Victorian Law Reform Commission undertook a review of the civil justice system recommending reform. In its 2008 report, the Commission acknowledged ADR ‘is part of government policy at both state and federal levels’. The proposals made by the Commission recommended ‘greater and earlier use of ADR in the civil justice system generally and in Victorian courts in particular’. The Commission took a wider view of ADR recommending processes other than mediation already widely used by Victorian Courts. Processes recommended include:

- early neutral evaluation
- case appraisal
- mini-trial/case presentation
- special masters
- court-annexed arbitration
- special referees
- conciliation
- conferencing
- hybrid ADR processes
- collaborative law
- industry dispute resolution schemes.

The Committee was of the opinion that a variety of ADR options ‘would assist the courts to more efficiently and effectively manage the diverse types of disputes in the court system. In other words, the existing limited menu of ADR options should be expanded to a more comprehensive smorgasbord’. It is important to note that the Commission supported provision of ADR services through the courts on the basis that the court possesses some kind of authority and credibility which could influence, persuade or assist parties to resolve their disputes. In addressing the issue of access to justice, the Commission focussed on the cost of access and noted that ADR processes may assist in reducing the cost of access to justice but:

... such costs may be less than the costs incurred if the matter proceeds to trial. Therefore, cases which are settled or resolved through ADR processes may incur less cost, but where the matter still proceeds to trial there may be an increase in the overall

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69 Above n 68 at 212.

70 Above n 68 at 218.

71 Above n 68 at 219.

72 Above n 68 at 219-220.
costs borne by the parties. However, if there is a narrowing of the issues, or if certain matters are resolved during the ADR process that might otherwise have led to significant interlocutory costs, then the ADR process may result in a net decrease in costs in cases which still proceed to trial. Generalisations about the likely costs consequences of many of the commission’s civil justice reform proposals are fraught with difficulty.\footnote{73}

Courts at every level of hierarchy are now required to provide alternatives to court processes for the resolution of disputes.\footnote{73} Victorian Government Attorney-General, Rob Hulls, on the importance of ADR, the extent to which ADR now forms part of the justice system in Victoria, and expanding the use of ADR processes said:

ADR is really the key theme of assisting people to resolve disputes outside the courts system. ADR; some people call it Alternative Dispute Resolution; I prefer to call it Appropriate Dispute Resolution – because we want disputes resolved in the most appropriate way.

Well, in what will be an Australian first, what we intend to do is, not just expand ADR right around the state, in regional and rural Victoria, encourage people to resolve their disputes, outside the court process – but if ultimately, the dispute has to get to court, we’re going to actually have judges trained in dispute resolution. So we will, for the first time in Australia, we will have judge-led mediation.\footnote{75}

In 2007, the Victorian Parliament commissioned the Law Reform Committee to undertake an inquiry into alternative dispute resolution. The terms of reference included consideration of the ‘the reach and use of ADR mechanisms’ and its capacity to improve access to justice among other things.\footnote{76} In report released in May 2009, the Committee stated that ADR ‘has a significant potential to increase access to justice’ for disadvantaged members of the community.\footnote{77} This ability flows from perceived benefits of ADR including minimised cost, quicker resolution of disputes, availability of non-adversarial processes and ‘remedies … adaptable to the needs’ of parties.\footnote{78} The committee also pointed to ‘diverse range of services’, but which has also been criticised as a leeway for confusion on the part of consumers who would be unable to distinguish between services in terms of process and quality. Overall, the Committee supported making various ADR

\footnote{73} Above n 68 at 630.

\footnote{74} Sourdin, T., ‘Mediation in the Supreme and County Courts of Victoria’ Department of Justice, March 2009. Also Sourdin, T., Alternative Dispute Resolution, 2008 Thomson Reuters at 169-198


\footnote{78} Above n 77 at 64.
options available to consumers of ADR. In addition, the Committee pointed to the ‘user-friendly nature of ADR’ as compared with courts and flexibility in terms of making services more issue, procedurally and culturally appropriate.\[79\]

The Committee acknowledged ADR may hinder access to justice where the matter is not suitable for ADR processes. It was suggested that ADR should be seen only as ‘one of a range of strategies that can be used to resolve a dispute’.\[80\] The Committee further classified matters which require a public hearing as unsuitable for ADR. The concern that the private nature of ADR, that is, privacy and confidentiality of the process and outcome, ‘may hide systemic issues from public scrutiny’ was acknowledged. The Committee recognised that individual benefits must be balanced with public interests in providing ADR processes.\[81\]

Under the *Family Law Act 1975* (Cth), parties to a family law dispute are required to attempt resolution through family dispute resolution before certain orders may be made by the court. Family dispute resolution is a process ‘in which [an independent] family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other’.\[82\] The Act provides that parties seeking certain orders must provide a certificate from a dispute resolution practitioner to the effect that they have made a genuine effort to resolve the dispute.\[83\] Victoria Legal Aid provides a free ADR service ‘that helps parents going through separation or divorce resolve family disputes. This service is offered through the Roundtable Dispute Management (RDM) service which is said to help ‘people to avoid costly court action ... sort out issues quickly and confidentially, in a safe and supportive environment.’\[84\] The RDM service thus provides avenues to parties who are entitled to legal aid to attempt to resolve their disputes by an accredited\[85\] family dispute resolution practitioner.

Another initiative of the Victorian Government through the Justice Department is the Neighbourhood Justice Centre (NJC),\[86\] a partner of DSCV providing referral to mediation (through DSCV) to persons located within the Collingwood

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\[79\] Above n 77 at 64.

\[80\] Above n 77 at 81.

\[81\] Above n 77 at 82 – 83.


\[83\] Section 60I, *Family Law Act 1975* (Cth).


\[85\] See *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth).

neighbourhood. The NJC opened to the community in February 2007. Its broad vision is to:

... enhance community involvement in, and ownership of, the justice system. It will respond to, and engage with, the community in addressing issues and concerns, thereby creating a justice system which, over time, is more integrated, responsive, accessible and more effective in reducing crime, addressing the underlying causes of criminal behaviour and increasing access to justice.87

The NJC will seek to increase access to justice by providing a range of services on-site including mediation (ADR).88 The NJC also, has as one of its aims diversion from traditional court processes and building community capacity to address dispute.89 The aim of building community capacity to handle conflict is in line with the goal of the federal Attorney General to provide ‘everyday justice’.

4.5. Community Legal Centres

Community Legal Centres focus on providing legal services to the disadvantaged members of the public who would not otherwise have the means of accessing mainstream legal services because of associated costs and/or lack of relevant information. Tomsen and Noone report governmental support for the work of CLCs and the growth of CLCs in Australia is part of legal aid developments in the 70s and 80s with formal acceptance as part of legal aid coming late in 1983.90 CLCs are now divided into two main streams, generalist centres and specialist centres. Generalist centres provide services across a wide area of law and specialist centres focus on specific areas, for example, consumer law and mental health. There are over 200 CLCs in Australia funded by both Commonwealth and State governments.91

CLCs pride themselves as being ‘independent, not-for-profit community based organisations that provide free legal advice, information and education to ... client communities with a particular focus on disadvantaged members of the Australian community and those with special needs’.92 This description


89 Above n 87 par. 9. There is another centre located within the Magistrate Court in Geelong.


92 Above n 91 at 2.
emphasises various aspects of the work of CLCs and values which underlay the provision of services. Of note are: a community focus, addressing special needs and disadvantage, and lack of associated costs to clients.\textsuperscript{93}

CLC services include information, advice, casework including legal representation, outreach work, community education, capacity building, law and policy reform and advocacy and referrals. An estimated number of services provided by CLCs across Australia during the 2007/2008 financial year include:

- over 140,000 information, support and referral services
- more than 210,000 individual advices
- over 50,000 individual cases
- over 2,600 community legal education projects
- around 1000 law reform or policy projects.\textsuperscript{94}

Emphasis has been placed on rights-based approaches and providing access to justice. The National Association of Community Legal Centres (NACLC) offers a detailed description of services and values of CLCs:

At the root of their work are the concepts of justice, human rights, and community. These values affect not just the outcomes of CLC work but the processes they use. A rights-based, holistic, community development approach to legal service delivery means CLCs try and deal not just with the immediate legal problem of their clients, but with other broader social problems. CLCs understand the value of early intervention and prevention. They seek to educate the community about the law, and empower community members to avoid legal problems in the future. Where laws or policies clearly disadvantage particular groups, CLCs describe the problems to governments and corporations and offer fairer solutions.\textsuperscript{95}

4.6. Access to Justice and Community Legal Centres

CLCs provide access to justice to disadvantaged members of the community. The NACLC in 'Why Community Legal Centres are Good Value', stated that ‘clients of community legal centres are those who are facing injustice’ and CLCs provide a means of accessing justice to these clients through providing accessible services in terms of location and cost.\textsuperscript{96} The Legal and Constitutional References Committee of the Senate in 2004 acknowledged that CLCs form a ‘crucial part of providing access to justice’ and ‘have a vital role to play in helping to achieve a fairer and more effective legal aid system that is available and accessible to all

\textsuperscript{93} Above n 90 at 199 - 230.

\textsuperscript{94} Community Legal Service Information System Database (CLSIS), CA11 Report for 07/08.


By providing legal services to disadvantaged members of the community, CLCs provide and improve access to justice in Australia.

However, performing this function is not without difficulties. A major difficulty relates to the provision of funding for CLC operation. The NACLC has identified ‘insufficient and inequitable funding to individual CLCs’, ‘fragmentation of government funding’ and insufficient funding for capacity building and workforce developments as major barriers to the providing access to justice.98

Noone and Tomsen have also identified funding as a barrier to provision of services by CLCs. Whilst governments recognise that CLCs provide ‘value for money’, the practice has been to provide additional funds which are not commensurate with ‘increases in running costs’.99 In addition, provision of funding by governments has created a tension between traditional legal services and the social inclusion, ‘preventive and social change’ focus of CLCs.100 Noone and Tomsen report that increased commonwealth funding for CLCs resulted in an ‘interventionist approach’ in which the Commonwealth sought to ‘control and direct its expenditure’ thereby limiting the range of services provided by CLCs.101

Furthermore, tension between providing services crafted to meet community needs and services directed by governments who provide funding to CLCs was also raised. This is contrary to the position which obtained at the time CLCs were established and funded by the community.102 Giddings and Noone note that CLCs were originally established to provide non-traditional legal services to disadvantaged members of the public. This included the involvement of non-lawyers with ‘centres ... staffed by both lawyer and non-lawyer volunteers working on an equal footing’ but there was some tension between mainstream legal practitioners and CLC lawyers – ‘the traditional practices of the legal profession were seen as part of the problem in limiting access to justice’.103

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97 The Senate, “Legal Aid and Access to Justice – Senate Committee Report” Legal and Constitutional References Committee, The Senate, June 2004 at xx and 217 respectively. See also Above n 64 at 36-39.

98 Above n 95.

99 Above n 90 at 199.

100 Above n 90 at 199 - 200.

101 Above n 90 at 218 – 219.

102 Above n 90 at 202 – 208, 229.

4.7. Community Legal Centres and Alternative (Appropriate) Dispute Resolution

Both CLCs and ADR have been recognised by both Commonwealth and Victoria State governments as critical to providing and improving access to justice. Regardless of this connection, there is little empirical data on the link between ADR and CLCs or whether ADR is relevant to the work of CLCs. The aim of the research is to investigate this grey area to see what CLCs do in relation to appropriate dispute resolution.

CLCs generally pride themselves as having a holistic approach towards addressing their clients’ needs. They ‘employ a wide variety of strategies to work towards the best outcomes for their clients and their communities’. It has however been noted that providing appropriate services to clients is becoming increasingly more difficult due to ‘limited resources and competing client priorities’. The NACLC has developed a ‘Strategic Service Delivery Model’ to assist CLCs in meeting clients’ needs. This model requires a multi-disciplinary approach involving an assessment of community needs; a survey of other legal service providers and community organisations; a plan of service delivery including early intervention, capacity building and preventative measures; collaboration with other service providers; delivery of service using various means including law reform; legal education, test cases, provision of accessible services; referrals and partnerships with other service providers. The Federation of Community Legal Centres, Victoria states:

The multi-disciplinary approach used by CLCs works effectively in disadvantaged communities and is flexible and responsive in targeting services towards areas of need. CLCs need to employ a multi-skilled team to effectively implement this model.

Whilst there is no direct mention of ADR in the multi-disciplinary model, some CLCs provide dispute resolution services to their clients. In report of a Joint Review of Western Australia CLCs, it was stated that some Western Australia CLCs participate in ADR including conciliation and mediation, and majority of CLCs are looking towards providing mediation services. This indicates the diversified nature of CLCs across Australia. This diversification may be positive, in terms providing a range of services, but as Giddings and Noone note, it also ‘reflects the lack of cohesive, national approach to … continuing development.’

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104 Above n 91 at 2.

105 Above n 91 at 3-4. See also Federation of Community Legal Centres Victoria, “Victorian State Budget Submission 2009-2010” December 2008.


107 Joint Review Steering Committee, “Joint Review of Community Legal Centres” (Western Australia), September, 2003 at 34.

108 Above n 103 at 258.
In 1984, the Federation of CLCs in Victoria was asked to make a submission to the Legal Aid Commission of Victoria on the establishment of mediation centres. The Federation stated upfront that the submission was not representative of a collective view of all CLCs in Victoria. Whilst it acknowledged the need for stand-alone mediation centres, areas of concern included voluntariness of process, self-determination, issues to be mediated and coercion. One major concern was mediating disputes involving power imbalance:

Parties that opt for mediation should be carefully screened and this process must take into account the power status in relationships; the appropriateness of a legal remedy; the general likelihood of ‘success’ and the state of the dispute. If the ‘state’ is a crisis situation – mediation would probably be inappropriate.\(^{109}\)

The Federation was not convinced ADR could provide access to justice. Access ‘to law and the legal system’ was considered of so much importance that:

[p]hilosophically, we find it difficult to subscribe to conciliation or compromise approach. We encourage our clients to assert their legal rights in a win or loose situation.\(^{110}\)

The Federation was also of the opinion that mediation centres should not be identified or collocated with legal centres or other governmental agency:

We are strongly opposed to locating the Centres near a court or court associated building. We stress our opposition to any move to locate the Centres in any disused court houses.\(^{111}\)

On the involvement of CLCs, the Federation submitted that CLCs’ are not ‘appropriate venue[s] for such a centre’ because they ‘should where possible be the advising agency on the legal rights of the disputants’.\(^{112}\) CLCs could, however, refer clients to mediation centres and provide legal advice to clients. There was also a recommendation that the dispute resolution centres should not be referred to as ‘Community Justice Centres’ because ‘Justice involves notions of adversarial conflict and is associated with the more traditional methods of dispute resolution’.\(^{113}\)

Although there are still concerns relating to power imbalance and suitability of ADR processes, the Federation’s attitude to ADR has changed in some regards. In a submission to the Victorian Parliament Law Reform Committee, the Federation of CLCs, Victoria stated:

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\(^{109}\) Federation of Victorian Legal Centres, Submission to LACV on Dispute Resolution Options, November 1984 at 2.

\(^{110}\) Above n 109.

\(^{111}\) Above n 109.

\(^{112}\) Above n 109 at 7.

\(^{113}\) Above n 109 at 8.
In some contexts, the availability of ADR processes may produce better access to justice; for example, by preventing costly and traumatic litigation and promoting earlier settlement of disputes.\(^{114}\)

However, the Federation recommended that parties who have opted to resolve their disputes through ADR must have access to legal advice to prevent negative effects of power imbalance, and that ADR should not substitute other legal processes.

The Federation of CLCs in Victoria also supported ADR in a submission to NADRAC on ADR in the Civil Justice System. Whilst endorsing the advantages of ADR as a way of improving access to justice for CLC clients, some barriers for people from 'low-income and disadvantaged backgrounds' were identified:

- financial costs associated with ADR;
- the difficulty of obtaining adequate legal advice and representation;
- the emotional and psychological costs of participating in ADR, particularly when self represented;
- disability or mental illness; and
- for culturally and linguistically diverse (CALD) clients, cultural and linguistic barriers, particularly when exacerbated by an inability to obtain assistance from an interpreter.\(^{115}\)

The Federation was also concerned that increased use of ADR might ‘stifle public interest litigation’.\(^{116}\) The Federation identified a limited role for CLCs: providing legal advice to disadvantaged parties in an ADR process but raised funding as an issue.\(^{117}\)

Whilst referral and provision of legal advice have been identified as roles CLCs could play in ADR, the latter is plagued by lack of, or low funding and no significant contribution has been made by CLCs in relation to the former. During the 2007/2008 financial year, only 3.4% of CLC clients were referred to dispute resolution compared with 15.5% and 3.5% referred to private lawyers and courts and tribunals respectively.\(^{118}\) The Dispute Settlement Centre of Victoria reports that in 2008, 2.4% of its clients were referred by Victoria Legal Aid and CLCs.\(^{119}\)

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\(^{114}\) Above n 109 at 1. See also Federation of Community Legal Centres (Vic) Inc., Submission to NADRAC on Alternative Dispute Resolution in the Civil Justice System, May 2009.

\(^{115}\) Federation of Community Legal Centres (Vic) Inc., Submission to NADRAC on Alternative Dispute Resolution in the Civil Justice System, May 2009 at 1.

\(^{116}\) Above n 115 at 2.

\(^{117}\) Above n 115.


\(^{119}\) See above n 61.
In addition, there is no direct mention of CLCs at both the commonwealth and state levels in reforming the justice system to expand and promote ADR but governments at all levels acknowledge the work of CLCs in addressing disadvantage through meeting legal needs and providing access to justice. The implication is that where ADR reforms are not extended to CLCs, it may diminish efforts of the government to promote access to justice through ADR. This is more so given the number of CLCs and people who approach CLCs for legal assistance. With compulsory mediation operating within most court jurisdictions, there could be a further reduction in costs where parties are referred directly to ADR by CLCs in the first instance rather than attending court only to have the matter referred to ADR within the court system. The recent initiative of the Federal Attorney General relating to partnership of CLC with Family Relationship Centres is a step in the right direction.\textsuperscript{120}

It is against this backdrop that this project undertakes an investigation into the use of ADR by CLCs and the attitude of CLCs to initiatives expanding ADR at both levels of government.

\textsuperscript{120} See further discussion on the CLC/FRC partnership below on p 44.
5. Alternative Dispute Resolution, Community Legal Centres and Access to Justice.

5.1. CLCs and the definition of ADR

A starting point in the project was to explore the view of participating CLCs on ADR and in doing that it was important to ask interviewees to define ADR. There were diverging views about what constitutes ADR. Overall, most participating CLCs use ADR skills and ADR processes, particularly negotiation in their daily work. Some interviewees had not considered some of these processes as ADR until their involvement in this project.

Generally ADR was viewed by interviewees as an alternative to the court process:

It is a way of resolving disputes without having to resort to a litigious option, a court-based option, hopefully with a view to providing an environment where the parties can negotiate effectively to that end.

...a complete alternative to court because it may enable a person to negotiate an outcome.

I would say it is an opportunity for people to come together presenting their points of view, with someone facilitating that conversation. It does not have a litigious part about it, does not have a punishment part about it, it does not have an inducement...it is very much about what is in the hearts of the people who are involved in it...it relies on the goodwill of the people involved, it relies on a degree of expertise, the expertise of the person managing it or resourcing it needs to be fairly high...sole function is to facilitate the flow of conversation and your role is to tidy it up and put a little ribbon on it and say here we go.

The last definition focuses on facilitative processes and all definitions focus on the non-adversarial characteristics of ADR Not all interviewees viewed alternativeness to courts as a guarantee for non-adversarialism:

...you can be alternative to the courts and still be adversarial...so just because you are not in the courts does not mean it is not adversarial...a mediation itself can be adversarial.

Some interviewees also defined ADR in terms of the role and expertise of the dispute resolution practitioner and ADR’s role as a process facilitating community cohesion:

...the notion of ADR I think has two different versions. One for me is the ADR practitioner being the expert, a lawyer or [other experts]...the other is the community based mediation where you have co-mediators and you attempt to have some parallelism between the...mediator and the people
so you might have an older person and a young person or you might have someone from two different languages and that model is demonstrated in attempts to have indigenous mediators in the Disputes Settlement Centre...and I think those two versions are two quite different one.

The community model of ADR was preferred by some interviewees because it is thought to have the potential to address hierarchical decision making and incorporates checks and balances into the process.

Other definitions focussed on how ADR is being used by the government:

\[ I defines it as something that may be a preliminary step in getting to court ...in same sort of legal framework but the potential for solutions may be more immediate and may be more creative and may be different \]

This definition views ADR as operating in the shadow of the law; as part of the justice system but with an advantage over adversarial and determinative court processes, focusing on creativity - allowing parties to be creative in generating options that may resolve the matter for them - and facilitating a quick resolution. Negotiation occurs on the doorsteps of courts in the shadow of the law.

There were perceptions that whatever is referred to as ADR should be cost free and not compulsory. Locating ADR services within courts, and probably the court system was viewed by one interviewee as having a potential to diminish the value of ADR:

\[ ...but I think if you had more regionalised outlets it would be more likely that people would see those as resources rather than if there are only a few and they are all in courts then they are all in the shadow of the courts rather than trying to build a stronger feeling of community. \]

Another definition focused on the cost of ADR. ADR would benefit CLC clients because it is generally considered as involving low costs, an advantage over court processes:

\[ My understanding of ADR is ... a no cost or little cost option for people to try and resolve a disagreement or a dispute ... quickly. \]

Most CLCs were very particular about the cost to clients of using ADR processes. For most, ADR has to be cost free or involve minimal cost:

\[ And another thing I would say is ADR has to be cost free. So all these industry schemes are cost free, family law has various ADR processes but if your lawyer is charging you $250 an hour, I am not sure I would describe it as ADR ... ADR needs to be cost free or relatively cost free. \]

Most CLCs would encourage clients to consider ADR processes because of the cost advantages to their clients:

\[ ... lawyers would try and explain to the people what the costs and benefits were of the systems... \]
We try and resolve matters really in a most cost effective way for clients ...

An ADR incentive for CLCs is therefore low cost. But in some cases compulsory ADR has been viewed as increasing cost for clients, particularly, where such clients are eligible for legal aid:

The other problem with RDM [Roundtable Dispute Management] is that in family law matters we are usually working with the party who ends up being the primary carer for the children and often that person may be eligible for legal aid and the other person is not and therefore is not prepared to spend money on what is not a known outcome. They would rather have their day in court or go to something that is a no cost FDR [Family Dispute Resolution], have their say, get their certificate if it does not work out and then off they go to court ... very significant cost agents.

In terms of using informal ADR processes and ADR skills, CLCs often engage in negotiations on their clients’ behalf. While some view this as ADR, some merely see it as doing their work:

I would consider most of what we do as ADR in terms of trying to legally assist in negotiations with other parties ... really everything we do is going down the path of dispute resolution but not a formal one as such ...

One interviewee did not consider industry dispute resolution (IDR) schemes and ombudsman services as ADR because of the decision making powers of the ombudsman and IDR schemes:

...we do not think of ombudsman as ADR organisations. We see them as complaint bodies that we would write to or contact to make complaints. I do not refer to the various ombudsmans or equal opportunity commission as ADR bodies. It’s just not the way we think of it or the OPI. This may be because we see them as regulatory bodies and also ... we have an idea that they have more decision making powers or sort of persuasive powers than perhaps the DSCV would have. I think that we see DSCV and FRC as a process which people should follow but not necessarily having decision making powers. In the rare cases where everyone is happy to go and accept their decision, that will be great ... we see them quite differently.

Another interviewee also had issues with industry schemes and tribunals being referred to as ADR because, according to the interviewee, they are not ‘disadvantaged user’ friendly. This makes most CLC clients unable to participate effectively in their processes:

... if people are too scared or reluctant to go to the tribunal ... those tribunals some might describe as ADR, I’m not sure I would. For instance, VCAT requires some people to go to mediation, but my experience is if a low income person goes to mediation; that is not mediation, it is execution.
For some interviewees, another criterion for measuring whether a process should be classified as ADR is the absence of power imbalance. Where a process fails to address power imbalances, it should not be classified as ADR:

*I think if there is power imbalance not addressed, that is not ADR ... ADR needs to ... deal with imbalance of power.*

Interviewees pointed to the disadvantage to their clients of attending VCAT mediation. Power imbalances in regard to VCAT processes were highlighted and linked to whether VCAT provides ADR or whether the type of ADR provided is effective. One interviewee said:

*...if they are told they cannot have their support person or their lawyer with them because the other side do not have a lawyer. That is significant power imbalance and in my view it breaches all the fundamental tenets of good mediation and fundamentals of ADR.*

**Recommendation 1:**

**NADRAC should provide clarifications as to what processes constitute Alternative Dispute Resolution processes and what the features of each process are for the benefit of users of ADR.**

**5.2. CLCs’ awareness of ADR services and processes.**

Most interviewees were aware of ADR processes. However, there were differences in the level of knowledge, use and exposure to ADR services. Most CLCs are aware of the Dispute Settlement Centre of Victoria, private mediation services, industry dispute resolution schemes, family dispute resolution including Family Relationship Centres and mandatory ADR processes that are part of court processes. One interviewee who works on criminal matters was not aware of restorative justice processes:

*I don’t think I have participated in in any restorative ...it doesn’t happen ... it just doesn’t happen. No, I have not heard of it.*

Another interviewee involved in intake was aware of Victoria Legal Aid Roundtable Dispute Management but not aware of most ADR service providers including the Dispute Settlement Centre of Victoria:

*I am not familiar with ADR.*

CLC clients awareness of ADR processes differ. Interviewees stated most clients would generally not request or expect to use ADR processes when they seek assistance from CLCs. Many clients often leave it to the CLC legal adviser to determine process most suitable for their legal issue. When asked whether clients request ADR processes, some interviewees responded:
Generally they don’t, generally they are not really aware of those sorts of services [ADR]. Although, there has been a definite increase in people being aware of mediation with family law matters ... But certainly in other areas such as neighbourhood disputes they certainly don’t know there are services such as the DSCV for example ... No, I don’t think they would put it in those terms ...they just want their rights they don’t know how they have them, safeguard them ...they rely on us to advice them of ways to resolve it whether that be through ADR or otherwise ...

... there is only a relatively small proportion of people who are determined to go to court ...most people see the obvious benefits of resolving things through negotiation ...but they don’t come in here and say I want to take this to court or I really want to resolve this through ADR ... people would say that they don’t want to go to court but they don’t say they want to go to ADR ... I try to give them the spectrum.

CLCs see it as their duty to advise clients on various processes available and the cost and other benefits of ADR processes. But given that some CLC staff are unaware of ADR processes, it cannot be guaranteed that every client receives that advice. The type and quality of ADR information received is dependent on the provider of the information or advice:

.....lawyers would try and explain to the people what the costs and benefits are of the systems and depending on the lawyer ... some of them would be more prescriptive in how they recommend things, and I imagine that would depend on how strong they thought the case was and how capable the person was to represent themselves to go through those processes ...I don’t know how they would decide those processes but in a lot of cases there aren’t two sort of equal ways to go forward and for most of our clients they do not have much income so the chance of taking ... a court approach would be more restrictive. So, I don’t think there would be much resistance to the idea of using ADR.

Recommendation 2:

ADR stakeholders should provide training for CLC staff on ADR processes to create awareness of ADR processes and the potential benefits for CLC clients. This training should also include case studies on suitability of ADR processes.
5.3. CLCs’ view on relevance of ADR to their work and to access to justice

5.3.1. Relevance of ADR to work of CLCs

Most interviewees viewed ADR as relevant to the work of CLCs but the level of relevance attached to ADR differs across participating CLCs. This differential may be explained by perceptions of what is and what is not regarded as ADR. As one interviewee said:

We generally seem to think of ADR as only relevant to neighbourhood disputes and family law matters...we would try and intervene and do our particular intervention and we would not see that as ADR. We would not say we are trying to resolve a dispute. We would see that as just doing our job - trying to fix it. Just trying to 'get up' the landlord. The way your questions come in and I'm like ... Oh I never really thought of thinking of what we do as ADR.

Some CLCs considered the use of non-adversarial ADR processes as being very critical to their work. CLC clients are generally not able to afford legal representation and also lack the skills to self-represent, so an adversarial process will be most disadvantageous. They have a preference for non-adversarial processes:

If our clients are in the civil jurisdiction in the courts, they are already in the wrong place. A civil lawyer’s aim is to keep them out of the court ... our clients need to be anywhere but a court ... if they are in the court they are already halfway to getting a bad result.

Aside from the benefit of a non-adversarial process, using ADR processes also result in cost benefits for the clients who are unable to afford the cost of seeking redress through the courts or defending a court action:

Most of our clients don’t have a lot of money so court is not an option for them ... exploring and looking at other options which are common sense solutions to their problems [is important]. The difficulty for a lot of our clients is that they end up in the courts because they are dragged there by third parties.

All participating CLCs would use ADR where appropriate. Some actively promote the use of ADR but others are indifferent:

We are not against it, but we are quite ambiguous towards it ... if we can provide alternatives we will because a client should be made aware of all their options ... we are not big proponents ... big pushers of it.
5.3.2. CLCs view on ADR and Access to Justice

Most interviewees view ADR as improving access to justice only where power imbalances, unfair treatment of disadvantaged members of the community by industry dispute resolution schemes and government departments, adversarial ADR, high costs, disadvantage as a result of compulsoriness of ADR and injustices that could result are addressed. Some interviewees query motivations for access to justice initiatives by current governments. Some were of the opinion that the idea that ADR provides access to justice to disadvantaged members of the community is a secondary consideration in the ADR initiatives recently introduced by the government; the primary consideration being reduction in courts’ caseloads and costs to the government of providing access to justice through the courts:

...the bulk of court time is expended in doing commercial work than in spending time to assist with the type of clients we work with and frankly the courts are more concerned about trying to manage the list as quickly as can be and as pragmatic as they can. I don’t know how interested they are in outcomes for the small players but it’s no skin off my nose, I don’t think it hurts the clients ...

Concerns about compulsory ADR processes were also raised. Some interviewees were of the opinion that compulsoriness may incapacitate ADR processes and diminish perceived advantages of ADR processes:

The NADRAC stuff I have read suggests that mediation should be compulsory and the latest commonwealth access to justice stuff seems to be saying that you can have ADR instead of legal advice. So I think it is fundamentally wrong to push people to a system without them knowing what that system can do and can’t do ... I would say the states and commonwealth are trying to avoid their responsibilities to fund legal aid, they are in the process of trying to force people into mediation, they are risking diluting and damaging the capacity of mediation to be something less bureaucratic and less scary that the legal system.

Another interviewee was of the opinion that compulsory ADR would neither deliver justice nor transform people’s idea of justice. Concern was raised about portraying lawyers as obstacles to access to justice and ADR as a way to circumvent lawyers:

That is the other sad thing about the compulsoriness of it. It is not as though it’s going to build stronger notions of people’s idea of justice and how justice evolves, where we negotiate and talk, and respect differences and try to move somewhere. I think it shrinks the capacity of it to do something into a misguided attempt to save money. And also I think there is a real antipathy to lawyers; politicians and media have very unfortunate ways of
stereotyping lawyers and the law and that is part of the reason why it is attractive.

In relation to ombudsman services, industry dispute resolution schemes and complaint schemes, interviewees praised their effectiveness and viewed them as a better process for resolution of disputes involving disadvantaged members of the community. All CLCs interviewed were of the opinion that these schemes, in general, are relevant to their work and processes are used for their clients’ benefits. However, there were reservations about some of these schemes and their procedure:

> There are so many different ombudsman services ... the only one we have problems sending people to is ... where the police is concerned ... a lot of our clients are frightened off by that because they are actually complaining about police to police and our experience is the clients suffer reprisals, so we have been very careful in advising clients that there might be ramifications of that ... we did try and set up the ombudsman’s office an anonymous process ... it’s not just the ombudsman’s office, it’s the statutory processes of the Equal Opportunity and Human Rights Commission, Human Rights Commission of Australia ... as well as other offices. Again there is reticence from people to complain because of fear of reprisals but the Ombudsman schemes are pretty good, at least there is no cost involved. Consumer Affairs ...mixed responses there ... 

Interviewees also identified barriers to disadvantaged people in using the industry schemes and some tribunal processes, including lack of knowledge about rights and procedural issues:

> But I believe that in any ADR scheme, people should know their rights and we also need to make sure that the way the system works is fair for everybody. So with the Energy Ombudsman it was really obvious that to tell a ...person ... who did not really understand how the system worked to ring up the company was just so silly, it was unbelievable, really ridiculous... in the tenancy area ...a lot of the African women are petrified of going to the VCAT tribunal ... I don’t like using Consumer Affairs ...by and large CAV’s view is probably whatever we do is good and therefore it is OK...if people are too scared or reluctant to go to the tribunal ... For instance, VCAT requires some people to go to mediation, but my experience is if a low income person goes to mediation; that is not mediation, it is execution.

While the link between ADR and access to justice was considered relevant to the work of CLCs, interviewees were of the opinion that careful consideration must be given to the nature of that interconnectedness and roles of various players in the access to justice movement. Issues identified relate to conflict of interests where CLCs have to work in partnership, for example, with Family Relationship Centres; power imbalances; disputants capacity to engage in problem-solving;
lack of education on rights. One interviewee was of the opinion that linking ADR to access to justice may not guarantee client satisfaction in the justice system:

I think there are two options ...you either make legal solution much more accessible and access to courts and tribunals [and representations] more timely or you could go through ADR. Neither may work, you will always get people who may not get satisfactory resolution in either ...I suppose it is a bit of a philosophical question whether ADR is required because the justice system is flawed... the harsh reality is you do need to push people through the process because resources are limited.

For most interviewees, knowledge of the law is critical to effective participation in the process; addressing power imbalances and obtaining outcomes that are fair and equitable. It is only when these issues are addressed that ADR could be justifiably said to improve access to justice. There is also the feeling that disadvantaged parties, in reality, have no option but to take whatever the system throws at them because they have limited resources.

5.3.3. Public Interest litigation and ADR - Test cases on Social Justice Issues

One major concern of participating CLCs is the effect of ADR on public interest litigation. CLCs are concerned about systemic and endemic problems that affect their clients and they see their role as changing the system, campaigning for law reform and in instances pressuring organisations to change their system:

...everytime I have taken the problem to an IDR it is resolved but the practice, the systemic problem is never addressed. So I sent a letter to the ombudsman saying, these three cases, I specifically do not want them to go to IDR because I want them addressed systemically ...I could solve their problem with IDR, but I guess what I wanted to address was the power imbalance...

...you say to politicians, this is unfair, they will say “... we can change it ...you run the case and we can change it ...”

For some participating CLC lawyers, ADR outcomes are limited to parties alone, have no ramifications for the wider community, and do not have positive impacts on the predicaments of disadvantaged members of the community generally and into the future. They are seen as neither being capable of addressing systemic and endemic issues nor having any implications for law reform. This makes ADR options unattractive to CLCs in certain circumstances.
Recommendation 3:

ADR service providers should ensure that information about parties’ legal rights are provided to them prior to the process and that parties (particularly vulnerable parties) are allowed legal representation during ADR processes where appropriate.

Recommendation 4:

Both the Commonwealth and Victoria governments should provide funding to support research into and roundtable discussions on the involvement of CLCs in the expansion of ADR.

Recommendation 5:

More research funding is also required into the justice quality of ADR particularly for disadvantaged members of the community.

Recommendation 6:

The Federation of Legal Centres, Victoria and the National Association of Community Legal Centres should develop an ADR protocol for Community Legal Centres.

5.4. Alternative Dispute Resolution, CLC Lawyers and CLC Clients’ best interest.

5.4.1 Clients’ Background and use of ADR

CLCs pride themselves as providing legal services, or access to justice to disadvantaged members of the community. One CLC lawyer said:

They’re marginalised, disadvantaged. A lot of our clients are homeless or at risk of homelessness ...clients who are working poor...

Further, a large percentage of CLC clients are migrants generally with poor language skills:

60-70% ... are African, 10-15% are Vietnamese, and we have other non-English-speaking refugees such as Burmese.
In addition some other CLC clients have other needs or conditions that make them vulnerable:

*Drug users ... drug or alcohol issues ... Generally people who are 20 years or older. We have a 16 year old ... mental illnesses and being discriminated against. Low socio-economic status.*

And:

*[Those] with some other form of special disadvantage, such as a psychiatric disability or something of that nature ... so they are vulnerable in short.*

Thus CLC clients are vulnerable and CLCs view them as somewhat ‘helpless’ in relation to legal issues. CLCs see their roles as providing the much required legal assistance to their clients. CLCs are also of the view that whatever process would be used for resolution of disputes must be able to deliver justice relative to their legal rights. Processes which would not further disadvantage already disadvantaged clients are preferable:

*The other thing is that most of our clients, because of their profile, I would not want them going anywhere on their own ... if they turned up in any jurisdiction alone, would more likely lose.*

And another CLC lawyer said:

*If you take our clientele ... the power imbalance is so great......one of the family in the building dispute went to a compulsory conference at VCAT...he was the one person who had any chance of understanding what was going on. I don’t think his inability to understand was his background (cultural) ... but lack of legal and building knowledge ... broadly speaking 95% of our clients can’t participate in that sort of thing because they do not have the wherewithall.

... the demographics of this area is that most people do not have beyond Year 9 education, there are really pivotal issues and that power imbalance does play out all the time ... people do exploit other people’s lack of power [and] lack of confidence. Most people are significantly governed by State intervention, they rely on the State for their income, housing and to look after their children, and so they are very acquiescent when their rights are trodden on ... they have to be because they are frightened of losing the little that they have and so it’s a fine line we have to run.*

### 5.4.2. Types of Legal Issues and ADR

Generally the types of legal issues CLC clients present with include: family law; criminal law; motor vehicle accidents; consumer issues; contracts; family violence; sexual assault; neighbourhood disputes; wills and power of attorneys; debt and financial issues; fines; victim of crimes; tenancy and housing; administration and guardianship. Whilst some CLCs specialise in certain matters, the five participating CLCs project are generalist centres willing to take on a range of matters. According to one CLC lawyer:

*[We deal with] a broad range of matters. We do not specialise in any area.*
And another CLC lawyer:

... just a general range for clients.

CLCs are thus willing to assist their clients with diverse types of legal issues although where they are of the opinion that clients would receive a better service through a specialist centre or another service provider, they are willing and quick to refer clients to those services. CLCs assist clients in these areas by undertaking casework. One of the participating CLCs started off by undertaking casework on behalf of their clients with over 70% of service provided being casework. In addition to casework, the five participating CLCs engage in community education work although at different levels. One of the participating CLCs provides community education as a preventative and empowering strategy:

So what we are trying to do here ... is working with the community members, build their sense of confidence, their knowledge, and their capacity ...

Law reform is another area of work for all participating CLCs. In fact, it could be said that a desired end result of the work of CLCs is law reform aimed at preventing disputes into the future. CLCs consider the legal needs of their clients, identify the underlying causes and endeavour to use processes that address underlying causes in order to obtain an outcome which would prevent future occurrences – a form of final settlement of the issue. This area of practice is also known as preventative law. According to one CLC lawyer:

The legal problems that I see are very much endemic to the position they [clients] have in society as people of low income ... as a lawyer I would prefer that we address some of the more endemic problems and it takes a lot of time, work and different strategies.

All participating CLCs are flexible in their approach to addressing their client’s issues to the extent that whatever process used must: result in an outcome considered fair for their clients; address inequalities in accessing justice and in everyday transactions; ultimately deliver social justice for their clients. This is not a simple task for CLCs to accomplish. It requires different skills and strategies and achieving an outcome may well depend on the experience of the CLC lawyer and their willingness to utilise a range of strategies to achieve their goals, including political strategies at times to push law reform. CLCs would engage in extensive negotiations on behalf of clients; provide advice; make necessary telephone calls; write letters to relevant organisations and persons; make representations to governmental institutions and service providers; and make submissions to Law Reform agencies among other things to achieve their goals:

... every time I have ever taken the problem to an IDR it is resolved but the practice ... the systemic problem is never addressed. So I sent a letter to the ombudsman saying, these three cases, I specifically do not want them to go to IDR because I want them addressed systemically ... I could solve their problem with IDR, but I guess what I wanted to address was the power imbalance. So, I guess, how you address power imbalance is another
CLCs are frequently approached by clients for assistance in relation to non-legal issues. Clients present a range of issues that require special skills to be able to identify what legal issues are presented; or whether the issues have any legal aspect or ramifications. CLCs most times have to work with clients to identify the issues they are faced with:

By and large their [clients] thinking is not advanced ...sometimes they know they have a problem, sometimes they don’t ... sometimes they just feel uncomfortable and they know that something is wrong and so the role of the lawyer is to identify what the issue is, if it is legal and whether it has a legal resolution or what some other outcomes might be that could resolve the issue ...we would assist people to resolve their issues in a non-legal way ...

They’re very difficult because they are not people who can help themselves ...they are helpless sometimes of their own creation actually. I must admit you become a bit of a coach – “this is your life, you need to make the most of it, you have a child you want to have a relationship with, you need to pursue that and here are the ways you can do that. That’s it”

CLC lawyers thus have wider roles than practising lawyers in other areas of practice. They deal with a range of matters and sometimes need other skills or depend on people with other skills to be able to address their clients’ issues. A lot of work is being done on integration of community services which may assist CLCs to perform this role more efficiently. But CLCs do not necessarily see themselves as providing ADR services when they have to use these skills to assist their clients. One of the advantages of ADR is that it assists parties to clarify issues involved in any dispute even where there is only one party. ADR skills may be used to assist parties to clarify the issues they are facing. This happens during mediation intake sessions where a dispute assessment officer (DAO) would interview disputants to assess the nature and the level of disputes as well as the issues involved:

I should have also clarified that quite often we would assist people to resolve their issues in a non-legal way ... and I would see that as being different from ADR because I assume with ADR you have a legal problem that gets resolved through that system [legal] whereas it might be that they could resolve it some other way ... it might be at the end of the day we suggest ... what they might need to do is counselling ... or that although they have a legal document that might protect them to some extent, it's not actually going to resolve the problem ...
5.4.3. Role of CLC Lawyers and ADR

The main purpose of CLCs is to provide access to justice for disadvantaged members of the public - those who face difficulties accessing legal services without some form of assistance. CLCs are out there to protect their clients’ rights. As legal professionals, they have a duty to act in the best interest of clients and will use legal means to ensure the rights of clients are identified, protected, enforced.\(^{122}\) One interviewee said:

...our role is to really resolve these issues ... We are actually funded as advocates to help people solve their problems.

Lawyers, including CLC lawyers, traditionally see their role as trying to ‘fix’ their clients’ problems. As such, the idea that a client may be able to take steps to fix their own legal problems is a new concept which lawyers may be finding difficult, but which they have to grapple with. The new civil justice system, as envisaged by the Federal Attorney-General’s department, seems to aim at empowerment; the whole idea being to provide everyday justice which clients themselves may realise for themselves in daily interactions.

As discussed, CLCs aim to provide assistance to ensure their clients’ rights are protected or enforced and would use various processes to achieve this aim. Where, in a CLC lawyer’s view, a process appears incapable of achieving that goal, and would result in marginalisation or further disadvantage to their clients, that process will not be used. This perception resonates with the lawyer-client relationship where the lawyer would use all lawful means to secure clients’ rights:\(^{123}\)

...we would try and intervene and do our particular intervention ... We would see that as just doing our job ... trying to fix it.

... we would look for ways that were low cost jurisdiction that overcame the imbalance of power.

CLC clients also appear to trust CLCs to be able to protect their interests. The expectation of CLC clients that CLCs will act for them to protect their best interests appear to conflict with one of the core beliefs of ADR, that is, that everyone is capable and should be given the opportunity to resolve their disputes themselves.\(^{124}\) The traditional role of lawyers is to assist clients in achieving the best outcome in a dispute. Lawyers are believed to possess the

\(^{122}\) Dal Pont, G E., Lawyers’ Professional Responsibility, Lawbook Co. 2006, at 45.

\(^{123}\) Above n 122 at 71.

\(^{124}\) See above n 58 at 60.
skills to do that. When lawyers are required, under an ADR process to send clients to ADR to self-represent and self-determine, lawyers may consider this as not being the best interest of their clients and particularly vulnerable clients:

The idea that people can go into a mediation without any knowledge of their legal rights is a ludicrous proposition and all it does, in my opinion is it favours the existing imbalance of power.

It [ADR] denies the fact that for most people who are coming to see us there are power imbalances behind the problems they face ... the ADR thing does not acknowledge that and it can't acknowledge it.

But the thing I find is that I am generally not able to do much in an ADR way ... I want to reserve the right to deal with a problem I see in any way that I see fits ... The thing about ADR is that it is like old fashioned law to me; All parties are equal ... and we will behave in a particular way... and I struggle with that ... I will deal with somebody and I will keep dealing with them if I think it is fine in an ADR way but if I come away thinking, hang on, you're cheating, actually ... my clients are much less powerful than I realise ... and I discover that halfway through the process ... well I have committed myself to ADR ...so people like me are a bit wary of it.

One interviewee was of the opinion that ADR is for those who are well resourced and willing to allow a dispute to drag on for a long time, not those who have immediate and pressing legal needs that must be met:

ADR actually exists when you think about big companies ... you get big companies getting into disputation ... they do it away from the courts ... because they are companies, the person who is the facilitator can sit back for as long as it takes.

This relates to the aspect of mediation where the parties may not reach a settlement after the session, and a mediator is not in a position to determine terms of settlement or compel the parties to settle the disputes one way or the other:

ADR is better able to be operated amongst people who are educated, who better understand themselves ... who can allocate their resources to problem-solving ... A lot of people I act for are not much good at problem solving because they do not think they can solve problems.

Another issue raised in relation to the lawyer/client relationship is representation. The access to justice movement has led to new causes of action, the development of law and public awareness of legal issues and problems. And poverty and preventative law are examples of these developments. This has

\[125\] Dal Point discusses a client’s dependence on their lawyer; the high degree of trust a client has in a lawyer and the lawyer’s special skills to assist the client to achieve the best outcome within legal limits.

\[126\] Above n 122 at 45. Lawyers also have been said to have a duty to promote access to justice by ensuring that quality justice is delivered at the lowest possible costs. See Above n 122 at 81-82.
meant that lawyers now see new roles for themselves and now act for clients they would not have represented previously; those with limited means. This has resulted in effective access to justice for many vulnerable, less privileged people who otherwise would not have been able to afford legal representation. Lawyers are approached for different types of issues; have to identify legal issues; as well as make a decision on how best to assist their clients. Lawyers now provide more than pure legal assistance and CLCs in particular have extended their services to community legal education, social transformation and empowerment. Whilst most CLC lawyers have accepted this expanded role, the approach and extent of acceptance differ. Some see a wider role of community empowerment through conflict resolution skills development (problem-solving skills) and will work with communities while on the other hand, some are of the opinion that a lawyer’s role is to individual clients. Some lawyers are of the opinion that lawyers should not focus on development of problem-solving/conflict resolution skills but rather on addressing systemic issues which may pose obstacles to procedural justice being achieved in ADR processes. This tension is evident in the following:

As a lawyer, I would prefer that we address some of the more endemic problems and it takes a lot of time, work and different strategies. The traditional lawyer/client relationship is that the lawyer has one client and that is their client and people like me would assert that is very important, in fact it is essential to the work we do. To achieve systemic change there are other ways that you need to go about the work you do as a lawyer and one of those things is to work with groups of people so that they are empowering themselves as well as getting assistance from others. That is hard work for us to do basically ...  

To achieve this systemic change through community empowerment, one of the participating CLCs is now embarking on community education in conflict resolution to assist community members in the development of problem-solving skills. The underlying aim was explained as follows:

...we have a project ... risky, new, and innovative, it is around conflict resolution ... I am trying to make sure that every thing is interconnected and builds on everything else that we are doing...I have been doing a lot of work with residence groups which is a newly formed group of local housing tenants to actually know their rights ...build their sense of confidence, their knowledge, and their capacity to actually understand what is going on ...what that feeds into is that we have funding to do conflict resolution ...focus group with community members ... to get the issues identified and the solutions, and then to do another focus group with identified powerful people and suggest to them we don’t want to go in an adversarial position. We want to come up with a group plan where we can have a process whereby everybody owns it and has some responsibility ... a bit like a problem solving court ... like real conflict resolution, and so bring groups together and they air their grievances having ensured there is no power imbalance ...and it goes with ADR ...get people to understand different
people’s experiences…and that is a good ADR model…we are calling this project ‘creating the rights spaces’…

This appears to be the first CLC in Australia to provide problem-solving/conflict resolution training to the community. The success of this approach in resolving endemic problems is yet to be seen and it could be that other CLCs will be challenged to take that approach in achieving everyday justice for members of their community. To do this, CLCs would have to overcome ideas about the traditional role of lawyers and the community versus individual clientele difficulty. While some interviewees were of the opinion that resolving endemic problems require engaging community groups, they feel that may be at odds with the traditional role of lawyers:

So we are probably saying to ourselves that there are probably more things we can do for the community but they have got to come through the doors. They have to raise things in a particular way and there needs to be a level of comfort about that.

Whilst conflict resolution training may not be viewed as a traditional practice area for CLCs, some interviewees were of the opinion that CLCs have a great role in educating clients about their rights prior to attending an ADR session. This role is to increase clients’ awareness of outcomes that may result from formal legal processes and those that are legally appropriate so that clients do not agree to outcomes completely incongruent with their legal rights:

Before we refer anyone to mediation in family law, we make sure a person knows where they stand in regard to their family law situation...

And:

Before people go into ADR and mediation, they need to know what their rights are and if someone is informed of their legal rights, you can actually save everybody a lot of time and effort...

I think ADR would work effectively if there is a lawyer involved in the process providing clients’ information of their rights through the whole process.
But some interviewees were sceptical about the value of educating clients of their rights for the purpose of participating in an ADR process:

No ... it's too simplistic I think. It's not only teaching about rights, it is teaching people about when to exercise rights and how to exercise rights. The problem I have with that [educating about rights] is that it is too hypothetical because you cannot teach them how the other side is likely to engage with them ...you might tell them it could happen this way or that way ...you can show them various things can happen ... and you can talk to them about their emotions ...

The concern raised is that although educating about rights and dispute resolution skills may be useful, that education must be provided to all the parties in a dispute to provide a level playing field. In addition, vulnerable parties should have further protection in case the other party begins to use tactics at odds with the non-adversarial value of ADR processes. As one interviewee said:

... mediation itself can be adversarial.

Teaching conflict resolution skills and educating about rights are important steps as they will form the bedrock of achieving every day justice which is the goal of access to justice. Clients of CLCs who have gone through the education may be able to use to them for problem-solving in everyday life.

Closely related to educating clients about rights is the need for legal education on the part of ADR providers, and in particular, mediators. Some interviewees were of the opinion that legal education is critical to achieving fairness of outcome in ADR processes:

One of the big problems ... is that some of these people [ADR facilitators] are hot to trot with ADR but they do not necessarily know the law. My view is you cannot do ADR if you do not know the law.

And another interviewee spoke of the value of having lawyers who have knowledge of the law facilitating the process and compared services facilitated by lawyers with those facilitated by non-lawyers:

...the Chairperson [RDM] ...has a very active role in the outcome and they usually have extensive family law experience and have the ability to provide the parties with a reality check as the negotiations go on. I don't get the same feeling from some of the more pure mediations that are provided ... If that person has an idea of the true outcome that could be achieved in court ... that makes for a much more realistic outcome.

And another interviewee:

...there is a something about it [mediation] that is not right; ... I don’t think the stuff about the facilitator is well developed.
Recommendation 7:

In addition to recommendations 2-6 above, ADR stakeholders, particularly NADRAC and the ADR Directorate, Department of Justice Victoria should look into the practice of ADR, particularly the role of third parties in ADR processes and provide guidelines or establish standards to be followed in each ADR process. Mechanisms for ensuring that guidelines or standards set are followed must also be put in place. The National Accreditation and Practice Standards are examples for mediation and should be made compulsory for all mediators and compliance ensured.

5.5. Collaboration between CLCs and ADR services

5.5.1. Provision of ADR by CLCs

Aside from informal negotiation and use of formal ADR processes and schemes, participating CLCs do not provide ADR processes directly to clients. CLCs support ADR by providing ADR advice, information and referral. CLCs also engage in formal ADR processes on behalf of clients:

...we discuss advantages of ADR with clients. We say if you can agree, it is good because it will save you cost, it is less stressful and will save time and you are more likely to have a better relationship with your neighbour. If the ombudsman agrees with you, that's great.

Advising clients on alternatives to the court or adversarial system is not viewed as a diversion of clients' attention away from their rights. It is about choice of process; providing an opportunity for the client to consider and make an informed decision about the process which would deliver a fair but less costly outcome:

I would tell someone that if their only option was to go to a cost intensive jurisdiction they were wasting their time...My view is that the first thing I would say is it has got to be practical. There is no point telling someone they have a legal right that they either cannot afford to enforce or they cannot access because of cost reasons. So we would start, not so much from ADR, but to say you might have these rights and in theory you can go to the High Court but in reality you can’t ... so we would say let’s look at what the alternatives are.

CLCs generally provide ADR information in form of advice and brochures from ADR service providers although not in all instances were those brochures available:

... when people come in, they will always be provided with information straight up about the DSCV. In relation to family law matters, the information is provided quite early on because it is mandatory...
Generally through the course of advice and we will refer clients and give them brochures provided to us from Legal Aid on Roundtable Dispute Resolution.

There are new initiatives about making ADR information available to CLC clients through CLC websites. For example, an interviewee said:

*There is no information about ADR on our website but there are negotiations underway. DSCV [Dispute Settlement Centre Victoria] is redoing their stuff and there have been discussions about publications and website and they are planning to link the two websites together so there will be a direct link on their service to us and vice versa.*

One barrier to the provision of ADR for CLCs is conflict of interest that may arise where CLCs provide ADR services directly. This may mean CLCs are representing two clients, unless some separation may be achieved between staff providing ADR and staff providing legal services (co-location of services is discussed below).

### 5.5.2. CLCs’ relationship with ADR Service providers

Most CLCs interviewed had relationships with ADR providers. The relationship in most instances being limited to awareness of the ADR provider and the services provided for purposes of referral. For example, most CLCs were aware of the Dispute Settlement Centre Victoria and would refer neighbourhood disputes to the Centre. One CLC has a ‘vibrant relationship’ with the Family Mediation Centre providing family mediation services before the advent of the Family Relationship Centres:

*...the next most vibrant relationship would be with the Family Mediation Centre. We take a pretty strong mutual interest in what each of us are doing. We do all the obvious things like attend AGMs, attend working groups that are relevant to each other, cross refer...*

This evidences the common interests and goals of ADR service providers and CLCs and speaks to the relevance of a relationship between both.

As stated above, most participating CLCs have an ongoing partnership relationship with the newly established Family Relationship Centres particularly because of the new legally assisted family dispute relationship scheme introduced by the Federal Attorney General. In Victoria, seventeen (17) Community Legal Centres are in Partnership with Family Relationship Centres. CLCs are being funded to provide legal assistance to families using the Family Relationship Centres (FRCs). The assistance would cover “provision of legal information and education to Family Relationship Centre clients on family law”, “individual legal advice for Family Relationship Centre clients”, “legal assistance before, during and following family dispute resolution as recommended by and in partnership with Family Relationship Centres”, “assistance with drafting
parenting agreements and consent orders” and “training and professional development of staff in centres”\(^ {127}\).

Most CLCs are optimistic about this partnership in that it is an opportunity to provide legal advice to parties going through the FRCs:

> ... we have a good relationship with the FRC ...and counsellors here...What we hope to do is to take referrals from those two agencies, either clients who might be vulnerable where there might be concerns about power imbalance...

As discussed above, most CLCs are of the opinion that ADR can only provide access to justice where parties are aware of their legal rights and where practitioners have the knowledge of the applicable law. Previously, legal representation was not allowed in FRC dispute resolution processes but the Federal Attorney General has made recent changes to the law in this area which allows legal representation and partnership with CLCs to provide legal assistance.

CLCs provide information to their clients about FRCs as a certificate from a Family Dispute Resolution Practitioner (FDRP) must be provided to the court indicating that parties have genuinely participated in the dispute resolution. As at the time of the interviews for this project, details of the partnership between CLCs and FRCs were still being worked out. Issues raised by participating CLCs in regards to the partnership include CLC independence and differences in ethical obligations (lawyers and Family Dispute Resolution Practitioners (FDRPs)):

> ...it is apparent from our discussions with the FRCs we come from different disciplinary backgrounds, we have different focuses and to some extent we have mutually exclusive ethical requirements and our difficulties are not individual but are almost disciplinary and that in itself causes misunderstandings.

Some of the issues include bar to future legal representation for clients who receive legal advice in the ADR process; decisions on whether representation should be provided to a client or not; confidentiality and ethical requirements:

> A classic example might be a FRC telling a lawyer when they should or should not act in a matter. That is a matter for a lawyer to determine, that is a legal judgement. Another example may be in an assisted mediation where a FRC says because you have assisted in legal mediation, under our rules you can now no longer represent that client in future proceedings. We would say particularly where our clients have nowhere else to go, that is totally counter to accessibility to justice and confidentiality is the other issue ... there are major issues with confidentiality ... and how we are going to get around it, I do not know.

Another issue raised in relation to partnership with FRCs is lack of representation for both parties during the dispute resolution process. When a CLC is providing advice to a client, fairness requires that the other party should also have access to legal advice:

_The problem we have is that we believe access to justice should be fair and if there is advice on one side, there should be advice on the other. We are struggling at the moment because we thought VLA would be involved as well but they are not being funded to help so we therefore are looking at having cases where there will only be one side with a lawyer. In cases where one side has a lawyer, for example, the husband has an income and he can afford a lawyer, it would be fair for us to help on the other side. But to be fair we would have to get agreement from both sides that one side is being represented at mediation ... that is OK ... again from mediation point it the equality of power in the mediation that is an issue._

In relation to family dispute resolution generally, some participating CLCs raised concerns about referral of disputes involving family violence to FRCs for dispute resolution. Although there are mechanisms in place to ensure such matters are exempt from compulsory non-court dispute resolution, most CLCs are of the opinion that some family violence matters have slipped through this safeguard (and will continue to slip through the system) and have been referred to compulsory dispute resolution:

...I put it to them in terms that if you refuse to go then because of the way in which court matters progress through the system, we are thinking the reason for refusal is going to be scrutinised by the court and are likely to direct parties back to ...FDR. It is very difficult ... there are plenty of circumstances which fall under the radar, they are not exactly family violence matters...you know subtle intimidation, financial control, psychological control ... the way the matters progress on a duty day where the court is hearing 30 matters on the first return day of the matter, there just is not the time. I think it is going to be difficult because that in itself will become a contested issue. I think it is going to be a lot of work for the court.

Aside from collaboration with FRCs, there were other examples of CLCs collaborating with ADR service providers to meet clients’ needs:

_We have already worked closely with Consumer Affairs Victoria to get some of their conciliators to assist us because we think they are sometimes better at finding a solution. But we are also looking for them to help us on community education type projects ... we would certainly look to non-adversarial outcomes._

There is also collaboration with the Dispute Settlement Centre Victoria through provision of training to CLC staff on referrals, community education on issues of stalking and dispute resolution:
We have built a relationship with the DSCV...and they made an offer that they might be able to do free training for the neighbourhood residents group around conflict resolution.

5.5.3. Integrated Services /Collocation with ADR Service Providers

The integrated model for service delivery has been described as a multi-disciplinary, holistic approach to service delivery the purpose of which:

... is to marshal the combined resources of a network of professionals for the benefit of clients, as well as to further public interest. The work they do is carried out by and through the relationships they establish with each other, with their clients and with communities.\(^\text{128}\)

According to Noone, foundation CLCs in Australia aimed at providing a ‘holistic’ service which:

... derived from a recognition of the relationship between socio-economic and systemic factors and legal problems. The aim was not only to address the client’s ‘legal’ problem, but also other related issues. Thus, community legal centres valued working with non-legal health and welfare workers in the resolution of clients’ issues.\(^\text{129}\)

As seen above, CLC clients present with a range of issues, and sometimes CLC staff members are faced with the responsibility of determining how to assist the clients. In most instances they are referred to other service providers but research shows that ‘referral fatigue’ is a barrier to accessing justice.

Whilst integration with health and welfare services is one issue, integration with an ADR service provider is another due to the very nature of dispute resolution. ADR involves a process which enables resolution of a dispute between two parties or more in a non-adversarial manner. Where CLCs are integrated with ADR service providers, conflict of interests may arise as CLCs are under a duty to act only for one party in a dispute. However, service and organisational integration may be limited to co-location of various services in the same building so that referral between services becomes easier. This will improve access to justice for CLC clients where ADR is a more appropriate means of dispute resolution. Noone reporting on the approach undertaken by an integrated service said:

The enduring features of the integrated approach adopted by the two, legally distinct, organisations include: co-location of the organisations, crossover of board membership, including community members; use of a common reception area, but maintenance of separate filing and administrative systems (to ensure the professional obligations of the


\(^{129}\) Above n 128 at 97.
lawyer/client relationship are met); use of informal referrals between staff of the two organisations; attendance by legal centre staff of the two organisations; attendance by the legal centre staff at larger health service centre staff meetings; and employment of practitioners who are prepared and keen to work with other disciplines.\textsuperscript{130}

The benefit of providing an integrated service to deliver legal, welfare and health services has been the subject of literature:

...the benefit for the legal aspects of a client's problem can be identified as access to other professionals who can aid the legal process and facilitate the lawyer's role through, for example, the obtaining of relevant reports to present to the court; increased options available for sentencing can draw on related services and support available ... and the availability of alternative responses to legal action that can be expeditiously dealt with by workers in the other agencies.\textsuperscript{131}

In the Federal Attorney General's strategic framework for access to justice, the 'no wrong number, no wrong door' approach was introduced as a better option to provide access to justice. This goal, it was stated, would be achieved by setting up a common referral database with a list of legal and non-legal services, and location and type of services. The 'no wrong number, no wrong door' is preferred by the Attorney-General's department over a 'single integrated service, accessible by telephone and internet which provides information, warm referrals and (where appropriate) legal advice'. The preference is due to the cost of integrating services and difficulties which may be encountered in ensuring 'all jurisdictions participate and to develop and transition to common information technology systems and training'.\textsuperscript{132} But co-location may be an advantage where full integration is not required but services are available in one location and warm referrals may occur more frequently and more efficiently. This would be particularly useful for regional services where non-availability of some services make the work of service providers more tedious, cost and time intensive. In addition the availability of referral information may not necessarily mean that referral is occurring as envisaged where perceived benefits of services are not shared.

Most participating CLCs welcomed the idea of co-location with ADR service providers as long as there is sufficient separation and circumstances and practices which may lead to confusion on the part of clients are avoided. There are other reservations:

\textit{I am very interested in the way that health and law relate ... one of the problems could be because ... legal or advocacy services are adherently positional, unlike a health service. I can see more scope for a health service and ADR service to co-locate and I can also see more scope for advocates within a health context to have much more training about legal issues and their resolution ... Uncover other issues, make an appropriate referral to a}

\textsuperscript{130} Above n 128 at 99.

\textsuperscript{131} Above n 128 at 104.

\textsuperscript{132} Above n 20 at 79.
lawyer if that is necessary, if they are provided within one organisation, then conflicts of interest become a barrier … I think it is a problem that manifests itself in all kinds of ways nationally and I don’t think the sector has thought it through adequately. A tangible example of this is a number of CLCs are co-located with FRCs which can cause perceived conflict of interest at best or actual conflict of interests … the tension for funders is they want to get economic benefits of co-locating services and don’t care about conflict of interests …

I think the whole notion of a one stop shop is a good one…very good in theory but there are difficulties with it. I don’t think there is a lot of thought put into it at this stage … people making policy decisions do not understand the problems, they do not understand what a CLC does and they do not understand the issues with clients.

It is established in literature that a good relationship is essential to integration of services. Good relationships with other service providers are welcomed by CLCs but differences in ethical requirements must be addressed satisfactorily:

I think the community legal sector is staunchly independent and it would resist any attempt for a consortium to move in and not just co-locate but sort of suggest that you two need to get along and this is what you must do … a mandatory partnership … I expect that is something we would resist … we look forward to a relationship … so long as our independence is respected.

Independence is thus a condition for integration of services or co-location on the part of CLCs. Some participating CLC staff members were of the opinion that the likelihood of conflict of interests makes it impossible to co-locate or integrate legal and ADR services.

I’m pretty sure that we would not support having particular programs within the legal service being offered to clients just because of their perception of conflict…we are very very conscious of that … we would not be supportive of an ADR Centre here but having a relationship with an ADR service will be great but not co-located.

Some participating CLCs were more positive. For example, one of the participating CLCs, already part of an integrated service with a community health service, saw no problems with co-location but highlighted the need for trust between various agencies:

It would be wonderful to have a dispute settlement centre within the centre for the community … you need to build the relationship. But again it would be about ensuring that we trust the big agencies.

In a CLC where collaboration with an ADR service provider exists, co-location was not viewed as problematic:

I saw that [co-location] as a viable proposition … we are having them come here. We are hoping they will come here on a regular weekly basis.

I think it [co-location with an ADR service provider] would work well … it would be less adversarial … and the problems would be more easily
resolved and more effectively resolved ... with the current system...there is a lot of paper work involved. If we had in house facilitators to negotiate a resolution to say a family law matter, I think it would be better than writing letters. You take a harder line when you write a letter ...because you do not have a mediator.

Co-location is thus not impossible, but there is a need to work out details to maintain the integrity of each profession and to ensure appropriate services are delivered to clients. There is a lot to learn from collaboration between FRCs and CLCs and the relationship between the Dispute Settlement Centre Victoria and some participating CLCs. Even where CLCs have identified conflict of interests and confidentiality as impediments, they are open to discussion on the issues:

...how important is it [conflict of interests] really? ... Lawyers will talk about it a lot ... part of me wonders what the actual risk is, what the actual detriment is.

I don't know how to get around the issue of confidentiality if you have the lawyer [providing legal assistance to parties in an FDR with an FRC] involved in mediation. In some respects, it is no different to situations where you have been in court and you have had a number of pre-court discussions and the matter has failed to resolve, you have gone into court, you are privy to all of that but as a matter of practice you treat those pre-discussions as without prejudice negotiations. That is the only way I can think to get around it. Civil Lawyers ... [and] Family Lawyers do it all the time ...

Closely related to the issue of trust is the issue of alienation of rights and delivery of justice to CLC clients. CLC lawyers act as advocates for their clients so that even where services are co-located, the willingness of CLC lawyers to refer clients to the service may be impacted by perception that ADR would not deliver justice or may lead to their clients forfeiting their legal rights leading to more disadvantage for already disadvantaged clients.

It is important to note that some of the participating CLCs are to an extent integrated and co-located services. One is integrated and co-located with a health service and the other is part of another program. In relation to how they have been able to work together interviewees said:

So long as everyone is aware they are separate services ... so long as people understand if they go to ADR they are not seeing Lawyers ...same as here with their housing, they need to understand they are not seeing Lawyers; you need to be clear to them ...

If the mediation services were to be conducted by another service but co-located, I think it can work but it needs to be made clear to the client that the two organisations are not linked ... I think it is a possibility provided the structures are right

In terms of benefits of co-location to a legal service, one CLC Lawyer said:
...ideally we would prefer [those] who have already made contact with agencies and people and individuals at the centre who indicate certain issues to be referred to us so that we are taking up a particular legal problem on their behalf.

This makes the work of CLCs easier and allows CLCs to assist more clients who would not ordinarily approach a legal service for assistance.

5.5.4. Funding Issues

Lack of adequate funding has always been a barrier to provision of services for CLCs. What CLCs do or are able to do is very much dependent on the availability of funds. Where CLCs are open to developing some form of collaboration or co-location, funding was identified as a possible barrier.

...there was a decision to restructure and try to seek further and better funding so we could meet the needs and do some early intervention and prevention work ... there [are] issues around lack of infrastructure, the lack of support, the fact that everyone is too busy to think strategically to develop collaboration and partnerships with other agencies with the limited resources ... So funding is critical and something we struggle with all the time ...

Apart from the huge costs [of co-locating], and CLCs usually have extremely limited funding, I think it would have to be [considered] at a policy level, personally, I think it has potential value.

CLCs definitely see some value in co-locating services, but are restrained by limited funding and associated costs. The issue of co-location is worth looking at in order to improve access to services for members of the community. Another issue relates to policy but that, as discussed above, is something that stakeholders are able to work through.

Recommendation 8:

Collaboration between CLCs and ADR stakeholders should be encouraged and/or strengthened in order to improve access to ADR services and justice for community members.
Recommendation 9:

Collaboration and Co-location should involve discussion around the interests and obligations of each profession/field involved to ensure those interests and obligations are adequately catered for.

Recommendation 10:

A co-location pilot should be funded to determine whether perceived benefits of co-location of ADR and CLC services would materialise to improve access to justice for disadvantaged members of the community.

5.6. Expansion of ADR Services

5.6.1. CLC Attitude towards Initiatives Expanding ADR

As discussed above, both the State and Federal governments have embarked on expansion of ADR both at the State and Commonwealth levels. CLCs' attitude towards the expansion varies. Most participating CLCs welcomed the expansion of ADR but raise issues relating to power imbalance, justice for disadvantaged members of the community, compulsoriness, and structure. Some of these have been discussed above. Most CLCs see a role for themselves in the expansion of ADR:

*From my management point of view, I think it [expansion of ADR] is a good idea ...so long as it is not being abused or something that is compulsory ...more solutions the better.*

*Something I would welcome. Speak on the Family Law System ...I just think there are a lot of hurdles in the way at the moment. What we are doing at the moment is quite groundbreaking.*

*It [ADR] is an avenue for justice, but if it is a compulsory avenue that everyone is put onto then its capacity to do justice is [limited] ...Something that is more flexible, something that is less bureaucratic and I think the formalities of the law and the institutions of court makes it difficult for people ...I think a notion of justice that is evolving and dynamic is more likely to be seen out of the expansion of ADR. If it can be done in a way that respects people's differences and protects them against ...the overbearingness of the relationship that precedes them going into [it] ...I*
hope some of the good qualities ...can be preserved as it gets sort of mainstreamed and pumped out in institutions.

The success of the expansion for some CLCs is dependent on whether it enhances access justice for members of the community and delivers a good outcome for the disadvantaged. The basis of any initiative should be the best interest of the community. If ADR does that, and there is sufficient funding, then the initiatives would be supported:

...but we need to be strategic in locating where the funding opportunities are to do the things we want to do...it is for the people to lead and the leaders to follow ...good ideas, good processes, good programs work because they are what the community need ...so we will look at what they have got in regard to funding opportunities and see if it aligns with what we are doing or what we are trying to do... we need to be able to meet community expectation or else you lose trust.

Availability of funding, ‘systemic acknowledgement of the work of CLCs’ and opportunities to learn from other disciplines are incentives for CLCs to participate in the expansion of ADR. Very critical is also the need to support CLC initiatives so that CLCs can continue to be a relevant part of the legal system and access to justice agendas:

I think our relationship with institutions such as the courts are improved if we can assist with that kind of work simply because we are diverting work that would simply come before the court ...because of that we have a system acknowledgement of the work the CLC is doing and ... it can only improve our survival chances into the future ...I think it [expansion] is something that CLCs are welcoming. We realise that it is something we want to be part of. From a financial point of view, we realise it could lead to funding. On a very base level it is very advantageous to us ...for our clients. I think our involvement in that kind of work benefits them, there are improved outcomes and I think CLCs are quite uniquely positioned to assist with that kind of work for the reason that we identify when it is not appropriate and therefore matters with merit are getting to court ...I think it is very advantageous to see how other disciplines deal with the same problem. It is very advantageous to us to see that a legal problem is capable of being remedied by a non-legal action...because of the complexities of the problems our clients face, it is artificial to say one kind of result will assist, one means of fixing the problem will help. It can be legal but a variety of social alternatives and this CLC is open to that.

Participating CLCs generally saw a role for CLCs in the expansion: that of providing legal advice to ADR participants. As discussed above, CLCs are of the opinion that availability of, and access to, legal advice is critical to the ability of ADR to deliver justice or a fair outcome to parties:

I think the task of giving advice and educating is bigger than it was before because people are being forced into either judge run thing that they are
not familiar with or a mediator run situation that again, they don't have much experience of...

...explaining what the boundaries are, what the law generally would say, giving an idea of what would happen if they can't negotiate ...what the outcome might be ...trying to reduce how much fear that person has got about it...in some cases trying to get the person to talk to someone else who had more communication expertise or cultural expertise to brief the person on what it is going to be like and to try and prepare them.

I’m sure we [CLCs] will have a role in terms of we are part of the legal system ...advising clients on what the benefits were and also basically what it is ...if lawyers are mediators [and] there are lawyers who are planning to be trained, CLCs would be great at it.

In addition to the legal advice role, there is also room for CLCs to organise training for lawyers to increase awareness of ADR among lawyers:

I still have a concern that there are many lawyers in CLCs who do not understand there is an alternative to the court or alternatively there is no point in going to court.

An innovative suggestion was that CLCs may be involved in expanding ADR and improving its capacity to achieve justice if unrepresented parties were to be referred to a legal service for the service to attempt to resolve the matter without litigation:

For instance, the civil jurisdiction of the Magistrate Court ...should [have] much more jurisdiction to refer people to a legal service. I think these people should be referred to a legal centre and you could probably resolve that matter ...my argument is that a lot of low income people dispute liability because they cannot afford to pay ...they do not know what other rights they have...but you don’t have to put someone through a court case ...for a lot of civil matters there should be a referral back [to legal centres]. You can use ADR or EDR; people need to know their rights.

I think the role of CLCs in explaining to people when a court case is in their interest and when it is not, could save government a fortune and could save a lot of grief for low income earners. If ADR is seen as limiting adversarial proceedings to only those matters where it is unavoidable, then I think it has an enormous role, and I think CLCs have an enormous role in reducing adversarial proceedings.

There are thus opportunities to explore how CLCs might carry out the function of expanding ADR: referral to a CLC by the court for an unrepresented party to explore what other options that party might have; providing pre- and post-ADR advice to disputants; raising awareness of ADR amongst clients and lawyers; educating lawyers and CLC workers on ADR, including information on available processes, how to use them, and the benefits of ADR processes; educating the
community on the desirability of non-adversarial processes; and educating the community generally on how to resolve disputes without going to court.

5.6.2. ADR Training for CLC Staff

On the relevance of ADR for CLC staff, most participating CLCs were of the opinion that some form of ADR training would benefit CLC staff including on alternative processes to court and on ADR benefits. Better training on how to use non-court jurisdictions was also considered to be very useful.

Some CLCs provide referral training for their intake staff.

...often CLCs train front of office staff but do not do training in referrals ...I have done some quite significant training of staff...we do it regularly...every six months we have referral training...because agencies change ...

Some interviewees agreed with the need for training for CLC volunteer lawyers to increase their awareness and use of ADR processes.

...even getting our night-time volunteers ...to understand there is an alternative to the courts ...Looking for alternatives to the court that are realistic and viable...I still have a concern that there are many lawyers in CLCs who do not understand there is an alternative to the court or alternatively there is no point in going to court.

One interviewee commented on the need to change mindsets about how to meet clients’ legal needs:

It seems to me one of the challenges is trying to get people to think that might be a better way to go, not just in neighbourhood disputes and fencing, but potentially in some elements of family law too. It is ... the capacity to get that person to take that step back from thinking there is an arbiter outside who is going to fix it all up. I would imagine that that is an area where some legal training could be useful because it is difficult if someone has a really strong view ...

Recommendation:

See recommendations 1-10 above.
6. Conclusion

CLCs are supporters of ADR with the level of support varying from one CLC to the other. Participating CLCs raised issues about ADR and its ability to improve access to justice including cost; compulsoriness of ADR; power imbalances; and fair process. ADR should cost little or nothing and parties should have a choice as to whether they want their dispute referred to ADR or not. ADR should have the capacity to provide procedural justice; it should address power imbalances and all parties should be informed of their legal rights prior to the process.

CLCs are willing to use ADR processes and collaborate with ADR service providers so long as their independence is maintained and they can continue their goal of providing access to justice, including fair outcomes to their clients. They also see a role for CLCs in the expansion of ADR provided ADR addresses power imbalance and provides opportunities for participants to receive legal advice or assistance which may be crucial to the fairness of the outcome.

There are divergent views on co-location with ADR service providers; some CLCs see this as a viable opportunity but others do not. In relation to expansion, some query whether expansion of ADR is only a cost cutting venture which is unconnected with the goal of access to justice. This distinction, it is thought, would determine whether ADR could be said to improve access to justice for disadvantaged members of the community.

In conclusion, CLCs are open to ADR and more work needs to be done in the area of training for CLC staff. The potential of CLCs to improve the use of ADR within the community should not be ignored. Recommendations identified above, if adopted will lead to improved access for disadvantaged members of the community.
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Research Project
Improving Access to Justice: Alternative Dispute Resolution and Community Legal Centres

QUESTIONS FOR CLC DIRECTORS

The interview will be structured around questions below. However, we are interested in your views about the topic of the research and so these questions will form the starting point of the discussion.

1. How would you describe clients who access the CLCs services?
2. Can you describe services provided by the CLC?
3. Does the Centre provide Alternative Dispute Resolution services to clients? If yes, what type of service(s)?
4. If answer to Q3 is No, has the Centre provided such services to clients in the past? If yes, what type of service(s) and why was it discontinued?
5. Has the Centre been involved in setting up ADR services elsewhere?
6. If no ADR service provided, does the center provide information about ADR to clients? If yes, what type of information?
7. At what stage is the information provided?
8. Is the Centre aware of ADR service providers such as the DSCV, Relationships Australia, Family Mediation Centre, Roundtable Dispute management, VCAT mediation services etc?
9. Does the centre discuss advantages of ADR processes with clients?
10. Are clients actively encouraged to resolve disputes through ADR processes?
11. Does the Centre provide referral information to clients about ADR?
12. If yes, to which ADR service provider are clients referred?
13. Is there a relationship between the Centre and an ADR service provider?
14. If yes to question 13, what type of relationship is it?
15. Are ADR and CLC services collocated in this centre?
16. Is there information about ADR on the Centres website?
17. What kind of matters does the Centre commonly deal with?
18. Does the centre seek to recruit staff trained in Alternative Dispute Resolution processes/or with ADR skills?
19. Does the Centre prefer to assist clients to resolve their disputes through ADR processes rather than through court processes?
20. Where the Centre is in a position to make a choice of process, what informs the decision? Are there any set criteria for determining which process is suitable?
21. What difference would it make to the work of the Centre if ADR services were to be provided directly to clients?
22. What are your views on the expansion of ADR?
APPENDIX B

QUESTIONS FOR INTAKE/ADMIN STAFF/PRINCIPAL SOLICITORS

The interview will be structured around questions below. However, we are interested in your views about the topic of the research and so these questions will form the starting point of the discussion.

1. How would you describe clients who access the CLCs services?
2. What sort of issues do clients contact the CLC about?
3. Can you describe services provided by the CLC?
4. Do clients ask about ADR services when they contact the Centre?
5. Does the Centre provide Alternative Dispute Resolution services to clients? If yes, what type of service(s)?
6. If no ADR service provided, does the center provide information about ADR to clients? If yes, what type of information?
7. At what stage is the information provided?
8. Are clients enthusiastic about ADR when ADR information is provided or do they prefer to have their disputes resolved through courts?
9. Is the Centre aware of ADR service providers such as the DSCV, Relationships Australia, Family Mediation Centre, Roundtable Dispute management, VCAT mediation services etc?
10. Does the centre discuss advantages of ADR processes with clients?
11. Are clients actively encouraged to resolve disputes through ADR processes?
12. Does the Centre provide referral information to clients about ADR?
13. If yes to Q 12, to which ADR service provider are clients referred?
14. Is there information about ADR on the Centre's website?
15. Does the Centre prefer to assist clients to resolve their disputes through ADR processes rather than through court processes?
16. Where the Centre is in a position to make a choice of process, what informs the decision? Are there any set criteria for determining which process is suitable?
17. What are your views on the expansion of ADR?