



NATIONAL **PRO BONO** RESOURCE CENTRE

# Alternative Dispute Resolution and the possible role of pro bono lawyers

## Discussion paper

October 2011

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## Contents

Acknowledgments.....	4
1 Background .....	4
2 The trend towards increased use of ADR .....	5
2.1 Cost of litigation.....	5
2.2 Positive views on the utility of ADR for disadvantaged clients.....	6
2.3 Government sponsorship of the concept of ADR .....	7
2.3.1 New legislative requirements to take steps to resolve disputes before going to court in civil matters.....	8
3 The ADR landscape .....	9
3.1 Mediation.....	10
3.2 Conflict management.....	10
3.3 Who are mediators? .....	11
3.4 Accreditation requirements for mediators.....	12
3.4.1 Family dispute practitioners .....	13
3.5 Existing free ADR schemes and services .....	13
4 The role of lawyers in ADR.....	14
4.1 Lawyers in the role of ADR practitioner.....	14
4.1.1 Queensland Public Interest Law Clearing House (QPILCH) .....	14
4.1.2 Public Interest Law Clearing House (PILCH (VIC)) .....	16
4.1.3 LEADR.....	16
4.1.4 LawWorks UK .....	17
4.2 Lawyers assisting party to the ADR.....	18
4.3 Lawyers delivering community legal education on ADR.....	19
5 Issues in the use of ADR for people experiencing disadvantage .....	19
5.1 Can unequal bargaining power between parties to ADR be overcome?.....	19
5.2 Will use of ADR have a negative impact on public interest litigation? .....	20
5.3 Can ADR be used appropriately in disputes involving family violence? .....	21
5.4 Is there bias (real or perceived) when only one party can afford to pay for mediation .....	22
5.5 Is there a way of using lawyers as both advocates for a client and ADR practitioners in the same matter? .....	23
6 The role of pro bono – Identifying the gaps .....	23
7 Possible roles for pro bono in ADR .....	25
7.1 Redressing unequal bargaining power situations.....	25
7.2 Complex civil proceedings with self-represented litigants .....	25

7.3	Disputes within and between Indigenous communities.....	26
7.4	Disputes within and between not-for-profit organisations.....	27
7.5	Small claims pilot project .....	27
8	Preliminary conclusions .....	28
9	Summary of questions for comment .....	29

## Acknowledgments

This paper was prepared by the National Pro Bono Resource Centre with the assistance of the following who are thanked for their contributions and comments:

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**Serena Beresford-Wylie** (NADRAC Secretariat)

**Allison Wood** (NADRAC Secretariat)

**Natasha Mann** (Director, ADR Directorate & Community Justice Centres, NSW Department of Justice and Attorney General)

**Fiona Hollier** (Chief Executive Officer, LEADR, and Vice Chair, Mediator Standards Board)

**Michelle Sindler** (Chief Executive Officer, Australian International Disputes Centre)

**Alan Kirkland** (former CEO, Legal Aid NSW)

**Monique Hitter** (Director for Civil Law, Legal Aid NSW)

**Philip Field** (Ombudsman, Banking and Finance, Financial Ombudsman Service)

**Lavinia Shaw-Brown** (LawWorks Mediation, UK)

**Iain McCowie** (Solicitor and Coordinator, Self Representation Service (Courts), QPILCH)

**Teresa Cianciosi** (Manager, LIV Legal Assistance Scheme, PILCH (VIC))

**Juanita Pope** (Senior Lawyer, PilchConnect, PILCH (VIC))

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## 1 Background

The National Pro Bono Resource Centre (the Centre) is an independent, non-profit organisation that aims to improve access to justice for socially disadvantaged and/or marginalised persons in Australia through the promotion, development and support of professional pro bono legal services. Improved dispute resolution increases access to justice.

With the rise in the use of Alternative Dispute Resolution (ADR) and the increasing expectation that parties to a dispute will consider and use ADR before initiating or proceeding with litigation, this paper explores the role that pro bono lawyers might play in assisting in the ADR process.

The Centre has consulted legal referral and service providers (Legal Aid NSW, Bunbury Community Legal Centre, Law Access NSW and Public Interest Law Clearing House (VIC) Incorporated (PILCH VIC)), mediation accreditation bodies (LEADR, AIDC), those involved in delivering government and industry sponsored ADR schemes (Community Justice Centres NSW, Financial Ombudsman Service and Credit Ombudsman Service Limited), and pro bono mediation schemes (Queensland Public

Interest Law Clearing House Incorporated (QPILCH), Community Mediation Service (CMS) and Law Works (UK).

The information collected through research and consultation has raised series of issues (Section 5) and the need for further information and comment. Accordingly the Centre has created a Discussion Paper that outlines the ADR landscape, discusses the role of lawyers in the process both as ADR practitioners and as lawyers acting for parties to a dispute, identifies issues arising from its consultations, suggests possible roles for pro bono lawyers in ADR and seeks further input from interested parties through setting out a series of 10 questions upon which it seeks comment in Section 9.

**Interested parties are invited to submit comments on the Discussion Paper by 1 December 2011, in particular on the preliminary conclusions in the paper and in response to the questions set out in Section 9.**

The Centre proposes to publish a final paper on the possible role of pro bono lawyers in the ADR process in 2012.

## 2 The trend towards increased use of ADR

Without making any judgments about the utility of ADR for disadvantaged clients, there is evidence pointing to ADR becoming more frequently used as a way of resolving disputes. There are a growing number of voluntary and mandatory ADR schemes (see Section 3.5 of this paper), and a number of factors which make it more likely that ADR will be used, specifically: the cost of litigation, positive views on the utility of ADR for disadvantaged clients, and continuing government sponsorship of the concept of ADR.

### 2.1 Cost of litigation

ADR is promoted as cheaper, quicker and therefore a more accessible path to justice. For example, in its review of the Western Australian criminal and civil justice system, the Western Australian Law Reform Commission concludes that: "Litigants often prefer settlements achieved through ADR because it is faster and less expensive than waiting for a decision by a judge".<sup>1</sup>

The cost of litigation is particularly prohibitive for disadvantaged clients. The Law Society of NSW *Access to Justice* Report stated that the cost of calling expert evidence represents a significant barrier for disadvantaged people.<sup>2</sup> Roundtable participants at a Law and Justice Foundation consultation also commented that the risk of having a costs order made against an unsuccessful

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<sup>1</sup> Western Australia Law Reform Commission, *Review of the Criminal and Civil Justice System* (1999), para 11.4

<sup>2</sup> Law Society of NSW, *Access to Justice Final Report*, December 1998, p. 38, referred to in consultations with the Law Society of NSW quoted in Law and Justice Foundation, *Access to Justice and Legal Needs* (2003), para 3.7.

litigant presents a significant disincentive for disadvantaged people to pursue civil claims, particularly those which may be test cases or cases of public interest.<sup>3</sup>

In addition to the financial costs, there are often high personal and emotional costs to litigation, with the adversarial nature of litigation potentially damaging personal relationships. The effect of delays in the process can negatively impact on a litigant's expectation or preparedness to pursue matters through the courts.<sup>4</sup>

Litigation also has a cost to the public purse, as observed by the Victorian Law Reform Commission: "Governments cannot reasonably be expected to provide unlimited publicly funded resources for the adjudication of disputes, particularly private disputes that do not have significance beyond the interests of the individual parties".<sup>5</sup>

## 2.2 Positive views on the utility of ADR for disadvantaged clients

There are strong advocates of ADR generally, for example former High Court Justice, Michael Kirby AC CMG: "I am convinced that ADR has a glowing future in Australia. That future will be assured if we are conscious of the abiding need for effective courts and judges, and of the concurrent provision of alternative ways of resolving disputes that help parties to a just outcome more quickly, more cheaply, by their own empowerment and without some of the downsides that court proceedings can entail. What is needed is not a 'starry-eyed' embrace of a new fad that will replace the courts, but the best utilisation of new techniques that will assist our society and those with disputes to lawful, just and economical solutions to the conflicts that inevitably arise."<sup>6</sup>

The Australian Lawyer Alliance described the benefits of ADR as follows:

- It is more cost effective for parties
- It provides a more flexible forum for people to express their concerns and grievances
- Parties are able to tailor the resolution of their issue to their individual circumstances
- Alternative dispute resolution proceedings can remain confidential
- Other parties can be present or participate if required; and
- It can refine issues in dispute.<sup>7</sup>

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<sup>3</sup> Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003 quoted in Law and Justice Foundation, *Access to Justice and Legal Needs (2003)*, para 3.8.

<sup>4</sup> Submission from Peter Fosterbunch, Legal Access Services Pty. Ltd., Submission from the NSW Attorney Generals Department, Alternatives to traditional approaches in Civil Law Working Group Discussion, Access to Justice Roundtable Proceedings of a Workshop July 2002, Law and Justice Foundation of NSW, April 2003, quoted in Law and Justice Foundation, *Access to Justice and Legal Needs (2003)*, para 3.5.

<sup>5</sup> Victorian Law Reform Commission, *Civil Justice Review (2008)*, p.72, quoted in NSW Government Attorney General's Department, *ADR Blueprint Discussion Paper (2009)*, p.20.

<sup>6</sup> The Hon Michael Kirby AC CMG, 'Alternative Dispute Resolution: A Hard-Nosed View of its Strengths and Limitations' (2009) 28 *The Arbitrator and Mediator* 1 at p.1.

<sup>7</sup> Australian Lawyers Alliance, Submission 27, p.16, quoted in Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.22

A paper published by the Federation of Community Legal Centres Victoria, which expresses concern about the utility of ADR for CLC clients, nevertheless identified a number of potential benefits of ADR specifically for people experiencing disadvantage<sup>8</sup>:

- By promoting settlement prior to hearing, legally-assisted ADR at an early stage can reduce court costs and avoid unnecessary legal fees.
- ADR provides a valuable opportunity to emphasise their clients' vulnerability which can be a useful 'reality check' and can help persuade creditors to modify unrealistic demands.
- Clients who cannot afford to engage private practitioners can often achieve better outcomes by participating in legally assisted mediation than they would by appearing unrepresented in court.
- ADR is often a less stressful option for CLC clients who may be experiencing multiple forms of disadvantage which makes them particularly vulnerable to the emotional strain of litigation.

The experience of the Community Mediation Service (CMS) at Bunbury Community Legal Centre in Western Australia is that, unlike the Courts, the mediation process has the potential to offer an all-encompassing service because is not limited by jurisdiction. Mediators at the CMS can deal with issues that include workplace, neighbourhood and community disputes, as well as family law disputes involving parenting issues and property settlements (see Section 5.3 for more information on the work of the CMS). The mediators also have the option of assisting parties on the day to prepare undertakings which are later lodged with the Court, thereby freeing up Court time and allowing the Magistrates to deal with the more difficult cases<sup>9</sup>.

### 2.3 Government sponsorship of the concept of ADR

Federal, state and territory governments have been strong supporters of ADR at least since the mid 1990s. A key body that has provided this support and advocacy is the National Alternative Dispute Resolution Advisory Council (NADRAC), which is an independent, non-statutory body funded by the Australian Government Attorney-General's Department to provide policy advice to the Australian Attorney-General on the development of ADR, and promote the use and raise the profile of ADR. NADRAC was established in October 1995 and had its origins in the 1994 report of the Access to Justice Advisory Committee chaired by the Hon Justice Ronald Sackville, *Access to Justice - an Action Plan*. This report recognised the need for a national body to advise the Government, and federal courts and tribunals, on ADR issues with a view to achieving and maintaining a high quality, accessible, integrated federal ADR system.<sup>10</sup>

The Report of the Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice* (December 2009) endorsed efforts to enhance the use of ADR as an alternative means of

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<sup>8</sup> Federation of Community Legal Centres Victoria, *Activist ADR: Community Lawyers and the New Civil Justice*, October 2010, Ch.4

<sup>9</sup> Email from Sandra Hall (Mediation Coordinator at the CMS) 27 July 2011

<sup>10</sup> For more information about NADRAC see the NADRAC website at <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Home>

delivering justice. The Report encourages all courts to consider, introduce and expand ADR options with clear criteria, guidelines and methods of referral. The Report makes reference to the findings and recommendations of a NADRAC inquiry that was due to be released around the same time.<sup>11</sup>

NADRAC released its report *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* in September 2009 following an inquiry into the use of ADR in the federal civil justice system. The Report contains 39 recommendations and identifies strategies to remove barriers and provide incentives for greater use of ADR in the federal civil justice system, including a recommendation that legislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.<sup>12</sup>

Dispute resolution provisions contained in the *Family Law Act 1975* have already imposed a requirement since July 2007, that an individual who wants to apply to the court for a parenting order must first attend family dispute resolution, and obtain a certificate from an accredited family dispute resolution practitioner confirming that an attempt at family dispute resolution was made. There are some exceptions to this requirement, such as cases involving family violence, child abuse or urgency.

### *2.3.1 New legislative requirements to take steps to resolve disputes before going to court in civil matters*

In recent times, the Commonwealth, New South Wales and Victorian parliaments have seen legislative attempts to require parties to a dispute to attempt ADR before commencing court proceedings.

On 1 August 2011 the *Federal Civil Dispute Resolution Act 2011* came into force requiring parties to take “genuine steps” to resolve civil disputes before proceedings are commenced in the Federal Court or the Federal Magistrates Court. When commencing proceedings in court, parties will be required to file a statement outlining what steps they have taken to resolve their dispute or, if they have not taken any steps, the reasons why. The court will be able to take into account the failure to take steps when exercising its existing case management directions and costs powers.

Similar provisions were introduced in NSW and Victoria but have recently been postponed (in NSW) and repealed (in Victoria) following a change in government in those jurisdictions.

Amendments to the *NSW Civil Procedure Act* which became effective 1 April 2011 required parties in a civil dispute to take “reasonable steps” to resolve the dispute, or narrow the issues, before they filed in court. In a media release explaining the postponement of the reforms, NSW Attorney General, Greg Smith SC explained that concerns had been raised by a number of key stakeholders that the provisions might have unintended consequences and that “compliance with pre-trial obligations should reduce, not add to, the cost of resolving disputes”<sup>13</sup>. He said that the

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<sup>11</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.35

<sup>12</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Recommendation 2.1 – Pre-action requirement, p.35

<sup>13</sup> Hon Greg Smith SC MP, *NSW Government to Postpone Pre-litigation Reforms*, Media Release 23 August 2011

postponement would enable NSW to monitor the success of the similar Federal provisions to ensure this was the case.

The pre-litigation requirements in Victoria, which were introduced in 2010, were repealed on 29 March 2011. The current Parliament has taken the view that these requirements "would add unnecessarily to the costs of resolving a dispute and make it more difficult for disputants to access the courts"<sup>14</sup>, and they provide "an opportunity for disputants who were not prepared to negotiate in good faith to delay a settlement or decision and thereby prevent or delay disputants with legitimate claims from gaining access to the Courts".<sup>15</sup> The Attorney General, Hon. Robert Clark MP, said "the Government's view, and the view of many practitioners, is that to seek to compel parties to comply with similar pre-litigation requirements through heavy handed provisions, will simply add to the complexity, expense and delay of bringing legal proceedings".<sup>16</sup> Under amendments to the *Civil Procedure Act 2010* (Vic) which commenced 30 March 2011, the courts have power to make rules with respect to any mandatory or voluntary pre-litigation processes.

### 3 The ADR landscape

There is a vast range of ADR services within the civil justice system, both outside and within courts and tribunals. The kind of ADR processes provided varies greatly. The main types of ADR are mediation, conciliation, arbitration and expert referral.<sup>17</sup> Differences can be identified based on jurisdiction, location, the way in which services are provided, their quality, and how enmeshed ADR processes are in the litigation process.<sup>18</sup>

ADR can occur by way of court order, or encouragement, and by choice, and is delivered through one of three mediums: a private mediator or arbitrator; a court authorised (or court connected) scheme; or through community-based services.<sup>19</sup> Legal professional associations also provide avenues for legal practitioners to deliver or access ADR services. The Law Society of NSW, for example, offers: accreditation through the Law Society Mediation Program; access to experienced commercial arbitrators; nominations to Supreme, District and Local Court arbitration panels; and a low-cost Early Neutral Evaluation Service.<sup>20</sup>

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<sup>14</sup> Civil Procedure and Legal Profession Amendment Bill 2011, Explanatory Memorandum

<sup>15</sup> Civil Procedure and Legal Profession Amendment Bill 2011, Explanatory Memorandum

<sup>16</sup> The second reading speech of the Attorney General, the Honourable Robert Clark MP on the Civil Procedure and Legal Profession Amendment Bill 2011 (Vic) (10 February 2011)

<sup>17</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.20

<sup>18</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 5, para 5.1

<sup>19</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.20

<sup>20</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.21

### 3.1 Mediation

This paper focuses more heavily on mediation than other forms of ADR because it appears to be the most commonly used form of ADR for the types of clients and matters that might attract pro bono assistance.

Mediation is a process in which the participants, with the support of the mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision.<sup>21</sup>

Two types of mediation that may be useful for cases involving disadvantaged parties are shuttle mediation and co-mediation. Shuttle mediation is where the mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the mediation process.

Co-mediation uses two dispute resolution practitioners (mediators) who can bring different expertise and perspectives (for example male/female; Aboriginal/non-Aboriginal). The co-mediators play well-defined and mutually understood complimentary roles as well as providing checks, balances and support for each other, and effective debriefing and planning. Co-mediation approaches also avoid a focus by parties on a sole expert and allow one mediator to observe and identify issues while the other is implementing the process.<sup>22</sup>

NADRAC has observed that early mediation is likely to be more facilitative and interest-based, while mediation practised shortly before or after proceedings have commenced is more likely to be interventionist and rights-based. The latter may be better understood as 'facilitated settlement negotiation' than 'mediation'.<sup>23</sup>

### 3.2 Conflict management

Another model for dispute resolution which is being successfully utilised by community ADR services and can incorporate all types of ADR is Conflict Management. Conflict Management is the overall management of a community dispute by a neutral third party, from the referral stage to the ultimate resolution. For example Community Justice Centres NSW has facilitated the Conflict Management process for resolving disputes within and between Indigenous communities.<sup>24</sup>

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<sup>21</sup> Australian National Mediator Standards, *Approval Standards*, November 2008 at <http://msb.org.au/sites/default/files/documents/Approval%20Standards.pdf>

<sup>22</sup> NADRAC, *Solid Work You Mob Are Doing* at [www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_SolidWorkyouMobaredoingReport](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport)

<sup>23</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 5, para 5.1, footnote 116

<sup>24</sup> For a case study example of an Indigenous community dispute that was resolved with the involvement of Community Justice Centres NSW using conflict management see NADRAC, *Solid Work You Mob Are Doing*, Chapter 4 at

Community Justice Centres NSW describes the objective of Conflict Management as being “to resolve the disputed issues, by agreement, to the satisfaction of the disputing parties. The conflict manager cannot adjudicate or direct the parties but may make decisions on process and procedure with the prior consent of both parties.”<sup>25</sup>

The methods, techniques and processes used in conflict management may include any/all methods of ADR including the conduct of interviews, negotiation, the conduct of meetings, facilitation, mediation (including co-mediation), arbitration, facilitated negotiation, referral for specialist advice, decision making on processes and procedure, lobbying and/or liaising with other stakeholders, neutral supervision and advice/guidance on process and procedure.

### 3.3 Who are mediators?

Mediators come from diverse backgrounds and many do not have any legal training. Non-lawyer mediators tend to offer specialist skills, for example in family dispute resolution, psychology, property experts such as builders, surveyors, and valuers. The CEO of LEADR (Association of Dispute Resolvers), Fiona Hollier, estimated that approximately half of their 1574 financial members Australia-wide are lawyers. Of those who provided information about their legal qualifications on their membership forms, there were 185 solicitors, 85 barristers, and another 147 who indicated they had a law degree. Of the 600 LEADR financial members in NSW, 62 indicated that they would be interested in doing pro bono mediation work.<sup>26</sup>

A concern that has been raised by advocates of disadvantaged clients is that many of the mediators that deal with their clients’ cases are not legally trained and, more importantly, are not familiar with the issues which complicate the legal problems of low income parties. For example, Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre in Victoria) notes that many mediators at the Victorian Civil and Administrative Tribunal (VCAT), Financial Ombudsman Service, and Credit Ombudsman Service Limited are not legally qualified. She explains that where one party to a mediation is a credit provider who is usually aware of their legal rights and process, and the other party is a low income consumer, the outcome is usually in the credit provider’s favour because the mediator does not have the legal expertise to explain the strengths and weaknesses of the consumer’s case to them.<sup>27</sup> (See also Section 5.1 on unequal bargaining power)

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[www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_SolidWorkyouMobaredoingReport](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport)

<sup>25</sup> [http://www.lawlink.nsw.gov.au/lawlink/community\\_justice\\_centres/ll\\_cjc.nsf/vwPrint1/CJC\\_aboutus#h2](http://www.lawlink.nsw.gov.au/lawlink/community_justice_centres/ll_cjc.nsf/vwPrint1/CJC_aboutus#h2)

<sup>26</sup> National Pro Bono Resource Centre (NPBRC) meeting with Fiona Hollier (CEO, LEADR) at LEADR, 15 March 2011

<sup>27</sup> NPBRC telephone interview with Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre, VIC), 16 August 2011

### 3.4 Accreditation requirements for mediators

The National Mediator Accreditation System (NMAS) commenced operation on 1 January 2008. It is an industry based scheme which relies on voluntary compliance by mediator organisations, called Recognised Mediator Accreditation Bodies (RMABs), which agree to accredit mediators in accordance with the requisite standards. An independent industry body known as the Mediator Standards Board (MSB), which was launched in September 2010, is responsible for developing and maintaining the NMAS. MSB members include Recognised Mediator Accreditation Bodies, Alternative or Appropriate Dispute Resolution (ADR) membership organisations, law societies, courts, government agencies, mediation training organisations and mediation centres.<sup>28</sup>

The industry developed nationally consistent accreditation standards in order to enhance the quality of national mediation services, build consumer confidence in ADR services, improve the credibility of ADR and help build the capacity and coherence of the ADR field<sup>29</sup>. To be accredited by a RMAB, a mediator must have completed a mediation education and training course comprising a program of a minimum of 38 hours in duration, with each course participant being involved in at least nine simulated mediation sessions, performing and being assessed in the role of mediator in at least three of the nine<sup>30</sup>.

To maintain their accreditation, mediators must, within each two-year cycle, provide evidence to the RMAB that they have:

- a) Sufficient practice experience by showing that they have either:
  - i) conducted at least 25 hours of mediation, co-mediation or conciliation (in total duration) within the two-year cycle; or,
  - ii) where a mediator is unable to provide such evidence for reasons such as, a lack of work opportunities (in respect of newly qualified mediators); a focus on work undertaken as a dispute manager, facilitator, conflict coach or related area; a family, career or study break; illness or injury, an RMAB may require the mediator to have completed no less than 10 hours of mediation, co-mediation or conciliation work per two-year cycle and may require that the mediator attend 'top up' training or reassessment; and,
- b) Have completed at least 20 hours of continuing professional development in every two-year cycle that can be made up as follows:
  - i) attendance at continuing professional development courses, educational programs, seminars or workshops on mediation or related skill areas as referred to in the competencies (see the Practice Standards) (up to 20 hours);
  - ii) external supervision or auditing of their clinical practice (up to 15 hours);
  - iii) presentations at mediation or ADR seminars or workshops including two hours of preparation time for each hour delivered (up to 16 hours);
  - iv) representing clients in four mediations (up to a maximum of 8 hours);

<sup>28</sup> Mediator Standards Board website at <http://www.msb.org.au/about-us/msb-members>

<sup>29</sup> For more information on the national accreditation standards see the NADRAC website at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR\\_NationalMediatorAccreditationSystem\\_NationalMediatorAccreditationSystem](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem)

<sup>30</sup> "Experience qualified" mediators, who have been assessed by an RMAB as demonstrating a level of competence by reference to the competencies expressed, are exempt from these requirements.

- v) coaching, instructing or mentoring of trainee and/or less experienced mediators (up to 10 hours);
- vi) role playing for trainee mediators and candidates for mediation assessment or observing mediations (up to 8 hours);
- vii) mentoring of less experienced mediators and enabling observational opportunities (up to 10 hours).

### 3.4.1 Family dispute practitioners

A family dispute resolution practitioner operates under the *Family Law Act 1975* as an impartial third party and manages processes aimed at maximising participant self-determination while recognising the interests of others, especially children, directly affected by the dispute. Practitioners that wish to provide family dispute resolution and issue section 60I certificates under the *Family Law Act 1975* must meet Accreditation Standards set out in the Regulations.<sup>31</sup>

There are three pathways for family dispute resolution practitioners to meet the accreditation requirements:

1. completion of the full Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent); or
2. an appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units from the Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent); or
3. included in the Family Dispute Resolution Register before 1 July 2009 and competency in the three specified units (or higher education provider equivalent).

## 3.5 Existing free ADR schemes and services

There are a number of existing government and industry sponsored ADR schemes providing free ADR services. NADRAC found that the growth in ADR processes outside the litigation system in Australia has emerged in four main areas – the community, family, environmental and business sectors. These processes are responsible for the resolution of many disputes that would otherwise result in litigation.<sup>32</sup>

Free ADR services are provided by government schemes (for example Fair Work Australia, Human Rights Commission and state anti-discrimination boards) or industry ombudsman schemes (for example the Financial Ombudsman Service, Credit Ombudsman Service Limited, Energy and Water Ombudsman, and Telecommunications Ombudsman). In federal family disputes, there are free ADR services being provided by government funded community organisations or Legal Aid. In the states and territories, government agencies and government funded community organisations provide

<sup>31</sup> For more information see Attorney General's Department website on family dispute practitioner accreditation at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_ResearchandEvaluation\\_ForPotentialFamilyDisputeResolutionPractitioners](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForPotentialFamilyDisputeResolutionPractitioners)

<sup>32</sup> NADRAC, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 5, para 5.5

many of the ADR services in family and smaller civil disputes (for example Community Justice Centres and Unifam in NSW, Dispute Settlement Centre Offices in Victoria, and Centrecare in Western Australia).

Most ADR services and systems that operate within federal courts and tribunals are staffed by court officers or employees. For example, the Federal Court's mediation service is staffed by registrars who act as mediators and are trained accordingly.<sup>33</sup>

Civil disputes in the state courts and tribunals (especially larger disputes), and federal civil disputes (excluding family law matters), are less likely to be dealt with by free government or industry sponsored ADR services, and are more likely to be undertaken by private ADR practitioners.<sup>34</sup>

Even where a matter is covered by an existing free ADR scheme, there may be scope for lawyers to provide information about the ADR process, help parties prepare for their participation in the ADR process, and/or provide advice during the process (See Section 4.2).

## 4 The role of lawyers in ADR

### 4.1 Lawyers in the role of ADR practitioner

The Centre has identified the following examples of pro bono referral services which refer suitable cases to mediation, and mediation schemes which have panels composed of lawyers in the role of ADR practitioner. Barristers often act as mediators in this context. To date the schemes in Australia have only handled a small number of cases (usually involving property and estates). The schemes rely on the ability of those administering the scheme to make an assessment from their current or previous dealings with the client about the capacity of the client to effectively participate in the mediation, or the need to find legal representation for the client in the mediation.

#### 4.1.1 *Queensland Public Interest Law Clearing House (QPILCH)*

QPILCH have recently started a mediation scheme as part of the self-represented litigants program operating at the Supreme Court, Court of Appeal and Queensland Civil and Administrative Tribunal (QCAT)<sup>35</sup>. The scheme currently has 28 panel members on its Brisbane panel and a small number of regionally based mediators (about 8) throughout Queensland, around half of whom are barristers. QPILCH obtains an authority from the client to send a referral to the panel with basic information about the matter. They try to obtain expressions of interest from a few mediators, who generally self select on the basis of the suitability of their skills and experience to the case. The Bar Association provides the venue so the mediation can be undertaken at no cost to the parties.

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<sup>33</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 5, para 5.17

<sup>34</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 5, para 5.17

<sup>35</sup> For more information see QPILCH website at [http://www.qpilch.org.au/01\\_cms/details.asp?ID=564](http://www.qpilch.org.au/01_cms/details.asp?ID=564)

QPILCH has found that having the mediation scheme seems to work well in terms of matching appropriate clients and matters with pro bono mediators. As QPILCH usually organises mediations for self-represented parties who have been assisted by QPILCH on a previous occasion, QPILCH is aware of the suitability of the matter for mediation and the client's ability to participate effectively in a mediation, and can also help to explain the process to the client. They will also look for representation for the client if they assess the client as being disadvantaged or vulnerable in the process.

Around 75% of self-represented parties who have been surveyed by QPILCH indicate that they would be interested in having their matter mediated. In the 2010/2011 financial year, QPILCH arranged five mediations: three property disputes, one wills and estate matter, and one professional negligence case.

Interestingly, where one party has had the capacity to pay for the mediation and the other does not, the mediation has been provided free to both parties, and QPILCH are not aware of any complaints being raised about this.

Some examples of recent matters where a mediator was provided by QPILCH's mediation service:

1. **A dispute about the sale by instalment contract of a client's interest in property in regional Queensland.** The relationship between the owners and the buyer (a relative of one of the owners) had deteriorated and matters were complicated when this owner lost mental capacity. The Supreme Court made orders that the parties participate in mediation. Two of the parties were age pensioners with no capacity to pay for the mediation. The Service was able to find a panel member who agreed to mediate the matter on a pro bono basis. At the mediation QPILCH's client was represented by lawyers providing pro bono assistance (for the mediation only). This meant that all the parties were represented by lawyers at the mediation. This matter was ideal for pro-bono mediation because the parties were in agreement over the need for the property in question to be sold and there were strong prospects that the matter would in fact settle. This matter settled at mediation.
2. **Client seeking to enforce an equitable interest in property that arose out of an agreement the client made to do some work for her mother and her mother's former partner.** The client (daughter) was granted leave to intervene in her mother's de-facto property proceedings in order to protect her interest in that property. In this case the mediation process was undertaken by the parties at their own initiative, although a trial date had been set. This matter was suitable for mediation as the client expressed a willingness to engage with the other parties in an attempt to resolve the dispute and the parties had already participated in mediation at a much earlier stage of the proceedings (although at that stage the client's case had not been properly pleaded). The client did not have the resources to pay for further mediation as she was a low income earner with limited English who was approaching retirement age with limited financial resources. This matter settled at mediation.
3. **Property dispute between three siblings about their incapacitated father's house.** The client (one of the siblings) was working part time while he was studying and had no assets/savings. He claimed that his father had made an agreement allowing him to reside in his property while he was studying and assisting his father with his day to day living. The other two siblings, who held power of attorney for their father, were seeking orders in the

Supreme Court to allow the property to be sold. The Court ordered that the parties attend mediation. The two siblings who had power of attorney were legally represented, but attended the mediation without their representatives. This reduced the imbalance between the parties. QPILCH commented that this might have been less likely had the parties been put to the expense of paying a mediator.<sup>36</sup> This matter did not settle at mediation.

#### *4.1.2 Public Interest Law Clearing House (PILCH (VIC))*

The referral scheme at PILCH (VIC) does not have a formal mediation scheme but sometimes refers clients to mediation on a case by case/needs basis where the service assesses mediation as being appropriate. Here is an example of a matter that PILCH (VIC)'s Law Institute of Victoria Legal Assistance Scheme (LIVLAS) referred to mediation:

**Neighbourhood fencing dispute.** Counsel acted as a mediator on a pro bono basis in a matter involving a neighbourhood fencing dispute. Both parties purchased their property in 1989 and there was no fence between the properties, with the boundary demarcated by an existing dog enclosure and some bushes. The client's neighbour built a shed over the boundary line and the client proceeded to demolish part of the shed. The neighbour issued proceedings in the Melbourne County Court claiming adverse possession and compensation for the damage to the shed. The parties, which both had legal representation, agreed to mediation and the matter did settle at mediation after the first Directions Hearing.

#### *4.1.3 LEADR*

LEADR is an Australasian, not-for-profit membership organisation which was formed in 1989 to promote and facilitate the use of dispute resolution processes including mediation. LEADR accredits mediators and also refers mediators for commercial, IT, personal injury, estates, construction, employment, family and community/neighbourhood disputes.<sup>37</sup>

LEADR accepts referrals of matters suitable for mediation on a pro bono basis and tries to provide the parties with a choice of several mediators who are willing to provide their ADR services on a half fee basis. However the service is currently not widely known or used.

LEADR had quite an active pro bono mediation referral scheme from at least 1992, where Legal Aid NSW would refer its clients and LEADR would find a mediator willing to provide their services at no charge to the Legal Aid client, and at half of their usual fee to the other party (often a government department). However since around 2002, referrals from Legal Aid have declined as more Legal Aid clients' disputes have been resolved by government or industry sponsored ADR schemes<sup>38</sup>. Now

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<sup>36</sup> Email from Iain McCowie (Solicitor and Coordinator, Self-Representation Service (Courts) QPILCH), 18 July 2011

<sup>37</sup> For more information see the LEADR website at <http://www.leadr.com.au/aboutleadr.htm>

<sup>38</sup> Email from Monique Hitter (Director for Civil Law, Legal Aid NSW), 22 March 2011

about three to four cases per year are referred to the LEADR pro bono scheme by large law firms, and usually involve estate and property issues.<sup>39</sup>

#### *4.1.4 LawWorks UK*

An interesting example of a model for a pro bono mediation service from the UK is the one run by LawWorks, which is a charity that aims to provide pro bono legal help to individuals and community groups who cannot afford to pay for it and who are unable to access legal aid. It has been running a pro bono mediation referral service for over five years. About 90% of LawWorks' mediation panel members are lawyers. This reflects the nature of LawWorks (previously known as Solicitors Pro Bono Group) which works primarily to match clients with members of the legal profession.

LawWorks organises around 100 mediations a year, of which about 30 are conducted by telephone, and the rest face to face. The service could provide more mediations if it had more resources. They find that 90% of the clients who approach their service meet the means test for the service.

One major difference between Australia and the UK is that there are less government or industry resourced mediation schemes in the UK, which means that there is a much wider range and volume of matters that can be referred to mediation. The range of matters that LawWorks refers to mediation includes most civil matters that would be heard in a UK County Court: landlord/tenant, property, neighbourhood disputes involving land, debt/mortgage, wills & probate, contract, consumer and partnership disputes. In the UK there is no equivalent service to the government funded community mediation services (like Community Justice Centres in NSW) that would be able to mediate many of these issues in Australia (see Section 3.5), but there are small community mediation services which are funded by local housing associations.

LawWorks has found that their clients become more interested in mediation when it is explained that they are more likely to be able to engage a pro bono mediator to conduct a mediation session than they are to find a pro bono lawyer to take on their matter in court. Unrepresented litigants often end up with particularly messy and protracted court matters, and this has been an incentive for potential litigants to try mediation.

LawWorks tries to find a pro bono legal adviser to help an unrepresented party to a mediation where the other side has legal representation. The legal adviser helps the client to prepare for the mediation and attends the mediation session but does not act for the client otherwise.

Where one party has the resources to pay for the mediation and the other does not, the mediator still provides the service on a pro bono basis. While this has raised some concern from mediators, LawWorks is continuing to operate on this basis.

The National Mediation Helpline (NMH), which was launched in November 2004 and operated on behalf of the UK Ministry of Justice in conjunction with the UK Civil Mediation Council, provided individuals and businesses involved in a civil dispute in England and Wales with information and advice on mediation. The service explained the basic principles of mediation, answered general enquiries relating to mediation and put parties in contact with an accredited mediation provider. The service has stopped operating because courts were not referring cases to it. LawWorks believes

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<sup>39</sup> NPBR meeting with Fiona Hollier (CEO, LEADR) at LEADR, 15 March 2011

that this reflects a suspicion and a lack of confidence in the quality of mediation services, which could be addressed with a mediator accreditation scheme.<sup>40</sup>

## 4.2 Lawyers assisting party to the ADR

According to the Law Council of Australia's guidelines for lawyers in mediations, a lawyer's role during ADR is to help clients to best present their case and assist clients and the ADR practitioner by giving practical and legal advice and support in a process that is intended to be more about problem-solving and less adversarial.<sup>41</sup>

Helping clients to prepare for ADR may involve<sup>42</sup>:

- Undertaking a risk analysis and linking risks to the client's interests
- Explaining the nature of the ADR process
- Identifying interests
- Developing strategies to achieve final outcomes

The existing pro bono mediation schemes that are canvassed in this paper (see Section 4.1) rely on a relationship between the organisation referring to (or running) the pro bono mediation scheme and the client to inform the service about whether the client needs legal representation to participate in the ADR process. If the client needs and does not already have legal representation, the organisation will find legal representation for the client.<sup>43</sup>

Here are two examples<sup>44</sup> of recent matters where Counsel has appeared at mediation for PILCH(VIC) clients on a pro bono basis:

1. **Elderly couple subjected to elder abuse, seeking to enforce an equitable interest in property that arose out of the building of a granny flat on their daughter's property.** The clients (the elderly couple) and their daughter agreed that they should sell their own home and build, at the clients' expense, a granny flat on their daughter's 2 acre property. The clients were not on the title to the property and were seeking to establish their equitable interest in it. The relationship between the clients and their daughter deteriorated and whilst the clients were in hospital, their daughter padlocked access to the granny flat and the contents were placed in storage. In this case the County Court at Melbourne made orders that the parties participate in mediation. Both parties were legally represented in the matter and at mediation. Counsel assisted the clients to prepare for mediation and advised them during the mediation and on possible terms of settlement. The matter did not settle at mediation.

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<sup>40</sup> NPBRC conference call with Lavinia Shaw Brown (LawWorks UK), 21 March 2011

<sup>41</sup> The Law Council of Australia, *Guidelines for Lawyers in Mediations*, 23 March 2007

<sup>42</sup> The Law Council of Australia, *Guidelines for Lawyers in Mediations*, 23 March 2007

<sup>43</sup> Ninety percent of mediators on the panel of the mediation service at LawWorks UK are also lawyers, and often provide advice to a party to a mediation (provided they have the practising certificate and insurance to allow them to do so): NPBRC conference call with Lavinia Shaw Brown, LawWorks UK, 21 March 2011

<sup>44</sup> Email from Teresa Cianciosi (Manager LIV Legal Assistance Scheme, PILCH (VIC)), 5 September 2011

2. **Disabled client seeking to enforce an equitable interest in her friend's property.** The client maintained that she loaned her friend money and the friend alleged she gifted the money. The client was the applicant in civil proceedings commenced in the Supreme Court in Melbourne and the Court had made orders that the parties participate in mediation. The last mediation was held three days prior to the commencement of a 5 day listed trial hearing. The defendant refused to comply with previous mediated consent orders. Both parties were legally represented in the matter and at mediation. Counsel assisted the client to prepare for mediation and advised her during the mediation and on possible terms of settlement. The matter did not settle at mediation, resulting in a three day trial before the Supreme Court. (Currently awaiting Trial Judge decision).

### 4.3 Lawyers delivering community legal education on ADR

If ADR becomes more frequently used as a way of addressing unmet legal need, lawyers may increasingly be asked, or even required<sup>45</sup>, to provide information about ADR when acting for parties to a dispute (see Section 2.3). NADRAC has recommended the introduction of measures that require or encourage the provision to disputants of information or advice concerning the full range of methods or processes that are available to resolve their dispute.<sup>46</sup>

Lawyers are often the first point of contact for people seeking to resolve a dispute and are therefore in a position to provide general information about ADR, suggest ADR to appropriate clients with appropriate cases, and advise clients when ADR is mandatory.

## 5 Issues in the use of ADR for people experiencing disadvantage

### 5.1 Can unequal bargaining power between parties to ADR be overcome?

The Federation of Community Legal Centres (FCLC) (Victoria) released a paper<sup>47</sup> in October 2010 drawing on CLC experience to conclude that some disputes, by their nature, will always be more appropriately resolved by adjudication. Disadvantages faced by CLC clients (due to poverty, mental illness, homelessness, language difficulties, limited literacy or other factors) can prevent them from participating in ADR on an equal footing. The paper argues that it is vital that low income and disadvantaged parties have access to legal representation, interpreters and other support services

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<sup>45</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.30 provides the example of some state/territory legal professional associations requiring their members to advise clients about ADR options, such as NSW Bar Association, Rule 17A

<sup>46</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, Chapter 4, para 4.34

<sup>47</sup> Federation of Community Legal Centres Victoria, *Activist ADR: Community Lawyers and the New Civil Justice*, October 2010, at [http://www.communitylaw.org.au/cb\\_pages/federation\\_reports.php#Alternativedisputeresolution](http://www.communitylaw.org.au/cb_pages/federation_reports.php#Alternativedisputeresolution)

whenever they engage in ADR, and where such clients cannot access these services, they should be exempt from mandatory ADR processes.

Celia Tikotin has observed that in the consumer credit area, even well trained mediators are unable to redress the power imbalance between parties to mediation if they are not familiar with both the legal issues and practice issues affecting low income consumers. For example, she has found that many mediators who do not know about the inalienability of Centrelink income have encouraged judgment-proof clients to agree to pay an amount to the other party, when they would not have had to pay anything if their legal rights had been upheld at adjudication.<sup>48</sup> Denis Nelthorpe (Manager, Footscray Community Legal Centre) adds that:

“Most lawyers, and mediators, concentrate on issues of liability in making decisions. There is now a growing realisation among advocates for low income and disadvantaged clients that liability is not the only, or even the main issue for many of these clients. More often than not the key issue for these clients is “capacity to pay” and the consequences of non payment. This is a recent development for many in the legal aid sector. In our experience mediators are rarely even aware of the issues let alone the relevant law. This could be overcome by appropriate training but will be a major impediment to the involvement of low income and disadvantaged clients in ADR until addressed by those advocating increased use of mediation.”<sup>49</sup>

The role of the mediator to address any power imbalance between the parties may potentially be affected by a conflict of interest between the interests of the mediator (whose key performance indicators often relate to the volume of cases they can encourage to reach settlement), and the interests of the parties for a fair and just outcome. Graham Wells (Civil Law Advocate, Springvale Monash Legal Service), explains that even though an unconscionable or manifestly unfair outcome can be reviewed, this does not necessarily protect disadvantaged clients where an outcome is poor but not flawed enough to be “unconscionable” or “manifestly unfair”.<sup>50</sup>

The FCLC paper argues that even where parties have access to legal assistance and other services, adjudication will remain the better option in some cases, due to irremediable power imbalances, or simply a party’s desire for vindication of their legal rights. Graham Wells comments that a good mediator will suspend the mediation when they realise that the power imbalance is too great, rather than trying to manage it.<sup>51</sup>

## 5.2 Will use of ADR have a negative impact on public interest litigation?

Community Legal Centres have found that adjudication can be uniquely effective in exposing systemic injustice and driving progressive law reform by revealing a series of cases where the law is

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<sup>48</sup> NPBRRC telephone interview with Celia Tikotin, 16 August 2011

<sup>49</sup> Email from Denis Nelthorpe (Manager, Footscray Community Legal Centre), 1 October 2011

<sup>50</sup> NPBRRC telephone interview with Graham Wells (Civil Law Advocate, Springvale Monash Legal Service), 16 August 2011

<sup>51</sup> NPBRRC telephone interview with Graham Wells (Civil Law Advocate, Springvale Monash Legal Service), 16 August 2011

unjust. The FCLC paper<sup>52</sup> expressed concern that the individualised, private nature of ADR may limit CLCs' capacity to engage in strategic litigation and to use casework as a basis for law reform activities. It stresses that it is important that courts and tribunals establish clear guidelines to facilitate public interest litigation, where there is a need for clarification of the law or a public denunciation of injustice. Denis Nelthorpe makes the observation that ADR may be more appropriate in civil disputes between individuals, where the issues are about relationships (family and neighbourhood disputes) and do not involve issues of liability or public interest.<sup>53</sup>

### 5.3 Can ADR be used appropriately in disputes involving family violence?

A situation that could be viewed as inherently involving an irremediable power balance is where family violence is present. The Report of the Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice* (December 2009) found that ADR is not an appropriate means of delivering justice in certain matters, including those involving victims of domestic violence.<sup>54</sup> Family Relationship Centres will generally not mediate family law cases where there is an apprehended violence order, especially where the order extends to children.

However many disputes that are mediated at the Community Mediation Service (CMS) at the Bunbury Community Legal Centre<sup>55</sup> in Western Australia are cases where there has been a restraining order. Interestingly, it is proximate to a Family Relationship Centre, but as family dispute practitioners generally do not take cases where a restraining order has been made, many of these cases are referred to the CMS. Since 2005 the CMS has been conducting a Restraining Order Referral Program at the Magistrates Court in both Bunbury and Manjimup in relation to Applications for Restraining Orders. This Program is the outcome of recommendations made by Magistrates who found that the presence of a Restraining Order often escalated the issues rather than resolving them, and therefore many applications would be better resolved outside of the court environment.<sup>56</sup> The Program attempts to settle, through mediation, the issues which have given rise to such applications.

The Mediation Coordinator at the CMS, Sandra Hall, explains that:

“the escalation of issues can occur in situations at that very tenuous point of separation where mothers and fathers do things in anger causing one or both of them to have real concerns for their safety. So they tend to apply for Restraining Orders to give themselves some short term space and protection until things settle down. In many cases the children are adversely impacted by being unable to spend time with both parents. With the option of mediation, irrespective of what the parents decide to do with the Restraining Order, they have the opportunity to voice their concerns, to

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<sup>52</sup> Federation of Community Legal Centres Victoria, *Activist ADR: Community Lawyers and the New Civil Justice*, October 2010,

[http://www.communitylaw.org.au/cb\\_pages/federation\\_reports.php#Alternativedisputeresolution](http://www.communitylaw.org.au/cb_pages/federation_reports.php#Alternativedisputeresolution)

<sup>53</sup> NPBRC telephone interview with Denis Nelthorpe (Manager, Footscray Community Legal Centre), 15 August 2011

<sup>54</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into Access to Justice*, December 2009, para 6.33

<sup>55</sup> Bunbury CLC runs a mediation service, Community Mediation Service (CMS), in parallel with its legal advice service and clients are often referred to the mediation services by the legal advice service.

<sup>56</sup> Email from Sandra Hall (Mediation Coordinator at the CMS), 27 July 2011

negotiate, and to put in place suitable arrangements for the children. Previously, parents were unable to do this if an Order was in place and so they had to take on the difficult and often onerous task of employing a lawyer to negotiate on their behalf or to file applications in the Family Court<sup>57</sup>.

CMS mediators, who are all trained as family dispute practitioners, employ strategies such as shuttle mediation where the parties are in different rooms, or where the mediator talks to the parties at different times so they are not present at the same time. Where the CMS assesses a matter as being inappropriate for mediation, for example where a client is particularly vulnerable and there is risk of intimidation, the service will refer the matter to Legal Aid seeking inclusion in their ADR program or a grant of legal assistance.<sup>58</sup>

Another example of a mediation service that deals with cases involving family violence is Roundtable Dispute Management (RDM) (Victoria Legal Aid's (VLA) in-house family dispute resolution service). RDM is often found to be suitable for matters involving substantial issues of family violence. Women's Legal Service (Victoria) runs a duty lawyering service to represent women in RDM, which aims to reach agreements which are legally enforceable. RDM employs professional case managers who can conduct a comprehensive risk assessment with each party to a dispute. RDM also has detailed policies and procedures<sup>59</sup> to manage cases involving allegations of family violence. Like the mediation service run by CMS, parties to a dispute may completely avoid each other in a 'shuttle' or an 'assisted negotiations' conference.

#### **5.4 Is there bias (real or perceived) when only one party can afford to pay for mediation**

Real or perceived conflicts of interest may arise where one party to the ADR has the resources to pay for the service, but the other does not. Where one party can pay for the mediation and does so, there is a risk that the perception will be that the mediator may be working in the interests of the party who is paying them. Different pro bono mediation schemes have handled this in different ways (see examples of pro bono mediation services at Section 4.1 above), each with its own issues.

The experience of PILCH(VIC) has confirmed the existence of this problem, even where it is only a matter of perception and no actual bias exists. They suggested that co-mediation, where there are two mediators conducting the mediation at the same time (see Section 4.1.3), may be a way to work around this issue.

LEADR's pro bono mediation referral scheme (see Section 4.1.3) finds a mediator willing to provide their services at no charge to the Legal Aid client, and at half of their usual fee to the other party (often a government department). LEADR's impression is that the level of commitment of non-fee paying parties varied: some were committed to participating fully to try to resolve the matter; others

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<sup>57</sup> Email from Sandra Hall (Mediation Coordinator at the CMS), 27 July 2011

<sup>58</sup> Email from Sandra Hall (Mediation Coordinator at the CMS), 27 July 2011

<sup>59</sup> See Roundtable Dispute Management practice manual at <http://www.legalaid.vic.gov.au/rdm.htm#manual>

did not seem to have the motivation that is usually associated with the need to obtain value from the service they had paid for.<sup>60</sup>

The QPILCH (see Section 4.1.1) and LawWorks UK (See Section 4.1.4) schemes provide mediations free for both parties, even if only one of the parties meets the means test for pro bono assistance. Perhaps surprisingly, the mediators involved have not raised concerns about this.

## 5.5 Is there a way of using lawyers as both advocates for a client and ADR practitioners in the same matter?

A conflict of interest may also be perceived where the advocate or investigator for the client's matter also acts as the mediator. This is a problem that has discouraged some Community Legal Centres from using their lawyers to act as mediators<sup>61</sup>.

The conciliation model adopted by the Australian Human Rights Commission utilises its officers in a joint investigation/conciliation role, with both:

- an advocacy role in relation to the legislation (which involves explaining to parties their full range of possible settlement options while ensuring that any agreement does not contravene the intent and purpose of the legislation) and
- a requirement to attend to power differentials between parties with a view to enabling substantive equality of process (which involves intervening to ensure a fair process for both parties).

In response to concerns that a joint investigation /conciliation role would necessarily compromise the perceived impartiality of the conciliator, the Commission conducted research<sup>62</sup> which found that very few survey participants (4%) felt that the conciliator was biased against them. The Commission argues that the data also supports the view that intervention to enable substantive equality of process, if done appropriately, does not necessarily lead to perceptions of bias.

## 6 The role of pro bono – Identifying the gaps

Pro bono legal work as defined by the National Pro Bono Resource Centre includes:

- Giving legal assistance for free or at a substantially reduced fee to:—
  - (a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or

<sup>60</sup> NPBRC meeting with Fiona Hollier (CEO, LEADR) at LEADR, 15 March 2011

<sup>61</sup> Telephone conversation with Nick Comino (Former Volunteer Coordinator at Redfern Legal Centre), March 2011

<sup>62</sup> Dispute resolution in the changing shadow of the law: a study of parties' views on the conciliation process in Federal Anti- Discrimination Law , Tracey Raymond & Sofie Georgalis, 2002, [http://www.hreoc.gov.au/complaints\\_information/publications/shadow\\_paper.html](http://www.hreoc.gov.au/complaints_information/publications/shadow_paper.html)

(b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or

(c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;

- Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
- Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
- Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

Pro bono is a limited resource. Pro bono providers prioritise their resources according to unmet legal need and are looking for opportunities where they can make a real difference. To identify where there may be gaps in ADR services which pro bono lawyers could appropriately address, consideration will need to be given by pro bono service providers as to whether:

- the relevant ADR process for the dispute is one that permits the involvement of lawyers
- the legal need is already being met by existing ADR schemes (see Section 3.5)
- the matter is appropriate for pro bono assistance (disadvantaged/low income client, cannot obtain legal aid or other assistance)
- there are issues that affect how appropriate ADR is for resolving the dispute (e.g. power imbalance, willingness of parties to participate and common interests in resolution, not a public interest case which is more appropriate for adjudication, see Section 5)
- The skills of their lawyers are a good match for the legal need (see Section 3.4 on accreditation)

An example of an area where there is a gap in ADR services is in family disputes where there has been violence.<sup>63</sup> Many women appear in court unrepresented when they have been excluded from mediation through Family Relationship Centres and cannot afford private legal representation, but do not qualify for a grant of legal aid.

Pro bono lawyers could assist in these cases as ADR practitioners, as mediators do at Bunbury Community Legal Centre in Western Australia (see Section 5.3). Pro bono lawyers could also assist parties to participate in the ADR process, for example, the Women's Legal Service in Victoria runs a duty lawyering service to represent women in Roundtable Dispute Management (RDM) (see Section 5.3), which aims to reach agreements which are legally enforceable.

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<sup>63</sup> The practice varies according to the policy of the organisation running the family relationship centre.

## 7 Possible roles for pro bono in ADR

### 7.1 Redressing unequal bargaining power situations

As explained above in section 5.1, while ADR may have the potential to improve access to justice for low income and disadvantaged clients as it can result in disputes being resolved quickly, cheaply and effectively, adequate safeguards need to be in place to protect clients who may not be in a position to participate equally in an ADR process due to their disadvantage. In some respects, ADR may actually offer clients less protection than litigation where there are formal rules controlling the conduct of the proceedings, such as rules of evidence. As observed by Ojelabi in her research regarding CLC views on ADR, “most CLC staff are of the opinion that ADR can only provide access to justice where parties are aware of their legal rights and where (ADR) practitioners have knowledge of the applicable law in the area.”<sup>64</sup>

The roles that pro bono lawyers could play to redress unequal power between the parties to ADR include: 1) providing legal assistance to unrepresented parties to ADR, especially where one party does have representation, and/or 2) being an ADR practitioner who understands both the law and practice in the area of the dispute and can effectively make these disadvantaged parties aware of the strengths and weaknesses of their case. The need for this kind of assistance is likely to increase as the number of mandatory and voluntary ADR schemes increases.

From their experience as lawyers working with low income, marginalised and vulnerable clients, pro bono lawyers may have the knowledge of types of legal issues that affect disadvantaged clients that would enable them to accurately and thoroughly inform a disadvantaged party of the strengths and weaknesses of their case. If they are also trained as ADR practitioners they would also have knowledge of ADR processes so they can confidently advise a disadvantaged party on how ADR works and used strategies to address any power imbalance between the parties to the dispute.

Celia Tikotin expressed the opinion that where there is an appropriately trained lawyer acting as a mediator, this may even obviate the need for disadvantaged parties to be legally represented. In her experience, a legally trained mediator who understands “poor law” can make parties aware of the strengths and weaknesses of their case, which has the potential to address any power imbalance between the parties.<sup>65</sup> (See also Section 5.1 on unequal bargaining power)

### 7.2 Complex civil proceedings with self-represented litigants

Many of the matters successfully referred to mediation by existing pro bono mediation schemes involve self represented litigants in disputes over property and estates, often between neighbours or family members. Fiona Hollier commented that mediation is often a good option for struggling farming families who are having disputes over property, because there are usually emotional factors

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<sup>64</sup> Lola Akin Ojelabi, ‘Community legal centres’ views on ADR as a means of improving access to justice – Part II’ (2011) 22 ADJR 173 at p.174

<sup>65</sup> NPBRC telephone interview with Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre), 16 August 2011

contributing to the dispute and utility in preserving family relationships.<sup>66</sup> Denis Nelthorpe, similarly provided the example of bushfire-related property cases, where both parents have died and family members are in dispute about out how to divide the property.<sup>67</sup>

In the experience of PILCH (VIC)'s Law Institute of Victoria Legal Assistance Scheme (LIVLAS) (see Section 4.1.2), matters which have been suitable for mediation have included property law disputes, debt recovery matters, mortgage disputes and employment law matters.<sup>68</sup>

### 7.3 Disputes within and between Indigenous communities

NADRAC's report *Indigenous Dispute Resolution and Conflict Management* identifies that there is a shortage of dispute resolution options that adequately meet the cultural needs of Indigenous dispute resolution participants.<sup>69</sup> These disputes are often complex, not well articulated and multi-faceted. Dispute resolution in these matters may involve a lot of preparation and can be a protracted process where litigation might be part of the process of bringing people to the point where they are willing to participate in ADR.<sup>70</sup>

Pro bono lawyers could be involved as ADR practitioners, trainers for Indigenous ADR practitioners and advocates for indigenous parties to ADR. However specific training would be required to enable these lawyers to help to address the barriers faced by Indigenous people in using ADR services.

NADRAC suggests that services without Indigenous practitioners could consider cooperative arrangements with other organisations that do have Indigenous practitioners. In disputes between Indigenous and non-Indigenous participants, NADRAC suggests that services may also need to consider a teamwork model, such as co-mediation, in which both an Indigenous and a non-Indigenous practitioner are used.<sup>71</sup> NADRAC also suggests that ongoing training and professional support is required to enable Indigenous practitioners to maintain their skills and confidence<sup>72</sup>, which is the kind of community legal education that pro bono lawyers with ADR skills could assist with.

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<sup>66</sup> NPBRC meeting with Fiona Hollier at LEADR, 15 March 2011

<sup>67</sup> NPBRC telephone interview with Denis Nelthorpe (Manager, Footscray Community Legal Centre), 15 August 2011

<sup>68</sup> Email from Teresa Cianciosi (Manager, LIV Legal Assistance Scheme, PILCH (VIC)) 5 September 2011

<sup>69</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management*, 2006; (follow up report 2009)

<sup>70</sup> See for example the case study at NADRAC, *Solid Work You Mob Are Doing*, Chapter 4 at [www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_SolidWorkyouMobaredoingReport](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport)

<sup>71</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p.11

<sup>72</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p.14

## 7.4 Disputes within and between not-for-profit organisations

Another area of unmet legal need which has been identified as being suitable for pro bono ADR services is where there are disputes between officers of a not-for-profit (NFP) community organisation where the NFP itself is eligible for pro bono assistance.

PilchConnect, a service which provides free and low cost legal information for not-for-profit community organisations, receives many inquiries in relation to such matters, however suggests that the allocation of pro bono resources should only be considered once all parties have taken all appropriate steps to resolve the issues by other means/services before seeking pro bono mediation. For example, in Victoria the Department of Justice offers community organisations an opportunity to mediate internal disputes at no cost through the Dispute Settlement Centre of Victoria.<sup>73</sup>

## 7.5 Small claims pilot project

Community Justice Centres NSW are looking at the possibility of running a pilot mediation project for small claims under \$10,000 and would welcome assistance from pro bono lawyers to act as mediators.<sup>74</sup> The pilot will be based on a similar project at the Victorian Broadmeadows Magistrates' Court which commenced in October 2007.

Approximately 100 disputes (civil claims of less than \$10,000) were included in the Broadmeadows compulsory court-annexed mediation pilot from November of 2007 to June of 2008. The Dispute Settlement Centre of Victoria trained and accredited the mediators involved, and the mediations that were undertaken as part of the Pilot were conducted at the Court premises. An initial evaluation of the Pilot found that the resolution rate was well over the target of 75% and there were major reductions in the need for magistrate's hearing time. The project delivered speedier turnaround times for civil disputes, with fewer court attendances on the part of litigants and equivalent disposals of cases using less expensive resources.<sup>75</sup>

However the Broadmeadows Pilot has been criticised for using some mediators who did not understand that many low income parties were judgment-proof because they had no income other than Centrelink benefits. Denis Nelthorpe estimated that 90% of cases that were mediated in the Broadmeadows project were matters where an uninsured driver was being pursued by an insurance company. He observed many mediators acting "more like debt collectors, trying to persuade low income parties that they should agree to settle by paying some amount".<sup>76</sup> Perhaps the involvement of pro bono lawyers as mediators with better knowledge of the legal issues affecting the parties to the mediation would address some of these concerns.

<sup>73</sup> Email from Juanita Pope (Senior Lawyer, PilchConnect, PILCH (VIC)), 26 September 2011

<sup>74</sup> NPBRC meeting with Natasha Mann (Director, ADR Directorate & Community Justice Centres, NSW Department of Justice and Attorney General) at Community Justice Centres, Parramatta NSW, 8 March 2011

<sup>75</sup> Transformation management services, *Evaluation of Broadmeadows Court-annexed Mediation Pilot at* <http://122.100.10.189/trans/docs/Broadmeadows%20Evaluation%20REPORTPDFNov.pdf>

<sup>76</sup> NPBRC telephone interview with Denis Nelthorpe (Manager, Footscray Community Legal Centre), 15 August 2011

## 8 Preliminary conclusions

The likelihood that ADR will become a more significant way of meeting unmet legal need than it is currently, is evidenced inter alia by the growing number of government and industry sponsored ADR schemes, the increasing cost of litigation, positive views on the utility of ADR for disadvantaged clients and government sponsorship of the concept of ADR (including legislative requirements to take steps to resolve disputes before going to court).

To identify where there may be gaps in ADR services which pro bono lawyers could appropriately address, consideration will need to be given as to whether:

- the relevant ADR process for the dispute is one that permits the involvement of lawyers
- the legal need is already being met by existing ADR schemes (see Section 3.5)
- the matter is appropriate for pro bono assistance (disadvantaged/low income client, cannot obtain legal aid or other assistance)
- there are issues that affect how appropriate ADR is for resolving the dispute (e.g. power imbalance, willingness of parties to participate and common interests in resolution, not a public interest case which is more appropriate for adjudication, see Section 5)
- The skills of their lawyers are a good match for the legal need (see Section 3.4 on accreditation) or whether training is warranted.

Drawing on the experience of the few existing pro bono mediation schemes, the types of matters that might be suitable for mediation on a pro bono basis include: self-represented litigants with property law disputes, debt recovery matters, mortgage disputes and employment law matters, and also where there are gaps in existing free ADR schemes, such as family law cases where there is a restraining order in place.

The roles that pro bono lawyers might play in ADR include acting as ADR practitioners, assisting/representing disadvantaged parties to ADR, and delivering community legal education on ADR. Pro bono lawyers have the potential to provide the necessary combination of legal knowledge, ADR skills and experience in dealing with disadvantaged clients which is needed to effectively address the power imbalance that low income, marginalised and vulnerable parties face when they participate in ADR.

If pro bono lawyers are going to play these roles they will need:

- Knowledge of ADR processes, particularly skills relevant to the areas of need e.g. strategies for addressing power imbalances between the parties, particularly in cases involving family violence;
- Knowledge of the legal issues affecting people experiencing disadvantage e.g. the rights of Centrelink recipients in debt recovery cases; and
- Experience with assisting vulnerable clients who are unable to participate in ADR on an equal footing. More specialist knowledge may be relevant for particular ADR contexts e.g. Indigenous conflict management

Additionally pro bono lawyers who contribute as ADR practitioners will need the resources (cost and time involved) to establish and maintain accreditation as mediators or other ADR practitioners.

## 9 Summary of questions for comment

1. What is the extent of ADR use in the CLC sector?
2. What types of ADR are most useful for disadvantaged and low income clients?
3. Is Conflict Management a process where pro bono lawyers could be usefully involved?
4. Can unequal bargaining power be overcome with legal representation and/or a skilled ADR professional?
5. Where a pro bono lawyer is acting as an ADR practitioner, should the service be provided free of charge to one or both parties if one has the capacity to pay?
6. Is the impartiality of the ADR practitioner compromised if they act as both an advocate for a client and ADR practitioner in the same matter?
7. Are the areas/projects identified in Section 7 of this paper appropriate for pro bono?
8. What additional areas/projects might be appropriate?
9. Is there enough need/demand for lawyers to act as mediators on a pro bono basis to justify the resources required for lawyers to be trained and maintain their accreditation?
10. Are there any other issues relating to the use of ADR for people experiencing disadvantage and the involvement of pro bono legal service providers in ADR?