Alternative Dispute Resolution

Assisting people experiencing disadvantage

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Executive Summary

This paper draws on submissions received by the National Pro Bono Resource Centre (‘the Centre’) in response to a Discussion Paper it released in October 2011 on the possible roles of lawyers acting pro bono in ADR (‘Discussion Paper’). In light of evidence indicating that use of ADR is frequently being used as a way of resolving disputes\(^1\), the Discussion Paper aimed to identify opportunities for pro bono lawyers to improve access to justice for disadvantaged and marginalised people by assisting them to participate in ADR processes.

Pro bono is a finite resource and many submissions identified the greatest need being for legal advice and representation for disadvantaged and marginalised clients rather than lawyers acting pro bono as ADR practitioners.

There is much diversity in ADR processes and the ways in which ADR is delivered. Advising a client effectively on how to navigate the ADR landscape requires knowledge of available services and a clear understanding of the different ADR processes. These can range from, for example, industry-based dispute resolution schemes, which discourage the use of legal representation, right through to court-ordered mediation or arbitration where both parties are highly likely to be legally represented. However as mediation has been identified by many submitters as being the most commonly used ADR process in matters involving disadvantaged parties, it is the predominant form of ADR discussed in this report.

The submissions received in response to the Discussion Paper provided much information about the knowledge, skills, qualifications and experience required of lawyers to be effective in assisting disadvantaged parties in an ADR context. The submissions also indicated that considerable variation exists among legal professionals in their level of knowledge about ADR and in their confidence in assisting parties to participate in ADR processes.

Accordingly, this paper draws on the knowledge of those who are experienced in ADR processes to provide a resource that will be of interest to all lawyers and ADR professionals who assist people experiencing disadvantage.

Much of the substance of this paper is found in the key comments extracted from the submissions and arranged by issue. Some key points are as follows:

The nature of the ADR process and the roles and skills of lawyers

The key roles that lawyers can play in the ADR context were identified as ADR practitioner, legal representative for parties engaging in an ADR process, provider of community legal education about ADR, or supporter of participants in a collaborative law process.

Whether the role of the third party to the other parties in dispute in an ADR process is facilitative (e.g. mediation), advisory (e.g. conciliation) or determinative (e.g. arbitration) has an impact on the

\(^1\) In its submission, the Commonwealth Attorney-General’s Department indicated that approximately 10% of all cases opened by CLCs during 2010-2011 involved some form of ADR occurring mainly in the areas of civil and family law. See section 1.2 on the trend towards use of ADR.
role that a lawyer might usefully play. For example, some submissions suggested that legal assistance is more important in facilitative rather than in advisory or determinative processes because the neutrality of the facilitator’s role prevents them from providing legal advice to a disadvantaged party. Others saw legal assistance as potentially counter-productive to a facilitative process, because it brought an undesirably legalistic approach to a process that is designed to be non-adversarial and to address underlying conflict issues that may not be legal in nature.

Submissions unanimously agreed that it is vital that a lawyer be clear about the role he or she is playing in an ADR process. For example, if acting as an ADR practitioner in mediation, the lawyer should be impartial and thus avoid advocating for either party. However if acting as a lawyer for a disadvantaged client, the role might include explaining the nature of the ADR process, ensuring that the process is conducted fairly, advising on the strengths and weaknesses of the client’s case, and ‘reality testing’ any settlement options against the likely outcome if the matter were litigated. Submissions revealed that in practice these roles may not be so clearly defined, with ADR practitioners in facilitative processes sometimes providing an opinion on the likely outcome of a matter if it were to be litigated.²

The submissions stressed that to play their role in ADR effectively, lawyers need more than just knowledge of the law and familiarity with legal issues. They need to have knowledge of the particular type and model of ADR and the skills to enable them to use ADR processes to the benefit of their clients, for example an understanding of how and when to use different negotiation styles.

**Learning from the experience of existing pro bono ADR schemes**

Pro bono clearing houses in Queensland and Victoria have both handled a small number of cases that had been referred to mediation (usually involving property and estates) where barristers have usually acted as the mediator. Some of these matters have been included in the paper as case studies (see section 3.8). LEADR had quite an active pro bono mediation referral scheme between the years 1992 to 2002 which largely relied on Legal Aid to refer its clients, but has declined as more Legal Aid clients’ disputes have been resolved by government or industry sponsored schemes. In the UK, LawWorks have been operating a widely used mediation service for over five years, but notably, the UK has fewer government or industry-based mediation schemes than Australia.

**Examples of types of matters and areas of law where lawyers have successfully played roles to assist clients on a pro bono basis**

The following are suggestions for types of matters and areas of law where pro bono legal resources have been, and may continue to be focused usefully, as either ADR practitioners or advocates for parties, or both. They are drawn from the case studies provided by existing pro bono ADR schemes, and through other consultations and submissions.

- Complex civil proceedings involving self-represented litigants
- Disputes within and between Indigenous communities;
- Disputes within and between not-for-profit organisations;
- Small claims matters in courts;

²See footnote 29 in the report for an example.
- Family law (specifically the Co-ordinated Family Dispute Resolution Pilot and disputes about children and property);
- Disputes between or involving small business;
- Estate disputes;
- Assisting parties to make agreements resulting from ADR processes binding/enforceable by drawing up agreements or seeking consent orders;
- Some employment related disputes (including discrimination and harassment); and
- Collaborative law practices.

See section 3.5 for details.

Research on the CLC sector, which often uses ADR to assist people experiencing disadvantage, indicated that CLCs focus on the facilitative nature of ADR processes and that a perception exists within the CLC sector that ADR processes are best suited for community disputes, like neighbourhood and fencing disputes (see section 3.7).

**Power imbalance and understanding and addressing the issues that affect people experiencing disadvantage**

An issue raised in the Discussion Paper was how, and to what extent, any power imbalance between a marginalised or disadvantaged individual and the other party might be addressed. Various methods and techniques were suggested for both ADR practitioners and/or lawyers acting for a party.

It was suggested that effective ADR practitioners and lawyers will have a strong general knowledge about the legal issues that affect people experiencing disadvantage and the types and sources of their disadvantage, but that the actual independence, professionalism and skill of the ADR practitioner may be the most important factors in ensuring a fair and effective ADR process.

Significantly it was also suggested that it is not possible to equalise other aspects of entrenched disadvantage relating to a client’s circumstances and that sometimes a determinative process may best serve the interests of the client (See section 3.3).

**ADR that incorporates relevant support services**

Several submissions highlighted the positive outcomes for people experiencing disadvantage when ADR is delivered as part of a model that incorporates various support services, not just legal services, such as the Coordinated Family Dispute Resolution Pilot. It may be that similar levels of co-operation are possible and necessary in other areas of need, and that lawyers acting pro bono can contribute effectively within a coordinated support model.

**Where only one party can afford to pay**

Most submissions expressed the view that where only one party can afford to pay, the ADR service should be provided free of charge to both parties to avoid a problematic perception of bias against the party who cannot afford to pay. However no submissions directly challenged the view that it would be preferable to have one party paying than have no mediation at all. An option raised to

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3 See section 3.6.1.
resolve this issue was to require the party that can afford to pay, to make a contribution to the cost of the ADR service rather than directly paying the ADR practitioner (see section 5.2).

The organisation/coordination of lawyers who already have skills and experience in ADR
Given that there are significant numbers of lawyers who are already trained in ADR processes and some accredited as ADR practitioners, these lawyers should be encouraged to maintain their skills and accreditation and act pro bono either as an ADR practitioner or as a lawyer acting for a client in an ADR process. A critical part of developing capacity in this area is the provision of more effective coordination of those wishing to contribute their skills on a pro bono basis. It is suggested that the best way for this to occur is by building on the current activities of pro bono clearing houses in the ADR area, and through ADR practitioner membership organisations like LEADR. However these organisations will need to be appropriately resourced to provide such coordination.

Conclusion
This paper contains a wealth of information about the use of ADR processes, particularly involving disadvantaged and marginalised clients. Given the trend towards increased use of ADR, lawyers will inevitably be involved in advising and supporting these clients through ADR processes. To assist them effectively, lawyers need to have the skills and knowledge to navigate this landscape. This paper aims to help them to do that.
Glossary

Following the recommendation of the Commonwealth Attorney General’s Department in its submission, unless stated otherwise, the terminology used in this paper and defined in this glossary is taken from the NADRAC Glossary of ADR terms.⁴

Advisory ADR Processes

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

Alternative Dispute Resolution

Alternative Dispute Resolution or ADR usually refers to processes other than judicial determination, in which an impartial person (an ADR practitioner) 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 mean assisted or appropriate dispute resolution.⁵

Arbitration

Arbitration is a process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

Collaborative Law

Collaborative Law is a form of collaborative practice where the process is led by lawyers representing each of the participants and it has been agreed that the lawyers will cease to act for their client if the matter proceeds to litigation. See also Collaborative Practice.

Collaborative practice

Collaborative Practice is a facilitative approach to resolving disputes where the participants, and other experts such as lawyers, sign an agreement to focus on negotiation and settlement rather than


⁵ The meaning of ‘ADR’ is still evolving. For example, the International Chamber of Commerce refers to ADR as ‘amicable dispute resolution’ and excludes arbitration from the forms of dispute resolution that it considers as falling under the heading ‘ADR’, see International Chamber of Commerce, ICC ADR - A wise precaution <http://www.iccwbo.org/court/adr/id4592/index.html>.
litigation. It is essentially focussed on a collaborative and interest based negotiation. All participants are members of a problem solving team that agree to disclose all information and also agree to negotiate in a constructive manner (often by agreeing to communication and other protocols). In most collaborative models, participants wishing to engage in the collaborative process are supported by a lawyer. The participants must also be prepared to participate actively in a process of open negotiations, aimed exclusively at settlement.

Co-mediation

Co-mediation is a process in which the participants to a dispute, with the assistance of two dispute resolution practitioners (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Conciliation

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

Note: the term ‘conciliation’, may be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an endeavour to avoid, resolve or manage a dispute
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.

Conflict Management

NSW Community Justice Centres uses the term Conflict Management to describe a flexible process of facilitation used by independent dispute resolution practitioners to address disputes involving groups of people who share membership of a community, local organisation, employment setting etc. Rather than aiming to resolve or eliminate all existing points of conflict between individual community members, conflict management focuses on developing processes for managing present and future disputes that concern the community as a whole and, where appropriate, coming to agreement about specific issues in dispute. (See also “Facilitation”.)
Determinative ADR Processes

Determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the participants) and makes a determination. Examples of determinative dispute resolution processes are arbitration, expert determination and private judging.

Facilitative ADR Processes

Facilitative dispute resolution processes are processes in which a dispute resolution practitioner assists the participants to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.

Facilitation

Facilitation is a process in which the participants (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the participants to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

Mediation

Mediation is a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

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6 NADRAC also warns that the term mediation may sometimes be used differently, for example to refer to a process in which the dispute practitioner gives advice. NADRAC is of the view that for clarity and consistency it would be better if such processes were referred to as ‘conciliation’ or ‘advisory mediation’ or ‘evaluative mediation’. See NADRAC, Mediation <http://www.nadrac.gov.au/what_is_adr/Mediation/Pages/default.aspx>.
Pro bono lawyers

The Centre use of the term “pro bono lawyers” is intended to include all legal practitioners who undertake pro bono legal work, regardless of whether it is on a full time, part time or occasional basis.

Shuttle mediation

Shuttle mediation is a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between participants who are located in different rooms, or meet different participants at different times for all or part of the process.
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.

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 aims to assist pro bono legal service providers to consider the issues that affect the potential for ADR to improve access to justice for parties experiencing disadvantage.

The Centre focused its research on the role of pro bono lawyers, rather than the role of pro bono ADR practitioners who may also be non-lawyers, primarily because the aim of the Centre is to encourage pro bono legal services. Therefore the primary audience for the resources that the Centre provides is lawyers and law firms undertaking or considering pro bono legal work. Initial research also indicated that the greatest unmet need was for lawyer acting in various roles supporting ADR processes rather than ADR practitioners willing to act pro bono. The material contained in this paper will nevertheless be of interest to any service providers assisting people experiencing disadvantage to resolve a dispute.

1.1 Initial discussion paper

The Centre released a Discussion Paper in October 2011 after initial research and consultations with 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 Discussion Paper focused on mediation because initial research indicated that it was the type of ADR process that was being most frequently used in the legal assistance sector. However as it was not our intention to completely exclude views about other forms of ADR, we did not limit the scope of our questions to mediation.

The discussion paper explored a number of issues and invited interested parties to submit responses, including, but not limited to answering the following questions:

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 the Discussion 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?

This final paper draws on the common themes and issues raised in the submissions received to the Discussion Paper to provide a deeper analysis of issues affecting the involvement of pro bono lawyers in ADR including:

- The potential roles that lawyers can play in ADR;
- Issues for consideration in deciding how best to use limited pro bono legal assistance resources in the ADR sphere;
- The knowledge, skills and resources required for pro bono lawyers to effectively assist in ADR; and
- The resources required to enable lawyers to provide pro bono legal assistance in ADR.

1.2 The trend towards increased use of ADR

Without making any judgments about the utility of ADR for people experiencing disadvantage, 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 4.1.1), and a number of factors that 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.
1.2.1 Cost of litigation

ADR is often promoted as cheaper, quicker and therefore a more accessible path to justice.\(^7\) The cost of litigation can be 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.\(^8\) The risk of having a costs order made against an unsuccessful litigant presents a significant disincentive for disadvantaged people to pursue civil claims, particularly those that may be test cases or cases of public interest.\(^9\)

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 affect a litigant’s expectation or preparedness to pursue matters through the courts.\(^10\)

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”.\(^11\)

1.2.2 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.”\(^12\)

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\(^7\) See for example NADRAC, *Alternative Dispute Resolution in the Civil Justice System*, Issues Paper (March, 2009), 3 [2.12].
The Australian Lawyers 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.  

A paper published by the Federation of Community Legal Centres Victoria that expresses concern about the utility of ADR for CLC clients, including the impact of profound disadvantage on a person’s ability to participate in ADR on an equal footing, nevertheless identified a number of potential benefits for people experiencing disadvantage:

- 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 it 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 3.6.1 for more information on the work of the CMS). The mediators also have the option of assisting parties on the day to prepare undertakings that are later lodged with the Court, thereby freeing up Court time and allowing the Magistrates to deal with the more difficult cases. 

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15 Email from Sandra Hall (Mediation Coordinator at the CMS) to NPBRC, 27 July 2011.
1.2.3 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 to 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.\(^\text{16}\)

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 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.\(^\text{17}\)

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.\(^\text{18}\)

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.

\(^\text{16}\) For more information about NADRAC see the NADRAC website at \(<\text{http://nadrac.gov.au}>\).

\(^\text{17}\) Senate Legal and Constitutional Affairs References Committee, Access to Justice, December 2009, 105 [6.35].

\(^\text{18}\) NADRAC, The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction (September 2009) 21 [2.1].
1.2.3.1 Recent 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 are 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 is 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”. He said that the 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 took 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”, and would 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”. 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”. 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.

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20 Explanatory Memorandum, Civil Procedure and Legal Profession Amendment Bill 2011.
21 Explanatory Memorandum, Civil Procedure and Legal Profession Amendment Bill 2011.
22 Victoria, Parliamentary Debates, Legislative Assembly, 10 February 2011, 432 (Robert Clark, Attorney General).
2 Potential roles for lawyers in ADR

The roles that lawyers could potentially play in the ADR space are:

- ADR practitioner (e.g. as a mediator, conciliator or arbitrator);
- Advocate for parties engaging in an ADR process (by providing legal representation and/or advice);
- Provider of Community Legal Education on ADR; or
- Support for participants in a collaborative law process.

2.1 Lawyers acting as ADR practitioners

NADRAC describes the role of ADR practitioners for the three main types of ADR (mediation, arbitration and conciliation) as follows:23

Mediators assist the participants to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Arbitrators make determinations following an arbitration process in which the participants to a dispute present arguments and evidence.

Conciliators assist the participants to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

While there is continuing growth in the numbers of non-lawyer ADR practitioners, many mediators, conciliators and arbitrators are lawyers.24 The CEO of LEADR (Association of Dispute Resolvers), Fiona Hollier, estimated that in March 2011 approximately half of their 1574 financial members Australia-wide were 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.25

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25 NPBRC meeting with Fiona Hollier (CEO, LEADR), 15 March 2011.
2.2 Lawyers assisting party to ADR (advocate providing representation and/or advice)

According to the Law Council of Australia’s guidelines, 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.\(^{26}\)

Helping clients to prepare for ADR may involve:\(^{27}\)

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

In its submission, the Northern Territory Department of Justice Community Justice Centre described the assistance that lawyers acting pro bono could provide in ADR (which would apply equally to all lawyers) as follows:

Independent pro-bono lawyers would be able to assist in:

- educate/evaluate parties to strategise and negotiate at mediation;
- provide advice on pros and cons to litigation;
- ensure parties clearly understand their obligations including confidentiality, where applicable;
- manage risks;
- confirm whether the parties have the legal authority to settle matters;
- provide alternatives to parties for settlement;
- reality test options considered at the negotiations; and
- ensure any agreement can be made binding.

(Community Justice Centre, Northern Territory Department of Justice)

2.3 Lawyers delivering Community Legal Education (CLE)

Lawyers can increase the awareness of ADR in the community by conducting CLE activities such as training and producing information materials. Lawyers are also 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 to people who might not know much if anything about ADR, as well as suggesting ADR to clients with appropriate cases and advising clients when ADR is mandatory.

Lawyers can also assist in the ADR space by increasing the knowledge of ADR practitioners about legal issues that are relevant to the provision of ADR services for people experiencing disadvantage.

\(^{26}\) The Law Council of Australia, *Guidelines for Lawyers in Mediations* (at 23 March 2007).

\(^{27}\) The Law Council of Australia, *Guidelines for Lawyers in Mediations* (at 23 March 2007).
In its submission, the Northern Territory Department of Justice Community Justice Centre suggested specific topics that would be useful:

- Provision of Professional Development to educate mediators on topics such as legal requirements of Confidentiality, Child Protection, Mandatory reporting, Report Writing for Courts etc

(Community Justice Centre, Northern Territory Department of Justice)

### 2.4 Need for clarity about which role a lawyer is playing

The submissions emphasised the need to be clear about which role a lawyer is playing in any particular matter, given the different focus, underlying philosophies, responsibilities and professional standards that will apply to a role.

While both provide support to participants in the ADR process, the roles of ADR practitioner and advocate are distinct. Advocacy roles are most appropriately performed by the client’s legal and non-legal representatives. Whilst advocates focus on providing personalised advice to the client about the content of their matter, the ADR practitioner’s focus is on upholding the ADR process.

(Women’s Legal Services NSW)

Most submissions were emphatic that the impartiality of the ADR practitioner is critical and would be compromised by acting as an advocate for a party in a dispute where they also had a role as an ADR practitioner.

To avoid the perception of bias, the Energy and Water Ombudsman Victoria (EWOV) suggested that ADR practitioners should not even act as advocates in an industry in which they also act as an ADR practitioner.

Ideally, ADR practitioners should avoid any suggestion of bias or conflict of interest, and not act as advocates within the industries in which they operate. For example, a lawyer who acts for investment landlords should not be appointed as a mediator in a landlord/tenant dispute, despite not having acted for the particular landlord in question.

(Energy and Water Ombudsman Victoria (EWOV))

Some of the specific reasons provided for avoiding having dual roles as advocate and ADR practitioner were:

- that the ADR practitioner would have to focus on the needs of one party over the other and the process would then be subject to claims of lack of procedural fairness.

EWOV believes that if an ADR practitioner acts simultaneously as an advocate and an ADR practitioner, the perception of a fair outcome cannot be achieved, regardless of whether the outcome is in fact fair and reasonable. The dual roles are likely to result in the practitioner focusing primarily on
the needs of one party over the other. The process would then lack procedural fairness and the ADR practitioner would be subject to claims of bias and conflict of interest.

(Energy and Water Ombudsman Victoria (EWOV))

- that the perception of bias could, rather than equalising a power imbalance, shift the power to the party that is being advocated for by the ADR practitioner, especially where the other party is unrepresented.

The perception of bias can impact as deeply as actual bias on the ability to negotiate fair and reasonable outcomes. It would not create an equitable bargaining power between the parties, rather it may shift the power to the party represented by the pro bono lawyer.

(Public Transport Ombudsman Victoria)

- the negative impact on the facilitative process.

There are significant issues with ADR practitioners providing legal advice. One issue is that the dynamics of a facilitative process change (the disputants stop negotiating with each other and instead spend time trying to convince the facilitator).

(Tania Sourdin, Centre for Court and Justice System Innovation, Monash University)

- the limited avenues for recourse if the ADR practitioner gives incorrect legal advice.

Another issue is that if there are private sessions there are real issues with the provision of outcome advice (which is likely to be based on untested inputs). There are other issues – if the practitioner ‘gets it wrong’ and a disputant relies on advice the disputant may be unable to seek recourse (there are significant limitations in respect of ADR practitioner immunity).

(Tania Sourdin, Centre for Court and Justice System Innovation, Monash University)

However depending on the type of ADR practice, ADR practitioners (whether lawyers or non-lawyers) may be subject to practice standards that would prevent them for playing dual roles, even where the parties consent. Pro bono lawyers would also be prevented from playing dual roles by their legal professional obligations.

This may depend on the type of ADR practice, Australian National Mediator Standards and any actual or perceived conflict of interest impairs the impartiality, bias or conflict of interest the practitioner should consider withdrawing regardless of the express agreement of the participants.

(Community Justice Centre, Northern Territory Department of Justice)
I note that the professional standards for accredited mediators may also provide guidance on the question of whether it is appropriate for a pro bono lawyer to act as both an advocate for a client and an ADR practitioner in the same matter.

(Commonwealth Attorney General (former Attorney General, Robert McClelland))

... [M]ediators are not supported in the giving of legal advice in the National Mediator Accreditation System (NMAS). Shifting or changing this composition may have many unintended consequences in the context of insurance and the composition of the mediation industry (non lawyers may be less valued).

(Tania Sourdin, Centre for Court and Justice System Innovation, Monash University)

Such practice may be incompatible with the lawyer’s obligations as a legal practitioner under the relevant Rules, or as a mediator under the Australian National Mediator Standards.

(Commonwealth Attorney General’s Department)

Where the ADR practitioner is a lawyer, the ADR practitioner would have legal professional obligations to the person they are advocating for. These obligations include to use all information they hold for the benefit of the person they act for. Once an ADR practitioner who is a lawyer advocates for a person in ADR surely they are providing legal services to that person and are obligated then to comply with their legal professional obligations.

(Ashurst)

Another issue that arises is how to resolve ethical dilemmas which may arise in relation to a lawyer’s ethical requirement to act in the best interest of a client. Where the lawyer acts as a legal advocate and an ADR practitioner, those ethical requirements may be breached.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

However it was also suggested that as part of their role of ensuring that parties respect the ADR process, ADR practitioners can use the ADR process to address the power imbalance between parties, without stepping into an advocacy role. Several submissions expressed the view that the neutrality or impartiality of the ADR practitioner does not have to prevent them from using the process to redress power imbalances.

In supported Family Dispute Resolution (FDR) models, the concepts of “neutrality” or “impartiality” need not prevent practitioners from intervening to manage power imbalances or seeking to promote the best interests of the children. For example the Co-ordinated Family Dispute Resolution program (CFDR) involves the Family Dispute Resolution Practitioner (FDRP) explicitly acknowledging the history of violence and stating that they will intervene to address any imbalances. Parties are asked to respect the process, including not interrupting, and ensure that the process remains as non-
adversarial as possible. The FDRP is able to use questioning, reframing and summarising as one way of redressing the imbalance and can provide encouragement and support to both parties.

...

As discussed above, an effective ADR practitioner can nonetheless safeguard the interests of a vulnerable client the way that they conduct the mediation in ways that do not amount to providing advocacy.

(Women’s Legal Services NSW)

However, where the ground rules in an ADR proceeding are clear about addressing power imbalance and preventing parties from agreeing to terms that are unjust, the ADR practitioner may intervene to address such issues. In such cases, however, the practitioner would not be acting as an advocate for a party, but rather, applying the rules which would have been discussed with the parties at an earlier stage.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

...[W]here a pro bono lawyer does not represent any one party, he or she might be able to fulfil a number of ‘independent’ roles such as explaining the ADR process to both parties and taking steps to ensure the process is fair (e.g. ensuring a disadvantaged party has access to necessary support services).

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

A situation that was identified as being one where ADR practitioners do play a legitimate advocacy role is within a legislative scheme where an ADR practitioner acts as an investigator/conciliator but also has a legitimate role to ensure any agreement does not contravene the intent and purpose of the legislation.

However there is a distinction to be made between a party’s legal representative acting as an ADR practitioner and the situation in which a person acts as an investigator/advocate for a legislative scheme, for example conciliators at the Australian Human Rights Commission. In the latter case, the practitioner has not previously acted for one of the clients against the other and therefore their neutrality may not be compromised.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

The use of conciliation by government agencies such as those listed above is generally conducted under a statutory framework. Conciliators employed by those agencies do have a dual role in that they are advocates for the legislation as well as acting as an impartial conciliator to assist the parties to resolve the matter. However, this is not the same as acting as an advocate for one of the parties. Conciliators also have a duty to ensure the process is fair, as does any ADR practitioner.

(Victorian Department of Justice)
2.5 Collaborative law

The NADRAC glossary defines Collaborative Law and Collaborative practice as follows:\(^{28}\):

**Collaborative Law** is a form of collaborative practice where the process is led by lawyers representing each of the participants and it has been agreed that the lawyers will cease to act for their client if the matter proceeds to litigation. See also *Collaborative Practice*.

**Collaborative practice** is a facilitative approach to resolving disputes, where the participants, and other experts such as lawyers, sign an agreement to focus on negotiation and settlement rather than litigation. It is essentially focussed on a collaborative and interest based negotiation. All participants are members of a problem solving team who agree to disclose all information and also agree to negotiate in a constructive manner (often by agreeing to communication and other protocols). In most collaborative models, participants wishing to engage in the collaborative process are supported by a lawyer. The participants must also be prepared to participate actively in a process of open negotiations, aimed exclusively at settlement.\(^{29}\)

In its submission, NADRAC identified collaborative practice as an ADR process where lawyers may be able to legitimately play a role that may combine elements of both the role of ADR practitioner and the role of advocate.

The Council is of the view that having an ADR practitioner who also acts as the advocate of one party would not be appropriate except in situations where the parties are using Collaborative Practice and acting in accordance with the *Law Council of Australia’s Australian Collaborative Practice Guidelines for Lawyers*, which can be found at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=48054DBF-0CDC-95F8-9F3D-6B645E96D004&siteName=LCA](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=48054DBF-0CDC-95F8-9F3D-6B645E96D004&siteName=LCA)

*(National Alternative Dispute Resolution Advisory Council (NADRAC))*

2.6 Some ADR schemes restrict the involvement of lawyers

It is important to note that while some ADR schemes generally do not permit the involvement of legal representatives during the conduct of the ADR session\(^{30}\), this does not prevent lawyers from

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\(^{30}\) For example, all industry-sponsored Ombudsman schemes conform to the Department of Industry, Science & Tourism (Cth), *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (August 1997). Benchmark 1 – Accessibility, paragraph 1.20 on legal representation, specifically states that schemes should discourage the use of legal representatives before the decision-maker except in special circumstances. For a list of industry-sponsored Ombudsman schemes see Commonwealth Ombudsman, *Industry sponsored*
providing advice and assistance outside the session, and there may be special circumstances where lawyers will be allowed to participate in the ADR session on an exceptional basis.

...[T]he Superannuation (Resolution of Complaints) Act (Cth) 1993 (SRC Act) affects the scope for pro bono lawyers in the conciliation process. Under s 62(1) of the SRC Act the staff required to assist the Tribunal perform its functions, including conciliators, are ‘employees’ of the Tribunal engaged under the Public Service Act 1999...

...

Of course, complainants always remain free to seek their own advice, including from pro bono legal professionals, about any aspect of their complaint to the Tribunal.

(Superannuation Complaints Tribunal)

EWOV fully supports the National Benchmark that requires industry based dispute resolution schemes to:

- be free to customers
- maximise access
- discourage use of legal representatives (except under special circumstances)

(Energy and Water Ombudsman Victoria (EWOV))

ADR certainly has an important role to play in small claims tribunals like QCAT. However, the self-representation model adopted by QCAT can give rise to difficulties in cases involving disadvantaged parties. Under the QCAT Act, parties are required to appear for themselves unless the interests of justice require otherwise.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

3 The best use of limited pro bono legal assistance resources in ADR: Issues to consider

3.1 What is pro bono legal work?

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

(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, with individual pro bono providers (ranging from large law firms to sole practitioners and barristers) having quite different limitations and areas of focus. As pro bono providers need to balance competing demands and priorities, they are looking for opportunities where they can make a real difference in addressing unmet legal need. This paper discusses issues that were raised in submissions as being important for consideration when deciding whether ADR is appropriate for the client and their individual circumstances, and whether they are equipped to provide pro bono legal assistance in an ADR process.

### 3.2 Is the ADR process facilitative, advisory or determinative?

NADRAC’s Discussion Paper on ADR terminology explains that one way of classifying ADR processes is according to the role of the third party to the other parties in dispute. It divides ADR processes into facilitative (where the third party facilitates resolution, e.g. mediation), advisory (where the third party makes an evaluation or provides advice, e.g. conciliation) or determinative (where the third party makes a decision, e.g. arbitration). It also explains that facilitative and advisory categories could be further classified together as non-determinative or consensual processes. 31 This framework is useful in looking at the role that lawyers might play and helping lawyers think about the nature of the ADR process and their possible contribution on a pro bono basis.

Some submissions viewed legal representation as being especially important where facilitative ADR processes are being used, due to the limitations of the role of the ADR practitioner in facilitative ADR processes. They explain that the ADR practitioner in a facilitative process, such as mediation, while using a variety of methods to assist parties to identify the issues and reach an agreement about the dispute, is supposed to be a neutral third party who cannot provide legal advice and, even if they see

that a disadvantaged party may be agreeing to an unjust outcome, can only advise parties to seek legal advice.

While a skilled ADR professional could also be useful in overcoming unequal bargaining power, the ability of an ADR practitioner to act as a representative or advocate of any party is constrained by the requirement for them to be an independent third party.

There is an inherent tension between these functions which means that the presence of a skilled ADR practitioner does not replace the need for disadvantaged clients to have their own legal representation where there is a significant imbalance in power between the parties.

Where there is a significant imbalance of power between the parties, a Mediation Agreement drafted by a pro bono lawyer may also be appropriate. Such an agreement should ensure that the terms of engagement of a mediator reflect and cater for the parties' unequal resources.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

It is not the role of a mediator to be familiar with all aspects of the law relating to the issues affecting disadvantaged or impoverished clients. Nor is it the role of a mediator to encourage parties to agree to a particular settlement or to coerce parties into a settlement. It is appropriate, however, for a mediator to encourage parties to seek legal advice so that they are fully informed about their legal rights when participating in a mediation. There may be instances where a mediation is suspended to enable a party to seek legal advice or obtain other relevant information.

(Victorian Department of Justice)

...[S]killed third parties may also assist in addressing the disadvantage to parties but this is dependent on the type of ADR practised. Due to the requirement that third parties remain neutral and/or impartial, it may be difficult for third parties to intervene in a manner that could potentially reduce disadvantage generated by power imbalance. It therefore becomes important to have another professional who would be in a position to act for a party in an ADR process particularly where that party is disadvantaged one way or the other. In a facilitative mediation, the mediator, where aware of any disadvantage, may only advise the parties to seek legal advice or other professional advice before proceeding with the mediation. In a worst case scenario, the mediator or third party where not familiar with the relevant law may be oblivious to any disadvantage that may accrue to a party as a result of power imbalance.

While CLCs recognise the relevance of ADR to their work, they would only use ADR processes in relation to specific matters and with legal representation or advice. This is due to the perception that most CLC clients need education and support to use ADR processes effectively... Where a facilitative model of mediation is used, legal representation and provision of information on legal rights and responsibilities and consequences of terms of any agreement would be beneficial.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)
Others viewed the involvement of lawyers in facilitative processes as unnecessary, and as potentially counterproductive. An overly legalistic and adversarial approach could be detrimental to an ADR process that is designed to be non-adversarial, to address underlying conflict that may not be legal in nature, and encourage self determination.32

Further, disputes in the Arts sector often involve an extra-legal dimension as artistic works are by their nature very personal to the client. Mediation can provide a holistic resolution of the matter, extending beyond legal issues. In our view there are a large number of very effective ADR practitioners who are not lawyers and indeed, sometimes lawyers can have an overly legalistic or rights based approach (rather than an interest based approach) to mediation which can hinder resolution.

(Arts Law Centre of Australia, from response to question 7)

I think there are significant issues in suggesting that those with legal issues necessarily benefit from legal advice being provided by a legal practitioner. This is because often business and other issues can often be presented as ‘legal issues’ when the legal issue may simply be a symptom of underlying conflict. For example a partnership dispute or a contract dispute may be considered from a number of perspectives. If it is defined as a legal dispute, broader communication issues and differing values may not be explored. In addition, many disputes can have numerous ‘legal issue’ symptoms. For example a dispute could be defined as an administrative law dispute when in fact the dispute has surfaced in response to procedural dissatisfaction or poor communication skills and management. As Maslow noted: "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."

(Tania Sourdin, Centre for Court and Justice System Innovation, Monash University)

My personal feelings towards the role of mediators and the extent of their legal training is that less is more (even though I have had legal training) because it reduces the potential of the mediator to intervene in the negotiations.

(Community Mediation Service, Bunbury Community Legal Centre, Sandra Hall)

Pro bono would be helpful in very isolated areas – Mildura, Wodonga, Bathurst FRCs all struggle to find legal advice/representation for both clients in a dispute. However, it is only useful where the pro bono lawyer understands the mediation process and that it is not adversarial in nature. I have had this

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32 Research undertaken by Professor Tania Sourdin in the Victorian Supreme and County Courts found that thirty-five percent of the mediators who responded to a survey on private mediation sessions expressed views to the parties regarding what they thought was the likely outcome if the matter was litigated. Professor Sourdin notes that this approach differs from the ‘mediation description’ offered by NADRAC in which the mediator does not proffer any opinion or advice, as well as the National Mediator Standard. (Tania Sourdin, ‘Mediation in the Supreme County Courts of Victoria’ (Research Report, Department of Justice (Vic), 2001) 57 [2.46].)
experience with the Legal Aid lawyer that has been working in partnership with me at the FRC. It has taken a significant amount of time for all parties involved to develop an appropriate working relationship as they come from different backgrounds and philosophies (one predominantly adversarial, the other facilitative) and this has sometimes lead to tension between lawyers and mediators when they have opposing views on the handling of a case.

(Ray Overvliet, Wagga Family Relationship Centre)

A cornerstone of the ADR process is the protection of self-determination. Empowering parties to determine for themselves the outcome of their conflict rather than having that power taken away by an umpire or the Judiciary is part of the design of the mediation process and the skill set of ADR practitioners.

The ethical issue is to consider is whether an ADR facilitator/mediator may unwittingly take away the opportunity for self determination by rigidly counterbalancing a perceived power imbalance between parties by including a representative or an advocate to the negotiation.

...[I]n certain cases the facilitator should give the parties...

...an opportunity to make final call whether support persons mitigate perceived power imbalance such as legal practitioners or simply ‘balancing the numbers on both sides’.

(Community Justice Centre, Northern Territory Department of Justice)

Another aspect of facilitative negotiation is the emphasis placed on the process of direct, face-to-face communication between the parties rather than negotiations conducted on their behalf by legal representatives. Direct communication through the mediation process often allows parties to better explore the issues in dispute and develop a range of solutions that may or may not relate to any relevant legal rights.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

[The] majority of mediations occurring in the ‘shadow of the law’, where litigation is the fallback position, are handled by evaluative mediators. There is a strong influence from former judges who have close to a stranglehold on these mediations and who, even if they have received mediation training, focus on settlement rather than on resolution and on legal positions rather than on the interests of the parties.

(Rosemary Howell, Chair, Strategic Action Pty Ltd, Professorial Visiting Fellow, Faculty of Law, University of New South Wales)

Where advisory processes such as conciliation are being used, the ADR practitioner needs more knowledge about the application of the relevant law since their role includes providing advice about what might happen if the matter proceeds to adjudication. It was suggested that the legal knowledge of a pro bono lawyer acting as an ADR practitioner might be more desirable if they are a conciliator than if they are a mediator, and the need for legal advice/representation may not be as
great as in facilitative processes where the ADR practitioner is not expected to have any legal knowledge.

In conciliation conferences, as well as facilitating a conversation between the two parties, the conciliator can provide advice and reality checking, and offer an opinion about what might happen if the matter proceeds to adjudication.

(Ray Overvliet, Wagga Family Relationship Centre)

Steve Lancken expressed the view that determinative processes may become more useful in cases involving disadvantaged parties if those parties are legally aided or supported by pro bono lawyers.

Mediation is probably the most useful and versatile process though more determinative processes like neutral evaluation and arbitration could be useful in particular cases where parties are legally aided or supported by pro bono lawyers. It seems to me that in any case where there is the chance that pro bono resources could be appropriately applied then ADR could be useful, if only to ensure that resources are not wasted.

(Steve Lancken (Australian Principal), The Trillium Group)

This may be because determinative processes like arbitration have become increasingly “a mimicry of the judicial process”, which has led to a situation where “most parties do not know what options they have for resolving their dispute” and “are heavily reliant on their legal advisers.”

Typically arbitration and expert referral [result in] binding determinations, increasing the risk for disadvantaged and low income clients, particularly if they are not represented.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

Megens and Cubitt explain that: “Often arbitrators were people with technical expertise in the area in dispute who were respected by the parties for that expertise”, however due to a number of reasons “there are now increasing numbers of qualified lawyers acting as arbitrators, which has adversely affected the way arbitrations are conducted and the popularity of arbitration as an alternative to the Courts has suffered”.  

The Victorian Bar ADR Committee made the point that it is difficult to discuss ADR generally because there is so much diversity in ADR processes, even within mediation, and that in future research each ADR process may need separate discussion.

...
This difficulty in the discussion is compounded by framing the question in terms of the generality of ADR rather than the specificity of mediation. As stated in the NADRAC Glossary of ADR Terms, “ADR is an umbrella term for processes, other than judicial determination” and includes, for example, adjudication and arbitration – both determinative processes entirely different from mediation.

And there is extraordinary diversity in mediation. There are, for example, high-end commercial mediations in which there may be a Queens or Senior Counsel Mediator and each party will be represented by lawyers at the mediation – perhaps even by senior and junior counsel with an instructing solicitor. At the other end of the spectrum, the mediator may not be a lawyer and the parties will not be represented.

The entire spectrum is all “mediation” – though obviously very different in many ways.

3.3 Can unequal power between the parties be addressed with legal assistance?

An important consideration for lawyers providing legal assistance on a pro bono basis in an ADR process is whether the assistance they provide can adequately address any power imbalance between the disadvantaged party they are assisting and the other party to the ADR.

The Centre’s initial Discussion Paper highlighted the concerns raised in a Federation of Community Legal Centres (FCLC) (Victoria) paper which was released in October 2010. The FCLC paper drew on CLC experience to conclude that some disputes, by their nature, will always be more appropriately resolved by adjudication. It found that 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 FCLC paper argues that it is vital that low income and disadvantaged parties have access to legal representation, interpreters and other support services whenever they engage in ADR, and where such clients cannot access these services, they should be exempt from mandatory ADR processes.

Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre, Victoria) 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. Denis Nelthorpe (Manager, Footscray Community Legal Centre, Victoria) added that:

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35 Federation of Community Legal Centres Victoria, Activist ADR: Community Lawyers and the New Civil Justice (October 2010).
36 Interview with Celia Tikotin (Telephone Interview, 16 August 2011).
“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 used of mediation.”

In its submission, the Victorian Department of Justice responded to this concern by outlining the safeguards that the Dispute Centre of Victoria (DSCV) has in place to protect vulnerable parties:

During the intake process, the Coordinator advises parties who have not had legal advice to obtain such advice prior to mediation. If the parties do not have a solicitor, the Coordinator refers them to the closest Community Legal Centre. The mediation service provided by DSCV is free, with no cost to the parties.

... The DSCV is conscious of the need to be alert to any power imbalances between the parties in order to ensure a fair process. The mediators employed on the mediation panel for civil mediations have a legal background, are accredited under the National Mediator Accreditation System and regularly attend Professional Development sessions provided by the DSCV. These sessions provide an opportunity for mediators to engage with each other and discuss issues such as working with a variety of vulnerable clients.

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.

Some of the submissions that the Centre received in response to the Discussion Paper echoed the concerns of the FCLC paper, that deeply entrenched disadvantage may not be able to be adequately addressed with legal advice or representation, and cautioned that there are some cases where power imbalance is so entrenched that they may be unsuitable for ADR.

There is also the disadvantage many of our clients suffer from a lifetime of relative powerlessness. They have never been successful in asserting their rights previously and operate on the assumption that they will not be able to do so in the context of ADR either.

Pro bono legal representation can help equalise the position of clients so far as process and availability of assistance in litigation goes but cannot equalise other aspects of disadvantage related more closely to the client’s life circumstances and outlook. A skilled ADR professional will not be able to overcome the client’s life circumstances and outlook either.

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37 Email from Denis Nelthorpe (Manager, Footscray Community Legal Centre) to NPBRC, 1 October 2011.
38 Interview with Graham Wells (Civil Law Advocate, Springvale Monash Legal Service) (Telephone Interview, 16 August 2011).
While a pro bono lawyer could play a part in ensuring the process of ADR was fair when bargaining power is unequal, we are less convinced that a pro bono lawyer could address the actual and perceived inequality that can result in ADR being more disadvantageous to pro bono clients.

(Ashurst)

The Society would caution against attempts to redress the power imbalances in certain cases, for example in family law matters where domestic violence is involved. We note that there is no requirement to undertake Family Dispute Resolution if there has been domestic violence or child abuse. In certain situations, mediation is not a suitable option though a highly skilled ADR practitioner could manage such power imbalances.

We also note that low income parties who hold genuine claims are often best served by getting their ‘day in court’ quickly in the low-cost self-representing tribunals or forums where their cases are determined. In some ways this can be an empowering process for many of these parties. In our view, low income clients need swift and appropriate advice on how to get to this point as quickly as possible.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

Not all cases are suitable for mediation and it is important for each case to be fully assessed to determine suitability. An irremediable power imbalance may be a reason to assess a case as unsuitable for mediation or to suspend a mediation if it becomes apparent during the mediation.

(Victorian Department of Justice)

Many submissions expressed the view that while unequal bargaining power cannot be overcome, participation in ADR may still be preferable to going to court for some clients.

Family Dispute Resolution has been considered by many as an unfavourable option for victims of family violence. Without proper safeguards in place, the process can be used by perpetrators as a further abuse of power. The capacity of the victim to engage in the FDR process effectively is diminished. They may lack confidence to articulate the issues that are important for them and unable to influence the agenda. As a result, there have been many instances where women have agreed to arrangements that are not in the best interests of the children or lead to further exposure to family violence.

Despite the potential difficulties ADR presents for women who are victims of violence, it may nonetheless be a preferable alternative to family law proceedings which can be protracted, isolating and unpredictable.

(Women’s Legal Services NSW)
The PTO understands that consumers who contact us are at risk of being affected by unequal bargaining power, as they are individuals attempting to negotiate an outcome with large organisations. By the very nature of the parties involved, there is an inherent disparity in bargaining power, which can be amplified when a consumer is disadvantaged or vulnerable.

(Public Transport Ombudsman Victoria)

This is a question of degree. In many cases significant amelioration of the bargaining inequality is possible and, in light of the fact that many parties will either not be able to access a court or tribunal or suffer significant disadvantage when doing so, using the skills of ADR professionals and lawyers to make ADR available to more parties is often preferable to excluding people from accessing services altogether.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

Mediation is the most likely process (more likely than courts) to ensure that parties are not coerced into agreements by the more powerful. Unequal bargaining power cannot be overcome. It exists and needs to be acknowledged and any process needs to be acutely aware of the risk of coercion. Accredited mediators are trained in this skill.

(Steve Lancken (Australian Principal), The Trillium Group)

Some submissions expressed the view that in some circumstances, legal representation may be the best way to overcome power imbalance.

I also recognise that sometimes legal representation is the most appropriate way to address power imbalances particularly for disadvantaged consumers or for those who are unable to advocate on their own behalf.

(Public Transport Ombudsman Victoria)

...Unequal bargaining power can be managed, if not overcome, with legal representation. There are many examples of David v Goliath disputes in which the less powerful party wins. That is what lawyers for weaker parties strive to do.

(Victorian Bar ADR Committee)

The role of legal and non-legal advocates is also very important in ... redressing the power imbalances through the way they support the process and in explaining and/or advising the client. The legal practitioner must be free to intervene if their client’s interests are not being met.

(Women’s Legal Services NSW)
We strongly disagree that an appropriately trained ADR professional could obviate the need for representation for disadvantaged parties in ADR.

(Ashurst, from response to question 7)

3.4 Are the skills of the pro bono lawyer a match for the unmet legal need?

Some submissions expressed the view that limited pro bono legal assistance resources would be best used by having lawyers doing what they have been traditionally trained to do - provide legal advice and representation to address well established existing unmet legal needs, rather than expanding into new areas by providing services as ADR practitioners.

We would add that your study should consider whether the pro bono time of a practising lawyer would be spent more effectively acting for a pro bono client than acting as a mediator in a pro bono matter. There are many mediators looking for experience but still a dearth of free assistance for civil law casework.

(Ashurst, response to question 8)

In our view, the greatest legal need continues to arise from lack of access to legal advice and representation for disadvantaged and low income clients, rather than access to free or low cost ADR.

(Law Institute Victoria)

There is so much unmet need for legal services in Queensland that lawyers who are not already accredited and trained in mediation should be directed to providing assistance in their area of expertise.

Most pro bono services are inadequately resourced and there is a high level of unmet need for those services. Therefore, any extension of services into ADR should not be done at the expense of existing services. It is also important that low income, disadvantaged parties should not be directed into ADR without knowledge of and advice about their legal rights.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

The current avenues for referral to legal advice are limited – advice from a Community Legal Centre is not universally available in all areas. LawAccess is an excellent referral, but the service is limited to brief legal information in most cases.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)
3.5 Focusing pro bono resources on matters where legal assistance in ADR is most needed (Comments on areas suggested in the Discussion Paper)

The Centre’s Discussion Paper canvassed a few roles for lawyers in ADR that were suggested as potentially being a good match for pro bono legal assistance and asked stakeholders to comment on the suitability of these, and whether there were any additional areas/projects that they would suggest. The specific roles that were canvassed in the Discussion Paper were:

1. Redressing unequal bargaining power situations (as either ADR practitioners or advocates)
2. Complex civil proceedings with self-represented litigants
3. Disputes within and between Indigenous communities
4. Disputes within and between not-for-profit organisations
5. Small claims pilot project

In their submissions, the Victorian Bar ADR Committee and Steve Lancken challenged the assumption that there can be areas where pro bono legal assistance is or is not appropriate, arguing that disputes in which one or more parties are disadvantaged do not present as a separate and distinct category requiring a different approach from other parties.

(12) Similarly, it is, we think, misleading to speak in terms of “types of ADR . . . for disadvantaged and low income clients”.
(13) There are certainly common aspects to being disadvantaged and low income, but mediation, in particular, is neither appropriate nor inappropriate by reference to whether a party is disadvantaged or low income.
...

(52) More significantly, the assumption underlying Question 7 seems to be that there are some areas in which pro bono support by lawyers in ADR or mediation is appropriate or not appropriate – an assumption the Victorian Bar Committee questions throughout this response.
(53) As to the specific areas and projects identified in Section 7, they are, by definition, deserving. The flaw is the assumption that, by reference to areas, or to the state of being disadvantaged or low-income, mediation or pro bono support in mediation is, by definition, appropriate or not.
(54) One has to prioritize between deserving demands on the limited resources and availability of pro bono support – but this Discussion Paper is not framed in terms of competing demands and priorities. It is framed in terms of what is “appropriate for pro bono” or not, etc.
...

(From response to Question 10)
(60) This will be an ongoing discussion. In general terms, properly trained mediators can bring their skills to bear in all disputes. Disputes in which one or more parties are disadvantaged do not present as a separate and distinct category requiring a different approach.

(Victorian Bar ADR Committee)
I do not think that there are many more issues for the recipients of pro bono services, in deciding to use ADR than there are for those NOT worthy of pro bono assistance. Power imbalances exist and will continue to exist regardless of whether a party engages in mediation or some other ADR process.

(Steve Lancken, The Trillium Group)

Nevertheless the Centre takes the view that it may be helpful to highlight examples of matters where pro bono resources could make a difference, especially since they are drawn from the case studies in Section 3.8 where lawyers have successfully provided assistance to parties to ADR on a pro bono basis.

Most submissions expressed the view that all the area/projects identified in Section 7 of the Discussion Paper were appropriate situations where pro bono legal support could make a positive contribution.

The Council considers that the areas identified are appropriate although should not be seen as an exhaustive list. ADR is appropriate for and should be available in any type of dispute.

(National Alternative Dispute Resolution Advisory Council (NADRAC))

In my view, these areas are appropriate for pro bono either in relation to provision of legal advice and representation of parties in an ADR process or acting as an ADR practitioner.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

The areas identified are appropriate but a lawyer cannot simultaneously perform a mediator role and provide legal advice.

(The Law Society of South Australia)

Some provided specific comments on each of the roles canvassed in the Discussion Paper:

3.5.1 Redressing unequal bargaining power

Areas in which pro bono lawyers could assist in providing services to clients with social and economic disadvantages

Preparation for mediation, including initial advice on merits and appropriate settlement outcomes

Pro bono lawyers could valuably assist by helping parties in suitable cases prepare for mediation. They could help parties develop a realistic sense of the merits of their case should it proceed to court and better understand the likely risks, costs and time involved. Unlike mediators, pro bono lawyers would be free to advise parties to agree on appropriate terms and inform them about the consequences of
not reaching agreement at mediation. The fact that such services could be provided by a lawyer with no financial interest in the matter proceeding to court would be of particular benefit in matters concerning vulnerable clients.

Legal representation where one party is legally represented and the other is not

While lawyers do not generally attend CJC mediations, on occasion they do at the request of one of the parties. This mainly occurs in small claims matters. Often there is legal representation on one side only. The settlement rate for these matters is around 50%, well below the CJC average of around 80%.

This low settlement rate could be due to a number of factors. A possible factor is that the unrepresented party feels less confident entering into an agreement where the other side is represented as there may be a real or perceived power imbalance. As the reason a party is not represented will often be financial, access to pro bono lawyers to attend a mediation could be very beneficial in these circumstances.

Representation where a matter would otherwise be unsuitable because of power imbalance or vulnerability of a party

CJC undertakes careful screening and assessment of all matters to ensure only suitable matters proceed to mediation. Factors that may affect suitability include risks associated with violence, mental health issues, a significant power imbalance that cannot be overcome by the mediators and other relevant considerations.

Being assessed as unsuitable can have the undesirable effect of “screening out” some of the most vulnerable members of the community who are also likely to have difficulty accessing court or other alternatives to mediation.

... Where the reason a matter is assessed as unsuitable relates to power imbalance, legal representation could in some cases rectify this by providing the more disadvantaged party with additional support. An example would be where the source of the power imbalance related to a party’s inability to advocate on their own behalf.

In matters like these, the use of pro bono lawyers could provide a valuable role in supporting disadvantaged parties and ensuring they are not excluded from access to justice through the use of CJC mediation as a result of their vulnerability. Helpful assistance could include pro bono lawyers preparing clients and/or attending mediation with them.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

Pro bono lawyers can assist in partially redressing unequal bargaining power in ADR by acting for pro bono clients in the dispute.

(Ashurst)
3.5.2 Complex civil proceedings with self-represented litigants

To assist effectively in ADR a lawyer needs to understand the client’s prospects in litigation and therefore have done considerable work in determining the available evidence and the law.

Given the amount of work required for a lawyer to properly assist in complex civil litigation for self-represented litigants, the client would be better assisted if the lawyer simply acted in the matter.

In terms of the appropriateness of such matters for ADR per se, it depends on the nature and circumstances of the matter and the parties.

(Ashurst)

ADR is a particularly useful tool in matters where the costs of litigation would far outweigh the value of the claim or where the quantum of the claim is small but the legal issues involved are complex (for example, some property and trust disputes)

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

The LIV suggests that pro bono would be limited in estate issues particularly when taking into account the value of the estate, and further, would not be appropriate in neighbourhood disputes because Victorians can access the Dispute Settlement Centre Victoria.

(Law Institute Victoria (LIV))

3.5.3 Disputes within and between Indigenous communities

Regarding the third category of the role of pro-bono in disputes within and between indigenous communities, there are complex cultural considerations which affect the efficacy of traditional models of ADR. The ADR process may need to be modified or adjusted in such situations - often there is a much broader class of interested stakeholders, layers of critical non-legal interests to be identified, and complex issues of authority and decision making within an Indigenous community which must be addressed in order to commence any ADR process effectively. Arts Law believes that more work needs to be done on the use of ADR for Indigenous clients and more capacity building within the ADR sector in relation to the unique characteristics of Indigenous dispute resolution processes. The simple injection of greater pro bono participation is welcome but unlikely to address these issues.

(Arts Law Centre of Australia)

If there is a shortage of ADR practitioners with appropriate cultural understanding to work with Indigenous people to resolve disputes this may be an area pro bono practitioners could assist in. However it would need to be established that such a shortage exists and that the assistance provided
by pro bono lawyers as ADR practitioners was more helpful to clients than assistance to represent the clients.

(Ashurst)

In relation to disputes within and between indigenous communities a conflict management approach (as defined) would be more suitable and an issue that may arise in relation to this approach for pro bono lawyers is the amount of time that will be required. Another issue is additional training that may be required in relation to culture and communication. This may mean that pro bono lawyers are required to commit more time and resources to these matters without a corresponding increase in payment.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

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

It seems there are already sources of assistance to access ADR in these disputes.

(Ashurst)

### 3.5.5 Small claims pilots

In many jurisdictions ADR is already available in small claims credit and debt matters. The need for such services needs to be established in the different jurisdictions.

(Ashurst)

The LIV submits that pro bono assistance would be helpful for small claims.

(Law Institute Victoria (LIV))

### 3.6 Focusing pro bono resources on matters where legal assistance in ADR is most needed (Additional areas suggested in submissions)

In addition to the roles suggested in the Discussion Paper, additional areas or projects that were suggesting in submissions included: Family Law (specifically the Co-ordinated Family Dispute Resolution Pilot, disputes about children and property division); disputes between or involving small business; estate disputes; assisting parties to make agreements that result from ADR processes binding/enforceable by drawing up agreements or seeking consent orders; some employment related disputes (including discrimination and harassment); and collaborative law practices.
In cases involving legal rights, particularly where a party is disadvantaged, the experience of the mediation process and the likelihood of early resolution can be vastly improved with good preparation for mediation and timely, realistic legal advice.

While the majority of CJC mediation deal with primarily non-legal issues (the majority concern interpersonal relationship breakdown for which the remedies frequently include codes of conduct for future communication and at times apologies) there are cases that do involve legal rights and responsibilities. Notable examples include family disputes about children and property division, estate disputes, some employment related disputes (including discrimination and harassment) and small claims matters.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

3.6.1 Family disputes involving violence

According to a report by the Federation of Community Legal Centres Victoria, many women with family law cases involving violence 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. 39

In its submission, Women’s Legal Services NSW suggested that pro bono legal assistance could be useful in family law disputes where there has been violence, as demonstrated by the successful involvement of CLC solicitors in the Co-ordinated Family Dispute Resolution Pilot.

The Co-ordinated Family Dispute Resolution (CFDR) Project is a pilot project auspiced by the Commonwealth Attorney General’s Department and co-ordinated between family dispute resolution practitioners, community legal centres, domestic violence services and men’s services. It also draws on additional support services where appropriate for example, for CALD and ATSI clients. The project aims to provide a safe option for resolving family law issues where there is a history of family violence. It is significant that the issue of family violence itself is not mediated, as this is not appropriate. Instead, CFDR provides an opportunity for clients to mediate family law issues involving children where there is a context involving a history of family violence. CFDR prioritises the safety of children and their families and there will be circumstances where it is not appropriate to use CFDR because it would be unsafe or dangerous.

CFDR involves active case management with cooperation and information sharing between the agencies involved in any particular case. Clients are assisted in accessing counseling and other support as necessary. Each case is subjected to thorough risk assessment at intake and throughout the process which encompasses stages of preparation, mediation and follow-up. Victims are assisted to develop a safety plan and perpetrators are assisted in addressing their behaviour. Information sessions can help participants understand the mediation process and develop strategies.

39 Federation of Community Legal Centres Victoria, Activist ADR: Community Lawyers and the New Civil Justice (October 2010) 19 [4.3.1].
Family Law has not traditionally been an area of high involvement by pro-bono lawyers. However as demonstrated by the Co-ordinated Family Dispute Resolution Pilot, there is a role for solicitors employed by community legal centres to be involved in Family Dispute Resolution with other services providers. This model could potentially extend to include the involvement of pro-bono solicitors.

Pro-bono lawyers who are not FDRPs can provide assistance to clients participating in FDR by providing legal advice, assisting with preparing opening statements, explaining the process. There is also scope for conducting community legal education to provide information about the FDR process.

(Women’s Legal Services NSW)

Another example of pro bono lawyers assisting parties to participate in the ADR process in these circumstances is the Women’s Legal Service in Victoria which runs a duty lawyering service to represent women in Roundtable Dispute Management (RDM) (see Section 5.3 of the Discussion Paper), which aims to reach agreements which are legally enforceable.

The Discussion Paper suggested that pro bono lawyers could also assist in these cases as ADR practitioners, as mediators do at Bunbury Community Legal Centre in Western Australia (see Section 5.3 of the Discussion Paper). Many disputes that are mediated at the Community Mediation Service (CMS) at the Bunbury Community Legal Centre 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. 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:

“...[T]he escalation of issues can often 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 negotiate, and to put in place suitable arrangements for the children. Previously, parents were

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40 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. Interview with Sandra Hall (Mediation Coordinator at the CMS) (Teleconference, 6 April 2011).
41 Interview with Sandra Hall (Mediation Coordinator at the CMS) (Teleconference, 6 April 2011).
42 Email from Sandra Hall (Mediation Coordinator at the CMS) to NPBRC, 27 July 2011.
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".  

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.  

3.6.2 Disputes between or involving small businesses

Another area that may be appropriate is the resolution of disputes between or involving small businesses. This may be an area in which a pro bono lawyer may provide legal advice/representation to a small business owner at a reduced fee (may need to be means tested). Where the other party has the capacity to bear the cost of legal representation, that party should be advised to seek such representation at their own cost.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

Small business disputes.

(Steve Lancken, The Trillium Group)

3.6.3 Assisting parties to make agreements that result from ADR processes binding/enforceable by drawing up agreements or seeking consent orders

... [I]t is contrary to CJC policy for mediators to facilitate the making of binding agreements at voluntary mediation unless there are legal representatives at the mediation to draw up the agreement. Instead, it is suggested that the good faith agreement parties enter into at mediation includes a statement to the effect that, ‘the parties to the dispute agree to have an enforceable agreement drawn up after the mediation in the same terms as the CJC mediation agreement.’ In some cases lawyers will also assist the parties to make the agreement enforceable in other ways, for example by asking the court to make consent orders or similar.  

Pro bono lawyers could greatly assist clients who are not otherwise able to access legal assistance to have their agreements made enforceable under current CJC policy.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

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43 Email from Sandra Hall (Mediation Coordinator at the CMS) to NPBRC, 27 July 2011.  
44 Email from Sandra Hall (Mediation Coordinator at the CMS) to NPBRC, 27 July 2011.
However, many clients need the assistance of a lawyer within the mediation process. Lawyer assisted mediation is available through Legal Aid and in some circumstances through family relationship centres in conjunction with community legal centres. This option offers victims of domestic violence a safer and more structured way of resolving their family law matters. The involvement of a solicitor also facilitates drafting of consent orders so that the client is afforded legally binding outcome and the need for further action is minimised. Clients benefit from being able to resolve their matters before they escalate.

(Women’s Legal Services NSW)

3.6.4 VCAT Pilots

Comments contained in VCAT’s submission indicated that they are working with pro bono legal service providers to improve the delivery of their services in a number of areas.

We are working to ensure that pro bono assistance and support for litigants in person at VCAT generally, including participants in ADR processes, is provided in the most effective way possible. Our litigant in person co-ordinator, Therese Boman, was appointed in July 2011. Her role is to liaise with pro bono legal service providers to improve the delivery of these services. A number of pilots are in progress. These will be evaluated and will assist to inform the implementation of an overall model to assist litigants in person across VCAT.

... Short mediation and Hearing Pilot ...

... Alternative dispute resolution in Anti-Discrimination matters ...

... ADR in Residential Tenancies matters ...

... (Victorian Civil and Administrative Tribunal (VCAT))

3.6.5 Collaborative law practice

Several submissions mentioned collaborative law practice as an area of ADR practice where lawyers acting pro bono could make a positive contribution.

Collaborative law practice
The Department supports the use of collaborative law practice to resolve disputes.

45 See Glossary and section 2.5
Collaborative law practice is well established in the family law field, and is another area where lawyers may consider providing pro bono services.

(Commonwealth Attorney General’s Department)

The Society notes that the paper does not address the way in which this issue applies collaborative law. Collaborative law depends on the legal representative of each party acting with transparency and without seeking to attain tactical advantage. This means that a collaborative lawyer who is an “advocate” for a party may not “advocate” in a traditional sense.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

Develop collaborative practices with ADR institutions to promote areas such as:

- Restorative Justice Programs
- Family Group Conferences
- Court referred mediations such as Personal Violence Restraining Orders (also known as Apprehended Personal Violence Orders in other jurisdictions)
- Provide support to parties at mediation from Culturally and Linguistically Diverse backgrounds and where capacity to attend may be an issue.

(Community Justice Centre, Northern Territory Department of Justice)

3.6.6 Any ADR process

ADR is appropriate for and should be available in any type of dispute.

(National Alternative Dispute Resolution Advisory Council (NADRAC), response to question 7)

It is clear that there is plenty of scope for lawyers to do pro bono work in the ADR field, in the same way that lawyers offer pro bono legal advice or legal representation in litigation to disadvantaged or impecunious clients.

Given that ADR is now such an integral part of the legal landscape, there seems no reason why a lawyer may not represent a client in any ADR process on a pro bono basis, just as they would give pro bono legal advice or assistance to the same client or represent the client in court on a pro bono basis. This includes acting for a client who is making a complaint to one of the government schemes listed above.

(Victorian Department of Justice)

It seems to me that in any case where there is the chance that pro bono resources could be appropriately applied then ADR could be useful, if only to ensure that resources are not wasted.

(Steve Lancken, The Trillium Group)
3.6.7 Community Legal Education

We suggest that consideration could be given to having pro bono training initiatives sponsored by law firms.

(The Law Society of South Australia)

3.6.8 Conflict Management processes

In its Discussion Paper, the Centre asked whether Conflict Management is an ADR process in which pro bono lawyers could provide assistance. This was prompted by an initial consultation meeting with Natasha Mann, NSW CJCs, where she suggested it may be an area worth exploring for pro bono mediators in general (not necessarily legally trained).  

The submissions revealed the need to provide further definition and explanation of the term “Conflict Management”.

(30) It is not clear from the Discussion Paper that “conflict management” is a process that is independent from mediation – indeed, Section 3.1 of the Discussion Paper seems to suggest that it is a type of mediation.

...  

(32) Section 3.2 is headed “Conflict Management”; and the first sentence presents it as nothing more than “another model for dispute resolution which is being successfully utilised by community ADR services”.

(33) Only at the end of the paragraph, and then only as an “example” – as if “Conflict Management” were a generic and general form of ADR – is there reference to its use in Indigenous communities.

(34) This is all very confusing. “Conflict Management” is not in the NADRAC Glossary of ADR Terms. Only when one goes to the footnoted NADRAC 207-page report Solid Work You Mob Are Doing does one learn from the Preamble that it is, it seems, specific to Indigenous Australians and that NADRAC research project.

(Victorian Bar ADR Committee)

In its submission and follow up email to its submission, NSW CJCs clarified its use of the term “Conflict Management” as describing the flexible process of facilitation it uses to address disputes involving groups of people. NADRAC does not define the term “Conflict Management” but defines an equivalent ADR process called “facilitation”.

Conflict Management is not formally defined by the National Alternative Dispute Resolution Advisory Council (NADRAC). We note that NADRAC primarily uses the term in the context of disputes involving Indigenous people and communities.

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46 Interview with Natasha Mann (Director, ADR Directorate & Community Justice Centres, NSW Department of Justice and Attorney General) (Community Justice Centres, Parramatta NSW, 8 March 2011).
CJC uses the term Conflict Management to describe a flexible process of facilitation used by independent dispute resolution practitioners to address disputes involving groups of people who share membership of a community, local organisation, employment setting etc. Rather than aiming to resolve or eliminate all existing points of conflict between individual community members, conflict management focusses on developing processes for managing present and future disputes that concern the community as a whole and, where appropriate, coming to agreement about specific issues in dispute.

... 

The term Conflict Management as used by CJC relates to the ADR process referred to as "Facilitation" and defined by NADRAC as follows:

**Facilitation** is a process in which the participants (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the participants to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

A recent example [of the use of Conflict Management outside the context of Indigenous dispute resolution] that comes to mind is one involving a dispute between a large number of tenants residing in a public housing building.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

The Law Society of South Australia and NADRAC specifically expressed the view that conflict management is a process that pro bono lawyers with the requisite skills and experience could become involved in.

Conflict Management is an area where appropriately trained pro bono lawyers could be involved.

(National Alternative Dispute Resolution Advisory Council (NADRAC))

However, some practical constraints were identified in other submissions that may make Conflict Management unsuitable for the provision of pro bono legal assistance, namely:

- It is used in disputes which centre on interpersonal and other non-legal issues.

  CJC generally uses conflict management processes in community disputes involving significant numbers of parties, for example in the case of feuds between Aboriginal community groups. Most of these disputes centre on interpersonal and other non-legal issues and the assistance of pro bono lawyers would not usually be needed.

  (NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

- It is requires a high level of expertise in the chosen area and is time consuming.
The Society is aware that Conflict Management usually requires a high level of expertise and experience in the chosen area and tends to be a lengthy process. As a result, we suspect that there would be limitations on the availability of appropriate pro bono practitioners capable of providing this service.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor)

Some submissions suggested that pro bono lawyers may be able to assist with particular aspects of the conflict management process, rather than managing the entire conflict.

Conflict management is a field that is increasingly being used, often in an employment situation or other ongoing relationship and as a result is often born by the business. As this process is a time consuming and expensive form of ADR and given the constraints on pro bono services, it is more likely that pro bono lawyers would be involved in providing advice and assistance at discrete points in the process, rather than managing the conflict from beginning to end.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre)

In my view, conflict management is a process aimed at prevention of conflict or elimination of factors which may result in escalation of an existing conflict while also engaging with parties in relation to resolution. Based on this view, pro bono lawyers can be involved in conflict management by providing community legal education on various topics, facilitating discussion between parties, for example, between government agencies and communities using ADR skills. For example, a CLC just completed a program aimed at empowering community members and preventing conflicts into the future:

Working with the community members, build their sense of confidence, their knowledge, and their capacity.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

3.7 Learning from the Community Legal Centre experience of ADR (CLC use of ADR and the roles CLC lawyers play)

The pro bono community can draw on the experience that CLCs have with the use of ADR to assist disadvantaged clients and their views on the impact of ADR on access to justice (see also Section 3.3). CLCs are also a significant source of referrals to the pro bono community and if pro bono lawyers are going to become involved with ADR it may be through or in partnership with a CLC.

The submissions reflected different perceptions about the extent of ADR use in the CLC sector, ranging from “extensively used” to “not much used”, which may be due to varying levels of awareness and therefore use of ADR by each CLC.

Interestingly, most CLCs did not view Ombudsman services as ADR organisations. Most CLC staff interviewed were aware of ADR processes but the extent of knowledge, use and exposure to ADR
differed. Some CLC staff were not familiar with ADR. These put together means that ADR is not so much used by CLC staff and uses of some ADR services may not be regarded as ADR.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

FRCs across Australia have been “strongly encouraged” to work collaboratively with Legal Aid and CLCs, as these organisations have been given government funding for legally assisted mediation program (where parties to mediation are facilitated by FRC Family Dispute Practitioner, and represented by Legal Aid or CLC lawyer).

... The 2006 Family Law Revisions are intended to move away from an adversarial approach to family law however it is taking time for everyone who was involved family law pre 2006 to make a shift not just in their understanding of the application of the law (this was almost immediate) but in their philosophical approach to families in dispute. Even now, six years down the track some clients are getting advice that FDR is “a hurdle” to going to court, although we are seeing this far less frequently in the last year or so.

(Ray Overvliet, Wagga Family Relationship Centre)

ADR is extensively used across the Community Legal Centre (CLC) sector. For the period 2010-11 around 50% of CLCs funded under the Community Legal Services Program opened cases that involved some form of ADR services, and approximately 10% of all cases opened during 2010-11 involved some form of ADR. Of those, civil law matters made up 52%, family law 43% and criminal law 4%.

In civil law matters, ADR was used most frequently in Tenancy, Credit and Debt, Neighbourhood Disputes, Government/Administrative Law, Consumer Complaints, Discrimination, Employment, Motor Vehicle, Wills/Probate, Injuries and Immigration matters.

**Percentage of Opened Cases by Law Type involving ADR in 2010-11**

<table>
<thead>
<tr>
<th>State</th>
<th>Civil Law</th>
<th>Criminal Law</th>
<th>Family Law</th>
<th>Total – Opened Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>13%</td>
<td>11%</td>
<td>24%</td>
<td>18%</td>
</tr>
<tr>
<td>VIC</td>
<td>6%</td>
<td>3%</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>QLD</td>
<td>7%</td>
<td>1%</td>
<td>11%</td>
<td>7%</td>
</tr>
<tr>
<td>SA</td>
<td>25%</td>
<td>1%</td>
<td>6%</td>
<td>15%</td>
</tr>
<tr>
<td>WA</td>
<td>14%</td>
<td>14%</td>
<td>25%</td>
<td>17%</td>
</tr>
<tr>
<td>TAS</td>
<td>29%</td>
<td>12%</td>
<td>35%</td>
<td>29%</td>
</tr>
<tr>
<td>NT</td>
<td>9%</td>
<td>13%</td>
<td>16%</td>
<td>12%</td>
</tr>
<tr>
<td>ACT</td>
<td>2%</td>
<td></td>
<td></td>
<td>2%</td>
</tr>
<tr>
<td><strong>National Total</strong></td>
<td><strong>10%</strong></td>
<td><strong>5%</strong></td>
<td><strong>11%</strong></td>
<td><strong>10%</strong></td>
</tr>
</tbody>
</table>

(Commonwealth Attorney General’s Department)

The full extent of the use of ADR in the CLC sector may be not known, as it is occurring on an informal basis.
My experience is that there is already extensive mediation and ADR occurring in the CLC sector on an ad hoc or informal basis. Mediators offer services free or at reduced cost (sometimes no fee to the CLC client) in such matters. What may be needed are easy and coordinated access points to ADR services.

(Steve Lancken (Australian Principal), Trillium Group)

Ojelabi’s research identified a focus on the facilitative nature of ADR processes and a perception within the CLC sector that ADR processes are best suited for community, including neighbourhood and fencing disputes.47

The research found that most CLCs viewed ADR as an alternative to court processes. There was also an emphasis on the facilitative nature of ADR processes (although not all ADR processes are facilitative), and the focus of ADR on community, referring here to the perception that ADR processes are best suited for community, including neighbourhood and fencing disputes.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

While CLCs may suggest ADR to clients in appropriate cases, the Arts Law Centre of Australia has found that some clients do not follow through and engage in ADR.

In Arts Law’s experience, suggestions that ADR may be suitable to resolve a matter are often not followed through by the parties. There remains scope for ADR to be used more comprehensively, but this will require encouraging parties to proceed with ADR...

(ARTS LAW CENTRE OF AUSTRALIA)

The submissions that the Centre received only described experiences of CLC lawyers acting as legal advisors/representatives and did not mention lawyers acting as ADR practitioners. They mentioned CLC staff playing the roles of:

- referring people to ADR (including to a mediator from a panel),
- providing information and advice about the ADR process,
- providing parties to ADR with advice and representation during the ADR.

Upon referral from the FRC, we assist female FDR participants (with legal advice and representation) who are victims of domestic violence. We also provide regular advice clinics at the FRCs to women who are taking part in FDR.

The Arts Law mediation service is available to assist in any legal dispute involving an artist or arts organization. At least one party to the dispute must be an Arts Law subscriber. Arts Law has a panel of mediators, from whom a suitable mediator will be selected, subject to the parties to the dispute...

47 Lola Akin Ojelabi, ‘Community legal centres’ views on ADR as a means of improving access to justice – Part I’ (2011) 22 ADJR 111, 113-114
Law solicitors encourage clients with matters that mediation would be suitable for to consider mediation. Arts Law Sample Contracts which may be purchased from the Arts Law website also include a standard mediation provision, through which parties agree to submit any disputes arising under the contract to mediation as a first response.

... Utilizing pro bono lawyers in the mediation service has not been pursued to date because of the potential strain it would place on Arts Law’s employed solicitors and other services.

(Arts Law Centre of Australia)

3.8 Case studies from existing pro bono mediation schemes

3.8.1 Examples of pro bono mediation schemes where lawyers act as mediators

The Centre has identified the following examples of pro bono referral services which refer suitable cases to mediation, and mediation schemes that 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.

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). 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 that the mediation can be undertaken at no cost to the parties.

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. 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.49 This matter did not settle at mediation.

Public Interest Law Clearing House (PILCH Victoria)

The referral scheme at PILCH Victoria 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 Victoria’s Law Institute of Victoria Legal Assistance Scheme (LIVLAS) referred to mediation:

**Neighbourhood fencing dispute.** Counsel from the Victorian Bar 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, who were both represented, agreed to mediation and the matter settled at mediation after the first Directions Hearing.50

**LEADR**

LEADR is an Australasian, not-for-profit membership organisation that 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.51

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 between the years 1992 to 2002. 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 2002, referrals from Legal Aid have declined as more Legal Aid clients’ disputes have been resolved by government or industry sponsored ADR schemes.52 Now

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49 Email from Iain McCowie (Solicitor and Coordinator, Self-Representation Service (Courts) QPILCH) to NPBRC, 18 July 2011.
50 The submissions of the Victorian Department of Justice and the Law Institute of Victoria pointed out that this matter could have been handled by the Dispute Resolution Centre Victoria.
52 Email from Monique Hitter (Director for Civil Law, Legal Aid NSW) to NPBRC, 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.\(^5^3\)

**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 fewer 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

\(^5^3\) Interview with Fiona Hollier (CEO, LEADR) (LEADR, 15 March 2011).
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 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.\textsuperscript{54}

### 3.8.2 Examples of lawyers assisting parties to ADR as an advocate

The existing pro bono mediation schemes that are canvassed in this section 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.\textsuperscript{55}

Here are two examples\textsuperscript{56} 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.

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 them on possible terms of settlement.

\textsuperscript{54} Interview with Lavinia Shaw Brown (LawWorks UK) (Conference Call, 21 March 2011).

\textsuperscript{55} 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): Interview with Lavinia Shaw Brown (LawWorks UK) (Conference Call, 21 March 2011).

\textsuperscript{56} Email from Teresa Cianciosi (Manager LIV Legal Assistance Scheme, PILCH (VIC)) to NPBRC, 5 September 2011.
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 What knowledge/skills/experience do lawyers need to assist parties to ADR processes experiencing disadvantage?

4.1 Knowledge of ADR processes

The submissions emphasised that the benefits for disadvantaged parties of having lawyers assisting them participate in ADR would only be fully realised if those lawyers possess the knowledge and skills in the relevant ADR process.

Where a pro bono lawyer is acting as an ADR practitioner, it could be assumed that fairness of process and outcome would be achieved due to the knowledge of the law and familiarity with legal issues. However, the practitioner must also be skilled in the type and model of ADR being practised in order to harness the benefits of those processes.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

This applies to both lawyers acting as ADR practitioners and lawyers providing representation and/or advice to parties to ADR. Professor Tania Sourdin writes that with the move towards ADR, many lawyers are aware that their role has been transformed in recent years, but that this awareness is not uniform across the profession. “Many lawyers have never received training in negotiation. Few plan or consider the negotiation process, and do not understand how and when to use different negotiation styles. As a mediator working in NSW and Victoria I have observed considerable differences in the way lawyers approach mediation. While most experienced lawyers display high levels of competence and understanding of ADR processes, a minority do not”.57

4.1.1 The ADR landscape and existing free ADR schemes and services

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.58 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.\(^5^9\)

ADR can occur by way of court order, or encouragement, and by choice, and can be delivered through: a private mediator or arbitrator; a court authorised (or court connected) scheme; or through community-based\(^6^0\) or industry-sponsored services. 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.\(^6^1\)

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.\(^6^2\)

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).\(^6^3\) In federal family disputes, there are free ADR services being provided by government funded community organisations or Legal Aid.\(^6^4\) In the states and territories, government agencies and government funded community organisations provide 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).

\(^5^9\) NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction* (September 2009) 63 [5.1].


\(^6^2\) NADRAC, *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction* (September 2009) 63 [5.5].


\(^6^4\) The Commonwealth Attorney General’s Department’s submission provided further information about changes to the fee structure for the services of Family Relationship Centres. Prior to 1 July 2011, FRCs did provide three hours of free joint family dispute resolution sessions. However since the fee regime changed on 1 July 2011, FRCs provide up to one hour of joint dispute resolution sessions (such as mediation) free of charge. For the second and third hours of joint family dispute resolution, FRCs will charge clients earning $50,000 or more gross annual income $30 per hour, but will provide these two hours free of charge for clients earning less than $50,000 gross annual income or who receive Commonwealth health and social security benefits.
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.\textsuperscript{65}

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.\textsuperscript{66}

The Public Transport Ombudsman of Victoria suggested that referral of complaints from CLCs and pro bono lawyers to industry Ombudsman schemes could reduce CLC workloads without diminishing rights of consumers and could assist in the identification of systemic problems that can be addressed with policy and law reform.

From the community awareness and stakeholder relations work undertaken by the PTO, it is clear that there are many benefits to be gained for consumers, pro bono lawyers and ADR schemes, when close working relationships are established between CLCs and the services provided by industry Ombudsman schemes.

\textit{Referral of complaints}

It is widely recognised that pro bono legal services, such as CLCs, have high workloads and limited resources. Workloads can be reduced through the referral of appropriate complaints to external dispute resolution services, such as the PTO, without diminishing the rights of the consumer.

As our services are free, informal and easy to use, pro bono lawyers can:

\begin{itemize}
  \item refer consumers to our service where appropriate,
  \item act as a review point for clients who are happy to deal directly with us but want to maintain a connection with their lawyer, or
  \item act as an authorised representative for their client and deal directly with our office.
\end{itemize}

\textit{Systemic Improvements}

The investigation and resolution of individual complaints is a key role for the PTO and for pro bono lawyers and CLCs. It is our experience that often an individual complaint can give rise to systemic issues that may affect a number of consumers or a class of consumers. Often the systemic nature of a complaint can be either overlooked or not progressed, during the course of resolving the individual complaint.

The PTO, and other industry Ombudsman schemes, are required either through mechanisms such as their Charter and/or the National Benchmarks to identify, review, refer or resolve systemic issues facing the industry they oversee. Schemes are resourced to undertake this work and have ready access to relevant regulators and to executive management of the members of the scheme to progress this work.

\textsuperscript{65} NADRAC, \textit{The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction} (September 2009) 66 [5.17].
\textsuperscript{66} NADRAC, \textit{The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction} (September 2009) 66 [5.17].
The PTO considers that strong connections between pro bono lawyers and external dispute resolution services will lead to ongoing and increased identification of systemic issues which will assist in ensuring that industry deals with systemic issues, thereby reducing the impact to other consumers and leading to better service provision overall.

(Public Transport Ombudsman Victoria)

4.1.2 The most appropriate ADR process for a client experiencing disadvantage

As explained in Section 3.2, the appropriateness of legal assistance may be affected by the type of ADR process being used, and therefore pro bono lawyers need to have knowledge of ADR processes to be able to assess which one, if any, is most appropriate for the circumstances of their client’s matter.

Several submissions named mediation and conciliation as being useful for disadvantaged clients because they are low cost, flexible and informal, and can consider issues of a non-legal nature.

Mediation is useful for disadvantaged clients in the arts sector as it is low cost, flexible and informal. Further, solutions reached through the mediation process can consider the whole of the conflict, including emotional responses and the wider implications of the conflict rather than being limited to the legal issues, which can result in a more fulfilling compromise. Many Arts Law clients have non-legal issues which are as important as the legal issues – for example, issues of professional reputation, artistic integrity, industry contacts etc.

(Arts Law Centre of Australia)

In general terms, as mediation is the most flexible of the ADR processes, it is presumed that this would be the most useful to disadvantaged and low income clients, as opposed to arbitration and adjudication.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

Because mediation is more likely to be time and cost-effective than the formal processes of arbitration or litigation, mediation is generally encouraged by the CLC [CJC (sic)] in resolving complex and/or multiple parties/issues as the first step, or in conjunction with applications other forms of dispute resolution such as arbitration or court proceedings resolution be reached at mediation.

(Northern Territory Department of Justice, Community Justice Centre)

Arbitration and expert referral were considered by some as being less likely than mediation and conciliation to be useful for disadvantaged parties.
The Society considers that mediation and conciliation are likely to be more useful types of ADR for disadvantaged and low income clients than more formal processes such as arbitration or expert referral. Typically, arbitration and expert referral are:

(a) More complex processes, both in terms of the rules which govern them and the requirements imposed on the parties;
(b) Longer in duration, increasing delay and expense;
(c) More expensive as a suitably qualified arbitrator or expert must be retained;
(d) Resulting in binding determinations, increasing the risk for disadvantaged and low income clients, particularly if they are not represented; and
(e) Not suited to the type of disputes commonly involving disadvantaged and low income clients, particularly disputes involving relatives or other personal relationships.

Mediation and conciliation offer a more flexible, low cost alternative to litigation which aims to assist the parties to reach a mutually agreed resolution to the dispute.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

The LIV suggests that arbitration is unlikely to be suitable, where arbitration leads to a determination by an independent decision-maker. Arbitration is more common in commercial contractual disputes and there may be little scope for parties to identify issues and develop options as can be done during the process of mediation.

(Law Institute Victoria)

However some also stressed that the most appropriate type of ADR process will depend on the individual and the circumstances of their case, and that any ADR process which empowers the disadvantaged party is useful.

The type of ADR that is most useful will always depend on the particular dispute, the individual parties involved and their commitment to the process. Therefore it is not possible to proscribe one type that is particularly useful for disadvantaged and low income clients.

(National Alternative Dispute Resolution Advisory Council (NADRAC))

...We do not agree that there are “types of ADR most useful for disadvantaged and low income clients”.

(Victorian Bar ADR Committee)

Ombudsman schemes are particularly useful because they... offer tailored processes to resolve customer complaints

(Energy and Water Ombudsman Victoria)

Culturally effective Indigenous dispute resolution adopts key principles of western mediations combined with Indigenous dispute resolution protocols including the use of language and appointing appropriate facilitators with cultural, relational and geographical expertise.
Indigenous dispute resolution bridges the gap between the legal plurality that affects the extended Indigenous families who manage the incompatibility between traditional practices and dominant Australian law. By way of example, Indigenous dispute resolution practitioners work with urban based mediators and legal practitioners assist parties to consider realistic alternatives and options in lieu of violent revenge traditionally administered known as ‘payback’.

(Northern Territory Department of Justice, Community Justice Centre)

What is most concerning for CLCs is the power imbalance that may result in unfair outcomes for low income and disadvantaged clients. Therefore, ADR processes which empower clients and which generally reduce or eliminate the negative effect of power imbalance would be most useful for disadvantaged clients.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

4.1.3 Inclusion of relevant and coordinated support services in the ADR process

Several submissions reported on the success of ADR services that incorporate various support services in a model which seeks to address the needs of disadvantaged clients in a more holistic manner.

In delivering services to disadvantaged clients, it is important that ADR is delivered as part of a model that incorporates various support services. The Co-ordinated Family Dispute Resolution (CFDR) Project is a pilot project auspiced by the Commonwealth Attorney General’s Department and co-ordinated between family dispute resolution practitioners, community legal centres, domestic violence services and men’s services. It also draws on additional support services where appropriate for example, for CALD and ATSI clients.

CFDR involves active case management with cooperation and information sharing between the agencies involved in any particular case. Clients are assisted in accessing counselling and other support as necessary. Each case is subjected to thorough risk assessment at intake and throughout the process which encompasses stages of preparation, mediation and follow-up. Victims are assisted to develop a safety plan and perpetrators are assisted in addressing their behaviour. Information sessions can help participants understand the mediation process and develop strategies.

(Women’s Legal Services NSW)

In addition, collaboration between ADR professionals and legal practitioners, integration and /or co-location of services was discussed. Whilst the potential of such arrangements to improve services and

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Another example of a model that incorporates support services is the Dispute Resolution Conference (DRC) that was launched in the Children’s Court in NSW in February 2011, which involves (in addition to the Registrar) social workers from Community Services, lawyers for each party (including both parents and the child where appropriate) and sometimes other family members or support persons. For more information see Attorney General & Justice, Common Questions (FAQs) Children’s Court, Lawlink <http://lawlink.nsw.gov.au/lawlink/childrens_court/ll_cc.nsf/pages/CC_common_questions#Q8>.
access to justice for parties was highlighted, it was thought that relationship building and trust were essential elements and more importantly, that the ethical requirements of both professions would need to be addressed.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University (from response to question 4 on unequal bargaining power))

*FRCs and legal assistance*

Legal assistance partnerships in place between Family Relationship Centres, community legal centres and legal aid commissions provide an opportunity, where appropriate, for family dispute resolution to be attempted where there may be family violence or power imbalances. Addressing power imbalance was one of the core objectives for the partnerships (as well as improving the focus on the best interests of children and assisting clients to engage in less adversarial dispute resolution processes).

(Commonwealth Attorney General’s Department)

FRCs across Australia have been “strongly encouraged” to work collaboratively with Legal Aid and CLCs, as these organisations have been given government funding for legally assisted mediation program (where parties to mediation are facilitated by FRC Family Dispute Practitioner, and represented by Legal Aid or CLC lawyer).

... There have been benefits for the FDPs at the FRC in having to work with lawyers. Initially they were resistant, asking “what is the value of lawyers in mediation?” and fearing that it may complicate things by adding more egos to the room. However having lawyers involved in mediations at the FRC has essentially provided FDPs a lot of on hand legal knowledge and an equal exchange of information that they didn’t have previously.

The partnerships have also forced staff at FRC’s to think more about the process/ground rules for the mediation process and practical considerations such as where different participants sit around a table during mediation to maximise support for vulnerable clients. I found there was a big difference in the confidence of the client, depending on whether the lawyer was sitting next to, across from or away from the client on the table. Clients felt more supported when their lawyer was sitting next to them, even if they didn’t actually say anything.

(Ray Overvliet, Wagga Family Relationship Centre)

*4.1.4 ADR techniques used to address power imbalance*

Some of the ADR techniques that were mentioned in submissions as having been used successfully to address power imbalance include: telephone/shuttle mediation, using breaks, private sessions, controlling when/how long parties can speak, involving appropriate support persons/services, increasing the informality of the process, using plain English and offering a ‘cooling off’ period.
The mediation process itself can incorporate measures that support victims to negotiate effectively with the perpetrator. There is flexibility in the way in which FDR is delivered, for example, by telephone or shuttle (parties in separate rooms). The process can be structured to include breaks and private sessions. Safety concerns can be monitored throughout the mediation and the FDRP can terminate the mediation if it becomes unsafe. The FDRP can utilise the FDR process in order to redress imbalances, for example, by controlling when and for how long the participants speak.

(Women’s Legal Services NSW)

However, a skilled mediator should be capable of assessing the unique factors in a mediation case, and modifying the mediation process accordingly in order to equalise bargaining power, for example by using a shuttle-mediation process, increasing the level of informality in proceedings, managing breaks, or recommending that support persons be used.

(Arts Law Centre of Australia)

The model for industry based Ombudsman schemes is designed to address power imbalances, without the need for legal representation. This is achieved through the independent investigative function, accessible services and the process of shuttle negotiation, whereby consumers do not have to deal directly with the body they are complaining about, unless it is assessed as suitable and the consumer agrees.

(Public Transport Ombudsman Victoria)

EWOV strongly believes that a skilled, independent ADR professional can assist in significantly reducing the power imbalances between disputing parties.

This is certainly the case with industry Ombudsman schemes, such as EWOV, that redress power imbalances rather than create them. When there is a power imbalance between a complaining customer and their energy or water provider, EWOV redresses that imbalance through

- simple and easy complaint processes
- specialist knowledge of the relevant industry and the codes and regulations under which it operates
- access to decision-makers within the relevant business where the customer generally only has access to a business contact centre
- empowering consumers by translating complex and technical information into plain English for the customer. The fact that parties are generally not legally represented also assists in levelling the power imbalance by taking the focus away from legal rules (e.g. contract terms, which can more readily be taken advantage of by the business) and placing it on practical options for resolution of the problem.

(Energy and Water Ombudsman Victoria)

We know that ADR benefits are enhanced when parties and prepared and supported to participate...
Cooling off

We provide for a ‘cooling off’ period for mediations conducted by panel mediators in which one or more parties were self represented. The cooling off period (two business days) allows parties who have reached settlement an opportunity to reconsider the settlement agreement. Our preliminary investigations suggested that self-represented parties benefit from having a cooling off period (even though very few revoked their agreements), so we will continue to offer it while conducting further analysis of the pilot results.

(Victorian Civil and Administrative Tribunal (VCAT))

4.1.5 Ensuring that the ADR practitioner (neutral third party) is concerned with the fairness of the process and outcomes and not just settlement

The Discussion Paper raised the issue that the fairness of the ADR process could potentially be compromised by a conflict of interest between the interests of the ADR practitioner (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) explained 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”.68

This concern was also raised in submissions which emphasised that having an ADR practitioner who is focused on the fairness of the process and outcome, and not just on settlement, is particularly important where disadvantaged clients are concerned.

... ADR processes which empower clients and which generally reduce or eliminate the negative effect of power imbalance would be most useful for disadvantaged clients... Processes in which the mediator or third party is not only concerned about settlement but also about fairness of process and outcome would be most useful.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

We discourage either party taking an adversarial approach to the complaint, as in our experience this hinders the ability to reach fair and reasonable outcomes...

We work hard to resolve complaints and to assist in rebuilding the relationship between the operator and the consumer so that if an issue arises in the future the consumer is empowered to manage the issue by themselves.

/Public Transport Ombudsman Victoria

In her submission, Rosemary Howell warns that fairness is a very subjective concept.

68 Interview with Graham Wells (Civil Law Advocate, Springvale Monash Legal Service) (Telephone Interview, 16 August 2011).
My work with the Aboriginal and Torres Strait Island Legal Services (ATSILS) opened my eyes to the range of influences on what is ‘fair’ and the importance of developing a collaborative understanding of what is fair in the particular dispute. Paternalistic and overly legalistic perceptions of what is fair can miss the mark completely.

(Rosemary Howell, Chair, Strategic Action Pty Ltd, Professorial Visiting Fellow, Faculty of Law, University of New South Wales)

4.2 Knowledge of the context of the dispute, the legal issues affecting people experiencing disadvantage, and the factors contributing to disadvantage/unequal bargaining power

4.2.1 Understanding of the context of the dispute and “poverty law”

The Discussion Paper voiced the concerns of some stakeholders about ADR practitioners who were 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) noted that many mediators at the Victorian Civil and Administrative Tribunal (VCAT), Financial Ombudsman Service, and Credit Ombudsman Service Limited are not legally qualified. She explained 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.⁶⁹

Some submissions reinforced this message about the importance of the ADR practitioner and any legal advisors having specialist knowledge of the context of the dispute and understanding “poverty law”.

Both ADR practitioners and representatives need to have specialised skills specific to the legal context in which they are operating. In particular, Family Law practitioners are required to complete a graduate diploma in FDR to become accredited as an FDRP. Further skills and knowledge are necessary to conduct FDR where there is family violence. Practitioners must have demonstrated understanding of the dynamics of domestic violence and how the power imbalance impacts on the conduct of ADR. Understanding how clients experience different types of disadvantage is also essential.

(Women’s Legal Services NSW)

The issues raised by the report regarding the inability of mediators to fully understand the issues facing low-income parties (p.20) are relevant. One of the reasons mediation is a powerful dispute

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⁶⁹ Interview with Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre, Vic) (Telephone Interview, 16 August 2011) cited in Discussion Paper 11 [3.3].
resolution tool is its ability to incorporate the extra-legal aspects of the dispute into the resolution. As the report suggests, further training of mediators may be necessary to increase awareness of the issues impacting low-income parties, to ensure that the mediation process can meet its full potential.

(Arts Law Centre of Australia)

We emphasise that in order to provide a sound service to disadvantaged clients, a pro bono lawyer must have not only the appropriate training and accreditation but also experience in, and understanding of, the relevant areas of law and the legal and non-legal issues facing people experiencing disadvantage.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)

My staff are trained to understand the legal rights and responsibilities of consumers and operators. Consumer and operators are provided with advice about respective rights and responsibilities during the course of an investigation and during negotiations of fair and reasonable outcomes.

(Public Transport Ombudsman Victoria)

Ombudsman schemes are particularly useful because they... have staff with specialist knowledge. In EWOV’s case, the Conciliation Team has thorough knowledge about the energy and water sectors. This supports efficient, well informed, and tailored outcomes for each customer.

...

When there is a power imbalance between a complaining customer and their energy or water provider, EWOV redresses that imbalance through

...

- specialist knowledge of the relevant industry and the codes and regulations under which it operates

...

(Energy and Water Ombudsman Victoria)

To help us understand how we can best support parties, we are running a 12 month ‘ADR intake’ pilot. We employed an ADR Intake and Assessment Coordinator who engages with the parties, providing them with information about ADR at VCAT and how they should prepare. The feedback we obtain from our party satisfaction surveys will enable the Coordinator to allocate disputes to ADR practitioners according to their strengths and areas of expertise.

(Victorian Civil and Administrative Tribunal (VCAT))
In research on the role of CLCs in using ADR as a means of access to justice, the importance of CLC lawyers’ education on ADR processes and skills was highlighted and so also was the importance of ADR practitioners gaining knowledge of the law relevant to matters they facilitate.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

Others expressed the view that it is appropriate knowledge (of the context of the dispute and the ADR process) and not necessarily legal knowledge that is required to protect the interests of disadvantaged parties, particularly where a facilitative process was being undertaken.

It is the PTO’s view that unequal bargaining power can be successfully managed through ADR processes, utilising skilled staff who are appropriately trained. This may include both legally trained and non-legally trained ADR professionals.

(Public Transport Ombudsman Victoria)

The Council believes it is not necessary for parties to be represented by a lawyer in order to address a possible power imbalance. A skilled and trained ADR practitioner will be able to ensure that all parties have the opportunity to express their opinion and work to resolve the matter to their satisfaction. We draw your attention to the NADRAC publication *A Fair Say Managing Differences in Mediation and Conciliation* which can be located at http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CF4D)~A+fair+say.pdf/$file/A+fair+say.pdf.

(National Alternative Dispute Resolution Advisory Council (NADRAC))

In paragraph 7.1, Arts Law notes the view that “most CLC staff” consider that ADR is useful where the ADR practitioners “have knowledge of the applicable law.” In the arts sector, where there are often very vague arrangements and the true legal position is sometimes very difficult to determine. For example, many clients approach Arts Law to resolve disputes arising in the context of long-standing collaborations in which no formal agreement as to the rights of the parties. In these situations, a strong understanding of industry practice is as important as legal skills in a mediator.

(Arts Law Centre of Australia, from response to question 7)

CJC uses the facilitative model of mediation, which requires the mediator/s to take a neutral role in assisting parties to communicate with one another and generate solutions to the dispute themselves. The facilitative model does not require (or allow) mediators to evaluate the merits of either party’s position or offer advice. As the mediators’ expertise lies in the skill of facilitation and understanding of the mediation model rather than technical knowledge about the area of dispute, legal qualifications have not traditionally been regarded as necessary or advantageous for the mediator role.

(NSW Justice and Attorney General Department, ADR Directorate, Community Justice Centres)
The Victorian Bar association argued that the need for legal knowledge will differ from case to case, depending on whether the matter involves complex legal issues that the parties need to be aware of, so the individual’s circumstances need to be considered.

(37)... As between the two alternatives posed by Question 4 (the protection of legal representation for the weaker party or the skilled mediator managing the imbalance), the Victorian Bar Committee sees, generally speaking, the skilled mediator as having a significant role to play – that being consistent with the basic principle that the mediator is to facilitate discussion between the parties themselves (rather than between one party and the legal representative of the other) – that mediation is about interest-based solutions achieved by mediated discussion between the parties themselves. 

(38) All that said, a skilled mediator and a legal representative also skilled in mediation can so manage the mediation as to meet both aims: protection of the weaker party while still achieving discussion between the parties.

(39) The distinction needs to be drawn between the “unequal bargaining power” (or other imbalance of power) in Question 4 and the different question, in a mediation where there are legal issues and complexities, of the fairness of the process requiring that each party be aware of the legal issues involved. That requires a quite different discussion.

(Victorian Bar ADR Committee)

4.2.2 Knowledge of the types and sources of disadvantage

Some submissions discussed different types of disadvantage and the factors leading to the disadvantage faced by parties to ADR:

ADR practitioners are ethically obliged to create a safe place for parties to negotiate, as part of ensuring 'equal' power this requires the practitioner to recognise power may favour one party due to:

- emotional (one party has better self control in difficult situations)
- hierarchical (in an organisation)
- physical (location of the mediation, bully)
- experience (work skills/knowledge)
- informational (omitting facts from the other party)
- numbers (parties attending negotiations on behalf of a party)
- capacity (age, mental capacity)

(Community Justice Centre, Northern Territory Department of Justice)

There is disadvantage that arises from the actual inequality such as:

- The fact that a person who knows they cannot afford litigation may feel compelled to settle for far less than they are likely to receive should the matter be adjudicated
- A person in financial or emotional crises may be more likely to accept a settlement for less or for a more disadvantageous outcome than they are likely to receive were the matter to be adjudicated in order to get the matter finalised quickly; and/or
- A client’s ability to present their case and negotiate the outcome.
There is also the disadvantage many of our clients suffer from a lifetime of relative powerlessness. They have never been successful in asserting their rights previously and operate on the assumption that they will not be able to do so in the context of ADR either.

(Ashurst)

Accordingly, to avoid the power imbalance that can arise where one party only has a legal adviser present, Arts Law’s mediation is for unrepresented parties. Arts Law accepts that this does not address the situation where one party – even unrepresented – is more sophisticated or articulate or commercially experienced than the other and the consequent power imbalance that results in this situation.

(Arts Law Centre of Australia)

4.3 Accreditation/qualifications to act as an ADR practitioner

There is currently no comprehensive legislative framework for the operation of ADR in Australia. Many different laws govern the operation of ADR in the different Australian jurisdictions. However, the ADR industry has recognised the need for consistent standards and a National Mediator Accreditation System has been in place since 1 January 2008.

The pro-bono lawyer in his or her capacity as an ADR practitioner ought to have the appropriate qualification (ie National Mediation Approval Standards) to practice within a clear framework.

(Community Justice Centre, Northern Territory Department of Justice)

The use of only appropriately trained and accredited ADR practitioners is in the council’s view, particularly important.

(National Alternative Dispute Resolution Advisory Council (NADRAC))

Mediators

The National Mediator Accreditation System (NMAS) is an industry based scheme that relies on voluntary compliance by mediator organisations, called Recognised Mediator Accreditation Bodies (RMABs), that 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.70

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. 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.

Conciillators

There is currently no accreditation scheme for conciliators, although under the NMAS work conducted as a conciliator does count towards the hours of practice experience required to establish


[72] “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.

Mediators who seek to be reaccredited must satisfy their RMAB that they continue to meet the approval requirements [...] In addition mediators seeking re-accreditation 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);
   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).

(See Mediator Standards Board, ‘Australian National Mediator Standards: Approval Standards’ (March 2012) 7 [6])
and maintain accreditation.\textsuperscript{73} The NMAS are focused on mediation and do not seek to accredit conciliators or other practitioners who use advisory processes.\textsuperscript{74} Fiona Hollier, CEO of LEADR, suggests that there may need to be some further development of the NMAS to clarify the situation with respect to conciliators, and perhaps establishing a separate accreditation for conciliators.\textsuperscript{75}

**Arbitrators**

The Institute of Arbitrators and Mediators Australia (IAMA) has an internal accreditation and grading scheme for Arbitrators. Its policy for the registration of practising arbitrators states that it is essential to the function of the Institute as a nominating or appointing authority for arbitrators, that only such persons who, by education, experience and competence are qualified to so act, should be represented to the public as arbitrators.\textsuperscript{76}

**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.\textsuperscript{77}

\begin{itemize}
\item Family dispute resolution practitioners can meet the accreditation requirements by:
\begin{itemize}
\item completion of the full Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent); or
\item 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).
\end{itemize}
\end{itemize}

Practitioners may also meet accreditation requirements if they were included in the Family Dispute Resolution Register before 1 July 2009 and achieved competency in the three specified units (or higher education provider equivalent) before 30 June 2011.

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\textsuperscript{73} Mediator Standards Board, ‘Australian National Mediator Standards: Approval Standards’ (March 2012) 7 [6.1.a].
\textsuperscript{74} Tania Sourdin, ‘Australian National Mediator Standards: Commentary on Approval Standards’ (September 2007) 20.
\textsuperscript{75} Interview with Fiona Hollier (CEO, LEADR) (LEADR, 1 March 2012).
\textsuperscript{76} The Institute of Arbitrators and Mediators Australia, *Policy for the Registration of Practising Arbitrators*, as adopted on 13 September 2001 and amended on 18 September 2008, 1 [1.3].
\textsuperscript{77} Attorney General’s Department (Cth), *Family dispute resolution practitioner accreditation* (10 Nov 2011) <http://ag.gov.au/Families/Familydisputeresolution/Pages/Familydisputeresolutionpractitioneraccreditation.aspx>
5 Resourcing of pro bono ADR services

Many submissions stressed the importance of providing ADR services that are free of charge and otherwise accessible to clients experiencing disadvantage. However providing a free service requires additional resources to coordinate pro bono legal assistance in ADR, and train/accredit lawyers who are not already skilled and experienced in ADR processes.

In our view the issue of funding must be considered. We submit that such a pro bono service can only be supported if there is an adequate funding source. There are already several pro bono schemes available with limited success and availability due to this issue of inadequate funding. Another service provider does not rectify this problem.

...If pro bono ADR services are offered, national accreditation should be required as a minimum standard for mediators. However the cost of accreditation and maintaining accreditation may deter pro bono lawyers if financial support is not provided to them.

(Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

... There will be a continuing need for an experienced pro bono body or provider to navigate the processes available and to recommend what is appropriate and when. It is not enough to leave it, for example, to a pro bono lawyer.

(Rosemary Howell, Chair, Strategic Action Pty Ltd, Professorial Visiting Fellow, Faculty of Law, University of New South Wales)

5.1 Need for ADR services that are free of charge and otherwise accessible

Affordability of representation is a major issue for many women wishing to resolve legal disputes. Many clients cannot afford to pay a private solicitor and FDR through the Family Relationship Centre is a very accessible and cost effective option for them.

(Women’s Legal Services NSW)

The costs associated with legal action are high and can be unpredictable. Models of ADR that create certainty in costs are most useful for low-income clients. For example, Arts Law’s mediation service is based on a set fee of $100 per hour per party. Other cost minimisation options that are useful to low-income clients include allowing the parties to pre-determine the duration of the mediation session.

(Arts Law Centre of Australia)
The PTO deals with many disadvantaged consumers in the context of public transport in Victoria. It is our experience that consumers are best served by a free, accessible and impartial ADR service.

Complaints can be made to my office over the phone and there is no need for the consumer (or their advocate) to put information in writing.

... 

It is our experience that if consumers have to pay to use ADR services like the service provided by my office, even when they can afford to, it is a barrier to access and reduces the likelihood of consumers seeking redress, which in turn reduces the likelihood of systemic improvement to operator services.

(Public Transport Ombudsman Victoria)

Ombudsman schemes are particularly useful because they... provide free services to customers ... are (highly) accessible to customers. Customers can usually raise complaints by phone, email, the internet, by an interpreter, or by a third-party representative... use an informal process. For example, EWOV does not require a written complaint, and the majority of customer complaints are resolved directly over the phone.

(Energy and Water Ombudsman Victoria)

5.2 If one party can afford to pay, should they be required to pay?

One way of supporting the provision of free ADR services for disadvantaged parties is to charge a fee to the party that does have the capacity to pay. However the issue arises that there is potentially a perception of bias in favour of the party that is paying the ADR practitioner.

Some submissions advocated for ADR services that are free of charge to both parties where at least one party is disadvantaged, even if the other party has the capacity to pay, because it provides an incentive for the parties to participate and avoids any perception of bias.

In a context where it can be difficult to secure co-operation of parties, a payment requirement may act as a disincentive.

(Women’s Legal Services NSW)

We take the view that offering mediation to both parties to a dispute on a pro bono basis, even where one of those parties has the funds to pay for a mediation, is an effective use of pro bono resources. Represented parties are sometimes reluctant to engage in a constructive way with a self represented party, for example by committing financial resources towards a mediation, viewing it as a ‘waste of time’. We believe that the members of our panel are happy with our approach as it provides an incentive to parties to participate in a mediation.

(QPILCH, Iain McCowie)
To maintain the perception of impartiality, it is preferable that where only one party has the capacity to pay for the service, the service be provided free of charge to both parties.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

The LIV is concerned that charging one party to the mediation may create a power imbalance amongst the parties from the outset. Further, it could have the effect of making it appear that the ADR professional is favouring the party who is paying for the services. In this regard, the LIV suggests that the ADR service should be provided on a no cost basis to both parties.

(Law Institute Victoria (LIV))

This is a difficult issue to resolve but in my view, in order to promote fairness and to prevent allegations of bias, the service should be provided free of charge to both parties where a pro bono lawyer is acting as an ADR practitioner.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

Other submissions saw some scope for having one party paying and shared experiences of situations where one party has paid without any issue of bias arising.

Both free of charge and free to one party is appropriate depending on the circumstances. For disputes between (for instance) banks and borrowers it is not unusual for the services of the ADR practitioner to be provided free to one or both parties. It is also not unusual for the more financially able to pay all of the fees of the ADR practitioner where one party is disadvantaged and so long as the process is not coercive then this can be appropriate also.

(Steve Lancken (Australian Principal), The Trillium Group)

(44) There is no difficulty in principle with a mediator being paid all or part of the mediation fee by one party only, provided the arrangement as to fees is disclosed to all parties. Indeed, there is no reason why a mediator should decline a fee from a party who is able to pay just because the other party cannot pay.

(45) The experience of the Victorian Bar Committee members is that parties who cannot afford to contribute towards the cost of the mediator have generally been appreciative of the services of a professional accredited mediator who impresses that party in the course of the mediation with the mediator’s impartiality. Our committee is firmly of the view that payment by one party only is better than the alternative of no mediation at all.

(46) The key is in the actual independence, professionalism and skill of the mediator. We note the finding of Human Rights Commission survey that only a very small number of respondents (4%) felt that the HRC conciliator in a joint investigation/conciliation role was biased against them (final paragraph of Discussion Paper Section 5.5) – also the HRC argument that the data “supports the view
that intervention to enable substantive equality of process, if done appropriately, does not necessarily lead to perceptions of bias.”

(Victorian Bar ADR Committee)

The report questions whether real or perceived bias arises when only one party can afford to pay for mediation (p.22). In some cases (particularly employment matters between an employer and employee) one party will offer to bear the total cost. In our experience, this does not generally lead to any bias.

(Arts Law Centre of Australia)

Requiring parties to contribute to the costs of services may mean that additional services can be provided. In circumstances where the contributions of the parties are unequal, the mediation must be managed in a way that does not give a real or perceived advantage to the party who makes a greater contribution to the costs of mediation.

( Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

This should be taken on a case-by-case scenario as payment accepted from one party creates a perception of bias and in the very least may affect impartiality to perform their duty ethically...

(Community Justice Centre, Northern Territory Department of Justice)

There could be a perception of bias if the mediator is paid by one party, but not the other. This might not be the case where an industry organisation is paying, e.g. a travel organisation.

(Law Society of South Australia)

The Queensland Law Society has found that parties who pay something may be more engaged in the process and more motivated to settle.

However as one of our ADR Committee members noted in a pro bono mediation that she undertook, “the reason it did not settle was that the parties were not hurting enough. One party was using the resources of their father’s estate and the other was a mature aged student who was self-representing. The court made the order for mediation and in my view there was not enough at stake for them to seriously consider settlement. If they were paying for the service (and really the court should have ordered that the estate pay for it rather than referring to the pro bono service provider) I think they would have been much keener to settle. It is certainly the case that if a party pays something they will be more engaged in the process. If there is a capacity to pay, then it should not be completely free. Each party should pay something in my view otherwise they may not truly engage in the process”.

( Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))
A suggestion that was made for addressing the issue of bias was to ask the party who can afford to pay, to contribute to the cost of running the ADR service and disbursements, rather than to the ADR practitioner.

... [A]n option may be to require a financially advantaged party to make a financial contribution to the costs of the mediation as distinct from that party engaging and paying the practitioner themselves. (Women’s Legal Services NSW)

However, there may be genuine a case to support reimbursement or a fee where the practitioner may be required to undertake travel to remote regions and/or required for extended periods due to complexities of the matter. Whether a party or both parties share charges/fees for services the ADR practitioner ought to negotiate and seek consent from all parties the remuneration before they provide services. (Community Justice Centre, Northern Territory Department of Justice)

5.3 Does the demand for lawyers to act as ADR practitioners justify the costs of establishing and maintaining those services? (e.g. accreditation costs)

Submissions were polarised on this issue. Some pointed to an existing and increasing demand for ADR services meaning that there would be an increased need for trained and accredited as ADR practitioners, especially in particular areas of unmet need. (However they also question whether these ADR practitioners need to be lawyers.)

The use of ADR in Australia is increasing in Australia. As you are aware, this year we have seen the introduction of the Civil Dispute Resolution Act 2011 (Cth) which requires parties to file a statement outlining the steps taken to resolve the dispute before filing in court. This is likely to increase demand for pro bono ADR services. We are very keen to encourage the use of ADR by lawyers in general and therefore an increase in the number of lawyers trained and accredited in ADR would be a great benefit to the broader justice system. (National Alternative Dispute Resolution Advisory Council (NADRAC))

There remains scope for ADR to be used more comprehensively, but this will require encouraging parties to proceed with ADR and greater availability of pro bono mediators.

... The greatest challenge is sourcing lawyers and mediators who will provide professional, effective, competent and committed service to their clients/the parties.

...
Insofar as the role of pro bono lawyers is concerned, greater involvement of mediators willing to provide services on a pro bono basis would result in greater utilization of the Arts Law mediation service and other equivalent services. However we reiterate our view that it is not only lawyers who can be effective ADR practitioners.

(Arts Law Centre of Australia)

Increased use of mediation within the civil justice system may ultimately lead to increase in demand for lawyers to act as mediators on a pro bono basis. On the other hand, there are many non-lawyer ADR practitioners and an increase in use of ADR may also lead to a corresponding increase in the number of non-lawyer ADR practitioners. Although it is not yet the case that court-connected ADR programs restrict membership of ADR panels to lawyers, there is some debate around the need for that to happen in order to address issues of disadvantage.

(Dr Lola Akin Ojelabi, School of Law, La Trobe University)

The specific contexts where it was suggested that there may be increased demand or need for lawyers trained as ADR practitioners included:

- **Family law**
  
  A shortage of accredited Family Dispute Resolution Practitioners has contributed to delays in people resolving their family law matters. Waiting lists in FRCs can be prohibitive for some clients and not all clients are eligible for legal aid. In other circumstances FRCs or other FDR providers may not be willing or equipped to take on matters where there is a history of violence. Lawyers wishing to work as FDR practitioners are required to complete the FDRP training and accreditation. In the family law context, completion of the training is likely to be justified by the demand. However, it is difficult for us to comment on the extent to which this would be the case in other areas of law.

(Women’s Legal Services NSW)

- **In the Northern Territory, need for ADR practitioners advanced knowledge of cross-cultural mediation in the remote Indigenous community context and Criminal Law expertise.**

In the Northern Territory there is a need for ADR practitioners advanced knowledge of cross-cultural mediation in the remote Indigenous community context and Criminal Law expertise to support

- Education of to Indigenous people about mediation
- Training and capacity building of Indigenous Mediators
- Promote mediation and conferencing to the Judicature through Diversionary Programs and Victim Offender Mediation programs

(Community Justice Centre, Northern Territory Department of Justice)
The opposing view was that there are already many accredited ADR practitioners (lawyers and non-lawyers) who just need to be more effectively utilised and coordinated, which could be done either by pro bono clearing houses or ADR practitioner membership organisations such as LEADR.

Lawyers do not need to be trained. There is sufficient capacity in the ADR sector that could be easily harnessed through membership organisations like LEADR.

... My experience is that there is already extensive mediation and ADR occurring in the CLC sector on an ad hoc or informal basis. Mediators offer services free or at reduced cost (sometimes no fee to the CLC client) in such matters. What may be needed are easy and coordinated access points to ADR services.

... What is needed, in my view, is coordination rather than creation of new ADR resources. I think that it is easier to ensure that ADR practitioners are aware of the issues confronting the disadvantaged than for pro bono lawyers to spend at least 6 days at a cost of more than $4,000 to be accredited as mediators.

... Duplication of services should be avoided if possible. I am aware that legal aid services offer ADR in Family Law matters; there are some ad hoc schemes that offer services and some who waive fees where there is a need. For ADR services to be provided pro bono the matter should be one where there is a need for pro bono services and this requires some analysis and triage.

... Most ADR practitioners of any standing have experience in assisting vulnerable parties to fairly engage in processes. Such knowledge is a requirement of the NMAS accreditation.

If mediators who are already accredited are used in pro bono matters there is no doubling of resources.

(Steve Lancken, The Trillium Group)

The LIV believes that there are sufficient ADR practitioners in Victoria and notes that the LIV maintains a list of mediators who could be approached to conduct pro bono mediations. We note that the LIV Legal Assistance Scheme does not currently have any registered firms that have indicated a willingness to undertake ADR on a pro bono basis. Further, we note that the examples used in the paper involved pro bono counsel acting as mediators.

(Law Institute Victoria (LIV))

(58) Of course, we who believe in the virtues of mediation believe also that CLCs and others in the community sector should support their lawyers in mediator training and ongoing accreditation because we believe in the process.
This is, of course, a matter for decision by the CLCs and community sector – however, there is the resource of mediators at the independent Bar, and in the independent profession, available to them as an alternative to their paying for the training and ongoing accreditation of their own people, and those people then being diverted to mediate when briefing counsel might be more cost-effective.

(Victorian Bar ADR Committee)

Another potential resource in terms of pro bono ADR practitioners could be the Mediator Standards Board. This body is setting up a national mediator database. Its members include LAMA, LEADR, the Various Law Societies, Institutes and Bars as well as Courts, Tribunal and Community based ADR providers.

(Tania Sourdin, Centre for Court and Justice System Innovation, Monash University)

As discussed, we have never had any difficulty obtaining mediators for pro bono matters, and indeed, have more offers for assistance with mediation than we have matters to refer.

(Ashurst)

Some obstacles that were identified as preventing existing trained and accredited ADR practitioners from being effectively used to address the demand:

- Need to encourage lawyers who are already trained and accredited to maintain their skills and accreditation and undertake pro bono work.

In the first instance the emphasis should be on encouraging lawyers who are already trained as mediators to offer their time on a pro bono basis. Undertaking pro bono work is often attractive to lawyers with training in mediation and conflict resolution as it provides an opportunity to gain experience, particularly for junior practitioners.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))

The LIV believes that there are sufficient ADR practitioners in Victoria and notes that the LIV maintains a list of mediators who could be approached to conduct pro bono mediations. We note that the LIV Legal Assistance Scheme does not currently have any registered firms that have indicated a willingness to undertake ADR on a pro bono basis. Further, we note that the examples used in the paper involved pro bono counsel acting as mediators.

(Law Institute Victoria (LIV))

Many lawyers are trained as mediators and accredited under the National Mediator Accreditation System. It is not unduly onerous for lawyers wishing to act as an ADR practitioner on a pro bono basis to establish and maintain their accreditation. Lawyers are well used to the requirement to comply with continuing professional development activities in order to maintain their practising certificate.

(Victorian Department of Justice)
- **Insufficient promotion of existing pro bono ADR services**

  Our experience with regard to QPILCH is that there are accredited mediators who are willing to provide their services pro bono but the service itself must be made available to the appropriate sector.

  (Queensland Law Society (Matt Dunn, Principal Policy Solicitor))

  There may be scope for both the PILCH (Vic) scheme and the LEADR scheme to be more widely promoted and used. We note that the neighbourhood fencing dispute example given on p.16 could also have been mediated free of charge by the Dispute Settlement Centre of Victoria.

  (Victorian Department of Justice)

  From extensive discussions with colleagues (in the ADR “field”), whether they be lawyers or non-lawyer ADR practitioners, I am aware that many already do contribute and would want to continue and expand that contribution to the provision of pro bono ADR services. Indeed there are membership organisations like LEADR who you have consulted that could help in marshalling ADR practitioners with an interest in providing pro-bono services.

  (Steve Lancken, The Trillium Group)

- **Insufficient paid work to maintain the cost of accreditation.**

  ...[T]he Society acknowledges the concern that maintaining accreditation is of itself an expense undertaking and that anecdotally there is insufficient fully paid ADR work in this jurisdiction to sustain the financial commitment required. A particular example is that of a local practitioner with extensive experience in ADR, particularly community consultation and dispute resolution between clans in Indigenous communities, noting that whilst this work is time consuming and requires specialist expertise – there is difficulty in ascertaining who should be responsible for meeting the cost although the value of the process is self-evident.

  (Law Society Northern Territory)

In her submission, Rosemary Howell expressed the view that regardless of debate about whether there is sufficient demand for lawyers to be accredited as mediators, all lawyers should be encouraged to undertake ADR training.

Whilst we can have the debate over accreditation (it is interesting that mediators are seen as requiring accreditation to ensure service quality while arbitrators apparently can manage without it) we should in fact be encouraging every lawyer to have ADR training. It is clearly seen by the courts and the government as an important face of dispute resolution and involves a skill set that law school and lawyers should all be embracing.

(Rosemary Howell, Chair, Strategic Action Pty Ltd, Professorial Visiting Fellow, Faculty of Law, University of New South Wales)
6 Additional issues raised in submissions

6.1 Concerns about the use of ADR

The limitations of ADR

The limitations to ADR need to be acknowledged, particularly in relation to FDR. There will always be a proportion of family law matters for which FDR is not appropriate. Sometimes the circumstances are such that a client will need to apply directly to court and seek an exemption from participating in FDR. These circumstances include: where there is a child protection investigation, criminal charges pending against the violent party, where no contact is the only safe outcome and when the matter is urgent, for example a recovery order. In other cases, it may be difficult to secure the cooperation of perpetrators of violence where this means acknowledging their violent behaviour. Patterns of coercive and controlling behaviour are at odds with the child-focused and consensual co-operative approach.

(Women’s Legal Services NSW)

The potentially negative impact of ADR on public interest litigation

The Discussion Paper explained that 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 unjust. It quoted a Federation of Community Legal Centres (Victoria) paper which argued 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. Denis Nelthorpe made 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.

In its submission, the Victorian Department of Justice expressed the view that:

The availability of ADR as an option does not interfere with the capacity of community legal centres and others to engage in litigation as part of law reform activities.

ADR practitioners need to understand that the issues that impact on disadvantaged clients the most may be related to their capacity to pay and the consequences of non-payment, rather than liability.

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78 Federation of Community Legal Centres Victoria, ‘Community Lawyers and ADR' in Activist ADR: Community Lawyers and the New Civil Justice (October 2010) 18-20.
79 Interview with Denis Nelthorpe (Manager, Footscray Community Legal Centre) (Telephone Interview, 15 August 2011).
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.

(Denis Nelthorpe)

Concern that ADR is a lesser form of access to justice for people who cannot afford to go to court (and the opposing view that power imbalances between parties are not reduced by litigating)

We are concerned that the ever-increasing push for ADR is part of a wider reduction in access to court for people in our pro bono client base. A two-tiered justice system is developing where disputes worth more money receive the benefit of the rigour of the court system and the disputes our clients are involved in are accorded such rigour less and less. A small (in money terms) dispute may have a significant impact on the life of an individual.

(Ashurst)

Power imbalance is not going to be any less pronounced in the court room than it is in a mediation room. And it is paternalistic to suggest that the disadvantaged should be deprived of a valuable service (ADR) because of their disadvantage. The perceived problem with power imbalances is that the power may be used to coerce and without wanting to diminish the possibility of that happening, I cannot understand why there is more concern in an ADR setting (where there is a witness) than in courts or tribunals or negotiations not involving ADR. Mediators (especially those accredited under the NMAS) are well versed at managing conversations between parties who have different (real or perceived) power. Mediators are trained and attuned to the inappropriate use of power to coerce. If pro bono recipients are aware that in a consensual ADR process they can end the discussion on their own terms then coercion is unlikely.

(Steve Lancken, The Trillium Group)

The need for holistic, coordinated service provision (e.g. CFDR)

ADR cannot be provided in isolation to disadvantaged clients but must be delivered in conjunction with appropriate support services. Where ADR cannot take place, appropriate and effective referrals must be made. There needs to be a high degree of co-operation between inter-disciplinary practitioners, and this is occurring in the family law area with projects such as the Co-ordinated Family Dispute Resolution pilot. It may be that similar levels of co-operation are possible in other areas of law but we do not have any direct experience.

(Women’s Legal Services NSW)

CFDR Pilot
• In relation to the broader issue of whether ADR can be used appropriately in disputes involving family violence, it should be noted that on 24 March 2011 the former Attorney-General launched the Coordinated Family Dispute Resolution (CFDR) Pilot which aims to test a supported family dispute
resolution model for use in family violence cases and evaluate whether it is workable in practice and provides families with a safe option of family dispute resolution.

- In particular, in families where there is past or current family violence and the family is assessed as suitable to participate, CFDR aims to achieve safe and sustainable post-separation parenting outcomes.
- CFDR is a distinct, new model of family dispute resolution that builds on and enhances family dispute resolution practice by involving a wide range of professions (for example legal and support services such as men’s services and women’s and domestic violence services) working collaboratively. By using this collaborative model, it seeks to overcome any unequal bargaining power of the parties in the mediation.
- The coordination of professions is mainly facilitated through case-management meetings. In CFDR, the family dispute resolution practitioners work cooperatively and collaboratively with domestic violence and men’s workers and with family lawyers and other non-legal advocates throughout the process. The family dispute resolution practitioners and domestic violence and men’s workers work particularly closely during the intake phase; and with lawyers and/nonlegal advocates during the mediation. Clients each have a lawyer advocate (and/or other nonlegal advocate) to assist them with the content of their negotiations.
- The pilot commenced in early November 2010 and it is expected to conclude on 30 April 2013. The model used in the pilot was developed by the Women’s Legal Service based in Brisbane. The model is being piloted in five locations, led by a mix of family dispute resolution providers and legal aid. The Australian Institute of Family Studies is evaluating the pilots.

(Commonwealth Attorney General’s Department)

The appropriateness of compulsory ADR for disadvantaged parties in a self-representation model (in the context of small claims tribunals)

The self-representation model limits the role pro bono lawyers can play in compulsory or voluntary ADR processes. Unrepresented and disadvantaged parties who are required to attend a compulsory ADR process may have limited understanding of the process and what it involves, might not be able to prepare adequately, and might lack the necessary awareness of the strengths and weaknesses of their case to successfully negotiate a settlement outcome. Limited access to legal assistance is particularly problematic in cases where there is a significant power imbalance between the parties, as is noted in the Discussion Paper.

The appointment of suitably qualified ADR practitioners can help to alleviate these issues but, as mentioned above, does not replace the role of a legal advisor. Pro bono lawyers are not entirely excluded from QCAT’s ADR process and may provide advice and assist with procedural matters through CLCs or other pro bono services. However further consideration should be given to the appropriateness of compulsory ADR for disadvantaged parties in a self-representation model and the role for pro bono lawyers in this area.

There is scope for pro bono lawyers to work with tribunals such as QCAT to help facilitate ADR processes and increase understanding of the issues surrounding disadvantaged parties.

(Queensland Law Society (Grace Van Baarle, Manager of QLS Dispute Management Centre))
Preparation for assisting a party to an ADR process is likely to be as much work as preparing for litigation

To be able to negotiate effectively and advise your client on any settlement proposal you need to have undertaken sufficient investigation of the fact and consideration of the law to have a sense of your client’s prospects if the matter was litigated. We would therefore be unlikely to agree to act for a client just in ADR unless we were prepared to properly and fully represent the client;

(Ashurst)

The non-disadvantaged party’s willingness to participate in ADR

Members of the LIV have noted that there can be reluctance from parties to go to mediation. In a situation when one party is more resourced than the other, their willingness to participate in a free mediation may be impacted, as they may choose to litigate in the hope of achieving a better outcome. In this regard, mediation would not be beneficial for a party experiencing disadvantage.

(Law Institute Victoria (LIV))

6.2 The need to encourage use of accredited ADR practitioners

In its submission, the Law Society Northern Territory expressed its concern that the Northern Territory Supreme Court’s practice direction requiring parties to civil disputes to engage in ADR prior to commencement of civil proceedings does not define ADR or encourage the use of accredited mediators.

Additionally, the Supreme Court has issued a practice direction (6 of 2009) requiring parties to civil disputes to engage in mediation or other alternative dispute resolution processes prior to commencement of civil proceedings. The Court does not define alternative dispute resolution, nor does it encourage the use of accredited mediators. Thus, despite not having a role as a local accreditation body the Society has assumed the mantle of raising awareness about the National Accreditation Standards by encouraging the Courts to ensure that any referrals to ADR are to accredited individuals and that entry onto any list of mediators, maintained by the Courts, requires accreditation in line with the national standards.

(Law Society Northern Territory (general comments, rather than responses to the questions at Section 9))

6.3 ADR terminology and data collection

The need for precise and consistent use of ADR terminology and practice

The Department recommends that any pro bono ADR scheme:

• use terminology consistent with NADRAC’s glossary of ADR terms (available on the Council’s website at <www.nadrac.gov.au>)
• consistently apply the National Principles for the Resolution of Disputes developed by NADRAC (available on the Council’s website at <www.nadrac.gov.au>)

(Commonwealth Attorney General’s Department)

I also encourage consistency of ADR practice and understanding through use of standard terminology. The National Alternative Dispute Resolution Advisory Council (NADRAC) has developed a glossary of ADR terms and seven National Principles for the Resolution of Disputes to facilitate consistency in these areas. I would encourage any pro bono ADR scheme to make use of NADRAC’s glossary and the National Principles, which are available on the Council’s website at <www.nadrac.gov.au>.

(Commonwealth Attorney General (former Attorney General, Robert McClelland))

... (10) We do not, for example, see “shuttle mediation” or “co-mediation” as different “types of ADR” distinct and discrete from mediation (see Question 2), or even as “two [distinct and discrete] types of mediation” (see Discussion Paper Section 3).
(11) “Shuttle mediation” is rather a “strategy” in mediation – as stated in the first full paragraph of text on page 22 of the Discussion Paper.
... (14) This difficulty in the discussion is compounded by framing the question in terms of the generality of ADR rather than the specificity of mediation. As stated in the NADRAC Glossary of ADR Terms, “ADR is an umbrella term for processes, other than judicial determination” and includes, for example, adjudication and arbitration – both determinative processes entirely different from mediation.
...

(Victorian Bar ADR Committee)

The need for data collection and evaluation on the effectiveness of any pro bono ADR assistance scheme

WLS NSW supports approaching the development of this pro-bono work in an informed way to ensure proper selection, training and support of appropriate practitioners, and to include evaluation and reflection on the practice to enhance its success.

(Women’s Legal Services NSW)

We measure our ADR outcomes to evaluate their quality. Apart from recording settlement rates, we identify where ADR has assisted parties to resolve some of their issues, reduced hearing times and costs, and increased their satisfaction.

(Victorian Civil and Administrative Tribunal (VCAT))

The Department recommends that any pro bono ADR scheme:
...
• incorporate data collection and evaluation, to ensure the scheme is meeting the needs of users and to inform future enhancements to the scheme.

Use of accredited mediators and nationally consistent ADR terminology and practice enhance the quality and coherence of national ADR services and help to build consumer confidence in ADR. The collection and publication of de-identified quantitative and qualitative data on ADR services will assist in building an evidence base to inform future policy-making in this area.

(Commonwealth Attorney General’s Department)

I would like to emphasise the importance of data collection, reporting and evaluation into any national pro bono ADR scheme, to assist in building an evidence base to inform future policy-making. The contribution of pro bono ADR practitioners to the collection and publication of de-identified quantitative and qualitative data would be of great assistance.

(Commonwealth Attorney General (former Attorney General, Robert McClelland))

6.4 Concerns about negative impacts of having pro bono lawyers involved in ADR services

The Law Society Northern Territory expressed their concern that the low pay for community mediators is insufficient to attract and sustain quality mediators, and pro bono lawyers entering this arena could threaten the little income that mediators are making in a jurisdiction where there are limited opportunities for paid ADR work.

The Community Justice Centre (CJC) has been established by the Northern Territory Government to provide mediation services to the community to help people resolve their own disputes without legal action. The CJC service is free, confidential, voluntary, timely, and easy to use. Anecdotal evidence that the rate paid to mediators in the CJC of approximately $40 per hour is insufficient to attract and sustain quality mediators. The Society is not aware of the role (if any) lawyers play in assisting participants in the CJC. The Society wishes to stress that the CJC is considered by many a useful fora for resolving disputes.

...  

• It is likely that the legal profession are already providing services that could be defined as pro bono, being a substantial reduction on usual fees per hour in the area of ADR.

• There is insufficient fully paid ADR work in the jurisdiction, and a business model that maintains accreditation needs adequate income to sustain that outlay.

The Society notes that the discussion paper canvasses ADR practitioners providing this training on a pro bono basis to potential Indigenous mediators. It has been discussed that the role of training provider is an avenue of income for ADR practitioners, particularly where “students” are endeavouring to meet mandatory training requirements as part of accreditation. This role then is an important part of the business model of ADR practitioners wishing to meet the cost of accreditation.

(Law Society Northern Territory)
There is a risk that having parties dependent on pro bono legal assistance will delay the ADR process if the pro bono lawyer becomes unavailable during the ADR process in a complex matter.

Whilst ADR normally offers a cost and time effective process of resolving conflict, complex matters often take longer to resolve primarily due to the availability of the parties to attend. The risk of delays may further be exacerbated should a party become so reliant on the pro bono lawyer the negotiations may effectively be stalled should the pro bono legal practitioner become unavailable.

(Community Justice Centre, Northern Territory Department of Justice)