

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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Alternative Dispute Resolution in the Civil Justice System

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About the Federation of Community Legal Centres (Vic) Inc

The Federation of Community Legal Centres (Vic) (FCLC) is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres (CLCs) are independent community organisations which provide free legal services to the public. CLCs provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist CLCs provide services on a range of legal issues to people in their local geographic area. There are generalist CLCs in metropolitan Melbourne and in rural and regional Victoria.

Specialist CLCs focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

CLCs receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

CLCs provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

CLCs integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

CLCs are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Summary

The Federation welcomes the opportunity to respond to the issues paper, 'Alternative Dispute Resolution in the Civil Justice System', produced by the National Alternative Dispute Resolution Advisory Council (NADRAC).

The Federation broadly supports greater use of alternative dispute resolution (ADR). We consider that in many cases, ADR offers a cheaper, less stressful and more effective means of resolving disputes than a formal court hearing. However we are concerned that mandatory ADR could, in certain circumstances, be detrimental to the interests of our clients and other parties from low-income or disadvantaged backgrounds.

We believe that if mandatory ADR is introduced, it must be accompanied by appropriate legal and related support for low-income parties, to allow them to participate on equal terms with better-resourced and more legally sophisticated opponents. In particular, we believe that low-income parties should not be compelled to engage in mediation unless they can obtain free or low-cost legal representation. Similarly, CALD parties must have access to interpreting services and translated materials, if they are to participate on an equal footing.

We consider that if pre-action protocols are introduced, low-income parties should, at the most, be required to exchange letters or negotiate by telephone, rather than engage in costly formal mediation without adequate support.

We endorse the Victorian Parliament Law Reform Committee's view that ADR must not stifle public interest litigation.

Finally, we wish to emphasise that ADR practitioners should be thoroughly trained to detect power imbalance between the parties, and to ensure that this does not lead to unjust outcomes for low-income or disadvantaged litigants.

6.1 What are the barriers to the use of ADR before civil proceedings are commenced? To what extent do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?

For CLC clients, significant barriers include:

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

Costs

Costs represent a major barrier to participation in ADR. Formal mediations, for example, represent a very significant commitment of resources by all parties. At the very least, they require the engagement of a suitably qualified mediator. Parties may incur further costs hiring an appropriate, neutral venue for the mediation. In more complex matters, mediation often requires each party to engage a legal adviser to assist with the negotiation process.

For this reason, the imposition of compulsory mediation without appropriate safeguards may have a chilling effect on litigation by CLC clients and other people on low incomes. Such people are highly

unlikely to be able to meet the costs involved.

Difficulty of obtaining legal representation

Low-income parties are unlikely to have the benefit of legal representation during mediations, even if they can obtain preliminary advice from a CLC. At present, CLCs seldom have the capacity to represent their clients in court in civil matters. Without a significant increase in funding, their capacity to assist clients in civil mediations will be equally constrained.

To compel low-income parties to represent themselves in mediations creates a risk of serious injustice. In our experience, formal mediations are high-pressure environments, placing self-represented parties at a disadvantage more profound than that of appearing unrepresented before a judicial member in a court or tribunal. In a court hearing, self-represented litigants receive some assistance from the judge, who is responsible for resolving the dispute according to established legal principles, and upholding strict standards of procedural fairness. In a mediation, by contrast, self-represented parties are deprived of the intercessions and assistance of the judge and the procedural safeguards of the court room. The outcomes of mediations between represented and unrepresented parties are therefore not necessarily a fair and just compromise of competing claims. They may rather reflect some parties' susceptibility to pressure or ignorance of the true strength (or weakness) of their legal position.

Even where both parties are self-represented, mediation may lead to unfair results due to a power imbalance between them. Parties to litigation vary considerably in their legal knowledge and experience. Where one party is an experienced litigant, the other, less legally sophisticated party may be at a significant disadvantage without legal representation.

Emotional and psychological costs

Although mediation does not always result in a settlement, the psychological strain involved may cause the less experienced self-represented party to withdraw his or her action, rather than proceed to court.

Disability or mental illness

Almost nine per cent of CLC clients have some form of disability.¹ In some instances, disability or mental illness will impede a party's capacity to take part in ADR.

Cultural and linguistic barriers

ADR is a particularly significant barrier to culturally and linguistically diverse (CALD) disputants who require an interpreter in order to participate effectively. We refer to the report of the Victorian Parliament Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, for its considered discussion of this issue. We note the committee's finding that, despite the provision of some free interpreting services in Victoria, 'language barriers may still prevent significant segments of the community from accessing ADR services.' We support the committee's view that 'there is scope to increase the capacity of ADR practitioners to work effectively with people who have language difficulties.'²

Rendering ADR compulsory may create an even greater institutional barrier for CALD parties, if the

¹ Attorney-General's Department, Australian Government, *Review of the Commonwealth Community Legal Services Program*, March 2008, p 6.

² Parliament of Victoria Law Reform Committee, *Inquiry Into Alternative Dispute Resolution and Restorative Justice: Final Report of the Victorian Parliament Law Reform Committee*, May 2009, p 92.

change is not accompanied by an increase in the availability of free interpreting services. To compel CALD parties to engage in mandatory ADR without the assistance of interpreters would greatly increase the risk of unjust settlements. It would be equally unfair to require the parties themselves to pay for interpreters' services, particularly if they are on low incomes. The Federation believes that interpreters should be provided free of charge wherever low-income CALD parties are compelled to engage in ADR. We endorse the Victorian Parliament Law Reform Committee's recommendations regarding additional measures the Government and private ADR providers should take to assist CALD parties, such as producing translated explanatory materials in written form and on DVDs.

Our comments pertain equally to pre-action ADR and ADR that takes place in the course of litigation.

6.5 *What changes to cost structures and civil procedures could be made to remove practical and cultural barriers to the use of ADR, both before commencing litigation and throughout the litigation process?*

As noted above, ADR can be prohibitively expensive for low-income parties. Even if the parties are not required to pay for a venue or a mediator, they may still require legal representation during the ADR process if they are to participate effectively. In the absence of Legal Aid funding for civil litigation, and given the limited resources of CLCs, it is likely that such parties will be forced to engage a private solicitor or proceed unrepresented.

The prospect of recouping solicitors' fees by way of a costs order, after the conclusion of the matter, will not assist low-income parties who either do not have the money in the first place, or cannot afford to risk losing it in an unsuccessful action. Tax-deductibility of ADR costs may also be of negligible value to CLC clients, particularly those who are dependent on Government benefits (82 per cent of CLC clients earn less than \$26,000 per annum and 58 per cent receive some kind of income support).³

The only way to implement compulsory ADR fairly with respect to low-income parties is to provide it at no cost, and to ensure that such parties also have access to free or low-cost legal advice and representation. This may require increased funding for Legal Aid or CLCs, as well as alteration to court fee structures to include automatic fee waivers for low-income parties.

- 6.13 *What are the advantages and disadvantages of:*
- (1) requiring disputants to consider ADR*
 - (2) requiring disputants to participate in an assessment of the dispute for suitability for ADR*
 - (3) introducing statutory provisions requiring litigants to attend ADR before they can file civil proceedings or stating that the default or usual position should be that courts and tribunals should refer matters to ADR, unless the court is persuaded that this is not appropriate*
 - (4) making attendance at ADR, or particular types of ADR processes, mandatory in federal civil proceedings*
 - (5) pre-action protocols, and*
 - (6) overriding purpose obligations?*

Parties should not be prevented from commencing a civil action simply because they do not attempt ADR. In our view it should be sufficient for them to demonstrate good reasons for failing to attempt ADR. Inadequate financial resources, inability to obtain legal representation and significant power imbalance between the parties should be regarded as legitimate reasons.

³ Attorney-General's Department, Australian Government, *Review of the Commonwealth Community Legal Services Program*, March 2008, p 6.

Alternatively, it should be sufficient to demonstrate that there is a public interest in bringing the matter to court. The settlement of claims through ADR can allow unfair or unscrupulous behaviour to remain hidden. This is particularly true of cases between individuals and large, well-resourced corporate entities. The latter may take advantage of ADR to prevent a matter from proceeding to a court hearing, avoiding public exposure and the setting of a precedent that may benefit many individual litigants. Compulsory ADR may therefore be detrimental to low-income or one-off litigants, if imposed without regard to the public interest in full ventilation and determination of certain matters.

In this respect, the confidentiality of ADR settlements is problematic. We note that ADR routinely leads to confidential settlements, in which no party accepts liability for the alleged wrongdoing. This undermines several important functions of the justice system, including the denunciation of unlawful conduct and the public vindication of legal rights. If compulsory ADR is introduced, it must be accompanied by a significant attitudinal shift away from confidentiality, towards accountability and transparency. We commend the Victorian Parliament Law Reform Committee's report for affirming the need to 'ensur[e] that cases which are the subject of ADR, but may have a public interest element, are not hidden from public scrutiny.'⁴

6.14 *If pre-action protocols were to be introduced, what should these include?*

The Federation believes that if pre-action protocols are introduced, an exchange of letters and good faith, informal negotiations with a view to settlement (such as those informal processes commonly undertaken between solicitors by correspondence or telephone) ought to be enough to satisfy them.

We would be concerned if formal mediations were included in the pre-action protocols without appropriate safeguards, due to the cost involved and the difficulties this would create for low-income parties.

6.15 *What are the advantages and disadvantages of requiring disputants to participate in ADR in good faith/make a genuine attempt to resolve the dispute? If such a requirement was introduced, what should be done to protect the confidentiality and integrity of ADR processes?*

It is difficult to see how a 'good faith' requirement could be enforced in the context of a mediation. As noted at page 36 of the NADRAC issues paper, this would involve subjective judgments on the part of the mediator, and may erode the necessary relationship of trust between the mediator and the parties.

If compulsory ADR were limited to the exchange of letters, or informal negotiation by telephone, a 'good faith' requirement might be justified. The parties' good faith could be demonstrated by a willingness to engage in negotiation by telephone or letter. Negotiations conducted by letter should be accepted as good faith attempts if they clearly state the parties' positions and evidence supporting their claims.

6.18 *What are the advantages and disadvantages of mandating different types of ADR or having different mandatory requirements for different types of dispute? How should types of dispute be distinguished?*

We agree that varying degrees of compulsory ADR are appropriate in different types of disputes. In determining the level of ADR appropriate to each dispute, it is important that courts consider the parties' financial resources. Compulsory formal mediation may be appropriate in disputes between large corporate entities. However, as outlined above, it could give rise to injustice if imposed on individuals with limited financial resources.

⁴ Parliament of Victoria Law Reform Committee, *Inquiry Into Alternative Dispute Resolution and Restorative Justice: Final Report of the Victorian Parliament Law Reform Committee*, May 2009, pp 82-83.

6.19 *What are the characteristics of disputes for which ADR, or some forms of ADR, would not be appropriate?*

The Federation considers that mediation is inappropriate in cases where there is a significant power imbalance between the parties. Such a power imbalance might arise due to one party's lack of English language or literacy skills, unfamiliarity with the legal system, disability, mental illness, age, gender, low income or financial dependence upon the other party.

We strongly oppose the introduction of mandatory ADR in cases involving violence. To compel parties to engage in mediation, in these circumstances, may be traumatic for the non-violent party and may appear to legitimise the aggressor's violent behaviour. In many cases, the non-violent party would be significantly disadvantaged in attempting to negotiate with the aggressor.

6.20 *To what extent would it be beneficial to require ADR practitioners to undertake an intake and assessment process to assess the participants' needs, exclude inappropriate cases and refer elsewhere where appropriate?*

If compulsory ADR is to be introduced, it is vital that matters are thoroughly screened for suitability. ADR practitioners should undergo comprehensive training to recognise power imbalances, a history of violence or otherwise dysfunctional behaviour that would render a case unsuitable for ADR.

8.1 *How might a specialist role similar to that of family consultants be useful in other federal courts and tribunals/areas of civil jurisdiction?*

In matters involving CALD parties, a specialist similar to a family consultant might be useful, to assist the parties and ADR practitioner(s) in negotiating cultural differences and to reduce the risk of miscommunication.