Federation of
Community Legal Centres
VICTORIA

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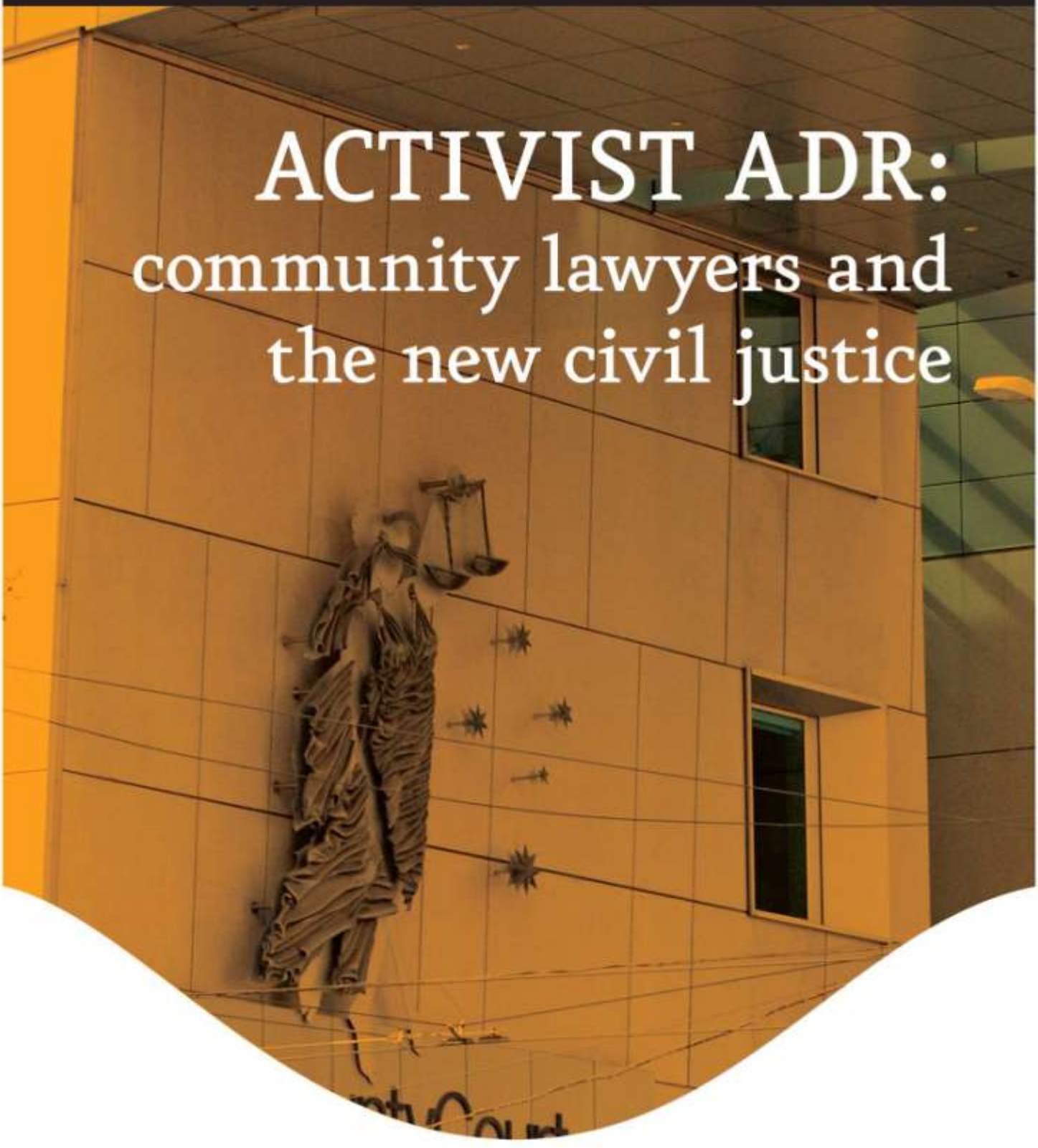
# ACTIVIST ADR:
## community lawyers and the new civil justice



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Lucinda O'Brien
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# Contents

# Glossary of terms and Abbreviations

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| **ASIC** | Australian Securities and Investment Commission |
| **ADR** | Alternative dispute resolution |
| **CALD** | Culturally and linguistically diverse |
| **CLC** | Community Legal Centre |
| **CLE** | Community legal education |
| **NADRAC** | National Alternative Dispute Resolution Advisory Council |
| **PILCH** | Public Interest Law Clearing House |
| **RDM** | Roundtable Dispute Management |
| **VCAT** | Victorian Civil and Administrative Tribunal |
| **VLRC** | Victorian Law Reform Commission |
| **WLS** | Women's Legal Service |
| **CCLS** | Consumer Credit Legal Service |

# Executive Summary

Alternative dispute resolution (ADR) is now the centerpiece of Victorian and national civil justice policy. Advocates of ADR argue that it promotes access to justice. Skeptics assert that its primary aim is to cut costs, and that it compromises fundamental principles of fairness and transparency.

In recent years, there has been an outpouring of state and federal policy statements, reviews and reports on ADR, many of them linking ADR to access to justice. Some have recognised that if ADR is to deliver real justice for all members of society, participants must have access to support services, so that they can participate fully and fairly.

The rise of ADR presents significant challenges for the CLC movement, in both practical and philosophical terms. In some ways, CLC clients stand to benefit from ADR more than any other social group. CLC lawyers confirm that ADR can be very useful in resolving disputes quickly, cheaply and effectively. The self-help ethos of ADR also has some parallels in CLC community legal education.

At the same time, CLC experience suggests that some disputes, by their nature, will always be more appropriately resolved by adjudication. CLC clients are often profoundly disadvantaged, due to poverty, mental illness, homelessness, language difficulties, limited literacy or other factors. These disadvantages can prevent people from participating in ADR on an equal footing. It is vital that low-income and disadvantaged parties have access to legal representation, interpreters and other support services whenever they engage in ADR. Where they cannot access these services, they should be exempt from mandatory ADR processes.

Even where parties have access to legal assistance and other services, adjudication will remain the better option in some cases. This may be due to irremediable power imbalances, or simply a party's desire for vindication of their legal rights. As CLCs have found, adjudication can be uniquely effective in exposing systemic injustice and driving progressive law reform.

In this sense, CLCs must reconcile ADR with their tradition of activism and their focus on systemic change. The individualised, private nature of ADR may limit CLCs' capacity to engage in strategic litigation and to use casework as a basis for law reform activities. It is important that courts and tribunals establish clear guidelines to facilitate public interest litigation, where there is a need for clarification of the law or a public denunciation of injustice.

To this end, CLC lawyers must engage with current policy debates over ADR, to help policymakers develop progressive and flexible ADR strategies. CLCs should work with State and federal governments to ensure that ADR is appropriately targeted, to maximise its benefits, while at the same time ensuring that it does not compromise the rights of disadvantaged people.

# Summary of recommendations

**Recommendation 1:** Commonwealth and State Governments should allocate significant ongoing funding for legal assistance for low-income parties attempting ADR, particularly in civil law matters.

**Recommendation 2:** CLCs should work with legal aid commissions, courts and tribunals to provide legally assisted ADR in civil disputes. CLCs should model these services on existing legal aid ADR schemes, such as Victoria Legal Aid's Roundtable Dispute Management.

**Recommendation 3:** Commonwealth and State Governments should provide additional funding for interpreters, cross-cultural trainers and Aboriginal Torres Strait Islander liaison staff to ensure that ADR services are widely accessible.

**Recommendation 4:** People who fall into a category of disadvantage (eg low income, CALD status, disability, mental health issues, homelessness or limited literacy) should be automatically exempt from mandatory ADR processes, unless they can obtain appropriate legal representation.

**Recommendation 5:** Courts, tribunals and government ADR providers (such as the Dispute Settlement Centre of Victoria) should publish de-identified case studies and regular reports on systemic and public interest issues that arise in their ADR processes, in line with the recommendation of the Victorian Parliament Law Reform Committee.

**Recommendation 6:** All courts and tribunals with mandatory ADR processes should establish guidelines to facilitate public interest litigation. The guidelines should state that important test cases and public interest cases are exempt from mandatory ADR. This would be consistent with NADRAC's recommendations in its 2009 report, *The resolve to resolve,* and the Victorian Law Reform Commission's approach to pre-action protocols.

**Recommendation 7:** CLCs should document their ADR casework, including cases successfully resolved through ADR and cases that are inappropriate for ADR due to their subject matter or a party's disadvantaged status. These case studies should inform future CLC policy and law reform work.

**Recommendation 8:** CLCs should continue to engage in policy and law reform work in relation to ADR. CLCs should work with State and federal governments to ensure that ADR is appropriately targeted, to maximise its benefits, while at the same time ensuring that it does not compromise the rights of disadvantaged people.

# Introduction

> Adjudication and ADR…are the twin means of dispute resolution, each worthy of equal support… In the velvet glove of the concept of 'dispute resolution' is the hard fist of…responsibility…to vindicate legal rights.
>
> The Hon. Justice Kevin Bell, *One VCAT: President's review of VCAT*

The rise of alternative dispute resolution (ADR) promises to have a profound impact on community legal centres (CLCs), but so far, the nature of this impact is unclear. Advocates of ADR contend that it promotes access to justice. By contrast, ADR skeptics assert that it is merely a pragmatic attempt to reduce court lists, and that it compromises fundamental principles of fairness and transparency.

CLCs cannot afford to embrace ADR without pausing to reflect on these debates. It is arguable that our clients stand to benefit from ADR more than any other social group. Like courts and government bureaucracies, low-income people have an interest in faster, cheaper processes without the mystifying formality of traditional courts. In this sense, the self-help paradigm of ADR resonates strongly with the CLC practice of community legal education. At the same time, CLC experience suggests that some disputes, by their nature, will always be more appropriately resolved through adjudication. CLC clients are often profoundly disadvantaged, due to poverty, mental illness, homelessness, language and literacy issues or for other reasons. These disadvantages can make it difficult for some people to participate in ADR on an equal footing.

Moreover, CLCs must reconcile ADR with their activist tradition, which regards the legal system as a means of achieving systemic change. We must consider how the individualised, private nature of ADR may limit the potential for us to monitor the impact of particular laws, to engage in strategic litigation and to use our casework as a basis for lobbying and campaigns.

This report evaluates current federal and State ADR policy, weighs up the benefits and some potential pitfalls for the community law movement, and sets out ways in which ADR could be better adapted to the needs of CLC clients. It is intended to stimulate discussion and further policy work on community law and ADR.

# 1. Community law and the rise of ADR

> Community legal centres did not come out of the pro bono legacy but instead an activist agenda, which sought to utilise the legal system to bring about social change.
>
> Mary-Anne Noone, 'The activist origins of Australian community legal centres'

## 1.1 The CLC activist tradition

CLCs spring from a radical tradition of activism and idealism.[1] They draw on volunteers to provide free legal services to people who are poor and disadvantaged. They aim to provide these services in a non-threatening and holistic way, taking account of clients' particular needs and life experiences. CLCs aim to be accessible. Their lawyers dress informally and their offices are generally at street level, in community centres or shop-fronts. As well as providing legal advice, they place a heavy emphasis on community legal education (CLE) and law reform. This reflects CLCs' strong commitment to collective action and social change – a desire to empower and engage whole communities, rather than simply to solve one-off legal problems. Through their casework, CLCs identify laws and legal processes that have a disproportionate impact on the poor. They draw on their casework to advocate for law reform. In this sense CLC law reform is deeply practical. Its primary goal is to make tangible improvements to the lives of low-income people.

With this practical approach, community lawyers pursue a 'substantive vision' of justice. This approach differs from the more 'procedural' notion of access to justice often adopted by government.[2] As Nicole Rich has pointed out, the legal aid system essentially follows the procedural model. Through the legal aid system, government provides free or subsidised legal services to very poor and disadvantaged people. This works on the premise that if people can exercise their rights under existing laws, through traditional institutions, they will receive fair treatment.[3] By contrast, CLCs recognise that many laws are inherently unjust or ill-adapted to the needs of low-income people. To focus solely on casework would be to reinforce this unjust system and further entrench social inequality. The community legal sector recognises that to achieve real justice, it is necessary to address the causes of disadvantage. This means challenging unjust laws and engaging in 'bottom up' community activism.[4]

This transformative function of community law has come under pressure in recent years. Successive Labor and Liberal governments have embraced CLCs and provided considerable funding, in a bid to meet the enormous public demand for affordable legal services. With this government funding, CLCs

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1 Mary-Anne Noone, 'The activist origins of Australian community legal centres' in Christopher Arup and Kathy Laster (eds), *For the public good: pro bono and the legal profession in Australia* (2001) 128-37, 129-31; Nicole Rich, *Reclaiming community legal centres: maximising our potential so we can help our clients realise theirs*, Victoria Law Foundation Community Legal Centre Fellowship 2007-2008 Final Report (2009), available at http://www.consumeraction.org.au/downloads/VLFCLCFellowship07-08reportWebFinal.pdf (last accessed 11 October 2010) 35-39.

2 Rich, ibid 36.

3 Ibid 39.

4 Jeff Giddings, 'Casework, bloody casework' (1992) 17(6) *Alternative law journal* 261, 263.

have been able to expand their services significantly. At the same time, under the terms of their 'service agreements', CLCs have acquired new reporting obligations and lost some control over the services they provide.[5] In the words of Mary-Anne Noone, this loss of independence has occasioned a 'mid-life crisis' in the sector.[6] Reliance on government funding is inherently incompatible with a radical, oppositional stance towards the legal system. Under increasing pressure to deliver legal services, some CLCs have shifted away from systemic law reform and policy work.[7] In this context, Rich had argued forcefully that CLCs must strive to continue their activist law reform work, or risk becoming a low-cost substitute for government legal aid.[8] Systemic law reform work is thus increasingly important to CLCs, as a touchstone of their independence and enduring radical vision.

## 1.2 What does ADR have to do with it?

The National Alternative Dispute Resolution Advisory Council (NADRAC) defines ADR as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.'[9] CLC lawyers often represent clients in mediations and case conferences, but rarely engage in policy debates over ADR, at least in the context of civil law.[10] The sector's relatively muted response to ADR may be due to the overwhelming number and variety of ADR processes in which they participate. The increasing pressure on CLCs to perform casework may also be a factor.

It is important that CLCs engage in policy debates over ADR. ADR, in various forms, is increasingly significant in many areas of CLC practice. No longer limited to family dispute resolution, it now extends to fields as diverse as consumer law, anti-discrimination and even child protection. CLC lawyers must respond to this significant change in the civil justice system. They must carefully monitor its effects on disadvantaged people and critically evaluate claims that ADR increases access to justice. They must also try to reconcile the practice of ADR with their long-standing tradition of public interest litigation and progressive legal change.

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5 Jeff Giddings and Mary-Anne Noone, 'Australian community legal centres move into the twenty-first century' (2004) 11(3) *International Journal of the Legal Profession* 257, 273.

6 Mary-Anne Noone, 'Mid-life crisis: Australian community legal centres' (1997) 22(1) *Alternative law journal* 25.

7 Rich, above n 1, 39-46.

8 Ibid 46.

9 National Alternative Dispute Resolution Advisory Council, *Dispute resolution terms: the use of terms in (alternative) dispute resolution* (2003). See also the Hon. Justice Kevin Bell, *One VCAT: President's review of VCAT,* Victorian Civil and Administrative Tribunal, 30 November 2009, available at http://www.vcatreview.com.au/presidents-report (last accessed 2 May 2010) 33.

10 By contrast, CLCs have been active in debates over the role of ADR in family law. See, eg, Federation of Community Legal Centres (Vic) Inc, 'ADR and its role in federal dispute resolution' (1998), available at http://www.communitylaw.org.au/lrs.php#Family (last accessed 8 May 2010). The paucity of CLC policy work on civil law ADR is surprising, given that the majority of CLC casework involves civil law issues. In the 2008-2009 financial year, in Victorian CLCs, around 57% of individual client services were in civil law (including fines and infringements). This figure is derived from the Community Legal Service Information System (CLSIS) database, which contains data from 35 of the 51 CLCs in Victoria. See Federation of Community Legal Centres (Vic) Inc, *Annual Report 2008-2009*, available at http://www.communitylaw.org.au/publications.php (last accessed 13 May 2010) 7.

# 2. Current ADR policy

Difficulties in obtaining justice reinforce poverty and exclusion. Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind.

Australian Government Attorney-General's Department,
*A strategic framework for access to justice in the federal civil justice system*

The aim of the Government's dispute resolution policy is to prevent and minimise disputes, and to provide a system that resolves disputes at the lowest possible level of intervention, with the courts being the last resort.

Victorian Attorney-General's *Justice statement 2*

ADR has many features which potentially increase access to justice. However, ADR services may not be equally accessible to all members of the community.

Victorian Parliament Law Reform Committee,
*Inquiry into alternative dispute resolution and restorative justice*

In recent years, there has been an outpouring of State and federal policy statements, reviews and reports on ADR, many of them linking ADR to access to justice. What follows is a brief and selective overview.

## 2.1 The Justice Statements

When the Victorian Government released its first *Justice statement* in 2004, it set out an ambitious reform agenda. Attorney General Rob Hulls pledged to make the legal system more accessible to ordinary people. The *Justice statement* favoured ADR as a low-cost, informal process that could be adapted to the particular needs of the parties. At the same time, it recognised that the benefits of ADR should not come the expense of traditional adjudication. The *Justice Statement* maintained that the courts are 'the essential arbiter of irresolvable disputes' and 'the protector of legal rights.'[11]

The *Justice statement 2*, released in 2008, was more emphatic in its preference for ADR over litigation. It pointed out that trials can be stressful for the parties, and that lawyers can sometimes pursue 'technical legal points' when they could be settling matters quickly and efficiently. The *Justice statement 2* declared that the system should primarily 'prevent and minimise disputes,' with courts representing a 'last resort.'[12] It proposed new case management powers for judges, 'overriding obligations' on lawyers, simpler rules of procedure and measures to encourage people to resolve their disputes out of court.[13]

11 Victorian Government, Department of Justice, *Justice statement* (2004) 36.
12 Victorian Government, Department of Justice, *Justice statement 2* (2008) 40.
13 Ibid 42.

## 2.2 The Victorian Civil Justice Review

As foreshadowed by the *Justice statement*, the Victorian Law Reform Commission (VLRC) conducted a review of the civil justice system in Victoria. Its *Civil justice review: report* endorsed greater use of ADR, both prior to and during litigation.[14] More controversially, the report suggested limiting 'the "right" of litigants to a judicial adjudication,' by means of pre-action protocols. These protocols would be modeled on Lord Woolf's reforms in the United Kingdom.[15] They would make it a condition of access to the courts that parties first attempt to settle, through exchange of letters, informal negotiation and various forms of ADR. The VLRC recommended that public interest matters be exempt from the pre-action protocols. It also maintained that the protocols would not infringe parties' right to a fair hearing under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It suggested that the notion of 'entitlement' to a court hearing, at public expense, 'may no longer be tenable.'[16]

## 2.3 The Victorian Parliament Law Reform Committee

The Law Reform Committee of the Victorian Parliament ('the Law Reform Committee') has also conducted an inquiry into ADR, releasing its report in May 2009.[17] The Law Reform Committee made wide-ranging and innovative recommendations for improving ADR services in Victoria. It paid particular attention to the needs of Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse (CALD) backgrounds.[18] It considered the potential impact of power imbalances and emphasised the needs of people with language difficulties and limited literacy. The Law Reform Committee stressed the importance of legal advice, concluding that all ADR providers should furnish participants with information about legal assistance services.[19] It also noted the public interest role of litigation and observed that ADR might, in some cases, serve to hide significant issues from public scrutiny. To address this potential problem, the Law Reform Committee recommended that government providers publish de-identified case studies and regular reports on systemic and public interest issues arising in ADR.[20]

## 2.4 The Commonwealth Access to Justice Taskforce

In 2009 the Commonwealth Attorney-General created an Access to Justice Taskforce, charged with 'developing a more strategic approach to access to justice issues.'[21] The Taskforce published its report in the same year, recommending more government support for ADR. The Taskforce argued that supply of ADR services 'should not just respond to demand, but… should influence participants towards the most appropriate method' of resolving their dispute.[22] In this sense, like the VLRC, the

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14 The Report discussed a wide range of ADR techniques, including mediation, early neutral evaluation, mini-trials, use of special referees, industry dispute resolution, collaborative law and judge-led mediation: Victorian Law Reform Commission, *Civil justice review: report* (2008) 210-86.

15 United Kingdom Department for Constitutional Affairs, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (1996).

16 *Civil justice review: report*, above n 14, 270, 284.

17 Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009).

18 It recommended cross-cultural training for ADR practitioners and recruitment of new practitioners from a range of backgrounds, including from CALD and Aboriginal and Torres Strait Islander communities: ibid 103-7.

19 Ibid 84-92. The Government responded in November 2009, accepting the Law Reform Committee's recommendations in full or, in some cases, 'in principle'. Victorian Government, *Government response to Victorian Parliament Law Reform Committee inquiry into alternative dispute resolution and restorative justice* (2009), available at http://www.parliament.vic.gov.au/lawreform/inquiries/ADR/govt%20resp.pdf (last accessed 21 April 2010).

20 *Inquiry into alternative dispute resolution,* above n 17, 82-84.

21 Commonwealth of Australia, Attorney-General's Department, *A strategic framework for access to justice in the federal civil justice system: report by the Access to Justice Taskforce* (2009) ix.

22 Ibid 54.

Taskforce contemplates a strong interventionist role for government, in steering parties away from the courts and towards various kinds of ADR.

### 2.5 The National Alternative Dispute Resolution Advisory Council

NADRAC serves the dual purpose of providing advice to the Commonwealth Government and 'promoting the use' of ADR to the general public.[23] In 2009 it published a report entitled *The resolve to resolve – embracing ADR to improve access to justice in the federal jurisdiction*.

NADRAC concluded that in order to overcome 'resistance' to ADR in the legal profession, the Commonwealth Government should introduce pre-action guidelines in the federal jurisdiction. These guidelines would require exchange of documents, negotiation and, if necessary, formal ADR proceedings, not unlike the VLRC's pre-action protocols. NADRAC considered the need for exemption on limited grounds, including urgency, risk of 'undue prejudice', public interest factors and 'subject matter'.[24] It acknowledged the need for 'specifically tailored solutions' to accommodate people with disabilities, language difficulties or 'cultural differences'.[25]

### 2.6 The President's review of VCAT

In 2009, Justice Kevin Bell undertook a broad-ranging review of the Victorian Civil and Administrative Tribunal (VCAT).[26] Although not exclusively concerned with ADR, the report made several recommendations designed to render VCAT a 'centre of excellence' in ADR.[27] In his report, Justice Bell described ADR and adjudication as 'twins', with complementary roles to play in achieving justice. He pointed out that ADR can sometimes achieve justice more effectively than adjudication. At the same time, he cautioned that ADR should not be applied indiscriminately in a manner that might compromise access to justice.

23 National Alternative Dispute Resolution Advisory Council, *Charter*, available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_Charter_Charter (last accessed 11 May 2010).

24 National Alternative Dispute Resolution Advisory Council, *The resolve to resolve – embracing ADR to improve access to justice in the federal jurisdiction* (2009) 32, 36.

25 Ibid 57.

26 *President's review of VCAT*, above n 9.

27 Ibid 84.

# 3. ADR and access to justice

> Access to justice means to me that the complainant feels heard, but not only that, that there's some acceptable resolution… I find that there's very rarely access to justice in using the law, and that…it's about who's got the most money to spend on legal resources, technicalities…
>
> Manager, Disability Discrimination Legal Service

> If one party has a lawyer…and then the…weaker party [is] without a lawyer it doubles that imbalance.
>
> Lawyer, Women's Legal Service

> Because we are involved and run the process for them, they are happy to do it… I think because we're in there batting for them they feel positive about it.
>
> Lawyer, Consumer Action Law Centre

A common theme of recent State and federal policy documents is that ADR is cheaper, faster and simpler than adjudication. On this basis, it is often maintained that greater use of ADR will result in greater access to justice. It is important that we look carefully at these arguments and at the varying definitions of 'access to justice' that underpin them.

In some cases, the phrase 'access to justice' is used to describe improved case management in the upper courts. At other times, access to justice is defined more broadly, to include a greater range of disputes affecting the general population. A third approach considers how people at the margins of society can obtain access to justice. This last approach recognises that disadvantaged people require targeted support to participate in the justice system, and that this support is a necessary feature of a fair and inclusive society.

## 3.1 Access to justice and the upper courts

The NADRAC *Resolve to resolve* report and the VLRC *Civil justice review* focus on case management in the Federal and Victorian Supreme Courts, respectively. They aim to increase settlement rates by encouraging parties to attempt ADR. Both reports are addressed primarily to lawyers and sophisticated corporate litigants. It is likely that these parties will benefit from greater use of ADR and more efficient case management procedures. However, these measures will have few direct benefits for individual low and middle-income earners, who generally cannot afford to litigate in the upper courts.[28]

28 Legal representation in the Federal and Supreme Courts is prohibitively expensive for most low and middle-income earners. This means that when such individuals appear in the upper courts, they are almost always self-represented. The VLRC devotes a chapter to self-represented and 'vexatious' litigants. It makes many valuable recommendations in relation to self-represented

## 3.2 Mainstream access to justice: the self-help model

The Commonwealth Taskforce adopts a much broader definition of access to justice. It explicitly aims to make the law more accessible to ordinary people – those who encounter legal problems in everyday life. To this end, it places heavy emphasis on access to legal information (as distinct from personalised legal advice) and referral networks.[29] It argues that, armed with the right information, many people can solve their own legal problems.[30] This approach is, to some extent, compatible with the transformative agenda of the CLC movement. It underpins much of the community legal education (CLE) conducted by CLCs. Nevertheless, community lawyers have always recognised the limits of what CLE can achieve.

> If you grow up with a certain level of education, you're able to digest continuing legal education or self-represented litigant materials. Our clients, I don't think, by and large, are able to do that. Our clients have got a huge range of issues, quite often health, including mental health, substance abuse, and so on, that make them extremely ill-equipped to self-represent at alternative dispute resolution-type matters.
>
> Lawyer, PILCH Homeless Persons' Legal Clinic

As Giddings and Robertson point out, the self-help paradigm is most beneficial to members of mainstream society – 'articulate, middle-class people' with high levels of literacy and self-confidence. Older people, the mentally ill and people with intellectual disabilities are unlikely to benefit from legal information, without additional help.[31] For these people, as one CLC lawyer has observed, enforced self-reliance 'easily degenerates into neglect.'[32]

In discussing ADR, the Taskforce reaches the limits of this self-help model.[33] The Taskforce acknowledges that mediation can 'present specific challenges' where one party is self-represented, particularly if the matter is complex. It suggests ADR could be 'better adapt[ed]' to the needs of self-represented parties.[34] The Taskforce does not explore the difficulties that self-represented parties face, nor propose specific solutions. However it notes that legally assisted mediation is particularly effective in resolving disputes.[35]

In this sense, the Taskforce recognises the need for more legal aid funding,[36] noting that legal assistance services are under-resourced.[37] It recommends that the Commonwealth Government 'work with' legal aid commissions to expand legally assisted ADR, particularly in civil law matters.[38] This is an excellent recommendation, but without a significant increase in legal aid funding, it will have

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parties. It notes that while information services are beneficial to self-represented parties, 'often what is needed is substantive legal advice and assistance' (at 572). Unfortunately the solution – greater access to affordable legal advice – falls outside the VLRC's terms of reference: Victorian Law Reform Commission, above n 14, 561-604.

29 *A strategic framework for access to justice*, above n 21, 28, 79.

30 Ibid 147-48.

31 Jeff Giddings and Michael Robertson, 'Informed litigants with nowhere to go: self-help legal aid services in Australia' (2001) 25(4*) Alternative law journal* 184, 188. The Taskforce recognises this to some extent, conceding that certain groups need specially developed resources and even 'outreach' programmes. On the whole, however, it places its faith in people's capacity to help themselves.

32 Giddings and Robertson, ibid 187.

33 *A strategic framework for access to justice*, above n 21, 165.

34 Ibid 93.

35 Ibid 144-45.

36 Ibid 56.

37 Ibid 44, 146.

38 Ibid 145.

limited effect. This is because, as the Taskforce concedes, the vast majority of Australians 'who might be expected to meet the…criteria' are currently ineligible for a grant of legal aid.[39]

In this context, it is concerning that the Taskforce recommends 'expand[ing] ADR services…for self-represented litigants.'[40] The recommendation makes no exception for people whose illness, age, disability, language difficulties, lack of legal knowledge or other circumstances make it impossible for them to engage on an equal footing. There is a risk that compulsory ADR will effectively exclude these people from the justice system, if they cannot obtain the assistance they need to participate fairly.

## 3.3 Justice at the margins

> Access to justice is like a continuum. At one end of the continuum you've got people who have extreme difficulty…acting on self-represented litigant materials… For whatever reason, their health or their substance abuse or their language or their literacy means that they can't do it themselves. Then further along the continuum you have people with slightly better levels of education…that might be able to pick up some materials, understand what the issues are and self-represent or advocate. And then…professionals who are well able to do those sorts of things… But certainly at the lower end of the continuum you have people for whom…those kinds of materials are a complete waste of time, people who need assistance and representation.
>
> Lawyer, PILCH Homeless Persons' Legal Clinic

The Victorian *Justice statements*, the Victorian Parliament Law Reform Committee report and the VCAT review specifically address the challenges involved in making justice accessible to the poor and disadvantaged.

With the original *Justice statement,* the Victorian Government recognised that social and economic disadvantage prevents many people from properly exercising their legal rights. It also acknowledged that some people derive little benefit from self-help resources. In the *Justice statement*, the Victorian Government pledged to adopt special measures to ensure that disadvantaged people enjoy 'genuine' equality before the law. It undertook to consider increasing legal aid assistance in civil law matters.[41] The *Justice Statement 2* reaffirmed the importance of state-funded legal assistance services.[42] The *Justice statements* did not specifically address the need for legal services for parties engaging in ADR. On the contrary, as noted above, the *Justice statement 2* gently criticised lawyers for pursuing 'technical legal points' instead of settlements. In general terms, however, the *Justice statement 2* undertook to accommodate the needs of different communities (such as refugees and indigenous people) in the implementation of 'community ADR'.[43]

The Law Reform Committee, in its lengthy report, considered the practical needs of participants in ADR in more detail. While accepting that ADR can be more 'user-friendly' than litigation, the Law Reform Committee observed that some groups may still have difficulty accessing and participating in ADR services.[44] It acknowledged the importance of legal advice and said that all parties to ADR should be referred to legal services.[45] It argued that ADR practitioners should be drawn from diverse backgrounds, to break down cultural barriers, and that they should be specially trained to work with

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39 Ibid 44.
40 Ibid 94.
41 *Justice statement*, above n 11, 52, 69-71.
42 *Justice statement 2*, above n 12, 36.
43 Ibid 40-41.
44 *Inquiry into alternative dispute resolution*, above n 17, 78.
45 Ibid 87-88.

people who have language and literacy issues. It also recommended that ADR services should provide access to interpreters, translated materials and guides on DVD.[46]

In his VCAT review, Justice Bell made the equally important point that some matters will never be suitable for ADR, even with a full complement of support services. He acknowledged that ADR can present challenges where parties possess unequal bargaining power. Justice Bell observed that the decision to attempt ADR should be made 'according to the nature and needs of the dispute and the parties' in the individual case. It should not reflect 'a fixed view that one means of resolution is necessarily better than another, or that one means only should be tried.'[47]

## 3.4 ADR policy and CLC clients

These reports and inquiries reveal a broad range of attitudes to ADR and its role in promoting access to justice. Some policy statements have not specifically addressed the needs of low-income or otherwise marginalised people. Others, most notably the Law Reform Committee report and the first *Justice Statement*, recognise that if ADR is to deliver real justice, participants must have access to support services, so that they can participate fully and fairly.

Increasing the use of ADR will increase public demand for relevant support services, including legal assistance, interpreting and cross-cultural liaison. It is heartening to note that in recent months, both the Victorian and Commonwealth Governments have announced new funding for legal assistance services, including some funds specifically for legally assisted ADR.[48] Targeted funding of this kind is the best way to ensure that ADR delivers substantive access to justice for CLC clients.

**Recommendation 1**
Commonwealth and State Governments should allocate significant ongoing funding for legal assistance for low-income parties attempting ADR, particularly in civil law matters.

**Recommendation 2**
CLCs should work with legal aid commissions, courts and tribunals to provide legally assisted ADR in civil disputes. CLCs should model these services on existing legal aid ADR schemes, such as Victoria Legal Aid's Roundtable Dispute Management.

**Recommendation 3**
Commonwealth and State Governments should provide additional funding for interpreters, cross-cultural trainers and Aboriginal Torres Strait Islander liaison staff to ensure that ADR services are widely accessible.

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46 Ibid 92, 102-4. This would undoubtedly help many CLC clients, given recent findings by the Law Institute of Victoria (LIV) that many CALD people are unable to access interpreters in Victorian civil courts. The LIV found that there is less unmet demand for interpreters in ADR settings. However it argued that this is because ADR is voluntary and rarely attempted by people from CALD backgrounds. The LIV concluded that the need for interpreting services will become more acute as ADR becomes more prevalent and more widely understood by CALD communities: Law Institute of Victoria, *Final report: interpreting scoping fund project* (2010) available at http://www.liv.asn.au/getattachment/80358a3c-d0d5-460c-bbae-af9dcccaa3f8/Final-Report---Interpreting-Fund-Scoping-Project.aspx (last accessed 23 April 2010) 3, 33-34.

47 *President's review of VCAT*, above n 9, 84. Justice Bell also emphasised the need to measure and evaluate ADR systems, to ensure that they are operating fairly: 35-36. The Sackville Access to Justice Advisory Committee also stressed the importance of evaluation and monitoring: Commonwealth of Australia, Access to Justice Advisory Committee, *Access to justice: an action plan* (1994), 298-99. I am grateful to Mary-Anne Noone for pointing this out to me.

48 The Hon. Rob Hulls MP, 'Government delivers on justice while opposition fails' (Press release, 7 May 2010); the Hon. Robert McClelland MP, 'Building better partnerships between Family Relationship Centres and legal assistance services' (Press release, 4 December 2009) and the Hon. Robert McClelland, 'Additional $154 million for legal assistance services' (Press release, 11 May 2010).

# 4. Community lawyers and ADR

> Most of our disputes resolve through negotiation. It would be at least ninety per cent of them… We've always encouraged discussion.
>
> Lawyer, Springvale Monash Legal Service

> The alternative of court isn't what it's cracked up to be. It's expensive for the parties, it's…drafting affidavits which are damning of the other person… If you can avoid that, and get things worked out before hitting the step of the court, I think that that's actually going to benefit the children.
>
> Lawyer, Women's Legal Service

## 4.1 Reducing costs and using resources more efficiently

CLC lawyers confirm that ADR can be very useful in resolving disputes efficiently and effectively. By promoting settlement prior to hearing, legally-assisted ADR at an early stage can reduce court costs and avoid unnecessary legal fees.[49]

> There's huge levels of default judgment in matters under $10,000 in the Magistrates' Court… Before default judgment could be issued, if parties could be encouraged to come together to resolve some of these issues, then perhaps there'd be a much higher level of access and less judgments…saving huge amounts of money in terms of enforcement. If, where it's so patently obvious that someone, maybe say on Centrelink, with three kids with no house and no assets…can't afford to pay something…then maybe a whole lot of time could be saved by going through the steps of ADR rather than waiting until it gets to a summons for oral examination and…thousands and thousands of dollars have been spent in terms of court time and legal fees with no recovery from the debtor.
>
> Lawyer, Springvale Monash Legal Service

A CLC lawyer will spend less time on a matter if it settles early than if it proceeds to a full hearing in a court or tribunal. By bringing matters to swift resolution, CLC lawyers can help more people to resolve their problems.

## 4.2 Reality checking

Some CLC lawyers find that ADR provides a valuable opportunity to emphasise their clients' vulnerability. This can be a useful 'reality check' and can help persuade creditors to modify unrealistic demands.

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49 For an excellent discussion of the benefits of early legal advice and assistance, in the context of Victorian Magistrates' Courts, see Louis Schetzer, *Courting debt: the legal needs of people facing civil consumer debt problems* (2008), available at http://www.justice.vic.gov.au/wps/wcm/connect/984d0700410b77b7988ede0ffb994a81/CourtingDebt.pdf?MOD=AJPERES (last accessed 13 May 2010).

#### 4.2.1 Case study: Magistrates' Court pre-hearing conference[50]

The client, Mrs A, received a Centrelink pension. She initially engaged a private law firm to assist her with a sexual harassment claim. She had high expectations of the amount of compensation she might receive. After some time Mrs A's relationship with the law firm broke down and the firm refused to act for her any further. She continued to pursue her sexual harassment claim and eventually received $5,000 compensation. This was significantly less than she was expecting. The private law firm pursued Mrs A for its legal costs, amounting to $8,000. It issued proceedings against her in the Magistrates' Court. Mrs A sought help from a CLC.

The CLC negotiated with the firm on Mrs A's behalf, first informally, then formally through a court-auspiced pre-hearing conference. Through informal negotiation, the CLC lawyer persuaded the private firm to reduce its claim from $10,000 to $8,000, then to $4,000, and then to $2,500. In the pre-hearing conference the CLC lawyer emphasised Mrs A's precarious financial position and offered $2,000 to settle the matter, payable by instalments. The lawyer pointed out that Mrs A simply could not afford to pay any more. The law firm agreed to settle the matter for $2,000.

Without the assistance of the CLC lawyer, it is likely that Mrs A would not have resolved her dispute at the case conference. Mrs A could have defended her case in court unassisted, but it is more likely that she would have failed to appear, resulting in a default judgment. The judgment debt against her would have included the court fees and additional legal costs. This could have left Mrs A facing a debt significantly higher than the $8,000 for which she was originally sued.

## 4.3 Getting better legal outcomes

Many CLCs don't have the resources to represent clients in court, and the clients cannot afford to engage private practitioners. Often these clients can achieve better legal outcomes by participating in legally assisted mediation than they would by appearing unrepresented in court.

#### 4.3.1 Case study: Victoria Legal Aid Roundtable Dispute Management

Women's Legal Service (WLS) has a sister organisation, the Family Law Legal Service, which provides duty lawyer services in the Federal Magistrates' Court and Family Court. WLS noticed that a lot of women were appearing in court unrepresented. Many of these women had been excluded from mediation through Family Relationship Centres, due to a history of family violence. These women could not afford private legal representation but did not qualify for a grant of legal aid.

WLS believed that in many cases, if these women had access to legal representation, they could participate successfully in mediation, despite their history of family violence. In collaboration with Victoria Legal Aid, WLS began a duty lawyering service to represent women in Roundtable Dispute Management (RDM).

Unlike some family dispute resolution providers, RDM aims to reach agreements that are legally enforceable. Parties can apply for a grant of legal aid to put their agreement into formal court orders. This provides parties with certainty and a degree of protection in the event of further conflict.

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50 Some details have been changed in the interests of confidentiality.

## 4.4 Avoiding emotional costs

Many CLC clients experience multiple forms of disadvantage, making them particularly vulnerable to the emotional strain of litigation. As a less stressful option, ADR can be especially helpful to recent refugees, people suffering from mental illness or those who live with the day-to-day pressures of poverty.

### 4.4.1 Case study: VCAT case conference

A CLC client pursued a civil claim in VCAT. The client suffered from a mental illness. The matter was referred to a case conference. Quite quickly, the CLC lawyer arrived at an agreement with the other party. The lawyer advised that it was ultimately up to the client to decide whether to settle or proceed to a hearing. The lawyer emphasised that there could be an emotional cost involved in proceeding to a hearing, and that it was far from certain that the client would win. The client decided to settle rather than risk further damaging his mental health.

As all three case studies demonstrate, CLC lawyers play a critical role in helping their clients to understand ADR processes, negotiate effectively and make informed decisions to settle.

# 5. Litigation and legal change

> It's easy here to be adversarial…because we are always dealing with big power imbalance…
>
> Lawyer, Consumer Action Law Centre

> It unfortunately seems to be the threat of court and embarrassment and loss, that compels some respondents to actually end up coming to the table… Their motivation in the end to settle is only really because you've raised a big stick and held it over their head.
>
> Manager, Disability Discrimination Legal Service

Even where parties have access to legal assistance and other support services, adjudication will remain the more appropriate option in some cases. This may be due to irremediable power imbalances or simply a party's desire for 'vindication of their legal rights'.[51] Moreover, as CLCs have found, adjudication can be uniquely effective in exposing systemic injustice and driving progressive law reform.

## 5.1 Litigation as access to justice

The capacity to engage in litigation is an important element of access to justice. There is a risk that if low-income people do not have access to litigation, their needs will not be reflected in the common law. In 1994, the Sackville Access to Justice committee said that legal aid providers should 'promote social, political and economic change through the legal system.'[52] The committee affirmed that '[i]t is important that issues of concern to disadvantaged groups be litigated…so that it is not just the interests of the wealthy that direct the development of the common law.'[53]

There is also a broader public interest in the adjudication of disputes. NADRAC has recognised that litigation provides 'public accountability' in a way that ADR does not.[54] In a 1997 report, *Issues of fairness and justice in alternative dispute resolution,* NADRAC observed that ADR is moving into areas of public concern and interest, such as discrimination. It warned that where matters are resolved through confidential settlements, the public does not have an opportunity to respond. In this way, important social issues 'may effectively be privatised'.[55]

There is a vast body of academic writing on the relationship between litigation, public policy and progressive legal change. Much of it dates back to the 1980s, when ADR first rose to prominence in American courts and tribunals.[56] In 1984, Owen Fiss argued that settlement negotiations allow

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51 *President's review of VCAT*, above n 9, 84.

52 *Access to justice: an action plan*, above n 47, 227.

53 Ibid.

54 National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution* (1997) 25.

55 Ibid 25-26.

56 Even earlier than this, Mark Galanter argued, somewhat fatalistically, that settlements 'skew' the law in favour of institutional litigants. He pointed out that 'repeat players', such as banks and insurance companies, can litigate strategically, to obtain a

stronger parties to exert pressure on weaker opponents. In this sense, a settlement is no more than 'a function of the resources available to each party.'[57] In a more ideological vein, Richard Abel sharply criticised ADR for framing conflict in individual terms, even where the underlying problems are widespread. He argued that ADR undermines collective action and seeks to divert attention from the systemic nature of many injustices.[58] He suggested that 'formal law', meaning adjudication, is a more effective agent of social change, since it allows parties to 'demand state redress' for injustice.[59] In Australia, Mary-Anne Noone has expressed concern that ADR could hinder the practice of public interest law.[60]

Hazel Genn revived these debates in 2008 with an explosive series of lectures in the United Kingdom.[61] Genn's lectures address the 'Woolf report' and the UK's civil justice reforms, which imposed new restrictions on access to civil courts. Genn refused to accept the rationale for these changes, denying that there had been a calamitous 'rush to law' by ordinary citizens. She argued that the UK's civil justice reforms were merely an attempt to reduce public expenditure on courts, to compensate for the escalating cost of criminal justice.[62]

Genn argued forcefully that access to justice depends on access to the courts. She pointed out the public benefits that flow from litigation, in developing and clarifying the law.[63] She argued that courts should develop strategies to promote litigation with public value, rather than 'indiscriminately driving cases away.'[64] At the same time, Genn questioned the value of settlements reached through ADR, particularly compulsory ADR. She conceded that many litigants save money by settling, but maintained that 'there is a price to pay in terms of substantive justice.'[65] She concluded with an eloquent plea for the 'social and economic value' of civil litigation.[66]

## 5.2 CLC public interest litigation

CLC history attests to the value of litigation as a tool for promoting social justice. CLCs regularly use their casework to challenge the interpretation of particular laws, push for amendment to statutes, increase accountability and change the practices of industries and governments. Sometimes this forms part of a concerted law reform strategy. At other times it develops unexpectedly, out of routine casework. CLC cases have tested the law in areas such as housing, social security, prisoners' rights and consumer credit.[67] Some have triggered significant legal change. In 2004, the Consumer Credit Legal Service successfully challenged the practices of a debt collector, first at VCAT and then in the Supreme Court (see below).[68] In 2007, the Human Rights Law Resource Centre assisted a Victorian prisoner, Vickie Roach, in a High Court case concerning prisoners' right to vote. The High Court found that the Howard Government had acted unconstitutionally in denying prisoners the right to vote. It struck down the Howard Government's amendments to the Commonwealth *Electoral Act 1918*, and

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useful precedent. At the same time, they can settle cases likely to favour consumers: Mark Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change' (1975) 9 *Law and society review* 95, 102.

57 Owen Fiss, 'Against settlement' (1984) 93 *Yale law journal* 1073, 1076.

58 Richard Abel, *The politics of informal justice*, v 1 (1982) 7.

59 Ibid 308.

60 Mary-Anne Noone, 'Non-adversarial justice and public interest law: the need for vigilance' (Paper presented at the Non-adversarial Justice: implications for the legal system and society conference, Melbourne, 5 May 2010).

61 Joshua Rozenberg, 'Dame Hazel Genn warns of "downgrading" of civil justice', *Law society gazette,* 18 December 2008, available at http://www.lawgazette.co.uk/opinion/joshua-rozenberg/dame-hazel-genn-warns-039downgrading039-civil-justice (last accessed 23 April 2010).

62 Hazel Genn, *Judging civil justice* (2010) 71-73.

63 Genn points to Donoghue v Stevenson, a pro bono case that revolutionised the law of negligence: ibid 75.

64 Ibid 74-75.

65 Ibid 113.

66 Ibid 125.

67 Giddings, above n 4, 261-62.

68 *Taylor v Collection House Ltd* [2003] VCAT 687 (13 June 2003); *Collection House Ltd v Taylor* [2004] VSC 49.

restored voting rights to prisoners sentenced to less than three years.[69] The case attracted television and print media coverage around the country, stimulating public debate over prisoners' rights, the effects of imprisonment and the value of political participation.[70] In this sense, it demonstrated the extra-legal function of transparent, public adjudication, in drawing attention to profound social disadvantage.

### 5.2.1 Case study: *Collection House v Taylor*[71]

The Consumer Credit Legal Service (CCLS)[72] challenged the unconscionable practices of a debt collector, Collection House, in a VCAT application and subsequent Supreme Court appeal. Collection House purchased an old debt and pursued the debtor, Taylor, without revealing that it had no legal right to recover the debt.[73] The CCLS initially sought to resolve the matter through negotiation. The lawyers involved did not anticipate that the case would run to a hearing, or that this would have long-term consequences for the debt collection industry.[74]

The applicant in *Taylor* was a single mother with a 16 year old disabled child. Taylor did not receive any government support for her son, and had no assets of value. In 1992, she obtained a small loan to buy a car. When she fell behind in payments, the car was repossessed and sold, but the sale did not fully satisfy the debt. By 2001 the debt had been sold to Collection House. Due to interest and fees it had risen to $10,870.

On the evening of 21 April 2001, Taylor received a telephone call from Peter Hempenstall. Hempenstall worked for Collection House, but said he was ringing on behalf of ALR Lawyers. He said that his 'client', Collection House, instructed him to seek repayment of the debt. Failing this, the 'client' would consider legal action. Hempenstall said he would accept $5,000 in lieu of full payment. Taylor paid $4,500 on her credit card. She said she would have to contact the bank the next day, to seek additional credit. The next day she sought advice and discovered that the debt was statute-barred. She raised this with Hempenstall, but he insisted that 'the statute of limitations [did] not prevent ALR Laywers from pursuing the debt on behalf of [Collection House].'[75] Hearing this, Taylor paid the remaining $500.

With the help of CCLS, Taylor applied to VCAT, alleging that Collection House had engaged in unconscionable conduct and misleading and deceptive conduct under the *Fair Trading Act 1999* (Vic). VCAT agreed and ordered Collection House to repay the $5,000.[76] Collection House appealed.

In the Supreme Court of Victoria, Justice Nettle upheld the VCAT member's finding of unconscionable conduct.[77] He stated that 'cold-calling' people of Taylor's 'socio-economic

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69 *Roach v Australian Electoral Commission and Commonwealth of Australia* (2007) 233 CLR 162.

70 See, eg, Kenneth Nguyen, 'Prisoner goes to High Court to win right to vote,' *The Age*, 25 April 2007; Jane Fynes-Clinton, 'Jail no bar to rights,' *Courier-Mail*, 3 May 2007; and Michael Pelly and Paul Maley, 'Prisoners regain right to have a say,' *The Australian*, 31 August 2007. These and many other resources relating to the case can be viewed on the Human Rights Law Resource Centre website at http://www.hrlrc.org.au/content/topics/prisoners/roach-decision-prisoners-right-to-vote/ (last accessed 29 April 2010).

71 [2004] VSC 49.

72 In 2006, the Consumer Credit Legal Service merged with the Consumer Law Centre Victoria to form the Consumer Action Law Centre.

73 The debt was statute-barred. *Collection House Ltd v Taylor* [2004] VSC 49.

74 Liz Curran, *Making the legal system more responsive to community: a report on the impact of Victorian community legal centre law reform initiative*s, West Heidelberg Community Legal Service (2007).

75 *Collection House Ltd v Taylor* [2004] VSC 49, [8].

76 *Taylor v Collection House Ltd* [2003] VCAT 687 (13 June 2003).

77 Nettle J did not reject the argument that the conduct was misleading or deceptive, but held that this point should be re-determined by the Tribunal, for evidentiary reasons: [38].

> standing' at home in the evening, interrogating them and threatening them with legal action, was 'capable of constituting pressure of a very high order.' He held that, on the facts, Collection House bore the burden of establishing that the transaction was fair and reasonable, and that it had failed to discharge the burden.[78]

*Taylor* demonstrates the potential impact of CLC litigation. The case attracted media coverage[79] and the attention of the Australian Securities and Investments Commission (ASIC). ASIC launched an investigation into the practice of collecting statute-barred debts.[80] Its report acknowledged the role of *Taylor* in 'highlight[ing]' the risk of misleading and deceptive conduct in the context of statute-barred debts.[81] It subsequently issued a *Debt Collection Guideline for Collectors and Creditors*.[82] The Ethics Committee of the Law Institute of Victoria also revised its guidelines relating to letters of demand.[83] Collection House announced that it would no longer buy old debts.[84] The case is often cited by community lawyers when their clients are being harassed by unscrupulous debt collectors.

78 *Collection House Ltd v Taylor* [2004] VSC 49, [54]-[58].

79 See, eg, 'The push is on to pull in bad loans', *The Age*, 30 August 2003, available at http://www.theage.com.au/articles/2003/08/29/1062050670582.html?from=storyrhs (last accessed 30 March 2010).

80 John Tarrant, 'New guidelines for the debt collection industry' (2006) 34 *Australian Business Law Review* 165, 165.

81 Australian Securities and Investments Commission (ASIC), *Report 55: Collecting statute-barred debts* (2005), available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/statute_barred_debts_report.pdf/$file/statute_barred_debts_report.pdf (last accessed 30 March 2010) 3.

82 ASIC, *Regulatory guide 96: Debt collection guideline: for collections and creditors* (2005), available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ACCC-ASIC_Debt_Collection_Guideline.pdf/$file/ACCC-ASIC_Debt_Collection_Guideline.pdf (last accessed 30 March 2010).

83 Law Institute of Victoria, *Letters of demand guidelines* (2007), available at http://www.liv.asn.au/PDF/Practicing/Ethics/2007GuideLettersDemand.aspx (last accessed 30 March 2010).

84 *Collecting statute-barred debts,* above n 81, 13.

# 6. The limits of ADR

> If adjudication and ADR are twins, one does not thrive at the expense of the other. The function of both is to achieve justice… ADR is not to be applied in a way that compromises equal access to justice… If a party wants to access adjudication to obtain vindication of their legal rights, they must ultimately be given that access.
>
> The Hon. Justice Kevin Bell, *One VCAT: President's review of VCAT,* as cited by Mary-Anne Noone

*Collection House v Taylor* demonstrates that certain disputes can only be resolved through adjudication. Taylor's personal attributes, and the unusually aggressive tactics employed by Collection House, suggest that she would have fared badly in mediation. Moreover, a mediated settlement would have allowed Collection House to continue pursuing statute-barred debts.

## 6.1 What if Taylor had tried mediation?

It is instructive to speculate on the role mediation could have played in *Taylor*. It is arguable that if Taylor had engaged in mediation, she would have recovered less than the $5,000 she recovered in court. In mediation, Taylor would have faced considerable pressure to settle for a lesser amount. Collection House could have argued, as it did before VCAT and the Supreme Court, that it was legally entitled to pursue the debt. It could have listed its legal and administrative costs, and argued that Taylor should be held responsible.

It is likely that Taylor would have performed poorly in mediation, particularly if she had attended without legal assistance.[85] As Noone has observed, mediation at VCAT can be very stressful for inexperienced parties. In the credit list, creditors often exploit debtors' feelings of guilt or embarrassment to obtain an advantage in settlement negotiations.[86] Judging by Taylor's previous interactions with Hempenstall, and her suspected 'emotional difficulties' (to quote Justice Nettle), it seems likely that she would have been vulnerable to pressure of this kind.[87]

It is likely that a VCAT mediator would have strongly encouraged the parties to settle, regardless of the underlying issue of unconscionable conduct.[88] This is borne out by CLC lawyers' experiences, in which mediators have urged parties to make concessions, even where they have been victims of unethical or predatory behaviour by traders:

> [In] the Mathmagics-type cases,[89] where they try and make the client settle… we say that the sales methods, the product and the clientele they market to… the transactions are

85 There is no right to legal representation at VCAT, and in the Civil list, it is unusual for parties to be represented.

86 Noone, 'Non-adversarial justice', above n 60, 18.

87 *Collection House v Taylor* [2004] VSC 49, [58].

88 Tania Sourdin has observed that VCAT mediators 'actively encourage parties to settle.' Tania Sourdin, *Dispute resolution processes for credit consumers* (2007), La Trobe University, available at http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Research/$file/credit_report_dispute_resolution_processes_for_credit_consumers.pdf (last accessed 7 May 2010) 35, cited in Noone, 'Non-adversarial justice', above n 60, 16.

89 These cases involve mathematics tutorial software sold door-to-door, usually through a credit arrangement. Some software providers are alleged to have targeted low-income migrant communities. See the Consumer Affairs Victoria website and official Victorian Government warning, available at

> unconscionable… You go in and argue, 'This is unconscionable,' and they say, 'Well yes, but you might lose, we'd better mediate.'
>
> Lawyer, Footscray Community Legal Centre

In this context, it seems likely that a mediator would have encouraged Taylor to accept a compromise. For a woman in Taylor's circumstances, even a partial compromise would have been a significant financial blow.

Apart from the consequences for Taylor, a settlement would have had broader implications for consumers and CLC clients in particular. If Taylor had settled, there would have been no judgment, no media scrutiny and, in all likelihood, no ASIC investigation. Collection House would have been free to employ the same tactics against other vulnerable debtors.

## 6.2 Risk factors in ADR

CLC experience suggests that some cases, by their nature, will always be more appropriately dealt with by adjudication than through ADR.

### 6.2.1 Client vulnerability

The most striking aspect of *Taylor* is the extreme vulnerability of the applicant. Taylor was multiply disadvantaged, as a welfare recipient with no assets, very limited education and a disabled dependent child. Justice Nettle acknowledged in his judgment that stress and extreme disadvantage can affect a person's capacity to make rational decisions. [90] It is extremely important to recognise this in the context of mediation.

CLC clients are often profoundly disadvantaged, due to poverty, mental illness, homelessness, language difficulties, literacy issues or, in the case of recent migrants, general unfamiliarity with Australian culture. Long-term disadvantage can have a significant impact on self-esteem. Low self-esteem can in turn prevent people from assertively pursuing their legal entitlements. Traumatic life experiences may lead to fear of institutions and authority figures, particularly among refugees. These factors all impede our clients' ability to participate in mediation – to understand basic legal principles, to express opinions confidently, to evaluate settlement offers and to withstand pressure from a mediator or another party.[91]

> If you've had nothing but recurrent homelessness or disadvantage your entire life, you don't have any sense of entitlement at all. It's just this overwhelming sense of resignation… Your engagement or understanding of the law is completely different from anybody else's. You don't think that it's there to assist you.
>
> Lawyer, PILCH Homeless Persons' Legal Clinic

> Footscray Legal Service has found that if it tells refugee [clients]…particularly African women who are refugees, that they have a right to get a stay [of eviction] but they have to go to the Tribunal, they all say, 'No, no, I couldn't possibly do that'… They are absolutely petrified of authority. They are absolutely petrified of going to a court… I think in their own country…if you go to court it's associated with something that's absolutely disastrous… A mediator might well

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http://www.education.vic.gov.au/aboutschool/participation/parentupdate/dec09/bewarevce.htm (last accessed 4 May 2010).

90 *Collection House Ltd v Taylor* [2004] VSC 49, [54], [57].

91 The New South Wales Law and Justice Foundation has made similar observations in relation to people suffering from a mental illness. See Law and Justice Foundation of New South Wales, *On the edge of justice: the legal needs of people with a mental illness in NSW – Access to justice and legal needs volume 4* (2006) 140. See also Mary-Anne Noone, 'The disconnect between transformative mediation and social justice' (2008) 19 *Australian Dispute Resolution Journal* 114.

> think that they're being reasonable, and taking both sides into account, but if one party is actually petrified of someone in authority, the chance is that… if told, 'Well, you should bring this to an end,' they will bring it to an end. Not because it's in their best interests, but because a figure of authority said that.
>
> Lawyer, Footscray Community Legal Centre

> When the discrimination has been…nasty…a lot of my clients have developed mental health issues… depression, anxiety, through the discrimination…and therefore they're just in a very poor state… and in particular when confronted with a very powerful respondent, just find the whole thing very difficult.
>
> Manager, Disability Discrimination Legal Service

> Most of our clients are disadvantaged, have trouble reading English let alone…understanding legal principles …Our clients can't go in there without having knowledge of their legal rights because they're completely out-manoeuvred …so it's redressing some of those assumptions… It's not fair for our clients just to go in without knowing anything, without having that support of an advocate…
>
> Lawyer, Springvale Monash Legal Service

Ordinarily negotiation may, for vulnerable clients, constitute a highly stressful and frightening experience. Well-intentioned mediators and other parties may not realise they are having this effect. For multiply disadvantaged clients, an advocate is a vital safeguard against poor decision-making due to stress, misunderstanding or lack of self-confidence.

**Recommendation 4**
People who fall into a category of disadvantage (eg low income, CALD status, disability, mental health issues, homelessness or limited literacy) should be automatically exempt from mandatory ADR processes, unless they can obtain appropriate legal representation.

### 6.2.2 Unethical or illegal activity

Where there is evidence that a party has acted unethically or illegally, it is not appropriate to settle through mediation.

> If… under our current door-to-door laws, you bring an action to say a contract is unenforceable by reason of a breach of the *Fair Trading Act* direct sales provisions, a successful outcome, legally, would be that the contract is unenforceable. Any compromise accepts that potentially an unenforceable contract can be enforced… The mediators take the view that they're looking for a compromise, which in a sense is saying, 'We believe it may be a better outcome to defeat the legislation because you'll only lose half instead of all.'
>
> Lawyer, Footscray Community Legal Centre

Where Parliament has enacted legislation to address unethical behaviour, there is a clear public interest in the full application of these laws, in an open and transparent manner. There is a particularly strong public interest where the behaviour targets vulnerable people, or appears to be widespread and systematic.

### 6.2.3 Legal uncertainty

In some cases, the needs of the parties must be balanced against the broader public interest in a legal decision, due to the widespread or systemic nature of a particular problem, or the need to clarify the law. As noted above, *Taylor* had long-term consequences for debt collection practices in Victoria.

CLCs continue to seek clarification of their clients' legal rights, but these efforts are sometimes thwarted by compulsory ADR procedures:

> I recently had this issue with… an industry scheme. And I said… 'I don't see every consumer. I want a ruling about whether what they've done is a breach of the Act and is in fact illegal.' They said, 'Under our rules we have to send it back [for negotiation].' The three cases were settled within 24 hours and I didn't get a ruling… [T]he New South Wales Court of Appeal makes a decision three months later on the same issue and now the Ombudsman is about to send out a circular telling insurers what they can and can't do. But I have doubts as to whether they could ever have made a ruling… under their own jurisdiction, which would have achieved the same result.
>
> Lawyer, Footscray Community Legal Centre

Recently, Consumer Action Law Centre has become aware of a potentially misleading practice by private car park operators. One of these operators allegedly issues large 'fines' to drivers who overstay their allotted time. The 'fines' are deliberately designed to look like council parking infringements. As one lawyer commented, 'We've been trying to run a public interest case on this… but they always settle.'

This inability to obtain a legal decision means that each case must be negotiated individually. A clear statement of the law would clarify the rights of all parties concerned, potentially resolving a large number of disputes. It would also allow for public scrutiny and may help to raise consumer awareness about these car parks' misleading practices.

**Recommendation 5**
Courts, tribunals and government ADR providers (such as the Dispute Settlement Centre of Victoria) should publish de-identified case studies and regular reports on systemic and public interest issues that arise in their ADR processes, in line with the recommendation of the Victorian Parliament Law Reform Committee.[92]

**Recommendation 6**
All courts and tribunals with mandatory ADR processes should establish guidelines to facilitate public interest litigation. The guidelines should state that important test cases and public interest cases are exempt from mandatory ADR. This would be consistent with NADRAC's recommendations in its 2009 report, *The resolve to resolve,* and the Victorian Law Reform Commission's approach to pre-action protocols.[93]

### 6.2.4 'All or nothing' disputes

Some legal issues are inherently unsuitable for ADR, as there is little or no room for negotiation. Commercial actors, or parties to a neighbourhood dispute, may find it worthwhile to forgo some entitlements, to save money or to preserve an ongoing relationship. These factors seldom apply to a one-off dispute between a CLC client and a large business or public authority.

Many CLC clients' disputes fall into the 'all or nothing' category, as they concern tenancy, social security or, as in *Taylor*, a single large debt. These disputes are extraordinary events in the lives of our clients. As Genn has pointed out, in these circumstances, a legally 'inaccurate' decision may have far-reaching implications for an individual's welfare.[94] Accordingly, it is rarely in that individual's interests

92 *Inquiry into alternative dispute resolution,* above n 17, 82-84.
93 *The resolve to resolve*, above n 24, 37; *Civil justice review: report*, above n 14, 144.
94 Hazel Genn, 'Tribunals and informal justice' (1993) 56 *Modern law review* 393, 411.

to forego legal rights or procedural safeguards, in the name of efficiency or to preserve a relationship.[95]

> Certain matters are inappropriate for ADR in any circumstances, for example where the Director of Housing wants the premises vacated and the tenant doesn't want to go. The only 'wiggle room' is you can leave immediately or leave in 30 days. That's just not appropriate if a client has a strong case… For people at risk of eviction, we say if they've got an arguable case they've got a right to seek a determination according to law.
>
> Lawyer, PILCH Homeless Persons' Legal Clinic

Some of these matters involve questions of law,[96] which cannot be adequately addressed through negotiation. Others involve diametrically opposed, irreconcilable interests. In these cases, the fairest solution is to determine the matter according to legal principles, through a transparent and formal process.

## 6.3 A new challenge for activist CLCs

As well as providing legal assistance to individuals, CLCs have an important role to play in shaping ADR policy and practice in Australia. CLC case studies and law reform work can fill a gap in current ADR policy. Drawing on their work with low-income, marginalised people, CLC lawyers can help to develop progressive and flexible ADR policies. We can draw attention to the many clients who need assistance to participate in ADR. We can also help policy-makers to identify the cases in which ADR is not, and never will be, a suitable option. Consistent with CLCs' tradition of activism, it is equally important that we defend our clients' right to an adjudicated decision, where this is in the public interest or where it may effect progressive legal change.

**Recommendation 7**
CLCs should document their ADR casework, including cases successfully resolved through ADR and cases that are inappropriate for ADR due to their subject matter or a party's disadvantaged status. These case studies should inform future CLC policy and law reform work.

**Recommendation 8**
CLCs should continue to engage in policy and law reform work in relation to ADR. CLCs should work with State and federal governments to ensure that ADR is appropriately targeted, to maximise its benefits, while at the same time ensuring that it does not compromise the rights of disadvantaged people.

95 Noone, 'Non-adversarial justice', above n 60, 15-19.
96 For a discussion of questions of law in mediation see Genn, *Judging civil justice*, above n 62, 75, 99-100.

# Conclusion

CLC clients have much to gain from ADR, provided it is properly targeted and adequately supported. CLC experience has shown that in many cases, ADR can be a quick, simple and effective way to resolve a dispute. It is important to remember, however, that social or economic disadvantage can make it difficult for our clients to engage in ADR on an equal footing. For these people, the presence of an advocate is an essential safeguard against inappropriate settlements.

It is also important to recognise the role of litigation in developing the law and facilitating public debate over important social justice issues. As Justice Bell has observed, the benefits of ADR should not come at the expense of adjudication. True access to justice requires that they play complementary roles.

CLC lawyers have a unique insight into the legal concerns of low-income and disadvantaged people. It is our responsibility to articulate our clients' needs, and support them to play an active part in the new, multi-faceted civil justice system.

# Works Cited


Abel, Richard, *The politics of informal justice*, v 1 (1982)

Australian Securities and Investments Commission, *Regulatory guide 96: Debt collection guideline: for collections and creditors* (2005), available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ACCC-ASIC_Debt_Collection_Guideline.pdf/$file/ACCC-ASIC_Debt_Collection_Guideline.pdf (last accessed 30 March 2010)

------- *Report 55: Collecting statute-barred debts* (2005), available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/statute_barred_debts_report.pdf/$file/statute_barred_debts_report.pdf (last accessed 30 March 2010)

Bell, The Hon. Kevin, *One VCAT: President's review of VCAT*, Victorian Civil and Administrative Tribunal, 30 November 2009, available at http://www.vcatreview.com.au/presidents-report (last accessed 2 May 2010)

Commonwealth of Australia, Access to Justice Advisory Committee, *Access to justice: an action plan* (1994)

------- Attorney-General's Department, *A strategic framework for access to justice in the federal civil justice system: report by the Access to Justice Taskforce* (2009)

Consumer Action Law Centre, 'Collection Point misleads client and sues his lawyers', (Press release, 23 December 2009), available at http://www.consumeraction.org.au/downloads/MR-CollectionPoint-231209-FINAL.pdf (last accessed 11 October 2010)

Consumer Affairs Victoria website, http://www.education.vic.gov.au/aboutschool/participation/parentupdate/dec09/bewarevce.htm (last accessed 4 May 2010)

Curran, Liz, *Making the legal system more responsive to community: a report on the impact of Victorian community legal centre law reform initiatives*, West Heidelberg Community Legal Service (2007)

Federation of Community Legal Centres (Vic) Inc, 'ADR and its role in federal dispute resolution' (1998), available at http://www.communitylaw.org.au/lrs.php#Family (last accessed 8 May 2010)

------- *Annual Report 2008-2009,* available at http://www.communitylaw.org.au/publications.php (last accessed 13 May 2010)

Fiss, Owen, 'Against settlement' (1984) 93 *Yale law journal* 1073

Fynes-Clinton, Jane, 'Jail no bar to rights,' *Courier-Mail*, 3 May 2007

Galanter, Mark, 'Why the "haves" come out ahead: speculations on the limits of legal change' (1975) 9 *Law and society review* 95

Genn, Hazel, *Judging civil justice* (2010)

------- 'Tribunals and informal justice' (1993) 56 *Modern law review* 393

Giddings, Jeff, 'Casework, bloody casework' (1992) 17(6) *Alternative law journal* 261

Giddings, Jeff and Mary-Anne Noone, 'Australian community legal centres move into the twenty-first century' (2004) 11(3) *International journal of the legal profession* 257

Giddings, Jeff and Michael Robertson, 'Informed litigants with nowhere to go: self-help legal aid services in Australia' (2001) 25(4) *Alternative law journal* 184

Hulls, The Hon. Rob, 'Government delivers on justice while opposition fails' (Press release, May 2010)

Human Rights Law Resource Centre website, http://www.hrlrc.org.au/content/topics/prisoners/roach-decision-prisoners-right-to-vote/ (last accessed 29 April 2010)

Law and Justice Foundation of New South Wales, *On the edge of justice: the legal needs of people with a mental illness in NSW – Access to justice and legal needs volume 4* (2006)

Law Institute of Victoria, *Final report: interpreting scoping fund project* (2010) available at http://www.liv.asn.au/getattachment/80358a3c-d0d5-460c-bbae-af9dcccaa3f8/Final-Report---Interpreting-Fund-Scoping-Project.aspx (last accessed 23 April 2010)

------- *Letters of demand guidelines* (2007), available at http://www.liv.asn.au/PDF/Practicing/Ethics/2007GuideLettersDemand.aspx (last accessed 30 March 2010)

McClelland, The Hon. Robert, 'Additional $154 million for legal assistance services' (Press release, 11 May 2010)

------- 'Building better partnerships between Family Relationship Centres and legal assistance services' (Press release, 4 December 2009)

National Alternative Dispute Resolution Advisory Council, *Charter*, available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_Charter_Charter (last accessed 11 May 2010)

------- *Dispute resolution terms: the use of terms in (alternative) dispute resolution* (2003)

------- *Issues of fairness and justice in alternative dispute resolution* (1997)

------- *The resolve to resolve – embracing ADR to improve access to justice in the federal jurisdiction* (2009)

Nguyen, Kenneth, 'Prisoner goes to High Court to win right to vote,' *The Age*, 25 April 2007

Noone, Mary-Anne, 'Mid-life crisis: Australian community legal centres' (1997) 22(1) *Alternative law journal* 25

------- 'Non-adversarial justice and public interest law: the need for vigilance' (Paper presented at the Non-adversarial Justice: implications for the legal system and society conference, Melbourne, 5 May 2010)

------- 'The activist origins of Australian community legal centres', in Christopher Arup and Kathy Laster (eds), *For the public good: pro bono and the legal profession in Australia* (2001) 128-37

------- 'The disconnect between transformative mediation and social justice' (2008) 19 *Australian dispute resolution journal* 114

Pelly, Michael and Paul Maley, 'Prisoners regain right to have a say,' *The Australian*, 31 August 2007

Rich, Nicole, *Reclaiming community legal centres: maximising our potential so we can help our clients realise theirs*, Victoria Law Foundation Community Legal Centre Fellowship 2007-2008 Final Report (2009), available at http://www.consumeraction.org.au/downloads/VLFCLCFellowship07-08reportWebFinal.pdf (last accessed 19 April 2010)

Rozenberg, Joshua, 'Dame Hazel Genn warns of "downgrading" of civil justice', *Law society gazette*, 18 December 2008, available at http://www.lawgazette.co.uk/opinion/joshua-rozenberg/dame-hazel-genn-warns-039downgrading039-civil-justice (last accessed 23 April 2010)

Schetzer, Louis, *Courting debt: the legal needs of people facing civil consumer debt problems* (2008), available at http://www.justice.vic.gov.au/wps/wcm/connect/984d0700410b77b7988ede0ffb994a81/CourtingDebt.pdf?MOD=AJPERES (last accessed 13 May 2010)

Sourdin, Tania, *Dispute resolution processes for credit consumers* (2007), La Trobe University, available at http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Research/$file/credit_report_dispute_resolution_processes_for_credit_consumers.pdf (last accessed 7 May 2010)

'The push is on to pull in bad loans', *The Age*, 30 August 2003, available at http://www.theage.com.au/articles/2003/08/29/1062050670582.html?from=storyrhs (last accessed 30 March 2010)

United Kingdom Department for Constitutional Affairs, *Access to justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996)

Victorian Government, *Government response to Victorian Parliament Law Reform Committee inquiry into alternative dispute resolution and restorative justice* (2009)

Victorian Government Department of Justice, *Justice statement* (2004)
------- *Justice statement 2* (2008)

Victorian Law Reform Commission, *Civil justice review: report* (2008)

Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009)