Federation of
Community Legal Centres
VICTORIA

Ms Kerryn Riseley
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002

31 March 2008

Dear Ms Riseley,

Inquiry into Alternative Dispute Resolution

The Federation of Community Legal Centres (Vic) Inc ('the Federation') is the peak body for fifty-two community legal centres across Victoria, including both generalist and specialist centres. Community legal centres provide free legal advice, information, assistance, representation and community legal education to more than 100 000 Victorians each year. Community legal centres adopt a holistic approach to addressing legal issues, working alongside a range of community-based service providers to address problems that may not have a purely legal dimension or solution.

The community legal sector also undertakes strategic research, policy development and social and law reform activities. The day-to-day work of community legal centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

The Federation appreciates the extension of time which has allowed us to respond to the Inquiry, and the Discussion Paper's useful outline of the current state of ADR processes and practices in Victoria. However, our responses to the questions in the Discussion Paper are briefer and more selective than we would prefer, due to the sheer breadth of complex and interconnected issues raised. In particular, we believe that the topic of restorative justice is perhaps better suited at this time to a separate process of inquiry.

Accordingly, our comments below concentrate more on what the Federation regards as fundamental principles underpinning any consideration of ADR.

ADR and access to justice (Qs 13, 15-18)
Community legal centres have expertise in working with disadvantaged and marginalised communities, and aim to provide a bridge to the justice system so that it is accessible, welcoming and fair for all Victorians. Genuine access to justice also means that there are adequate and appropriate remedies available to address violation of rights, and that all members of the community have an understanding of the legal system, their rights within it, and their options for achieving justice. All members of the community must also therefore have access to legal advice to assist them to decide which avenue to choose for a particular legal issue or problem, and to assist them to take or defend a legal action.

In some contexts, the availability of ADR processes may produce better access to justice; for example, by preventing costly and traumatic litigation and promoting earlier settlement of disputes. However, ADR should not be compulsory, nor be used as a substitute for other dispute resolution options simply because it may appear more cost effective; rather, ADR should be an appropriate method for the circumstances and

Suite 11, Level 1
54 Victoria Street
Carlton South
Victoria 3053

Tel: 03-9652 1500
Fax: 03-9654 5204
administration@fclc.org.au
www.communitylaw.org.au

Federation of
Community Legal Centres
(Vic) Incorporated
Registration A0013713H
ABN 30 036 539 902

should not be offered at the expense of fundamental rights and obligations such as the right to a fair trial and public hearing by a competent, independent and impartial tribunal (Article 14(1), *International Covenant of Civil and Political Right*s). Parties offered ADR must also have access to independent legal advice.

Where ADR may be inappropriate (Qs 5, 7, 8)

Further, ADR is inappropriate if it fails to address power disparities between the disputants. For example, the resolution of civil disputes through ADR may be problematic if the matter involves a claim by a consumer against a large corporation such as a bank (or the reverse), especially if the consumer is not legally represented. This type of dispute is often characterised by unequal bargaining power and a lack of ability of consumers to negotiate any terms of their contract of relationship. It may follow that consumers accept a negotiated settlement in order to avoid the risk of adverse costs orders and the stress of litigation, yet through doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of the corporation to pay or forego a comparatively small individual and confidential settlement rather than risk having a test case judgement made against them that would be costly if applied to a large volume of consumers.

Any requirement for parties to participate in ADR must consider these kinds of power inequalities, preferably through court oversight. A court could consider the benefits of ADR in both the individual case as well as the wider social justice context.

ADR may also not be helpful when a matter is urgent and where the immediate impact of the issue disproportionately affects one party. For example, in the case of a person being evicted from their home, or a child being expelled from school, the impact of any delay is greater for that individual. There needs to be capacity to move urgent matters effectively through the court system, so that they are not stymied by a more powerful party who may have the advantage of both time and money. This may require intensive judicial monitoring of the practice of parties in ADR; for example, through judicial mediation.

ADR regulation and standards (Chapter 7)

The Federation does not believe that a 'one size fits all' model is the best way to approach the issue of regulation of diverse ADR practices and schemes in Victoria. At the same time, however, our member centres' experiences suggest that only some ADR processes evidence a 'best practice' approach; for example, the Domestic Violence & Incest Resource Centre regularly engages with Victoria Legal Aid Roundtable Dispute Management (RDM) in relation to family law matters, and finds that this approach, which includes legal representation, can be more empowering and flexible for clients, provided they are well-prepared beforehand and have access to lawyers.

Practice standards must embody fundamental agreed-upon principles, and any regulatory framework must enable such standards to be enforced. At the same time, however, the framework must also be flexible enough to encompass the sometimes very different approaches to relevant expertise and ADR practice taken by Indigenous and other disadvantaged communities. These communities must therefore be central to any discussion of appropriate standards and monitoring.

Mediation in the criminal court jurisdiction (Q 19)

The Federation supports the submission by our member centre, Youthlaw.

Restorative justice and access to justice (Qs 20-28, 42)

We believe that a broader range of information and consultation modes is necessary in order to gain informed community views about restorative justice approaches. This needs to be supported with an issues paper which clearly and in detail outlines the different types of models of restorative justice, their use to date in different jurisdictions, which types of offences and offenders have been involved, and the strengths and weaknesses of current evaluative research applied to such approaches.

The Federation broadly supports the concept of restorative justice due to its emphasis on crime prevention, rehabilitation and recidivism reduction, rather than on punitive measures which result in increased penalties and imprisonment rates or further stigmatisation of offenders who have completed their sentence.

In principle, the Federation supports the application of restorative justice approaches to a broader range of offenders and offences, and at different stages of the criminal justice process, than tends to be currently the situation in Victoria. However, we believe that referral should not be mandatory, that any restorative process should operate in tandem with the existing criminal justice system, and that offender participation in a restorative justice scheme should be rewarded, rather than sanctioning refusal to participate.

It is essential to any effective and fair restorative justice process that the parties genuinely consent to participation. The question of whether restorative justice should be applied to situations involving clear power disparities and/or especially traumatic victim impacts (eg family violence or sexual assault offences) requires additional careful consideration informed by the experiences of victims/survivors and specialist workers in those fields, and by research on long-term outcomes. Any implementation of restorative justice schemes in these contexts must include specialist training and ongoing professional development, with mandated practice standards, in relation to the dynamics and impact of sexual assault and/or family violence; as well as regular monitoring and evaluation of such schemes.

Data collection and analysis (Qs 2, 4, 30-31, 35, 40)
It is essential that any use of ADR and restorative justice approaches is supported by evaluative research and monitoring, grounded in systematic documentation of processes and outcomes. Data collection and analysis should be as independent as is practical; for example, all industry-based ADR schemes should be required to report to an independent monitor and be subject to regular evaluation.

The Federation also supports NADRAC's recommendation that more agencies should collect information about the background of parties using ADR, in order to identify unmet needs and increase the accessibility of ADR processes.

If you require any further information, please contact me on 03 9652 1506 or via policy@fclc.org.au.

Sincerely

Dr Chris Atmore
Policy Officer