Submission

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

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Response to *A Strategic Framework for Access to Justice in the Federal Civil Justice System*

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Contents

About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for over fifty community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

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

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

About community legal centres

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

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

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

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

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

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

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

Introduction

The Federation of Community Legal Centres is pleased to provide its comments on the report of the Attorney-General's Access to Justice Taskforce, entitled *A Strategic Framework for Access to Justice in the Federal Civil Justice System* ('the Taskforce report'). The Federation thanks the Attorney-General's Department for allowing us extra time in which to complete this submission.

This submission also addresses *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, a report released by the National Alternative Dispute Resolution Advisory Council ('the NADRAC report') on 4 November 2009. We appreciate that the Taskforce report did not discuss ADR in detail as it did not wish to pre-empt the findings of the NADRAC inquiry into ADR in the civil justice system. As the NADRAC report has direct relevance to the recommendations of the Taskforce report, we will take this opportunity to comment on NADRAC's findings.

The Federation is a member of the National Association of Community Legal Centres ('NACLC') and endorses the NACLC's submission dated 2 November 2009.

We gratefully acknowledge the assistance of our member centres, particularly the Consumer Action Law Centre, Women's Legal Service Victoria, Whittlesea Community Legal Service and Peninsula Community Legal Centre, in the preparation of this submission.

General comments

The Federation broadly endorses the Taskforce report. We welcome the emphasis on early intervention, integrated service delivery and assisted referrals (the 'no wrong number, no wrong door' approach). We believe that these measures will do much to improve access to justice in Australia.

We particularly welcome the recommendation that Government bodies improve the quality of primary decision-making (Recommendation 10.1). Centrelink recipients are frequent users of community legal services, making up 58% of our client base.[1] It is our experience from working with our clients that many people never challenge adverse decisions by Centrelink, as they are not fully aware of their rights.[2] Improvements to primary decision making would assist those Centrelink recipients who never seek our assistance, as well as many of our existing clients.

We also strongly endorse Recommendation 8.10 regarding public interest costs orders. This measure, if implemented, will greatly assist many disadvantaged groups and not-for-profit organisations.[3]

Funding

Legal advice and representation are essential components of the justice system. As recognised by the Taskforce report,[4] legal aid and community legal services are significantly underfunded. The Victorian Government has also recognised this. Last year the Attorney-General's *Justice Statement 2* observed that the 'assistance available for civil justice matters was dramatically reduced in 1996 after the Commonwealth reduced its contribution to legal aid.' It points out that '[w]hereas the Commonwealth used to provide 55% of legal aid funding, its portion has fallen to less than a third in recent years.'[5]

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[1] *Review of the Commonwealth Community Legal Services Program,* Attorney General's Department, 2008, p 6.

[2] *A Strategic Framework for Access to Justice in the Federal Civil Justice,* Attorney General's Department, 2009 ('the Taskforce report'), 131.

[3] See Public Interest Law Clearing House (PILCH), *Submission to the Attorney General of Victoria on Protective Costs Orders*, 2008, available at http://www.pilch.org.au/Assets/Files/Submission%20to%20the%20Victorian%20Attorney-General%20on%20Protective%20Costs%20Orders.pdf (accessed 11 November 2009).

[4] The Taskforce report, above n 2, 43.

[5] Victorian Government, *Attorney-General's Justice Statement 2* (2008) 36.

The Victorian Law Reform Commission has confirmed that these cuts led to 'the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries.' It concludes that, while '[s]ome of these matters have been picked up by the private profession…substantial areas of law, particularly poverty-related law, have not been picked up.'[6]

CLCs and legal aid providers simply cannot meet demand for their services, particularly in civil law. The recommendations of the Taskforce report may result in some efficiency gains but will not compensate for this funding deficit.

We join with the NACLC in calling for greater recurrent funding for CLCs and legal aid services.

Alternative dispute resolution

The Taskforce report endorses greater use of alternative dispute resolution ('ADR'), 'not just [to] respond to current demand, but [to] influence participants toward the most appropriate method to get a fair outcome in the most timely and cost effective way.'[7] We agree that ADR can be beneficial in many circumstances. However we do not believe that ADR is preferable to litigation in every case, or that parties should be put under pressure to engage in ADR if their matter is more appropriate for judicial determination.

1 The need for legal assistance and representation in ADR

The Federation is concerned that some parties may be disadvantaged if they are required to settle their disputes through ADR, particularly if they have no access to legal assistance. The Taskforce report states that self-represented litigants should be required to participate in ADR. While the report concedes that 'it may… be necessary to better adapt ADR services to meet their needs,'[8] we believe that much more is necessary to avoid injustice to self-represented parties.

a Lack of procedural safeguards

Legal representation is often more important in ADR than in a court hearing. This is because the procedural safeguards of the court room are absent from ADR. Moreover, in a court hearing, the judge will ordinarily assist a self-represented litigant to some extent.[9] In mediation, by contrast, the mediator must remain 'neutral' and cannot provide assistance to the same degree. ADR proceedings are not recorded, making it difficult to assess the fairness of the process retrospectively. Without proper safeguards, there is a risk that self-represented parties may accept settlements that do not reflect their true legal entitlements. Access to justice is weakened, not enhanced, by settlements of this nature.[10]

b Power imbalances

Legal assistance also helps to correct the power imbalances that characterise most disputes. Relationships between landlords and tenants, or employers and employees, may be the more common examples of such an imbalance, but there will be many other cases in which one party feels intimidated by the other. Without legal representation, the vulnerable party may succumb to pressure to accept an unfair settlement. We acknowledge that mediators try to correct power imbalances and to ensure that vulnerable parties can participate on an equal footing. However their efforts will not always guarantee fairness to the weaker party.

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[6] Victorian Law Reform Commission, *Civil Justice Review Report* (2008) 608.

[7] The Taskforce report, above n 2, 54.

[8] Ibid 54.

[9] See the discussion of the judge's duty to assist self-represented litigants in *Tomasevic v Travaglini* (2007) 17 VR 100.

[10] We refer to the submission of our member centre, Peninsula Community Legal Service, dated 13 November 2009. See especially pp 3-4 of that submission.

Despite ubiquitous references to mediators' neutrality, mediators can never be completely neutral. They inevitably 'bring with them their social class, ethnic heritage, and professional and political ideologies.' A mediator's assessment of the parties' claims may have a significant bearing on the outcome of a mediation. [11] In this sense, there is a risk that commonly held stereotypical attitudes may affect the mediator's response to parties' behaviour.[12]

To take one example, often noted in the context of family law, traditional gender stereotypes dictate that men should be aggressive and assertive, while women should be pliant and submissive. Such deeply ingrained social norms may lead a mediator to tolerate aggressive behaviour by a male party, while regarding a female party as unreasonable because she becomes angry or refuses to compromise.[13]

To counteract power imbalances, including systemic inequalities due to gender, ethnicity or socio-economic status, all participants in ADR should have access to legal advice and representation. In this respect, increasing use of ADR may lead to greater demand for free legal services. For this reason, we do not regard ADR as a solution to the underfunding of legal services in Australia. As noted above, we believe that genuine access to justice can only be achieved through increased government funding in this area.

> *Case study*
> Victoria Legal Aid ('VLA') provides an ADR service to clients going through separation or divorce. The service is called 'Roundtable Dispute Management' ('RDM'). All matters are carefully checked against strict criteria, to assess whether or not they are appropriate for mediation. Matters are 'screened out' if there is a history of violence or some other significant power imbalance between the parties. Where there is a power imbalance of a less serious nature, the RDM employs 'shuttle' mediation, so that the parties do not have to confront each other or negotiate face to face.
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> The RDM requires at least one party to be legally represented. In some cases, one party is eligible for legal aid funding but the other is not, due to VLA's very stringent means testing.
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> The Women's Legal Service Victoria (WLS) provides a duty lawyering service at RDM, to advise and represent women who cannot obtain assistance from VLA.
>
> WLS believes that the RDM represents best practice in balanced, supportive ADR, but that legal advice and representation are still essential to the fairness of the process.[14]

2 The role of litigation

We are pleased that the Taskforce report recognises the value of litigation where 'significant' issues are at stake. We strongly agree that in some instances, judicial determination of a dispute serves the public interest.[15] In consumer law, for example, cases resolved in courts and tribunals serve as precedents, guiding business, consumers and industry-based dispute resolution schemes on the proper interpretation of the law.

As the Taskforce report acknowledges, settlement through ADR can sometimes allow unfair or unscrupulous behaviour to remain hidden.[16] This is particularly true of cases between individuals and large, well-resourced

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[11] Richard Hofrichter, 'Neighbourhood justice and the social control problems of American capitalism: a perspective' in Richard L. Abel (ed), *The politics of informal justice vol 1: the American experience* (1982) 207-248, 241-42; Rachael Field and Jonathan Crowe, 'The construction of rationality in Australian family dispute resolution: a feminist analysis' (2007) 27 *Feminist Law Journal* 97, 113. See also Martha Shaffer, 'Divorce mediation: a feminist perspective' (1988) 46 *University of Toronto Faculty Law Review* 162, 185.

[12] See Field and Crowe, ibid, 115.

[13] Ibid 115. See also Shaffer, above n 11.

[14] We understand that the Women's Legal Service will discuss this in more detail in its own submission.

[15] The Taskforce report, above n 2, 30

[16] Ibid 30-31.

corporate entities. The latter may take advantage of ADR to prevent a matter from proceeding to court, to avoid public exposure and the creation of a precedent that could benefit many other individual litigants.

In this respect, the confidentiality of ADR settlements is problematic. ADR routinely leads to confidential settlements, in which no party accepts liability for the alleged wrongdoing. This undermines several important functions of the justice system, including the denunciation of unlawful conduct and the public vindication of legal rights. Diversion to ADR may therefore be detrimental to low-income or one-off litigants, if imposed without regard to the public interest in full ventilation and determination of certain disputes.

Moreover, there is a risk that parties dependent on legal aid or CLCs will face disproportionate pressure to settle via ADR, as a cost-saving measure, while wealthier parties retain the option of litigating any matter to conclusion. This not only contradicts the principle of access to justice but could, over time, result in significant distortion of the law. As Mark Galanter has observed, 'repeat players' (such as insurance companies or banks) are able to 'play for rules' as well as immediate gains. By virtue of their experience, repeat players can identify changes in the law that would serve their interests, and pursue these changes through strategic litigation over the long term. By contrast, the one-off low income litigant generally has neither the expertise nor the incentive to 'play for rules'.[17]

For these reasons we believe that ADR should complement, rather than replace, formal adjudication, and that low income parties should not face undue pressure to settle through ADR.

3 Response to NADRAC's recommendations

The Federation is disappointed that the NADRAC report failed to consider the needs of low income parties. At present, very few CLC clients litigate in the federal court system. This is likely to change, however, with the enactment of national consumer credit laws, whereupon CLC clients will no longer have access to the Victorian Civil and Administrative Tribunal ('VCAT') in consumer credit matters. The abolition of the Federal Magistrates' Court will put further pressure on the Federal Court to simplify its procedures and adapt to the needs of low income parties.

We are aware that within the federal court system, low income parties already have access to a range of fee exemptions and free interpreting services when they engage in ADR. Nevertheless, there remain many barriers to justice in the federal system.

a ADR-related legal costs

Although low income parties generally do not pay fees for court-mandated ADR, they may incur other costs, most significantly, the cost of legal representation. Most CLCs and pro bono schemes do not have the resources to assist parties in mediations, meaning that low income parties must either pay private solicitors' fees or participate in mediations unrepresented. For the reasons outlined above, we believe that participants in mediations should always have access to legal advice and representation.

Low income parties are also disproportionately affected by delays associated with ADR. Some ADR processes can be slower than court or tribunal proceedings. Low income parties often cannot afford to wait, because all of their income is needed for essential expenses and they have no disposable income buffer. Workers reliant on unpaid wages or underpaid benefits need a quick resolution to their claim. In credit and debt disputes, interest continues to accrue as the dispute progresses, and delay can jeopardise a person's major asset, such as his or her home. By contrast, issuing proceedings in a court or tribunal can expedite settlements.

[17] Mark Galanter, 'Why the "Haves" come out ahead: Speculations on the limits of legal change' (1974-1975) 9 *Law and Society Review* 95, 100.

b *The need for interpreters and translated materials*

The NADRAC report acknowledges '[the] need [for] specifically tailored solutions to account for disabilities, language barriers or cultural differences' but does not elaborate on what these solutions might be.[18] We believe this is a very significant access to justice issue, which deserves greater attention.

We refer to the recent report of the Victorian Parliament Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, which found that 'language barriers may still prevent significant segments of the community from accessing ADR services.' We support that committee's view that 'there is scope to increase the capacity of ADR practitioners to work effectively with people who have language difficulties.'[19]

We also refer to a recent paper by the Law Institute of Victoria, entitled *Creating an Interpreting Fund for civil legal matters in Victoria*. The paper canvasses the unmet need for interpreters in the Victorian civil law system, and proposes a dedicated fund to meet this need.[20]

We hope that any expansion of ADR in the federal system will be accompanied by increased funding for interpreters and translated written materials, particularly in minority languages such as Somali, Dinka and Amharic.

c *Pre-action guidelines*

Similarly, we are somewhat concerned that NADRAC recommends 'pre-action guidelines' (which would include a requirement to negotiate and to exchange relevant documents) without recommending an exemption for self-represented litigants.[21]

Given the very limited resources available for civil law matters in CLCs and through legal aid, it is likely that many low income parties would have to comply with the guidelines without legal assistance. We believe that many low income litigants could be severely prejudiced if they were required to negotiate and exchange documents without legal assistance.

> *Example*
> Mick sustained an injury at work. His workplace was covered by the federal Comcare scheme. He made a claim for compensation but the claim was rejected. Comcare told Mick that he had a right to seek review of the decision, but that if he engaged a solicitor he would have to pay the solicitor's fees himself, regardless of the outcome. Mick was broke and so decided to go ahead with the review without legal assistance.
>
> Mick had a report from his GP describing his injuries, but Comcare told him he needed more evidence to support his claim. He went to see a specialist. The specialist wrote a report, using technical language and impairment ratings taken from the Comcare *Guide to the Assessment of the Degree of Permanent Impairment*.[22] Having neither medical nor legal training, Mick could not understand the report or its implications for his compensation claim.

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[18] National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) 57.

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

[20] Law Institute of Victoria, *Interpreting Fund Scoping Project Options Paper: Creating an Interpreting Fund for civil legal matters in Victoria* (2009), available at http://www.liv.asn.au/PDF/News/eNews/2009InterpretersFundOptionsPaper (accessed 23 November 2009).

[21] NADRAC recommends certain exceptions to the guidelines, for example urgent matters or matters in which 'a prospective party would be unduly prejudiced by having to take such steps: above n 18, 32.

[22] Available at http://www.comcare.gov.au/forms__and__publications/publications/claims/?a=41161.

> Nevertheless, Mick was required to participate in conciliation, in an attempt to settle his claim. Comcare was represented by a senior staff member with extensive experience in workers' compensation law.[23]

We would be particularly concerned if parties were required to comply with the guidelines, unrepresented, where the opposing party had legal representation or extensive litigation experience.

We believe that if the pre-action guidelines are adopted, the guidelines should include a specific exemption for parties who are self-represented due to their financial circumstances, inability to access a CLC (for example due to living in a remote rural area) or other factors such as disability.

Consumer law[24]

The Federation is concerned that with the introduction of the National Consumer Credit Code, CLC clients will no longer have recourse to the VCAT in consumer credit disputes. This is because the VCAT cannot exercise federal jurisdiction. Currently, the VCAT offers numerous benefits to parties with low-quantum consumer credit disputes, including low filing fees, little risk of an adverse costs order, timeliness and members with specialist knowledge of consumer credit law.

Industry Ombudsman schemes share some of the advantages of the VCAT. For many consumers (particularly self-represented consumers) they are often more accessible, and we note that these schemes deal with a much larger number of disputes than the VCAT.[25] However, not all disputes can be resolved through these schemes, particularly due to their jurisdictional limits. Moreover, these schemes, like other forms of ADR, cannot determine or develop the law. They currently rely on the legal precedents set by the VCAT and its New South Wales counterpart, the Consumer, Trader and Tenancy Tribunal, for guidance when determining disputes.

Vesting jurisdiction in State Courts, including the lower courts, would not compensate for the loss of access to the VCAT and the Consumer, Trader and Tenancy Tribunal. The cost of litigating in State Supreme Courts would be prohibitive for most CLC clients involved in consumer credit disputes. Currently, many consumer credit matters in State Supreme Courts are initiated by the lender. Without the ability to transfer these matters to a low cost forum, such as the VCAT, consumers would be severely disadvantaged.

To ensure access to justice in consumer credit matters, and to enable the continuing development of the law in this area, there must be an appropriate, accessible forum for legal action under the new National Consumer Credit laws. This would benefit not only Victorian CLC clients, but those who currently have no access to a State-auspiced low-cost tribunal for consumer disputes.

In this regard, we note that the Government has provided for a small claims procedure to be available in a limited number of consumer credit disputes under the new national laws. While we welcome this first step, the procedure does not address the great majority of our concerns. Amongst other weaknesses, the small claims procedure only covers limited types of disputes. It imposes very low monetary thresholds and is not available above the Magistrates' Court or local court level. It only applies if the plaintiff elects it, meaning that in actions first issued by the lender, the consumer has no capacity to invoke the procedure.

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[23] This example draws on several cases the author has observed.

[24] This section draws heavily on a briefing paper prepared by Nicola Howell, Associate Lecturer at QUT School of Law, entitled *Consumer issues in the implementation of a national consumer credit law* (2009), available at http://www.consumersfederation.org.au/documents/NationalConsumerCreditLaw-BriefingpaperEnsuringaccesstojusticeMarch09_000.pdf (accessed 24 November 2009).

[25] For example, in Victoria in 2007-2008, 379 matters were issued in the VCAT credit list, whereas the Financial Ombudsman Service considered 1842 cases involving consumer credit (although it should be noted that this is an Australia-wide figure).

Thank you for the opportunity to comment on the Taskforce report. If you would like to discuss any aspect of this report, please contact me on (03) 9652 1512.

Lucinda O'Brien
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List of abbreviations

ADR	Alternative dispute resolution
CLC	Community legal centre
FCLC	Federation of Community Legal Centres (Vic) Inc.
NACLC	National Association of Community Legal Centres
NADRAC	National Alternative Dispute Resolution Advisory Council
RDM	Roundtable Dispute Management
VCAT	Victorian Civil and Administrative Tribunal
VLA	Victoria Legal Aid
WLS	Women's Legal Service (Vic)