

EARLY INTERVENTION MEASURES AND ALTERNATIVE DISPUTE RESOLUTION

Submission to the
Productivity Commission

November 2013



Alternative mechanisms to improve equity and access to justice including by early intervention measures and alternative dispute resolution

(Inquiry Terms of Reference 8. a. and b.)

1. Introduction

About CLCs

Community Legal Centres (**CLCs**) are a vital part of the legal assistance sector. Many Australians are unable to afford private lawyers, are ineligible for legal aid and seek help from CLCs. CLCs are independent, community organisations that provide free legal advice, representation and practical assistance including information, advocacy and skills building, with a focus on the disadvantaged and people with special needs. Informed by research and their community service experiences, CLCs also work to prevent legal problems and disputes from occurring in the future by educating communities about their legal rights and responsibilities and by advocating to change laws and policies that are unfair or likely to cause future legal problems for CLC clients.

The first part of this submission addresses the use of Alternative Dispute Resolution (**ADR**) and responds to some of the questions raised in Section 9 of the Issues Paper. These questions seek information about the potential for resolving more disputes through ADR without compromising fairness and equity, and ask how ADR might be strengthened to improve access to justice. The second part of this submission highlights some of the early intervention work undertaken by CLCs and the ways in which CLCs currently use informal alternative dispute resolution mechanisms to prevent disputes or prevent disputes from escalating.

ADR

Our experience working with vulnerable and disadvantaged communities and individuals has given us an understanding that ADR is not appropriate or fair in all circumstances or for all people.

CLCs' experience confirms that ADR can be very useful in resolving disputes efficiently and effectively, but that ADR can also, in certain circumstances, operate unfairly. An individual's life experience, including their experience of disadvantage, can affect their capacity to participate in ADR – to understand the relevant legal principles, to express opinions confidently, to evaluate settlement offers and to form a decision, and to withstand pressure or perceived pressure from a mediator or another party.

The opportunity for equitable access to ADR can be strengthened for clients by:

- ensuring that they can access independent advice and support;
- increasing transparency, accountability and evaluation of ADR schemes; and

- ensuring that any person whose matter would at any point be more appropriately dealt with by a Court or in another way, can still have access to that forum.

Even with these protections, there will remain many vulnerable people whose legal problems may need resolution and enforcement by legal action. In any event, it is essential for an individual to know their legal position - their rights and liabilities or obligations - before they can be in a position to 'consent' to the ADR process, and make an informed decision about possible resolution.

Early intervention and informal alternative dispute resolution by CLCs

In an earlier submission to the Productivity Commission, we have discussed the work of CLCs, including direct legal services and some of the preventative and early intervention work undertaken by CLCs across Australia.

In this submission, we specifically highlight the value of some of the informal alternative mechanisms used by CLCs to address legal issues early and to avoid the escalation of problems and costly litigation. These mechanisms include early intervention strategies, such as informal negotiation and advocacy as well as assistance to clients to participate in more formal ADR.

2. About alternative dispute resolution

What is ADR?

ADR is described by the National Alternative Dispute Resolution Advisory Council as follows:

Alternative Dispute Resolution or ADR is usually an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also mean assisted or appropriate dispute resolution. The main types of ADR are mediation, arbitration and conciliation....

ADR processes may be facilitative, advisory, determinative or, in some cases, a combination of these. The ADR practitioner in a facilitative process, such as mediation, uses a variety of methods to assist parties to identify the issues and reach an agreement about the dispute. Advisory processes, such as conciliation or expert appraisal, employ a practitioner to more actively advise the parties about the issues and range of possible outcomes. A process can be selected to best suit a particular dispute.¹

While it is true that there are many forms of ADR, ADR is generally premised on an assumption that both parties are equally able to understand, articulate and protect their position in a way satisfactory and suitable for them, and that any unfairness in 'bargaining position' can be addressed by the system, mediator or facilitator. This view is not shared

¹What is ADR?" at http://www.nadrac.gov.au/what_is_adr/Pages/default.aspx accessed 12/11/2013.

by a number of commentators², nor by all CLC workers, as we explain later in this paper.

Nonetheless, ADR can be very beneficial to many CLC clients and is frequently utilised by CLCs in appropriate cases.

The benefits of ADR

This paper uses a broad definition of 'ADR', encompassing mediation and conciliation schemes and external dispute resolution (EDR)³ schemes such as the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Ltd (COSL).

CLC lawyers often find that these forms of ADR can be very useful in resolving civil disputes efficiently and effectively for clients and also in requiring less resources from already stretched CLCs to resolve the individual matters. Many CLCs don't have the resources to represent many (or any) clients in court, and in these circumstances, ADR processes provide a less resource intensive forum in which to negotiate. Some CLC lawyers find that ADR can provide a better opportunity to emphasise their clients' disadvantaged circumstances. This can be a useful 'reality check' and can help persuade other parties to modify unrealistic demands.

Many CLCs consider the use of non-adversarial ADR processes as critical to their work because CLC clients are generally not able to afford legal representation and lack the skills to self-represent:

If our clients are in the civil jurisdiction in the courts, they are already in the wrong place ... they are already halfway to getting a bad result."⁴

By resolving disputes prior to a court hearing, ADR is beneficial not only to individual clients in terms of an earlier, cheaper and less stressful resolution, but to the legal system and the general public. By promoting settlement prior to hearing, ADR can significantly reduce the number of matters in a court list, quickening the process for those people whose matters remain before the court, and saving costs. It can also save time and resources for CLCs, since a lawyer generally spends much 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 use their scant resources more efficiently and assist more clients.

Also, where there are multiple matters involving one opponent, or a group of similar opponents, such as financial services providers, over one or more common legal issues, ADR or EDR can offer opportunities to provide a resolution path for multiple clients, as well as changed policies or practices that may avoid the need for others similarly affected, to bring actions in the future.

² Indeed discussion of the inequity and power imbalance identified as issues for ADR occurred almost as early as ADR itself, see, for example, the seminal NADRAC Discussion Paper, Issues of Fairness and Justice in Alternative Dispute Resolution Canberra, November 1997.

³ The Australian Securities and Investments Commission describes External Dispute Resolution as follows: "Someone who provides you with credit (for example a bank or a finance company) or helps you get credit (for example, a broker or other intermediary) is required to be a member of an **external dispute resolution (EDR) scheme**. ... An EDR scheme is a free, independent dispute resolution service that can help you if you have a complaint or dispute with one of its members (for example, a credit provider or broker), or if you are having difficulties repaying your loan..." There are currently two EDR schemes for credit matters: the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service Ltd (COSL). See 'What is an EDR scheme and how can it help me?' at <https://www.asic.gov.au/asic/asic.nsf/byheadline/What+is+external+dispute+resolution+%28EDR%29+and+how+can+it+help+me%3F?openDocument> accessed 13/11/13.

⁴ Ojelabi, Lola Akin, Community legal centres' views on ADR as a means of improving access to justice – Part I' in (2011) 22 *Australian Dispute Resolution Journal* 111 at 112-3.

Case study – Using ADR to solve multiple cases with common legal issue/s

In May 2013, Caxton Legal Centre received the final decision from the Financial Ombudsman Service (FOS) for the last of the 116 flood insurance cases run by the service. All 116 clients were individuals and families affected by the January 2011 floods and who had their initial insurance claims refused.

The 116 Caxton clients were part of a cohort of more than 700 clients who engaged either a Legal Aid body or a community Legal centre to dispute flood insurance refusals. Caxton worked alongside Legal Aid Queensland, Legal Aid New South Wales and the Insurance Law Service (a project of the Consumer Credit Legal Centre (NSW)). The collaborative work of the four organisations is (as far as we are aware) the largest casework collaboration between Legal Aid commissions and the CLC sector. The project also involved volunteer solicitors and students, and the support of pro bono firms in the early days.

Caxton's assistance resulted in reversals of refusals in nearly 50% of cases and more than 5 million dollars in money returned to the community. Caxton undertook this work, and secured the return of the \$5 million, with a total funding of just \$350,000 over two years. The collective efforts of the four organisations returned more than \$20 million dollars to flood-affected families.

All cases were resolved by either direct negotiation with insurers or through the External Dispute Resolution process at FOS, making the process both free and very low risk for clients.

Caxton's flood recovery work also helped change the law relating to flood insurance and precipitated the rewriting of a number of insurance policies.

ADR can also bring psychological benefits for individual clients. Many CLC clients experience multiple forms of disadvantage including mental or physical illness or injury, or disability, making them particularly vulnerable to the emotional strain of litigation. By avoiding litigation, informed and sensitive ADR can be especially valuable to CLC clients, particularly those living with mental illness or experiencing trauma, or those already struggling with the day-to-day stress of poverty, as these two case studies show:⁵

Case studies – ADR/EDR can consider and take into account parties' individual circumstances and characteristics

A client of Consumer Action Law Centre (CALC) in Victoria entered into two loans with a financial service provider (FSP) totaling around \$150,000. At the time of entering into the loans, the client was working only intermittently and was experiencing mental health illnesses. He alleged he was placed under undue pressure by a relative, using his home as security. The bank did not make appropriate inquiries into the adequacy of the client's income. Eventually he ran out of loan funds to service the loans, and the FSP threatened to repossess his house.

Throughout the process the relevant case managers showed an awareness of the fact that the client's mental illness made him more vulnerable to the pressure applied by his relative to enter the loan and the failures by the FSP to

⁵ This section draws on the Federation of Community Legal Centre's 2010 report, *Activist ADR: community lawyers and the new civil justice*, available at http://www.communitylaw.org.au/cb_pages/federation_reports.php#Alternativedisputeresolution .

properly assess his capacity to pay. There was also appropriate consideration given to the present vulnerability of the client and his children, for whom he is the sole carer, when seeking a fair outcome.

The client and the FSP reached a settlement. The settlement means the client and his children will be able to stay in his home and make affordable repayments on the loan. The total loan amount over the life of the loan was reduced considerably, saving the client around \$100,000.

Case study – quicker, easier resolution can bring non financial benefits to clients

One CLC's solicitor, working in partnership with their local Family Relationships Centre, recently assisted a client referred to the centre by the FRC for legally assisted mediation. The client was a mother with three children, all with special needs. She had concerns about the father's capacity to care for the children as he had been diagnosed with a serious degenerative illness and suffered multiple other complex health problems. With both parties represented in the mediation their advocates were able to reach an agreement for the children to spend time with the father on a regular basis and a Parenting Agreement was entered into. The financial cost of resolving this matter through the courts would have been far higher than the cost of funding the centre's whole FRC Partnership, due to the complexity of the children's and the father's complex health issues. Importantly, the children and adults, people already living with multiple disadvantage factors and poor health, were saved from the financial and emotional and physical costs of protracted legal action.

CLCs have found that EDR schemes are particularly beneficial to CLC clients. Funded by industry, they are free for individuals. In some circumstance they have the power to suspend legal proceedings or enforcement action, while they attempt to resolve the dispute. Schemes such as the FOS develop practice notes and guidelines, which can be of great assistance to individuals and CLC lawyers. Many EDR schemes also have an obligation to identify recurring or systemic issues and report them to the relevant regulator, which can lead to valuable law reform, addressing laws or practices that operate unfairly.

Lola Akin Ojelabi, in her study of CLCs' experiences and views on ADR, wrote:

In regards to ombudsman, industry dispute resolution and complaint schemes, interviewees praised their effectiveness and viewed them as better processes than the courts in resolving disputes involving disadvantaged members of the community but identified obstacles which may arise for the disadvantaged, including lack of knowledge about rights and procedural issues.”⁶

ADR, fairness and equity

The benefits of ADR must be weighed against legitimate concerns that ADR can, in certain circumstances, compromise fairness and equity. Commentators have expressed such concerns since the 1980s. Owen Fiss has argued that settlement negotiations allow

⁶ Ojelabi, Lola Akin, 'Community legal centres' views on ADR as a means of improving access to justice – Part I' in (2011) 22 *Australian Dispute Resolution Journal* 111 at 114.

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.'⁷

Another analysis is that power is an attribute of a relationship, and "[t]here is always some power disparity in the resolution of disputes... Power cannot be measured and therefore an imbalance of power is not something that can be 'balanced' by a mediator..."⁸

Richard Abel has criticised ADR for framing conflict in individual terms, even when the underlying problems are widespread.⁹ Much more recently, in the Australian context, Mary-Anne Noone has expressed concern that ADR could hinder the practice of public interest law.¹⁰

In the United Kingdom, Professor Dame Hazel Genn has also argued that access to justice depends on access to courts and tribunals. Dame Genn points out that court and tribunal decisions bring public benefits, since they develop and clarify the law. On this basis, she argues that civil justice policy should promote litigation with public value, rather than 'indiscriminately driving cases away.' While litigants may save money by settling, she maintains that 'there is a price to pay in terms of substantive justice.'¹¹

Power imbalances and ADR

CLC experience shows that some people are unsuited to ADR, due to their vulnerability or features of the relationship, past behaviours or current circumstances, and the inevitable imbalance of power between the parties to the dispute. 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. People from certain cultural backgrounds do not like to say no to a direct question and may answer yes, simply to avoid offence, whether or not that is the correct answer to the substantive question, or they disagree with the statement. Parties and processes need to be aware and allow for such differences.

Long-term disadvantage can have a significant impact on self-esteem and can prevent such people from actively pursuing their legal entitlements. Traumatic life experiences can lead to fear of institutions and authority figures, particularly in refugee communities. These factors all impede an individual's capacity to participate in mediation – to understand the relevant legal principles, to express opinions confidently, to evaluate settlement offers and to withstand pressure from a mediator or another party.¹² This is especially true when the other party is a large company or government department with long experience handling similar disputes, or when one party has access to legal advice and the other does not.

While recognising and guarding against unfair power dynamics in ADR processes, or in particular cases, it is also important for CLC lawyers to rise to the challenges of stepping out, when appropriate, from the lawyer's traditional position of believing that the best thing for the client is to have legal representation. There are many clients of CLCs where this

⁷ Owen Fiss, 'Against settlement' (1984) 93 *Yale Law Journal* 1073, 1076.

⁸ Baylis, Claire and Carroll, Robyn (2005) "Power issues in mediation," *ADR Bulletin*: Vol. 7: No. 8, Article 1. Available at: <http://epublications.bond.edu.au/adr/vol7/iss8/1> accessed 12/11/13.

⁹ Richard Abel, *The politics of informal justice*, v 1 (1982) 7, 308.

¹⁰ Mary-Anne Noone, 'ADR, public interest law and access to justice: the need for vigilance' (2011) 37.1 *Monash University Law Review* 57.

¹¹ *Ibid* 74-75, 113.

¹² The New South Wales Law and Justice Foundation has made similar observations in the relation to people experiencing 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.

will be the case – because of their vulnerability and disadvantage – but it is not always or automatically the case. There are CLCs that have risen to this challenge; one CLC has, for example, embarked on community education in conflict resolution skills.¹³

The importance of ADR being used only in appropriate cases and with appropriate support

Community legal centres are supportive of ADR as a way to avoid or have early resolution of civil disputes, where this is appropriate for the people and situation involved. It is important that the parties are supported, as necessary, to understand the legal issues involved and the consequences of agreements they make as part of ADR.

For example, CLCs in NSW have had instances where they have had to step in to assist parents in child protection matters who have signed up to legally binding agreements that they cannot possibly meet, because they were not provided with free legal advice prior to participating in ADR mechanisms. Sometimes these injustices have occurred because literacy and language barriers were not considered before or during the ADR process. In other instances the ADR process did not cater for the needs of people with disability.

Another example concerns domestic or family violence matters. CLCs believe that ADR processes such as mediation are never appropriate for addressing the issue of the violence itself, because of the risks to victims' safety and the fact that treating family violence as an ADR matter implies that it is a 'dispute', when in fact the violence is usually a crime and entails the imposition of power and control by one (usually male) party over another (most commonly his female partner and/or children).

There are mixed views about whether family law issues are ever appropriate for ADR when they arise in a family violence context. Many CLCs take the view that Family Dispute Resolution (**FDR**) is not appropriate in any case where there is a history of violence, as the power balance is skewed. Others believe that, with appropriate safeguards, negotiation and mediation can occur fairly and appropriately about other aspects of the relationship requiring resolution, for example, parenting orders, regardless of whether there has been a history of violence. Many Aboriginal and Torres Strait Islander women have long advocated for culturally safe and appropriate dispute resolution programs to address and reduce family violence.

If ADR is to be used, it is important to acknowledge that 'separate' legal issues such as parenting and property disputes cannot be fully resolved without also understanding how they have played out in the context of the family/domestic violence.

In practice, FDR where there is family violence does take place in some circumstances. For example, families with a history of past and/or current family violence are exempted from the requirement for separating parents to participate in FDR before they take a matter to court, but Women's Legal Service Brisbane (and other consultants) were funded by the Attorney-General's Department to develop an alternative model, Coordinated Family Dispute Resolution (**CFDR**).

A number of CLCs across the country were involved in the pilot CFDR program. These matters could have been considered unsuitable for mainstream Family Relationship Centre mediation and hence would have been excluded from (affordable) ADR and left with no option but to go to court (or worse, the matter would have been left unresolved, leading to more complicated legal issues). CLCs such as South West Sydney Community

¹³ Quoted in Ojelabi, Lola Akin, 'Community legal centres' views on ADR as a means of improving access to justice – Part I' in (2011) 22 *Australian Dispute Resolution Journal* 111 at 117.

Legal Centre found this program to be an excellent strategy for the avoidance and early resolution of family disputes.¹⁴

In Victoria, CLCs have also supported clients to participate in Victoria Legal Aid's Roundtable Dispute Management (**RDM**) program. Where the client is a victim of family violence and the case is assessed as suitable for mediation, the parties are legally represented and arrangements can be made (where there are safety concerns) for the parties to take part in the process from separate locations by telephone. Only individuals who satisfy Victoria Legal Aid's legal aid guidelines for RDM, will be able to access this service. Given restrictions on legal aid for Family Court matters, at least this can offer victims an opportunity to resolve family law issues with legal assistance and in a safe setting, as opposed to possibly not being legally represented at court and being vulnerable to direct cross-examination by the perpetrator of the violence.

In general, if parties do not meet legal aid criteria, the other main ADR option is mediation via a Family Relationship Centre. There is a screening process for family violence cases, but the experience of some Victorian CLCs is that some of these cases are then assessed as suitable for mediation, without best practice safeguards necessarily being in place.

Given this variable context, it is essential that the family law FDR framework and the state and territory ADR frameworks operate consistently to protect victims and potential victims from family violence.¹⁵ This must include comprehensive screening and risk assessment mechanisms to ensure that resolution of issues other than violence may be attempted safely,¹⁶ ensuring access to legal representation throughout the process, and providing specialist education and training for judicial and court officers and ADR practitioners on the nature and dynamics of family violence, and on the conduct of ADR processes in the context of family violence.¹⁷

We also refer the Commission to the submission from Women's Legal Services Australia, which emphasises that for FDR to operate effectively in family violence contexts, women must have a real choice as to whether to refuse mediation and proceed to Family Court. This necessitates full resourcing of legal aid for family law, together with the development of a specialised domestic violence funding pathway in legal aid commissions for family law matters.

Matters unsuitable for ADR

It will always remain the case that some legal problems should be resolved in court, in the interests of justice and transparency, or because this is the only way to achieve the required remedy or necessary clarification of the law. For example, when a large company or institution has acted unjustly, there is often a strong public interest in bringing the facts to light in a court or tribunal. This is particularly true when the behaviour in question targets vulnerable people, or appears to be widespread and systematic.

Some legal issues are inherently unsuitable for ADR. Some matters involve questions of law and cannot be resolved 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 formal process.

¹⁴ An evaluation was commissioned by the Australian Government Attorney-General's Department <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF>

¹⁵ Family Violence - A National Legal Response (ALRC Report 114), published on 11 November 2010, last modified on 19 July 2012, para 23.30, ADR in family violence legislation, <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114> accessed on 13/11/13

¹⁶ Ibid.

¹⁷ Ibid.

One of the advantages of ADR for parties in ongoing legal relationships with mutual benefits is that ADR allows parties the flexibility to make concessions in the interests of preserving an ongoing relationship, but this consideration is seldom relevant 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 a single large debt. These disputes are extraordinary events in the lives of CLC clients. As Genn has pointed out, in these circumstances, a legally 'inaccurate' decision may have far-reaching implications for an individual's welfare. Accordingly, it is rarely in that individual's interests to forego legal rights or procedural safeguards, in the name of efficiency or to preserve a relationship.

The potential for greater use of ADR, with safeguards

In some circumstances, disadvantaged parties can achieve good legal outcomes by participating in ADR, provided that they have access to legal and any other needed assistance (eg interpreters, support person). In 2009, then Commonwealth Attorney-General Robert McClelland appointed an Access to Justice Taskforce, which published its report in the same year.¹⁸ The Taskforce noted that legally assisted mediation is particularly effective in resolving disputes.¹⁹

Case studies – why legal assistance is needed by CLC clients, and the added benefits it can bring

Wyndham Legal Service assisted Bun, a Burmese client, with a complaint against a car dealer. Bun had arrived in Australia as a refugee and could neither read English nor understand verbal representations made to her in the transaction with the car dealer.

Bun's brother Noy, who understands basic English, initially attended a car dealer and spoke to a representative about Bun's intention to purchase a car. A representative at a car dealer verbally represented to Noy that Bun could purchase a car for \$15,999 subject to a loan that would span over 36 months. This sale representative did not tell Noy what the interest rate would be but said that "I'll give you the best deal".

After talking to Noy, the sale representative then asked him to wait at the dealership and went to Bun's house and drove Bun to the office of a financial services provider (FSP). When the sale representative drove Bun there, she was brought into a room with a representative of the FSP while the sale representative waited outside.

While in a room, Bun was asked to sign the contract without the assistance of an interpreter or anyone who spoke her language. Consequently, the terms of the loan contract were not explained or interpreted to her before she signed.

When Bun attended the CLC's legal clinic she had been making monthly payments of \$582.24 for the last 34 months. Bun was of the impression that the Loan Contract was for a fixed term of 36 months because this was what the sale representative represented to Noy. It was only recently that Bun learned that the Loan Contract was for a fixed term of 60 months.

¹⁸ 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).

¹⁹ *Ibid* 144-45.

Bun paid a \$5,000 deposit for purchase of the car after signing the Contract for Sale of Used Motor Vehicle. Hence, Bun only required a loan for \$10,999. Furthermore, it was only recently that Bun learned that the annual percentage rate for the loan term was fixed at 29.95%. Based on this rate, Bun would need to pay a total of \$34,934.4 over 60 months period for what was a \$10,999 loan.

Wyndham Legal Service wrote to the FSP informing them of Bun's intention to file a complaint with FOS alleging unjust transaction pursuant to section 76 of the National Credit Code, misleading and unconscionable conduct pursuant to the Australian Consumer Law on the part of the sale representative and that of the FSP. The FSP quickly offered to resolve the matter by way of waiving the remaining payments on the loan, though without admitting any wrongdoing.

Muhammad is from a non-English speaking background. His family was approached by a door-to-door salesman, selling educational products. As Muhammad's wife strongly wanted these products for their children, Muhammad reluctantly agreed and signed a contract and lease agreement. The sales representative promised Muhammad that if he was not happy with the products after one year he could cancel the contract without penalty. Muhammad presented to Northern Community Legal Centre (SA) (NCLC) with a summons for him to attend Magistrates' Court. The finance company was claiming he owed them \$10,000. NCLC assisted Muhammad with making a complaint to the Financial Ombudsman Service. As a result of a FOS conciliation conference the matter settled with Muhammad agreeing to pay \$1,500 at a negotiated payment rate of \$50 per week.

It is the strong view of many CLCs that ADR is only a 'safe' option if a party has access to free legal advice and assistance. As Ojelabi said in her article of the CLC lawyers she interviewed:

For most interviewees, knowledge of the law is critical to obtaining outcomes that are fair and equitable, effective participation in the process and addressing power imbalances. It is only when these issues are addressed that ADR could be justifiably said to improve access to justice.²⁰

...

[As one CLC lawyer said]

"The idea that people can go into a mediation without any knowledge of their legal rights is a ludicrous proposition and all it does, in my opinion is it favours the existing imbalance of power. The thing about ADR is that it is like old fashioned law to me; all parties are equal ..."²¹

The involvement of legal assistance lawyers can also assist in ensuring that unfair and unlawful practices or systemic issues are identified and addressed, beyond ensuring that justice is done in the individual case. This serves to protect the public, particularly the vulnerable, in the future.

²⁰ Ojelabi, Lola Akin, 'Community legal centres' views on ADR as a means of improving access to justice – Part I' in (2011) 22 *Australian Dispute Resolution Journal* 111 at 114.

²¹ *Ibid* 115-6.

Case study – ensuring legal protection for one client family through ADR, and protecting others as well

The Consumer Credit Legal Centre in NSW (CCLC) was consulted by a young woman from Africa, living and studying in Western Sydney. She had signed as co-borrower for her mother's home loan when she was younger than 20 years old. Neither the mother nor the client could really afford the loan, the value of the property was arguably inflated and there were a number of details about the deal which simply "did not add up". It transpired that the property developer involved had sold a significant number of properties to other African refugees in similar circumstances.

The client and her mother managed to pay the loan for a couple of years by supplementing their income with borrowings from a range of other sources such as credits cards and personal loans. When CCLC became involved the lender had already repossessed the home and the client and her mother were being sued in the Supreme Court of NSW for about \$200,000. The client, who was at that time working and studying and caring for her young baby, was facing inevitable bankruptcy.

CCLC withdrew the client's defence in the Supreme Court and commenced action in the Consumer Trader and Tenancy Tribunal instead against a range of parties including the lender, the property developer, mortgage broker and other relevant players in the scam. Redfern Legal Centre then commenced acting for the client's mother. The matter was ultimately settled confidentially but the client and her mother not only avoided bankruptcy, but were paid an amount sufficient to pay the other debts they had accrued while trying to pay the mortgage. The lender was also better off because instead of pursuing the penniless clients, it was able to secure a contribution for its losses from other more "culpable" parties.

Informed by the CCLC, ASIC subsequently took out enforceable undertakings against the property developer and CCLC has advised a number of clients in relation to compensation for their losses as a result.

CLCs generally support the continuing and greater use of ADR for appropriate matters and clients, provided that certain safeguards are in place, including that both parties have access to legal advice and assistance where needed.

Scope for increasing the use of and improving ADR in civil disputes

As mentioned, some EDR schemes identify and report on issues that can be addressed by changes in law, policy or process. They are not, however, charged with advocating for reform nor are they resourced to do so.

This is likely to remain the remit for CLCs and the other legal assistance services, and some other consumer groups. This is an important and complementary role that CLCs perform.

Similarly, CLCs, with their tradition of advocating for, developing and utilising early intervention and alternative mechanism for resolution of legal problems and disputes, play

an important role in promoting the appropriate use of ADR and other effective mechanisms, and in identifying ways they can be made more accessible, appropriate, effective, efficient and equitable – especially for disadvantaged people and people with special needs – and for suggesting new areas for their use and improvements.

For example, recently the Consumer Action Law Centre in Victoria produced a detailed report on default judgments in the Magistrates' Court, in which it observed that 'each year 30,000 to 40,000 people receive default judgments against them in the Victorian Magistrates' Court, often for relatively small debts.'²² The report notes that '[t]he court process confuses many debtors and provides few options for those who cannot afford to repay their debt in full.'²³ It recommends creating 'an additional option for debtors when legal proceedings are issued, allowing debtors to enter into an agreement to repay in instalments without having default judgment entered against them.'²⁴

EDR schemes provide a low-cost and much less intimidating forum in which such arrangements can be negotiated but the continuing high rates of default judgment in the Magistrates' Court suggest that more could be done to promote awareness of, access to and participation in these schemes.

Strengthening ADR and improving access to justice

ADR, therefore, can promote access to justice provided parties have access to legal assistance before, and sometimes during, the ADR process. If increased reliance on ADR is to provide better access to justice, State and Commonwealth governments must fund legal aid commissions, specialist Aboriginal and Torres Strait Islander legal services and community legal centres to provide assistance of this kind.

Increasing use of ADR will also increase public demand for other important support services, such as interpreting services and cross-cultural liaison, and these too must be funded adequately. Targeted funding of this kind is the best way to ensure that ADR delivers substantive access to justice for all Australians.

Greater transparency in ADR is also necessary to promote access to justice. It is unacceptable that many ADR schemes do not publish anonymous (de-identified) information about the outcomes of their cases. This is the case even in jurisdictions with compulsory ADR processes, such as the Magistrates' Court and the former Credit List in the Victorian Civil and Administrative Tribunal. This lack of transparency means that CLCs and other legal service providers cannot advise their clients of what to expect, and the likely outcome of their dispute.

Better evaluation would also improve the substantive justice of agreements reached through ADR processes. Where mediation is compulsory, participants should be routinely surveyed and invited to provide feedback on their experiences. The results of these surveys should be publicised, along with basic, de-identified information about the respondents (that is, whether the respondent is an individual or a representative of an insurance company, bank or a similar institution).

Finally, consideration should be given to charging certain ADR, as well as EDR, programs with responsibility for identifying systemic and unfair or unlawful practices that appear in individual cases but that may affect people other than the parties to the particular dispute. ADR programs would then be obliged to report systemic concerns or unfair practices to the appropriate government or professional regulatory agencies to recommend change.

²² Consumer Action Law Centre, *Like Juggling 27 Chainsaws* (2013), 7.

²³ *Ibid* 8.

²⁴ *Ibid* 9.

These opportunities highlight the potential ADR holds for improving access to justice, and could represent a significant step forward in the pursuit of equitable access to justice.

3. About CLCs and early intervention measures

It is important to acknowledge that Alternative Dispute Resolution or ADR is a term of art, and that it does not encompass all forms of strategies that resolve legal issues, such as the more informal, often practical, but often very skilled, informal methods of advocacy, negotiation and mediation undertaken by CLCs.

Even more importantly, in the context in which CLCs operate, ADR does not address the causes of legal problems, or any legal problem other than the one being negotiated. Nor does it even consider let alone resolve related problems, for example, consequential effects such as debt default or eviction flowing from, for example, an unfair dismissal from employment, or causation issues such as family violence leading to absence from work. People, especially the disadvantaged and vulnerable, need assistance with the package of their often inter-related problems, not merely the neat resolution of one 'legal' part.

Among all the legal service providers in Australia, CLCs place the greatest focus on employing early intervention strategies that prevent problems arising in the first place. An economic analysis of the value of CLCs stated the following:

It is important to emphasise that the value of [the] preventative work [provided by CLCs] is far greater than the reactive costs that would be incurred in the absence of such services. The fence at the top of the cliff not only saves lives, but it is also much cheaper than the ambulance at the bottom.²⁵

The CLC Strategic Service Delivery Model developed by the National Association of Community Legal Centres (**NACLC**)²⁶ allows centres to identify common causes of people seeking assistance and then design service delivery in such a way as to reduce the future need for that assistance. Preventative strategies used by CLCs include community education projects that assist individuals or communities to identify legal problems at an early stage and, where possible, use their own advocacy skills to resolve those problems before they escalate or become intractable.

²⁵ Institute for Sustainable Futures, University of Technology Sydney, *The Economic Value of Community Legal Centres* (2006) commissioned by NACLC and the Combined Community Legal Centres' Group NSW.

²⁶ NACLC developed the Strategic Service Delivery Model to help CLCs plan innovative preventative strategies within their limited resources and competing client priorities. The model is evidence-based and is focused on meeting the needs of clients with complex needs. For further information, please see: *Community Legal Centres: Putting Social Inclusion Into Practice* available at <http://www.naclc.org.au/resources/SocialInclusionflyer.pdf>

Informal advocacy and negotiation – key CLC strategies to achieve earlier resolution

CLCs commonly prevent matters from requiring a formal legal process by building a client's capacity to advocate on their own behalf, supported by the CLC worker when needed. In other cases, where appropriate, CLCs achieve early resolution by advocating and negotiating with the other party on behalf of their client. The first option is the ideal, as it provides the person with the skills and resources to resolve their own problems and better prepares them to avoid or address similar issues arising in the future²⁷. This is not always possible for, or wanted by, people from some of the disadvantaged and vulnerable groups assisted by CLCs.

An example of a case where the client, equipped with information about their legal rights and supported to negotiate her own position, is the story of Joanne.

Case study – Informed and empowered client negotiation

Joanne was a young woman working as an administrator at a rural hospital. She became pregnant, discussed taking unpaid maternity leave with her employer and gave appropriate notice. When Joanne was ready to return to work she was told that her position was no longer available and she would either have to work fewer or more hours than she previously did. Joanne was distraught. Fewer hours would not provide adequate income and more hours meant more pressure at home and less time with her children. Joanne felt that she was being discriminated against and she felt torn between two options neither of which felt right. Joanne could not afford a private lawyer and wasn't a member of a union, so she consulted her local generalist community legal centre for legal advice.

The Bendigo-based Loddon Campaspe Community Legal Centre assisted Joanne with additional specialist advice from Victoria's employment rights specialist CLC, JobWatch. Lawyers from the two centres worked hand-in-hand to provide a specialist service in a rural location.

Joanne was advised by the lawyers that when returning from unpaid parental leave she was entitled to the position that she held immediately before going on leave – unless that position genuinely no longer existed – or such other role that was most like the pre-leave position. Joanne also had the right to request flexible work arrangements. Joanne was supported to assert her legal rights and to negotiate a new contract that offered more favourable terms than had been offered. By reaching a negotiated outcome all parties avoided the cost and stress of going to court.

²⁷ The importance of building individuals' resilience in this way was recognised in the Report by the Access to Justice Taskforce Attorney-General's Department 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' September 2009, Chapter 12, pp 147 ff.

CLC lawyers will, wherever possible, involve a person in resolving their own problem as much as they are able and comfortable with doing. When clients have a disability or mental health, language or literacy issue, this requires a more time and resource intensive service, but it is also a more empowering and appropriate service and one that is more likely to lead to sustaining and beneficial change for the client.

Case study – informed and supported collaborative negotiation

In April 2009, the Consumer Law Centre of the ACT (CLC) was approached by Maria, a single mother with mental health issues, whose only source of income derived from her NewStart allowance, providing her with very little disposable income. What little money Maria did have, she managed poorly.

By the time Maria presented to the CLC, her mortgage was nearly \$15,000 in arrears and she was at risk of losing her home. Community organisation Care and the CLC spent many months collaborating in negotiations with Maria's mortgage lender and successfully organised a manageable direct-debit payment scheme. Immediately thereafter, the centre lost contact with Maria and concluded that the issue had been successfully resolved.

In March of 2011, however, Maria presented once again to the CLC. She had been unable to maintain the payment scheme and had accumulated additional arrears (now closer to \$20,000); her house remained at risk of being repossessed. Further investigation revealed that Maria suffered from schizophrenia as well as drug and alcohol addictions, and that she was struggling in many areas of her life. The CLC feared that the loss of her home would endanger both her physical and mental well-being, as well as the well-being of her children.

On instructions from Maria, the CLC took the lead in organising a more holistic plan for her long-term financial security – a plan that Maria helped develop, willingly participated in, and was comfortable with. The CLC collaborated with Care, the Public Trustee, Maria's mental health care professional and other community organisations. Care assisted Maria with her successful application for a Disability Support Pension, thus providing Maria with a larger financial buffer.

With the CLC's assistance Maria's quality of life has improved dramatically. Her mortgage repayments are now made in a timely manner and she remains in possession of her home.

The amount of time, effort and skill that CLC lawyers and other CLC workers spend on advocating and negotiating desired outcomes for their clients is considerable; and the benefits to the community and to the individuals, including health and well-being benefits – and the resulting savings to government support services – are not always capable of financial quantification. Consider, for example, these two stories:

Case studies – Sometimes all someone needs is a little practical help to solve a big problem

The homeless outreach solicitor from a regional NSW CLC recently assisted a young client that came to their youth drop in clinic. She was 16 years old, 5 months pregnant and living with her mother and siblings. Her parents were divorced following a history of domestic violence. Her

mother was pressuring the young woman to contribute financially to the household, but she had no income. She needed her birth certificate to apply for Centrelink payments and to get medical services and apply for her own housing. Her father was withholding her birth certificate to induce her to visit him on weekends contrary to parenting orders and the client's wishes. The CLC solicitor attempted to assist the client to apply for a fee waiver to obtain another copy of her birth certificate however this process was lengthy and, on instructions from the client, the solicitor negotiated directly with the father for the return of the birth certificate to his daughter. This proved successful and the client was able to apply for the services she needed.

A CLC's Domestic Violence Outreach solicitor assisted a young mother referred into this programme from Department of Community Services. The father had removed the children, one of whom was due to start school for the first time on the following Monday. Acting on instructions, the solicitor spoke with and negotiated directly with the father who agreed to return the children two days later. The recovery of the children was much quicker than seeking orders through the court. The mother was relieved that she didn't have to attend court. The solicitor referred the father to his nearest community legal centre for free legal advice and is now assisting the mother to negotiate parenting orders.

Practical assistance such as this may seem simple, but it often requires considerable skill in communicating effectively and negotiating fair outcomes in culturally safe ways with a diverse range of people, while maintaining appropriate professional boundaries.

These skills, knowledge and experience are also required to provide effective referral services. CLC workers frequently provide 'warm' referrals, that is, where the CLC worker identifies an appropriate service provider for the person, and makes contact themselves with that service provider, sometimes actually attending with the person at first, or making the initial telephone contact with the client to the service provider, to ensure that the person is supported to transition to the other needed services. These are all time and resources intensive actions, but they protect people from falling 'between the cracks'.

Case study – practical assistance tailored to the individual's needs

The NSW Central Coast CLC's homeless peoples' outreach solicitor was consulted by a survivor of domestic violence. The client had poor English and cross-cultural issues complicated her situation. The solicitor found a counsellor who spoke the client's language and negotiated free counselling for her and arranged the first appointment. The lawyer then arranged for free immigration advice from a specialist legal centre for the client, linking them up. Despite initial reluctance due to cultural issues, after some time and support, the client reported the domestic violence to the police and obtained final Apprehended Domestic Violence Orders. With the help of the CLC lawyer, she received a victim of criminal injuries compensation payment of \$8,000.00.

Community legal education – keeping people out of the legal system

As discussed in our previous submission on *Access to Justice Arrangements*²⁸ community legal education is a core activity of most CLCs. CLCs are innovative and proactive in devising ways to reach their different communities and target groups; they are committed to providing accessible and culturally safe services.

Case study – Educating young people about their rights and responsibilities

The Youth Legal Service in Western Australia has a comprehensive community legal education program which aims to educate young people and youth workers about avoiding legal problems. In one year 2006/2007 the legal service conducted 82 community legal education workshops. Topics included:

- *A Law Education Program provided to young people aged between 10 - 18 years, and their parents or guardian, as a diversion option from the Children's Court and/or an action plan option for Juvenile Justice Teams. The program examines offending behaviour, encourages the young person to take responsibility for his/her behaviour, explores the consequences of future offending, and provides information about legal rights and responsibilities.*
- *Planning and budgeting – a practical workshop for young people which uses an interactive quiz to determine how well each person knows his/her finances, then guides participants through the development of a financial plan for savings and living expenses.*
- *Young people and public space – a workshop exploring the laws and regulations governing peoples' behaviour in public space. The workshop uses quizzes and role-playing to identify the powers of various agencies in enforcing those laws. The aim is to increase young people's awareness of the consequences of certain behaviour in public space.*

Case study - Reaching out and yarning through radio

Tune in to 88.9 Richmond Valley Radio and you might hear Nancy Walke and Karin Ness, who are Aboriginal access workers at Northern Rivers Community Legal Centre, presenting their regular fortnightly program on legal issues in the community. The pair feature sessions on issues like family law, rights in public spaces, credit and debt, youth services and domestic violence. The program is an innovative way of getting legal information out into the community. As well as playing great music, Nancy and Karin conduct interviews with local community people, singers and songwriters, and spokespeople on relevant Aboriginal issues such as the Stolen Generations, child protection matters and recommendations arising from the Royal Commission into Aboriginal Deaths in Custody.

²⁸ Joint submission submitted to the Productivity Commission's Access to Justice Inquiry by the following peak bodies: National Association of CLCs; Community Legal Centres NSW; Federation of CLCs (Victoria); Queensland Association of Independent Legal Services; Community Legal Centres Association (WA); Community Legal Centres Tasmania; Northern Territory Association of CLCs; Australian Capital Territory Association of CLCs; and South Australian Council of Community Legal Services.

Case study – Getting young people to think about cyber bullying

CLC sometimes use social media to connect with young people and deliver community legal education. ACCAN and the Indigenous Women's Legal Program (IWLP) staff, coordinated by Donna Hensen, a Wiradjura/Gamilaroi woman, at Women's Legal Services NSW, produced a YouTube clip, "Think B4 U Click", about cyber bullying. The clip features definitions, tips, and personal stories of young people's experiences with cyber bullying, and is complemented by workshops held with young Aboriginal and Torres Strait Islander people at secondary schools in rural and regional areas. Young people learn about their legal rights in relation to cyber bullying and are given practical tips on how to respond and how the law can help. These workshops are conducted by IWLP staff, with Elders who are respected by the young people present, helping them feel safe to share their stories and learn about bullying on social media sites. Donna explains "We can't go into a community and tell them what to do. We aim to give people the information and support to make changes from within."

Policy and law reform – important strategies to address and avoid unfairness and unnecessary legal interventions

Policy and law reform advocacy is another extremely important prevention strategy used by CLCs, as also discussed in our previous submission. Through casework and information from the communities they work with, CLCs are able to identify a policy, law or process that unfairly impacts on disadvantaged groups. CLCs engage policy-makers in a dialogue about these problems and offer possible solutions. If governments or agencies change the relevant policies, laws or practices, CLCs return to the front-line to educate affected groups, and sometimes other community workers and even public servants, about the change. This cycle encapsulates the holistic nature of CLC work.

Engaging in policy and law reform work can be both effective, in that this work resolves or reduces a particular legal problem for the CLC's current clients, and efficient, because it reduces the number of people who would develop similar legal problems, potentially becoming clients of that CLC or parties seeking recourse through courts or tribunals.²⁹

²⁹ Rich, N, *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs* (2009), p 14.