Invitation to make a submission

The Law Reform Committee invites you to make written comments and submissions to inform its inquiry into alternative dispute resolution.

There is no particular form or structure required in your written response and your submission can be as short or as long as you like. You do not need to answer all the questions in this paper—just the questions you would like to respond to. Your submission may address any issues relevant to the terms of reference, and does not need to be confined to the questions posed. If you would like to discuss how to make a submission or need more information, please contact the Executive Officer at the address below.

Closing date for submissions – 9 November 2007

Responses to this discussion paper should be sent by post or email to –

The Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002

Email: vplrc@parliament.vic.gov.au
Phone: (03) 8682 2851
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Website: www.parliament.vic.gov.au/lawreform

Note that submissions made by email must be accompanied by at least one piece of verifiable information, such as a daytime telephone number or home or work address.

Confidentiality

All submissions are treated as public documents which are available on the Committee’s website, unless you request your submission to be kept confidential. If you would like the whole or part of your submission to be kept confidential, you should clearly identify the parts that you wish to be kept confidential. Please also advise the Committee as to why you would like it to be kept confidential. If you have any questions or concerns about confidentiality, please contact the Committee’s Executive Officer before you make your submission.

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Public hearings

The Committee will also hear oral submissions and evidence at public hearings in Melbourne later this year. The dates of the public hearing will be advertised in *The Age* and on the Committee’s website. A transcript of the hearings will be made available on the Committee’s website.

Parliamentary privilege

All written submissions to the Committee and statements made at the public hearing are protected by parliamentary privilege.

Questions

If you have any questions about this discussion paper, or the Committee’s Inquiry, please contact the Committee at the above address.
Committee Membership

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Mr Johan Scheffer, MLC (member from 9 August 2007)

DEPUTY CHAIR
Mr Robert Clark, MLA

MEMBERS
Mr Colin Brooks, MLA
Mr Luke Donnellan, MLA
Mrs Jan Kronberg, MLC
Mrs Judy Maddigan, MLA (member from 8 August 2007)
Mr Edward O’Donohue, MLC
Mr Tony Lupton, MLA (member until 8 August 2007)
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The functions of the Law Reform Committee are set out in section 12 of the Parliamentary Committees Act 2003 (Vic). That section states:

(1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—
   (a) legal, constitutional or parliamentary reform;
   (b) the administration of justice;
   (c) law reform.

Terms of reference

The following reference was made by the Legislative Assembly on 1st March 2007:

To the Law Reform Committee - for inquiry, consideration and report no later than 30 June 2008 on:

(a) the reach and use of alternative dispute resolution (ADR) mechanisms, including Government established ADR schemes and restorative justice schemes, so as to improve access to justice and outcomes in civil and criminal court jurisdictions and to reduce the need, where possible, for contact with the court system, particularly in marginalised communities;

(b) whether a form of Government regulation of alternative dispute resolution providers is appropriate or feasible so as to ensure greater consistency and accountability for Victorians wishing to access alternative dispute resolution.
Summary of questions

The current reach and use of ADR schemes in Victoria (Chapter 3)

Question 1: ADR provision in civil disputes

1(a) Do you agree with the Committee’s identification of the services outlined in section 3.1 of this chapter as ‘ADR providers’ in the civil jurisdiction? If not, what attributes of a service or scheme do you believe make it an ADR provider?

1(b) What do you consider to be the ADR service gaps and/or duplications in civil ADR supply in Victoria for:
- Court and tribunal connected ADR?
- publicly funded ADR suppliers?
- privately funded ADR suppliers?

Question 2: Data collection for ADR in the civil jurisdiction

2(a) Is there a need to improve data collection in relation to civil ADR use and users?

2(b) What type of data would be useful? Why would this data be useful?

2(c) How should the data collected be reported?

2(d) Who should be responsible for the collection and reporting of data in relation to ADR use and users? In particular, is there a role for government and/or private ADR providers in this data collection and reporting? If so, why?

Question 3: Restorative justice program service provision

3(a) Do you agree with the Committee’s identification of the services identified in section 3.3 as ‘restorative justice’ providers? If not, what attributes of a service or scheme do you believe make it a ‘restorative justice’ provider?

3(b) What are the restorative justice service gaps and/or duplications in the Victorian criminal court jurisdiction?
Question 4: Data collection for restorative justice programs

4(a) Is there a need to improve data collection in relation to the use and users of restorative justice practices?

4(b) What type of data would be useful? Why would this data be useful?

4(c) How should the data collected be reported?

4(d) Who should be responsible for the collection and reporting of data in relation to restorative justice use and users? Is there a role for government in this data collection and reporting? If so, why?

ADR and access to justice (Chapter 4)

Question 5: ADR service diversity

5(a) Does the current diversity of ADR providers in Victoria increase access to justice? If so, how?

5(b) What issues are associated with a diversity of ADR service providers? How can these issues be addressed?

ADR and access to justice (Chapter 4)

Question 6: Mechanisms for making a complaint

How should parties be able to make a complaint or lodge a claim with ADR service providers?

Question 7: Other service features affecting access to justice

7(a) What features of ADR services offer the potential to increase access to justice?

7(b) To what extent are current ADR providers in Victoria incorporating these features in service design?

7(c) What are the current gaps in relation to ADR services providing access to justice and how can these be filled?

Question 8: Time and cost factors affecting access to justice

8(a) To what extent does ADR increase access to justice by reducing the cost and time required to resolve disputes?

8(b) Should user-pays charges be imposed for ADR services? If so, in what circumstances should they be imposed, and how can we ensure that charges do not reduce access to justice?

8(c) Is there the potential to reduce the amount of time taken to resolve civil disputes using ADR processes? If so, how could this be achieved?
Question 9: Increasing consumer awareness and understanding of ADR

Is there a need to better promote ADR providers and services? If so, how should this be done, for example, by individual services or by government? What kind of promotional material is required and at whom should it be targeted?

Question 10: Increasing accessibility of dispute resolution mechanisms and ADR providers

10(a) Can we do more to help Victorians to resolve disputes themselves?
10(b) To what extent is referral loss from ADR service providers currently an issue? If this is a problem, how can it be overcome (for example, referral guidelines between service providers)? Do we need to collect greater data on referrals? If so, what sort of data should we be collecting?
10(c) Should there be a central gateway (for example, phone line or website) for accessing information about dispute resolution and ADR services? If a central gateway for ADR disputes is desirable, who should operate this service and what services should it provide?

Question 11: Referral to ADR by legal advisors

11(a) Do legal advisors currently have sufficient understanding of ADR processes and utilise/refer to these appropriately?
11(b) What is the best way to ensure that ADR services and processes are well understood by legal advisors?
11(c) How can we increase the capacity of legal advisors to refer appropriate cases to ADR? For example, by education or by statutory obligation.

Question 12: Court referral to ADR

12(a) Should there be greater referral of matters from courts to ADR? If so, how do we increase court referral to ADR? For example, should a program based on the Magistrates’ Court intervention order pilot be rolled out more broadly?
12(b) What type of disputes are most suitable for court referral to ADR? Should there be referral guidelines? If so, what should be included in the guidelines?
12(c) Should courts refer matters to an in-house ADR process (for example, judicial mediation) or to an external provider?
12(d) What are the barriers to greater referral of matters from courts to ADR? How can these be overcome?
Question 13: Mandatory referral to ADR

13(a) Should there be greater mandatory referral of cases from court to ADR? If so, in what circumstances is mandatory referral appropriate?

13(b) At what stage should cases be referred to mandatory ADR, for example, pre-litigation (as a condition of commencing action) or post-filing?

13(c) Should there be sanctions associated with non-participation in mandatory ADR? If so, what sanctions are appropriate?

Question 14: Online ADR

14(a) Is there potential to make greater use of online ADR services in Victoria? If so, in what types of disputes should online ADR services be used?

14(b) What are the advantages and disadvantages of online ADR services? How can any disadvantages or problems with online ADR services be overcome?

14(c) What are the features of a best practice online ADR service?

Question 15: ADR and access to the courts

Is there a real danger that increased use of ADR processes could decrease access to the courts for some groups in the community? If so, which groups are particularly at risk? How can this problem be overcome?

Question 16: Power imbalances

What potential power imbalances exist in ADR processes? How can these be addressed?

Question 17: Non-suitability of ADR processes to some disputes

17(a) Is ADR suitable for all parties? What factors should be taken into account in determining whether ADR is appropriate for particular parties?

17(b) Are there some disputes for which ADR processes are not suitable? If so, which disputes? How can we ensure that these disputes are not referred to ADR processes?

Question 18: Confidentiality of ADR process and outcomes

18(a) Does the confidentiality of ADR processes and outcomes create issues? If so, how can these be addressed?

18(b) Is ADR used by powerful parties to avoid setting legal precedents? If so, to what extent is this an issue and how can it be addressed?
Question 19: Criminal case conferencing

19(a) Should criminal case conferencing be introduced into the Victorian court system? If not, why not?

19(b) If so, in which courts should criminal case conferencing programs be introduced?

19(c) To which offences should it apply?

19(d) At what stage(s) of the court process should it be used?

19(e) Should participation in a criminal case conference be compulsory for the State/Commonwealth and an accused?

19(f) If not, in which cases should it be used? Should guidelines be developed for referral to a case conference? If so, what should these guidelines contain?

Question 20: Access to justice for victims

To what extent do restorative justice processes increase or decrease access to justice for victims?

Question 21: Net-widening

Is there a danger that restorative justice programs will net-widen, bringing more offenders into the criminal justice system? If so, how can this be overcome?

Question 22: Offender participation rates

Should efforts be made to increase the current offender participation rate in Victorian restorative justice programs? If so, how?

Question 23: Offences to which restorative justice processes apply

23(a) Is there the potential to use restorative justice programs in relation to a greater range of offences? If so, which offences should restorative justice initiatives be used for?

23(b) Should there be restrictions on repeat offenders accessing restorative justice programs?

Question 24: The age of the offender

Should the use of restorative justice programs in Victoria be extended to adults? If so, should any age restrictions apply to accessing restorative justice programs?
Question 25: Referral to restorative justice programs

At which stage is it appropriate to refer offenders to restorative justice programs: pre-sentence, post-sentence, parole?

Question 26: Mandatory referral to restorative justice programs

26(a) Should there be mandatory referral to restorative justice programs? If so, in what circumstances?

26(b) What are the issues associated with mandatory referral to restorative justice programs? How can these be addressed?

Question 27: Impact of participation or non-participation in restorative justice programs

Should there be any sanctions associated with refusal to participate in a restorative justice process (for example, treated as an aggravating factor in sentencing)? Should there be any rewards for participation in restorative justice processes (for example, consideration in sentencing or granting parole)?

Question 28: Sharing information about what works in terms of restorative justice

28(a) Should there be national best practice standards for restorative justice programs? If so, what should these standards be and who should set these standards?

28(b) How can we better share information within Victoria, nationally and internationally about what works in terms of restorative justice? What sort of information should we be sharing? How could it be shared?

Measuring the outcomes of ADR (Chapter 5)

Question 29: Measuring and reporting civil ADR outcomes

Is there a need for sector-wide reporting of civil ADR outcomes? If so, what measures should be used to assess outcomes? Who should collect this data and how should it be published?

Question 30: Measuring the outcomes of civil ADR for individuals

30(a) How should we be measuring the outcomes of civil ADR for individuals?

30(b) What are the advantages and disadvantages of the various performance measures (for example, agreement rate, agreement quality, participant transformation, cost savings and time savings)?
Question 31: Measuring the impact of civil ADR use on the courts

31(a) How has increased use of civil ADR impacted on the courts?

31(b) How should these impacts be measured and reported?

Question 32: The incorporation of ADR processes into Victoria’s Model Litigant Guidelines

Should a specific requirement to use ADR processes and participate ‘fully and effectively’ whenever possible be incorporated into the Victorian Model Litigant Guidelines? If so, how should this be achieved?

Question 33: The benefits for society of the use of ADR processes for civil disputes

What are the benefits for society of the use of ADR processes in relation to civil disputes? How can these benefits be measured?

Question 34: Measuring the outcomes of restorative justice processes

34(a) In your view, what are the outcomes of restorative justice processes?

34(b) How should we measure the outcomes of restorative justice processes? What indicators should be used?

34(c) How can we increase the pool of data available about the outcomes of restorative justice processes and the sharing of this information between programs and jurisdictions?

34(d) In your view, what are the elements of a best practice restorative justice program?

ADR and marginalised communities (Chapter 6)

Question 35: Data collection on the use by members of marginalised groups of civil ADR services

35(a) Is there a need to improve data collection in relation to civil ADR use by members of marginalised groups?

35(b) What type of data would be useful? Why would this data be useful?

35(c) How should the data collected be reported?

35(d) Who should be responsible for the collection and reporting of data in relation to ADR use by members of marginalised groups? Is there a role for government and/or private ADR providers in this data collection and reporting? If so, why?
Question 36: Advantages and disadvantages of civil ADR processes for marginalised individuals and communities

What advantages do civil ADR processes offer for marginalised individuals and communities? What are the disadvantages associated with ADR use for these groups?

Question 37: Barriers to marginalised communities accessing civil ADR services

37(a) What are the barriers to marginalised individuals and communities accessing civil ADR services?

37(b) How can these barriers be removed?

Question 38: Increasing access to information on ADR for marginalised communities

38(a) Is there a need to better promote ADR providers and services to marginalised individuals and communities? If so, how should this be done? For example, what kind of promotional material is required and how should it be distributed?

38(b) Is there the need for a more coordinated approach by agencies and service providers to provide information (including about ADR) to marginalised individuals and communities? If so, how could this be achieved?

Question 39: Improving access to services

39(a) What features of ADR services improve access for marginalised individuals and communities (for example, service availability, service design, availability of interpreters)? To what extent are these features currently utilised by Victorian ADR service providers?

39(b) Is there a greater need for community involvement in ADR service design? If so, how could this be achieved?

39(c) Do we need to increase the capacity of ADR practitioners to deal appropriately and sensitively with members of marginalised communities? If so, how can this be achieved?

39(d) How can we increase information sharing between practitioners about best practice dispute resolution techniques in relation to particular groups in society? For example, should a national ADR information network be established as recommended by NADRAC? If so, how should this operate?
Question 40: Data collection on members of marginalised groups’ access to restorative justice programs

40(a) To what extent are members of marginalised groups currently accessing restorative justice programs in Victoria?

40(b) How can we improve data collection in relation to access to ADR programs by members of marginalised groups?

40(c) What type of data would be useful? Why would this data be useful?

40(d) How should the data collected be reported?

Question 41: Advantages and disadvantages of restorative justice processes for marginalised individuals and communities

41(a) What advantages do restorative justice processes offer for marginalised individuals and communities? What are the disadvantages associated with the use of restorative justice initiatives for these groups?

41(b) Is there a need for restorative justice programs to be utilised further in relation to marginalised communities and groups? For example, is there merit in the Koori Court having a restorative justice diversion component?

Question 42: Restorative justice responses to family violence

Are restorative justice responses to family violence matters appropriate? If so, in what circumstances? What safeguards, if any, would need to be in place?

Regulation of ADR (Chapter 7)

Question 43: Current regulation of civil ADR

Does the discussion of current regulatory practices set out in section 7.3 accurately capture the extent of regulation of civil ADR in Victoria?

Question 44: Advantages of the current Victorian system of civil ADR regulation

What are the advantages of the current system of civil ADR regulation in Victoria?

Question 45: Disadvantages of the current Victorian system of civil ADR regulation

What are the disadvantages of the current system of civil ADR regulation in Victoria?
Question 46: Potential government regulation of civil ADR providers

Could government play a role in increasing the simplicity and transparency of the civil ADR regulatory landscape? Would this be appropriate and/or feasible? How could this best be achieved?

Question 47: Processes which fall within ‘ADR’ for regulatory purposes

47(a) Which processes should be considered to be ‘ADR’ for the purposes of regulation (including regulatory reform) of ADR providers?

47(b) Should regulation (including any regulatory reform) apply to all ADR processes, or just certain processes (for example, mediation)?

Question 48: Definitions of ADR processes

48(a) Do ADR processes (for example, mediation) require standard definitions? If so, what are the essential elements which should be included in the definitions of these processes?

48(b) Should the definitions of ADR processes apply generally to all services in which the processes are used, or is it acceptable for each ADR provider service to apply its own definitions?

48(c) Where should any definitions or descriptions of ADR and ADR processes be contained: in legislation, in codes of practice, in training, accreditation or practitioner/provider guidelines, and/or consumer advice documentation?

Question 49: Standards for ADR service provision

Should there be common standards for ADR practitioners (for example, educational requirements or practice standards)?

Question 50: Training for ADR practitioners

50(a) Should training be required for ADR practitioners?

50(b) What is the appropriate content for ADR education and/or training courses?

50(c) Should there be any prerequisites to undertaking ADR training courses? If so, what should these prerequisites be? For example, should an undergraduate degree be necessary?

50(d) What is the appropriate assessment to use for ADR education and/or training courses?

50(e) Who should determine which training courses are adequate and acceptable for an individual to become an accredited ADR practitioner?
50(f) Who should determine the minimum standards of training required for an individual to become an accredited ADR practitioner?

50(g) Who should determine the minimum standards of training required for an individual to practice ADR in a particular arena?

50(h) To what extent should ADR practitioners accredited by one organisation have this accreditation recognised to allow them to practice for another organisation?

50(i) To what extent is ongoing training required of ADR practitioners?

50(j) Should there be any prerequisites for individuals who provide training and education in ADR (for example, training or ongoing experience)?

Question 51: Tertiary qualifications for ADR practitioners

51(a) Should ADR practitioners be required to have a tertiary qualification as a minimum requirement for practising? Why/why not?

51(b) If so, what tertiary qualification should be required?

Question 52: Performance and competency standards for ADR practitioners

52(a) Are performance and competency standards, key performance indicators or KSAO (knowledge, skills, abilities and other attributes) requirements an appropriate tool to assess whether an ADR practitioner may practice?

52(b) If so, what should these standards or KSAOs be?

52(c) Should the standards or KSAOs be assessed?

52(d) If so, how should they be assessed?

52(e) Who should be responsible for undertaking any assessment of KSAOs?

Question 53: Accreditation of ADR providers and practitioners

53(a) Is there a need for ADR providers and practitioners to be accredited?

53(b) Should accreditation be compulsory for providers and practitioners wanting to provide ADR services?

53(c) Which model of accreditation (if any) should be adopted by Victoria and/or nationally? Are there any models of accreditation not referred to in this Discussion Paper that the Committee should consider?

53(d) Should ADR providers and practitioners be required to undergo re-accreditation? If so, how often should they be required to apply for re-accreditation?
Question 54: ADR practice standards

54(a) Is there a need for standards for ADR providers and practitioners?

54(b) What kinds of matters should be covered in ADR provider or practitioner standards?

54(c) Should there be common minimum standards for ADR service provision or should each organisation be able to develop and implement its own minimum standards?

54(d) If common minimum standards were to apply to all ADR providers and practitioners, should the draft Australian Mediator Practice Standard apply as these minimum standards?

54(e) If not, who should be responsible for developing and implementing ADR standards?

54(f) Where should standards for ADR providers and practitioners appear: in legislation, as part of organisational guidelines or codes of conduct, under court rules?

Question 55: Confidentiality and admissibility of ADR processes

55(a) What are the advantages and disadvantages of the current regulation of confidentiality requirements?

55(b) Should there be a requirement of confidentiality for ADR providers in ADR proceedings?

55(c) Should there be a requirement of confidentiality for all parties present at an ADR session?

55(d) When should the ADR process commence for the purposes of confidentiality? Should it include preliminary conferences or discussions with an ADR provider’s intake staff? When does the ADR process end? Does it include follow-up procedures?

55(e) What information should be protected by any confidentiality requirement (for example, the fact of settlement, terms of settlement, documents, statements or notes made by disputants, by witnesses, or by the ADR practitioner)?

55(f) Where should any requirements of confidentiality appear: in a party/ADR practitioner agreement, in legislation, or in a code of conduct or practice?

55(g) Should sanctions/penalties apply for breaches of any confidentiality requirements, and if so, what should those penalties be?

55(h) Should there be exceptions to any confidentiality requirements? If so, what should these exceptions be? Where should these exceptions appear: in a party/ADR practitioner agreement, in legislation, or in a code of conduct or practice?
Summary of questions

55(i) To what extent should statements made in ADR processes (both court connected and other processes) be admissible in Victorian court proceedings?

Question 56: Immunity of ADR practitioners

56(a) Should ADR practitioners involved in an ADR process have immunity?

56(b) Should the presence of practitioner immunity depend on whether the process is compulsory or voluntary for participants, or whether the process is connected to a matter before a Victorian court or tribunal?

56(c) Where should ADR practitioner immunity be stipulated (for example, in legislation or in the ADR practitioner/client contract)?

56(d) Should ADR practitioner immunity be absolute or qualified for acts done in good faith? Should this depend on whether the process is connected to a court matter?

56(e) Should ADR practitioners be required to obtain professional indemnity insurance?

56(f) What should the minimum requirements for professional indemnity insurance cover be?

Question 57: The roles of the Commonwealth and States in regulating ADR

57(a) What should be the respective roles of the Commonwealth and States in regulating ADR providers?

57(b) If Victoria is to be a best practice regulator, what regulation model should be adopted?

Question 58: Self-regulation for ADR practitioners

58(a) Is greater self-regulation regulation of ADR providers required, appropriate and/or feasible?

58(b) If so, what form should this regulation take?

Question 59: A government approved panel of ADR providers

59(a) Should there be a government approved panel/register of ADR providers?

59(b) What training, educational or other requirements should be necessary to be on such a panel/register?
Question 60: An ADR industry council

60(a) Is co-regulation in the form of an industry council an appropriate form of regulation of ADR providers?

60(b) If so, how could such an industry council be established? How should it function?

Question 61: Generalist ADR legislation

61(a) What are the advantages and disadvantages of generalist ADR legislation? In particular, is the current array of ADR provider regulation confusing for consumers?

61(b) Should overarching generalist legislation regulating ADR providers and practitioners be enacted in Victoria? If so, what provisions should this Act contain?

Question 62: An ADR ombudsman

62(a) How should practice standard breaches and/or misconduct by ADR practitioners be dealt with?

62(b) Should there be an ADR ombudsman?

62(c) If so, how should this scheme operate?

62(d) Should membership of an ADR ombudsman scheme be compulsory for ADR practitioners to practice?

Question 63: Commonwealth generalist legislation

63(a) Is Commonwealth generalist legislation an appropriate and/or feasible method of regulating civil ADR providers?

63(b) If so, what provisions should this legislation contain?

Question 64: Other models of civil ADR regulation

64(a) Are there any other possible models of ADR provider regulation that you consider would be suitable in Victoria?

64(b) If so, how would such a model of regulation function – what would be the elements of this model?
Question 65: Regulation of restorative justice

65(a) Is there a need for regulatory reform in relation to restorative justice conferencing programs? If so, what elements of the programs require regulation: the process, the participants, or both? How would such a model of regulation function?

65(b) What should any regulation of conference convenors cover? Should it include training and educational requirements, accreditation, and practice standards?

65(c) What should the regulatory standards for conference convenors be?

65(d) Should referral guidelines be established for judicial members and those they consult with in determining whether a case is suitable for referral to restorative justice conferencing?

65(e) Who should be responsible for the regulation of conferencing programs and conference convenors? What role should the Government play in the regulation?
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1. Introduction

1.1 Terms of reference

In March 2007, the Victorian Parliament Law Reform Committee received terms of reference asking it to inquire into, consider and report to Parliament on alternative dispute resolution (ADR). The terms of reference ask the Committee to consider the current reach and use of ADR mechanisms, including Government established ADR schemes and restorative justice schemes. The terms of reference require the Committee to consider the role of ADR in improving access to justice, improving outcomes in civil and criminal court jurisdictions and reducing contact with the court system, particularly for marginalised communities.

The Committee has also been asked to report on whether a form of Government regulation of ADR providers would be appropriate or feasible in order to ensure greater consistency and accountability for Victorians wishing to access alternative dispute resolution.

1.2 Purpose of this Discussion Paper

The purpose of this Discussion Paper is to outline current ADR mechanisms in Victoria and elsewhere and to identify issues and best practice. This information is intended to provide background information to relevant stakeholders and members of the public who may wish to make a submission to the Committee.

In order to assist stakeholders, this Discussion Paper aims to give guidance in relation to the types of issues the Committee wishes to consider as part of its inquiry and poses a series of questions about issues relating to ADR. The questions are intended to be a general indication rather than an exhaustive list of the areas the Committee will cover in the Final Report. The Committee recognises that stakeholders can make an important contribution to identifying issues in an Inquiry. We welcome both submissions that directly address the questions identified in the Discussion Paper and comments on any other issues relevant to the terms of reference.

It is important to note that this Discussion Paper reflects the fact that the Committee has not yet reached any conclusions in relation to the issues identified. The Discussion Paper summarises the current state of play in Victoria and other jurisdictions in relation to ADR and examines the views of other reform agencies. It does not favour any particular reform option. This is because the Committee considers it important to hear the views of stakeholders and other interested persons before reaching any conclusions or forming recommendations. We therefore welcome submissions on any aspects of the Committee’s terms of reference to inform our deliberations.

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1.3 The context of the inquiry

The last thirty years has seen a dramatic increase in the use of alternative dispute resolution (ADR) mechanisms, both in Australia and internationally. In relation to civil disputes, ADR processes have emerged in response to concerns that traditional court processes are slow, costly and may not necessarily deliver the best outcomes for parties. In the criminal jurisdiction, restorative justice practices seek to better address the needs of both offenders and victims by recognising the underlying causes of criminal behaviour, making offenders take responsibility for their actions and repairing or restoring harm.

The policy framework for ADR and restorative justice programs and services in Victoria is provided by a number of high-level strategic documents, including Growing Victoria Together and the Attorney-General’s Justice Statement. Growing Victoria Together sets out the Victorian Government’s vision for the state’s future to 2010. Growing Victoria Together identifies safer communities, increased community cohesion and responsive services as key priorities. The Attorney-General’s Justice Statement has a dual focus on modernising justice, and protecting rights and addressing disadvantage. The Statement provides a commitment to resolve civil disputes earlier and recognises the increasing importance of ADR as a dispute resolution mechanism. The Statement also acknowledges the complexity of the underlying causes of criminal behaviour and advocates a more flexible and creative approach to addressing crime, including through restorative justice initiatives.

The Committee’s work in relation to ADR in the civil context is also informed by two major current Victorian initiatives. The Victorian Department of Justice is undertaking the Contemporary Justice Service Delivery – ADR Project. The first phase of this project has focused on filling knowledge gaps in relation to Victorian ADR users and service providers. To date, three reports have been published on ADR service providers and community users of ADR, and a fourth report on small businesses is forthcoming. The second phase of the project will involve the development of projects and programs to address the issues identified in these research reports.

In addition, the Victorian Law Reform Commission has recently completed the first stage of its civil justice inquiry. The Commission’s recommendations take a highly creative approach to the streamlining of civil justice processes, including encouraging the increased use of ADR and empowering courts to make greater use of ADR mechanisms.2

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1 Department of Premier and Cabinet, Victoria, Growing Victoria Together: A Vision for Victoria to 2010 and Beyond (2005) 15.

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1 Department of Premier and Cabinet, Victoria, Growing Victoria Together: A Vision for Victoria to 2010 and Beyond (2005) 15.
In relation to restorative justice, the Committee acknowledges the significance of the opening in 2007 of the Neighbourhood Justice Centre in the City of Yarra which is underpinned by ‘the objectives of simplifying access to the justice system and applying therapeutic and restorative approaches in the administration of justice.’ The Committee is also cognisant of proposals to build on successes of restorative justice processes in the Children’s Court of Victoria and to extend these to a wider age group.

In undertaking its review into ADR mechanisms in Victoria, the Committee acknowledges the existing policy and program framework and recognises the wide variety and diverse interests of stakeholders. It is hoped that this Discussion Paper will provide a framework for stakeholders to provide input into the Inquiry process, by stimulating thought and encouraging submissions.

### 1.4 The inquiry process

After receiving written submissions, the Committee will hold public hearings in Melbourne later in the year. The dates of the public hearings will be advertised.

Following the public hearings, the Committee will write a Final Report in which it will make recommendations to the Victorian Government. The Final Report will also be tabled in Parliament. The Government will then consider those recommendations and is required to make a response within six months of the tabling of the Report.

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3 Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic) s 1.
This chapter provides an outline of the definitional issues relating to ADR in civil disputes and criminal matters. The history and development of ADR in civil disputes and criminal matters in Victoria and Australia is then canvassed, including discussion of the perceived advantages and disadvantages of these ADR processes.

2.1 The definitions of ‘ADR’ in civil disputes and criminal matters

2.1.1 The definition of ‘ADR’ in civil disputes

Despite the fact that ADR processes are now regarded as mainstream in Australia, ADR continues to be conceptually and terminologically problematic. This section explores some of the issues associated with defining ADR in relation to civil disputes.

i) Definitions of ADR

There is no agreed definition of ADR in Australia. The National Alternative Dispute Resolution Advisory Committee (NADRA), established by the Commonwealth Government to provide policy advice on ADR, has defined ADR broadly as:

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 be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

Alternatively, Sourdin defines ADR as:

Processes that may be used within or outside courts and tribunals to resolve or determine disputes (and where the processes do not involve traditional trial or hearing processes) … ADR describes processes that are non-adjudicatory, as well as adjudicatory, that may produce binding or non-binding decisions. It includes processes described as negotiation, mediation, evaluation, case appraisal and arbitration.

ADR contrasts in many ways with formal court processes, such as those in the Victorian and Commonwealth court systems (including the Victorian Supreme Court and the Federal Court). However, ADR and the formal justice systems are not homogenous, separate and opposed entities. Their relationship is complex and evolving.

7 Tania Sourdin, Alternative Dispute Resolution (2nd ed, 2003) 3.
8 Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (2nd ed, 2002) 39.
9 Ibid.
The breadth of the definitions above recognises that ‘ADR is an umbrella term for a variety of processes which differ in form and application. Differentials include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached.’

ii) Common elements of definitions of ADR
Despite the absence of an agreed single definition of ADR, an examination of the definitions reveals broad common elements of ADR, including:

- ADR includes a range of dispute resolution processes.
- ADR does not include litigation.
- ADR is a structured informal process.
- ADR normally involves the intervention of a neutral third party.
- ADR processes can be non-adjudicatory.

iii) What A, D and R stand for
There is no consensus as to what the acronym ‘ADR’ signifies.

‘A’: Alternative?
ADR has historically been used to define dispute resolution processes that are an ‘alternative’ to litigation in the court system.

Criticisms of the use of the word ‘alternative’ include that it is inaccurate and focuses on the primacy of litigation where in reality the majority of disputes have traditionally been resolved without the use of formal legal processes. Other definitions have been suggested, including ‘additional’, ‘appropriate’ and ‘assisted’ dispute resolution.

‘D’: Dispute or conflict?
Some commentators use ‘dispute’ and ‘conflict’ interchangeably, while others seek to distinguish them, arguing that ADR is strictly about the resolution of disputes. An example of this distinction can be found in the Dictionary of Conflict Resolution:

A dispute exists after a claim is made and rejected. A conflict, however, can exist without a claim being made. Thus, although a dispute cannot exist without a conflict, a conflict can exist without a dispute.

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10 McCrimmon and Lewis, above n 5, 2.
12 Astor and Chinkin, above n 8, 5, 77-78.
13 Ibid, 78.
14 Field, above n 11, 20.
Chapter 2: Background

‘R’: Resolution or settlement?

Again, some authors are particular about the use of the term ‘resolution’ while others use it interchangeably with conflict ‘settlement’ and ‘management’. ‘According to Sir Laurence Street and NADRAC, the concept of ADR may encompass conflict avoidance, conflict management and conflict resolution.’

iv) The meaning of ‘ADR’ in this Discussion Paper

In developing this Discussion Paper, the Committee is cognisant of differences of opinion in relation to the definition of ‘ADR’ and which processes fall within the ambit of this term. For the purposes of this paper, the Committee is utilising the definition of ADR as formulated by NADRAC, being ‘processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.’ For the purposes of this paper, ‘ADR’ refers to the following processes:

- information provision
- complaint handling
- facilitation
- conferencing
- mediation
- conciliation
- arbitration
- expert appraisal and determination.

Although negotiation is the most frequently used method of resolving all types of disputes, it falls outside the Committee’s inquiry as it cannot be said to rely upon a third party in a facilitative, advisory or decision making role. Issues in relation to the formulation of a definition of ADR to be utilised in the regulation of the sector are discussed in chapter seven of this Discussion Paper.

2.1.2 The definition of ADR in criminal matters: ‘restorative justice’

i) ‘Restorative justice’ and ‘ADR’

The conceptual and practical relationship between ‘ADR’ and ‘restorative justice’ is complex and challenging. Restorative justice practices such as victim-offender and community conferencing resemble civil law ADR processes such as mediation in that they bring the parties together and attempt to negotiate an agreed outcome. However, McCrimmon observes that ‘it is argued that there is no true ‘dispute’ which can be resolved – the dispute occurred in the past and entirely on the offender’s terms.’

15 Astor and Chinkin, above n 8, 82.
16 McCrimmon and Lewis, above n 5, 5.
17 Ibid, 10.
ii) Restorative justice practices

There is no universally accepted definition of restorative justice. However, it can be described as an approach to crime that focuses on repairing the harm caused by criminal activity, addressing the underlying causes of criminal behaviour, and reducing the frequency and seriousness of re-offending. The focus of restorative justice is on restoration rather than retribution. Restorative justice initiatives are often based on the rationale that ‘those involved in, and affected by, criminal activity should be given a genuine opportunity to participate in the process by which the response to the crime is decided.’

A related concept is therapeutic jurisprudence. Therapeutic jurisprudence is a holistic approach which looks at the law as a social force that produces behaviours and consequences that are either therapeutic or anti-therapeutic. Therapeutic jurisprudence initiatives focus on ways to maximise the therapeutic outcomes, such as psychological wellbeing, for all participants in the legal process. Therapeutic jurisprudence has informed the development and operation of problem-solving courts in Victoria such as the Drug Court and the Koori Court, which seek to achieve therapeutic outcomes by dealing with the underlying causes of criminal behaviour and producing outcomes that benefit the offender and the community.

There is some overlap between the restorative justice and therapeutic jurisprudence movements. Both seek to prevent further offending and emphasise the importance of collaboration. However, they have slightly different focuses and are discussed in the literature as two distinct legal movements.

In its broadest sense, restorative justice may be considered by some stakeholders to include diversionary programs (such as cautioning) and problem-solving courts (such as the Drug Court). However, one possible distinction between restorative justice and therapeutic justice is that whereas problem-solving courts apply therapeutic justice approaches within and throughout the existing structure and process of the relevant court, restorative justice initiatives take place outside the actual hearing process in the court room. For the purposes of this Discussion Paper, the Committee defines ‘restorative justice’ as programs which involve meetings of offenders, victims (where they choose to attend) and communities to discuss and determine collectively the approach to be taken to a crime. These meetings are often referred to as ‘restorative justice practices’.

21 Ibid.
24 Ibid.
26 Heathen Strang, Restorative Justice Programs in Australia: A Report to the Criminology Research Council (2001) 5.
27 Strang restricted coverage of ‘restorative’ practices to ‘programs involving meetings of victims, offenders and communities to discuss and resolve an offence’ in the paper Restorative Justice Programs in Australia: A Report to the Criminology Research Council (2001) 5. See also G Davies...
'conferences', and this is the term used throughout this paper. Group conferencing is the most common restorative justice process used in Victoria. Programs throughout Australia provide for a number of different conferencing models and conferencing can potentially occur at different stages of the criminal process, including as diversion from court prosecution or at the pre-sentencing stage, action taken in parallel with court decisions and in connection with prison release.

Restorative justice processes are used not only in criminal matters, but also in a range of other matters, including family welfare and child protection, and disputes in schools and workplaces. However, these processes are outside the scope of this Inquiry and therefore are not being considered by the Committee.

Common elements of restorative justice conferencing programs are:

- A conference only takes place if the victim is willing to take part (or community members if it is a community panel conference).
- Conferences are private and relatively informal.
- The victim and the offender are able to talk honestly about what happened, to describe the consequences of the offence, and to discuss ways that the harm can be repaired.
- Offenders are encouraged to take responsibility for their actions, show remorse and take steps to repair the harm they have caused, generally through an outcome agreement or plan. These can include an apology and/or other reparative measures such as voluntary financial restitution to the victim for all or part of the damage incurred, and community work. The aim of these agreements includes to provide reparation to the victim(s) and the wider community and to reduce the amount and seriousness of future offending.
- A report from the conference, including any agreed plan, is given to the Court. In some cases the Court adjourns to allow the offender to complete all or part of the plan before sentencing.

2.2 The history and development of ADR in civil disputes and criminal matters in Victoria

This section summarises the major developments in both civil ADR and restorative justice in Victoria and Australia. It is not intended to provide a detailed examination of the history of ADR. Instead, it demonstrates the diversity of settings in which these processes have developed, in order to provide a context for the discussion in chapter three of this paper on the reach and use of these mechanisms in Victoria.

30 Ibid.

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30 Ibid.
2.2.1 The history and development of ADR in civil disputes

ADR has a long history in Australia. Indigenous communities engaged in consensual dispute resolution rather than using litigation or imprisonment.31 Upon federation, provision was made in the Australian Constitution for the use of conciliation and arbitration in relation to industrial disputes.32

In recent years ADR has increasingly been used in a variety of contexts. In the 1960s and 1970s, access to justice emerged as an area of community concern. Throughout the 1970s and 1980s, a range of dispute resolution processes such as mediation, conciliation and arbitration, gained popularity as an alternative to traditional litigation in the courts. Support for the use of ADR processes partly resulted from criticism of formal court processes as expensive, time consuming, inaccessible, conflict-inducing and disempowering for the parties involved.33 In contrast, ADR is associated with a range of advantages, including being a more cost effective, informal, flexible and efficient form of justice which allows for the active participation of all parties and assists in the preservation of relationships.34 It also allows parties to access a wider and more adaptable range of remedies to disputes than litigation.35 It is important to note that not all advocates of ADR have been critical of formal justice processes. ADR may be viewed as an additional or subsidiary process, which provides a cheaper, more time effective way of dealing with more minor disputes that do not warrant the use of court resources.36

The 1970s and 1980s saw the development of important ADR mechanisms throughout Australia. In Victoria, the initiatives included:

- Neighbourhood mediation centres (the Victorian version of community justice centres, which were developed in various other Australian jurisdictions) were established in 1987. Now called the Dispute Settlement Centre Victoria, mediation and facilitation services continue to be provided throughout the state.
- Ombudsman Victoria was established in 1973. It was the third Ombudsman office initiated in Australia, following the appointment of Ombudsmen in Western Australia (1971) and South Australia (1972). Since then, in addition to the Ombudsman Victoria and other statutory ombudsmen, the deregulation and privatisation of formerly government-owned services has provided the basis for Victorian industry ADR schemes such as the Energy and Water Ombudsman Victoria.

ADR processes have not just gained popularity outside the courts. Court-connected ADR has become increasingly institutionalised and processes such as mediation feature in the legislation (and often case management schemes) of all Victorian courts.

31 Astor and Chinkin, above n 8, 11.
32 Australian Constitution s 51(xxxv).
33 McCrimmon and Lewis, above n 5, 2.
36 McCrimmon and Lewis, above n 5, 2.
Following the 1994 Sackville report *Access to Justice: An Action Plan*, the Commonwealth Government created the National Alternative Dispute Resolution Advisory Council (NADRAC), an independent body whose role is to:

a) provide the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and

b) promote the use and raise the profile of alternative dispute resolution.37

NADRAC has played a key role in the development of national policy on ADR provision and regulation.

Although ADR is now used frequently across a diverse range of disputes, it continues to be an evolving area and regulation of ADR provision is still at a formative stage.38 There are a number of ongoing concerns that stakeholders and commentators have identified with ADR processes. Firstly, ADR lacks the formal checks and balances offered by the court system. It does not possess the same procedural fairness safeguards39 and even where procedural fairness is maintained, there is no third party decision maker who ensures any agreement made between parties constitutes a substantively just outcome.40 Where either party is dissatisfied with an element of the process, there is no fundamental right of judicial review.41 Lack of enforceability of any agreements made is a related concern, although parties may choose to have an agreement formalised as a written contract. Despite these concerns, ADR schemes continue to flourish as an effective method of resolving disputes. Issues associated with ADR are discussed throughout this paper.

2.2.2 The history and development of restorative justice in criminal matters

Over the past 25 years, restorative justice has become a ‘global phenomenon’ in criminal justice systems.42 McCrimmon observes that, ‘as with the development of ADR in general, the development and proliferation of various ‘alternative’ criminal justice processes in Australia cannot be attributed solely to one influence or policy agenda.’ Motivations for the implementation of such reforms include: cost-effectiveness and efficiency; a decrease in recidivism, and the desire to create a more appropriate and culturally flexible system for dealing with offenders (especially Indigenous and young offenders).43

39 Ibid, above n 11; 54.
41 Ibid, above n 11; 55.
43 Ibid.
44 McCrimmon and Lewis, above n 5, 7.

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b) promote the use and raise the profile of alternative dispute resolution.37

NADRAC has played a key role in the development of national policy on ADR provision and regulation.

Although ADR is now used frequently across a diverse range of disputes, it continues to be an evolving area and regulation of ADR provision is still at a formative stage.38 There are a number of ongoing concerns that stakeholders and commentators have identified with ADR processes. Firstly, ADR lacks the formal checks and balances offered by the court system. It does not possess the same procedural fairness safeguards39 and even where procedural fairness is maintained, there is no third party decision maker who ensures any agreement made between parties constitutes a substantively just outcome.40 Where either party is dissatisfied with an element of the process, there is no fundamental right of judicial review.41 Lack of enforceability of any agreements made is a related concern, although parties may choose to have an agreement formalised as a written contract. Despite these concerns, ADR schemes continue to flourish as an effective method of resolving disputes. Issues associated with ADR are discussed throughout this paper.

2.2.2 The history and development of restorative justice in criminal matters

Over the past 25 years, restorative justice has become a ‘global phenomenon’ in criminal justice systems.42 McCrimmon observes that, ‘as with the development of ADR in general, the development and proliferation of various ‘alternative’ criminal justice processes in Australia cannot be attributed solely to one influence or policy agenda.’ Motivations for the implementation of such reforms include: cost-effectiveness and efficiency; a decrease in recidivism, and the desire to create a more appropriate and culturally flexible system for dealing with offenders (especially Indigenous and young offenders).43

39 Ibid, above n 11; 54.
41 Ibid, above n 11; 55.
43 Ibid.
44 McCrimmon and Lewis, above n 5, 7.
Restorative justice philosophies stem from concepts used in Indigenous and pre-industrial Western justice systems. In Australia, these philosophies were the impetus behind the establishment of the Children’s Courts and the use of police cautioning as an alternative to charging for first-time offenders and less serious offences. In the 1970s and 1980s, restorative justice gained popularity through the informal justice movement and victim-offender mediation programs. The current concept of ‘restorative justice’ became popular in the 1990s and led to the use of conferencing for juvenile offenders.

New Zealand introduced the first statutory-based conferencing scheme in 1989, introducing family group conferencing as part of the Children, Young Persons and Their Families Act. The New Zealand experience is drawn on extensively throughout this paper and the key components of that country’s restorative justice model are summarised in Box 1 on the following page.

In 1991, the New South Wales Police Service commenced a pilot scheme of police-run conferencing in Wagga Wagga to provide an ‘effective cautioning scheme’ for juvenile offenders. Unlike its New Zealand counterpart, the ‘Wagga model’ of conferencing is police run.

Australia and New Zealand have become world leaders in the use of conferencing as a form of restorative justice. According to Strang, ‘conferencing has come to be seen as a viable response to dissatisfaction with existing diversion programs, even though considerable variation has emerged between jurisdictions in the style of that response.’ Restorative justice initiatives in Australia are utilised at different stages of the criminal justice process, including the sentencing and post-sentencing stages. They include victim-offender mediation, conferencing and circle sentencing. While many of these initiatives were initially applied to young offenders, they are increasingly being made available to adult offenders. For example, restorative justice schemes for adult offenders have been established in the ACT and Queensland.

In Victoria, a juvenile justice group conferencing program has been operating in Children’s Courts as a pre-sentence option since 1995. Restorative justice for adult offenders has recently been incorporated into Victorian legislation for the first time with the Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic).

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45 Strang, above n 26, 3.
46 Daly and Hayes, above n 29, 1.
47 Ibid.
48 Ibid, 2.
49 Ibid, 1.
50 Straun, above n 26, 6.
51 Australian Law Reform Commission, above n 20, [4.22].
Box 1: Case study: restorative justice in New Zealand

New Zealand began using restorative justice programs in the late 1980s, partly in response to dissatisfaction with the criminal justice system’s approach to offending, including amongst the Maori community.

In 1989 the youth justice system began using Family Group Conferences for young offenders. A Youth Justice Coordinator facilitates a meeting between the offender, their family and the victim to decide how the offender can be held accountable and encouraged to take responsibility. The resulting agreement might include an apology, reparation to the victim or community work.

In the 1990s restorative justice programs became available for some adult offenders. The Ministry of Justice currently funds 31 community groups to provide programs. The programs are usually:

- victim-offender conferencing – a facilitated meeting between the offender, victim and their supporters to talk about what happened and how to repair the harm caused by the offence
- community panel conferencing – a meeting between the offender and a panel of community members.

Participation is voluntary for victims and offenders and offenders must admit responsibility before they can take part.

The evaluation of a 2001 pilot of court-referred restorative justice found, amongst other things, that most offenders and victims saw the conferences as a positive experience, that offenders were less likely to be sentenced to imprisonment and that there was a 4% decrease in offenders’ reconviction rate.

In 2002 New Zealand formally recognised restorative justice in legislation. Sentencing, parole, and victims’ rights legislation now encourage restorative justice programs where appropriate and allow the courts and the Parole Board to take the outcomes into account in their sentencing and parole decisions.

The New Zealand Government recently announced a three year project to expand restorative justice programs nationwide.

Sources:
The use of restorative justice involves balancing the need for particularity with those aspects of traditional justice which are generally seen as positive: predictability and consistency.54 Concerns have been raised about the appropriateness and/or effectiveness of restorative justice in general and conferencing in particular. ADR is usually seen as appropriate where the parties have an ongoing relationship (which provides a significant motivation to achieve reconciliation), which is not usually the case with participants involved in conferencing for criminal matters.55 The offender may feel pressured to reach an agreement, rather than genuinely seeking to repair the harm done.56 Critics of restorative justice also describe conferencing as being 'soft on crime'.

Evaluations of restorative justice conferencing programs have produced mixed results in terms of recidivism rates for conference participants and the costs of program delivery in comparison to 'traditional' justice methods.58 What is clear is that both offenders and victims who have participated in these programs have been highly satisfied with the process.59 This has been an important development for victims, who had otherwise consistently found that their needs were not meaningfully addressed in the traditional criminal justice system.56 These issues are discussed further in subsequent chapters of this paper.

Restorative justice programs are now an established feature of criminal justice systems throughout Australia. In October 2006, the Commonwealth Attorney-General recognised this in announcing that the NADRAC Charter would be broadened to include, among other things, the provision of advice on restorative justice and the use of ADR in criminal offences.56

2.3 Conclusion

As the above discussions demonstrate, ADR in both civil disputes and restorative justice schemes is a complex and evolving area. In its consideration of the matters in the following chapters of this Discussion Paper, the Committee recognises that many of these are subject to ongoing uncertainty and debate. The Committee therefore values stakeholder responses to the questions raised throughout this paper.

54 McCrimmon and Lewis, above n 5, 11.
55 Ibid, 10.
58 See 5.3.1 and 5.3.3 of this Discussion Paper.
59 See 5.3.1 and 5.3.2 of this Discussion Paper.
60 See 5.3.2 of this Discussion Paper.
3. The current reach and use of ADR schemes in Victoria

This chapter provides an overview of the schemes and services that the Committee considers to be ‘ADR providers’ in civil disputes and criminal matters, which are currently operating in Victoria. It presents information about a cross-section of current ADR service provision and as such is not an exhaustive list of every organisation which offers ADR as a conflict resolution mechanism. In particular, ADR mechanisms used in family law, a Commonwealth matter, are not explored.

An examination of the use and users of ADR services in the Victorian community follows the overview.

3.1 An overview of the reach of ADR in civil disputes

The current ADR sector encompasses a diverse and complex range of suppliers, settings, types of disputes handled and ADR processes used.

As will be discussed in chapter 7 of this Discussion Paper, the practice of ADR in Victoria can be difficult to capture because different organisations understand and apply terms such as ‘mediation’ differently. The information about ADR supply that follows comes from stakeholders’ self-identification of the ADR processes they offer and engage in.

Figure 1 on the following page provides an outline of some of the major public and private ADR suppliers in Victoria.
Figure 1: Major ADR suppliers in Victoria

Public Supply of ADR in Victoria

Courts
Federal Court*
Family Court*
Supreme Court
County Court
Magistrates’ Court
Children’s Court
Therapeutic justice initiatives*

Tremunals
VCAT

Statutory ADR Suppliers
Ombudsmans
Legal Services Commissioner
Victoria Legal Aid
Victorian Small Business Commissioner
Victorian Equal Opportunity and Human Rights Commission
Health Services Commissioner

Government Departments
Consumer Affairs Victoria
Internal dispute resolution processes of government departments*
Internal dispute resolution processes of universities and councils*

Local Government
Other ADR Suppliers
Dispute Settlement Centre Victoria

Private Supply of ADR in Victoria

Internal dispute resolution
Business to Business ADR

Industry ADR Schemes
Telecommunications Industry Ombudsman
Public Transport Industry Ombudsman
Energy and Water Ombudsman Victoria
Banking and Financial Services Ombudsman
Insurance Ombudsman Service
Financial Industry Complaints Service
Private Health Insurance Ombudsman

Other Private Providers
Barriers and Solicitors
Private mediators
Others

Informal provision of ADR by citizens and communities


* Note: these ADR suppliers are not discussed in detail in this paper. Refer to section 2.1.2 for discussion of the overlap between restorative justice and therapeutic justice.

The following sections provide an overview of ADR in the civil jurisdiction in both the public and private spheres in terms of the type of ADR services provided; remedies available; limits on the service; and the enforceability of any agreement reached.

3.1.1 ADR in the civil court jurisdiction and VCAT

ADR processes have been institutionalised within the civil jurisdiction of the Victorian courts and tribunals. The use of ADR is provided for in the legislation, rules of procedure, practice notes and case management schemes which regulate these juridical bodies. ADR services may be provided by the court or the court may refer the parties to choose an external ADR provider.

Public Supply of ADR in Victoria

Courts
Federal Court*
Family Court*
Supreme Court
County Court
Magistrates’ Court
Children’s Court
Therapeutic justice initiatives*

Trumunals
VCAT

Statutory ADR Suppliers
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Victoria Legal Aid
Victorian Small Business Commissioner
Victorian Equal Opportunity and Human Rights Commission
Health Services Commissioner

Government Departments
Consumer Affairs Victoria
Internal dispute resolution processes of government departments*
Internal dispute resolution processes of universities and councils*

Local Government
Other ADR Suppliers
Dispute Settlement Centre Victoria

Private Supply of ADR in Victoria

Internal dispute resolution
Business to Business ADR

Industry ADR Schemes
Telecommunications Industry Ombudsman
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Energy and Water Ombudsman Victoria
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Insurance Ombudsman Service
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Other Private Providers
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Chapter 3: The reach and use of ADR schemes in Victoria

The Court of Appeal, Supreme Court, County Court and Magistrates’ Court have legislated power to refer parties to mediation or arbitration. The Victorian Civil and Administrative Tribunal (VCAT) also has the power to refer parties to mediation. In practice, parties are often referred to mediation at an early stage in proceedings as part of the court or VCAT’s case management system.62 Other procedures such as County Court pre-hearing conferences and VCAT’s compulsory conferences provide opportunities for parties to discuss their matter and negotiate agreement early in the proceedings. The ADR processes available to each court can potentially be used for all cases before them, although the Magistrates’ Court has a limit of $10,000 on arbitration for small claims.63 The remedies available are those offered by the court, and any written agreement made can be registered as a legally binding court order.

There may be potential to improve the provision of, or referral to, ADR services by Victorian courts and tribunals. Issues such as the stage of proceedings at which parties are and should be referred to ADR, and who should pay for these services, are canvassed in chapter 4 of this Discussion Paper.

3.1.2 Non-court ADR

There are also a range of ADR suppliers that operate outside the courts and tribunals in Victoria. This section provides an overview of these in both the public and private spheres. As discussed previously, ADR services have developed in a piecemeal manner and no clear picture exists of the full range of current ADR suppliers. The Committee acknowledges the recent contribution of the Department of Justice report Alternative Dispute Resolution Supplier Survey 2006 in relation to the information presented in this section.

i) Statutory ADR suppliers

A variety of statutory bodies offer ADR services to Victorians. They include Commissions such as the Health Services Commissioner and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Other initiatives include ADR for conflict arising from Workcover claims (Accident Compensation Conciliation Service) and conciliation services offered by Victoria Legal Aid. These bodies provide monetary remedies or a decision reversal (or both) but the ability to make legally binding decisions is generally limited. An exception to this are agreements reached through conciliation at VEOHRC, which may be registered with VCAT, whereupon they are taken to be a VCAT order and may be enforced accordingly.64

63 Magistrates’ Court Act 1989 (Vic) s 102. However, note that the Magistrates’ Court does not consider arbitration to be an ADR process: Department of Justice, Victoria, Alternative Dispute Resolution Supplier Survey 2006 (2007) 8.
64 Department of Justice, Victoria, above n 63, 11.
ii) Other public ADR providers

Publicly funded suppliers of ADR services cover a broad range of areas from consumer disputes (Consumer Affairs Victoria), to neighbourhood and workplace conflict (Dispute Settlement Centre Victoria). Public ADR suppliers generally provide free or low cost conciliation or mediation in addition to information and complaint handling services. Remedies include monetary awards or refunds, decision reversal and apologies. Agreements are not generally legally binding, although they can be formalised via a written contract. Many suppliers also lack the ability to enforce any agreements made.

iii) Industry ADR schemes

Victorians may have access to both Victorian industry schemes such as the Public Transport Ombudsman, and national schemes such as the Telecommunications Industry Ombudsman. These ADR schemes typically offer free information and complaint handling services for consumers in relation to the particular industry over which they have jurisdiction, as well as free mediation and/or conciliation to attempt to resolve disputes. While funding of industry ombudsman schemes is generally conceived of as private, the costs of the scheme are generally recovered across the consumers who use the services provided by the members of the industry scheme. Monetary remedies and decision reversals are commonly the potential outcomes offered by a scheme. Industry ADR schemes are unique in that decisions made by them are only binding on a consumer if the consumer accepts the decision. If the consumer does not accept the decision, they may pursue other remedies such as commencing litigation.

iv) Private ADR suppliers

There are several private suppliers of ADR who can provide services in a variety of settings, including court and tribunal connected ADR and ADR within and between private commercial organisations. These suppliers offer a range of services (often including ADR practitioner training and accreditation) on a user pays basis, although pro-bono assistance may also be available. Practitioners who can undertake conciliation, mediation and arbitration sessions can be sourced from organisations including the Law Institute of Victoria, the Victorian Bar Association, LEADR, the Australian Commercial Disputes Centre and the Institute of Arbitrators & Mediators Australia.

v) The complexity of the ADR supply landscape

It is clear that the current civil ADR supply landscape is diverse and complex. A number of ADR suppliers have jurisdictions restricted to one industry or dispute subject area (such as industry ADR schemes), as well as ADR suppliers who provide services for a broad range of matters (such as Dispute Settlement Centre Victoria). Suppliers also have many jurisdictional differences in terms of monetary and time

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66 Department of Justice, Victoria, above n 63, 10.
67 Field, above n 65, 57.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
limits. The ADR processes offered vary, as do the remedies available and the enforceability of any agreements or decisions. There have been concerns raised that the diverse range of ADR suppliers and their particular jurisdictions can be confusing for both consumers and suppliers. The complexity may result in ADR service gaps and duplication, as well as problems relating to consumers’ referral to and between ADR providers. This in turn may affect parties’ dispute outcomes and ability to access justice. These matters are dealt with further in chapters 4 and 5 of this paper.

Question 1: ADR provision in civil disputes
(a) Do you agree with the Committee’s identification of the services outlined in section 3.1 of this chapter as ‘ADR providers’ in the civil jurisdiction? If not, what attributes of a service or scheme do you believe make it an ADR provider?
(b) What do you consider to be the ADR service gaps and/or duplications in civil ADR supply in Victoria for:
   - Court and tribunal connected ADR?
   - publicly funded ADR suppliers?
   - privately funded ADR suppliers?

3.2 ADR use and users in civil disputes

Data about the use and users of ADR schemes is important to assist organisations that provide and fund these services to effectively and efficiently identify and target users, as well as to meet the needs and objectives of those utilising the service.

3.2.1 Use of civil ADR services

There is limited data about the extent to which ADR services are currently being used in Victoria, or the demographic profiles of users. A recent survey found that 35% of Victorians had at least one dispute with business, government, family, neighbours or associates in the previous 12 months. 69 Most of these disputes (65%) were resolved without assistance; however help from a third party was sought in around 15% of cases. The most common disputes related to electricity, gas, water or phone services or were family disputes. 70 External help from a third party was more likely to be sought in disputes that related to business and government rather than disputes involving family, neighbours or associates. 71

Data collected from Victorian ADR service providers shows that ADR processes are being extensively used by Victorians. In 2003-2006, 16 ADR providers handled over one million inquiries and complaints. This included:

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70 Ibid, 5-7.
71 Ibid.
• Consumer Affairs Victoria received 588,800 consumer contacts and 8,433 cases were mediated.
• The Dispute Settlement Centre Victoria received 13,923 contacts and 1,398 cases were mediated.
• 3,254 Magistrates’ Court cases were mediated.
• 1,500 Victorian Civil and Administrative Tribunal (VCAT) cases were mediated.72

There is limited data currently available on court referrals to and client use of ADR processes annexed to court proceedings. The Department of Justice has commenced a project to research the use and effectiveness of mediation in the Supreme and County Courts. A review of currently available data will be undertaken as part of this project and a system of information collection will be piloted. This project is due to be completed in April 2008 and will provide valuable information on the nature and extent of mediation in the higher courts.

3.2.2 Demographic profile of civil ADR users

NADRAC’s compendium of published ADR statistics shows that few agencies publish detailed statistical information about the demographics of parties using ADR.73 This information is generally only reported by agencies such as community mediation services and industry-based customer ADR schemes that identify accessibility as a key program goal. A mapping of ADR service users in New South Wales found that the majority of complainants were aged over 30, that distinction could not be made on gender (with women accessing some services more and men other services more) and a higher proportion of inquiries came from Indigenous people.74 The collection of data (such as age, gender, occupation, income, ethnic background) on those accessing services can help drive policies and programs aimed at increasing accessibility of services to particular groups. This issue is discussed further in chapter 6: ADR and marginalised communities.75

Question 2: Data collection for ADR in the civil jurisdiction
(a) Is there a need to improve data collection in relation to civil ADR use and users?
(b) What type of data would be useful? Why would this data be useful?
(c) How should the data collected be reported?
(d) Who should be responsible for the collection and reporting of data in relation to ADR use and users? In particular, is there a role for government and/or private ADR providers in this data collection and reporting? If so, why?

72 Department of Justice, Victoria, above n 63, 37-38.
75 National Alternative Dispute Resolution Advisory Council, above n 73, 24.
3.3 ADR in Victoria’s criminal justice setting: restorative justice practices

In Victoria’s criminal justice setting, restorative justice approaches are currently being utilised in the Children’s Court and Magistrates’ Court matters heard by the Neighbourhood Justice Centre. These examples of restorative justice practices are discussed below. Restorative justice is also used in a range of non-criminal settings such as educational facilities and workplaces, however the Committee is solely considering restorative justice in a criminal justice context as part of its Inquiry.

3.3.1 The Children’s Court

Victoria has a juvenile justice group conferencing program operating in the criminal division of the Children’s Courts, which commenced as a pilot in 1995. In November 2005 the program was enshrined in the Children, Youth and Families Act (Vic), which provides for the Children’s Courts to defer sentencing to allow a group conference to take place.76 Group conferencing projects have been operating in the Melbourne metropolitan area as well as some regional areas.77

The program is available for young people aged from 10 up to 18 years of age at the time of the commission of the offence.78 It operates as a voluntary pre-sentence diversionary intervention for offenders who have pleaded guilty to an offence and where the Court is considering imposing a sentence of probation or a youth supervision order.79 Offenders currently serving existing supervisory orders are excluded from the program, as are offenders who have committed sex offences, murder, manslaughter and other serious crimes of violence.80 If the offender has participated in a group conference and has agreed to the group conference outcome plan, the Court must impose a less severe sentence than it would have imposed had the youth not participated in the conference.81

Before the court makes a referral to the program it receives a suitability assessment from the Department of Human Services to ensure that the meeting between the victim and offender will be beneficial for both parties.82

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78 Children, Youth and Families Act 2005 (Vic) s 3, 415(1).
79 Bassett, above n 76, 3.
80 Children, Youth and Families Act 2005 (Vic) s 362(3).
81 Bassett, above n 76, 3.
82 Bassett, above n 76, 3.
3.3.2 The Neighbourhood Justice Centre (NJC)

Restorative justice for adult offenders has been incorporated into Victorian legislation for the first time with the Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic).

The Act establishes the NJC Court which will hear matters including:

- Magistrates’ Court matters
- Children’s Court Criminal Division matters
- some Victorian Civil and Administrative Tribunal matters, such as civil claims, residential tenancies and guardianship matters.

The NJC Magistrate hears criminal matters where the defendant lives in the City of Yarra. Civil matters are heard in a range of circumstances, including where the subject matter arose in the City of Yarra.

The NJC also houses on-site services such as mediation services (provided by Dispute Settlement Centre Victoria), legal aid, prosecution services, community corrections services, assessment services, victims services, referral to housing, drug and alcohol, employment and mental health services. These services can support and assist in the implementation of restorative justice practices.

Normally the Magistrates’ Court has the power to defer sentencing for up to 6 months for a defendant aged 18 years but under 25 years who is found guilty of an offence. Under the Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic), this deferral of sentencing power is extended to defendants appearing in the NJC Court who are aged 25 years or older. Restorative justice conferencing could occur for adult offenders under this provision.

The possible expansion of restorative practices in Victoria’s criminal justice setting is discussed in chapter 4 of this paper.

Question 3: Restorative justice program service provision
(a) Do you agree with the Committee’s identification of the services identified in section 3.3 of this chapter as ‘restorative justice’ providers? If not, what attributes of a service or scheme do you believe make it a ‘restorative justice’ provider?
(b) What are the restorative justice service gaps and/or duplications in the Victorian criminal court jurisdiction?

84 Ibid, 17.
85 Ibid, 14.
86 Sentencing Act 1991 (Vic) s 83A.
87 Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic) s 4Q(3).
88 Bassett, above n 76, 8.
3.4 The use and users of restorative justice practices

There is little data available in relation to the use and demographic profile of the users of restorative justice conferencing practices in Victoria or throughout Australia. This makes it difficult to evaluate the effectiveness of the sector and appropriately target potential users of these services.

Approximately 50% of young offenders will decline involvement in group conferencing, when mention is made of meeting the victim. This figure may indicate fear or discomfort on the offender’s part, which may in turn be related to the amount and type of information provided to potential conference participants about the process. This raises questions about whether and how restorative justice conferencing programs should try to increase participation rates among young offenders who are found to be suitable for referral to them.

Although restorative justice programs are increasingly an option for adult offenders, it remains mainly young people who are referred to and use them. Jesuit Social Services estimate that if group conferencing programs were expanded to include those aged up to 25 years, the number of referrals to these programs would not exceed 200 state-wide annually. This is discussed further in chapter 4 of this Discussion Paper. In the Victorian’s Children’s Court, the most recent data located came from an evaluation of the juvenile justice group conferencing pilot program in 1997. This noted that a high proportion of young offenders participating in group conferences were of an Anglo-Saxon background, and identified the need for the development of strategies by the Court to respond to the needs of Indigenous and culturally and linguistically diverse communities who may not be referred in proportionately high numbers to conferencing. These matters are canvassed in chapter 6 of this Discussion Paper. The Committee has identified a need for up-to-date data that captures these matters as well as the gender, previous offences and sentences of offenders. Current data on the demographic profile of victims would also be useful in increasing the effectiveness of conferencing programs.

Question 4: Data collection for restorative justice programs

(a) Is there a need to improve data collection in relation to the use and users of restorative justice practices?
(b) What type of data would be useful? Why would this data be useful?
(c) How should the data collected be reported?
(d) Who should be responsible for the collection and reporting of data in relation to restorative justice use and users? In particular, is there a role for government in this data collection and reporting? If so, why?

40 Ibid, 15.
41 Anne Markiewicz, Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program Phase Two (1997) IX.

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40 Ibid, 15.
41 Anne Markiewicz, Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program Phase Two (1997) IX.
4. ADR and access to justice

4.1 Introduction

This chapter considers the extent to which the availability and use of ADR mechanisms improve access to justice. Accessibility is one of the core values underpinning the Victorian Attorney-General’s Justice Statement. The Justice Statement states that ‘the justice system should provide appropriate access to people regardless of their means, and a range of processes which are appropriate to the issues to be resolved.’

Key factors enabling individuals to access justice are:

- ability to identify a legal need
- ability to obtain assistance, advice and support (including legal representation)
- ability to participate effectively in dispute resolution processes
- ability of all individuals to access mechanisms to protect legal rights equally, regardless of factors such as socio-economic status or place of residence.

This chapter first discusses a number of issues in relation to access to justice in relation to civil disputes and then considers how restorative justice practices provide access to justice in relation to criminal offences.

4.2 Access to justice in civil disputes

As has been noted earlier, one of the factors driving the development of ADR processes has been the inability of existing legal mechanisms to provide access to justice for many members of the community. Factors such as cost, delay, complexity and formality, frequently deter individuals from initiating formal legal action. Astor and Chinkin observe that ADR has its foundations in notions of ‘community participation and empowerment.’

Increasing access to justice is a powerful mechanism through which this empowerment can occur. This section considers a number of factors in relation to ADR processes that can be seen as increasing access to justice. It then identifies a number of potential barriers to access to justice created by ADR processes.

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[95] Department of Justice, above n 93, 69.
[98] Schetzer et al, above n 94, 8.
4.2.1 ADR: increasing access to justice

This section discusses a number of factors in relation to ADR processes that affect access to justice, namely:

- service diversity
- the diversity of mechanisms for making a complaint
- other service features affecting access
- cost and time savings
- consumer awareness and understanding of ADR
- consumer understanding of how to access ADR
- increasing knowledge and awareness of ADR among key stakeholders in the formal justice system
- mandatory referral and participation in ADR
- online ADR.

i) Service diversity

As has been noted earlier in this Discussion Paper, a diverse variety of ADR services and providers exist in Victoria. These range from court-annexed ADR processes, to public ADR services and industry-funded dispute resolution schemes. The diversity of ADR services available means that individuals are provided with a range of mechanisms by which to resolve a dispute, thus potentially increasing access to justice. This range of services may provide an inexpensive, fast and simple alternative to formal litigation for a party with a dispute.100 The Department of Justice’s recent survey of ADR suppliers found that the range of ADR services offered in Victoria includes information, complaint handling, mediation, conciliation and arbitration.101 Access to some ADR services may be limited by the types of disputes over which they have jurisdiction or by monetary or time limits.102

The diversity of the current ADR service system means that it may have the potential to specifically target services at particular groups in the community. This is discussed further in chapter 6, ADR and marginalised communities.

It must also be noted that a diverse ADR service system has a number of disadvantages. There may be consumer confusion about the appropriate service provider to access in relation to a particular dispute and even confusion among the service sector about the appropriate provider to whom disputes should be referred. These issues are discussed further in section 4.2.1(v) below, which focuses on community understanding of how to access ADR services. In addition, there is a broader policy issue that providing a diverse service system may in fact inappropriately extend the reach of ADR. For example, publicly funded ADR mechanisms may be used as an alternative to private negotiation.103 The limited

availability of data on ADR use and users, as identified earlier in this Discussion Paper, means that it is very difficult to assess whether ADR is currently being appropriately utilised in Victoria.

Question 5: ADR service diversity
(a) Does the current diversity of ADR providers in Victoria increase access to justice? If so, how?
(b) What issues are associated with a diversity of ADR service providers? How can these issues be addressed?

ii) Diversity of mechanisms for making a complaint
The Department of Justice’s survey of ADR suppliers found that ADR providers in Victoria have a flexible approach to receiving inquiries, with most providers accepting both complaints and inquiries by phone, email, letter or in person.104 Providing information in a range of ways and accepting complaints and claims in a variety of forms can be seen as increasing access to justice, as different individuals have different communication preferences. This issue is particularly important for some members of marginalised groups such as Indigenous or elderly users and is discussed in more detail in chapter 6, ADR and marginalised communities.

Question 6: Mechanisms for making a complaint
How should parties be able to make a complaint or lodge a claim with ADR service providers?

iii) Other service features that may affect access
There are a range of other features of ADR service providers that may increase access to justice. These include location, hours of operation, the availability of interpreters, informality and the physical environment of the service.105 These issues are discussed in more detail in chapter 6, ADR and marginalised communities.

In addition, parties may be more willing to access a service that they perceive as impartial. Victorian ADR service providers utilise a range of mechanisms to ensure that their service is widely perceived as being impartial. This includes training practitioners, permitting parties to select their own mediators, providing a right of review and using client feedback surveys.106

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104 Department of Justice, Victoria, above n 101, 6.
106 Department of Justice, Victoria, above n 101, 2.
iv) Cost and time savings

ADR improves access to justice in some cases by providing fast and inexpensive dispute resolution mechanisms. The Federal Attorney-General stated that people ‘often find ADR to be the most cost effective, timely and least stressful way to resolve their dispute. In this way, Australians can enjoy greater access to justice.’107

Concerns about the cost of litigation is commonly viewed as a major barrier to accessing advice and remedies through the formal justice system.108 While user-pays systems are increasingly being utilised in relation to a wide range of public services, ADR mechanisms in civil disputes in Victoria are generally provided at no cost to clients.109 A survey of Victorian ADR service providers found that none of the 18 suppliers charged directly for their services, although the Magistrates’ Court and VCAT charge filing fees and clients assisted by the Victorian Small Business Commissioner are charged a mediator’s fee.110 The survey found some support amongst stakeholders for user charges, however other stakeholders opposed the charging of fees on the basis that it potentially creates a barrier to access for some clients.111 User charges for mediation have been imposed in some jurisdictions, for example in South Australia in relation to retail and commercial leases.112

Even without user charges for mediation, there is evidence that disputes have significant costs for many Victorians. The cost of attempting to resolve disputes with business, government, family, neighbourhood and the community in the previous 12 months was estimated to be $2.7 billion, including time spent, out of pocket expenses, legal advice and other expert advice.113 The average cost to the disputant of resolving a consumer dispute with business or government was $1,152, with an average cost of $2,010 for resolution of disputes with family, neighbourhood or the community.114

108 Astor and Chinkin, above n 99, 53.
110 Department of Justice, Victoria, above n 101, 1.
114 Ibid, 39.

Question 7: Other service features affecting access to justice
(a) What features of ADR services offer the potential to increase access to justice?
(b) To what extent are current ADR providers in Victoria incorporating these features in service design?
(c) What are the current gaps in relation to ADR services providing access to justice and how can these be filled?

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108 Astor and Chinkin, above n 99, 53.
110 Department of Justice, Victoria, above n 101, 1.
114 Ibid, 39.
The time taken to resolve disputes also contributes to the cost of resolving a dispute. Individuals also spend significant amounts of time resolving disputes. A recent survey found that Victorians spent an average of 24 hours on resolving each dispute with family, neighbourhood or the community and 14 hours resolving disputes with government or business.\textsuperscript{115} The Department of Justice’s survey of Victorian ADR suppliers found that ADR in Victoria offers a quick way of dealing with many disputes. For example, issues referred to Consumer Affairs Victoria are usually resolved within 30 business days, those referred to the Dispute Settlement Centre are resolved within 40 calendar days and disputes referred to the Banking and Financial Services Ombudsman are resolved within 58 calendar days.\textsuperscript{116} While it is not possible to determine how long these disputes would have taken to resolve if they had not been settled by ADR, evidence suggests that it would be significantly longer: in the Magistrates’ Court, matters settled by ADR take on average eight weeks, while those disputes not settled, take up to 26 weeks.\textsuperscript{117}

Reducing the amount of time taken to resolve a dispute can be seen as increasing access to justice in a number of ways. The emotional cost of disputes has been found to be significant and reducing the time taken to resolve a dispute will reduce its emotional toll.\textsuperscript{118} In addition, the early resolution of disputes potentially reduces the escalation of the dispute and may reduce stress, fear or violence associated with a dispute.\textsuperscript{119} The knowledge that a dispute will be resolved quickly may encourage people to take action to address a dispute that they might otherwise decide to leave unresolved.

The Victorian Law Reform Commission has concluded that there is the potential to reduce the cost and time taken to resolve civil disputes that are litigated.\textsuperscript{116} There may also be the potential to decrease the amount of time disputes take to be resolved through ADR processes.

It is important to acknowledge that ADR mechanisms may not always result in cost and time savings. If agreement is not reached, or if an agreement made at ADR is later breached, then recourse to the formal justice system may still be required. In such circumstances, the preliminary ADR proceedings may be viewed as adding to the cost and delay of the matter.\textsuperscript{117} This issue and further issues in relation to how ADR proceedings impact on costs for both individuals and the courts are discussed in more detail the next chapter, \textit{Measuring the outcomes of ADR.}

\textsuperscript{115} Ibid, 40.
\textsuperscript{116} Department of Justice, Victoria, above n 101, 39.
\textsuperscript{117} Ibid.
\textsuperscript{118} Peacock et al, above n 113, 41.
\textsuperscript{119} Field, above n 111, 81.
\textsuperscript{122} Ibid, 40.
\textsuperscript{123} Department of Justice, Victoria, above n 101, 39.
\textsuperscript{124} Ibid.
\textsuperscript{125} Peacock et al, above n 113, 41.
\textsuperscript{126} Field, above n 111, 81.
v) Consumer understanding and awareness of ADR

While there are a range of ADR services available in Victoria, there is limited consumer awareness and understanding of both ADR processes and the organisations that provide them. Lack of consumer awareness has been identified as a significant barrier to accessing appropriate ADR processes.123 Those with a dispute that has the potential to be resolved by ADR may opt to pursue litigation or leave a dispute unresolved if they have limited understanding of ADR processes.124 Many consumers are confused by the different types of ADR services available and thus there is a risk that they will not approach the appropriate agency when seeking to resolve disputes.124 As stated by the Department of Justice:

the better informed disputants are about the suitability of ADR, the more likely that they will express preferences that align with their actual needs for ADR, thus leading to efficiency improvements in the market for civil justice.125

The Victorian Perceptions of Justice Survey conducted in 2006 found that 51% of respondents were aware of agencies able to assist in resolving disputes before they ended up in court.126 Another recent survey of Victorian consumers revealed that there was relatively high recognition of some dispute resolution services such as Consumer Affairs Victoria, the Victorian Equal Opportunity and Human Rights Commission and the Ombudsman Victoria.127 Low levels of awareness were found in relation to some other organisations.

The New South Wales Law Reform Commission has stated that there is a need for the public to be provided with information about the range of available dispute options and the qualification of ADR practitioners.128 The Commission identified that government, as a key provider of ADR services, has a duty to provide information about ADR services to the public and proposed a publicly available database of ADR

122 Field, above n 111, 80; Partington, above n 121, 105.
124 Field, above n 111, 81.
125 Ibid.
127 Peacock et al, above n 113, 10.
services. No such database has been established, although a central dispute resolution website has been set up by a number of key stakeholders in Victoria. This is discussed further below.

Victorian ADR providers currently promote their services in a variety of ways, in particular through websites, brochures, links on other agency’s websites, print media advertising, community outreach and education programs. A number of agencies also conduct assessment of public awareness of their services through surveys, although few utilise independent audits. In addition, to increase awareness of services, Victorian ADR providers currently provide material in a range of community languages and provide outreach to some marginalised groups. These activities are discussed further in chapter 6, ADR and marginalised communities.

Measures that aim to increase awareness of ADR services need to be cognisant of research that shows that, for most people, the first step in finding a service to assist in resolving a dispute is to ask family or friends. Other common approaches are to look on the internet or in the telephone directory. In addition, people report that they are likely to ask a legal advisor, local government or a government department for advice and referral in relation to a dispute. Thus there is the need to widely disseminate information about ADR processes and services.

A recent report prepared for the Department of Justice stated that there was the potential for the government to play a greater role in increasing awareness of ADR programs, working with ADR providers to develop best practice marketing programs that are both market-tested and evaluated. This may be more efficient than each provider producing its own material. As part of any such program, there may be the need to focus on the needs of specific groups such as young people, CALD community members and indigenous Victorians. This discussed further in chapter 6, ADR and marginalised communities.

It should be noted that the promotion of ADR services is potentially problematic in that promotion may result in increased demand for services, which may increase the burden on ADR providers, particularly if the demand is from individuals with higher needs or those with more complex disputes.

**Question 9: Increasing consumer awareness and understanding of ADR**

Is there a need to better promote ADR providers and services? If so, how should this be done, for example, by individual services or by government? What kind of promotional material is required and at whom should it be targeted?

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vi) Consumer understanding of how to access ADR

In addition to being aware of ADR services, it is important that consumers know how to access the appropriate kind of services when they have a dispute. Limited data is available on how clients are referred to ADR services. A recent survey of ADR providers reported high levels of referral from other service providers, community legal centres, government departments and welfare agencies. While the survey found the number of self-referrals to these services to be low, the Dispute Settlement Centre Victoria has reported an increasing number of self-referrals, particularly from clients who had accessed information on the internet. It may be useful for ADR providers to collect information on how service users found out about their services. This could assist in targeting promotional material to individuals and organisations that are regularly approached for information and advice about resolving disputes.

As noted above, it has been suggested that the current myriad of ADR services and service providers is potentially confusing for consumers, particularly for some groups such as those with limited education, cognitive disabilities or from culturally and linguistically diverse backgrounds. This discussed further in chapter 6, ADR and marginalised communities. Some ADR providers report that they receive many queries that are outside their jurisdiction and require referral to an appropriate dispute resolution body. This creates the potential for ‘referral loss,’ with consumers failing to follow up a referral. It is difficult to establish the extent to which referral loss is an issue, as many agencies do not follow up referrals to determine whether the client had actually accessed the service to which they were referred. Having considered this issue, a recent Department of Justice report identified a need for better data to be collected on referrals and a more coordinated approach to be adopted in relation to referrals.

A central access point to ADR services?

To increase the accessibility of ADR services and to reduce referral loss, a central access point or gateway, such as a telephone number and/or website has been suggested. Such an approach is supported by many Victorian stakeholders and offers many potential benefits. Firstly, despite evidence that the overwhelming proportion of Victorians with a dispute resolve the matter themselves, many ADR service providers report that a significant number of individuals who approach them for assistance in resolving a dispute have not actually spoken to the other party about their queries that are outside their jurisdiction and require referral to an appropriate dispute resolution body. This creates the potential for ‘referral loss,’ with consumers failing to follow up a referral. It is difficult to establish the extent to which referral loss is an issue, as many agencies do not follow up referrals to determine whether the client had actually accessed the service to which they were referred. Having considered this issue, a recent Department of Justice report identified a need for better data to be collected on referrals and a more coordinated approach to be adopted in relation to referrals.

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the issue or made any effort to resolve the dispute themselves.\textsuperscript{145} This suggests that some Victorians lack the capacity and/or confidence to attempt to resolve the dispute themselves. A central dispute resolution access point could provide information, advice and support for Victorians attempting to resolve disputes themselves and has the potential to reduce reliance on formal ADR mechanisms. Secondly, ensuring that consumers are initially referred to the correct agency may reduce referral loss. This may assist to ensure that disputes are resolved, rather than individuals just tolerating a problem, which may have negative emotional and financial impacts. In addition, a central access point offers the potential to reduce the burden on ADR service providers who currently report spending significant amounts of time referring disputes to other agencies.\textsuperscript{146}

Central access points already exist at a national level in relation to both financial services disputes\textsuperscript{147} and family relationship disputes.\textsuperscript{148} In Victoria, Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal have recently launched an online dispute resolution website which provides information about a range of strategies for resolving common disputes such as fencing and landlord/tenant disputes.\textsuperscript{149} The website provides information about how consumers can resolve issues themselves - with a particular emphasis on communication techniques - and provides advice about where to seek assistance if they are unable to resolve the dispute themselves. Such a website has the potential to be expanded to form a central access point for ADR services in Victoria and/or nationally.

However, a recent Department of Justice report, while recognising the potential efficiency and effectiveness of a central gateway to ADR services, concluded that:

there are so many different areas of endeavour to which ADR now applies, combined with multiple levels of government and regulatory responsibility, as well as a mix of both private and public funding, that the task of creating a sole access point may not be feasible (or, indeed, desirable).\textsuperscript{150}

\textsuperscript{145} Department of Justice, Victoria, above n 143.
\textsuperscript{146} Ibid.
\textsuperscript{150} Field, above n 111, 82.
vii) Increasing knowledge and awareness of ADR among stakeholders in the formal justice system

In addition to the general community having a knowledge of ADR services and processes, it is also important for other key players, particularly those involved in the formal justice system, to be aware of ADR processes and services and be able to make referrals where appropriate. This includes legal representatives and court personnel, including registrars and the judiciary. NADRAC has observed that ‘it is well recognised that without encouragement or even compulsion, few litigants and their lawyers will use ADR.’151

**Referral to ADR by legal advisors**

Many people with a legal issue or dispute first seek advice from a legal advisor. As stated by Sourdin:

> Clients expect lawyers to be informed about ADR processes. Clients expect lawyers to be able to give advice about managing and avoiding disputes, not just “fighting” them.152

Thus it is important that legal advisors have a working understanding of ADR processes and providers, and are able to provide their client with advice about the suitability of their case for ADR. The Victorian Law Reform Commission has recently recommended that lawyers should be better educated about ADR options and the suitability of particular disputes for ADR.154 Legal advisors who have an effective understanding of ADR processes and its benefits will be in a better position to refer appropriate cases to ADR.

Recent changes to the *Family Law Act 1975* (Cth) aim to ensure increased referral to ADR processes, and make referral compulsory in some instances. The Act requires family dispute resolution practitioners (including legal practitioners) who deal with a person considering instituting proceedings for divorce or in relation to their children or finances, to provide them with information about available family counselling and

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151 Mack, above n 123, 47.
153 Department of Constitutional Affairs, United Kingdom, above n 135, [5.2].
154 Victorian Law Reform Commission, above n 120, 29.
family dispute resolution services. Where there is a dispute over parenting issues, the matter cannot proceed to court unless a certificate about attendance at family dispute resolution is filed.

The Victorian Law Reform Commission has recently proposed the introduction of pre-action protocols to set out the behaviour that parties should demonstrate when there is a prospect of litigation. The protocols would include a requirement that parties endeavour to resolve the dispute without litigation. The Commission proposes that courts could be able to take unreasonable failure to comply with pre-action protocols into account, for example in determining costs.

In matters that proceed to litigation, the Victorian Law Reform Commission has recommended that overriding obligations should be imposed on participants, including parties and lawyers, to clarify obligations and duties in civil proceedings. The Commission has proposed that these overriding obligations should include an obligation to:

- use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes.

In cases where the dispute is unable to be resolved by agreement, the Commission recommends an obligation that reasonable efforts should be made to narrow the dispute, by resolving as many issues as possible by agreement. The Commission proposes that there be sanctions for non-compliance with these obligations.

Question 11: Referral to ADR by legal advisors

(a) Do legal advisors currently have sufficient understanding of ADR processes and utilise/refer to these appropriately?

(b) What is the best way to ensure that ADR services and processes are well understood by legal advisors?

(c) How can we increase the capacity of legal advisors to refer appropriate cases to ADR? For example, by education or by statutory obligation.

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155 Family Law Act 1975 (Cth) s 12E imposes this obligation specifically on legal practitioners.
156 Family Law Act 1975 (Cth) s 60I.
157 Victorian Law Reform Commission, above n 120, 18.
158 Ibid, 19.
159 Ibid, 5.
160 Ibid, 9.
161 Ibid, 10.
162 Ibid, 11.

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156 Family Law Act 1975 (Cth) s 60I.
157 Victorian Law Reform Commission, above n 120, 18.
158 Ibid, 19.
159 Ibid, 5.
160 Ibid, 9.
161 Ibid, 10.
162 Ibid, 11.
Referral to ADR by courts

The courts may also be well-placed to ensure that appropriate cases are resolved using ADR rather than litigation. The Federal Civil Justice Strategy Paper states:

Given that litigants may not be aware of the alternatives to litigation, the courts can play an important role in encouraging, and providing information, on ADR methods.163

As has been noted earlier, there is currently widespread use of ADR processes as part of the court system, with judges and other court staff having the ability to refer cases to ADR.164 In general, the legislation and court rules which provide the authority for court referral of matters to ADR offer little guidance to courts about appropriate referral of disputes to ADR.165

The Victorian Law Reform Commission has recently recommended that an increased variety of ADR options should be available and that courts should make greater use of these. In particular, the Commission has suggested that courts should appoint a dedicated person ‘with responsibility to recommend suitable forms of ADR and to provide assistance to parties in arranging ADR providers and facilities.’166

A number of possible barriers have been identified in referring disputes from courts to ADR. These include: lack of judicial understanding and awareness of ADR processes, lack of confidence in the quality of ADR services (for example, variable qualifications of providers), and concerns that if mediation is unsuccessful, this will add to the cost and delay of a court matter.167

In 2002, the Magistrates’ Court introduced a pilot program to refer appropriate intervention order applications to mediation at the Dispute Settlement Centre Victoria. An independent evaluation of the pilot found that the program had been successful. Key factors identified as contributing to the program’s success were:

- a comprehensive promotion strategy which raised awareness of the project among magistrates, key staff and other relevant stakeholders such as police168
- the development of clear guidelines and procedures for referral169
- providing senior court staff with reports on the outcomes of mediation.170

The evaluation found that the major barrier faced by court staff referring matters to mediation was the difficulty in convincing clients with suitable cases to consider mediation.171 This issue has also been identified in other jurisdictions and may arise for a number of reasons, including lack of understanding of and/or confidence in the ADR process and the client wanting to have their day in court. The provision of an in-house court ADR service has been suggested as one way of increasing consumer acceptance of ADR processes as it would derive credibility from relying on the

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163 Attorney-General’s Department, Commonwealth, above n 100, 145.
164 Mack, above n 123, 7.
165 Ibid.
166 Victorian Law Reform Commission, above n 120, 32.
167 Partington, above n 121, 104.
169 Ibid.
170 Conley Tyler and Bornstein, above n 168, 59.
171 Ibid, 56.
court’s reputation for providing impartial justice. However, the Victorian Law Reform Commission has recommended that mediation be conducted by judges and court staff only in limited circumstances. Instead the Commission recommends that courts should maintain a register of qualified ADR practitioners.

Having guidelines for referral of cases to ADR is important in ensuring consistency. While recognising the importance of each court or tribunal developing its own referral criteria, NADRAC states that factors that influence whether matter should be referred to ADR include:

- parties’ ability to participate. This may be influenced by factors such as fear of violence or cogitative disability.
- relative costs and benefits of ADR and litigation
- cultural factors
- the need for flexible processes and outcomes
- the public interest, which may require a public, authoritative determination.

These factors are discussed further in chapter 6, ADR and marginalised communities.

### Question 12: Court referral to ADR

(a) Should there be greater referral of matters from courts to ADR? If so, how do we increase court referral to ADR? For example, should a program based on the Magistrates’ Court intervention order pilot be rolled out more broadly?

(b) What type of disputes are most suitable for court referral to ADR? Should there be referral guidelines? If so, what should be included in the guidelines?

(c) Should courts refer matters to an in-house ADR process (for example, judicial mediation) or to an external provider?

(d) What are the barriers to greater referral of matters from courts to ADR? How can these be overcome?

#### viii) Mandatory referral to ADR

In some cases participants may be compelled to participate in ADR processes. This can happen at two stages. Firstly, participation in ADR may be a prerequisite for a court to hear a case. This may be provided in legislation or court rules for example in the *Family Law Act 1975* (Cth) or in a private contract between two parties. Alternatively, once court action is commenced, a judicial officer may have the power to refer a matter to ADR, without the parties’ consent. For example, in Victoria both

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172 Mack, above n 123, 43.
173 Victorian Law Reform Commission, above n 120, 29.
174 Ibid, 32.
175 Ibid, n 123, 8.
176 Ibid, 4.
177 *Family Law Act 1975* (Cth) s 60H(7).
the Supreme Court and Magistrates’ Court have this power. In some cases, there may be sanctions for non-participation in mandatory ADR proceedings.

It has been argued that mandatory referral to ADR is contrary to the philosophical underpinnings of ADR, and may in fact be a breach of human rights, however there is no clear evidence that mandatory referral affects the outcomes of ADR or client satisfaction with the process. There is also little evidence that those who receive a compulsory referral opt out of the process if given a choice.

NADRAC has argued that a standard practice of referring cases to ADR may lead to increased acceptance of ADR programs. A Department of Justice report recently concluded that there may be merit in further consideration of mandatory pre-litigation referral of civil matters to ADR. The Victorian Law Reform Commission has also recently supported referral to ADR processes without party consent. However, noting human rights concerns about referral to processes which have a binding outcome, the Commission recommends compulsory referral to ADR processes where agreement is reached by consent of the parties.

**Question 13: Mandatory referral to ADR**

(a) **Should there be greater mandatory referral of cases from court to ADR? If so, in what circumstances is mandatory referral appropriate?**

(b) **At what stage should cases be referred to mandatory ADR, for example, pre-litigation (as a condition of commencing action) or post-filing?**

(c) **Should there be sanctions associated with non-participation in mandatory ADR? If so, what sanctions are appropriate?**

ix) **Online ADR**

Information technology is increasingly being used to provide a broad range of services, including ADR. As was noted earlier, the internet is one of the most common ports of call for Victorians seeking information about resolving disputes. It is likely that the internet will increasingly be used as the first step in seeking information about resolving a dispute.

NADRAC has argued that a standard practice of referring cases to ADR may lead to increased acceptance of ADR programs. A Department of Justice report recently concluded that there may be merit in further consideration of mandatory pre-litigation referral of civil matters to ADR. The Victorian Law Reform Commission has also recently supported referral to ADR processes without party consent. However, noting human rights concerns about referral to processes which have a binding outcome, the Commission recommends compulsory referral to ADR processes where agreement is reached by consent of the parties.

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A range of online ADR services are available, such as complaint handling, mediation and facilitated negotiation.\textsuperscript{191} While most online ADR processes have focused around commercial disputes such as insurance claims, some ADR providers in Victoria have established online services.\textsuperscript{192} As previously mentioned, Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal have recently launched an online dispute resolution site which provides information about a range of strategies for resolving common disputes such as fencing and landlord/tenant disputes.\textsuperscript{193}

Online ADR services provide a range of benefits including the fact that they can be accessed anywhere (including in remote locations), they allow large amounts of written information to be transmitted, they allow communications 24 hours per day, they enable expert contribution even when the experts are located elsewhere and written communications allow for careful consideration of responses.\textsuperscript{194} Conley Tyler and Bretherton note that online services improve access to justice by ‘mitigating disadvantages such as geographic isolation, confinement or imprisonment, disability, threat of physical violence, shyness in face-to-face settings and socio-economic status cues. In addition, online methods may also increase access to ADR services for people with a range of disabilities including mobility, vision and hearing impairments.\textsuperscript{195}

However, there are also a number of issues associated with online ADR. Electronic communication techniques are predominantly text-based at present and, as well as favouring those who are more proficient in writing, may give rise to misunderstandings and miscommunications because there are none of the usual non-verbal cues of face-to-face interactions.\textsuperscript{196} It has been noted that many consumers prefer services to be provided in person and that those for whom online services have been most heavily advocated, such as people living in rural and regional areas, may have an even greater preference for face-to-face service provision.\textsuperscript{197}

It is important to note that online ADR has the danger of further compounding the exclusion of some groups. Service providers must recognise that some people may not have access to appropriate infrastructure and/or the skills or confidence to access material electronically.\textsuperscript{198} Further, some may be prevented by disability from accessing this information. NADRAC has noted that while internet usage is increasing among all segments of society ‘it is increasing most rapidly amongst more advantaged groups, especially industrial nations, urban, middle class, able bodied

\begin{footnotesize}
\begin{enumerate}
\item Ibid. 6.
\item Conley Tyler and Bretherton, above n 191, 9.
\item Attorney-General’s Department, Commonwealth, above n 100, 185.
\item Conley Tyler and Bretherton, above n 191, 9.
\item National Alternative Dispute Resolution Advisory Council, above n 194, 12.
\item Conley Tyler and Bretherton, above n 191, 9.
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NADRAC has emphasised that, in providing online services, the emphasis should be on replacing traditional methods of service and information delivery. Further, NADRAC has emphasised that, in providing online services, the emphasis should be on the needs and capacity of users, rather than the needs of the service provider.\(^{203}\)

The Federal Civil Justice Strategy Paper noted the danger of the 'digital divide' and concluded that communication technology should be used to supplement, rather than replace traditional methods of service and information delivery. Further, NADRAC has emphasised that, in providing online services, the emphasis should be on the needs and capacity of users, rather than the needs of the service provider.\(^{203}\)

Thus there is a danger of creating a two-tiered justice system in relation to civil disputes, where those with sufficient wealth and support access the formal justice system to resolve their issues in the courts, while individuals of limited means or well-educated, literate and computer literate.\(^{200}\) This is consistent with research that found that those reporting that they were most likely to use online ADR services were those who were already regular internet users.\(^{201}\)

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4.2.2 ADR: barriers to accessing justice

While ADR processes have the potential to increase access to justice, there is also concern that some ADR processes may in fact limit access to justice in some instances. This section identifies a number of potential barriers to access to justice created by ADR processes, namely:

- limiting access to the courts
- non-suitability of ADR processes to some disputes
- power imbalances
- confidentiality of proceedings.

i) Limiting access to the courts

While the use of ADR has the potential to substantially increase access to justice, it is important to note that the increased use of ADR procedures may in fact decrease access to the formal court system for some groups in the community.\(^{206}\) For example, people of limited financial means may have no option but to mediate a dispute. Astor and Chinkin note that it is not uncommon for those seeking legal aid to be referred to ADR and state that ‘the ideological vision of access to justice for all, rather than for those with the money to afford it, is well and truly in retreat.’\(^{205}\)

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power are forced to mediate their disputes. It may therefore be relevant to consider the types of cases that are being referred to ADR and to examine the reasons for referral to ensure that referrals are based on the suitability of the dispute for ADR rather than the availability of funds (both individual and institutional).207

**Question 15: ADR and access to the courts**

*Is there a real danger that increased use of ADR processes could decrease access to the courts for some groups in the community? If so, which groups are particularly at risk? How can this problem be overcome?*

**ii) Power imbalances**

ADR processes often assume that parties have equal power. However, power imbalances may exist in ADR in the same way they are present in formal court proceedings. In fact, power inequalities may be even greater in ADR processes because many of the checks and balances provided by litigation processes, such as legal representation and evidence rules, are not present. Examples of power imbalances that may be present in ADR proceedings include:

- Parents may feel that they do not have any power compared to child protection agencies.212
- A representative of a financial institution who regularly appears in ADR proceedings is likely to understand proceedings better and feel more comfortable than a customer participating in ADR for the first time.213
- Women negotiating property settlements may lack information and financial resources, compared to men. They may also be disadvantaged by their communication style, which may be less assertive than their partner’s style.212
- A person with a cognitive disability may be at a disadvantage in ADR proceedings with a service provider.213

A number of mechanisms have been identified to address potential power imbalances between parties involved in ADR processes. These include providing assistance with processes and procedures such as completing forms, creating ground rules, pre-screening to identify clients with special needs, providing interpreting services, providing support to people and ensuring that meeting environments and processes minimise power imbalances (for example providing informal meeting rooms that are free from distraction, explaining all processes and having frequent breaks).214 In particular, training ADR conveners to recognise potential power imbalances has been...
identified as important.215 Identifying and redressing a potential power imbalance requires a consideration of the entire person including culture, gender, ethnicity, age, socio-economic status and education level.216 However, in attempting to address a power imbalance between the parties, the convener must ensure that their neutrality and perception of their neutrality is not compromised.217 A co-mediation model, with two mediators assigned to each case is commonly used by some service providers. This enables parties and mediators to be matched on a range of criteria, including cultural background, age and gender.218 The presence of two mediators may also help preserve the perception of neutrality.

A survey of Victorian ADR service providers found that ADR service providers are aware of the potential for power imbalances in ADR proceedings and utilise a wide range of processes to address this issue, including those outlined above.219

### Question 16: Power imbalances

What potential power imbalances exist in ADR processes? How can these be addressed?

#### iii) Non-suitability of ADR processes to some disputes

While ADR has many benefits, it may not be an appropriate process for all disputes or all parties. For example, in considering whether an ADR process is suitable for people with a disability, Altamore argues that consideration needs to be given to:

- the capacities and attitudes of the parties;
- the nature of the dispute; and
- whether the person’s interests can be protected.220

There is considerable debate about the applicability of ADR to family violence disputes. It has been argued that ADR in such cases can take place in a manner similar to victim-offender mediation in a restorative justice model, an approach which is discussed further in chapter 6, *ADR and marginalised communities.*221 However, there are concerns that the power imbalance and the victim’s fear may be so great in these situations that the presence of a mediator may not adequately address the imbalance.222

Having considered the issue of domestic violence in detail, the New South Wales Law Reform Commission concluded that a number of factors should be taken into account in determining whether a dispute is suitable for ADR, including:

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215 Leigh, above n 212, 60.
219 Department of Justice, Victoria above n 101, 23.
220 Altamore, above n 217, 48.
222 Ibid, 66.
iv) Confidentiality of ADR processes and outcomes

The confidentiality of the ADR process is attractive to many participants because it protects their privacy, allowing full and frank disclosure of sensitive information that may assist in meaningfully working through the dispute. However, it has been observed that the confidential nature of ADR proceedings mean that there is no public scrutiny of the fairness of the outcomes and the appropriateness of the power exercised by any third party involved in the process. This may be an issue, particularly when there may be a perceived power imbalance between the two parties, for example an Indigenous service user and a service provider. In addition, concerns have been raised that there is a risk that powerful parties may use ADR procedures to settle matters confidentially, thus avoiding court proceedings and the potential for precedents to be set and the ‘floodgates to be opened’.

At a broader social level, the confidentiality of ADR processes has been criticised as limiting access to information about issues relating to rights and entitlements that are relevant to the community as a whole. Altamore, writing in the context of discrimination related to disability, argues that:

the private and confidential nature of settlements relating to discrimination matters reached through ADR processes can seriously impede group empowerment and systemic change … Dealing privately with an individual situation of discrimination does not address the fundamental systemic problems. The outcome of conciliation cannot be used to demonstrate the possibility of success or the level of settlement or to encourage others to negotiate or make complaints about discrimination. Media attention on a conflict may

Question 17: Non-suitability of ADR processes to some disputes

(a) Is ADR suitable for all parties? What factors should be taken into account in determining whether ADR is appropriate for particular parties?

(b) Are there some disputes for which ADR processes are not suitable? If so, which disputes? How can we ensure that these disputes are not referred to ADR processes?

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be sacrificed, legal precedent not set and community standards about appropriate treatment of people with disabilities not re-enforced.232

Such concerns may at least partly be addressed by the publication of generic complaint outcomes, for example, as currently reported by the Victorian Equal Opportunity and Human Rights Commission.228

The confidentiality of ADR processes is discussed further in chapter 7, Regulation of ADR.

**Question 18: Confidentiality of ADR process and outcomes**

(a) Does the confidentiality of ADR processes and outcomes create issues? If so, how can these be addressed?

(b) Is ADR used by powerful parties to avoid setting legal precedents? If so, to what extent is this an issue and how can it be addressed?

### 4.3 Mediation in the criminal court jurisdiction

ADR processes such as mediation also have the potential to improve access to justice and outcomes for participants in the criminal court system. Concerns have been expressed among judicial members and prosecutors for some time about the costs and court delays caused by approximately 50 per cent of defendants waiting until late in the criminal justice process to plead guilty to charges.229 In November 2006, the Supreme Court of Western Australia commenced a pilot mediation program for criminal cases to resolve issues in trials quickly and efficiently and in some cases avoid the need for a trial altogether.230 This may also improve outcomes in the criminal court jurisdiction for victims and their families as well as witnesses, who may find traditional criminal court processes stressful and disempowering.231

This mediation process, known as ‘criminal case conferencing’, can only occur with the consent of all parties.232 The consent of the accused is only valid where they have received a copy of the conferencing protocol which sets out key aspects of the process so that they have an informed understanding of the process.233 The conference does not form part of the trial process and the mediator’s role is that of a facilitator rather than an adjudicator.

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227 Altamore, above n 217, 45.
than a Court official.234 The mediators operating in the Supreme Court of Western Australia pilot program have extensive experience in the criminal jurisdiction.235 The conference may address any relevant issues but matters that might be discussed include identifying the issues, the making of admissions and the prospects of conviction or acquittal.236 All discussions at the conference are confidential and no report as to any detail of the conference is to be made to the Court.237

Results of the pilot program have been encouraging and the Court has widened its scope.238 Consideration is currently being given to whether this or a related process could be introduced in the New South Wales court system.239

Criminal case conferencing as utilised in the Supreme Court of Western Australia or a similar process, could possibly be introduced into the criminal jurisdiction of the Victorian court system.

**Question 19: Criminal case conferencing**

(a) Should criminal case conferencing be introduced into the Victorian court system? If not, why not?
(b) If so, in which courts should criminal case conferencing programs be introduced?
(c) To which offences should it apply?
(d) At what stage(s) of the court process should it be used?
(e) Should participation in a criminal case conference be compulsory for the State/Commonwealth and an accused?
(f) If not, in which cases should it be used? Should guidelines be developed for referral to a case conference? If so, what should these guidelines contain?

**4.4 Restorative justice and access to justice**

As discussed previously, restorative justice is an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour. Restorative justice is based on the rationale that those involved in, and affected by, criminal activity should be given a genuine opportunity to participate in the process which determines the response to the crime.240 Thus restorative justice initiatives use inclusive decision making processes that involve

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234 Supreme Court of Western Australia, above n 232.
235 Chief Justice Wayne Martin, ‘2007 District and County Court Judges’ Conference Opening Address’ (Speech delivered at the 2007 District and County Court Judges’ Conference, Freemantle, 28 June 2007) 4-5.
236 Supreme Court of Western Australia, above n 230.
237 Supreme Court of Western Australia, above n 232.
238 Supreme Court of Western Australia, above n 230.
239 Owens, above n 229.
bringing together the offender, the victim, and sometimes members of the wider community to determine collectively the approach to be taken to a crime.241

As noted in chapter 3, The current reach and use of ADR schemes in Victoria, restorative justice processes are currently being used in Victoria in both the Children’s Court and the Magistrates’ Court matters heard by the Neighbourhood Justice Centre.

This section examines how restorative justice processes can increase access to justice for both victims and offenders. There may also be potential to utilise restorative justice practices as a response to family violence and as an extension to the current Koori Court processes. Both of these issues are discussed further in chapter 6.

4.4.1 Access to justice for victims

The recent resurgence of restorative justice has its origins, at least partly, in the victims’ rights movement, and is a response to the exclusion and disempowerment that victims may feel as part of traditional criminal justice proceedings.242

Restorative justice processes actively involve the victim as a participant in proceedings and are potentially very empowering for the victim. As Freiberg states ‘there is a focus on the victim as victim, not the state as a surrogate victim.’243

Victims report high levels of satisfaction with restorative justice processes and report that participation helps them deal more appropriately with the impacts of the crime.244 Victims who participate in restorative justice processes have an increased likelihood of receiving an apology or other form of reparation and generally view these processes as fairer than courts.245 Daly found that about half of court cases are dismissed or withdrawn and therefore restorative justice processes are much more likely to result in an outcome of some sort for victims.246 She concludes that ‘although many victims may believe otherwise, the court is not likely to be a site of their vindication, not a place where they will routinely ‘get justice’’.247 However, it should be noted that outcomes of participation in restorative justice initiatives are not always positive for the victim, and in some cases they may feel worse about the crime. Outcomes of ADR processes for victims are discussed in more detail in the next chapter, Measuring the outcomes of ADR.

**Question 20: Access to justice for victims**

To what extent do restorative justice processes increase or decrease access to justice for victims?

245 Ibid.
4.4.2 Access to justice for offenders

Restorative justice programs can be seen as providing access to justice for offenders by providing a flexible approach to responding to crime that focuses on recognising and addressing the underlying causes of criminal behaviour. While participation in these programs may be confronting for offenders, in particular facing the victim and accepting responsibility for their actions, there is evidence that offenders view the process as fairer than traditional court proceedings, and there may be positive outcomes in terms of sentencing. The next chapter, Measuring the outcomes of ADR examines the outcomes of ADR processes for offenders in more detail.

This section explores issues associated with restorative justice that impact on access to justice for offenders. Firstly there is a discussion of whether restorative justice practices widen the net of the criminal justice system. Then the following issues are explored:

- offences to which restorative justice processes apply
- offender participation rates
- the age of the offender
- referral to restorative justice programs
- mandatory participation in restorative justice programs
- the impact of participation or non-participation in restorative justice programs
- sharing knowledge about ‘what works.’

i) Restorative justice: widening the net?

It is important to preface a discussion of restorative justice in the context of access to justice with a warning about the potential of restorative justice to widen the net of social control. There is concern that offenders who are referred to restorative justice programs may be those who would otherwise have no action taken against them: for example, the offence might be difficult to prove in court. This is possibly a greater issue in jurisdictions such as New South Wales and the Australian Capital Territory where police can refer offenders to restorative justice processes.

In addition, while offenders generally view conferencing as fairer than court processes, there is a danger that participation may have adverse consequences for them. For example, the rights of offenders may not be adequately protected and they may receive a harsher penalty or outcome than if the matter had proceeded to court.

Question 21: Net-widening

Is there a danger that restorative justice programs will net-widen, bringing more offenders into the criminal justice system? If so, how can this be overcome?

251 Strang, above n 244, 38.
ii) Offender participation rates

While the Committee is mindful of concerns about net-widening, there may also be potential to meaningfully and beneficially involve more offenders in restorative justice initiatives. As noted earlier, restorative justice programs in Victoria are voluntary and currently have high rates of non-participation. For example, approximately 50% of young people will decline involvement in the Victorian Children’s Court group conferencing programs, when mention is made of meeting the victim.252 This figure may indicate fear or discomfort on the offender’s part, which may in turn be related to the amount and type of information provided to potential conference participants about the process. This raises questions about whether and how restorative justice conferencing programs should increase participation rates among young offenders who are found to be suitable for referral to them.

Question 22: Offender participation rates
Should efforts be made to increase the current offender participation rate in Victorian restorative justice programs? If so, how?

iii) Offences to which restorative justice processes apply

Currently participation in restorative justice initiatives in Victoria is limited to less serious offences. In particular, crimes such as murder and sexual offences are excluded.253 In other jurisdictions, restorative justice processes are used for an even greater range of offences, for example, sexual assault in South Australia254 and murder in Texas.255 There is also debate about the suitability of restorative justice processes to family violence matters. This is discussed further in chapter 6, ADR and Marginalised communities.

The New Zealand Government recently launched a three year project to provide restorative justice nationally for more serious offences.256 This follows the success of a pilot program conducted in four courts which dealt with relatively serious offences, including a significant number of violent offences.257 This new program will apply where the offender pleads guilty and the seriousness of the offence is such that diversion is not possible and imprisonment is a potential outcome. Under the program, victims will have the opportunity to meet the offender and the outcomes of this meeting may be taken into account in sentencing. In announcing the reforms, the New Zealand Minister for Justice stated:

257 Crime and Justice Research Centre, New Zealand Court-Referred Restorative Justice Pilot Evaluation (2005), [3.3].
The evaluations also tell us that offenders do not consider a restorative justice process a ‘soft option’. It may well be the first time that an offender has had to accept full responsibility for their actions and be in a position to front up and to apologise to the person they have harmed.258

Evaluations in both Western Australia259 and South Australia260 have also suggested that restorative justice may be an effective response to serious crimes. Noting that court cases are often withdrawn or dismissed, Daly states that:

Although both RJ [restorative justice] critics and victims imagine that court is a place where serious offences are treated seriously, actual court practices often suggest otherwise.261

Question 23: Offences to which restorative justice processes apply

(a) Is there the potential to use restorative justice programs in relation to a greater range of offences? If so, which offences should restorative justice initiatives be used for?

(b) Should there be restrictions on repeat offenders accessing restorative justice programs?

iv) The age of the offender

Restorative justice programs in Australia have traditionally been perceived as being more applicable to young people than adult offenders.262 It has been observed that, even in jurisdictions such as Western Australian and the Australian Capital Territory, where adults are able to participate in restorative justice programs, it is predominantly young people who are referred.263

Jesuit Social Services (JSS) has proposed that young adults up to the age of 25 years should have the potential to access restorative justice programs in Victoria.264 JSS argues that, not only do young adults have a greater capacity to fulfill reparation agreements, restorative justice processes have the potential to ‘strengthen the resolve of the young person to desist from further harmful behaviour’.265 Ways in which young adults could be referred to restorative justice programs in Victoria using existing mechanisms are discussed further in the next section.

Question 24: The age of the offender

Should the use of restorative justice programs in Victoria be extended to adults? If so, should any age restrictions apply to accessing restorative justice programs?

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258 Crime Prevention Unit, above n 256.
260 Daly, above n 246, 13.
261 Ibid.
262 Strang, above n 244, 4.
263 Ibid.
264 Jesuit Social Services, above n 252, 1.
265 Ibid, 10.
v) Referral to restorative justice programs

The scope of restorative justice programs is potentially limited due to reluctance by police and courts to refer offenders to these programs. Piazza notes that restorative justice ‘is perceived as a small-scale response to minor crimes.' In addition, restorative justice responses may be perceived as being ‘soft on crime’. After the Macquarie Fields riots, the New South Wales Police Commissioner commented ‘I think it sends all the wrong messages … that it’s OK to assault police and get involved in riots … and all you get is conferenced.’ It has been suggested that where police and courts have discretion to refer offenders to restorative justice programs, they need information and training about restorative justice interventions to enable them to make an informed decision about appropriate referrals.

Currently, restorative justice processes are used in Victoria only at the pre-sentencing stage. However, restorative justice initiatives can be employed at different stages of the criminal justice process, including the sentencing and post-sentencing stages. A new program being implemented in New Zealand will use restorative justice to help prisoners reintegrate into the community. Victims will have the opportunity to meet offenders prior to their release from prison. New South Wales also has a post-sentence conferencing program for adults in prison or serving community orders. These conferences are generally held to help the victim deal with the crime and assist the offender’s rehabilitation.

It was noted above that it has been proposed that restorative justice programs should be available to young Victorian adults aged 18-25 years. This could be accommodated within existing legislative structures. Firstly, pre-sentence court diversion under the Magistrates’ Court Act 1989 (Vic) could be extended to include restorative justice programs. Secondly, restorative justice conferencing could occur under the Sentencing Act 1991 (Vic) which enables the sentence of a defendant aged 18-25 years who is found guilty, to be deferred for up to six months. Restorative justice could also occur at the post-sentence stage as discussed above.

Question 25: Referral to restorative justice programs

At which stage is it appropriate to refer offenders to restorative justice programs: pre-sentence, post-sentence, parole?

266 McCrimmon and Lewis, above n 242, 9.
267 Ibid, 236.
268 Ibid, 235.
269 Daly and Hayes, above n 254, 1.
270 Daly and Hayes, above n 256.
271 Ibid, above n 253, 7.
272 Ibid, 8.
vi) Mandatory referral to and participation in restorative justice programs

The restorative justice process may be very confronting for young offenders and there is evidence that approximately 50% decline to participate in Victorian Children’s Court group conferences. This raises the question of whether referral to restorative justice programs should be mandatory. In New Zealand, most juvenile offenders who plead guilty to an offence will be referred to restorative justice programs, although a court coordinator has the discretion to decline the referral if the case is not suitable. It has been argued that offenders should not be mandated to participate in restorative justice initiatives as the conference requires their active participation and there is a risk that a victim may be re-victimised if the offender is unapologetic, defiant or abusive.

vii) Impact of participation or non-participation in restorative justice programs

As noted above, many offenders refuse to participate in restorative justice programs. The question then emerges whether a refusal or willingness to participate in restorative justice outcomes should affect the outcomes for the offender. The Australian Law Reform Commission, in its review of federal sentencing legislation, recommended that legislation should specify that an offender’s refusal to participate in a restorative justice program should not be an aggravating factor. This is consistent with the current situation in the Children’s Court of Victoria, where:

If sentencing of a child is deferred for the purpose of the child’s participation in a group conference and the child has failed to participate in the group conference, the Court must not impose a sentence more severe than it would have imposed had sentencing not been so deferred.

In New Zealand, the Sentencing Act 2002 provides that the court must take restorative justice outcomes (such as any agreement between the victim and offender or any offer to make amends) into account in determining a sentence. In addition, the New Zealand Parole Board considers participation in restorative justice programs when it is considering parole applications.

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275 Jesuit Social Services, above n 252, 13.
276 Piazza, above n 255, 236.
277 Jesuit Social Services, above n 252, 10.
278 Piazza, above n 255, 237.
280 Children, Youth and Families Act 2005 (Vic) s 362.
282 Parole Act 2002 (NZ) s 7.
Question 27: Impact of participation or non-participation in restorative justice programs

Should there be any sanctions associated with refusal to participate in a restorative justice process (for example, treated as an aggravating factor in sentencing)?
Should there be any rewards for participation in restorative justice processes (for example, consideration in sentencing or granting parole)?

viii) Sharing knowledge about ‘what works’ in terms of restorative justice

There is a diverse range of restorative justice programs in operation throughout Australia. Many programs have been established in response to local issues and needs and indicate a flexible and localised response to dealing with crime. Condliffe has argued for a more nationally-consistent approach to restorative justice:

It is time for coordinated policy development within Victoria and for liaison across the various jurisdictions. It is time for politicians, policy makers, bureaucrats and program providers to consider the costs of these differences across the various states.

Lewis, on the other hand, argues that diversity and responsiveness to local needs is a feature of restorative justice programs, but argues that there is a greater need to share information and experiences, particularly in relation to successes. The New Zealand government has recently commenced a three year project to ensure quality, consistency and integration in the provision of restorative justice in New Zealand.

A project modelled on this New Zealand initiative may have benefits for improving the quality of restorative justice conferencing programs in Australia.

Question 28: Sharing information about what works in terms of restorative justice

(a) Should there be national best practice standards for restorative justice programs? If so, what should these standards be and who should set these standards?

(b) How can we better share information within Victoria, nationally and internationally about what works in terms of restorative justice? What sort of information should we be sharing? How could it be shared?

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283 Daly and Hayes, above n 254, 2.
284 Condliffe, above n 249, 56.
285 Ibid.
286 McCrimmon and Lewis, above n 242, 11.
287 Crime Prevention Unit, above n 256.
5. Measuring the outcomes of ADR

5.1 Introduction

The Committee’s terms of reference require the Committee to consider the extent to which ADR improves outcomes in relation to both civil disputes and criminal matters. The Committee has also been asked to consider the extent to which ADR reduces the need for contact with the court system. Measuring the outcomes of ADR is important in terms of identifying whether programs are meeting their aims and fulfilling their potential. This chapter explores the measurement of ADR outcomes firstly in relation to civil disputes and then in relation to criminal matters.

5.2 Outcomes of civil ADR

There are no agreed standards for measuring the outcomes of ADR in civil disputes and no uniform sector reporting. The absence of agreed performance measurements and data assessing the outcomes of ADR makes it difficult to assess both the performance of the sector and the outcomes for users and society in general. Such data would also be beneficial in terms of identifying potential improvements and increased efficiencies in the sector. While some performance outcomes such as participation and settlement rates are relatively easy to measure, other outcomes, such as the community becoming more equipped to deal with its own disputes, are inherently difficult to assess.

The Victorian Law Reform Commission has recently noted the dearth of research on the effectiveness and, in particular, the cost effectiveness, of mediation in Victoria. The Commission proposes the establishment of a Civil Justice Council which would conduct ongoing review of ADR processes in Victorian courts as one of its responsibilities. It should be noted that the Commission only considered ADR in relation to the courts and that data in relation to non-court based ADR programs would not be captured by the proposed Civil Justice Council. The National Alternative Dispute Resolution Advisory Council (NADRAC) is also currently examining the development of performance measurements for ADR.

This section considers some of the factors that may be used to assess the outcomes of the use of ADR to resolve civil disputes. It focuses on outcomes for three main stakeholder groups: individual users, the State and society as a whole.

290 Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (2nd ed, 2002) 72.

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290 Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (2nd ed, 2002) 72.
5.2.1 Outcomes for individuals

A range of factors may motivate individuals to access ADR services, including cost savings, time savings, ease of access and access to assistance and expertise. Agreement rates for ADR processes are often very high, generally between 50-85%. For example, in 2005-2006, the Dispute Settlement Centre of Victoria (DSCV) reported a settlement rate of 84% for mediations conducted. The 2002-2003 intervention order pilot, whereby matters were referred from the Magistrates’ Court to DSCV, had a settlement rate of 72% - significantly higher than the rate of intervention orders resulting from matters that proceed to court. An evaluation of the New South Wales Settlement Scheme - an initiative of the Law Society of New South Wales to refer appropriate matters to litigation - found a 69% agreement rate.

There has been limited research into why some cases reach agreement through mediation or other ADR process while others do not. Factors such as the motivation of the parties and their willingness to negotiate and compromise have been found to be critical to the success of mediation. Agreement rates do not appear to be affected by factors such as whether the mediation is voluntary or mandatory or whether, in cases where online dispute resolution is appropriate, it is conducted online or face-to-face.

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295 National Alternative Dispute Resolution Advisory Council, above n 288, 32.
299 Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray and Dev Vencappa, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (2007) iv.

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There are a number of weaknesses associated with measuring the success of ADR processes in terms of number of agreements reached, including that such indicators fail to capture data about disputes that never enter ADR processes, for example because one party refuses, or a party decides to ‘put up with’ the problem. It has also been suggested that those utilising ADR are more likely to be willing to settle than those who refuse to enter the process. Measures based on agreement rates also fail to consider the quality of any agreement, which is discussed further below.

ii) Agreement quality

It has been suggested that it is more appropriate to measure the quality of the agreement reached rather than the agreement rate. Agreement quality can be measured both in terms of the contents of the agreement and its durability.

One of the often cited benefits of ADR processes is that they offer a full range of outcomes, rather than the limited range of remedies available in court. Thus ADR may be seen as providing ‘individualised justice’, with agreements able to provide a range of outcomes that are best suited to the needs of the parties.

However, it is inherently difficult to measure the quality of an agreement reached through use of ADR. An agreement may not achieve the best result for each party and may not necessarily be fair. In addition, an agreement may not adequately protect the needs of vulnerable parties and third parties such as children. Party satisfaction with the agreement (discussed further below) is a commonly used measure, however, some parties – particularly vulnerable parties – may not know what the best or fairest outcome would be. They may be unaware of their legal rights, or the process may favour a party who is more educated or better resourced. These issues are discussed further in chapter 6, ADR and marginalised communities. It has been suggested that a register of agreements might be one way of enabling evaluations of agreement fairness. Such a register would need to provide safeguards for the protection of parties’ confidentiality.

The durability of agreements is also often used to measure ADR outcomes. An ADR process will only be truly successful in resolving an issue and in saving costs, if the agreement reached remains effective in the long term. The intervention order pilot conducted by the DSCV found that 17 of the 24 clients who responded to the survey reported that the agreement had worked ‘reasonably well’ or ‘very well’. An agreement reached remains effective in the long term. The intervention order pilot conducted by the DSCV found that 17 of the 24 clients who responded to the survey reported that the agreement had worked ‘reasonably well’ or ‘very well’.

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1. Astor and Chinkin, above n 290, 70.
3. Astor and Chinkin, above n 290, 71.
4. Ibid, 68.
7. Civil Justice Council, United Kingdom, Court-based Mediation: A Preliminary Analysis of the Small Claims Mediation Scheme at Exeter County Court (2004) 41.
8. Astor and Chinkin, above n 290, 73.
10. Ibid.
11. Conley Tyler and Bornstein, above n 300, 60.
evaluation of agreement durability in the family law context found that 61% of participants reported that all or most of the terms of agreement were still in force after 12 months. In cases where agreements were not working optimally, this was often reported to be related to external factors (such as children changing schools), rather than any deficiency in the agreement itself.

The durability of agreements reached through an ADR process may also be affected by the fact that, as opposed to court orders, they may lack enforceability, where some matters have not been agreed upon. While most agreements reached at mediation are complied with, NADRAC notes that ‘the legal enforcement of these agreements can involve separate and time-consuming contract litigation.’

### iii) Participant satisfaction

Participant satisfaction with ADR proceedings is another common indicator used to measure the outcomes of ADR. Factors that have been identified as contributing to participant satisfaction include, informality, time saving, the fact that the problem was resolved and the fact that both parties have an opportunity to participate actively in proceedings and ‘tell their story.’ In general, both Australian and international surveys, report high levels of client satisfaction with ADR processes, even when agreement is not reached.

For example, participants in the DSCV intervention order pilot reported high levels of satisfaction with both the process and the agreement reached. 30% of clients reported they were very satisfied with the agreement and 48% reported they were partially satisfied. An evaluation of the NSW Settlement Scheme found satisfaction with the mediation proceedings to be significantly higher than satisfaction with other forms of dispute resolution, including hearing and unassisted negotiation between parties. Key findings included:

- 87.5% of mediation participants were satisfied with the way the dispute was dealt with, compared with 62% satisfied with hearings and 70% satisfied with unassisted negotiation.
- 87% of mediation participants were satisfied with the outcome of the dispute, compared with 50% who were satisfied with hearings and 50% who were satisfied with unassisted negotiation.
- 91.7% of mediation participants felt the process was fair compared with 57.1% of hearing participants and 71.4% of unassisted negotiation participants.

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316 Ibid, 94.
317 Astor and Chinkin, above n 290, 72.
320 Conley Tyler and Bornstein above n 300, 60.
321 International Conflict Resolution Centre, above n 297, 34.
322 Sourdin and Matruglio, above n 298, 6.
Factors that have been identified as contributing to participant satisfaction include the skill of the ADR practitioner and perceptions of procedural fairness. In addition, the type of ADR process used may affect satisfaction rates. For example, the evaluation of the NSW Settlement Scheme 2002 found higher levels of party satisfaction and comfort with mediation as opposed to arbitration.

Although they are a common tool for measuring ADR outcomes, participant satisfaction surveys have been criticized on the basis that satisfaction is difficult to define and measure.

iv) Participant empowerment/transformation

Some research suggests that ADR processes help empower and transform participants. There is evidence that participation in ADR may enhance participants’ confidence and equip them with the skills to more effectively resolve future conflicts themselves. There is also evidence that mediation may have other positive outcomes for participants such as helping them move on with their lives and facilitating an ongoing relationship with the other party, which might not have been possible had the matter gone to court. Outcomes such as these are inherently difficult to measure.

v) Time savings

The Victorian Attorney-General’s Justice Statement identifies the early resolution of civil disputes as a key priority. Many ADR providers, particularly those with a complaints handling function, measure performance using time indicators. Time saved by ADR processes is of benefit to both the individual participants and the agency providing the service. Time savings may correspond to financial benefits for both parties and, particularly for individuals, may equate to emotional savings, given the high emotional cost of many disputes. The timely resolution of disputes also impacts on clients’ satisfaction with the process.

The Community Survey conducted by the Victorian Department of Justice found that time savings was a recognised feature of ADR services. However, the same survey identified that the time involved in ‘dealing with an outside agency’ was also a barrier to using ADR services.

As has been noted in chapter 4, ADR and access to justice, Victorians spend a significant amount of time resolving disputes. However, there is limited data currently available to determine the extent to which the use of ADR processes reduces the time taken to resolve civil disputes.

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323 National Alternative Dispute Resolution Advisory Council, above n 292, 3.
324 Sourdin and Matruglio, above n 298, 6.
325 Astor and Chinkin, above n 290, 72.
326 Bickerdike, above n 314.
329 Balstad, above n 318, 252.
331 Ibid, 22.
332 Ibid, 40.
vi) Cost savings

There is evidence that the general community recognises potential cost savings as a feature of ADR services.333 However, fear of cost has also been identified as a barrier to using ADR services.334

ADR will generally only be cheaper for both the individual and the state if a lasting agreement is reached.335 If the dispute is not settled, it may result in court action or, if the complainant decides to take no further action, an unresolved issue.336 However, even where ADR is unsuccessful, the process may narrow the issues in dispute, thus reducing the time taken to resolve the dispute if it is taken to court. It has been noted that most court cases settle rather than progress to the hearing stage, so therefore the cost savings associated with ADR process are not necessarily savings associated with avoiding a hearing but rather savings resulting from an earlier settlement.337 In general, the earlier a dispute is settled, the greater the cost savings will be for both the litigants and the courts.338

There is limited data available on the extent to which using ADR processes reduces costs for participants. The evaluation of the NSW Settlement Scheme found that 86.8% of surveyed mediators reported a belief that the mediation process had saved the parties costs.339 The amount of combined costs savings for both parties was estimated to be $55,000.340

Question 30: Measuring the outcomes of civil ADR for individuals
(a) How should we be measuring the outcomes of civil ADR for individuals?
(b) What are the advantages and disadvantages of the various performance measures (for example, agreement rate, agreement quality, participant transformation, cost savings and time savings)?

5.2.2 Outcomes for the State

ADR processes have the potential to provide a range of positive outcomes for the State. These include cost savings for courts and reduced costs of government litigation.

i) Savings for the Courts

The use of ADR processes has the potential to significantly reduce the burden of civil disputes on the court system. Factors that may lead to savings for courts include fewer cases being heard by courts, cases requiring less hearing time and decisions being less likely to be appealed.341 In addition, positive experiences of ADR may be

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self-reinforcing: clients and legal practitioners who are satisfied with their participation in an ADR process may be more likely to use these in the future, reducing the number of cases filed in the courts.\textsuperscript{345}

In the United Kingdom, Lord Woolf’s \textit{Access to Justice} report led to the introduction of judicial case management and an increased reliance on ADR processes.\textsuperscript{344} These reforms have led to a significant reduction in the demand on court services.\textsuperscript{343} An evaluation following the reforms found that settlements were occurring earlier in the process, there was a marked reduction in the proportion of cases that went to full hearing and a significant increase in the use of ADR processes.\textsuperscript{344} For example the number of cases in the Queen’s Bench fell by 19.6% in 2001 compared to 2000. Eighty-five percent of cases were reported to settle without recourse to the courts.\textsuperscript{345} However, the evidence of the impact of the reforms on reducing costs remains inconclusive.\textsuperscript{346}

The intervention order diversion project, whereby suitable intervention order applications were diverted to mediation conducted by the Dispute Settlement Centre Victoria, found that referral to mediation significantly reduced the court time taken to hear cases: where agreement was reached at mediation the complaint was either withdrawn or court orders were granted by consent.\textsuperscript{347} The evaluation also noted that such projects may reduce the burden on court time by clarifying the issues in mediation or by the disputant deciding not to take the case further following mediation.\textsuperscript{348} The diversion of small claims to mediation in the United Kingdom was found to significantly save judicial time, with an estimated 106 hours saved per month.\textsuperscript{349}

The Department of Justice has recently commenced a project to improve the knowledge base in relation to the role of mediation in the Supreme and County Courts in Victoria. This project will include an assessment of the effectiveness of mediation in settling issues and whether it is effective in reducing the length and cost of proceedings and in assisting the courts to manage their caseloads. The outcomes of this research will provide valuable input into the understanding of the benefits of ADR for the courts. The Victorian Law Reform Commission has suggested that a similar review of mediation in the Magistrates’ Court would also be beneficial.\textsuperscript{350}

\textsuperscript{342} Astor and Chinkin, above n 290, 57; Attorney-General’s Department, Commonwealth, above n 319, 134.


\textsuperscript{345} Department for Constitutional Affairs, United Kingdom (2002), above n 344, 7.


\textsuperscript{347} Conley Tyler and Bornstein, above n 300, 60.

\textsuperscript{348} Ibid.

\textsuperscript{349} Civil Justice Council, United Kingdom, above n 308, 24.

\textsuperscript{350} Victorian Law Reform Commission, above n 291, 32.
Question 31: Measuring the impact of civil ADR use on the courts
(a) How has increased use of civil ADR impacted on the courts?
(b) How should these impacts be measured and reported?

ii) Savings for the State as litigant

The State of Victoria is the most frequent user of the court system in Victoria. At any one time, there are several hundred cases involving the State in the State Courts as well as in the Federal and High Courts. The Commonwealth and the States have a common law responsibility to act as a model litigant in any court processes to which they are a party. In addition, the Victorian Attorney-General issued Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant in 2001. According to the Guidelines, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. Justice Finn in the Hughes Aircraft case posited that the State has ‘no private or self-interest of its own separate from the public interest’ it is constitutionally bound to serve. According to Lee, model litigant principles are therefore important because they help to ensure that ‘the public has good reason to trust public officials and the way its public officials and lawyers conduct litigation affecting the rights of its own citizens.’

The State of Victoria’s model litigant obligations have a wide-ranging application. They apply to Government Departments and agencies, as well as Ministers and officers where the State provides a full indemnity in respect of an action for damages brought against them personally. They extend to all litigation including that before courts, tribunals, inquiries, arbitration and other ADR processes. They apply to this litigation irrespective of the State’s status as plaintiff, defendant or third party. Further, lawyers engaged in such litigation, whether the Victorian Government Solicitor, in-house or private, must act in accordance with the Guidelines.

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532 Ibid.
533 Ibid.
534 Ibid, 4.
537 Lee, above n 351, 3.
538 Attorney-General, Victoria, above n 355, Notes, n 2.
539 Ibid.
540 Lee, above n 351, 6.
541 Attorney-General, Victoria, above n 355, Notes, n 2.
The State of Victoria’s Model Litigant Guidelines are based on the Directions on The Commonwealth’s Obligation to Act as a Model Litigant, which are contained in the Legal Services Directions 2005 (Cth).362 Victoria’s Guidelines require the State to ‘avoid litigation, wherever possible,’ which arguably infers an obligation on the State to be open to ADR at all stages of a dispute.364 However, the Commonwealth Guidelines positively oblige the Commonwealth to consider ADR in its behaviour as a model litigant by:

endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate.365

In addition, the Commonwealth Model Litigant Guidelines were revised in 2005 to require the Commonwealth and its agencies participating in ADR to participate ‘fully and effectively.’ Further, wherever practicable, they are to ‘ensure that their representatives have authority to settle the matter … so as to facilitate appropriate and timely resolution of a dispute.’366

In the United Kingdom, a pledge by the Lord Chancellor in 2001 that government departments would use ADR processes in all suitable cases resulted in significant cost savings. In 2004-2005 an estimated £28.8 million was saved by the use of ADR.367

There is the potential for the obligation to use ADR to be incorporated more explicitly into the Victorian Model Litigant Guidelines.

Question 32: The incorporation of ADR processes into Victoria’s Model Litigant Guidelines
Should a specific requirement to use ADR processes and participate ‘fully and effectively’ wherever possible be incorporated into the Victorian Model Litigant Guidelines? If so, how should this be achieved?

5.2.3 Outcomes for society

The efficient and effective resolution of disputes offers a range of benefits for society in general. These include promoting harmony, promoting public confidence in the justice system, and lowering the overall financial burden of resolving disputes.368 NADRAC states:

The State of Victoria’s Model Litigant Guidelines are based on the Directions on The Commonwealth’s Obligation to Act as a Model Litigant, which are contained in the Legal Services Directions 2005 (Cth).362 Victoria’s Guidelines require the State to ‘avoid litigation, wherever possible,’ which arguably infers an obligation on the State to be open to ADR at all stages of a dispute.364 However, the Commonwealth Guidelines positively oblige the Commonwealth to consider ADR in its behaviour as a model litigant by:

endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate.365

In addition, the Commonwealth Model Litigant Guidelines were revised in 2005 to require the Commonwealth and its agencies participating in ADR to participate ‘fully and effectively.’ Further, wherever practicable, they are to ‘ensure that their representatives have authority to settle the matter … so as to facilitate appropriate and timely resolution of a dispute.’366

In the United Kingdom, a pledge by the Lord Chancellor in 2001 that government departments would use ADR processes in all suitable cases resulted in significant cost savings. In 2004-2005 an estimated £28.8 million was saved by the use of ADR.367

There is the potential for the obligation to use ADR to be incorporated more explicitly into the Victorian Model Litigant Guidelines.

Question 32: The incorporation of ADR processes into Victoria’s Model Litigant Guidelines
Should a specific requirement to use ADR processes and participate ‘fully and effectively’ wherever possible be incorporated into the Victorian Model Litigant Guidelines? If so, how should this be achieved?

5.2.3 Outcomes for society

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362 Ibid, Notes, n 1.
363 Ibid, 1(c).
364 Lee, above n 351, 9.
365 Commonwealth Legal Services Directions 2005 (Cth), Appendix B: The Commonwealth’s Obligation to Act as a Model Litigant, paragraph 2(d).
366 Ibid, paragraph 5.

362 Ibid, Notes, n 1.
363 Ibid, 1(c).
364 Lee, above n 351, 9.
365 Commonwealth Legal Services Directions 2005 (Cth), Appendix B: The Commonwealth’s Obligation to Act as a Model Litigant, paragraph 2(d).
366 Ibid, paragraph 5.
Restorative justice may have a number of positive outcomes, including, as stated by the Australian Law Reform Commission, to:

- increase the satisfaction of participants in the criminal justice system;
- encourage offenders to accept responsibility for their conduct;
- reduce recidivism by addressing the causes of criminal behaviour; and
- provide insight into the causes of crime.371

This section discusses a number of outcome measures that have been used to evaluate the effectiveness of restorative justice. These are focused around outcomes for offenders, outcomes for victims and outcomes for the state and society. To date there has been limited evaluation and analysis of restorative justice programs and the further development of these programs would be greatly enhanced by the availability of comprehensive data. In particular, there is limited sharing of information about outcomes between different programs and different jurisdictions, which may hinder the development of best practice programs.372

In 2007 the New Zealand Government commenced the development of a national performance framework for restorative justice.368 The three year project aims to ensure quality, consistency and integration in the provision of restorative justice.369 New Zealand so that it meets the needs of the criminal justice system, victims and offenders. As was noted in the previous chapter, there is limited sharing of information about what works between restorative justice programs both state and nation-wide. A project modelled on this New Zealand initiative may have benefits for improving the quality of restorative justice programs in Australia.370

5.3 Outcomes of restorative justice practices

Restorative justice focuses on rehabilitating the offender and restoring the victim.370 Restorative justice may have a number of positive outcomes, including, as stated by the Australian Law Reform Commission, to:

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- encourage offenders to accept responsibility for their conduct;
- reduce recidivism by addressing the causes of criminal behaviour; and
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5.3.1 Outcomes for offenders

Restorative justice processes seek to make offenders take responsibility for their actions and to repair or restore harm caused. Recidivism rates are often used to provide indicators of the success of restorative justice programs. In addition, as restorative justice programs seek to actively involve the offender as a participant, measures such as offender satisfaction with the process and their perceptions of the procedure are also frequently used as performance measures. Sentencing outcomes are also a relevant outcome measure for offenders. These three performance indicators are discussed in more detail below.

i) Recidivism

Both in Australia and internationally, there is mixed data about the recidivism rates associated with various restorative justice initiatives. Hayes and Daly conducted an in-depth review of recidivism rates in South Australia and concluded that, consistent with earlier research by Maxwell and Morris in New Zealand, a causal link could not be found between restorative justice processes and reductions in offending.

Evaluations of other restorative justice programs have had varied results, including:

- An evaluation of the New Zealand Court-Referred Restorative Justice Pilot found a reconviction rate of 32% among conferenced offenders after 12 months, compared with 36% for a control group.
- Two independent evaluations of the Juvenile Justice Group Conference Pilot Program in the Victorian Children’s Court found little difference in re-offending rates between offenders who had attended group conferences and a control group.
- An evaluation of a diversionary conferencing program in the ACT found a 38% reduction in repeat offending for violent crime, compared to those who attended court for the same type of offence.

Variations in results may to some extent be due to the different processes of the different programs, although there has been no cross-program or cross-jurisdictional analysis of program features that affect recidivism rates.

References:

179 Hayes and Daly, above n 375, 757.

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179 Hayes and Daly, above n 375, 757.
ii) **Offender satisfaction**

Offenders who participate in restorative justice processes generally report high levels of satisfaction with the process. In particular, they report that the process is fair.\(^{380}\) One Queensland evaluation found that 98% of offenders would recommend participation in conferencing to others.\(^{381}\) Another study in New Zealand found that most offenders reported that the conference was a positive experience.\(^{382}\) This high level of satisfaction is significant, because having to take responsibility for their actions and meeting the victim can be very confronting for an offender.\(^{383}\) However, it must be noted that many offenders refuse to participate in restorative justice programs\(^{384}\) and therefore satisfaction is only measured among those who have agreed to participate.

iii) **Sentencing outcomes**

Many restorative justice programs are highly successful in diverting young people from the criminal justice system. Eighty percent of young people who attended group conferencing in the Victorian Children’s Court received a non-supervisory order from the court.\(^{385}\) Similarly, offenders participating in conferences in New Zealand were less likely to be sentenced to imprisonment (13.7% as opposed to 19%).\(^{386}\) In addition, there is evidence that agreements reached in restorative justice proceedings are more likely to be complied with than traditional judicial orders.\(^{387}\)

The Australian Law Reform Commission has recommended that restorative justice should be recognised as a purpose of sentencing.\(^{388}\) The impact of participation in restorative justice initiatives in sentencing and parole outcomes was discussed in the previous chapter.

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\(^{382}\) Crime and Justice Research Centre, Victoria University, above n 376, 3.
\(^{385}\) Ibid, 9.
\(^{386}\) Crime and Justice Research Centre, Victoria University, above n 376, 3.
\(^{388}\) Australian Law Reform Commission, above n 371, 143.
5.3.2 Outcomes for victims

Restorative justice can be seen as less stressful and more empowering for victims than traditional court processes.\(^{389}\) Conferencing programs actively involve victims as participants and open the possibility for victims to more fully deal with the crime and their feelings towards the offender.\(^{390}\) In addition, there is evidence that victims who participate in restorative justice processes may have lower levels of fear of future crime or victimisation.\(^{391}\)

Victims who participate in restorative justice processes may be more likely to receive an apology or some other form of reparation. One Australian study found that 89% of victims received an apology or other form of reparation as a result of restorative justice processes, as opposed to 14% of victims whose cases were tried in the courts.\(^{392}\)

An evaluation of a court referred restorative justice pilot in New Zealand found that 92% of victims were pleased they had participated in the program and three quarters reported that participation made them feel better about their experience as a victim.\(^{393}\) This was higher than the reported rate of offender satisfaction with the process. Once again it should be noted that this satisfaction rate is among those who have agreed to participate in the restorative justice process.

However, the evidence is no means conclusive in relation to victims’ experiences of restorative justice processes. Victims may not believe that an apology is sincere and may doubt that an offender will really change.\(^{394}\) In one study, 38% of victims reported that participation in the process made them feel worse.\(^{395}\) Piazza notes that if restorative justice is not carefully applied, the ‘prospect is not of things being put right; but of the victim being re-victimised.’\(^{396}\) He argues that this risk highlights the need for both victims and offenders to be thoroughly screened before participating in the process.

\(^{389}\) Beven, Hall, Froyland, Steels and Goulding, above n 383, 196.


\(^{392}\) Pollard, above n 380, 10.

\(^{393}\) Crime and Justice Research Centre, Victoria University, above n 376, 3.

\(^{394}\) Hayes and Daly, above n 375, 757.

\(^{395}\) Piazza, above n 370, 235.

\(^{396}\) Ibid, 237.
5.3.3 Outcomes for the State and society

Restorative justice programs also have the potential to provide benefits for all of society, including decreased recidivism, decreased justice costs and increased public confidence in the justice system. Recidivism was discussed above. Cost and increased public confidence in the justice system are discussed further below.

i) Cost

While cost effectiveness is often seen as a major motivation for use of ADR in the civil jurisdiction, restorative justice process may be as costly, at least in the short term, as traditional justice processes. For example, participation in a conference process in New Zealand was found to be no cheaper than a 12 month community supervision order, from which the program diverted offenders. Processes such as screening, preparation and conferencing may be seen as significantly adding to the costs of restorative justice programs, although these components are necessary to ensure the success of a restorative justice program. Conferences or mediation may be time consuming: victims may not be ready to participate until some time after the crime and both victim and offender must be given sufficient time to 'tell their story.' In determining the cost effectiveness of restorative justice initiatives, it is important to note that many of the goals such as reduced recidivism and victim empowerment are social benefits that are difficult to quantify and often not evident in the short term.

ii) Public perception

The Victorian Attorney-General's Justice Statement emphasises that it is important to have 'a community that is engaged with, and supportive of, the justice system.' Public perception of criminal justice processes, including restorative justice, is an important element to consider in restorative justice because its outcomes may affect matters such as public confidence in the justice system and public perceptions of safety.

In general, Australians tend to overestimate the amount of crime in the community. Gelb observes that 'public perceptions of crime and the criminal justice system are based not on the reality of crime but on the reporting of crime.' Gelb also observes that there is limited understanding in the general community about non-custodial sentences, with many viewing such sentences as 'soft options.' Despite this, the number of Australians reporting to favour community service for offenders over

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398 Piazza, above n 370, 238.
399 Freiberg, above n 390, 215.
400 Piazza, above n 370, 238.
401 Department of Justice, Victoria, above n 327, 9.
403 Ibid, 38.
imprisonment increased between 2000 and 2004. However, Gelb notes that many Australians remain sceptical about the real possibility of offender rehabilitation. There has been limited exploration of community attitudes towards restorative justice initiatives. Roberts and Hough found that when the community was aware of offenders’ circumstances and restorative actions the offender had undertaken, they were less likely to support imprisonment and more likely to support community supervision. Even a small gesture of restoration was found to positively impact on public opinion. Research conducted by the Neighbourhood Justice Centre (NJC) found that:

while the community is open to alternative justice approaches, any NJC restorative justice interventions will need to demonstrate their effectiveness in order to be fully accepted by the community. Such interventions would ideally show reductions in re-offending, high levels of victim and offender satisfaction with the process and improved perceptions of the justice system.

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**Question 34: Measuring the outcomes of restorative justice processes**

(a) In your view, what are the outcomes of restorative justice processes?

(b) How should we measure the outcomes of restorative justice processes? What indicators should be used?

(c) How can we increase the pool of data available about the outcomes of restorative justice processes and the sharing of this information between programs and jurisdictions?

(d) In your view, what are the elements of a best practice restorative justice program?

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404 Ibid, 34.
405 Ibid, 38.
407 Ibid.
6. ADR and marginalised communities

6.1 Introduction

This chapter considers ADR in relation to marginalised communities, with a particular focus on exploring whether ADR improves outcomes and access to justice and reduces the need for contact with the court system.

Marginalisation and disadvantage can arise from a range of factors and circumstances including age, gender, geographic location, cultural background, education level, mental or physical disability and socio-economic status. Often sources of disadvantage overlap, compounding the issues associated with marginalisation. In particular, poverty is often a common thread between disadvantaged groups and may be seen as entrenching and reinforcing disadvantage.409

Data shows that:

- 9.8% of the Victorian population is aged 70 years and over.410
- 5.1% of Victorians were unemployed in July 2007.411
- 0.6% of the Victorian population is Indigenous.412
- 25.6% of the Victorian population speaks a language other than English at home.413

6.2 The policy framework

The framework underpinning Government provision of ADR services to marginalised and disadvantaged communities in Victoria is provided by a number of high-level strategic documents, including Growing Victoria Together, A Fairer Victoria, The Attorney-General’s Justice Statement and the Aboriginal Justice Agreement.

Growing Victoria Together sets out the Victorian Government’s vision for the state’s future to 2010. Growing Victoria Together identifies ‘a fairer society that reduces disadvantage and respects diversity’ as one of ten goals for Victoria’s future.414 Progress in achieving this goal will measured in a number of ways, including a decrease in the rate of growth of the prison population and a decrease in re-offending rates.415

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413 Ibid.
415 Ibid, 19.
**A Fairer Victoria** is the Victorian Government's social policy action plan and sets out 14 strategies to address disadvantage in this state.[^416] A Fairer Victoria has a strong focus on increasing access to justice for members of disadvantaged groups. It identifies that access to justice can address disadvantage and protect human rights.[^419]

The Attorney-General's Justice Statement sets out the key strategic directions for the justice system for a ten year period from 2004. The Justice Statement has a focus on protecting rights and addressing disadvantage through promoting human rights, improving responses to victims of crime, addressing needs through problem-solving courts, and improving access to legal advice and information.[^418]

The Statement is underpinned by the four core values of equality, fairness, accessibility and effectiveness. Of particular importance for marginalised communities is the need for the justice system to have the flexibility to provide appropriate access for those who are otherwise unable to afford it and provide a range of appropriate processes to enable issues to be resolved.[^419]

The Statement recognises the complex link between disadvantage and offending, stating:

> The justice system needs to find more creative ways of addressing the sources of offending behaviour, as a matter of fairness to these disadvantaged groups, but also to improve community safety by reducing re-offending.[^420]

In 2000, Victoria became the first Australian jurisdiction to develop a formal justice agreement between the Government and elected members of the Koori community.[^421] The second phase of the agreement was released in 2006. The Aboriginal Justice Agreement sets out a partnership approach to reducing Koori contact with the justice system. The Agreement includes a strategy specifically targeted at increasing access to mediation and conflict resolution services.[^422]

### 6.3 The use of civil ADR by marginalised communities

As has been discussed earlier in this Discussion Paper, ADR processes are being used increasingly in Victoria and other jurisdictions in relation to civil disputes. This section explores the current context and use of ADR in relation to marginalised individuals and communities. It identifies advantages that ADR offers these groups as well as barriers to marginalised individuals and groups accessing ADR services.


[^419]: Department of Justice, Victoria, above n 409, 58.

[^420]: Ibid, 22.

[^421]: Ibid, 17.

6.3.1 Civil disputes: Use of ADR services by marginalised communities

Many Victorian ADR providers offer services that aim to increase the access of marginalised communities to their services. These include translated materials, interpreting services and community liaison workers. Table 1 provides examples of services for marginalised communities that are offered by some Victorian providers of ADR.

Table 1: Examples of services for marginalised communities offered by Victorian ADR providers

<table>
<thead>
<tr>
<th>Agency</th>
<th>Features</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neighbourhood Justice Centre</td>
<td>• Koori-specific worker</td>
</tr>
<tr>
<td></td>
<td>• interpreters available on site</td>
</tr>
<tr>
<td></td>
<td>• a range of services available on site, such as legal aid and victim support services</td>
</tr>
<tr>
<td></td>
<td>• a Screening Assessment and Referral Team available on site to link clients with appropriate services.</td>
</tr>
<tr>
<td>Dispute Settlement Centre</td>
<td>• free telephone advisory service for people living in rural areas</td>
</tr>
<tr>
<td>Victoria</td>
<td>• rural mediators</td>
</tr>
<tr>
<td></td>
<td>• mediators from a wide range of cultural backgrounds</td>
</tr>
<tr>
<td></td>
<td>• information provided in over 20 community languages</td>
</tr>
<tr>
<td></td>
<td>• interpreter services</td>
</tr>
<tr>
<td></td>
<td>• Koori mediators</td>
</tr>
<tr>
<td></td>
<td>• Koori Project Officer</td>
</tr>
<tr>
<td>Health Services Commissioner</td>
<td>• Koori Liaison Officer</td>
</tr>
<tr>
<td></td>
<td>• information available in community languages</td>
</tr>
<tr>
<td></td>
<td>• interpreters available</td>
</tr>
</tbody>
</table>


Department of Justice, Victoria, Dispute Settlement Centre of Victoria: Information Kit (2006)


It was noted earlier in this Discussion Paper that there is limited data available about users of ADR services generally. There is also a dearth of data available about the extent to which marginalised individuals are accessing ADR services in relation to civil disputes. The Victorian Department of Justice’s 2007 community survey surveyed the level of contact with ADR service providers. The survey found that, for most ADR services, there were no significant differences in contact levels between those who hold a concession card (and may therefore be assumed to belong to a lower...
socio-economic group) and those that do not hold a concession card.\textsuperscript{423} Data from the Dispute Settlement Centre Victoria shows that 24% of its mediation participants were born outside of Australia and English was not the first language of 21% of clients.\textsuperscript{424}

A review of the Koori Program of the Dispute Settlement Centre Victoria found that Indigenous and non-Indigenous clients sought different assistance from the Centre. In general the Indigenous clients sought assistance with issues such as problems with housing, education and organisations, while non-Indigenous clients sought assistance in relation to a broad range of disputes, in particular, neighbourhood disputes.\textsuperscript{425} Indigenous users seeking assistance from the Centre were generally aged between 30 and 60 years, with females more likely to contact the Centre than males.\textsuperscript{426}

The National Alternative Dispute Resolution Advisory Council’s (NADRAC) compendium of published ADR statistics shows that few agencies publish detailed statistical information about the background of parties using ADR.\textsuperscript{427} This information is generally only reported by agencies such as community mediation services and industry-based customer ADR schemes that identify accessibility as a key program goal. In its publication on ADR research, NADRAC identifies that the collection and publication of information about marginalised groups accessing ADR services would be useful.\textsuperscript{428} Such data would assist in identifying any unmet areas of service need such as translators or mediators from a particular cultural background. It would also help to identify groups that are not accessing ADR services and aid the tailoring of information, activities and services aimed at increasing the accessibility of ADR for members of these groups.

ADR programs are increasingly being used by Government, statutory and industry bodies to settle disputes about service, rights and entitlements in areas that directly affect many marginalised groups and individuals such as human rights, native title, disability services, housing, and access to utilities.\textsuperscript{429} In addition, members of marginalised groups are involved in the same types of disputes as other members of the community, such as neighbourhood disputes and consumer disputes. Altamore observes that as some groups, such as those with disabilities, become more visible in society, they will increasingly utilise ADR processes in relation to a wider gamut of disputes.\textsuperscript{430}

\textsuperscript{423} Graeme Peacock, Preslav Bondjakov, Erik Okerstrom \textit{Dispute Resolution in Victoria: Community Survey} 2007, Department of Justice (2007) 14.
\textsuperscript{424} Department of Justice, Victoria, \textit{Dispute Settlement Centre of Victoria: Information Kit} (2006) 3.
\textsuperscript{426} Ibid, 24.
\textsuperscript{428} Ibid.
\textsuperscript{430} Ibid.
6.3.2 Advantages of civil ADR for marginalised groups and individuals

Civil ADR may be attractive and useful to marginalised individuals and groups for the same reasons it is to the general community. In particular, ADR may be seen as providing fast and cost-effective resolution of civil disputes.431

ADR processes may provide flexibility and informality that allow participants from marginalised groups to more fully engage in the dispute resolution process. As observed by the Federal Attorney-General’s Department:

The flexibility of ADR processes allows the participants to control the parameters, processes and outcomes of the dispute and its resolution, which may be a very empowering experience for disputants from minority groups.432

Many minority groups may be frightened or intimidated by formal court procedures, or have a distrust of government institutions and processes.433 The informal environment of ADR may encourage the participation of people who would otherwise not engage with formal dispute resolution processes.434

Participants in ADR are generally actively involved in the process, as opposed to adversarial proceedings, where the participants may be mere observers. The opportunity to be actively involved in the resolution of their disputes gives participants a voice and allows them to ‘tell their story.’435 This opportunity to be heard can be very empowering for participants. For example, Sheenan observes that both parents and children involved in pre-hearing conferences in relation to child protection proceedings found it easier to express their views in a non-adversarial environment and ‘valued the opportunity to be heard and to speak for themselves.’436

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434 Attorney-General’s Department, Commonwealth, above n 432, 135.
435 McNee, above n 431, 4.
The greater flexibility of ADR processes compared to the formal justice system also provides increased opportunity to take into account ethnic or cultural practices in the dispute resolution process. Mediators or other third parties involved in the process, may specifically select because of their knowledge and understanding of the participant’s culture. For example, the Dispute Settlement Centre Victoria has trained a number of Indigenous and culturally and linguistically diverse (CALD) mediators.

The involvement of a third party who understands their culture may mean that participants feel more comfortable with the processes and be able to participate more fully. In addition, there is the potential for greater acceptance of behaviour that may not be deemed to be acceptable in a more formal and less culturally sensitive arena.

Another advantage that ADR may offer over adversarial proceedings is that in taking an open and collaborative approach there is a greater likelihood of preserving relationships between parties in dispute. The maintenance of relationships is particularly important for members of small communities, such as an isolated rural community or a small ethnic community, where relationship rifts may have widespread negative consequences for the whole of the community. NADRAC observes that early and effective dispute resolution processes may reduce the levels of violence in small Indigenous communities. Preserving goodwill is also important for people involved in disputes with services with which they have an ongoing relationship. For instance, a disabled person involved in a dispute with a service provider is more likely to feel comfortable with an outcome that maintains a positive relationship between the parties.

Many disputes involving small population groups may be highly complex, involve many players and have historical foundations. The flexible processes of ADR allow for the whole of the dispute to be considered, including historical contexts and issues that may not be able to be taken into account in formal court proceedings. In addition, the outcomes available to participants are not restricted and thus there is the opportunity for ADR processes to result in outcomes which recognise the background and complexity of the dispute and better meet the needs of participants.

690 National Alternative Dispute Resolution Advisory Council, above n 441, 17; National Alternative Dispute Resolution Advisory Council, above n 440, 5.
691 National Alternative Dispute Resolution Advisory Council, above n 441, 17; Simpson above n 442, 17.
692 National Alternative Dispute Resolution Advisory Council, above n 441, 17; Simpson above n 442, 17.
Chapter 6: ADR and marginalised communities

6.3.3 Issues for and barriers to marginalised individuals and communities accessing civil ADR services

While ADR processes can be seen as offering a range of advantages to marginalised individuals and communities, there are also a number of barriers to accessing its use in relation to civil disputes and a number of issues with the way it may be utilised. NADRAC has emphasised that dispute resolution and conflict management services should aim to be accessible to all groups in the community and should work towards achieving fairness in procedure so that their processes do not disadvantage particular groups or individuals as a result of culture, gender, age or other difference.\(^{445}\) The next two sections identify issues for and barriers to marginalised individuals accessing ADR services.

i) Barriers to marginalised communities accessing civil ADR services

While ADR processes are less formal than litigation processes, some of the barriers to access and participation may be the same. Despite the relative informality and flexibility of ADR processes discussed above, the processes may still seem complex, physical environments may be intimidating, there may be language and cultural barriers and distrust of government services and agencies may discourage contact.\(^ {446}\)

It was noted earlier that there is limited awareness of some ADR processes and services in the general community. Among members of marginalised groups there may be even less awareness of services and limited understanding of how to access these services. This may be for a range of reasons including lack of English language skills, lack of education or literacy and inability to access information resources such as the internet.

Question 37: Barriers to marginalised communities accessing civil ADR services

(a) What are the barriers to marginalised individuals and communities accessing civil ADR services?

(b) How can these barriers be removed?

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\(^{445}\) National Alternative Dispute Resolution Advisory Council, above n 440, 8.

\(^{446}\) Department of Justice, Victoria, above n 421, 14.
ii) Overcoming the barriers

Overcoming the barriers that prevent or restrict marginalised groups and individuals accessing civil ADR services may be resource intensive and time consuming. This section considers how these barriers may be removed. In particular, it discusses increasing access to information and increasing accessibility.

Increasing access to information

As marginalised individuals and communities may lack knowledge or awareness of civil ADR mechanisms, it is important that these services be publicised to these groups. Information about ADR services may be provided through community groups, organisations and centres as well as through more traditional means such as via websites and telephone information services. It is important that this information be available in a variety of community languages. A survey of ADR service providers found that agencies providing ADR in Victoria currently use a mix of 40 community languages to promote their services. The most frequently used languages are Arabic and Chinese (each used by 14% of agencies), Vietnamese (12%) and Greek, Italian and Turkish (12% each).447

Measures that aim to increase awareness of services need to be cognisant of research that shows that, for most people, the first step in finding a service to assist in resolving a dispute is to ask family or friends.448 The same research indicates the people with concession cards were significantly less likely to report that they would look for dispute resolution services on the internet.449

Marginalised groups may be in contact with a number of services in the community. It is therefore important that these services are linked effectively and have knowledge about services which are available to help clients resolve disputes. The Neighbourhood Justice Centre (NJC) model is a good example of this. A Screening Assessment and Referral Team is based at the NJC which focuses on meeting the needs of clients and connecting them with appropriate services, for example mental health, drug and alcohol and counselling services. In addition, a range of services are available onsite, such as legal aid, mediation, victim services.450

Outreach is also an effective way of providing information about services to the community, particularly those who might not otherwise access information. A community outreach approach is being actively modelled by the Neighbourhood Justice Centre.

ADR is increasingly being used by government agencies and industry bodies to resolve disputes about decisions or entitlements. There are a range of dispute resolution and ombudsman schemes that deal with disputes related to issues that may impact disproportionately on marginalised groups, for example health services, energy and water service provision and government decisions. A recent Victorian survey found that persons holding a concession card were less aware of many of these

448 Peacock, Bondjakov and Okerstrom, above n 425, 18.
449 Ibid.
services than persons not holding a concession card. The variety of such services may be confusing to consumers, and anecdotaly these agencies report that they receive many queries that are outside their jurisdiction and require referral. Some service providers have expressed concern that there may be ‘drop out’ from referral, with the result that the dispute remains unresolved. The issue of referral loss was discussed in detail in chapter 4, *ADR and access to justice*.

### Question 38: Increasing access to information on ADR for marginalised communities

(a) Is there a need to better promote ADR providers and services to marginalised individuals and communities? If so, how should this be done? For example, what kind of promotional material is required and how should it be distributed?

(b) Is there the need for a more coordinated approach by agencies and service providers to provide information (including about ADR) to marginalised individuals and communities? If so, how could this be achieved?

### Improving access to services

Making mainstream services accessible to members of marginalised communities requires a multifaceted approach. This may include reducing the formality of services, simplifying processes and providing physical environments that are open and welcoming. Access can also be increased by locating services close to public transport, providing infrastructure to ensure that people with disabilities can easily access the building and providing services that are local – for instance the Dispute Settlement Centre of Victoria (DCSV) has a panel of country mediators and can arrange for mediations to be held throughout Victoria. In addition, other matters to be taken into account include service availability, providing information about processes, community involvement in service design and ADR practitioners who are sensitive to the needs of participants. These matters are discussed in more detail below.

### Service availability

A person from a marginalised community who has a dispute may have a range of needs that do not relate directly to their dispute. Therefore it is important that a holistic and integrated approach be taken by ADR service providers. In relation to Indigenous persons, NADRAC notes:

The overlapping nature of problems and lack of access to services means that a dispute resolution service will need to address a range of issues that may not fit within its formal mandate. Services may therefore need to have a broad mission, or develop cooperative arrangements with other services through referral protocols or partnerships.

As noted above, community-based services and organisations can provide an important referral point for ADR services. It is also important that ADR services

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451 Peacock, Bondjakov and Okerstrom above n 423, 13.
453 Ibid, 77.
454 National Alternative Dispute Resolution Advisory Council (2006), above n 433, 5.
provide a referral point for clients. For example, a wide variety of services are available on site at the Neighbourhood Justice Centre. In addition, clients can receive referrals to services located off site. Such a partnership approach recognises the complex needs of many attending ADR services.

Marginalised individuals, for example drug users, may lead chaotic lives. It may be difficult for them to keep appointments. Therefore it is essential that as far as possible services are available on demand and that when appointments are made, clients are reminded prior to the appointment time and provided with any necessary assistance to attend the appointment.

Providing information about process

The provision of information to participants about the ADR process is also important. This will help increase participant’s understanding of the ADR process and their role in it, potentially increasing their confidence and capacity to fully participate in and contribute to the process. Providing information about the roles of other parties involved in the ADR process, for example the mediator, will help manage expectations of the process. An interpreter may be required at this stage, to ensure that participants from non-English speaking backgrounds fully understand all information about process.

Community involvement in service design

Programs and services aimed at marginalised groups are more likely to be appropriate and acceptable to these groups if they are actively involved in service design. This helps to ensure that ADR services are not automatically underpinned by western cultural norms. In addition, the community is more likely to trust and feel ownership of programs that it has been actively involved in developing. For example, the Koori community was actively consulted and involved in the establishment of the Koori Courts in Victoria.

ADR practitioners sensitive to the needs of participants

The involvement of members of marginalised groups in service delivery is an important component in effectively engaging these communities. Research has shown that the services that provide Indigenous mediators, liaison officers and other staff often experience an increase in Indigenous clients, including those who have not previously accessed these services. The value of training and accreditation of ADR practitioners is discussed further in chapter 7, Regulation of ADR. In setting training and accreditation standards, it is important to ensure that these requirements do not become a barrier to Indigenous or other marginalised people becoming ADR practitioners sensitive to the needs of participants

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455 National Alternative Dispute Resolution Advisory Council, above n 427, 25.
456 Brigg, above n 439, 297.
457 Bauman, above n 455, 38.
459 National Alternative Dispute Resolution Advisory Council, above n 441, 1.
practitioners. In this regard, it may be appropriate to recognise practical experience. In addition, specific training could be targeted at mediators from particular groups. For example, DSCV runs specific mediation training programs for people from Indigenous and CALD backgrounds.

It may not always be possible or appropriate for an ADR practitioner to be of a particular background. Therefore, it is also important to ensure that ADR practitioners in general have a good knowledge and understanding of the issues and barriers associated with particular groups accessing ADR services. This may involve formal training, communication with community representatives and information sharing with other relevant practitioners and agencies. NADRAC has suggested the establishment of a national ADR information network to facilitate information sharing about dispute resolution techniques in relation to particular groups in society.

6.4 Marginalised communities and restorative justice

This section examines the use of restorative justice programs in relation to members of marginalised groups and communities. It firstly considers marginalised communities’ experiences with the criminal justice system and then explores the advantages that restorative justice programs may provide this group. Finally the potential use of restorative justice responses to family violence matters are considered.

6.4 Marginalised communities and restorative justice

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6.4.1 Marginalised communities and the criminal justice system

Members of marginalised and disadvantaged groups make up a disproportionate number of the defendants coming before the courts.\textsuperscript{463} This overrepresentation is emphasised by a range of data including:

- Indigenous Victorians are six times as likely to be arrested as non-Indigenous Victorians and 13 times as likely to be imprisoned.\textsuperscript{465}
- Two thirds of Victorian prisoners report that their offences related to drug use.\textsuperscript{466}
- People with intellectual disabilities and acquired brain injuries are over-represented in the criminal justice system.\textsuperscript{467}
- The rate of mental illness among Victorian prisoners is over three times that of the general community.\textsuperscript{468}

Of particular concern is the overrepresentation of young people, especially young people from marginalised backgrounds, in the criminal justice system. Young people who have contact with the criminal justice system are at significantly greater risk of being imprisoned as adults.\textsuperscript{469} Young Indigenous offenders have been found to be even more likely than non-Indigenous juvenile offenders to be imprisoned as adults.\textsuperscript{470} One study found that 86 per cent of Indigenous juvenile offenders were subsequently imprisoned as adults.\textsuperscript{470} The 1991 Royal Commission into Aboriginal Deaths in Custody identified links between the social, cultural and economic disadvantage of Indigenous people and their disproportional representation in the criminal justice system.\textsuperscript{471}

There is limited data available about the extent to which restorative justice processes are used in Victoria in relation to criminal offences by people from marginalised groups. However, an evaluation of the use of group conferencing in the Victorian Children’s Court found that users were predominantly Anglo-Saxon and that members of marginalised groups were not well-represented.\textsuperscript{472}

As noted earlier, victims are often active participants in restorative justice processes. Therefore it is important to acknowledge that members of some marginalised groups may also be more likely to be victims of crime than the general community. For example, Indigenous Victorians were three times more likely to report being a victim of crime in the past twelve months than non-Indigenous Victorians.\textsuperscript{473} Crime victims from marginalised communities may be more reluctant to access justice and support

\textsuperscript{463} Ibid, 58.
\textsuperscript{465} Department of Justice, Victoria, above n 409, 59; Department of Justice, Victoria, Victorian Aboriginal Justice Agreement (2000) 8.
\textsuperscript{467} Ibid.
\textsuperscript{468} Ibid.
\textsuperscript{472} Anne Markiewicz, Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program, Phase Two (1997). IX.
services. Restorative justice programs may therefore be seen as providing increased justice outcomes for marginalised victims of crime.

Question 40: Data collection on members of marginalised groups’ access to restorative justice programs

(a) To what extent are members of marginalised groups currently accessing restorative justice programs in Victoria?

(b) How can we improve data collection in relation to access to ADR programs by members of marginalised groups?

(c) What type of data would be useful? Why would this data be useful?

(d) How should the data collected be reported?

6.4.2 Advantages of restorative justice processes for marginalised groups and individuals

Restorative justice programs also potentially provide a number of benefits for members of marginalised groups and communities. Group conferences in the Victorian Children’s Court recognise the links between juvenile and adult incarceration and attempt to prevent repeat offending. Such interventions allow the offender to be considered as a whole, and recognise issues underlying the offending behaviour, such as drug use or mental health issues. Restorative justice processes may also allow cultural contexts to play a greater role in the dispute resolution processes. For example, the involvement of members of the offender’s community may increase the shame associated with the offending behaviour and reduce the likelihood of re-offending.475 The involvement of victims or their representatives also enables victims to have a voice and reparations to be made. The potential outcomes of restorative justice initiatives such as reduced crime rates and reduced imprisonment rates were discussed in chapter 5, Measuring the outcomes of ADR.

Restorative justice programs in Australia are largely modelled on those developed in New Zealand. In New Zealand, interest in restorative justice emerged from dissatisfaction with the way young offenders, particularly Maoris, were treated by the traditional justice system.476 In Victoria, as elsewhere in Australia, restorative justice initiatives have been widely implemented in the juvenile jurisdiction. However, in contrast to the New Zealand model, there has been little focus on Indigenous offenders or indeed members of other marginalised groups. In fact, the evaluation of group conferences in the Victorian Children’s Court found that conferenced offenders were predominantly Anglo-Saxon.477 Evaluations of conferencing programs in other states have also identified low levels of referrals of marginalised individuals, in particular Indigenous offenders.478

474 Department of Justice, Victoria, above n 409, 13.
477 Markiewicz, above n 472, IX.
478 Strang, above n 476, 21.

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474 Department of Justice, Victoria, above n 409, 13.
477 Markiewicz, above n 472, IX.
478 Strang, above n 476, 21.
It therefore appears that, while restorative justice processes have the potential to provide benefits for members of marginalised groups, may not be reaching their full potential in this regard. The need for widespread consultation with marginalised communities in implementing restorative justice programs has been emphasised. In some Australian jurisdictions such as South Australia, Queensland and New South Wales, there have been more Indigenous people employed as restorative justice conference convenors.479

Another approach that has emerged in response to offending by members of marginalised communities, particularly Indigenous people, is the establishment of specialist courts that aim to provide culturally appropriate environments and sentencing. In Victoria, Koori Courts have been established at the Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton and Warrnambool Magistrates' Courts and are available to Koori defendants who plead guilty.480

The Koori Court provides an informal environment that is less alienating for Koori people and allows greater participation by Koori defendants, their families and the community.481 A Koori Elder or Respected Person provides advice to the court on cultural matters. The court aims to reduce re-offending and Koori imprisonment by increasing the positive participation of Koori offenders and increasing the accountability of Koori individuals, families and communities. While the magistrate retains full sentencing alternatives, the Court aims to make sentences that are more culturally appropriate to Koori offenders, thus reducing the rate of imprisonment, breach of order and re-offending.482 A Koori division of the Children's Court was established in 2005, following the successful pilot of adult Koori Courts.483

An evaluation of the Koori Courts in Shepparton and Broadmeadows found that during the initial two year pilot, recidivism rates decreased significantly, the number of offenders breaching community corrections orders fell and there was a reduction in the number of Kooris who failed to attend their court appearances.484 Similarly, Circle Sentencing programs in New South Wales, which provide informally, culturally appropriate sentencing for Indigenous offenders, have also resulted in reductions in re-offending.485

While the Koori Courts incorporate informality and increased involvement of the community, the victim and the offender, they involve traditional court and decision making structures, and are not restorative justice initiatives as defined by the Committee. However, there may be the capacity to increase the scope of these programs to include restorative justice elements. For example, the Koori Court could provide diversion to restorative justice conferencing programs.

479 Ibid, 39.
481 Department of Justice, Victoria, Overview of the Koori Court (2006).
482 Magistrates' Court of Victoria, above n 480.
483 Office of the Attorney-General, 'First Children's Koori Court Opens in Melbourne' (Press Release, 9 September 2005).
6.4.3 Restorative justice responses to family violence

As was discussed earlier in this Discussion Paper, sexual offences are currently excluded from restorative justice initiatives in Victoria. There is considerable debate about whether restorative justice processes are appropriate in matters of family violence.486 Restorative justice approaches may be seen as providing the community with ‘ownership’ over family violence matters and have been particularly advocated as a response to family violence in the Indigenous community.487 The Victorian Law Reform Commission’s Report on Family Violence found ‘qualified support’ in the Indigenous community for alternative criminal and civil responses, including restorative justice initiatives, to family violence matters.488 The Commission concluded that there was insufficient evidence to support the use of restorative justice approaches to family violence matters and recommended further research in this area.489 The Commission also recommended that, if restorative justice practices were introduced in relation to family violence matters, practice standards would need to be developed, practitioners would need to be trained and there would need to be regular monitoring and evaluations of programs.490

Question 41: Advantages and disadvantages of restorative justice processes for marginalised individuals and communities

(a) What advantages do restorative justice processes offer for marginalised individuals and communities? What are the disadvantages associated with the use of restorative justice initiatives for these groups?

(b) Is there a need for restorative justice programs to be utilised further in relation to marginalised communities and groups? For example, is there merit in the Koori Court having a restorative justice diversion component?

Question 42: Restorative justice responses to family violence

Are restorative justice responses to family violence matters appropriate? If so, in what circumstances? What safeguards, if any, would need to be in place?

489 Ibid, 85.
490 Ibid.
7. Regulation of ADR

7.1 Introduction

The Committee’s terms of reference require the Committee to consider whether a form of Government regulation of ADR providers is appropriate or feasible. In particular, the Committee is to address the issue of regulation with a view to achieving greater consistency and accountability for Victorians in the provision of ADR services. This chapter explores regulation of ADR. Firstly a definition of ‘regulation’ is provided and the different models of regulation are outlined. Then an overview of the current ADR regulatory landscape in Victoria is provided, together with a discussion about whether additional or alternative government regulation of ADR is appropriate or viable. The Committee notes that the lack of agreed definitions of ADR and ADR processes is a threshold issue if regulatory reform is to be introduced, and raises five particular issues for discussion: quality and standards, education and training requirements, accreditation, confidentiality obligations of ADR providers, and legal immunity and protection for ADR providers. Suggested models of regulation are then canvassed. The final part of the chapter outlines some regulatory issues as they apply specifically to restorative justice programs.

7.2 The concept of ‘regulation’ in ADR

Regulation has been defined as including ‘any law or ‘rule’ which influences the way people behave. Regulation is not limited to government legislation; and it need not be mandatory.’\(^{491}\) The Australian Office of Best Practice Regulation states that regulation is ‘essential for the proper functioning of society and the economy.’\(^{492}\)

Regulatory measures can be implemented in many forms through a number of regulatory models. Figure 2 below outlines the spectrum of models which may exist in the regulation of ADR.


\(^{492}\) Office of Best Practice Regulation, Best Practice Regulation Handbook (2006), [1-1].
7.3 Current regulation of ADR providers in Victoria

Since the 1970s, ADR services in Victoria and throughout Australia have developed in an ad-hoc manner in response to different needs within the community. As ADR services have increased, so too has the regulation surrounding its provision. Most ADR provision is now institutionalised and regulated to some degree: Astor and Chinkin state that it is no longer accurately labelled ‘alternative’ dispute resolution. However, the diversity in ADR supply is reflected in the diversity of regulators and regulatory schemes.

It is apparent that much ADR is already subject to forms of government control. This control may take the form of laws, regulations and rules specifically covering ADR. Indirect control also occurs through ADR being managed by an existing statutory body, or being directly funded by government. However, government regulation of ADR processes and practitioners is currently occurring in a situation-specific and ad-hoc manner.


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What follows is an overview of the current regulation of ADR providers (whether individual or organisational providers) in Victoria. It is intended to be indicative of the current regulatory landscape and as such does not purport to be an exhaustive list of regulators, those regulated or the regulations themselves which apply throughout Victoria. In particular, the regulation of family law ADR providers, a Commonwealth matter, is not explored.

7.3.1 ADR suppliers and regulation in Victoria

This section firstly explores regulation of some major public suppliers in Victoria, including courts and tribunals and non-court or tribunal annexed public suppliers. Following this is a discussion of the regulation of private suppliers of ADR including industry ADR schemes and other private provider bodies and individuals such as barristers, solicitors and private mediators.

i) Court and tribunal annexed ADR

The increased use of court-annexed mediation in particular has led to the introduction of many court and tribunal specific regulatory provisions throughout legislation and court rules, in Victoria and throughout Australia. Table 2 outlines the regulation of court and tribunal annexed ADR in Victoria.

In Victoria, the courts generally outsource ADR services. ADR practitioners are typically external to the court and are members of a panel of court-approved ADR service providers. ADR practitioners may also be regulated by these service provider organisations.

ii) Public ADR suppliers

Publicly funded ADR suppliers are often established and regulated by legislation, such as the Victorian Equal Opportunity and Human Rights Conciliation and the Accident Compensation Conciliation Service. Other ADR suppliers are managed by government departments. For example, the Dispute Settlement Centre Victoria and Consumer Affairs Victoria are managed by the Department of Justice. These public suppliers often have internal training and accreditation requirements for those ADR providers who undertake ADR services for them, and supplier specific standards, codes of conduct and rules of procedure. Provisions in relation to confidentiality and ADR practitioner immunity are generally contained in the governing or other applicable legislation. Table 3 outlines the regulation of a sample of government funded ADR suppliers.

iii) Industry ADR schemes

As discussed previously in this Discussion Paper, Victorians have access to both Victorian and national industry ADR schemes, often with appointed ombudsmen. These schemes are largely a product of the privatisation of services such as energy services, and industry self-regulation. Industry ADR scheme members agree to submit their consumer disputes to the applicable industry scheme for resolution. However, Field points out that most industry ombudsmen schemes rely on

496 Ibid, 30.

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496 Ibid, 30.
government for part of their legitimacy, as governments or independent regulators may require a scheme’s existence under legislation or as part of a licence for a business to operate in a market.\textsuperscript{907} Table 4 outlines the regulation of some industry ADR schemes in Victoria.

A further level of self-regulation exists for ADR provider organisations who are members of peak bodies which require compliance with certain standards in the provision of ADR services. For example, the Energy and Water Ombudsman Victoria is one of the ombudsmen that belong to the Australian and New Zealand Ombudsman Association (ANZOA), which was incorporated in 2003.\textsuperscript{498} ANZOA’s objects include the formulation and promotion of best practice standards to be met by Ombudsmen and their offices in the performance of their duties.\textsuperscript{499} All industry-based members of ANZOA come from ADR schemes which comply with the Australian Benchmarks for Industry-Based Customer Dispute Resolution Schemes\textsuperscript{100} and the Australian Standards on Complaint Handling\textsuperscript{501} and Dispute Resolution.\textsuperscript{102} Other Victorian ADR provider members of ANZOA include both statutory schemes such as Ombudsman Victoria, and industry schemes such as the Public Transport Ombudsman (Victoria).

\textbf{iv) Private ADR provider bodies}

Organisations whose professional members engage in ADR provision, such as the Victorian Bar Association and LEADR, have developed their own ADR regulatory systems including accreditation schemes. They also generally have codes of conduct or practice and re-accreditation requirements by which members who wish to remain accredited by their organisation must abide. An outline of the self-regulatory measures of these providers can be found at Table 5.

\textbf{v) ADR provider peak body}

There is currently no peak Victorian or Australian body of ADR providers which regulates all ADR practitioners. However, there may be potential for this to occur. The mediator peak body National Mediation Conference (NMC) is an example of a self-regulating peak body. NMC is engaged in the regulation of mediators only\textsuperscript{5} at a national level. At the 2006 National Mediation Conference, the body of the Conference approved a draft National Mediator Accreditation System, which allows Australian mediators who meet the threshold requirements set out in the more recently developed draft Approval Standards to be accredited to the NMC’s National Mediation Standard.\textsuperscript{503} The system will be voluntary for those mediators who wish to obtain Accreditation to the National Mediation Standard and there will be no

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compulsion for mediators to obtain this accreditation in order to practice.\textsuperscript{504} Accredited mediators will be listed in a national register and will be subject to Practice Standards which describe their practice and competency requirements as well as ethical and professional obligations. At the time of publication, the Draft Accreditation Standards (which incorporate the Approval and Practice Standards) were being finalised and the organisation responsible for drafting them has indicated that they may be implemented as a voluntary standard by 1 January 2008.\textsuperscript{505}

\textsuperscript{504} Ibid.
**Table 2: Regulation of court and tribunal connected ADR**

<table>
<thead>
<tr>
<th>Court/ Tribunal</th>
<th>Regulation source</th>
<th>Accreditation</th>
<th>Standards/ ethics</th>
<th>Confidentiality and admissibility</th>
<th>Immunity</th>
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</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>Supreme Court Act 1986 (Vic)</td>
<td>No – but website lists Victorian Bar, Law Institute of Victoria, IAMA and LEADR as sources of ADR practitioners.</td>
<td>Standards for Court- connected Mediation in Victoria: Approved by the Supreme Court’s Panel of Approved Mediators.</td>
<td>Inadmissibility: s 14A (SCA): mediation: No evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation, unless all parties who attend otherwise agree in writing.</td>
<td>S 14A (SCA): A special referee, mediator or arbitrator to whom a proceeding (or part of proceeding) is referred has the same protection and immunity as a judge of the Supreme Court in the performance of their duties.</td>
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<tr>
<td>County Court</td>
<td>County Court Act 1958 (Vic)</td>
<td>No – but website lists Victorian Bar, Law Institute of Victoria, IAMA and LEADR as sources of ADR practitioners.</td>
<td>Standards for Court- connected Mediation in Victoria: Approved by the Supreme Court’s Panel of Approved Mediators.</td>
<td>Inadmissibility: s 4B (CCA): mediation: No evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation, unless all parties who attend otherwise agree in writing.</td>
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</tr>
<tr>
<td>Magistrates Court</td>
<td>Magistrates' Court Act 1989 (Vic) Evidence Act 1958 (Vic)</td>
<td>Non-register mediators are listed by LEADR and DSVC and a number are appointed and gazetted under the Evidence Act 1958 (Vic)(^{59}). Non-register mediators must be accredited by their professional peer organisation.(^{60})</td>
<td>Standards for Court- connected Mediation in Victoria: Approved by the Supreme Court’s Panel of Approved Mediators.</td>
<td>Inadmissibility: s 92 (VCATA): Evidence of anything said or done in the course of mediation is not admissible in any hearing before the Tribunal in the proceeding, unless all parties agree to the giving of evidence. Confidentiality: see paragraph 7 of Mediation Code of Conduct.</td>
<td>S 143(1) (VCATA): A mediator has, in the performance of his or her functions as mediator, the same protection and immunity as a member of the Tribunal.</td>
</tr>
<tr>
<td>Victorian Civil and Administrative Tribunal (VCAT)</td>
<td>Victorian Civil and administrative Tribunal Act 1989 (Vic)</td>
<td>In the Credit List, for example, mediators are either Tribunal members or on the Tribunal’s panel of approved mediators.(^{62})</td>
<td>Mediation Code of Conduct</td>
<td>Inadmissibility: s 14A (SCA): mediation: No evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation, unless all parties who attend otherwise agree in writing.</td>
<td>S 143(1) (VCATA): A mediator has, in the performance of their functions as mediator, the same protection and immunity as a member of the Tribunal.</td>
</tr>
</tbody>
</table>

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505 Ibid.
507 Ibid.
Table 3: Regulation of public ADR providers

<table>
<thead>
<tr>
<th>Public ADR supplier</th>
<th>Regulation source</th>
<th>Training/educational requirements</th>
<th>Accreditation</th>
<th>Standards/Ethics</th>
<th>Confidentiality and admissibility</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accident Compensation Conciliation Service</td>
<td>Accident Compensation Act 1955 (Vic)</td>
<td>Conciliation officers must have undertaken a recognised ADR training program.</td>
<td>As determined by the organisation.</td>
<td>Confidentiality: +21N (EA): A mediator and any party or parties to a dispute may not disclose the identity of any person without his or her consent, or is made by a person who reasonably considers it necessary to disclose the information in good faith.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accident Compensation Conciliation Service</td>
<td>Accident Compensation Act 1955 (Vic)</td>
<td>Conciliation officers must have undertaken a recognised ADR training program.</td>
<td>As determined by the organisation.</td>
<td>Confidentiality: +21N (EA): A mediator and any party or parties to a dispute may not disclose the identity of any person without his or her consent, or is made by a person who reasonably considers it necessary to disclose the information in good faith.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

509 Department of Justice, Victoria, above n 506, 35.
### Table 4: Regulation of industry ADR schemes

<table>
<thead>
<tr>
<th>ADR provider</th>
<th>Regulation source</th>
<th>Training/ educational requirements</th>
<th>Standards/ Ethics</th>
<th>Confidentiality and admissibility</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy and Water Ombudsman (Victoria)</td>
<td>Governance arrangement is a Board of Management with an equal number of member and consumer representatives and an independent chairperson.</td>
<td>Tertiary qualifications but no specialist ADR accreditation is necessary. Approximately half of the conciliators shall have a legal qualification.</td>
<td>As determined by the organisation.</td>
<td>Conclusors handle information in line with the National Privacy Principles contained in the Privacy Act 1988 (Cth). Where they need to seek information from someone other than a consumer’s supplier or its agents, they discuss this with the consumer first.</td>
<td>No particular immunity for conciliators is granted by this organisation.</td>
</tr>
<tr>
<td>Public Transport Ombudsman (Victoria)</td>
<td>Governance arrangement is a Board of Management with an equal number of member and consumer representatives and an independent chairperson.</td>
<td>All conciliators have undertaken training with LEADR.</td>
<td>As determined by the organisation.</td>
<td>The collection, use and disclosure of personal information is done for the primary purpose of complaint handling and in compliance with the National Privacy Principles.</td>
<td>No particular immunity for conciliators is granted by this organisation.</td>
</tr>
</tbody>
</table>

510 Department of Justice, Victoria, above n 506, 22.  
511 Ibid, 36.  
512 Ibid.  
514 Department of Justice, Victoria, above n 506, 22.  
515 Ibid, 36.  
## Table 5: Regulation of private ADR providers

<table>
<thead>
<tr>
<th>ADR provider</th>
<th>Regulation source</th>
<th>Training/educational requirements for accreditation</th>
<th>Accreditation</th>
<th>Standards/Ethics</th>
<th>Confidentiality and admissibility</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Law Institute of Victoria (LIV)</td>
<td>Legal Profession Act 2004 (Vic)</td>
<td>Must be a legal practitioner under the Act (which includes the requirement of a law degree) plus approved mediation training.</td>
<td>-The LIV provides a list of legal practitioners who operate as mediators - Leaders in the field can also apply to become an LIV Accredited Mediation Specialist. Re-accreditation is required every 3 years.</td>
<td>LIV Practice Guidelines and various ethics guidelines.</td>
<td>Confidentiality: Under the LEADR Ethical Standards for Mediators, subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.</td>
<td>Immunity is dependent on the setting in which the ADR practitioner works.</td>
</tr>
<tr>
<td>LEADR</td>
<td>LEADR Accreditation Scheme</td>
<td>Includes completion of a LEADR dispute resolution workshop (such as the 4 day mediation workshop) or a comparable workshop, or dispute resolution training program developed through a recognised institution of higher learning which addresses both the theory and practice of mediation, and demonstrated competency.</td>
<td>LEADR Accreditation Scheme: Two levels of accreditation: 'accredited' and 'advanced'. Re-accreditation is required every 3 years.</td>
<td>LEADR Ethical Standards for Mediators, extracted from the Law Council of Australia’s statement for the ethical practice of mediation and adopted by the LEADR Board.</td>
<td>Confidentiality: Under the LEADR Ethical Standards for Mediators, subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.</td>
<td>Immunity is dependent on the setting in which the ADR practitioner works.</td>
</tr>
<tr>
<td>Institute of Arbitrators &amp; Mediators Australia (IAMA)</td>
<td>IAMA Mediator Accreditation Policy, Adjudicator Accreditation Policy</td>
<td>Benchmark criteria include: successful completion of a mediator training course recognised by the National Council with a minimum duration of 40 hours; and successful conduct of at least one simulated or actual mediation; and professional interview and report as outlined in paragraph 5; and provision of two independent referees names and contact details and/or references.</td>
<td>Grading as an Arbitrator, Accreditation as a Mediator or Adjudicator. The Institute has a policy that requires all Graded Arbitrators, Accredited Mediators and Accredited Adjudicators to undertake at least 75 hours of training every three years.</td>
<td>Principles of Conduct for Mediators Rules of Professional Conduct</td>
<td>Confidentiality: Principle 3, Principles of Conduct for Mediators: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or public policy.</td>
<td>Immunity is dependent on the setting in which the ADR practitioner works.</td>
</tr>
</tbody>
</table>

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520 Ibid, 3.
While the use of ADR has increased, the law that facilitates, supports and regulates these processes is arguably still at a formative stage.\textsuperscript{522} The diversity of settings in which the processes are used means that the legislation and/or other regulatory measures have often developed piecemeal in response to a particular service provision.\textsuperscript{523}

There is currently no national or Victorian single training and accreditation body for ADR providers, and no nationally or Victorian accepted benchmarks or criteria for training and accreditation. Instead, bodies such as ACDC, Ombudsmen and the Bar Association of Victoria use their own training and accreditation methods and standards.\textsuperscript{524} Different ADR practitioners, such as mediators, conciliators and arbitrators will arguably have their own particular education and training needs; however, within each of these types no minimum standards exist.

Quality control procedures such as complaints mechanisms differ, and ADR practitioner immunity from civil suit differs depending on the setting in which they are practising.

In short, ADR regulatory measures are not consistent, coordinated or systematic within and across jurisdictions and programs. This means that although practitioner requirements regarding elements of the process that are seen as central to ADR, such as confidentiality and impartiality, are common, it is more difficult to discern emerging minimum standards for training, education and accreditation.

Question 43: Current regulation of civil ADR

Does the discussion of current regulatory practices in section 7.3 accurately capture the extent of regulation of civil ADR in Victoria?

7.4 Does the civil ADR sector require regulatory reform?

This section first explores some perceived advantages and disadvantages of the current civil ADR regulatory landscape in Victoria. There is then a discussion about whether regulatory reform of the ADR sector is required, including the potential role of government in any regulatory reform.

7.4.1 Advantages and disadvantages of the current Victorian civil ADR regulatory landscape

An appreciation of the advantages and disadvantages associated with current ADR regulation is essential to effectively formulate best practice provision and regulation of ADR processes in Victoria. This section outlines the benefits and problems associated with the current regulation of ADR.

522 Carroll, above n 493, 172.
523 Ibid.
i) Advantages of the current Victorian civil ADR regulatory landscape

Perceived advantages of the current Victorian ADR regulatory landscape include:

- Situation specific regulation (including training, accreditation and practice requirements) can be sensitive to the diversity of institutional settings, processes, objectives and personnel which occurs in ADR service provision throughout Victoria.\(^{525}\) For example, ADR professionals who work intrinsically within the court and tribunal system require a high level of understanding of the operation, practice and procedure of the relevant court or tribunal.\(^{526}\)

- Flexibility of regulation allows providers to design their services to meet individual situations\(^{527}\) as well as consumers to choose the ADR system that suits their needs.\(^{528}\)

- Costs for consumers are minimised due to low compliance costs being incurred by ADR providers.\(^{529}\)

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Question 44: Advantages of the current Victorian system of civil ADR regulation

What are the advantages of the current system of civil ADR regulation in Victoria?

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ii) Disadvantages of the current Victorian civil ADR regulatory landscape

Perceived risks and problems with the current Victorian regulation of ADR include:

- Consumers may not have sufficient information to make informed decisions about the range of service providers available and the quality of providers.\(^{530}\) Further, users of ADR services may be confused by the exact nature of the processes offered by each supplier.

- Unscrupulous operators may operate without being held accountable for illegal or unethical conduct.\(^{531}\) Nor do consumers necessarily have consistently satisfactory avenues of recourse if dissatisfied with the level of service provided.

- The lack of consistent processes and criteria for the recognition and accreditation of ADR practitioners may lead to legal uncertainty and wasted public and private resources for both practitioners and organisations, which in turn may increase the cost and decrease the accessibility of ADR service provision.

- There are ADR providers, such as those who provide privately funded ADR, who remain unregulated. Self-regulation applies only to service providers who choose to adopt any common standards.\(^{532}\) Some ADR service providers, whether individuals or organisations, may choose not to become a member of a regulating

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Question 44: Advantages of the current Victorian system of civil ADR regulation

What are the disadvantages of the current system of civil ADR regulation in Victoria?

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\(^{526}\) Tania Sourdin, Alternative Dispute Resolution (2\(^{nd}\) ed, 2005) 192.


\(^{528}\) Ibid.

\(^{529}\) Department of Justice, Victoria, Alternative Dispute Resolution Supplier Survey 2006 (2007) 32.

\(^{530}\) Department of Treasury and Finance, Victoria, Victorian Guide to Regulation (2\(^{nd}\) ed, 2007), [3-7].

\(^{531}\) Department of Justice, Victoria, Alternative Dispute Resolution Supplier Survey 2006 (2007) 32.

\(^{532}\) National Alternative Dispute Resolution Advisory Council (NADRAC), A Framework for ADR Standards (2001) 75.
organisation and therefore may ignore these organisations’ standards of ADR practice.533

• Additional government intervention may be needed in specific areas of ADR practice such as family disputes involving violence, tenancy and other disputes where particular groups in the community would suffer disadvantage if specific protections were not provided.534

• In the absence of a generally recognised accreditation system, inappropriate regulation may be introduced, such as the establishment of threshold academic or professional credentials that are not directly relevant to mediation competence. Such thresholds may eliminate highly capable mediators as well as those from specific social backgrounds, and so reduce both the overall skill level of mediators and the diversity of their backgrounds.

• Some stakeholders have expressed concern that the shorter ADR training courses currently on offer are inadequate to deliver sufficient knowledge and skills to practitioners, who can then commence practice without further requirements.535 There is also a concern that people with certain qualifications, such as lawyers, may be assumed to need less training than others who do not have those qualifications.536

**Question 45: Disadvantages of the current Victorian system of civil ADR regulation in Victoria?**

**7.4.2 Is civil ADR regulatory reform required?**

As previously discussed, regulation of ADR provision is occurring across a diverse range of suppliers, however the ADR sector lacks a co-ordinated system of regulation. With the increasing use of ADR across a diverse range of settings, the need for consistent minimum standards of education, training, accreditation and practice becomes more compelling. Certainty in matters such as confidentiality, enforceability of outcomes and practitioner immunity are also increasingly important.

In its 2001 report *A Framework for ADR Standards*, NADRAC recommended that:

Commonwealth, State and Territory Governments undertake a review of statutory provisions applying to ADR services… including [making] recommendations on how to:

(a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and (b) provide means by which consumers of ADR services can seek remedies for serious misconduct.537

In Victoria, as in other jurisdictions, there has been a recent trend towards minimising the overall government regulatory burden. The Victorian Competition and Efficiency Commission (VCEC) examines regulation at a Victorian level to determine whether

organisation and therefore may ignore these organisations’ standards of ADR practice.533

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533 Ibid.
534 NADRAC, above n 532, 75.
535 Field, above n 495, 84.
537 NADRAC, above n 532, Recommendation 11.
regulation by way of legislation is necessary, or whether other forms of regulation would be better suited to the industry concerned. The VCEC states that ‘regulatory measures are required to be the minimum necessary to achieve the desired objectives, while avoiding or reducing the risks of undesirable side effects.’ It is considered particularly important that the regulatory burden on business be minimised to keep compliance costs as low as possible and avoid detrimental effects on business efficiency and performance.

Given this, the VCEC considers that:

the onus of proof should be on those advocating regulation to demonstrate that: there is a significant problem; the benefits of the proposed response outweigh its costs; and the proposal represents the best approach to solve the problem.

The Commonwealth Office of Best Practice Regulation posits that the challenge in formulating regulatory measures is ‘to deliver effective and efficient regulation – regulation that is effective in addressing an identified problem and efficient in terms of maximising the benefits to the community, taking account of the costs.’

The diversity and consistency principles

Any regulatory reform of ADR provision must consider the balance required between the competing principles of diversity and consistency. Advocates of ADR processes characterise them as flexible and adaptable, unconstrained by the many procedural and evidential rules that apply to court proceedings. Accordingly, some stakeholders contend that effective ADR regulation needs to recognise and allow for innovation and the diversity in definitions, institutional settings, processes, objectives and personnel. This approach is known as the ‘diversity principle.’ However, it is a basic premise of law-making that like cases be treated alike. It is therefore reasonable to expect consistency in the way that each ADR process and its providers are regulated. This ‘consistency principle’ is also linked to the need to establish consistent and reliable definitions and measures of quality in ADR service provision. However, in an emerging field like ADR it takes time to settle on the appropriate legal rules and apply them consistently.

7.4.3 Is the regulatory reform of ADR providers by government required, appropriate or feasible?

The Victorian Government currently funds and subsidises ADR services across a wide and diverse range of civil disputes. Where governments spend funds on ADR services, they are logically concerned to exercise their responsibility to ensure that those funds are expended wisely to ensure the quality and efficiency of ADR services and to ensure that the needs of vulnerable people are protected in these services.
According to the Victorian Attorney-General’s Justice Statement, ‘if ADR is to become accepted as the most appropriate form of resolving disputes, the Government must assist it to move to a new level of organisation and co-ordination.’

Potential advantages of government regulatory reform of the ADR sector include a decrease in the amount of existing regulation and simplification of the regulatory landscape (for example, by allowing for universal, industry-wide application). This may decrease the burden on ADR small business providers and make ADR more accessible to consumers, who will more easily know what the ‘rules of engagement’ in ADR processes are. Government regulation also allows for enforcement of ADR practitioner standards via legal sanctions, which may lead to higher levels of compliance and protect consumers from unscrupulous operators.

Potential disadvantages of government regulatory reform that increases regulation of the ADR sector include that significant resources may be required to establish and maintain the regulatory framework. Further, it may impose significant burdens on affected parties by increasing compliance costs.

In considering whether further regulation is required, the Committee is mindful of current trends to keep regulation to a necessary minimum. Further, the Committee recognises the importance of a system of regulation that ensures consistency and accountability for Victorians, while retaining the advantages of current ADR provision, such as adaptability. The VCEC considers that government intervention is justified where it addresses market failure, social welfare objectives or the management of public risk.

Compulsory ADR services

As has been identified previously, the parties’ consent is not always required for referral to an ADR process. This is the case for matters before the Victorian courts as well as at the Victorian Civil and Administrative Tribunal. There is arguably an additional need for the implementation, monitoring and enforcement of ADR practitioner standards by government where participation of parties in ADR is mandatory. This is because practitioner competency is central to the outcomes of ADR and parties should not be directed to expend time and resources on such a process unless it has a possibility of providing the benefits offered by ADR.

**Question 46: Potential government regulation of civil ADR providers**

Could government play a role in increasing the simplicity and transparency of the civil ADR regulatory landscape? Would this be appropriate and/or feasible? How could this best be achieved?

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548 Department of Treasury and Finance, Victoria, above n 529, B-3.
549 Ibid, [2-1].
550 Field, above n 495, 87.
7.5 The ADR definitional problem – who and what should be regulated?

7.5.1 The importance of definitions of ADR

As the level of regulation of ADR services increases, arguably so too does the need to define ADR in order to deliver effective and efficient regulation. Definitions are particularly useful in an evolving area such as ADR, to provide clarity and consistency. Definitions are also important because they convey crucial information about what the definer believes to be central to the process and what the user can expect from it.

7.5.2 Current definitional situation

As discussed in chapter 2 of this paper, although ADR processes are provided for in Victorian and Commonwealth legislation and court processes, there is no agreed single definition of ADR.

For the purposes of this Inquiry, the Committee is utilising the definition of ADR as used by NADRAC, being ‘processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.’ The Committee notes that debate continues as to which processes fall within the ambit of the term ‘ADR’, particularly in relation to processes such as negotiation and arbitration.

7.5.3 Regulation of ADR processes

Any moves to regulatory reform must consider which ADR processes should be subject to regulatory measures. Although mediation and conciliation may be less controversial processes to regulate, processes such as arbitration (which some stakeholders do not consider to be ADR) and hybrid processes such as med-arb may be more difficult to regulate.

The Victorian Law Reform Commission’s recently published Exposure Draft on the Civil Justice Review recommended that a wider range of ADR processes should be available to the Victorian courts, including early neutral evaluation, case appraisal and mini trial/case presentation. The Committee welcomes stakeholder comment on whether these and other processes should be included in any future regulation.

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551 Field, above n 495, 70.
552 Astor and Chinkin, above n 494, 76.
5 Refer to the Glossary of Terms and Acronyms for a definition of ‘med-arb’.
7.5.4 Definitions of different ADR processes

There are numerous definitions of ADR processes currently in use. They have been devised by a range of sources including academics, practitioners and provider agencies, and legislators.554

The Committee will consider the definition of ‘mediation’ as an example of the definitional problems facing ADR processes.

Different definitions and descriptions of ‘mediation’ in use in Victoria include those listed below.

NADRAC defines mediation as follows:

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.555

For matters mediated by the DSCV, mediation conferences are not legislatively defined by the Evidence Act 1958 (Vic) which regulates them. The Department of Justice website which informs consumers about mediation at the DSCV states that:

Mediation is an informal problem solving process in which the parties who are in dispute meet together and with the guidance of two skilled impartial mediators, discuss the issue in dispute, identify options, consider solutions and work towards a mutually acceptable agreement. The mediator runs a mediation session; the parties control what is discussed and agreed to.556

At VCAT, ‘mediation’ is not defined under the governing Victorian Civil and Administrative Tribunal Act 1998 (Vic). The Act states that subject to the Act and the rules, the procedure for mediation is at the discretion of the mediator. The ‘Guide to Mediation in the Anti-Discrimination List’ describes mediation as follows:

Mediation is a process in which the parties who are in dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.555

At VCAT, ‘mediation’ is not defined under the governing Victorian Civil and Administrative Tribunal Act 1998 (Vic). The Act states that subject to the Act and the rules, the procedure for mediation is at the discretion of the mediator. The ‘Guide to Mediation in the Anti-Discrimination List’ describes mediation as follows:

554 Astor and Chinkin, above n 494, 80.
557 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 88(7).
Mediation is a process in which an independent mediator helps disputing parties to try and arrive at an agreed resolution of their dispute. The mediator does not impose a decision on the parties. If an agreed resolution can be found at mediation, there is no need for the complaint to go to a formal hearing. The role of the ‘mediator’ in some processes is purely facilitative, but inevitably cause problems in regulating mediation. Another method of categorising ADR processes has been developed by NADRAC, which describes them as facilitative, advisory, determinative or, in some cases, a combination of these:

- **Facilitative processes** an ADR practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.

- **Advisory processes** an ADR practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and in some cases, possible or desirable outcomes and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

- **Determinative processes** an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative ADR processes are arbitration, expert determination and private judging.

- **Combined or hybrid processes** the ADR practitioner may play multiple roles. For example, in conciliation and in conferencing, the ADR practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).

One particular issue in relation to the definition of mediation is its relationship with conciliation. The two terms are often used interchangeably within literature and in practice. The role of the ‘mediator’ in some processes is purely facilitative, but advisory in others (which NADRAC would define as ‘conciliation’).

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561 Field, above n 495, 67.

562 NADRAC, above n 555, 2.
7.5.5 Benefits of defining ADR processes

There are several advantages for users, providers and regulators of ADR services in using dispute resolution practices consistently. According to the Department of Justice and NADRAC, the development of consistent definitions of ADR may:

- assist ADR users to develop realistic and accurate expectations about the processes they are undertaking, which may enhance user confidence and acceptance of ADR services
- assist referral agencies (including courts) to match ADR processes to disputes, which may improve ADR outcomes
- assist ADR suppliers to provide clear and consistent marketing information about the nature of the ADR services
- assist suppliers of ADR services to develop consistency in practice
- assist in the development of consistent and comparable training, standards, codes of conduct and ethical requirements of ADR providers
- assist government and suppliers of ADR services with policy and program development, data collection and evaluation
- assist with clarity and consistency in contractual obligations arising out of ADR practitioner/party agreements and the effective handling of complaints about ADR services
- assist government in creating consistency of terminology used in legislation.

As many Victorian courts and tribunals mandate the use of different dispute resolution procedures, it is critical that accurate terms are used. NADRAC points out that ‘terms other than ‘mediation’ may more accurately reflect the actual processes being offered by courts.’

7.5.6 Disadvantages of common terminology

Definitions can ‘set a process in concrete’ by inhibiting further development and thereby losing the advantages of flexibility, adaptability and dynamism that advocates of ADR view as inherent features of its processes.

Indeed, NADRAC states that ‘it is impossible and inappropriate to prescribe how dispute resolution descriptions should be used by service providers.’ According to NADRAC, what is important is that ‘descriptions of the actual process used by any ADR provider are available in forms that are easily understood by the users of the service’.

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563 NADRAC, above n 555, 1.
564 Ibid.
565 Ibid, 3.
566 Astor and Chinkin, above n 494, 80.
567 NADRAC, above n 555, 2.
568 Ibid.
7.6 Current issues in civil ADR regulation

7.6.1 Introduction: quality and standards of ADR service provision in Victoria

The growth in ADR services has seen a parallel growth in the development of training, accreditation and practice standards for ADR practitioners. This is generally viewed by stakeholders as beneficial, as the ADR practitioner plays an important part in the quality of the outcome of the ADR process. There are currently no uniform standards for ADR service providers or practitioners in Victoria or Australia. Instead, standards have been developed by many suppliers on an ad-hoc basis in response to specific issues or perceived need. Much of the development has focused on the creation of standards for mediators, as opposed to other ADR practitioners.

The development of uniform national standards has been impeded by the lack of a national representative body in the ADR area. Further, ADR processes are conducted at various levels in a range of settings throughout the country, so setting uniform standards has been difficult.

NADRAC has played a key role in the development of standards. In creating a framework for ADR standards, NADRAC has emphasised the importance of balancing recognition of the diversity of contexts in which ADR is practised and the need to facilitate the development of standards within these contexts, with a need to promote consistency in the practice of ADR by identifying essential standards for all ADR service providers.

This section explores particular issues within the regulation of ADR standards and quality of service provision. These are as follows: education and training of practitioners, practitioner accreditation, practitioner duties and responsibilities, confidentiality of ADR processes and practitioner immunity. The Committee welcomes suggestions from stakeholders on other pertinent issues in relation to the regulation of ADR.

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Question 48: Definitions of ADR processes

(a) Do ADR processes (for example, mediation) require standard definitions? If so, what are the essential elements which should be included in the definitions of these processes?

(b) Should the definitions of ADR processes apply generally to all services in which the processes are used, or is it acceptable for each ADR provider service to apply its own definitions?

(c) Where should any definitions or descriptions of ADR and ADR processes be contained: in legislation, in codes of practice, in training, accreditation, practitioner/provider guidelines, and/or consumer advice documentation?
7.6.2 Training and education of ADR practitioners

In the formative years of ADR there was debate about whether training was necessary for mediators.\textsuperscript{575} Training, education and accreditation are now recognised as important ways of ensuring practitioners attain a certain level of knowledge, competency and understanding of the requisite ethics before they commence practice.\textsuperscript{576} In particular, training is seen as important to the success of ADR outcomes.\textsuperscript{577} Debate surrounding training and education matters includes identifying the minimum standard of training and education of ADR providers, and whether all ADR providers should be subject to the same training and educational standards.

There is currently no single national organisation that trains ADR practitioners. Instead, a number of bodies, including the Australian Commercial Disputes Centre (ACDC), LEADR and The Institute of Arbitrators & Mediators Australia (IAMA) provide training and accreditation nationwide.

Astor and Chinkin recognise that ‘it is tempting for funding bodies to require a qualification guaranteed by reliable institutions that provide high quality courses of sufficient duration to ensure coverage of key issues and which evaluate their students carefully.’\textsuperscript{578} The Committee is of the preliminary view that any move to regulation of training and educational standards will need to recognise prior learning.

It appears that many of those who currently train prospective ADR practitioners do not have qualifications in ADR. This situation is gradually changing as universities produce graduates and post-graduates in ADR disciplines. It may also be appropriate to require trainers and educators of ADR practitioners to be involved in continuing professional development and in the practice of ADR.\textsuperscript{579}

i) Training courses in Victoria

There are many institutions in Victoria offering a variety of courses which lead to some sort of ADR practitioner qualification.\textsuperscript{580} Substantial differences exist in the purpose, content and duration of different ADR training courses, as do differences in opinion about their role in ensuring mediator competence.\textsuperscript{581}

\textsuperscript{575} Astor and Chinkin, above n 494, 206.
\textsuperscript{576} NADRAC, above n 536, 63.
\textsuperscript{577} Field, above n 495, 83, 100.
\textsuperscript{578} Astor and Chinkin, above n 494, 212.
\textsuperscript{579} NADRAC, above n 536, 68-69.
\textsuperscript{580} Ibid, 65.
\textsuperscript{581} Astor and Chinkin, above n 494, 208.
One difficulty with requiring extensive training for ADR practitioners is potential cost increases. For example, Astor and Chinkin note that, given that limited well-remunerated mediation work is available, longer, more expensive courses may deter candidates from qualifying as mediators.\(^{584}\)

ii) Tertiary education courses in Victoria

ADR education is developing in the tertiary sector. There are many tertiary institutions currently offering courses in ADR in Victoria.\(^{585}\) Courses are available at undergraduate level as well as at the post-graduate level. There are also individual units on ADR which are offered as part of other, non-ADR specific, tertiary courses.

The Victorian Department of Justice’s recent supplier survey identified the training, qualification and accreditation requirements for several ADR providers in Victoria. The mandatory minimum education and training required differs between providers, but many require completion of training courses offered by commercial organisations such as LEADR and the IAMA.\(^{586}\) The length of training courses varies, but generally lasts from three to six days. The courses generally incorporate both theoretical teachings and practical exercises. Victorian industry ADR schemes such as the Energy and Water Ombudsman and the Public Transport Ombudsman require practitioners to hold tertiary qualifications.\(^{587}\)

Box 2 outlines two of the ADR training courses offered in Victoria in addition to those organisations which train and accredit ADR practitioners.

### Box 2: Training offered by various training providers in Victoria

<table>
<thead>
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<th>Training provider</th>
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</tr>
</thead>
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<td>Offers the Certificate IV in Community Mediation. There are no minimum education entry requirements. The course runs over 12 days of classroom sessions. Subjects include Theories of Alternative Dispute Resolution, Communication Skills, and Mediation Placement Program.(^{582})</td>
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<td>Runs training courses mediation and conflict management for people interested in personal or professional development in these areas. Under the mediation training course, six units from the Certificate IV in Community Mediation training package are delivered over a six day period.(^{583})</td>
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</table>
Question 50: Training for ADR practitioners
(a) Should training be required for ADR practitioners?
(b) What is the appropriate content for ADR education and/or training courses?
(c) Should there be any prerequisites to undertaking ADR training courses? If so, what should these prerequisites be? For example, should an undergraduate degree be necessary?
(d) What is the appropriate assessment to use for ADR education and/or training courses?
(e) Who should determine which training courses are adequate and acceptable for an individual to become an accredited ADR practitioner?
(f) Who should determine the minimum standards of training required for an individual to practice ADR in a particular arena?
(g) Should organisations that offer specialised ADR processes, such as the courts, be able to impose additional training requirements on ADR practitioners for them to be able to conduct ADR processes for that organisation?
(h) To what extent should ADR practitioners accredited by one organisation have this accreditation recognised to allow them to practise for another organisation?
(i) To what extent is ongoing training required of ADR practitioners?
(j) Should there be any prerequisites for individuals who provide training and education in ADR (for example, training or ongoing experience)?

iii) Tertiary qualifications for ADR practitioners
Few dispute resolution practitioners possess specialist tertiary qualifications in dispute resolution.588 Accreditation by tertiary institutions has the advantage that these institutions are not directly allied with any professional interests and the qualifications of those institutions have general recognition. However, because of the varied backgrounds of ADR practitioners, the requirement of particular degrees, such as law degrees, inevitably excludes some candidates.589 Tertiary qualifications can be an expensive and time consuming requirement to fulfil. Further, it may preclude people from marginalised communities, who may find it difficult to gain entry or complete tertiary qualifications, such as Indigenous people and members of certain cultural groups. This reduces diversity among ADR practitioners and may result in the dominance of lawyer practitioners in certain areas of practice.590 It may also have the effect of reducing the pool of practitioners providing services to sectors of the community that may have the greatest need of alternatives to the formal justice system.591

588 Astor and Chinkin, above n 494, 212.
589 Ibid.
590 Ibid, 213.
591 Ibid, 212.
Chapter 7: Regulation of ADR

Question 51: Tertiary qualifications for ADR practitioners
(a) Should ADR practitioners be required to have a tertiary qualification as a minimum requirement for practising? Why/why not?
(b) If so, what tertiary qualification should be required?

7.6.3 Performance and competency standards

One response to the issues surrounding tertiary qualifications for ADR practitioners has been the development of performance or competency standards. Such standards are not based on formal qualifications or educational achievement. Instead, as Astor and Chinkin observe, they define in detail the tasks of the ADR practitioner and the knowledge, skills, abilities and other attributes (KSAOs) required to perform those tasks. A set of criteria is then developed against which an evaluator can decide if an ADR practitioner is demonstrating competence in the performance of those tasks. ADR practitioners are therefore assessed “in terms of what they do, rather than on the basis of formal qualifications”. This approach has the advantage of allowing greater diversity among ADR practitioners.

Question 52: Performance and competency standards for ADR practitioners
(a) Are performance and competency standards, key performance indicators or KSAO (knowledge, skills, abilities and other attributes) requirements an appropriate tool to assess whether an ADR practitioner may practice?
(b) If so, what should these standards or KSAOs be?
(c) Should the standards or KSAOs be assessed?
(d) If so, how should they be assessed?
(e) Who should be responsible for undertaking any assessment of KSAOs?

7.6.4 Accreditation of ADR providers

NADRAC describes accreditation as:

A process of formal and public recognition and verification that an individual (or organisation or program) meets, and continues to meet, defined criteria.

There is currently no national, single accreditation body for ADR providers and no nationally accepted benchmarks or criteria for accreditation. Instead, bodies such as ACDC, ombudsmen and the Bar Association of Victoria use their own accreditation methods and standards.

NADRAC, above n 560, 50.


592 Ibid, 214.
593 Ibid.
594 NADRAC, above n 560, 50.
Developing a national accreditation system for ADR is a challenging task. Indeed, NADRAC has recommended the development of a national accreditation system for mediators. Broad stakeholder support appears to exist for the draft National Mediator Accreditation System.

Many accreditation systems also require practitioners to undergo re-accreditation every two or three years. This allows for a continuous process of training and assessment of practitioners and review of accreditation requirements in line with identified needs.

**Question 53: Accreditation of ADR providers and practitioners**

(a) Is there a need for ADR providers and practitioners to be accredited?

(b) Should accreditation be compulsory for providers and practitioners wanting to provide ADR services?

(c) Which model of accreditation (if any) should be adopted by Victoria and/or nationally? Are there any models of accreditation not referred to in this Discussion Paper that the Committee should consider?

(d) Should ADR providers and practitioners be required to undergo re-accreditation? If so, how often should they be required to apply for re-accreditation?

**7.6.5 Quality in service provision by ADR practitioners: practice standards**

The conduct provisions and standards developed by ADR service providers and professional bodies are expressed in a variety of forms. Some appear as ‘rules’ that are annexed to or form part of the agreement between the ADR practitioner and the parties. ADR practitioners conducting mediation sessions at the Victorian Civil and Administrative Tribunal are governed by the Code of Conduct. The statutory based Accident Compensation Conciliation Service also has a Code of Conduct, as well as Protocols which include procedural requirements that Conciliation Officers are to ensure are met at the conciliation conferences. LEADR, a professional body for accredited ADR practitioners, has adopted the Ethical Standards for Mediators which were created by the Law Council of Australia.

Most conduct provisions and standards set out core principles with a detailed explanation of what those principles mean. For example, Sourdin notes that ‘it is common for standards documents such as mediation agreements to outline the roles and responsibilities of the practitioner and the parties, particularly relating to the

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597 Ibid.
598 NADRAC, above n 560, 61.
599 Sourdin, above n 526, 179.
costs, confidentiality, conflicts of interest, authority, privilege, liability and enforceability of any agreement reached.  

NADRAC has recommended that all ADR service providers adopt and comply with a code of practice which takes account of essential components of the process.  

Further, NADRAC has recommended that standards for ADR be developed comprising guidelines for developing and implementing standards, a requirement for a code of practice where applicable, and the enforcement of such a code through appropriate means. Although NADRAC believes that standards need to be developed to suit the context in which ADR services are provided, it considers that minimum standards should apply to all ADR service providers.  

A way forward? The draft Australian Mediator Practice Standards  

As discussed previously, draft Australian Mediator Practice Standards have recently been released. They include a description of a mediation process, and requirements regarding ethical practice, confidentiality and procedural fairness. There may be benefit in such a standard applying to all ADR providers rather than just to mediators.  

Question 54: ADR practice standards  

(a) Is there a need for standards for ADR providers and practitioners?  
(b) What kinds of matters should be covered in ADR provider or practitioner standards?  
(c) Should there be common minimum standards for ADR service provision or should each organisation be able to develop and implement its own minimum standards?  
(d) If common minimum standards were to apply to all ADR providers and practitioners, should the draft Australian Mediator Practice Standard apply as these minimum standards?  
(e) If not, who should be responsible for developing and implementing ADR standards?  
(f) Where should standards for ADR providers and practitioners appear: in legislation, as part of organisational guidelines or codes of conduct, under court rules?  

7.6.6 Confidentiality of ADR processes  

i) Current confidentiality requirements for ADR processes in Victoria  

Many codes of conduct for ADR practitioners have confidentiality clauses. In addition to ethical and professional obligations of confidentiality, ADR practitioners may be subject to confidentiality requirements imposed by legislation, court rules or by contractual arrangements made between the practitioner or service provider and the parties.  

In the absence of specific legal obligations, ADR practitioners will  

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In the absence of specific legal obligations, ADR practitioners will
make these decisions based on ethical obligations or their own conscience.\textsuperscript{606} Parties to the dispute, their representatives and others present during an ADR process may also be subject to confidentiality obligations.\textsuperscript{605}

The piecemeal growth in the application of ADR processes in particular types of disputes has meant that there are no single blanket statutory provisions regarding confidentiality or admissibility of ADR processes (including outcomes) in Victoria. The extent of any confidentiality in a matter requires interpretation of the applicable legislation, ADR practitioner/party agreement or other regulatory provision such as a code of conduct.\textsuperscript{607}

Sourdin has identified possible limitations on confidentiality which may arise in a range of different circumstances, such as:

- through the agreement or consent of the parties
- where ADR practitioner misconduct or incompetence is an issue
- where legislation specifies exceptions
- where reasonable excuse is raised
- where research takes place
- if an offence or fraud occurs during mediation
- where there is a commission of, or threat of, crime.\textsuperscript{608}

Sourdin notes that ‘there are also some broad exceptions to confidentiality that have been accepted by the courts – for example, where information may be otherwise available, on an application for costs, where there is an allegation of mediator pressure, or it has been suggested that the agreement made during or pursuant to an ADR process is ‘unconscionable’.\textsuperscript{609}

Legal doctrines around the above variables remain uncertain.\textsuperscript{610} In particular, Astor and Chinkin observe that confidentiality clauses contained within ADR practitioner codes of conduct or ADR practitioner/party agreements have not been fully tested by the courts.\textsuperscript{611} It is also worth noting that confidentiality clauses do not necessarily bind on third parties who may have acquired information about what transpired during an ADR session.\textsuperscript{612} All that seems certain is that ‘confidentiality is complex and cannot be absolute.’\textsuperscript{613}

\section*{ii) Common law privilege and legal professional privilege}

Where there is no legislation applicable to the ADR process or area of dispute in question, claims for disclosure must be considered under common law rules of evidence relating to privilege. The type of privilege most likely to be relevant is ‘without prejudice’ communications made in negotiations. In order to encourage

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iii) Privacy principles

In addition to any confidentiality requirements for ADR practitioners or providers, organisations that provide ADR services may be subject to privacy legislation in relation to personal information collected, held and used by them about parties involved in ADR processes. Under the Privacy Act 1988 (Cth), Commonwealth and ACT government agencies are governed by eleven Information Privacy Principles (the Commonwealth IPPs). Ten National Information Privacy Principles (the NPPs) apply to organisations (including not-for-profits) throughout Australia with an annual turnover of more than $3 million as well as some small businesses. Victorian public sector agencies and local councils are bound by the Information Privacy Principles (the Victorian IPPs) contained in the Information Privacy Act 2000 (Vic). However, Victorian courts and tribunals are exempt from the Victorian IPPs in relation to their judicial functions. Both the Commonwealth and Victorian privacy principles set out how the affected organisations should collect, use, keep secure and disclose personal information. Victorian industry ombudsmen such as the Energy and Water Ombudsman and the Public Transport Industry Ombudsman have privacy policies which have been made in accordance with the NPPs.

iv) Issues associated with the regulation of confidentiality

Proponents of confidentiality in ADR processes contend that it increases the likelihood of parties’ willingness to enter the process, as well as enhancing the effectiveness of the process by enabling open and honest communication to produce a workable income. However, confidentiality requirements and the non-admissibility of information exchanged during ADR processes in court proceedings must be balanced against a need to effectively investigate allegations of mediator misconduct, as well as communication to third parties or others where the outcome of an ADR process affects the interests of a party outside of the process. A further

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614 Sourdin, above n 526, 155. In Lukacs v Ripley (No. 2), the NSW Supreme Court decided that parties to mediation who are looking to settle part or whole of a dispute are protected by ‘without prejudice’ privilege. The AWA case confirmed that ‘without prejudice’ privilege can apply to mediation. However, there are several limitations on the without prejudice privilege.

615 Sourdin, above n 526, 156.

616 Privacy Act 1988 (Cth).


618 Privacy Act 1988 (Cth).

619 Information Privacy Act 2000 (Vic) s 10.

620 Energy and Water Ombudsman (Victoria), above n 513 and Public Transport Ombudsman (Victoria), above n 516.

621 Autor and Chinkin, above n 494, 178.

622 NADRAC, above n 560, 73.

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621 Autor and Chinkin, above n 494, 178.

622 NADRAC, above n 560, 73.
possible exception to confidentiality is where information may provide data for the purposes of research.\textsuperscript{623}

### Question 55: Confidentiality and admissibility of ADR processes

\textbf{(a)} What are the advantages and disadvantages of the current regulation of confidentiality requirements?

\textbf{(b)} Should there be a requirement of confidentiality for ADR providers in ADR proceedings?

\textbf{(c)} Should there be a requirement of confidentiality for all parties present at an ADR session?

\textbf{(d)} When should the ADR process commence for the purposes of confidentiality? Should it include preliminary conferences or discussions with an ADR provider’s intake staff? When does the ADR session end? Does it include follow-up procedures?

\textbf{(e)} What information should be protected by any confidentiality requirement (for example, the fact of settlement, terms of settlement, documents, statements or notes made by disputants, by witnesses, or by the ADR practitioner)?

\textbf{(f)} Where should any requirements of confidentiality appear: in a party/ADR practitioner agreement, in legislation, or in a code of conduct or practice?

\textbf{(g)} Should sanctions/penalties apply for breaches of any confidentiality requirements, and if so, what should those penalties be?

\textbf{(h)} Should there be exceptions to any confidentiality requirements? If so, what should these exceptions be? Where should these exceptions appear: in a party/ADR practitioner agreement, in legislation, or in a code of conduct or practice?

\textbf{(i)} To what extent should statements made in ADR processes (both court connected and other processes) be admissible in Victorian court proceedings?

### 7.6.7 Immunity of ADR practitioners

Immunity is a relevant issue for individual ADR practitioners in terms of their immunity from civil action in relation to the performance of their duties. The presence or absence of immunity has implications not only for the ADR practitioner, but for their accountability to consumers in terms of the quality of their services.

\textbf{i) Current immunity for ADR practitioners in Victoria}

The potential liability of ADR practitioners who assist parties to resolve disputes varies.\textsuperscript{624} There is no general immunity from legal action for ADR practitioners at common law or under statute.\textsuperscript{625} However, there are three ways in which immunity may be provided to ADR practitioners outlined below.

\textsuperscript{623} Ibid, 78.

\textsuperscript{624} Sourdin, above n 526, 148.

\textsuperscript{625} NADRAC, above n 560, 64-65.
Firstly, NADRAC notes that the common law extends judicial immunity to judges, other participants in the judicial system and quasi-judicial officers and bodies such as tribunals. In very limited circumstances this immunity may extend to an ADR practitioner.626

Second, a statute may provide that an ADR practitioner is not liable for any civil action arising out of his or her conduct as a practitioner (statutory immunity). The limits of the immunity conferred may vary. In the Victorian Supreme, County and Magistrates’ Courts, the mediator has absolute immunity (similar to that afforded to judges) for work undertaken in relation to ADR associated with proceedings listed in that court.627 Qualified immunity is provided for mediators working for the Dispute Settlement Centre Victoria or conciliation officers performing their duties for the Accident Compensation Conciliation Service, where the acts are done in good faith.628

An agreement between the parties may provide an ADR practitioner with contractual immunity. Practitioners engaged in both facilitative and determinative ADR processes have been afforded immunity in this way.629 The validity of such clauses depends on the nature of the liability that is sought to be excluded and the applicable law in the jurisdiction where the contract is made.630

In the absence of common law, statutory or contractual immunity, civil actions that might be brought against an ADR practitioner could include ‘actions for breach of contract’, negligence, statutory torts (for example, discrimination and harassment), breach of confidence, defamation, misleading or deceptive conduct and other statutory consumer protection actions.631 In Victoria, court action has been taken against a mediator on the basis that the practitioner applied undue pressure on the parties to agree and breached a duty of care owed to the client.632

The arguments for and against statutory immunity relate to the need to limit the potential liability of ADR practitioners and at the same time ensure an acceptable degree of accountability to Victorians who access ADR services.633 If immunity is to be provided, the extent of immunity must be determined and clearly defined.

NADRAC states that a possible solution to the problem regarding immunity is to rely on a range of sanctions in addition to exposure to litigation, to encourage the maintenance of acceptable standards. These sanctions could include reprimands, fines and suspension or, ultimately, removal of the right to practice. A number of ADR organisations have suggested that codes of conduct for practitioners should be developed that include complaint-handling and disciplinary procedures.635 They have also suggested that a financial compensation scheme may be needed for cases where

626 Ibid, 64.
627 Magistrates’ Court Act 1989 (Vic) s 108A; County Court Act 1958 (Vic) s 48C; Supreme Court Act 1986 (Vic) s 27A.
628 Accident Compensation Act 1985 (Vic) s 58; Evidence Act 1958 (Vic) s 21N.
629 NADRAC, above n 560, 63.
630 Ibid, 64.
633 Tapoohi v Lewenberg (No 2) [2003] VSC 410 (21 Oct 2003) in NADRAC, above n 560, 65
634 NADRAC, above n 560, 63.
635 Ibid, 70-71.
an ADR practitioner’s conduct has caused a loss which cannot be addressed by other means.\textsuperscript{636}

\textbf{ii) Immunity in court-annexed and community-based ADR processes}

NADRAC believes that legislative immunity is strongly justified in relation to court-ordered or court-annexed ADR, as it is part of a continuum of case management strategies offered by the court processes.\textsuperscript{637} However, NADRAC believes that it is very difficult to justify the immunity of ADR practitioners when the ADR is community-based. They point out that there is now almost no profession which is granted the privilege of immunity from civil liability.\textsuperscript{638} Further, community-based ADR practitioners are able to limit or cover their liability through individual contract and/or professional indemnity insurance.\textsuperscript{639}

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\hline
\textbf{Question 56: Immunity of ADR practitioners} \\
\hline
(a) Should ADR practitioners involved in an ADR process have immunity? \\
(b) Should the presence of practitioner immunity depend on whether the process is compulsory or voluntary for participants, or whether the process is connected to a matter before a Victorian court or tribunal? \\
(c) Where should ADR practitioner immunity be stipulated (for example, in legislation or in the party/ADR practitioner contract)? \\
(d) Should ADR practitioner immunity be absolute or qualified for acts done in good faith? Should this depend on whether the process is connected to a court matter? \\
(e) Should ADR practitioners be required to obtain professional indemnity insurance? \\
(f) What should the minimum requirements for professional indemnity insurance cover be? \\
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7.7 Possible models of regulatory reform

This section explores possible models of regulatory reform in the provision of ADR in civil matters. Firstly, the issue of whether regulation of ADR providers should occur on a state by state, federal or national basis is considered. Then some potential models of ADR regulation are canvassed, being: a national self-regulation scheme; quasi-regulation by way of Government financial support for ADR service provision; co-regulation in the form of an industry council; an industry or publicly funded ADR ombudsman; generalist Victorian government regulation via legislation; and a model of national government regulation. The Committee acknowledges that other possible models exist and welcomes suggestions from stakeholders of any other models by which ADR could be regulated.

\textsuperscript{636} Ibid, 71.
\textsuperscript{637} Ibid.
\textsuperscript{638} Ibid, 72.
\textsuperscript{639} Ibid, 70.
7.7.1 The roles of the Commonwealth and States in regulating ADR

An important threshold issue is whether ADR regulation is more appropriately undertaken by Commonwealth or State governments.

The industry view is that national regulation would be appropriate. However, this may be difficult to implement where the actual provision of many ADR services occurs in state-based organisations and structures, such as the state courts and other state-based agencies including the Dispute Settlement Centre Victoria and the Office of the Health Services Commissioner.

As previously discussed, there is considerable jurisdictional diversity between the growing number of State and Commonwealth legislative and other regulatory systems which regulate ADR. For example, while the Australian Capital Territory and Tasmania have enacted the *Mediation Act 1997* and the *Alternative Dispute Resolution Act* 2001 respectively, other states such as Victoria do not have such generalist legislation. The piecemeal nature of legislation within Victoria further contributes to jurisdictional irregularities.

According to Carroll:

> Obvious difficulties arise when different jurisdictions apply different laws and regulations to the practice of ADR in a particular dispute. Practitioners operating on a national basis, and national users such as insurers, are faced with differing provisions and court decisions in different jurisdictions. ‘These legal differences can create prospective inconsistencies over the rights and obligations of parties and providers in ADR.’

A number of possible jurisdictional models of ADR regulation exist. They include:

- The current system, in which all State and Commonwealth jurisdictions are responsible for their approach to the regulation of ADR provision without regard to consistency with other Australian jurisdictions.
- A single, national system of regulation, legislated or co-regulated by the Commonwealth Government.
- A federal system with a common model of regulation implemented by all States as well as by the Commonwealth Government. The uniform model could be developed by a working party of the Standing Committees of Attorneys-General, a national ministerial council.

Whatever jurisdictional model of ADR eventuates, Victoria currently has an opportunity to serve as a best practice model of ADR regulation.

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641 Carroll, above n 493, 199; NADRAC, above n 532, 78.
Question 57: The roles of the Commonwealth and States in regulating ADR
(a) What should be the respective roles of the Commonwealth and States in regulating ADR providers?
(b) If Victoria is to be a best practice regulator, what regulation model should be adopted?

7.7.2 Self-regulation for all ADR practitioners

As discussed previously in this chapter, the National Mediation Conference Ltd (NMC) has approved a draft National Mediator Accreditation System which incorporates draft Approval and Practice Standards for mediators. This is an example of how self-regulation can facilitate national consistency of industry requirements. This system may have the potential to be developed and expanded to apply to other ADR practitioners such as arbitrators and conciliators. One immediate barrier to this is that no national peak bodies currently exist for providers who engage in these other ADR practices. However, there are arguably ADR providers and provider bodies with sufficient expertise and experience who could form a peak body with appropriate representation to develop an effective industry code or standard for other ADR processes. Alternatively, a national ADR peak body could be established which could create minimum Approval and Practice Standards for all ADR providers, with additional requirements for different types of ADR as required.

Self-regulation can be effective because where agreement exists between major industry participants, levels of awareness among industry providers are generally high and so too is compliance. It also keeps the administrative costs of government relatively low. However, effective self-regulation relies on sufficient power and commonality of interest within an industry to deter non-compliance. Providers may not submit to relevant standards or where they breach their code or agreement, no legal remedies necessarily exist for consumers. Further, monitoring costs are incurred by the industry or professional association, which may be passed on to the consumer.

Question 58: Self-regulation for ADR practitioners
(a) Is greater self-regulation of ADR providers required, appropriate and/or feasible?
(b) If so, what form should this regulation take?
### 7.7.3 Potential forms of Victorian Government regulation

What follows are outlines of various models of regulation involving the Victorian Government that could potentially exist for ADR practitioners offering services in Victoria.

**i) Quasi-regulation: Government financial support for ADR service provision**

A form of quasi-regulation could be established where government approved panel providers of ADR services, or their clients, receive financial support from the government for referral of matters through government schemes or justice mechanisms. An example of this is the Victorian Small Business Commissioner (VSBC), who has a statute-based function to receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint. Each party makes a contribution to the mediation cost (generally $95) and the VSBC pays the remainder of the mediator’s fee. As previously discussed, where government plays a role in regulation, this can increase consumer confidence in and acceptance of a process such as ADR. Potential disadvantages of this form of regulation are the same as those canvassed under the section on a potential ADR industry council.

**Question 59: A government approved panel of ADR providers**

(a) Should there be a government approved panel/register of ADR providers?

(b) What training, educational or other requirements should be necessary to be on such a panel/register?

**ii) Co-regulation: An industry council that advises government**

ADR providers could be co-regulated by government and industry through the establishment of an industry council to advise the Victorian government on matters pertaining to ADR regulation. No such arrangement currently exists in Australia in relation to ADR providers. However, in Victoria, the recent Owner Drivers and Forestry Contractors Code of Practice provides an example of a possible structure for such a co-regulatory arrangement.

The Owner Drivers and Forestry Contractors Act 2005 (Vic) provides for the adoption of industry codes of practice through the enactment of regulations. The current Code of Practice has been produced by the Victorian Government after advice from two representative industry councils appointed by the Government. The Code operates in three ways:

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642 Small Business Commissioner Act 2003 (Vic) s 5(c).
643 Victorian Small Business Commissioner,
644 Ibid.
645 Owner Drivers and Forestry Contractors Code of Practice, operative from 1 December 2006, 1.
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- It establishes mandatory requirements that must be complied with (the Act provides legislative backing for this).
- It provides guidance to relevant stakeholders on conduct that is unlikely to be unacceptable (here, conduct that is likely to be unconscionable conduct and contract terms that are likely to be unjust contract terms).
- It describes industry best practice.646

The Act also provides for dispute resolution for stakeholders by mediation by the Small Business Commissioner at first instance, then at VCAT.647 This model of co-regulation could apply to ADR practice in Victoria, with the establishment of an ADR industry council, the formation of a code of practice, and the establishment of a dispute resolution structure where parties are dissatisfied with the conduct of the ADR practitioner.

An advantage of the ADR industry developing its own code in conjunction with government is that it can build on existing bodies of knowledge, expertise and practices that work, as the NMC is currently doing in its formulation of the National Mediation Accreditation Scheme. It also allows for flexibility: a code of practice can embrace a unified model or incorporate existing diverse models. Importantly, industry involvement may help to ensure that any regulation is tailored for the ADR industry and improve industry acceptance of the scheme.648 Finally, it reduces requirements for government resources to be dedicated to regulation, which can instead be allocated to service provision.

Because co-regulation allows industry strong ownership of the scheme, a strong industry association with broad coverage may be required. This may be the case for mediators, but no peak bodies exist for other ADR practitioners (although ombudsmen have the Australian & New Zealand Ombudsman Association). Potential disadvantages of co- and quasi-regulation (an example of which follows this section) include regulatory ‘capture’, whereby government agencies promote the interests of regulated parties at the expense of the community at large. In addition, unintended monopoly power gained by government approved market participants could restrict genuine competition.

Question 60: An ADR industry council

(a) Is co-regulation in the form of an industry council an appropriate form of regulation of ADR providers?
(b) If so, how could such an industry council be established? How should it function?

646 Ibid.
647 Ibid, 3.
648 Department of Treasury and Finance, Victoria, above n 529, B-2.
iii) Government regulation: generalist legislation

Regulation by government could continue to be in the ad-hoc manner which has developed to date. Alternatively, regulation could occur through a generalist statute as occurs in the Australian Capital Territory with the Mediation Act 1997, which provides general legislative control of mediators. Under the Act, individuals can be registered as a mediator by an approved agency. The Act enables the ACT Attorney-General to approve mediation agencies to accredit individual mediators according to the ACT Mediation Competencies. These standards of competency are declared by the ACT Attorney-General. It is important to note that these mediation competencies may differ from the draft Approval Standards that may be implemented by the National Mediation Conference Ltd as early as 1 January 2008.

An accredited mediator’s registration lasts for three years and may be renewed. Registered mediators must not disclose any information obtained in a mediation session. Evidence of communications made in a mediation session or documents prepared in connection with a mediation are not admissible in any proceedings except in certain circumstances. Mediators have protection from defamation as exists in relation to judicial proceedings, and have the same protection and immunity as a judge of the ACT Supreme Court for their functions as a mediator exercised in good faith.

Carroll observes that if the decision is made to regulate ADR practice by a generalist statute, these laws can prohibit practice by persons not recognised by the legislation (for example, by registration or accreditation procedures) or simply to exclude from the beneficial provisions of the legislation (for example, immunity from civil suit) persons who are not recognised by the legislation. The latter is the usual approach in Australia. Carroll also observes that while this may be preferable to prohibition because it does not preclude parties choosing to use ADR practitioners who do not meet particular legislative requirements, it increases the scope for practitioners to operate under different rules.

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Question 61: Generalist ADR legislation

(a) What are the advantages and disadvantages of generalist ADR legislation? In particular, is the current array of ADR provider regulation confusing for consumers?

(b) Should overarching generalist legislation regulating ADR providers or practitioners be enacted in Victoria? If so, what provisions should this Act contain?

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649 Mediation Act 1997 (ACT) s 5.
650 Evidence Act 1995 (Cth) s 131.
651 Carroll, above n 493, 182.
652 Ibid.
7.7.4 Disciplinary mechanisms – an ADR Ombudsman for Victoria?

ADR practitioners may not always act appropriately and may breach required standards of practice. If this occurs, there is a need for dispute and disciplinary mechanisms to address any such incidents that occur and ensure accountability of ADR practitioners. However, the manner and extent to which ADR practitioners are currently accountable for their services varies greatly across settings and provider organisations. For example, the Accident Compensation Act 1985 (Vic) provides for conciliation officers who work for the Accident Compensation Conciliation Service to be removed or suspended from office in certain circumstances, such as where they commit a serious breach of confidentiality requirements. Complaints about ADR practitioners who are members of an organisation with self-regulatory functions such as LEADR may result in that organisation taking disciplinary action such as withdrawal of accreditation. However, this may not prevent these ADR practitioners seeking accreditation with a different organisation, nor practicing as a private, non-accredited practitioner.

Some stakeholders argue that accrediting bodies and ADR service providers should determine and enforce any sanctions. Others propose that ‘an effective code of conduct should not require sanctions but that complaints should be dealt with under the contractual agreements between parties and ADR practitioners.’

Yet another possible model is an external regulator of ADR practitioners such as an ombudsman. An ADR ombudsman could be funded and regulated by government (such as Ombudsman Victoria) or by provider organisations who become members of and are subject to the ombudsman scheme (such as the Energy and Water Ombudsman).

Question 62: An ADR ombudsman
(a) How should practice standard breaches and/or misconduct by ADR practitioners be dealt with?
(b) Should there be an ADR ombudsman?
(c) If so, how should this scheme operate?
(d) Should membership of an ADR ombudsman scheme be compulsory for ADR practitioners to practice?

653 Accident Compensation Act 1985 (Vic) s 52I.
655 NADRAC, above n 560, 71.
7.7.5 The United States model of regulation – national generalist legislation

The lack of a consistent and co-ordinated approach to ADR provider legislation is not unique to Australia. For example, in 2001 the United States had over 2500 statutes which contain legal rules affecting mediation.656 This prompted a project which was undertaken by a joint committee of the American Bar Association and the National Conference of Commissioners on Uniform State Laws to develop a Uniform Mediation Act. The Drafting Committee working on this Act argued that uniform mediation laws across jurisdictions would be of general benefit for a number of reasons. Uniformity greatly contributes to simplicity in regulation. In addition, uniformity creates predictability: for example, stakeholders know that what is or is not admissible in one jurisdiction will be treated in the same way in another jurisdiction. Uniformity becomes particularly significant in cross-jurisdictional ADR processes.657

Question 63: Commonwealth generalist legislation

(a) Is Commonwealth generalist legislation an appropriate and/or feasible method of regulating civil ADR providers?
(b) If so, what provisions should this legislation contain?

7.7.6 Other possible models of civil ADR provider regulation

The Committee is cognisant that the models canvassed above are only a selection of possible models of regulation of civil ADR providers. The Committee welcomes stakeholder feedback on the models presented in this Discussion Paper as well as any other models of ADR regulation that may be appropriate and feasible.

Question 64: Other models of civil ADR regulation

(a) Are there any other possible models of ADR provider regulation that you consider would be suitable in Victoria?
(b) If so, how would such a model of regulation function - what would be the elements of this model?

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656 NADRAC, above n 532, 44.
657 Carroll, above n 493, 180.
7.8 Regulation of restorative justice providers in the criminal justice setting

As with ADR in civil disputes, high quality convenors and conference processes are critical to effective outcomes in restorative justice conferencing programs. This section outlines current regulation in relation to the Children’s Court of Victoria conferencing program, then the current Victorian and Australian regulatory landscape more generally in terms of both conferencing convenors and processes.

7.8.1 Regulation of the Youth Justice Group Conferencing Program in the Children’s Court of Victoria

Provisions of the Children, Youth and Families Act 2005 (Vic) regulate Children’s Court group conferences, including their purpose, the process in general terms (such as the use of an outcome plan), the required and possible participants, and the need for the convenor to be appointed by an approved service. Further, the Victorian Department of Human Services is developing draft Youth Justice Group Conferencing Guidelines which cover matters including pre-conference operations such as the referral and assessment process, and the conference process itself.

7.8.2 Regulation of other restorative justice conferencing convenors and processes

i) Regulation of conference program processes

Given the complexity of both the offenders’ and victims’ needs in criminal matters, it is important that all parties are clear about the aims of and procedures involved in conferencing programs.

The New Zealand Ministry of Justice developed Principles of Best Practice for Restorative Justice Processes in Criminal Cases in 2004 following a consultation process with restorative justice practitioners. The Principles state that best practice restorative justice processes require some minimum consistency of process: while flexibility and responsiveness to the needs of participants are inherent characteristics of restorative justice processes, particular steps should always be undertaken. The Principles refer to a number of restorative justice values which provide a framework within which flexibility and responsiveness can be exercised. These values include:

- physical and emotional safety of participants
- safeguarding of offenders’ and victims’ rights
- balance and fairness


Ibid, 4.
• voluntariness
• transparency (of process and outcome), and
• empowerment of participants.663

Best practice may also require that consistent referral guidelines for offenders are developed.

ii) Regulation of conference convenors

There are currently no industry level convenor training or requirements, accreditation procedures or performance standards for restorative justice conference convenors in Victoria or Australia. Some individual organisations such as the Centre for Restorative Justice, which is based in South Australia, are, however, starting to deliver training programs for restorative justice conference convenors. Minimum industry level standards for restorative justice conference convenors may ensure greater consistency for Victorians who participate in these programs. An example of possible minimum standards can be found in the New Zealand Ministry of Justice’s Best Practice Principles, which state that convenors should act in accordance with restorative values (discussed above) and demonstrate listed skills, knowledge and personal qualities.664

7.8.3 Sharing information about what works in restorative justice conferencing

As discussed previously, there is a need for stakeholders within and across jurisdictions to share information about what works so that best practice can continue to be developed across restorative justice programs.

The Committee is interested in hearing from stakeholders about the need for regulatory reform in relation to restorative justice initiatives and suggestions for any such reform.

Question 65: Regulation of restorative justice

(a) Is there a need for regulatory reform in relation to restorative justice conferencing programs? If so, what elements of the programs require regulation: the process, the participants, or both? How would such a model of regulation function?

(b) What should any regulation of conference convenors cover? Should it include training and educational requirements, accreditation, and practice standards?

(c) What should the regulatory standards for conference convenors be?

(d) Should referral guidelines be established for judicial members and those they consult with in determining whether a case is suitable for referral to restorative justice conferencing?

(e) Who should be responsible for the regulation of conferencing programs and conference convenors? What role should the Government play in the regulation?

663 Ibid, 5.
664 Ministry of Justice, New Zealand, above n 658, 6-7.
This Discussion Paper provides background information for persons and organisations who may wish to make a submission to the Victorian Parliament Law Reform Committee’s inquiry into ADR.

This Discussion Paper provides an overview of ADR in Victoria in relation to both civil disputes and restorative justice. In particular, this Discussion Paper focuses on five areas specifically identified in its terms of reference, namely:

- the reach and use of ADR schemes in Victoria
- access to justice
- measuring the outcomes of ADR
- ADR and marginalised communities
- regulation.

Throughout this Paper, the Committee poses questions to stimulate thought and to assist stakeholders to frame their submissions. However, you do not need to address all or any of these questions in your submission: the Committee welcomes submissions on any relevant aspect of its terms of reference. Submissions are due by 9 November 2007.

Following the receipt of submissions, the Committee will conduct public hearings to receive oral submissions and evidence. These hearings will be advertised in *The Age* and on the Committee’s website.

The Committee is due to table its final report on ADR no later than 30 June 2008.
Glossary of terms and acronyms

There are no agreed definitions for many of the concepts covered in this Discussion Paper. This glossary defines key terms as utilised in this paper.

**Accreditation**
NADRAC describes accreditation as:
A process of formal and public recognition and verification that an individual (or organisation or program) meets, and continues to meet, defined criteria.665

**ACDC**
The Australian Commercial Disputes Centre, a private ADR provider body.

**ADR**
Alternative dispute resolution, defined by NADRAC as:
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 be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.666

**ANZOA**
Australian and New Zealand Ombudsman Association.

**Arbitration**
NADRAC defines arbitration as:
A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.667

**CALD**
Culturally and linguistically diverse.

**Circle sentencing**
Based on traditional North American sanctioning and healing practices, circle sentencing provides the opportunity for broad participation (for example, victims, offenders and community members) in deliberations for an appropriate sentencing plan. Currently being utilised in New South Wales.

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667 Ibid.
Conciliation
NADRAC defines conciliation as:
A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.668

Conferencing (or group conferencing)
A meeting of the offender, victim (where they choose to attend) and communities to discuss and determine collectively the approach to be taken to a crime.

Criminal case conferencing
Use of mediation in criminal cases. Matters that may be addressed at a conference include identifying the issues, the making of admissions and the prospects of conviction or acquittal. Currently being utilised in the Supreme Court of Western Australia (see section 4.3).

DSCV
Dispute Settlement Centre Victoria: a program of the Department of Justice providing advice, education and dispute resolution information.

IAMA
The Institute of Arbitrators & Mediators Australia, a private ADR provider body.

IPP
Information Privacy Principles: principles covering the collection, storing and use of personal information. 11 national IPPs are contained in the Privacy Act 1988 (Cth) and apply to the Commonwealth and ACT government agencies. In Victoria there are 11 IPPs under the Information Privacy Act 2000 (Vic) which apply to Victorian public sector agencies and local councils. IPP may apply to ADR providers (see section 7.6.6).

JSS
Jesuit Social Services: a community-based organisation that operates group conferencing programs in the Children’s Court of Victoria.

KSAOs
Knowledge, skills, abilities and other attributes: a list of requirements which may act as a tool to assess whether an ADR practitioner is demonstrating competence in the performance of their tasks.

LEADR
A private ADR provider body.

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Med-arb  A hybrid process in which an ADR practitioner first uses one process (mediation) and then a different one (arbitration).

Mediation  NADRAC defines mediation as:

A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute’.669

NADRAC  National Alternative Dispute Resolution Advisory Committee: an advisory body established by the Commonwealth Government to provide policy advice on ADR.

NJC  Neighbourhood Justice Centre: established by the Department of Justice in 2007 as a three year pilot project, the NJC provides a court, on-site support services, mediation and crime prevention programs. The NJC aims to enhance community involvement in the justice system and to increase access to justice and address the underlying causes of offending.

NMC  National Mediation Conference: a national mediator peak body.

NPP  National Information Privacy Principles: these are enacted under the Privacy Act 1988 (Cth) and apply to a range of private sector organisations, including some ADR providers (see discussion in section 7.6.6).

OBPR  Office of Best Practice Regulation: a Commonwealth body that advises the Commonwealth Government, departments and agencies in relation to the development of regulatory proposals and the review of existing regulations.

Regulation  The Productivity Commission defines regulation as:

Including any law or ‘rule’ which influences the way people behave. It need not be mandatory.670

The range of models which may exist in the regulation of ADR are set out in figure 2 in chapter 7.

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669 National Alternative Dispute Resolution Advisory Council, above n 666, 9.
**Restorative justice**
Programs which involve meetings of offenders, victims (where they choose to attend) and communities to discuss and determine collectively the approach to be taken to a crime.

**Therapeutic justice**
A principle focused on maximising therapeutic outcomes for people involved in the criminal justice system. A therapeutic justice model seeks to address the causative factors underlying offending behaviour. Therapeutic jurisprudence has informed the development and operation of problem-solving courts in Victoria such as the Drug Court and the Koori Court.

**VCAT**
Victorian Civil and Administrative Tribunal.

**VCEC**

**VEOHRC**
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