



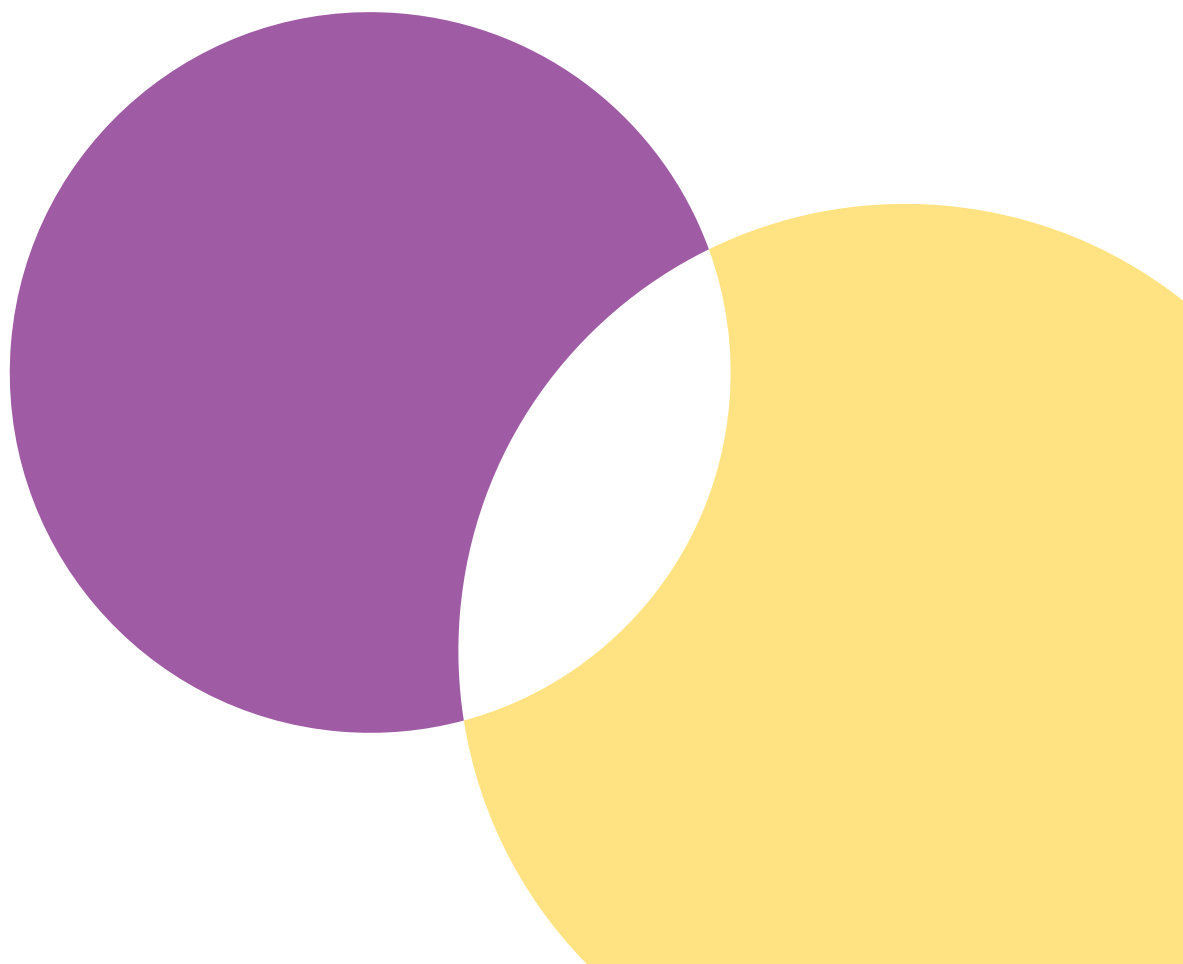
PARLIAMENT

OF VICTORIA

LAW REFORM COMMITTEE

INQUIRY INTO ALTERNATIVE DISPUTE RESOLUTION AND RESTORATIVE JUSTICE

MAY 2009





**Inquiry into
alternative dispute resolution
and
restorative justice**

**Final report of the
Victorian Parliament
Law Reform Committee**

May 2009

ORDERED TO BE PRINTED

by Authority
Victorian Government Printer

Parliamentary Paper

No. 184, Session 2006-2009

Parliament of Victoria, Australia

Inquiry into alternative dispute resolution
and restorative justice

Law Reform Committee

ISBN — 978-0-9757984-8-5

ISBN — 978-0-9757984-9-2 (electronic)

Printed on recycled paper.

This report is also available at www.parliament.vic.gov.au/lawreform

Committee membership

Members

Mr Johan Scheffer, MLC

Member and Chair from 9 August 2007

Mr Robert Clark, MP

Deputy Chair

Mr Colin Brooks, MP

Mr Luke Donnellan, MP

Mr Martin Foley, MP

Member from 30 October 2007

Mrs Jan Kronberg, MLC

Mr Edward O'Donohue, MLC

Mr Tony Lupton, MP

Member until 8 August 2007

Mr Brian Tee, MLC

Member and Chair until 9 August 2007

Mrs Judy Maddigan, MP

Member from 8 August 2007 until 30 October 2007

Staff

Ms Kerry Riseley

Executive Officer

Ms Deanna Foong

Research Officer from 25 August 2008

Ms Kate Buchanan

Research Officer until 29 August 2008

Ms Susan Brent

Research Officer

Ms Helen Ross-Soden

Administration Officer

Mr Ben Symon

Legal Policy Intern

Functions of the Law Reform Committee

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 1 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.

The reporting date was extended to 31 March 2009 by resolution of the Legislative Assembly on 26 June 2008.

The reporting date was further extended to 31 May 2009 by resolution of the Legislative Assembly on 31 March 2009.

Contents

- List of figures **xiii**
- List of case studies **xv**
- List of recommendations **xvii**
- Glossary **xxxiii**
- Chair’s foreword **xli**
- Executive summary **xliii**

- Part I: Introduction..... 1**

- Chapter 1 – Introduction..... 3**
- 1.1 The scope of this Inquiry 3
 - 1.1.1 What is ADR? 4
 - 1.1.2 What is restorative justice? 5
 - 1.1.3 What are ‘marginalised communities’? 5
- 1.2 The context for the Inquiry 6
 - 1.2.1 The policy context 6
 - 1.2.2 The broader context – the rise of non-adversarial justice 8
- 1.3 The relationship between ADR and restorative justice 9
 - 1.3.1 A common non-adversarial justice approach 10
 - 1.3.2 Separate and distinct concepts 10
 - 1.3.3 The Committee’s approach 11
- 1.4 Conduct of the Inquiry 12
- 1.5 Outline of this report 13

- Part II: Alternative dispute resolution..... 15**

- Chapter 2 – ADR: History and background..... 17**
- 2.1 The history and development of ADR 17
- 2.2 The development of ADR in Australia..... 18
- 2.3 What is ADR? 20
 - 2.3.1 Defining ADR..... 20
 - What does the acronym ADR mean? 21
 - 2.3.2 Types of ADR 22
- 2.4 Overview of Victoria’s contemporary ADR landscape 26
 - 2.4.1 ADR service providers in Victoria 26
 - Courts and tribunals 26
 - Public ADR providers 29
 - Industry ADR schemes 30
 - Private ADR providers 31
 - 2.4.2 Online dispute resolution (ODR) 32

Chapter 3 – Improving outcomes through ADR.....	35
3.1 The promise of ADR.....	35
3.1.1 Outcomes for participants.....	36
Settlement or agreement rates.....	36
Participant satisfaction.....	38
Fairness.....	40
Agreement durability.....	42
Time.....	43
Cost.....	44
Flexibility.....	46
Confidentiality.....	48
Participant empowerment.....	48
Preserving relationships.....	49
3.1.2 Outcomes for the state.....	50
Savings for the justice system.....	50
Savings for the state as a litigant.....	52
3.1.3 Outcomes for society.....	53
3.1.4 The Committee’s findings.....	54
3.2 An evidence-based approach to ADR.....	55
3.2.1 Existing knowledge constraints.....	55
3.2.2 Promoting an evidence-based approach to ADR.....	56
The role of government.....	57
What kind of data and research is required?.....	58
Challenges for data collection.....	59
Chapter 4 – Increasing access to justice through ADR.....	63
4.1 What is access to justice?.....	63
4.2 The relationship between access to justice and access to ADR.....	64
4.3 A framework for ADR in Victoria.....	64
4.4 The use and users of ADR services.....	67
4.4.1 The use of ADR services.....	67
4.4.2 The users of ADR services.....	68
4.5 Features of ADR that promote access to justice.....	69
4.5.1 Service diversity.....	70
Service overlaps.....	70
Referral loss.....	71
Central access point.....	74
4.5.2 User-friendly services.....	77
4.5.3 Flexibility.....	78
4.5.4 Cost.....	80
4.6 Issues with ADR and access to justice.....	80
4.6.1 Access to ADR and access to the courts.....	81
4.6.2 Matters not suitable for ADR.....	82
Cases that require a public hearing.....	82
Power imbalances.....	84
4.6.3 Access to legal advice and representation.....	87

4.7	Removing barriers to accessing ADR	88
4.7.1	Geographical barriers.....	88
4.7.2	Language barriers	89
4.7.3	Awareness of ADR services	92
	Current awareness of ADR and ADR services	92
	Current measures to raise awareness of ADR and ADR services.....	93
	Promoting the Dispute Settlement Centre of Victoria	94
	Raising awareness of ADR among disadvantaged groups.....	97
	Increasing access to ADR through community partnerships	99
4.7.4	Culturally appropriate services	102
	Community involvement in service delivery	102
	Community involvement in service development	104
	Cultural training for ADR service providers.....	105
Chapter 5 – Regulating ADR		109
5.1	What is regulation?.....	109
5.2	Current ADR regulation in Victoria.....	109
5.2.1	Court and tribunal-annexed ADR.....	110
5.2.2	Public ADR providers.....	111
5.2.3	Industry ADR schemes	111
5.2.4	Private ADR providers.....	112
5.2.5	National Mediator Accreditation Scheme (NMAAS)	113
5.2.6	Family law accreditation scheme.....	115
5.2.7	International developments.....	115
5.3	Is there a need to further regulate ADR in Victoria?	117
5.4	The role of government in regulating ADR	120
5.4.1	Models of regulation.....	120
5.4.2	The role of government in supporting NMAAS.....	123
5.5	Practitioner skills and abilities	124
5.5.1	Minimum education requirements	124
5.5.2	Training for ADR practitioners.....	126
5.5.3	Performance and competency standards.....	128
5.5.4	Accreditation.....	130
5.6	Immunity, confidentiality and inadmissibility	133
5.7	Complaints about ADR services	136
Chapter 6 – Resolving more disputes through ADR.....		139
6.1	Empowering Victorians to resolve disputes themselves	139
6.1.1	Dispute resolution education in schools	140
6.1.2	The educative role of ADR service providers	143
6.2	Increasing ADR provision.....	147
6.2.1	Expanding external dispute resolution schemes	147
6.2.2	Online dispute resolution (ODR).....	148

6.3	Obligations to use ADR	152
6.3.1	Pre-action ADR	152
6.3.2	Overriding obligations to use ADR	155
6.3.3	Victorian Government model litigant guidelines	156
6.3.4	The role of lawyers	158
6.4	Role of the courts	161
6.4.1	Current referrals to ADR by courts and tribunals.....	161
6.4.2	Court referral to a wider range of ADR processes	167
6.4.3	Timing of referrals.....	168
6.4.4	Referral to whom?	170
6.4.5	Mandatory court referral to ADR	174
6.4.6	Sanctions for non-participation.....	177
6.4.7	Facilitating appropriate referrals.....	179
	Referral guidelines	180
	Training.....	182
Part III: Restorative justice.....		185
Chapter 7 – Restorative justice: History and background		187
7.1	The history and development of restorative justice	187
7.1.1	The development of restorative justice in New Zealand	188
7.1.2	The development of restorative justice in Australia.....	189
7.2	What is restorative justice?	190
7.2.1	Defining restorative justice.....	190
7.2.2	Restorative justice principles	191
7.2.3	Restorative justice and criminal justice	192
7.2.4	Restorative justice processes	193
7.3	Restorative practices	196
7.4	Restorative justice and therapeutic jurisprudence.....	197
7.5	Potential issues with restorative justice.....	199
7.5.1	Human rights issues.....	199
7.5.2	The limitations of restorative justice	200
Chapter 8 – Current restorative justice programs in Victoria.....		201
8.1	The need to map restorative justice programs.....	201
8.2	Youth Justice Group Conferencing Program	201
8.2.1	History and development.....	201
8.2.2	Operation under the <i>Children, Youth and Families Act</i>	202
	Program administration and delivery.....	202
	Program process.....	204
	Program evaluation	207
8.3	Young Adult Restorative Justice Group Conferencing Program.....	212
8.3.1	History and development.....	212

8.3.2	Neighbourhood Justice Centre pilot	212
	Program administration and delivery	212
	Program process	213
	Referral pathways.....	215
	Program operation and evaluation	219
8.4	Post-sentence programs	219
8.4.1	Prison Fellowship programs	219
8.4.2	Other post-sentence programs	220
8.5	Restorative practices in other settings	221
8.5.1	Restorative practices in the Victorian education system	221
8.5.2	Restorative practices in the Family Division of the Children’s Court of Victoria	223
Chapter 9 – Improving outcomes through restorative justice		227
9.1	Outcomes of restorative justice	227
9.1.1	Outcome for offenders	227
	Diversion	227
	Recidivism	230
	Effective outcome plans.....	232
	Offender accountability.....	234
	Perceptions of fairness	235
9.1.2	Outcomes for victims.....	236
	Victim empowerment.....	236
	Understanding and forgiveness	237
	Healing	237
	Apology and reparations	238
	Victim satisfaction	239
9.1.3	Outcomes for disadvantaged individuals and groups	241
9.1.4	Outcomes for the state and society	243
	Cost	243
	Restoring community relationships.....	244
	Community confidence in the justice system	245
9.1.5	The Committee’s findings	245
9.2	Monitoring and evaluation	247
9.2.1	Current data collection in Victoria.....	247
	Youth Justice Group Conferencing Program	247
	Young Adult Restorative Justice Group Conferencing Program	249
9.2.2	The role of government in data collection	249
9.2.3	What kind of data should be collected?	251
	User demographics.....	251
	Participant satisfaction	252
	Recidivism	252
	Offender participation/non-participation	253
	Other data	253

9.2.4	Data collection issues	253
	Data collection methodology	253
	Privacy considerations	254
	Data management systems	255
	National collaboration.....	255
9.2.5	The Committee’s view.....	255
9.2.6	Evaluations	256
Chapter 10 – Improving current restorative justice programs in Victoria.....		259
10.1	A framework for restorative justice in Victoria	259
10.2	Offender referral and participation.....	261
10.2.1	Increasing referral to the YJGC Program	263
	Referral by magistrates	263
	The role of legal representatives	267
	The role of DHS court advice workers	269
10.2.2	Increasing offender participation in the YJGC Program	270
	Provision of information about the program.....	270
	Rewards for participation.....	271
	Indefinite referral to a conference.....	273
	Mandatory participation.....	273
	Participation by disadvantaged offenders	275
10.2.3	Program demand.....	280
10.3	Victim participation	281
10.3.1	Contacting victims	282
10.3.2	Providing information to victims.....	283
10.3.3	Training convenors about victims’ rights and needs	285
10.3.4	Post-conference follow-up with victims.....	285
10.4	Information and training on the YJGC Program for Victoria Police	287
10.5	Outcome plans.....	289
10.5.1	The use of outcome plans in sentencing.....	289
10.5.2	Monitoring outcome plans.....	291
10.5.3	Support for offenders to complete outcome plans.....	293
10.6	Fragmented service delivery	295
10.7	Dispute resolution conferences in the Children’s Court	296
Chapter 11 – Regulating restorative justice		299
11.1	Current regulation of restorative justice programs in Victoria	299
11.1.1	Regulation of the Youth Justice Group Conferencing Program	299
11.1.2	Regulation of the Young Adult Restorative Justice Group Conferencing Program.....	300
11.2	Is there a need to further regulate restorative justice in Victoria?	301
11.3	Who should regulate restorative justice?	304
11.4	Practitioner skills and abilities	305
11.4.1	The selection of restorative justice practitioners	305
11.4.2	Training for restorative justice practitioners.....	307

11.5	Accreditation	309
11.6	Practice standards	311
11.7	Complaints about restorative justice services	313
Chapter 12 – Expanding restorative approaches in Victoria.....		315
12.1	Expanding restorative justice programs in Victoria	315
12.1.1	Restorative justice for adult offenders	315
	Restorative justice for offenders aged 18 to 25 years	318
	Restorative justice for all adult offenders	318
	The Committee’s view	319
12.1.2	Restorative justice for serious offences	321
	Restorative justice responses to sexual offences and family violence.....	328
	Restorative justice responses to family violence in the Indigenous community.....	331
	The Committee’s view	333
12.1.3	Expanding referral pathways	333
	Police diversion to restorative justice	334
	Post-sentence restorative justice	339
12.1.4	Restorative justice in problem-solving courts	346
12.2	Community awareness and understanding of restorative justice	349
12.3	Information sharing and collaboration	353
12.4	Towards a restorative society	356
12.4.1	Educating lawyers and future lawyers about restorative justice	356
12.4.2	Moving towards a restorative society	357
Part IV: Conclusion.....		359
Chapter 13 – Conclusion.....		361
Appendices and bibliography		363
Appendix A – List of written submissions		363
Appendix B – List of witnesses.....		365
Appendix C – List of meetings and site visits		373
Appendix D – List of events attended.....		375
Appendix E – Summary of ADR regulation		377
Bibliography		391
Minority Report		423
Minority Report.....		423
Extract from the minutes of proceedings.....		429

List of figures

Part II – Alternative dispute resolution

Figure 1: Phases of ADR development..... 19

Figure 2: Types of ADR 23

Figure 3: ADR suppliers in Australia 27

Figure 4: Koories Know Your Rights! Program..... 96

Figure 5: Regulation continuum 110

Figure 6: Benchmarks for industry-based customer dispute resolution schemes 112

Figure 7: Australian National Mediator Accreditation System 114

Figure 8: Accreditation of family dispute resolution practitioners..... 116

Figure 9: LEADR mediation workshop..... 126

Figure 10: National Mediator Accreditation System practice standards 129

Figure 11: Schools Conflict Resolution and Mediation (SCRAM)..... 142

Figure 12: The Victorian Small Business Commissioner’s seven main characteristics of successful business relationships 144

Figure 13: Magistrates’ Court of Victoria’s Diversion to Mediation Program 162

Figure 14: Mediation pilot at the Broadmeadows Magistrates’ Court 165

Part III – Restorative justice

Figure 15: Traditional and restorative justice 193

Figure 16: Stages of referral to restorative justice 194

Figure 17: Marshall typology of restorative justice programs..... 195

Figure 18: Providers of the Youth Justice Group Conferencing Program..... 203

Figure 19: Aims of the Youth Justice Group Conferencing Program 203

Figure 20: Examples of outcome plans from youth justice group conferences..... 206

Figure 21: Youth Justice Group Conference Program process..... 210

Figure 22: Format of Young Adult Restorative Justice Group Conference Program conferences 214

Figure 23: Referral pathways to the Young Adult Restorative Justice Group Conference Program.....	215
Figure 24: The Criminal Justice Diversion Program.....	216
Figure 25: The Upper Hume Interagency Team’s Student Engagement Project	222
Figure 26: Court outcomes for Youth Justice Group Conference Program participants and control group.....	228
Figure 27: Neighbourhood Justice Centre evaluation indicators.....	248
Figure 28: Young people referred to, and participating in, the Youth Justice Group Conference Program between 2004-05 and 2007-08.....	262
Figure 29: New Zealand’s <i>Principles of best practice for restorative justice process in criminal cases</i>	312
Figure 30: Summary of adult restorative justice programs in Australia.....	316
Figure 31: Youth Justice Group Conference Program conferences by offence type. Metropolitan Melbourne 2003-07	323
Figure 32: Offences for which young offenders may be referred to restorative justice throughout Australia	324
Figure 33: Stage of referral to juvenile conferencing schemes in Australia.....	335
Figure 34: The Victorian Association for Restorative Justice (VARJ)	354

List of case studies

Part II – Alternative dispute resolution

Case study 1: What happens at a mediation? (Observation of a mediation conducted by a Victorian Bar accredited mediator)..... 25

Case study 2: ‘The complaint with the TIO has protected the consumer from potential legal costs’ (Example of an industry ombudsman process)..... 45

Case study 3: ‘She was at risk of losing her house’ (Example of an industry ombudsman process) 47

Case study 4: ‘Sometime later they were still both in commercial arrangements’ (Example of a court-referred mediation)..... 50

Case study 5: They ‘agreed to share the costs of the repairs’ (Example of a mediation conducted by the Victorian Small Business Commissioner) 153

Part III – Restorative justice

Case study 6: A convenor’s description of the conferencing process 208

Case study 7: ‘This is your opportunity to be your best self’ (Observation of a youth justice group conference) 211

Case study 8: ‘Without this opportunity he would have entered the justice system’ (A grandmother’s perspective on the group conference process)..... 229

Case study 9: ‘I am really sorry for what I have done’ (A case study presented by the Salvation Army – Brayton Youth and Family Services)..... 232

Case study 10: Post-sentence restorative justice for a homicide offence (Example of a mediation conducted by the New South Wales Department of Corrective Services)..... 340

List of recommendations

Part II – Alternative dispute resolution

Recommendation 1: Promoting an evidence-based approach to ADR..... 61

1.1 The Victorian Government should:

- work with the National Alternative Dispute Resolution Advisory Council and government, statutory, industry-based, community and other private ADR service providers to develop agreed performance measures for ADR services, and consistent data collection and reporting standards
- set data reporting standards for government and court-based ADR services in Victoria. At a minimum, the standards should require data collection regarding settlement rates, factors that may influence settlement rates, what happens to disputes not settled at ADR, participant satisfaction and perceptions of fairness, and the time and costs expended by participants and service providers. The standards should preserve the privacy of participants and confidentiality of ADR processes
- encourage data collection and reporting by private sector ADR services through measures such as reporting templates
- publish the data collected on an annual basis.

1.2 The Victorian Government should commission research into:

- the variables that influence whether ADR processes are successful or not successful
- what happens to disputes that are not settled through ADR
- the long term impacts of ADR on participants, including the long term durability of agreements
- the impact of ADR on the courts
- whether ADR improves outcomes compared with unassisted negotiation.

1.3 The Victorian Government should work cooperatively with courts, service providers, researchers and other interested organisations and individuals to identify further priorities for research, and sponsor research into those priorities.

Recommendation 2: ADR framework..... 66

The Victorian Government should develop an ADR framework that:

- sets out the overarching objectives and principles of ADR in Victoria, both in the community and the courts, including that:
 - ADR options can provide Victorians with a way of resolving disputes fairly, effectively and efficiently in a manner that is empowering to participants.
 - ADR should be as accessible as possible to all Victorians with a dispute.

- Where suitable alternatives are available, courts should be the last resort for resolving disputes.
- provides common approaches to data collection, evaluation and research; regulation; and strategies for engaging stakeholders from disadvantaged groups and communities
- sets out a strategy for disseminating information about ADR to key stakeholders and the general community so as to enhance awareness and understanding of ADR
- establishes a mechanism for sharing information about ADR.

Recommendation 3: ADR Committee.....66

The Victorian Government should establish an ADR committee with representation from a wide range of stakeholders including ADR service providers, courts, the legal profession, professional groups, education providers, consumers and community organisations. The committee should work together to identify and address strategic issues in relation to ADR, advise on best practice ADR policy and collaborate on issues of common interest, including potential reforms at a national level.

Recommendation 4: Data collection on access to ADR69

The Victorian Government should collect data and publish de-identified information on the extent to which Victorians, including disadvantaged individuals and groups, access ADR services so as to:

- identify any unmet needs in ADR service provision
- identify groups and individuals that are not accessing ADR services
- facilitate the customising of information, activities and services aimed at increasing the accessibility of ADR services for particular groups and individuals
- identify further opportunities to improve ADR services to better meet the needs of users and potential users.

Recommendation 5: Research on referrals by ADR service providers74

The Victorian Government should undertake research on:

- The extent of referral loss in the ADR service system in Victoria.
- Why members of the community drop out of the ADR system following a referral.
- The extent of inaccurate referrals by ADR service providers to other ADR service providers.

Recommendation 6: ADR referral protocols..... 74

- 6.1 The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to develop and implement referral guidelines and protocols to facilitate accurate referrals between ADR service providers.
- 6.2 The Victorian Government should provide initial and ongoing training to staff of government ADR providers on the effective use of these guidelines and protocols.

Recommendation 7: Equipping CAV staff to make appropriate referrals to ADR services 76

The Victorian Government should ensure that all relevant CAV staff receive regular training about the ADR services available in Victoria and the referral guidelines and protocols recommended in recommendation 6.1.

Recommendation 8: Enhancement of the disputeinfo website..... 77

The Victorian Government should redevelop the disputeinfo website to provide a practical, user-friendly and accessible service. The website should provide:

- comprehensive information on ADR and ADR processes
- comprehensive information on how to resolve disputes
- a database of ADR providers in Victoria (as well as national ADR schemes)
- links to all ADR service providers in Victoria.

Recommendation 9: Dissemination of information about the disputeinfo website 77

Following the redevelopment of the disputeinfo website, the Victorian Government should disseminate information about the website widely within the community, including through ADR service providers, other government departments and organisations that people commonly approach when they have a dispute.

Recommendation 10: Publishing information about matters of public interest arising in ADR..... 84

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to publish – in a de-identified form – regular case studies and reports on systemic issues and any other issues of public interest that arise as part of their ADR processes.

Recommendation 11: Training on power imbalances in ADR.....87

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide intake staff and ADR practitioners with initial and ongoing training to ensure that they have the skills to identify and address power imbalances.

Recommendation 12: ADR and access to legal advice.....88

The Victorian Government should develop mechanisms to ensure that ADR providers provide consumers with information about community legal centres and other relevant legal services, and refer consumers to these services where appropriate.

Recommendation 13: Dispute settlement centres throughout Victoria.....89

The Victorian Government should establish dispute settlement centres throughout the state to ensure that all Victorians have the opportunity to access these services.

Recommendation 14: Overcoming language barriers in ADR service provision92

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide support for people with limited English language or literacy skills. Such support should include providing access to interpreter services; providing translated materials or materials in plain English or on DVD; and providing assistance with writing complaints.

Recommendation 15: Resources to assist ADR practitioners work with people with language difficulties.....92

The Victoria Government should, in consultation with relevant organisations in the community, develop resources to assist ADR practitioners to work with people who have language and literacy issues. The resources should identify any potential barriers to effective participation, highlight the importance of continued explanation of complex written information, and suggest strategies for addressing literacy and related issues.

Recommendation 16: Increasing public awareness of the Dispute Settlement Centre of Victoria95

The Victorian Government should ensure that potential users are aware of the services provided by the DSCV. Strategies to increase awareness of the DSCV should include community outreach, media, printed material, the internet, DVDs and multilingual information, and working with community organisations, representatives and elders.

Recommendation 17: Increasing public awareness of ADR..... 99

The Victorian Government should, in conjunction with ADR service providers, professional associations, community organisations, community leaders and NADRAC, develop a strategy to better inform Victorians about the availability of ADR to ensure that the community – in particular disadvantaged individuals and groups – are aware of the availability of ADR services. This strategy should use a wide range of approaches including community outreach, media, printed material and DVDs, and the internet. This strategy should also include a multilingual component.

Recommendation 18: Increasing awareness of ADR in the CALD community 99

The Victorian Government should implement an awareness program based on the Koories Know Your Rights! Program to more widely disseminate information about ADR services to the culturally and linguistically diverse community.

Recommendation 19: Referral protocols between ADR providers and other organisations..... 101

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to develop referral protocols with other organisations that members of the community (especially members of disadvantaged groups) commonly turn to when they have a dispute.

Recommendation 20: Educating referring organisations about ADR 101

The Victorian Government should develop an ADR education strategy for organisations that members of the community commonly turn to when they have a dispute. This should include information about:

- the philosophy of ADR and its aims, benefits and potential outcomes
- ADR processes, service providers and how to make a referral to ADR services.

Recommendation 21: Recruitment of ADR staff 104

The Victorian Government should encourage all ADR providers to recruit and train staff with appropriate skills who have a wide range of backgrounds and experience that will enable providers to better meet the needs of the range of clients that they serve, including clients from the Indigenous and CALD communities.

Recommendation 22: Community involvement in ADR service development. 105

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to consult and involve members of the community, especially community leaders and peak community organisations, in the development and ongoing provision of ADR services and programs.

Recommendation 23: Staffing of regional dispute settlement centres..... 105

The Victorian Government should, in establishing dispute settlement centres throughout Victoria as recommended in recommendation 13, ensure that staff are appropriately recruited and trained to enable the centres to better meet the needs of the range of clients that they serve, including offering the Koori mediator program.

Recommendation 24: Cross-cultural training for ADR providers..... 107

The Victorian Government should require all government ADR providers, and encourage all other ADR providers operating in a cross-cultural environment, to provide regular cultural awareness training for intake staff and ADR practitioners. The training should provide an understanding of traditional community values including family roles, pre-arrival migrant and refugee experiences, the cultural appropriateness of ADR interventions, effective use of interpreters and communication styles and preferences.

Recommendation 25: An ADR information network 107

The Victorian Government should, through the proposed ADR Committee and in consultation with NADRAC, develop an ADR information network to enable ADR providers to share useful practical information, including best practice ADR techniques, particularly in relation to members of the Indigenous and CALD communities.

Recommendation 26: Victorian Government support for the National Mediator Accreditation Scheme 124

The Victorian Government should require all mediators providing services through government ADR providers, and encourage all other mediators in Victoria, to be accredited under NMAS.

Recommendation 27: Training for ADR practitioners 128

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide initial and ongoing training in all aspects of ADR for all staff providing ADR services (including those using forms of ADR other than mediation). This should include training on ADR theory, ADR processes and the knowledge, skills and ethics required for ADR practice.

Recommendation 28: Regulation of other ADR practitioners..... 133

The Victorian Government should collaborate with NADRAC and the Standing Committee of Attorneys-General to consider whether there should be regulation of other ADR practitioners, including arbitrators and conciliators, using a model based on the National Mediator Accreditation System.

Recommendation 29: Review of statutory provisions applying to ADR services..... 135

The Victorian Government should propose to the Standing Committee of Attorneys-General, that the Commonwealth, state and territory governments undertake a joint review of the statutory provisions that apply to ADR services, as recommended in recommendation 11 of NADRAC's report, *A framework for ADR standards*.

Recommendation 30: Complaints mechanism for ADR services 137

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to implement a clearly articulated complaints policy and complaints-handling system.

Recommendation 31: Dispute resolution education in schools 143

31.1 The Victorian Government should consider developing a conflict resolution program to strengthen the capacity of schools and students to manage and resolve conflict. This program could be based on the former Conflict Resolution in Schools (CRES) Program.

31.2 The Law Institute of Victoria should be encouraged to resume the Schools Conflict Resolution and Mediation (SCRAM) competition in Victoria.

Recommendation 32: Role of ADR providers in education to prevent and resolve disputes..... 146

The Victorian Government should develop a strategy to assist ADR providers to play a broader role in educating consumers about preventing disputes and resolving disputes at an early stage. This should include providing information about effective communication and negotiation skills, identifying best practice and educating community leaders from disadvantaged groups, in particular from the CALD and Indigenous communities, about dispute resolution techniques.

Recommendation 33: Extending external dispute resolution schemes..... 148

As part of its current review of ADR arrangements in licenced industries, the Victorian Government should consider establishing EDR or industry ombudsman schemes for motor car traders and repairers, real estate agents and the hospitality industry.

Recommendation 34: Research on online dispute resolution (ODR)..... 151

The Victorian Government should undertake research on how online dispute resolution services can be effectively provided through the disputefinfo website.

Recommendation 35: Provision of ODR via disputefinfo website 151

The Victorian Government should implement the findings of this research to provide comprehensive online dispute resolution services to the Victorian community through the disputefinfo website.

Recommendation 36: Encouraging ADR through the model litigant guidelines158

The Victorian Government should amend Victoria’s model litigant guidelines to include requirements that the State of Victoria, its departments and agencies:

- cannot commence court proceedings until ADR processes have been considered
- continue to consider using ADR and other settlement methods throughout the litigation process
- participate fully and effectively in all appropriate ADR processes applicable to the dispute.

Recommendation 37: Reviewing compliance with the model litigant guidelines158

The Victorian Government should undertake an annual review to ascertain compliance of the state, its departments and agencies with the model litigant guidelines. The Victorian Government should publish the results of this review.

Recommendation 38: Educating lawyers about ADR161

The Victorian Government should work with providers of legal education (undergraduate, postgraduate and continuing professional development) and relevant professional bodies to ensure that lawyers and future lawyers receive education about ADR, including its philosophy, aims, benefits, potential outcomes, processes, ADR service providers and the skills required for practice. This education should be placed in the context of overall teachings about non-adversarial law. In particular, the Victorian Government should implement strategies to enhance knowledge and understanding of ADR among lawyers in rural and regional areas.

Recommendation 39: Pre-action ADR in the Magistrates’ Court.....166

39.1 The Victorian Government should implement a staged rollout to all Magistrates’ Court locations throughout the state of a program for all defended civil disputes up to \$10 000 based on the successfully evaluated pilot mediation program at the Broadmeadows Magistrates’ Court.

39.2 Subject to the findings of the evaluation of the expanded pilot mediation program at the Broadmeadows Magistrates’ Court, the Victorian Government should consider increasing the jurisdiction of the statewide mediation program in recommendation 39.1 to disputes up to \$40 000.

Recommendation 40: Referral to a wider range of ADR processes168

The Victorian Government should ensure that the widest possible range of ADR options, such as those recommended in recommendation 17 of the Victorian Law Reform Commission’s *Civil justice review report*, are available to the courts.

Recommendation 41: Courts to maintain a list of ADR practitioners..... 174

The courts and VCAT should maintain an up-to-date list of appropriately qualified and experienced ADR practitioners to whom they can refer the parties to a dispute.

Recommendation 42: Training for judicial officers providing ADR 174

The Judicial College of Victoria, in collaboration with ADR education providers, should consider providing information and training about ADR, including education about different types of ADR and the skills required to practice it, for judicial officers who provide ADR.

Recommendation 43: Judicial guidelines on referral to ADR..... 182

The courts and VCAT should consider developing and implementing guidelines for their respective jurisdictions to ensure appropriate referral of cases to ADR. The guidelines could require judicial officers to consider each case's suitability for referral to ADR and consider the appropriate ADR process to refer the case to. In addition, the guidelines could include criteria to help judicial and court officers determine at which point referral to ADR is appropriate.

Recommendation 44: Training program for court referrers to ADR 183

The Judicial College of Victoria should consider developing, in consultation with relevant professional organisations, ongoing training programs for judicial officers about ADR and how to make appropriate referrals.

Part III – Restorative justice**Recommendation 45: Research on the outcomes of restorative justice processes 246**

The Victorian Government should commission research to identify and measure the outcomes of restorative justice processes. This should include research on:

- the comparative outcomes of different restorative justice processes and interventions at different stages of the criminal justice process
- the features of restorative justice processes that contribute to their success
- the features of restorative justice processes that impact on re-offending
- the elements of restorative justice processes that affect participant satisfaction levels
- the outcomes of restorative justice processes for disadvantaged individuals and groups and, in particular, the impact of gender and ethnicity on restorative justice processes and outcomes for both victims and offenders, including on satisfaction levels
- the cost-effectiveness of restorative justice interventions, compared to other interventions.

Recommendation 46: Consistent performance indicators and data collection methodologies for restorative justice programs250

The Victorian Government should develop consistent performance indicators and data collection methodologies to apply to all government-funded restorative justice programs in Victoria.

Recommendation 47: Collecting and reporting data about restorative justice256

The Victorian Government should collect and report on an annual basis a wide range of data about restorative justice processes and outcomes in Victoria in relation to both adults and young people. This should include data on user demographics, participant satisfaction, recidivism rates and the reason for participation or non-participation in restorative justice programs.

Recommendation 48: National framework for collecting and reporting data on restorative justice256

The Victorian Government should work with other Australian jurisdictions and NADRAC to develop a national framework for collecting and reporting data on restorative justice programs.

Recommendation 49: Evaluation of restorative justice programs257

The Victorian Government should regularly evaluate all government-funded restorative justice programs.

Recommendation 50: Restorative justice framework261

The Victorian Government should develop a whole-of-government restorative justice framework that:

- sets out the overarching objectives and principles of restorative justice in Victoria
- provides a blueprint for the consistent practice of restorative justice in Victoria, including providing common approaches to data collection, evaluation and research; practitioner training and collaboration; required standards of practice; and engaging victims and offenders from particular groups (for example Indigenous and CALD)
- sets out a strategy for promoting restorative justice to key stakeholders and the general community
- establishes a mechanism for sharing information and knowledge about restorative justice generally between those involved in administering and delivering restorative justice programs.

Recommendation 51: Educating Children’s Court magistrates about the YJGC Program..... 265

The Judicial College of Victoria should consider providing, in collaboration with the Department of Human Services, information and training for Children’s Court magistrates about the YJGC Program, including its aims, underlying philosophy, the benefits of participation, the process and the suitability criteria.

Recommendation 52: Educating lawyers about the YJGC Program 269

The Victorian Government should work with professional bodies to provide regular training and information for lawyers about the YJGC Program, including its aims, its underlying philosophy, the benefits of participation, the process and the suitability criteria.

Recommendation 53: Participation of Indigenous offenders and victims in restorative justice processes..... 278

53.1 The Victorian Government should establish a mechanism for the participation of Indigenous elders and other community representatives in appropriate YJGC Program conferences.

53.2 The Victorian Government should undertake research on the engagement of Indigenous victims and offenders in restorative justice processes. This research should be conducted in a manner that actively engages with Indigenous stakeholders to harness Indigenous culture and expertise.

Recommendation 54: Participation of CALD offenders and victims in restorative justice processes..... 280

54.1 The Department of Human Services should introduce a key performance indicator of the YJGC Program that relates to the participation of offenders from CALD backgrounds in the program.

54.2 The Victorian Government should undertake research on the engagement of CALD victims and offenders in restorative justice processes. This research should be conducted in a manner that actively engages with CALD stakeholders to harness CALD culture and expertise.

Recommendation 55: Review of YJGC Program demand..... 281

The Victorian Government should undertake a review to identify the likely demand for the YJGC Program throughout Victoria over the next five years.

Recommendation 56: Informing victims about the YJGC Program..... 283

The Victorian Government should develop and implement a system which allows for conference convenors to contact victims directly to inform them about the opportunity to participate in a YJGC Program conference.

Recommendation 57: Training YJGC Program providers about victims' rights and needs.....285

The Victorian Government should, in consultation with victims' groups, develop and provide training for YJGC Program providers about victims' experiences, concerns, rights and needs.

Recommendation 58: Follow-up with victims after a YJGC Program conference287

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to require service providers to:

- contact the victim following the conference to identify and address any concerns or needs
- notify the victim of the completion or non-completion of an outcome plan
- notify the victim of the court outcome
- seek feedback from victims about their experiences participating in the program, in particular in relation to their satisfaction with the process.

Recommendation 59: Information and training on the YJGC Program for police288

59.1 The Victorian Government should provide training and information for police about the YJGC Program, including its aims, underlying philosophy, the benefits of participation, the process, the suitability criteria and the role of police in conferences.

59.2 Victoria Police should amend the *Victoria police manual* to provide information about the YJGC Program and the role of police in group conferences.

Recommendation 60: Incorporating the YJGC Program conference outcome plan into the offender's sentence290

The Victorian Government should amend the *Children, Youth and Families Act 2005* (Vic) to specify that the court may include all or any of the terms of the YJGC Program conference outcome plan in or as part of the sentence order.

Recommendation 61: Monitoring YJGC Program conference outcome plans .293

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to:

- require service providers to monitor the completion of outcome plans
- set out a mechanism for a graded response to non-compliance with outcome plans
- require service providers to report to DHS and the Children's Court on the completion or non-completion of an outcome plan.

Recommendation 62: Support for offenders to complete YJGC Program conference outcome plans..... 295

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to provide that service providers should provide support to young people where necessary to ensure that the young person completes their outcome plan. This may include reconvening a conference and amending the plan if any aspect of the plan is unworkable.

Recommendation 63: Educating lawyers about dispute resolution conferences 297

The Victorian Government should work with professional bodies to provide regular training and information for lawyers about dispute resolution conferences in the Family Division of the Children’s Court of Victoria. This should include information about the purpose of the conferences and the role of the lawyer in the conference, with a particular emphasis on the need to adopt a cooperative, non-adversarial approach.

Recommendation 64: Identification of core skills and attributes of restorative justice practitioners 307

The Victorian Government, in consultation with practitioners and the Victorian Association for Restorative Justice, should develop a list of core skills and attributes required by restorative justice practitioners.

Recommendation 65: Training for restorative justice practitioners 309

The Victorian Government should provide a comprehensive training program for all restorative justice practitioners employed by contracted service providers. This training program should include initial training for all new practitioners, a period of mentoring and regular ongoing training.

Recommendation 66: Restorative justice practitioner accreditation..... 311

The Victorian Government should implement an accreditation system for restorative justice practitioners working for contracted service providers. This should include initial and periodic assessment of practitioners’ practical skills and be linked to an ongoing training program.

Recommendation 67: Restorative justice practice standards 313

The Victorian Government should implement practice standards which clearly articulate the key practice requirements for contracted restorative justice service providers and their staff, and require service providers and their staff to comply with these standards as a condition of their contract.

Recommendation 68: Complaints about restorative justice services.....314

The Victorian Government should ensure that all restorative justice programs implemented in Victoria have a clearly articulated complaints policy and complaints-handling system.

Recommendation 69: Restorative justice for adult offenders.....321

Subject to the findings of the evaluation of the YARJGC Program, the Victorian Government should implement a staged rollout of a group conferencing program based on the YARJGC Program model for all suitable adult offenders, initially at two Magistrates' Court locations. This program should have a legislative basis.

Recommendation 70: YJGC Program serious offences pilot.....327

The Victorian Government should implement a pilot for more serious offences within the YJGC Program. The pilot should include serious crimes of violence, but exclude family violence and sexual offences. The Victorian Government should develop clear eligibility guidelines for participation in the pilot and provide comprehensive specialist training for conference convenors. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Recommendation 71: Adult restorative justice serious offences pilot.....327

The Victorian Government should conduct a pilot for more serious offences as part of the adult restorative justice program recommended in recommendation 69. The pilot should include serious crimes of violence, but exclude family violence and sexual offences. The Victorian Government should develop clear eligibility guidelines for participation in the pilot and provide comprehensive specialist training for conference convenors. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Recommendation 72: Restorative justice responses to sexual offences.....333

The Victorian Government should undertake further research into whether, and if so, how, restorative justice processes might be effectively and appropriately applied to sexual offences in Victoria.

Recommendation 73: Restorative justice responses to family violence.....333

The Victorian Government should undertake further research into whether, and if so, how, restorative justice processes might be effectively and appropriately applied to family violence offences in Victoria, including in relation to family violence in the Indigenous community.

Recommendation 74: Post-sentence restorative justice..... 343

Subject to the findings of the evaluation of the YARJGC Program, the Victorian Government should implement a trial group conferencing program for adult and young offenders at the post-sentence stage, based on the YARJGC model. The trial should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Recommendation 75: Effect of participation in restorative justice on offender’s sentence management 345

The Victorian Government should specify in the program guidelines for the post-sentence restorative justice program in recommendation 74 that participation in the program may be taken into account in the offender’s sentence management.

Recommendation 76: Restorative justice in problem-solving courts 349

The Victorian Government should consider whether there are suitable ways to allow for victims and for the offender’s community of care to be more fully involved in proceedings in the Koori and Drug Courts.

Recommendation 77: Increasing community awareness and understanding of restorative justice 352

The Victorian Government should develop and implement a campaign to increase community awareness of restorative justice, including its underlying philosophy, the process and its outcomes. This should include using real examples and stories to promote restorative justice at a community level and widespread reporting of data and information about the outcomes of restorative justice programs.

Recommendation 78: Increasing information sharing and collaboration..... 355

The Victorian Government should propose to the Standing Committee of Attorneys-General the establishment of a national network to share information about restorative justice in Australia.

Glossary

accreditation	a process of formal and public recognition and verification that an individual or organisation or program meets, and continues to meet, defined criteria*
ADR	in this report, ADR is used to refer to alternative dispute resolution (see definition below). It is sometimes used to refer to ‘assisted’ or ‘appropriate’ dispute resolution
ADR practitioner	an impartial person who assists parties in dispute to resolve the dispute. A practitioner may work privately, as a statutory officer or through engagement by an ADR service provider
ADR service provider	an impartial organisation that assists parties in dispute to resolve the dispute
advisory dispute resolution processes	processes in which the ADR practitioner considers and appraises the dispute and provides advice about the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how they may be achieved. Advisory processes include mini-trial and early neutral evaluation
alternative dispute resolution	an umbrella term for processes, other than judicial determination, in which an impartial person assists the parties in dispute to resolve the dispute
ANZOA	the Australian and New Zealand Ombudsman Association, a professional association for ombudsmen in Australia and New Zealand
arbitration	a process in which the parties to a dispute present arguments and evidence to an ADR practitioner (the arbitrator) who makes a determination
CALD	culturally and linguistically diverse
CAV	Consumer Affairs Victoria, Victoria’s key consumer protection agency. CAV is a business unit of the Department of Justice

* Most of the definitions relating to ADR are drawn from National Alternative Dispute Resolution Advisory Council, *Dispute resolution terms: The use of terms in (alternative) dispute resolution* (2003).

the charter	the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
CJDP	the Criminal Justice Diversion Program. A program operating in all Victorian Magistrates' Courts which gives mainly first time offenders an opportunity to avoid a criminal record by undertaking conditions that benefit the offender, the victim and the community
collaborative law or practice	a non-litigious method of dispute resolution used mainly in family law disputes, but increasingly being used for a range of other disputes such as those relating to wills, probate, and property. The parties and their lawyers attempt to resolve issues through a series of conferences, underpinned by a binding agreement to focus on negotiation and settlement rather than litigation
co-mediation	a mediation conducted with the assistance of two ADR practitioners (the mediators)
conciliation	a process in which the parties to a dispute, with the assistance of an ADR practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator will provide advice on the matters in dispute and/or options for resolution but will not make a determination
conference or conferencing	<p>a general term that refers to meetings conducted by a chair or convenor in which participants or their advocates discuss issues in dispute.</p> <p>In the criminal justice system, it may be used to refer to a meeting between the offender, victim and community members to discuss the offence and to determine an appropriate response (see group conference).</p> <p>In the civil justice system, it may be used to refer to processes in courts, tribunals and government agencies that are similar to conciliation</p>
convenor	a person who organises and facilitates a restorative justice group conference
DHS	the Department of Human Services

DHS guidelines	<i>Youth Justice Group Conferencing program guidelines</i> . Guidelines developed by DHS to provide guidance for service providers delivering the YJGC Program
determinative dispute resolution processes	processes in which the ADR practitioner or judicial officer evaluates the dispute, which may include the hearing of formal evidence from the parties, and makes a determination. Determinative processes include arbitration and judicial determination
disadvantaged individuals and groups	a term used in this report to refer to individuals or parts of the community who are disadvantaged by a range of circumstances, or a combination of circumstances. The nature and impact of disadvantage varies according to context and may include age, gender, geographic location, cultural and linguistic background, education level, mental or physical disability and socio-economic status
dispute resolution	refers to all processes that are used to resolve disputes, whether within or outside of court proceedings. Dispute resolution processes may be facilitative, advisory or determinative (see descriptions elsewhere in this glossary)
DSCV	the Dispute Settlement Centre of Victoria. The DSCV is part of the Department of Justice and provides advisory and mediation services to help people resolve disputes, as well as community education
EDR schemes	external dispute resolution schemes. A term used to refer to industry ombudsman schemes (see below)
facilitative dispute resolution processes	processes in which the ADR practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about issues or the whole dispute. Examples of facilitative processes are mediation and facilitated negotiation
family dispute resolution practitioner	a person accredited to provide family dispute resolution services under the <i>Family Law (Family Dispute Resolution Practitioner) Regulations 2008</i> (Cth)

FOS	the Financial Ombudsman Service, a national industry ombudsman scheme dealing with complaints about financial products and services. FOS was formed by the merger of the Banking & Financial Services Ombudsman (BFSO), Financial Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) on 1 July 2008
group conference	a restorative justice process which involves a meeting of the offender, victim and community members to discuss the offence and to determine an appropriate response. Group conferences are sometimes also known as diversionary, victim-offender or family group conferences
IAMA	the Institute of Arbitrators and Mediators Australia, a not-for-profit organisation that promotes arbitration and other alternative approaches to resolving disputes
industry ombudsman schemes	industry-specific dispute resolution schemes that deal with complaints and disputes between consumers and a particular industry. Schemes are usually funded by the industry but are governed by industry and consumer representatives. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member but not the consumer. Also called EDR schemes
judicial determination	determination of a dispute by a court or tribunal following a hearing
Koori Court	a specialist court operating in Victoria which promotes greater involvement by the Koori community in the court process
LEADR	LEADR – Association of Dispute Resolvers, an Australasian, not-for-profit organisation that promotes alternative dispute resolution
mediation	a process in which the parties in dispute, with the assistance of an ADR 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, but may advise on or determine the process of mediation whereby resolution is attempted

NADRAC	the National Alternative Dispute Resolution Advisory Council. NADRAC is a body established by the Australian Government to provide advice about ADR
NJC	the Neighbourhood Justice Centre. The NJC is a pilot program located in the City of Yarra in Melbourne which incorporates a court, onsite support services for witnesses, victims, defendants and local residents, and community facilities. The NJC aims to increase community involvement in the justice system, increase access to justice and address underlying causes of offending
NMAS	the National Mediator Accreditation System, an industry-based voluntary accreditation scheme for mediators in Australia
online dispute resolution	an ADR process in which a substantial part, or all, of the communication takes place electronically, especially via the internet. Also called ODR, eADR, cyber-ADR
problem-solving courts	in this report, this term refers to courts which have the specific aim of resolving underlying causes of criminal or other behaviour. Examples in Victoria are the Drug Court, the Koori Court and the Family Violence Court
regulation	any law or ‘rule’ which influences the way people behave. Regulation is not limited to government legislation and need not be mandatory
restorative practices	approaches that focus on reparation and restoration in response to wrongdoing. These practices can be used throughout society, for example in schools and workplaces
restorative justice	a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future
restorative justice practitioner	a convenor or other person who provides restorative justice services
RMAB	Recognised Mediation Accreditation Body. RMABs are organisations that accredit mediators in accordance with the NMAS requirements

SCAG	the Standing Committee of Attorneys-General. SCAG comprises the Attorneys-General of the Commonwealth, states and territories, and New Zealand, and is a forum for discussing matters of mutual interest about justice policy, justice services and programs
standards	rules, principles, criteria or models by which quality, effectiveness and compliance can be measured or evaluated. Standards can be expressed in codes of practice, benchmarks, guidelines, models, exemplars, service charters, credentials, competencies and capabilities, as well as criteria for approval, certification, selection, endorsement or accreditation
therapeutic jurisprudence	a legal movement that draws on behavioural sciences to examine the impact of the law and legal processes on the emotional life and psychological well-being of the people involved. Therapeutic jurisprudence sees law as a social force which can produce therapeutic or anti-therapeutic outcomes, and aims to optimise the therapeutic effects
unassisted negotiation	a process whereby the parties in dispute, or their legal representatives, attempt to resolve the dispute without the assistance of a third party
VADR	the Victorian Association for Dispute Resolution, a not-for-profit organisation which promotes ADR
VALS	the Victorian Aboriginal Legal Service, a community co-operative organisation providing legal aid and assistance to Aboriginal and Torres Strait Islander people
VARJ	the Victorian Association for Restorative Justice, a professional association for individuals and organisations utilising restorative justice and restorative practices
VCAT	the Victorian Civil and Administrative Tribunal
VLRC	the Victorian Law Reform Commission, a central agency established under the <i>Victorian Law Reform Commission Act 2000</i> (Vic) for developing law reform in Victoria

YARJGC the Young Adult Restorative Justice Group Conferencing Program. The YARJGC is a pilot restorative justice program for offenders aged between 18 and 25 years operating at the Neighbourhood Justice Centre (see section 8.3 of this report)

YJGCP the Youth Justice Group Conferencing Program. The YJGCP is a restorative justice program for offenders aged between 10 and 18 years operating in the Children’s Court of Victoria (see section 8.2 of this report)

Chair's foreword

Alternative dispute resolution (ADR) and restorative justice have emerged in recent decades as two ways to try to deal with civil disputes and criminal offending outside of the courtroom. They are dynamic and innovative fields powered by the combined efforts of community organisations, universities, industries, courts and tribunals, and governments at federal and state levels.

This final report for the Law Reform Committee's Inquiry into alternative dispute resolution and restorative justice documents a proliferation in the availability of ADR programs that are now available through courts and tribunals, government agencies, industry schemes and through private providers. Even though this growing field is becoming increasingly difficult to map, this report nonetheless provides a comprehensive survey of the types of ADR services operating in Victoria.

Citizens who come in contact with the justice system are entitled to be treated decently and fairly. This means that justice should not cost unreasonable amounts of money and time, and should provide additional support for citizens who are 'doing it tough'.

This report urges the Government and the justice system to build a more comprehensive evidence base about both ADR and restorative justice. The fact is that we need to know more about what works in the area of ADR and restorative justice and what doesn't, and why. The Committee recommends that the Government establish advisory structures that will foster improvements in ADR performance delivery and increase access to those who can benefit from its processes. The Committee also found that there is a need for the Government to work with relevant stakeholders to find appropriate ways to better regulate ADR delivery and to see how Victorians can be supported to better resolve disputes themselves.

While there was much that the members of the Committee agreed upon, there were issues upon which members' views diverged. These issues are mostly to be found in chapter 12 and relate to whether and how restorative justice approaches in Victoria should be expanded.

There was agreement that caution should be exercised in making restorative justice programs available to adult offenders and for using restorative justice for more serious offences. The majority of Committee members felt that it was consistent with a cautious approach to recommend that the Government consider extending restorative justice programs to appropriate adult offenders and that the Government conduct pilot programs to examine how this should be done. The majority of Committee members also agreed that the Government should permit some more serious offences (with the exception of family violence and sexual offences) to be included in restorative justice programs.

These are matters that all Committee members weighed with great care and the divergence of views should be respected and taken into serious consideration by readers of this report. While there was a parting of ways on some issues, I think it is fair to say that members agree that the processes the Committee followed in conducting the Inquiry and preparing the recommendations have integrity.

On behalf of the members of the Law Reform Committee, I thank the many people and organisations – judges, lawyers, service providers, academics, community organisations and others – who took the time to contribute their views and expertise to this Inquiry. In particular, the Committee would like to thank everyone who attended the Committee’s Culturally and Linguistically Diverse Communities Forum and Indigenous Australian Communities Forum, which were respectively co-sponsored by the Ethnic Communities’ Council of Victoria and the Victorian Aboriginal Legal Service. I offer special thanks to those individuals who shared their personal experiences with the Committee and who permitted those experiences to be treated as evidence. The Committee is also very appreciative of those individuals and organisations that allowed Committee representatives to witness ADR and restorative justice processes first hand. Many of these stories appear as case studies in this report.

I acknowledge with special regard the hard work of my fellow Committee members Robert Clark, Colin Brooks, Luke Donnellan, Martin Foley, Jan Kronberg and Edward O’Donohue, as well as the members of our Secretariat, Kerryn Riseley, Deanna Foong, Susan Brent and Helen Ross-Soden. I would also like to acknowledge the role of Kate Buchanan who laid the ground work for much of this Inquiry before her departure in August 2008. I acknowledge their unswerving rigour in the examination of the voluminous, detailed and often overlapping or contradictory evidence that was presented. I especially thank the Deputy Chair, Robert Clark, for his invaluable grasp of the overarching issues and for his relentless attention to accuracy in the detail in the drafting of this report.

Kerryn Riseley deserves special mention for her leadership in both the research and project management of what has been a long and formidably complex inquiry. Ms Riseley and her team have rendered the labyrinth that is ADR and restorative justice in Victoria into a document that is both comprehensive and accessible without compromising the multifaceted character of ADR and restorative justice. This work has enabled the Committee to make recommendations on the way forward.

Johan Scheffer MLC
Chair

Executive summary

This report maps out future directions for alternative dispute resolution (ADR) and restorative justice in Victoria.

‘ADR’ is a term used to describe processes through which people resolve disputes with the help of a third person, rather than asking a court or tribunal to decide the case for them. Some of the better known types of ADR include arbitration, mediation and conciliation. ADR has the potential to resolve disputes more quickly and cheaply, and with less emotional cost, than traditional courtroom litigation. At the same time, it offers a way to relieve pressure on the courts and costs to taxpayers.

‘Restorative justice’ refers to programs in the criminal justice system under which people involved in an offence collectively resolve how to deal with its aftermath and implications for the future. Restorative justice focuses on repairing the harm caused by the offence, on encouraging offenders to take responsibility for their actions and on increasing victim and community involvement in the criminal justice system.

Together, ADR and restorative justice form part of a much wider movement that is exploring new and alternative ways to deal with civil disputes and criminal offending. They are part of an evolving field involving community organisations, industries, federal and state governments and courts and tribunals themselves.

The terms of reference for this Inquiry asked the Committee to look at the reach and use of ADR and restorative justice in Victoria. The Committee was asked to consider the capacity to improve access to justice and improve outcomes in civil and criminal cases. The Committee was asked whether ADR and restorative justice could reduce the need for contact with the courts, particularly for disadvantaged people and groups. The terms of reference also asked the Committee to consider whether a form of government regulation of ADR providers is appropriate or feasible.

In the course of the Inquiry the Committee spoke to judges, lawyers, service providers and people representing victims and disadvantaged people in the community. It found there are quite different issues and challenges facing ADR on one hand, and restorative justice on the other, and has dealt with them separately in this report.

ADR in the civil justice system

ADR is one of the success stories of Victoria’s justice system. Since the 1970s it has expanded into a large, highly diverse and innovative field. However, this success is now starting to create some new challenges. Members of the community need to be able to find and access the help they need from the many services available. They need services that are of consistently high quality and which produce results that are just and fair. There needs to be clearer understanding about when ADR can deliver justice that is accessible, efficient and fair, and when independent courts and tribunals have a role to play. This report aims to address these challenges.

ADR: History and background (Chapter 2)

ADR is now a significant part of the civil justice system in Victoria. There are so many types of ADR processes available, and so many service providers offering ADR, that it is becoming increasingly difficult to map the ADR field.

Types of ADR on offer in Victoria range from the more traditional arbitration and mediation to more innovative forms such as online ADR, in which parties try to resolve their disputes by using technology such as the internet.

There are a diverse range of service providers in Victoria including:

- courts and tribunals. Some, like the Victorian Civil and Administrative Tribunal, provide ADR in-house, while others refer disputes out to private ADR providers in a bid to end litigation before it goes to trial
- public ADR providers. Some of these are government agencies such as Consumer Affairs Victoria, which conciliates consumer disputes. Others are independent offices, such as the Ombudsman, who investigates complaints about state and local government authorities
- industry ADR schemes, which often take the form of industry ombudsman or complaints schemes. Industries which have schemes in Victoria include energy and water, telecommunications and banking and financial services
- private ADR providers from the legal and other professions.

Improving outcomes through ADR (Chapter 3)

Stakeholders in this Inquiry were confident that ADR can produce better outcomes than traditional litigation. They told the Committee that ADR is often faster, cheaper, more flexible and produces greater satisfaction than litigation. They pointed out long term benefits of ADR, such as teaching people to resolve disputes themselves. They also told the Committee that ADR can save public resources by alleviating pressure on the courts and can reduce the social and economic costs of conflict in the community.

However, the Committee also found that formal research and data about these issues is often conflicting or lacking. Part of the challenge is the sheer size and diversity of the ADR field. Different ADR processes and ADR providers have different objectives and performance measures, and can produce quite different outcomes.

The Committee believes it is time to start building a more sophisticated evidence-base about ADR. We need to know what works, why and when, so that different types of ADR are used appropriately and produce fair and lasting results.

The Committee believes that the Victorian Government can play a leadership role in this diverse field. The Committee has recommended that the government work with ADR providers and the national advisory body to develop consistent performance measures and reporting standards, and to collect and publish data. The Committee has also recommended research into key issues such as the factors that influence ADR's success.

Increasing access to justice through ADR (Chapter 4)

Stakeholders told the Committee that ADR also has the potential to improve access to justice for Victorians by providing a wide range of services which may be cheaper and simpler to use than courts and tribunals.

However, the Committee also heard that there are some barriers to realising this potential. The sheer number of services can be confusing for members of the community, who may become 'lost' in the system. Physical distance from service providers, language and poor community awareness about ADR make it hard for people to access services in practice. There is also a concern that ADR may become a 'second class' justice system for parts of the community that struggle to access the courts.

The Committee has recommended a series of strategies to address these concerns. These include:

- encouraging better coordination amongst ADR providers, including through an ADR framework for community and court-related ADR in Victoria, a new ADR Committee and better systems for referring people between ADR providers
- making the system easier to navigate for members of the community, including disseminating information on key ADR providers in the community and revamping the government's [disputeinfo](#) website
- reducing existing barriers to access for parts of the community, including establishing dispute settlement centres throughout the state, extending the capacity to deliver the Koori mediator program, introducing more assistance for people from non-English speaking backgrounds and developing culturally appropriate services
- introducing protections for people using ADR, such as by training ADR providers to identify and address power imbalances between parties.

Regulating ADR (Chapter 5)

ADR in Victoria is currently regulated by a combination of federal and state government legislation and industry guidelines and standards. Regulation varies according to the type of ADR process and the type of ADR service provider.

Stakeholders in this Inquiry expressed divergent views about whether additional regulation is required and the form it should take, should it be introduced. The Committee considered various options, including the new voluntary accreditation scheme for mediators, the National Mediator Accreditation Scheme (NMAS). The Committee has recommended that the government make NMAS accreditation mandatory for all mediators working for public ADR providers, and encourage other ADR providers to accredit their staff as well. The Committee has also recommended that the government work nationally to consider whether NMAS-style accreditation models should be introduced for providers offering other types of ADR such as arbitration and conciliation.

The Committee considered some specific regulatory issues and has recommended:

- more training for ADR providers
- a national review of legislative provisions dealing with protection of ADR providers from legal liability, confidentiality of ADR and the admissibility of ADR discussions as evidence in subsequent court proceedings
- implementation of complaints-handling systems by ADR providers.

Resolving more disputes through ADR (Chapter 6)

Although ADR has become a significant presence in the justice system, there is still scope to expand its use for the benefit of the community.

The Committee has recommended a number of different strategies to increase the use of ADR in appropriate cases, including:

- empowering Victorians to resolve disputes themselves – the Committee heard that most disputes that go to ADR or the courts are capable of being resolved by people themselves but that they often lack the necessary skills. The Committee has recommended work to raise skill levels in the community
- increasing the supply of ADR services, particularly by exploring the scope for additional industry ombudsman schemes for licensed industries and by undertaking research into the potential use of online ADR
- ensuring that the Victorian Government leads by example, by using ADR to resolve disputes wherever appropriate
- encouraging people in the justice system to use ADR more often. For example, although the courts and tribunals already refer cases to ADR, the Committee believes they should be able to refer people to a wider range of ADR processes and that there should be more training and guidelines for judicial officers about how and when to make appropriate referrals.

Restorative justice in the criminal justice system

Restorative justice is less established in Victoria's justice system than ADR. The evidence about the benefits of restorative justice is promising, but it raises complex legal and social issues about the aims of the criminal justice system, the rights of offenders, the rights and needs of victims and how to address causes of offending. The Committee believes restorative justice is an appropriate and useful tool in many cases, but that a careful and staged approach to its future is warranted.

Restorative justice in Victoria (Chapters 7 and 8)

Restorative justice programs have operated in Victoria's juvenile justice system since the 1990s but they remain on the margins of the criminal justice system. There are only two programs operating in the criminal justice system at present:

- the Youth Justice Group Conferencing (YJGC) Program in the Children’s Court. Under this Program, the Court can refer young people aged 10-18 years who have been convicted of certain criminal offences to a ‘group conference’ prior to sentencing. Conferences are run by community organisations and are attended by the young person, his or her lawyer and the police. The victim of the offence and members of the young person’s family can also attend if they wish. They negotiate an outcome plan designed to help the young person take responsibility and make reparation for the offence and to reduce his or her chances of re-offending. The Court takes the conference into account when sentencing the young person
- the Young Adult Restorative Justice Group Conferencing (YARJGC) Program at the Neighbourhood Justice Centre in Collingwood. This is a new pilot program for young adult offenders aged 18-25 years. Young adults whose charges are heard at the Centre can be referred to group conferences before plea, before sentencing or after sentencing.

Restorative justice principles and practices have been applied in settings outside the criminal justice system in Victoria, such as in schools and child protection proceedings. However, this report focuses primarily on the criminal justice system.

Improving outcomes through restorative justice (Chapter 9)

Existing research into restorative justice programs indicates they offer benefits for offenders, victims and the broader community, although these benefits are often intangible and hard to measure.

In the case of offenders, research suggests that, in some cases, restorative justice programs can divert offenders away from the criminal justice system, reduce rates of re-offending, produce better outcomes by addressing underlying causes of offending and encourage offenders to take responsibility for their actions. In the case of victims, restorative justice can be empowering, increase satisfaction with, and confidence in, the justice system, and lead to them receiving an apology and reparation. For the community, programs can restore community relationships and rebuild confidence in the legal system.

However, as with ADR in the civil justice system, the Committee was concerned by the gaps in available research and data about restorative justice and the implications for future policy and program development. The Committee has made a number of recommendations to promote more research and better data collection, including research into the factors that affect the success of programs and the outcomes for disadvantaged individuals and groups.

Improving current restorative justice programs (Chapter 10)

Although restorative justice operates on a much smaller scale than ADR in Victoria, responsibility for existing programs is split between different departments and service providers. The Committee supports efforts by the Victorian Government to develop a coordinated approach to restorative justice. It has also recommended a

whole-of-government framework which, amongst other things, sets out common objectives for programs and a mechanism for sharing information and knowledge.

The Committee received some evidence suggesting specific improvements to the YJGC Program in the Children's Court. It has recommended strategies to:

- increase participation by young offenders, particularly those from Indigenous and culturally and linguistically diverse communities, which currently have relatively low participation rates
- improve victims' experiences. Victims are involved or represented in over 80% of group conferences. To realise the potential benefits of restorative justice for victims, the Committee has recommended more training for conference convenors about victims' experiences and more follow up with victims after conferences
- encourage police support through more information and training
- improve the effectiveness of outcome plans, including specific recommendations regarding providing support to help young people complete the plans and monitoring compliance with plans.

Regulating restorative justice (Chapter 11)

Although the YJGC Program in the Children's Court has a statutory basis, it is largely regulated by departmental guidelines. The government works with service providers and the Victorian Association for Restorative Justice (VARJ), the peak body in the field, to provide training and to discuss service delivery issues. VARJ is also developing voluntary standards and accreditation protocols for service providers.

Stakeholders had conflicting views about whether additional government regulation is needed or appropriate. The Committee was impressed by the professionalism of those involved in the YJGC Program but, given the issues at stake and the vulnerability of participants in conferences, it believes more regulation is warranted to consolidate service quality. The Committee has recommended that the Victorian Government work with VARJ and service providers to develop a list of core skills and attributes for providers, provide a comprehensive training program for providers and implement an accreditation scheme, practice standards and a complaint-handling system.

Expanding restorative justice approaches in Victoria (Chapter 12)

New Zealand and some other states in Australia are using restorative justice more widely than Victoria.

The Committee considered a number of options for expanding restorative justice programs in Victoria, including:

- programs for adult offenders – most stakeholders thought group conferencing should be available for adult offenders of all ages, not just for young people or young adults. The Committee has recommended a staged rollout of programs for adult offenders, initially at two Magistrates' Court locations
- using restorative justice for more serious offences – stakeholders had different views about this issue and the Committee has recommended that the Victorian Government conduct pilot programs to test its appropriateness. These pilots should be subject to a suitability assessment for the offender, training for providers and a comprehensive evaluation. The pilots should exclude family violence and sexual offences
- post-sentence referral – the Committee supports a trial post-sentence restorative justice program for both adult and young offenders
- restorative justice in Victoria's problem solving courts – the Drug and Koori Courts already incorporate some elements of restorative justice. The Committee believes there is scope to expand these and has recommended measures for victims and the offender's community of care to be more involved in these Courts.

The Committee recognises that restorative justice needs the support of the community if it is to succeed. Stakeholders told the Committee that offenders are often more confronted by meeting their victims than by courtroom trials, but that restorative justice has often been labelled a 'soft option'. The Committee has recommended that the Victorian Government conduct a campaign to raise community awareness about restorative justice using real life examples. The government should also make its research and data about restorative justice widely available.

Finally, the Committee understands that restorative justice requires a cultural shift in the justice system as well as in the community. As such, it has recommended more training for lawyers and law students about restorative justice, and encourages the government to consider using restorative principles outside the criminal justice system.

PART I
INTRODUCTION



Chapter 1 – Introduction

On 1 March 2007 the Legislative Assembly gave the Law Reform Committee terms of reference to conduct an inquiry into alternative dispute resolution (ADR), including restorative justice.

People have always tried to resolve disputes outside the courtroom but, in the 1970s, ongoing concern about the cost, time and emotional stress associated with resolving disputes through the traditional adversarial court system caused ADR to be considered more seriously.

Since that time ADR has transformed the legal landscape in Victoria. There is now a large and growing number of agencies and services all offering to help people resolve their disputes without the need to go to court. These include ombudsmen and other government complaints agencies, industry-based complaints services and a range of private mediators and other professionals.

More recently, governments and courts in Victoria have experimented with new ways of dealing with criminal offences, including through the use of restorative justice. Restorative justice was first introduced in Victoria in 1995, with a pilot group conferencing program for young offenders.

However, the increasing use of ADR and restorative justice in Victoria has begun to create its own challenges. What is flexible, creative and dynamic from one point of view can, from another, appear ad hoc, fragmented and confusing. In order to ensure that all Victorians can share in the benefits of these new forms of justice, community members need to be able to find the service that is right for them from all the different options available; those services must be of a very high quality, and the outcomes must be fair and just.

In the two years since it was asked to conduct its Inquiry, the Committee has reviewed many volumes of literature and studies on the topic from both Australia and overseas. It has spoken to judges and lawyers; to organisations and professionals who provide ADR and restorative justice services; to groups representing victims and offenders; and to members of Victoria's Indigenous and multicultural communities.

The Committee's aim was to take stock of ADR and restorative justice in Victoria, their past successes and the challenges they face in the future. ADR and restorative justice are neither a panacea for every problem, nor a substitute for independent courts and tribunals, but they can help to deliver justice in a way that is accessible, efficient and fair.

In this report the Committee makes recommendations about ways the government can promote high quality ADR and restorative justice in appropriate cases, without inhibiting the dynamism and innovation that has made them so successful.

1.1 The scope of this Inquiry

The terms of reference for this Inquiry require the Committee to consider the reach and use of ADR mechanisms, including restorative justice. The terms of reference

ask the Committee to give particular consideration to improving access to justice, improving outcomes in civil and criminal court jurisdictions and reducing the need for contact with the court system, particularly in marginalised communities. They also require the Committee to consider the feasibility and appropriateness of government regulation of ADR and restorative justice service providers.

The terms of reference do not define ‘ADR’, ‘restorative justice’ or ‘marginalised communities’ and the Committee developed its own definitions for the purposes of this Inquiry.

1.1.1 What is ADR?

Defining ADR is not easy. There is no agreed definition of what ADR is, or consensus about the processes that constitute ADR, or even what the acronym ADR means.¹

The National Alternative Dispute Resolution Advisory Council, which advises the Australian Government on ADR, defines ADR as:

an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.²

This is the definition of ADR used by the Committee in this report. It covers a number of different processes through which an impartial third person helps people resolve disputes outside the courtroom. Some of the better known and more common processes in Australia include arbitration, mediation and conciliation. It also describes services offered by a range of different organisations and people, including government departments, ombudsmen, statutory schemes, industry ombudsman (or external dispute resolution) schemes, and private mediators and other professionals.

ADR clearly excludes traditional trials and judicial decisions in the courts. For the purposes of this Inquiry, the Committee has also decided to exclude unassisted negotiation between people involved in a dispute, even though people frequently resolve disputes in this way. This is because there is no impartial third party assisting the disputants to resolve the issues between them.

Chapter 2 describes types of ADR, and ADR services offered in Victoria, in greater detail.

¹ See discussion in Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 3-5; see issues raised in National Alternative Dispute Resolution Advisory Council, *ADR terminology: A discussion paper* (2002); National Alternative Dispute Resolution Advisory Council, *ADR terminology: Responses to NADRAC discussion paper* (2003); Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 77-78.

² National Alternative Dispute Resolution Advisory Council, *Dispute resolution terms: The use of terms in (alternative) dispute resolution* (2003), 4.

1.1.2 What is restorative justice?

As with ADR, there is no universally accepted definition of restorative justice.

For this Inquiry the Committee adopted the widely-accepted definition of restorative justice coined by Tony Marshall of the United Kingdom Home Office:

Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.³

This definition has been used internationally and encompasses a wide range of processes and programs.

The Committee acknowledges that restorative justice is part of a broader philosophical approach to dealing with conflict and wrongdoing that can be applied across all sectors of society, for example in schools and workplaces. Thus, in this report the Committee also considers the wider ‘restorative practices’ approach, where appropriate, and is informed by its underlying principles.

Chapter 7 considers the definitions and underlying principles and philosophies of restorative justice in more detail.

1.1.3 What are ‘marginalised communities’?

The terms of reference for this Inquiry refer particularly to ‘marginalised communities’ but there is no agreed definition of this concept.

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.⁴ There are also strong links between social and economic disadvantage and offending.⁵

Anglicare’s submission to the Inquiry highlighted that recent changes to socio-economic factors and demographics have led to an increased need for social services and support programs in some areas. The submission emphasised a number of concerning trends, including:

³ Tony E Marshall, *Restorative justice: An overview* (1999) Home Office, United Kingdom, 5. See also Howard Zehr, *The little book of restorative justice* (2002) Good Books, 36-37; Jason Nadeau, *Critical analysis of the United Nations declaration of basic principles on the use of restorative justice programs in criminal matters* (2001), 2.

⁴ Attorney-General, Victoria, *Attorney-General's justice statement: New directions for the Victorian justice system 2004-2014* (2004) Department of Justice, Victoria, 58.

⁵ Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 31.

- an increasing number of geographically-concentrated pools of underemployed and unemployed persons in both urban and rural areas, with limited access to community resources, facilities and information ...
- an upward pressure on child poverty rates;
- fewer numbers of Australia's children from low-income families completing school (compared to the OECD average);
- greater numbers of families living with an increasingly complex mix of factors that compound disadvantage and intensify their vulnerability ...⁶

The Committee acknowledges that the term 'marginalised' may be problematic and may itself compound disadvantage experienced by various demographic groups. The Victorian Aboriginal Legal Service suggested that the Committee should instead use the terminology 'groups who are subject to widespread systemic and institutional discrimination'.⁷

For the purposes of brevity and consistency with common usage, the Committee has elected to use the terminology 'disadvantaged individuals and groups' to describe these individuals and communities in this report. The Committee also recognises that the nature and impact of disadvantage may vary and, where possible, has endeavoured to refer to different demographic groups, and the individuals within them, by relevant features such as age, socio-economic status or cultural identity.

1.2 The context for the Inquiry

1.2.1 The policy context

In the thirty years leading up to this Inquiry, there was a dramatic increase in the use of alternative mechanisms to resolve conflict and deal with crime, both in Australia and internationally. In relation to civil disputes, ADR processes have emerged in response to concerns that traditional court process are slow, costly and may not necessarily deliver the best outcomes for involved 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; by making offenders take responsibility for their actions; and by repairing or restoring harm.

In recent years, both the Victorian and Australian governments have placed increased emphasis on alternative ways of resolving disputes and dealing with crime. At a national level, the National Alternative Dispute Resolution Advisory Council (NADRAC) was established in October 1995 to promote ADR and to provide advice to the Australian Attorney-General on the development of ADR.⁸ NADRAC has played a key role in the development of national policy on ADR provision and regulation. Currently NADRAC is looking into ways to remove barriers to ADR, to

⁶ Anglicare Victoria, *Submission no. 26*, 5.

⁷ Victorian Aboriginal Legal Service, *Submission no. 32*, 3.

⁸ National Alternative Dispute Resolution Advisory Council, *About NADRAC - NADRAC's Charter*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/About_NADRACCharter>, viewed 27 February 2009.

provide incentives to ensure greater use of ADR in civil proceedings, and to support recommended strategies through government initiatives (including legislative action).⁹

In October 2006, NADRAC's Charter was broadened to include, among other things, the provision of advice on restorative justice and the use of ADR in criminal offences.¹⁰ At the time of writing this report, NADRAC had not yet undertaken any research projects specifically relating to restorative justice.¹¹

Courts and tribunals throughout Australia are increasingly utilising alternative approaches to resolve matters at an earlier stage. Many courts and tribunals, for example, refer a variety of disputes to mediation. In addition, there has been a proliferation of non-court mechanisms, such as services provided by industry ombudsman schemes and public bodies, for resolving disputes within the community.

At a state level, in 2008 the Victorian Law Reform Commission released its *Civil justice review report* which provides a comprehensive analysis of the civil justice system. That report contains a number of key recommendations designed to reduce the time taken to resolve disputes, reduce costs and simplify the process of civil litigation. ADR is an important component in many of the Commission's recommendations. These recommendations aim to increase ADR through greater use of an increased array of options, more effective use of industry dispute resolution schemes, and additional provisions for mandatory referral to ADR.¹²

The Victorian Attorney-General has also placed an emphasis on ADR and restorative justice in two successive justice statements. The first justice statement was released in 2004 and provided a platform for reform based on three themes: modernising justice, protecting rights and addressing disadvantage.¹³ Justice statement 2, released in October 2008, builds on the first statement and identifies 35 priority projects based around the key themes of modernising justice, protecting rights, addressing disadvantage, reducing the cost of justice and creating an engaged and unified court system.

The justice statements provide a commitment to resolve civil disputes earlier, and recognise the increasing importance of ADR as a dispute resolution mechanism. Justice statement 2 re-brands ADR as 'appropriate' dispute resolution, rather than 'alternative' dispute resolution, and commits to promoting and expanding existing industry, community and court-based services.¹⁴ The statement also acknowledges the complexity of the underlying causes of criminal behaviour and advocates a more

⁹ See National Alternative Dispute Resolution Advisory Council, *ADR and civil proceedings reference*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference>, viewed 29 January 2009.

¹⁰ Philip Ruddock, 'Alternative dispute resolution gets a boost' (Media release, 25 October 2006).

¹¹ National Alternative Dispute Resolution Advisory Council, *Submission no. 255*, 10.

¹² Victorian Law Reform Commission, *Civil justice review: Report* (2008), 11.

¹³ Attorney-General, above n 4.

¹⁴ Attorney-General, above n 5, 39.

flexible and creative approach to addressing crime, including through restorative justice initiatives.¹⁵

The Department of Justice is currently preparing a restorative justice policy framework, although this was not available at the time this report was written.¹⁶

1.2.2 The broader context – the rise of non-adversarial justice

ADR and restorative justice can be seen as part of a broader movement in the past few decades towards alternative ways of dealing with legal problems in the community.

Victoria's justice system has its historical roots in an adversarial model of justice. In the civil arena, this involves two disputants who present competing evidence in a courtroom trial with the outcome determined by an independent judge in accordance with strict legal rules, leaving a 'winner' and a 'loser'. In the criminal arena, the state prosecutes alleged offenders on the community's behalf, leading to a verdict of guilt or innocence and, if the verdict is guilt, a sentence.

Criticism of the financial costs and delays in adversarial systems of justice are not new. However, there has also been concern about the emotional and social impact of the system on the people involved – the stresses for the parties and the cost to their relationships in civil cases, and the neglect of victims and the seeming inability of the system to address underlying causes of offending in criminal cases.

The new approaches to legal problems have come to be described as the 'non-adversarial law' or 'comprehensive law' movement.¹⁷ Along with ADR and restorative justice, other approaches that have established a foothold in Australia are:

- therapeutic jurisprudence, which draws on behavioural sciences to examine the impact of the law and legal processes on emotional life and psychological well-being. It sees law as a social force which can produce therapeutic or anti-therapeutic consequences, and aims to optimise the therapeutic effects¹⁸
- problem-solving courts, which aim to treat and resolve underlying causes of criminal or other behaviour instead of punishing offenders. In Victoria, examples include the Drug Court, the Family Violence Court and the court at the Neighbourhood Justice Centre (NJC) in Collingwood

¹⁵ Ibid, 24, 29.

¹⁶ Ibid, 29.

¹⁷ Arie Freiberg, 'Non-adversarial approaches to criminal justice' (2007) 16 *Journal of Judicial Administration*, 205; Susan Daicoff, *Law as a healing profession: The "comprehensive law movement"* (2005) bepress Legal Series.

¹⁸ Bruce J Winick and David Wexler, 'Introduction' in Winick and Wexler (eds.), *Judging in a therapeutic key: Therapeutic jurisprudence and the courts* (2003), 3, 7.

- other specialist courts like the Koori Court, which promotes greater involvement by the Koori community in the court process
- collaborative law (or collaborative practice), a non-litigious method of dispute resolution used mainly in family law disputes, but increasingly being used to resolve a range of other disputes relating to areas such as wills, probate, and property. The parties and their lawyers attempt to resolve issues through a series of conferences, underpinned by a binding agreement to participate in good faith and the understanding that the lawyers will withdraw if the parties go to court.¹⁹

Commentators have identified a number of common elements amongst these different approaches. They include an interest in preserving and enhancing the wellbeing and relationships of people involved in the legal system, a multidisciplinary focus that looks beyond strict legal rights and processes to issues such as emotions, values, needs and psychology; and a focus on non-court dispute resolution or processes that adopt a problem solving approach.²⁰

1.3 The relationship between ADR and restorative justice

While ADR and restorative justice have developed as two distinct areas of law, they have considerable commonality in origin, philosophy and development. Early community mediation programs in the United States in the 1970s and 1980s dealt with both criminal and civil matters. However, police and community reluctance to refer more serious criminal matters to such programs reportedly resulted in the separation of these two forms of issue resolution.²¹

Melissa Lewis and Les McCrimmon of the Australian Law Reform Commission have noted that there continues to be considerable overlap between ADR and restorative justice, although there are many practical and theoretical differences:

Mediation refers to conflict and compromise, and seeks to avoid 'blaming'. It seems to achieve the best outcome for all parties through collaboration, procedural flexibility, interest accommodation, contextualisation, active participation, and relationship preservation. In the criminal context, the perceived benefits of more informal methods of justice apply, but conferencing also involves having a particular theoretical basis (informed by criminological, psychological and

¹⁹ See generally Sourdin, above n 1, chapter 4; Victorian Law Reform Commission, above n 12, 245-248; Robert Lopich, 'Collaborative law overview - Towards collaborative problem solving in business' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008). See Daicoff, above n 17, and Monash University Faculty of Law, *Submission no. 7* for discussion of other theories of non-adversarial justice.

²⁰ Daicoff, above n 17, 3-4; Monash University Faculty of Law, *Submission no. 7*, 1; Freiberg, above n 17, 207.

²¹ Declan Roche, 'Dimensions of restorative justice' (2006) 62(2) *Journal of Social Issues*, 217, 225-226.

sociological theory) and aims specifically to attach stigma to the criminal *act* (not the offender) and to achieve an acceptance of responsibility.²²

The expansion of NADRAC's terms of reference to include restorative justice clearly recognises the synergies between ADR and restorative justice. However, there was some disagreement between stakeholders about the relationship between ADR and restorative justice and how they should be treated by the Committee. The Committee received submissions suggesting both that ADR and restorative justice, as forms of non-adversarial justice, share many commonalities and, conversely, that the two concepts are quite different and warrant separate inquiries.

1.3.1 A common non-adversarial justice approach

The Monash University Law Faculty urged the Committee to take a broad approach, taking into account 'the general trend towards more comprehensive, less harmful methods of dispute resolution'.²³ The submission stated that ADR and restorative justice are part of a wider trend towards non-adversarial justice within both justice systems and societies that 'seek to promote a more comprehensive and psychologically optimal way of resolving conflict in whatever context in which it arises – civil, criminal or family'.²⁴

Other stakeholders also saw scope for combining ADR and restorative justice programs with non-adversarial approaches such as therapeutic jurisprudence.²⁵ The NJC in Collingwood is an example of this approach. The legislation establishing the NJC refers to both therapeutic jurisprudence and restorative justice, and the NJC incorporates ADR services as well.²⁶

1.3.2 Separate and distinct concepts

Most stakeholders participating in this Inquiry treated ADR and restorative justice as quite separate and distinct concepts in their evidence and expressed interest in one or the other.

Stakeholders with a particular interest in restorative justice argued that a separate Inquiry focusing specifically on restorative justice was warranted. For example Mr Peter Condliffe of the Victorian Association for Restorative Justice told the Committee:

²² Les McCrimmon and Melissa Lewis, 'The role of ADR processes in the criminal justice system: A view from Australia' (Paper presented at the Association of Law Reform Agencies for Eastern and Southern Africa Conference, Uganda, 6 September 2005), 5. See also Peter Condliffe and Kathy Douglas, 'Reflections on conferencing practice: The need for accreditation and the dangerous debate?' (2007) 18(3) *Australasian Dispute Resolution Journal*, 140, 141-142; D Moore, 'Managing social conflict: The evolution of a practical theory' (2004) 21(1) *Journal of Sociology and Social Welfare*, 72.

²³ Monash University Faculty of Law, *Submission no. 7*, 3.

²⁴ *Ibid.*, 2.

²⁵ David Fanning, Magistrate, Neighbourhood Justice Centre, *Transcript of evidence*, Melbourne, 4 March 2008, 8-9; Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 21-22.

²⁶ *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1. See also Kathy Douglas, 'Therapeutic jurisprudence, restorative justice and the law' (2007) 32(2) *Alternative Law Journal*, 63.

there is some confusion about combining [restorative justice] with ADR ... restorative justice has a reach and a different feel about it to ADR ... [ADR] is concerned with dispute management whereas restorative justice is concerned with reparation and bringing together families of victims and so on into some sort of dialogue.²⁷

Similarly, Reverend Jonathan Chambers of Anglicare, a restorative justice service provider, stated:

our experience is this [restorative justice] is a bit different to dispute resolution, because when you get to restorative justice there is no dispute. If in fact you have got a person who is pleading guilty and two parties who are willing to enter into a conference, the business is actually about the reparation rather than how to resolve a dispute.²⁸

However, Anglicare's written submission acknowledged that 'There is far greater scope for designing and implementing restorative justice programs that are integrated with the whole ADR paradigm'.²⁹

1.3.3 The Committee's approach

In this Inquiry, the Committee has chosen to treat ADR and restorative justice as two separate and distinct concepts, as defined at the beginning of this chapter. The evidence received by the Committee highlighted that while ADR and restorative justice have some similarities, including emphasis on participant empowerment and a cooperative and collaborative approach, there are clear distinctions between these two concepts. These differences are apparent in their respective philosophies and aims, as well as the development and features of the processes which are associated with them.

The Committee has accordingly structured this report in two parts to correspond with this distinction. The first part focuses on ADR in the civil justice system. The second part focuses on restorative justice. However, throughout this report, the Committee identifies overlaps and commonalities between ADR and restorative justice. In particular, the Committee has highlighted discoveries that can be shared between ADR and restorative justice policy and program development.

The Committee recognises the growing momentum of non-adversarial justice approaches and acknowledges that both ADR and restorative justice fall within this overall umbrella. While the Committee has chosen to focus on ADR and restorative justice as distinct from other approaches and initiatives that might fall under the

²⁷ Peter Condliffe, President, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 2. See also Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 19.

²⁸ Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 2. See also McCrimmon and Lewis, above n 22, 10; F W M McElrea, 'Restorative justice as a procedural revolution: some lessons from the adversary system' (Paper presented at the 4th International Winchester Restorative Justice Conference, Winchester, United Kingdom, 10 October 2007), 1.

²⁹ Anglicare Victoria, *Submission no. 26*, 8.

description of non-adversarial justice, throughout this report the Committee reinforces the non-adversarial paradigm, locating both ADR and restorative justice clearly within it.

1.4 Conduct of the Inquiry

The Committee began the consultation phase of the Inquiry in September 2007 by releasing a discussion paper. The discussion paper outlined current ADR and restorative justice mechanisms in Victoria and other jurisdictions and identified key issues and possible directions for reform. The discussion paper posed 65 questions which provided guidance about the types of issues the Committee was considering in the Inquiry.

The Committee sent copies of the discussion paper for comment to over 150 stakeholders, including ADR service providers, professional associations, community legal organisations and university law schools.

A call for public submissions was also made in *The Age* on 15 September 2007.

The Committee received 42 written submissions which are listed at appendix A.

The Committee also wrote directly to the Victorian Attorney-General, the Minister for Education, the Minister for Corrections and the Minister for Community Services seeking information about relevant initiatives in their departments.

Extensive face-to-face consultations were conducted to gather a range of perspectives on both ADR and restorative justice. Six public hearings were held between November 2007 and June 2008. In addition, in June 2008, the Committee held two forums to obtain input from the Indigenous and multicultural communities. The Culturally and Linguistically Diverse Communities Forum was organised in conjunction with the Ethnic Communities' Council of Victoria and was held at Parliament House. The Indigenous Australian Communities Forum was held at the Koorie Heritage Trust in West Melbourne and was organised in conjunction with the Victorian Aboriginal Legal Service. A list of witnesses who appeared at these hearings and forums is in appendix B.

The Committee undertook two study tours to gather information about best practice programs operating in other jurisdictions. In February 2008 representatives of the Committee travelled to New Zealand to speak with stakeholders. In May 2008 Committee representatives travelled to New South Wales to speak with a range of stakeholders in relation to both ADR and restorative justice. A list of meetings held on these study tours forms appendix C.

A representative of the Committee also observed a civil law mediation facilitated by a member of the Victorian Bar in February 2008 and a Youth Justice Group Conferencing Program group conference in July 2008. Both of these observations have been written up as case studies in this report.

In addition, Committee representatives attended a number of conferences, forums and other events relevant to this Inquiry. The events attended are set out in appendix D.

The Committee conducted an extensive literature review about ADR and restorative justice. The results of this research are set out in the bibliography to this report.

1.5 Outline of this report

This report is divided into four parts:

Part I (this chapter) has sought to provide an overview of the Inquiry, including its context and key definitions, and explore the relationship between ADR and restorative justice.

Part II (chapters 2-6) examines alternative dispute resolution in the civil context.

- Chapter 2 explores the history and development of ADR, including providing key definitions.
- Chapter 3 investigates ADR's potential to improve outcomes in the civil justice system and identifies issues with evidence and data collection.
- Chapter 4 surveys ADR's potential to increase access to justice.
- Chapter 5 explores regulatory issues with the current provision of ADR in Victoria and whether regulatory reform is required.
- Chapter 6 considers how ADR can be expanded in Victoria.

Part III (chapters 7-12) examines restorative justice.

- Chapter 7 provides an overview of restorative justice including its history and underlying philosophy and principles.
- Chapter 8 provides an overview of current restorative justice programs in Victoria.
- Chapter 9 explores the outcomes of restorative justice and identifies issues with data collection.
- Chapter 10 investigates issues with the current provision of restorative justice in Victoria, with a particular focus on the use of restorative justice in the Criminal Division of the Children's Court of Victoria.
- Chapter 11 considers the current regulation of restorative justice providers in Victoria and examines whether further regulation is required.
- Chapter 12 looks at how restorative justice programs can be expanded in Victoria and considers the possibility for the use of broader restorative approaches throughout society.

Part IV (chapter 13) provides a summary and conclusion.

PART II
ALTERNATIVE
DISPUTE
RESOLUTION



Chapter 2 – ADR: History and background

Alternative dispute resolution (ADR) offers a different approach to dealing with conflict, one which is generally less formal and more flexible than litigation, and which focuses on party empowerment and participation. This chapter provides an introduction to ADR in the civil justice system, including its history and some important definitions. It also aims to provide an overview of the current reach and use of ADR in Victoria.

2.1 The history and development of ADR

ADR, in its various forms, has existed since ancient times. As communities began to emerge and grow into societies, processes were put in place to address disputes and to safeguard the good order of society. Arbitration and mediation were used in the resolution of private disputes in Mesopotamia³⁰ and in ancient Greece and Rome.³¹ In the Anglo-Saxon world, arbitration and mediation pre-dates the common law.³² Anthropological and sociological studies indicate that ADR was used in traditional societies.³³ Many commentators have provided a snapshot of the historical development of mediation and its variations in different parts of the world.³⁴ Mediation and arbitration are well documented in the major religions of the world and are referred to, for example, in the Bible,³⁵ the Qur'an,³⁶ the Talmud,³⁷ and in Confucianism.³⁸

³⁰ Rob Nelson, *Adapting ADR to different cultures*, <<http://www.gowlings.com/resources/publications.asp?pubid=776>>, viewed 17 February 2009. See also Jerome T Barrett and Joseph P Barrett, *A history of alternative dispute resolution* (2004) Jossey-Bass.

³¹ See Derek Roebuck and Bruno De Fumichon, *Roman arbitration* (2004) The Arbitration Press; Derek Roebuck, *Ancient Greek arbitration* (2001) The Arbitration Press.

³² See Derek Roebuck, *Early English arbitration* (2008) The Arbitration Press.

³³ Barrett and Barrett, above n 30.

³⁴ Christopher Moore, *The mediation process: Practical strategies for resolving conflict (2nd edition)* (1996), 20-22; Laura Nader and Harry Todd (eds.), *The disputing process: Law in ten societies* (1978); John A McConnell, *Mindful mediation: A handbook for Buddhist peacemakers* (1995) Buddhist Research Institute and Manachula Buddhist University; Dale Bagshaw, 'Innocents abroad? An examination of the relevance and effects of Western mediation education and training on dispute resolution practices in the Asia Pacific (Keynote Paper)' (Paper presented at the 3rd Asia-Pacific Mediation Forum, Suva, Fiji, 26-30 June 2006), 3; Ratu Filimone Ralogaivau, 'Blending traditional approaches to dispute resolution in Fiji with rule of law: The best of both worlds' (Paper presented at the 3rd Asia-Pacific Mediation Forum Conference, Suva, Fiji, 26-30 June 2006); Hugh F Landerkin, QC and Andrew Pirie, 'Judicial dispute resolution 2001: A Canadian perspective' (Paper presented at the Asia-Pacific Mediation Forum, Adelaide, 29 November-1 December 2001); Victorian Multicultural Commission, *Submission no. 34*, 3; LEADR - Association of Dispute Resolvers (LEADR), *Submission no. 36*, 13.

³⁵ Holy Bible, King James Version, 1 Tim. 2:5; Heb. 12:24; Heb. 9:15; Heb. 8:6.

³⁶ See Mohamed M Keshavjee, 'Alternative dispute resolution: Its resonance in Muslim thought and future directions' (Paper presented at the Ismaili Centre Lecture Series, Ismaili Centre, London, 2 April 2002); Syed Khalid Rashid, 'Peculiarities and religious underlining of ADR in Islamic law' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008); Said Bouheraoua, 'Foundation of mediation in Islamic law and its contemporary application' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008).

³⁷ Laurence Street, *The mediation evolution - its moral validity and social origin* (2003), <<http://www.laurencestreet.com.au/pub03.htm>>, viewed 2 March 2009.

³⁸ Urs Martin Laeuchli, *Negotiations and other ADR with the Chinese* (2002), <<http://www.mediate.com/articles/Laeuchli.cfm>>, viewed 18 February 2009.

Contemporary ADR emerged in the United States in the 1960s and 1970s, against a background of social justice reform, in response to dissatisfaction with the formal justice system. The formal justice system was seen as expensive, inaccessible, conflict inducing, and as exacerbating social problems.³⁹ More cooperative dispute resolution processes were sought.⁴⁰

The Pound Conference (formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice) took place in 1976 in Minneapolis. Judges, legal scholars, and leaders of the bar gathered to examine concerns about the efficiency and fairness of court systems and their administration. It has been said that the Pound Conference 'made ADR fashionable and brought it to the fore of the American adjudicatory scene'.⁴¹ The speech of Harvard Law School Professor Frank Sander recognised that not all disputes were suited to litigation and envisioned a dispute resolution centre whereby cases were matched to the most appropriate forum for redress.⁴² From this, the idea of the 'multi-door' courthouse evolved. This concept envisions one courthouse with multiple dispute resolution doors or programs. Cases are referred through the appropriate door for resolution, not just litigation.⁴³

2.2 The development of ADR in Australia

This section provides an overview of ADR development in Australia, with a particular focus on the Victorian experience where appropriate.⁴⁴

ADR also has a long history in Australia. Commentators have traced the history of ADR in Australia to the traditional systems of dispute resolution used by the Indigenous communities prior to European settlement.⁴⁵ Mechanisms for dispute resolution were strongly influenced by considerations of kinship, and behavioural rules were inscribed in social relations and in features of the landscape.⁴⁶ ADR became a feature of post-federation Australia as well, with an early focus on collective dispute management using arbitration and conciliation to resolve industrial disputes.⁴⁷ Australia's constitution expressly includes conciliation and arbitration as a head of legislative power for the prevention and settlement of industrial disputes.⁴⁸

³⁹ Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 4.

⁴⁰ Margaret A Shone, 'Law reform and ADR: Pulling strands in the civil justice web' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004), 3.

⁴¹ Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 15, citing Jeffrey Stempel, 'Reflections on judicial ADR and the multi-door courthouse at twenty: Fait accompli, failed overture or fledgling adulthood' (1996) 11 *Ohio State Journal on Dispute Resolution*, 297, 312.

⁴² Frank Sander, 'Varieties of dispute processing' (1976) 77 *Federal Rules Decision*, 111, 111-134.

⁴³ See generally Sourdin, above n 41, 265-268.

⁴⁴ For a good overview of the history of ADR in Victoria see Chris Field, Chris Field Consulting Pty Ltd, *Alternative dispute resolution in Victoria: Supply-side research project research report* (2007) Department of Justice, Victoria, 21-33.

⁴⁵ Astor and Chinkin, above n 39, 11-12; Judy Gutman, Tom Fisher and Erika Martens, 'Why teach alternative dispute resolution to law students? Part one: Past and current practices and some unanswered questions' (2006) 16(1&2) *Legal Education Review*, 125, 133.

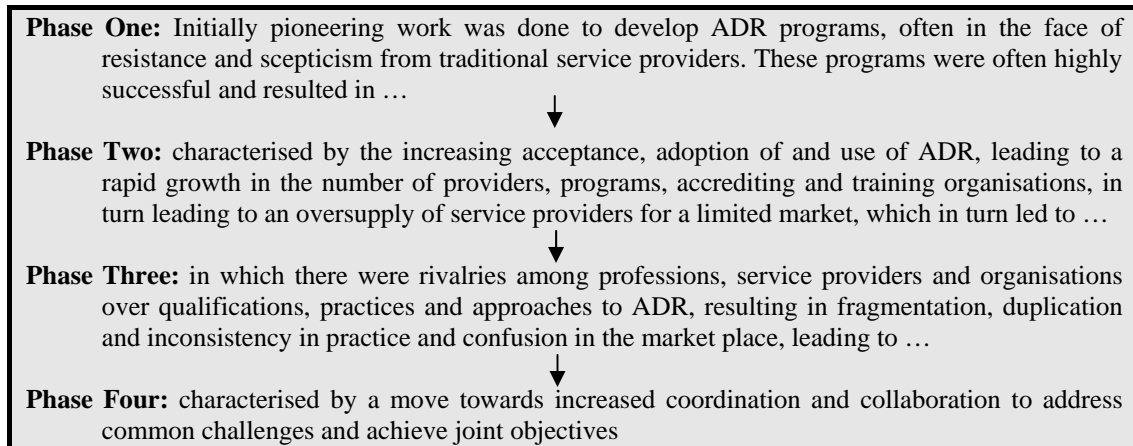
⁴⁶ Australian Law Reform Commission, *The recognition of Aboriginal customary laws: volume 1* (1986), 32.

⁴⁷ Field, above n 44, 21; Sourdin, above n 41, 14; Astor and Chinkin, above n 39, 16-17.

⁴⁸ *Commonwealth of Australia Constitution Act 1900* s 51(xxxv).

The National Alternative Dispute Resolution Advisory Council (NADRAC) has conceptualised four overlapping phases in the historical development of ADR to contemporary times which is set out in figure 1 below.

Figure 1: Phases of ADR development⁴⁹



In Australia, development of ADR initially took place beside or at the periphery of the formal justice system.⁵⁰ There were three important developments in ADR which arose because of the ‘access to justice’ movement of the 1960s and 1970s. These were the creation of institutions like ombudsmen to investigate complaints about maladministration by government bodies, the creation of specialist tribunals which incorporated ADR practices as a means to widen access to justice, and the development of community justice centres.⁵¹

Inspired by the development of neighbourhood justice centres in the United States, the New South Wales (NSW) Government passed legislation to pilot community justice centres in 1980.⁵² Community mediation was seen as a means to relieve pressure on the court system and to provide an inexpensive and accessible means to resolve disputes for the community.⁵³ The NSW pilot project was made permanent in 1983.⁵⁴ Community justice centres were established in the Australian Capital Territories (ACT) in 1988 and in Queensland in 1990.⁵⁵ Victoria’s first community justice centre, the Neighbourhood Justice Centre, was established in 2007. Mediation is provided at the centre through the Dispute Settlement Centre of Victoria (DSCV).⁵⁶

⁴⁹ National Alternative Dispute Resolution Advisory Council (NADRAC), *A framework for ADR standards: Report to the Commonwealth Attorney-General* (2001), 15.

⁵⁰ Field, above n 44, 22.

⁵¹ Ibid.

⁵² Astor and Chinkin, above n 39, 14.

⁵³ New South Wales Law Reform Commission, *Community Justice Centres: Issues Paper 23* (2003), paragraph 1.8.

⁵⁴ Ibid, paragraph 1.17.

⁵⁵ Astor and Chinkin, above n 39, 16.

⁵⁶ See Department of Justice, Victoria, *Mediation at the Neighbourhood Justice Centre*, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Neighbourhood+Justice/JUSTICE-Mediation+at+the+Neighbourhood+Justice+Centre>>, viewed 11 March 2009.

The formal justice system itself also began to incorporate ADR processes. The Family Court of Australia was a pioneer in this respect. When it was established on 5 January 1975, there was already a strong emphasis on counselling and conciliation in recognition that the adversarial approach was unsuitable for family disputes.⁵⁷ The Family Court has continued to be a leader in ADR since that time.

In recent years there has been a blossoming of ADR processes and service providers in Victoria both inside and outside the formal justice system. The size and diversity of the current ADR landscape is evident in section 2.4, which provides an overview of contemporary ADR in Victoria.

NADRAC concluded in 2001 that the contemporary ADR field in Australia now shows features of phases three and four as set out in figure 1, 'with a degree of fragmentation and diffusion, but moving to a phase of coordination and collaboration'.⁵⁸

2.3 What is ADR?

2.3.1 Defining ADR

As chapter 1 noted, there is no agreed definition of ADR or even consensus about what the acronym stands for. The rapid growth of ADR in Australia has not been matched by the development of consistent language within the field.⁵⁹ The literature review conducted by the Committee indicates that different organisations, practitioners and academics use the term ADR differently.⁶⁰

Despite the varied definitions of ADR, it is possible to identify some common features:

- There is a wide range of ADR processes.
- ADR excludes litigation.
- ADR is a structured and less formal process.
- ADR normally involves the presence of an impartial and independent third party.

⁵⁷ See generally Joe Harman, 'Leading horses to water and making them drink: Compulsory dispute resolution in the Australian context' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008), 221; Gutman, Fisher and Martens, above n 45, 134; Astor and Chinkin, above n 39, 17.

⁵⁸ NADRAC, above n 49, 15.

⁵⁹ Gregory Tillett, 'Terminology in dispute resolution: A review of issues and literature' (2004) 15 *Australian Dispute Resolution Journal*, 178.

⁶⁰ For examples of definitions of ADR, see Sourdin, above n 41, 3; Australian Law Reform Commission, *Alternative or assisted dispute resolution: Adversarial background paper 2* (1996); Laurence Street, *ADR: a generic, holistic concept* (2003), <<http://www.laurencestreet.com.au/pub01.htm>>, viewed 2 March 2009; LEADR, *Alternative dispute resolution* (2006), <<http://www.leadr.com.au/adr.htm>>, viewed 10 February 2009; Telecommunications Industry Ombudsman, *How the Telecommunications Industry Ombudsman handles complaints* (2008), <<http://www.tio.com.au/FAQ/Adr.htm>>, viewed 10 February 2009.

- Depending on the ADR process, the third party assists the other two parties to reach a decision, or makes a decision on their behalf.
- A decision reached in ADR may be binding or non-binding.

As chapter 1 discussed, the Committee has elected to adopt NADRAC's definition of ADR as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'.⁶¹

What does the acronym ADR mean?

There are diverse views as to what the acronym *ADR* actually means. Instead of 'alternative', other words such as 'assisted',⁶² 'additional', 'affirmative', 'appropriate', 'administrative', 'amicable',⁶³ and 'accelerated',⁶⁴ have been suggested.⁶⁵ 'Alternative' has been criticised because it suggests that litigation has been the primary means of dispute resolution. Some view that this is misleading because only a small proportion of disputes are resolved in court,⁶⁶ and ADR has been the main means of dispute resolution in many societies for a long time.⁶⁷ Today, ADR is increasingly regarded as 'appropriate dispute resolution', 'in recognition of the fact that such approaches are often not just an alternative to litigation, but may be the best and most appropriate way to resolve a dispute'.⁶⁸ For example, LEADR – Association of Dispute Resolvers (LEADR), a not-for-profit association that promotes ADR, stated in its submission that it believes 'alternative' is an inaccurate title as it focuses on the primacy of litigation. It favours descriptions that are more indicative of the types of processes being used, such as facilitative, consensual, determinative or non-curial.⁶⁹

There is also a divergence of opinions as to whether ADR is about resolving (that is, settling or managing) disputes or about resolving conflicts and whether there is a significant difference between resolution, settlement and management.⁷⁰ Some commentators use the terms conflict and dispute interchangeably while others draw a distinction between these two terms.⁷¹ Former Chief Justice of the NSW Supreme

⁶¹ National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute resolution terms: The use of terms in (alternative) dispute resolution* (2003), 4.

⁶² The Federal Court of Australia uses the term 'assisted dispute resolution'.

⁶³ Abu Haniffa Mohamed Abdullah, 'Amicable resolution of civil litigation in Malaysia' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, Malaysia, 16-18 June 2008).

⁶⁴ Ireland Law Reform Commission, *Alternative dispute resolution consultation paper* (2008), 39.

⁶⁵ Astor and Chinkin, above n 39, 78; Sourdin, above n 41, 3.

⁶⁶ Australian Law Reform Commission, *ADR - Its role in federal dispute resolution: Issues paper 25* (1998), paragraph 2.1; Murray Gleeson, 'The state of the judiciary' (Paper presented at the 35th Australian Legal Convention, Sydney, 22-25 March 2007), 10.

⁶⁷ Astor and Chinkin, above n 39, 5, 77-78.

⁶⁸ Attorney-General, Victoria, *Attorney-General's justice statement: New directions for the Victorian justice system 2004-2014* (2004) Department of Justice, Victoria, 33; Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 40.

⁶⁹ LEADR, *Submission no. 36*, 5.

⁷⁰ Tillett, above n 59, 179.

⁷¹ *Ibid*, 179-180.

Court, Sir Laurence Street, believes that ADR includes conflict avoidance, conflict resolution, and conflict management.⁷²

The Committee acknowledges that there are diverse views about what the acronym ADR means. For the purposes of this Inquiry, the Committee has elected to use it to mean ‘alternative dispute resolution’ as this is how ADR is referred to in the terms of reference, and also because it offers a different approach to dealing with disputes compared with traditional adjudication. The Committee also notes that the term ‘alternative’ appears to be more commonly reflected in literature and used by a majority of the stakeholders.

2.3.2 Types of ADR

There is a diverse range of institutions, programs and processes in Victoria that could fall within the Committee’s chosen definition of ADR.

Some of the more commonly known and used types of ADR in Victoria include:

- arbitration
- mediation (a description of a mediation conducted by a member of the Victorian Bar, which a Committee staff member attended in February 2008, is set out in case study 1)
- conciliation
- expert determination in the form of government or industry complaint schemes
- expert appraisal
- early neutral evaluation
- mini-trial
- private judging
- facilitation
- facilitated negotiation
- mediation-arbitration or med-arb.

NADRAC has categorised these dispute resolution processes into four different types – advisory, determinative, facilitative and hybrid. Figure 2 describes these different types of ADR and the changing role of the ADR practitioner.

The uncertain definition of ‘mediation’ illustrates the problem associated with categorising the different types of ADR. Although NADRAC prefers to see mediation as a facilitative ADR process, it has noted that the term is often used to describe situations where an ADR practitioner gives advice on the substance of the dispute.⁷³ Tasmanian legislation, for example, defines mediation to include conciliation.⁷⁴

⁷² Street, above n 60.

⁷³ Ibid, 2.

⁷⁴ *Alternative Dispute Resolution Act 2001 (Tas)* s 3(2).

Figure 2: Types of ADR

Category	Role of ADR practitioner	Examples
Advisory dispute resolution processes ⁷⁵	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	<ul style="list-style-type: none"> • expert appraisal • case appraisal • case presentation • mini-trial • early neutral evaluation
Determinative dispute resolution processes ⁷⁶	evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination	<ul style="list-style-type: none"> • arbitration • expert determination • private judging
Facilitative dispute resolution processes ⁷⁷	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	<ul style="list-style-type: none"> • mediation • facilitation • facilitated negotiation
Combined or hybrid dispute resolution processes	plays multiple roles	<ul style="list-style-type: none"> • In conciliation and in conferencing, the ADR practitioner may facilitate discussions and provide advice on the merits of the dispute. • In med-arb, the ADR practitioner first uses mediation and then arbitration.

⁷⁵ NADRAC, above n 61, 4.

⁷⁶ Ibid, 6.

⁷⁷ Ibid, 7.

However, even at the level of individual ADR processes, there is often little consensus about definitions. ADR processes are rarely defined comprehensively in Commonwealth⁷⁸ or state legislation.⁷⁹

In the academic community, Professor Gregory Tillett has identified at least 12 definitions of mediation;⁸⁰ Professor John Wade describes an ‘abacus’ of approaches;⁸¹ Robert A Baruch Bush and Joseph Folger describe four ‘stories’;⁸² Professor Carrie Menkel-Meadow describes eight different conceptual approaches to mediation;⁸³ Professor Laurence Boulle describes four models;⁸⁴ Professor Leonard Riskin has a ‘grid’ of mediator orientations⁸⁵; and Professor Nadja Alexander presents six contemporary practice models of mediation in her meta-model.⁸⁶ Professor Tania Sourdin has suggested that mediation is impossible to define, with various forms of processes used in different jurisdictions and subject areas, with the primary difference relating to the role of the mediator.⁸⁷

For the purposes of this report, the Committee has elected to use NADRAC’s descriptions of different ADR processes. There was support for NADRAC’s terminology amongst most stakeholders who addressed the issue, although some suggested alternatives.⁸⁸ The NADRAC descriptions used in this report are set out in the glossary to this report, and are also available on NADRAC’s website.

The implications of the lack of agreed definitions for future development and possible regulation of ADR processes are discussed in chapter 5.

⁷⁸ National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for Government policy-makers and legal drafters* (2006), 27.

⁷⁹ For example, *Mediation Act 1997* (ACT) does not define mediation. Instead, the Act defines ‘mediation session’ as a meeting between people in dispute and a registered mediator for the purpose of resolving the dispute by mediation, and includes anything done for the purpose of (a) arranging the meeting (whether or not successfully); or (b) following up anything raised in the meeting.

⁸⁰ Tillett, above n 59.

⁸¹ John Wade, ‘Current trends in dispute resolution in Australia’ (2004) 18 *Bond Dispute Resolution News*, 12, 16-18.

⁸² See Robert A Baruch Bush and Joseph P Folger, *The promise of mediation: The transformative approach to conflict* (2005) John Wiley and Sons, 9-18.

⁸³ Carrie Menkel-Meadow, ‘The many ways of mediation: The transformation of traditions, ideologies, paradigms and practices’ (1995) 11 *Negotiation Journal*, 217, 228-230.

⁸⁴ Laurence Boulle, *Mediation: Principles, process, practice* (2nd edition) (2005) LexisNexis Butterworths, 43-47.

⁸⁵ See Leonard L Riskin, ‘Understanding mediators’ orientation, strategies and techniques: A grid for the perplexed’ (1996) 1 *Harvard Law Review*, 7; Leonard L Riskin, ‘Decision making in mediation: The new old grid and the new new grid system’ (2003) 79(1) *Notre Dame Law Review*, 1.

⁸⁶ Nadja Alexander, ‘The mediation meta model: Understanding practice around the world’ (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008), 8-20.

⁸⁷ Sourdin, above n 41, 52.

⁸⁸ LEADR, *Submission no. 36*, 14; Supreme Court of Victoria, *Submission no. 18*, 6; Legal Services Commissioner, *Submission no. 31*, 3; Victorian Association for Dispute Resolution Inc., *Submission no. 10*, 3; Accident Compensation Conciliation Service, *Submission no. 21*, 2. Cf The Mediator Group, *Submission no. 3*, 6.

Case study 1: What happens at a mediation?

In February 2008 a representative of the Committee was allowed to observe a mediation between two parties, conducted by a member of the Victorian Bar. The dispute had arisen from the sale of a business. The purchaser was unhappy with the way the vendor had calculated the past profits from the business. The calculations had been stated to the purchaser during the negotiations and the purchaser claimed to have relied on them when deciding whether to buy the business.

The parties had exchanged letters through their lawyers but had made little progress, and the contract of sale required them to try mediation before going to court.

The mediation started at ten o'clock in the morning. The mediator sent the parties to different rooms where he described the process to them separately, before meeting both of them and their lawyers in a conference room. He began by explaining that mediation is a process of facilitated negotiation where full and frank disclosure is encouraged. The mediator then explained that he was impartial, that the process was confidential and that discussions and documents could not be used in court later.

Some differences between mediation and court litigation were then explained, including that the parties have the ability and responsibility to decide the outcome themselves, that they have more of a chance to speak up, and that mediation is not adversarial and provides a forum for cooperation rather than 'point scoring'. After this introduction, both parties were given a chance to ask questions and then were asked to sign an agreement protecting the confidentiality of the process and indemnifying the mediator from being sued himself, should there be any dissatisfaction with the final outcome.

The mediation commenced with each party's lawyer making a 'position statement' outlining their perspective on the facts and claims made. The mediator then summarised the key issues in dispute and gave both parties the chance to comment. The mediator only had to step in once to ensure a party could speak without interruption.

The mediator then held separate discussions with each party and started relaying settlement offers and counter-offers between the parties. Once he had outlined an offer, he left the party and their lawyer to discuss it and decide how they wanted to respond. One of his key messages was to focus on whether the offer represented a better deal *for them* than going to court, not on whether the other party was getting off lightly. He also used 'reality testing' to challenge any perceptions that did not reflect the reality of the situation.

One of the issues that arose was the purchaser's request to see certain documents held by the vendor. The parties agreed to jointly view and work through some documents and this took place in the mediator's presence. Negotiations about access to other documents continued throughout the day but the vendor decided not to make them available. The mediator terminated the mediation at this point, just after three o'clock, some five hours after the mediation had commenced.

Although the parties did not reach a settlement at the mediation, it was felt the process helped them understand each other's position and the dispute more clearly, and that this would help them to decide whether to continue with the dispute.

2.4 Overview of Victoria's contemporary ADR landscape

The Committee's discussion paper for this Inquiry noted the sheer number, diversity and complexity of ADR services now available in Victoria.

In 2007, the Victorian Government released a report on the supply of ADR services in Victoria, which identified a considerable number of public and private ADR providers.⁸⁹ Not all stakeholders, however, agreed with the list of ADR providers that the Committee had included in the discussion paper. Based on the submissions received, the Committee came up with its own list of ADR providers which is set out in figure 3.

ADR in Victoria is constantly evolving and changing as new programs and services are developed. During the course of the Inquiry, the Victorian Government announced a number of new initiatives.⁹⁰ The Committee did not attempt to conduct a comprehensive audit of ADR in Victoria during its Inquiry given the shifting nature of the ADR landscape. However, the following section describes some of the current major public and private suppliers of ADR.

2.4.1 ADR service providers in Victoria

Courts and tribunals

Although contemporary ADR evolved in response to institutionalised forms of justice, recently there has been a trend to institutionalise ADR to the extent that it appears no longer to be seen as an 'alternative' to dispute resolution.⁹¹ The strong interrelationship between ADR and the formal justice system is increasingly apparent today as the 'alternatives may be very closely connected with the formal justice system'.⁹²

In Australia, ADR development has occurred against a background of concern about heavier caseloads, and the rising costs and inaccessibility of the civil justice system.⁹³ Court-annexed ADR is seen to offer a faster and cheaper alternative to the court system, and to increase the court's capacity to deal with its caseload.⁹⁴

⁸⁹ Field, above n 44, 36.

⁹⁰ See chapter 1 of this report.

⁹¹ See Hilary Astor, 'Transforming the landscape of mediation' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008); Astor and Chinkin, above n 39, 7-10, 33, 79; Bronwen Gray, 'Mediation as a post-modern practice: A challenge to the cornerstones of mediation's legitimacy' (2006) 17(4) *Australasian Dispute Resolution Journal*, 208, 209; Sourdin, above n 41, 15-17.

⁹² Hilary Astor, 'Elizabeth's story: Mediation, violence and the legal academy' (1997) 2 *Flinders Journal of Law Reform*, 13, 15; Astor and Chinkin, above n 39, 33.

⁹³ Trevor Buck, *Administrative justice and alternative dispute resolution: The Australian experience* (2005) Department for Constitutional Affairs, v.

⁹⁴ Access to Justice Advisory Committee, Commonwealth, *Access to justice: An action plan* (1994), 277; Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 3. For example, with the introduction of the Individual Docket System in the Federal Court in 1997, mediation and other ADR options became important tools to assist the court in meeting performance criteria.

Figure 3: ADR service providers in Australia

	Victorian	Federal
Courts and tribunals	<ul style="list-style-type: none"> • Supreme Court of Victoria • County Court of Victoria • Magistrates' Court of Victoria • Victorian Civil and Administrative Tribunal • Children's Court of Victoria 	<ul style="list-style-type: none"> • Federal Court of Australia • Federal Magistrates' Court of Australia • Family Court of Australia • Administrative Appeals Tribunal • National Native Title Tribunal • Superannuation Complaints Tribunal
Public providers	<ul style="list-style-type: none"> • Victoria Legal Aid • Victorian Equal Opportunity and Human Rights Commission • Office of the Health Services Commissioner • Consumer Affairs Victoria • Legal Services Commissioner • Dispute Settlement Centre of Victoria • Accident Compensation Conciliation Service • Victorian Small Business Commissioner • Office of the Victorian Privacy Commissioner • Disability Services Commissioner • Ombudsman Victoria 	<ul style="list-style-type: none"> • Private Health Insurance Ombudsman • Office of the Privacy Commissioner • Australian Human Rights Commission • Office of the Mediation Advisor • Commonwealth Ombudsman • Family Relationship Centres
Industry providers	<ul style="list-style-type: none"> • Energy and Water Ombudsman (Victoria) • Public Transport Ombudsman (Victoria) 	<ul style="list-style-type: none"> • Credit Ombudsman Service Limited • Produce and Grocery Industry Ombudsman • Financial Ombudsman Service⁹⁵ • Telecommunications Industry Ombudsman
Professional bodies	<ul style="list-style-type: none"> • Law Institute of Victoria • The Victorian Bar • Victorian Association for Dispute Resolution 	<ul style="list-style-type: none"> • LEADR – Association of Dispute Resolvers • Institute of Arbitrators and Mediators Australia • The Chartered Institute of Arbitrators (Australia) • Australian Commercial Disputes Centre • Australian Centre for International Commercial Arbitration • Law Council of Australia

⁹⁵ On 1 July 2008 the Banking & Financial Services Ombudsman (BFSO), Finance Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) merged to form the Financial Ombudsman Service. The Credit Union Dispute Resolution Centre (CUDRC) and Insurance Brokers Disputes Limited (IBD) became, respectively, the Mutuals and Insurance Broking divisions of the Financial Ombudsman Service on 1 January 2009. See Financial Ombudsman Service, *About us*, <http://www.fos.org.au/centric/home_page/about_us.jsp>, viewed 10 February 2009.

Court-referred mediations began in Australia in the 1980s.⁹⁶ In 1983, provision was made for matters in the Victorian County Court Building Cases List to be referred to mediation.⁹⁷ In the 1990s, the mediation movement gained impetus and credibility when the Supreme Courts of NSW and Victoria conducted a 'purge' on the cases on their court lists by respectively launching the NSW 'Settlement Week' (1992) and the Victorian 'Spring and Autumn Offensives' (1992 and 1995).⁹⁸

The wide diversity of court-connected programs has been described as the most striking feature of ADR in Australia.⁹⁹ Today, every court and tribunal in Australia refers cases to some ADR process.¹⁰⁰ According to NADRAC, the main forms of ADR processes that are used are pre-trial conferences, mediation, arbitration, early neutral evaluation, expert appraisal and settlement negotiations.¹⁰¹ Depending on the context, the ADR process can be voluntary or mandatory.¹⁰² ADR is conducted in the 'shadow of the courts'; some ADR processes such as mediation have been described as 'an integral part of the Courts' adjudicative processes'.¹⁰³

Courts in Victoria have the power to refer cases to mediation and/or arbitration. In Victoria, the Supreme Court,¹⁰⁴ its court masters,¹⁰⁵ the County Court¹⁰⁶ and the Magistrates' Court¹⁰⁷ may order mediation with or without the consent of the parties. The Supreme Court may, with the consent of the parties, order arbitration in accordance with the *Commercial Arbitration Act 1984* (Vic).¹⁰⁸ The County Court is empowered to refer parties to arbitration with or without their consent.¹⁰⁹ The Magistrates' Court has a compulsory arbitration scheme for civil debt claims which are less than \$10 000.¹¹⁰ In the Victorian and Civil Administrative Tribunal (VCAT), mediation is extensively used in the Anti-Discrimination List, Domestic Building List, Planning and Environment List, and Retail Tenancies List.¹¹¹

⁹⁶ Henry Jolson, 'The wave of change: Developments and trends in mediation' (2006) 25(2) *The Arbitrator and Mediator*, 61, 63.

⁹⁷ *Ibid*, 63.

⁹⁸ *Ibid*, 64. Queensland followed suit with two 'Settlement Weeks': one in 1993 and one in 1994.

⁹⁹ Kathy Mack, *Court referral to ADR: Criteria and research* (2003) National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 69.

¹⁰⁰ Sourdin, above n 41, 16. For a good overview of the court-based ADR operating in Australia, see Sourdin, above n 41, 171-188.

¹⁰¹ NADRAC, above n 49, 19.

¹⁰² *Ibid*, 19. Fraser and Grice have noted that variations of voluntary and mandatory mediation services can be found in almost every Australian court. See Graeme Fraser and Christine Grice, 'The dispute resolution practitioner: Aiming for professionalism in a deregulated environment' (2008) 27(1) *The Arbitrator and Mediator*, 1, 4.

¹⁰³ J Spigelman, 'Mediation and the court' (2001) 39(2) *Law Society Journal*, 63 cited by Sourdin, above n 41, 16.

¹⁰⁴ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07(1).

¹⁰⁵ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07(1).

¹⁰⁶ *County Court Act 1958* (Vic) s 47A.

¹⁰⁷ *Magistrates' Court Act 1989* (Vic) s 108(1).

¹⁰⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 50.08(1), 50.08(2).

¹⁰⁹ *County Court Act 1958* (Vic) s 47A.

¹¹⁰ *Magistrates' Court Act 1989* (Vic) s 102(1).

¹¹¹ See Victorian Civil and Administrative Tribunal, *Mediation*, <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation?OpenDocument&1=30-Mediation-&2=~&3=~>>>, viewed 12 February 2009.

The Council of the Chief Justices of Australia and New Zealand have declared that court-annexed mediation is now an ‘integral part of the Courts’ adjudicative process and the shadow of the Court promotes resolution’.¹¹²

The Victorian Government has an ongoing program to further develop ADR in the courts and in VCAT. For instance, in its 2008-09 budget the government has committed \$3.7 million for judge-led mediation in the Supreme Court and County Courts, and a further \$5.8 million for the Magistrates’ Court’s non-family-violence-related intervention order mediation program.¹¹³

Public ADR providers

There are various government departments and statutory bodies that provide ADR services in Victoria.

The DSCV, a business unit of the Department of Justice, provides ADR services (dispute advisory services, mediation and facilitation) to individuals, communities and organisations. The DSCV, in various incarnations, has been providing mediation services since 1987. In 1993, the program was restructured to include a centralised administration which now handles disputes throughout Victoria.¹¹⁴

Consumer Affairs Victoria, which is also part of the Department of Justice, provides ADR services for a broad range of consumer disputes.

There is a range of independent statutory bodies which have been set up in Victoria and which provide ADR services. They include:

- the Office of the Victorian Small Business Commissioner, which has responsibilities for dispute resolution under the *Small Business Commissioner Act 2003* (Vic), the *Retail Leases Act 2003* (Vic) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic)
- the Legal Services Commissioner, whose core function is to receive and resolve complaints about lawyers
- the Office of the Victorian Privacy Commissioner, one of whose roles is to receive complaints relating to alleged breaches of privacy by public sector agencies and to try to settle them through conciliation
- the Accident Compensation Conciliation Service, which uses ADR principles to resolve workers compensation disputes in Victoria
- the Office of the Health Services Commissioner, which can receive, investigate and resolve complaints about health service providers, and also deals with the privacy of health information and an individual’s right to have access to their own information

¹¹² Jolson, above n 96, 65, referring to principle 1 of the Council of the Chief Justices of Australia and New Zealand’s ‘Declaration of Principles’ relating to court annexed mediations.

¹¹³ Attorney-General, *Attorney-General’s justice statement 2*, above n 68, 41.

¹¹⁴ Mandala Consulting Services, *Review of the Dispute Settlement Centre of Victoria Koori program* (2002), 6.

- the Disability Services Commissioner, which works with people with a disability and disability service providers to resolve complaints
- the Victorian Equal Opportunity and Human Rights Commission, which helps to resolve individual and representative complaints about discrimination, sexual harassment, and racial and religious vilification
- Ombudsman Victoria, an independent officer of the Victorian Parliament, who investigates complaints about state government departments, most statutory authorities and local government
- Victoria Legal Aid, which in addition to its other roles, also helps parents who are going through a separation or divorce to resolve their family disputes through its Round Table Dispute Management service.

Industry ADR schemes

Industry ombudsman schemes have increased in recent years due to the privatisation and corporatisation of previously government-owned essential services.¹¹⁵

Industry ombudsman, or external dispute resolution (EDR), schemes are essentially a product of industry self-regulation,¹¹⁶ set up by industry to provide low cost (or free), effective and relatively quick means of resolving consumer complaints about products and services.¹¹⁷ They offer an independent, fair, informal, free and speedy external dispute resolution service for consumers who have not been able to resolve their complaints directly with the scheme member.¹¹⁸ Most schemes use investigation, mediation and conciliation to resolve disputes¹¹⁹ and the vast majority of complaints are resolved through such means.¹²⁰ Where these processes do not result in a resolution, the schemes generally provide for a determination, up to a specified dollar limit.¹²¹ A determination which is accepted by the consumer is binding on the scheme member concerned. However, if the consumer rejects the determination, the scheme member is released from the determination and the consumer has the option of taking the matter to another forum such as a court.¹²²

In resolving disputes, industry ombudsman schemes go beyond merely applying the law. To achieve a fair and reasonable outcome, such schemes may not only consider

¹¹⁵ Anita Stuhmcke, 'The relevance of industry ombudsmen' (2002) March *Law Society Journal*, 73; Anita Stuhmcke, 'Resolving consumer disputes: Out of the courts and into private industry' (2003) 31 *Australian Business Law Review*, 48, 49.

¹¹⁶ Field, above n 44, 29.

¹¹⁷ Sourdin, above n 41, 208.

¹¹⁸ See generally Stuhmcke, 'Resolving consumer disputes: Out of the courts and into private industry' above n 115, 48; Fiona McLeod, Alison Maynard, Victoria Marles, Diane Carmody, Jo Benvenuti and Peter Hardham, 'Resolving customer disputes: Case studies and current issues' (Paper presented at the ADR - A Better Way to do Business Conference, Sydney, 4-5 September 2003); Paul O'Shea, 'The lion's question applied to industry-based consumer dispute resolution schemes' (2006) 25(1) *The Arbitrator and Mediator*, 63.

¹¹⁹ Ian Govey and David Symes, 'Part II: Developments in alternative dispute resolution practice: Developments in commercial ADR: Attorney-General Department's perspective' (2001) 13 *Bond Law Review*, 413, 418; O'Shea, above n 118, 70.

¹²⁰ O'Shea, above n 118, 70.

¹²¹ Govey and Symes, above n 119, 418.

¹²² McLeod, Maynard, Marles, Carmody, Benvenuti and Hardham, above n 118.

applicable legislation, industry codes and guidelines, but also other factors such as current good industry practice and what the ordinary person in the street would consider fair in the circumstances.¹²³ Funding is provided by a cooperative of industry participants or members.¹²⁴ A scheme member who fails to comply with a decision may be expelled from the scheme and have its business licence withdrawn by the relevant regulatory body.¹²⁵

The Telecommunications Industry Ombudsman and Financial Ombudsman Service¹²⁶ are national schemes based in Victoria. Other industry ombudsman schemes operating in Victoria are the Energy and Water Ombudsman (Victoria) and the Public Transport Ombudsman (Victoria).

Private ADR providers

There are also private sector organisations whose members provide ADR services in Victoria. While the main form of private ADR appears to be mediation, other processes such as arbitration, conciliation and private judging are also used.¹²⁷

The use of ADR in commercial disputes has a long history in Australia. Australia's oldest dispute management organisation, the Institute of Arbitrators Australia (now called Institute of Arbitrators and Mediators or IAMA), was set up in 1975.¹²⁸ In 1985 it established the Australian Centre for International Commercial Arbitration, a not-for-profit public company that aims to support and facilitate international arbitration and to promote Australia as a venue for international commercial arbitrations.¹²⁹ In 1986, the then New South Wales Attorney General, Justice Terry Sheahan, and the then Chief Justice of the New South Wales Supreme Court, Sir Laurence Street, established the Australian Commercial Disputes Centre to look for cheaper and speedier ADR processes that would minimise loss of commercial goodwill.¹³⁰

ADR has also been promoted by the work of other professional organisations like LEADR, law societies and institutes, and bar associations.¹³¹ Like IAMA, LEADR

¹²³ Ibid.

¹²⁴ Sourdin, above n 41, 209. See also Stuhmcke, 'Resolving consumer disputes: Out of the courts and into private industry' above n 115, 48.

¹²⁵ Field, above n 44, 30; O'Shea, above n 118, 71.

¹²⁶ The Financial Ombudsman Scheme was formed by the merger of the Banking and Financial Services Ombudsman (BFSO), Financial Industry and Complaints Service (FICS) and Insurance Ombudsman Service (IOS) on 1 July 2008. See Financial Ombudsman Service, *About us*, <http://www.fos.org.au/centric/home_page/about_us.jsp>, viewed 10 February 2009.

¹²⁷ NADRAC, above n 49, 22.

¹²⁸ Peter Condliffe, 'Arbitration: the forgotten ADR?' (2004) 78(08) *Law Institute Journal*, 42, 42.

¹²⁹ See Australian Centre for International Commercial Arbitration, *About ACICA*, <<http://www.acica.org.au/about.html>>, viewed 10 February 2009; Michael Pyrlles, 'Overview of international arbitration in Australia' (2006) 25(1) *The Arbitrator and Mediator*, 51, 56.

¹³⁰ Astor and Chinkin, above n 39, 20; Australian Commercial Disputes Centre, *ACDC's history*, <<https://www.acdcltd.com.au/about-us/history-of-acdc>>, viewed 10 February 2009.

¹³¹ Sourdin, above n 41, 26.

provides membership support as well as direct services such as training and referrals.¹³²

Within the legal profession, the Victorian Bar and the Law Institute of Victoria have a register of approved mediators.¹³³ It has been recognised that the 'increase in ADR processes and the growing institutionalisation of ADR have enmeshed ADR practice with legal practice'.¹³⁴

Voluntary associations such as the Victorian Association for Dispute Resolution have been established to promote ADR and for the benefit of ADR practitioners.¹³⁵

Outside of the justice system, many educational institutions have developed peer mediation programs using students as mediators.¹³⁶ Many organisations and institutions have their own internal grievance and dispute-handling processes which make use of ADR.¹³⁷

New areas in ADR are being explored and encouraged in Australia. Collaborative Professionals Victoria, for example, has been set up to promote collaborative legal practice¹³⁸ to lawyers, allied professionals and the public and to provide training in collaborative legal practice.¹³⁹

2.4.2 Online dispute resolution (ODR)

The internet is one of the most common ports of call for Victorians seeking information about resolving disputes.¹⁴⁰ In addition, online dispute resolution is now emerging as a new field of ADR in response to the rapid evolution of the internet and a corresponding increase in online transactions and conflict.¹⁴¹ A range of traditional ADR processes can be adapted for use online.¹⁴² While ODR could feasibly be applied to any dispute, most online dispute resolutions have occurred in relation to e-commerce and electronic data. ODR has been especially advocated for high volume, low transaction-cost disputes.¹⁴³

¹³² NADRAC, above n 49, 23

¹³³ See Law Institute of Victoria, *Law Institute of Victoria* (2007), <<http://www.liv.asn.au/>>, viewed 11 March 2009; The Victorian Bar, *The Victorian Bar*, <<http://www.vicbar.com.au/>>, viewed 18 February 2009.

¹³⁴ Gutman, Fisher and Martens, above n 45, 128.

¹³⁵ NADRAC, above n 49, 23.

¹³⁶ *Ibid*, 23.

¹³⁷ *Ibid*, 22.

¹³⁸ See glossary for definition.

¹³⁹ Further information can be found on Collaborative Professionals Victoria, *Welcome to Collaborative Professionals Victoria (CPV)*, <<http://www.liv.asn.au/collablaw/index.html>>, viewed 10 February 2009.

¹⁴⁰ Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Community survey 2007* (2007) Department of Justice, Victoria, 18.

¹⁴¹ Tania Sourdin, 'ADR and technologically supported negotiation - AI' (2006) 25(1) *The Arbitrator and Mediator*, 33, 9.

¹⁴² Melissa Conley Tyler, Di Bretherton and Lucy Firth, *Research into online alternative dispute resolution: Feasibility report prepared for the Department of Justice, Victoria* (2003) University of Melbourne, 14; Laurence Boulle, 'On-line ADR' (2005) 24(2) *The Arbitrator and Mediator*, 9, 10; Sourdin, above n 41, 225-232.

¹⁴³ NADRAC, above n 61, 9.

In Australia, online technology has been used to supplement more traditional approaches to dispute resolution. Parties and ADR providers communicate via the internet. The Law Council of Australia has a pilot online mediation program that started in February 2007.¹⁴⁴

The Victorian Department of Justice has a *disputeinfo* website which provides interactive tools and self-help information about dispute resolution.¹⁴⁵

¹⁴⁴ Law Council of Australia, *Welcome to the Online Mediation Platform for Law Council of Australia*, <<http://v2.theclaimroom.com/?host=280>>, viewed 11 March 2009. See also Victorian Law Reform Commission, *Civil justice review: Report* (2008), 225.

¹⁴⁵ Department of Justice, Victoria, *disputeinfo*, <<http://www.justice.vic.gov.au/disputeinfo>>, viewed 10 March 2009.

Chapter 3 – Improving outcomes through ADR

ADR is sometimes presented as a solution to many of the perceived problems with the civil justice system – resolving citizens’ disputes faster and more cheaply while at the same time reducing pressure on the courts and costs to the state and taxpayers. Witnesses in the Inquiry expressed optimism about ADR’s potential to improve outcomes in the civil justice system and reduce demands on the courts. However, the Committee found that hard data is often lacking or shows mixed results.

This chapter sets out the evidence before the Committee about the outcomes of ADR. It suggests some strategies to improve the knowledge base about ADR to support future policy and practice.

3.1 The promise of ADR

The diverse and unstructured nature of the ADR landscape in Victoria creates a threshold issue about how to describe and measure ADR’s outcomes.

In 2001, the National Alternative Dispute Resolution Advisory Council (NADRAC) proposed a number of common objectives for participants in ADR processes, ADR service providers, governments and the community. They were:

- to resolve or limit disputes in an effective and efficient way, having regard to matters such as durability, cost and timeliness
- to provide fairness in procedure
- to achieve outcomes that are broadly consistent with public and party interests.¹⁴⁶

However, ADR literature, research and standards continue to describe the objectives of ADR in different ways and use a variety of performance measures to assess whether ADR processes are meeting these objectives.¹⁴⁷

The Committee’s discussion paper asked stakeholders what *they* thought the outcomes of ADR were and how these should be measured.

In their responses, relatively few stakeholders addressed these issues. Victoria Legal Aid wrote that agreement or settlement rates and participant satisfaction with ADR processes could be used in most cases to measure outcomes.¹⁴⁸ The Accident Compensation and Conciliation Service suggested early resolution of disputes and

¹⁴⁶ National Alternative Dispute Resolution Advisory Council (NADRAC), *A framework for ADR standards: Report to the Commonwealth Attorney-General* (2001), 13-14.

¹⁴⁷ See, for example, NADRAC, above n 146, 127-128; Kathy Mack, *Court referral to ADR: Criteria and research* (2003) National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 15-22. See also the benchmarks used for industry schemes in Department of Industry, Science and Tourism, Commonwealth, *Benchmarks for industry-based customer dispute resolution schemes* (1997); Standards Australia, *Customer satisfaction - Guidelines for complaints handling in organizations AS 10002-2006* (2006).

¹⁴⁸ Victoria Legal Aid, *Submission no. 30*, 11.

durability of settlement agreements as appropriate measures.¹⁴⁹ Ms Margaret Lothian, the Principal Mediator of the Victorian Civil and Administrative Tribunal (VCAT), supported measuring ADR according to settlement rates, time and money spent and participant satisfaction.¹⁵⁰

This section looks at the full range of outcomes mentioned in the literature and by stakeholders.

3.1.1 Outcomes for participants

Settlement or agreement rates

ADR appears to be effective in resolving many disputes, but settlement rates vary according to the type of ADR, the service provider and the context.

Most of the reported data about settlement rates in Australia relates to mediation. NADRAC has noted that Australian research studies show consistently high settlement rates at mediation – usually between 50% and 85%.¹⁵¹ The Small Business Commissioner, Mr Mark Brennan, told the Committee that, since it was established, his office has had a 75% settlement rate for matters referred to mediation.¹⁵² The Law Institute and the Victorian Bar told the Committee they do not keep formal statistics but estimated that two-thirds to three-quarters of issues were resolved at mediation.¹⁵³

There is less data available for other types of ADR and what is available shows that their settlement rates vary. Consumer Affairs Victoria (CAV), which conciliates disputes about goods and services, reported a 70.7% resolution rate for general conciliation in 2005-06. CAV's Building Advice and Conciliation Victoria, which conciliates disputes about building matters, reported a 50.4% resolution rate in the same year.¹⁵⁴

The outcomes of determinative types of ADR, such as arbitration or determinations by industry ombudsmen, are harder to measure in terms of settlement rates. The ADR service provider will theoretically settle disputes in all cases by making a determination. The actual effectiveness of the determination in resolving the dispute needs to be measured in other ways – perhaps by examining the extent to which the

¹⁴⁹ Accident Compensation Conciliation Service, *Submission no. 21*, 4.

¹⁵⁰ Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Submission no. 17*, 11. See also Health Services Commissioner, *Submission no. 19*, 6; The Mediator Group, *Submission no. 3*, 13.

¹⁵¹ National Alternative Dispute Resolution Advisory Council, *ADR research: A resource paper* (2004), 32.

¹⁵² Mark Brennan, Small Business Commissioner, Office of the Victorian Small Business Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 5.

¹⁵³ Ian Lulham, Chair, ADR Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 11; Tony Nolan, Advanced Mediator, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 9.

¹⁵⁴ Consumer Affairs Victoria, *Annual report 2005-06* (2006), 26, 28. Some reports suggest that conciliation and case conferencing have much lower settlement rates at between 20 and 50%: Tania Sourdin and Tania Matruglio, *Evaluating mediation: New South Wales Settlement Scheme 2002* (2002), iii.

parties seek to challenge the determination – but this information is not always available.¹⁵⁵

Some stakeholders cautioned that settlement rates are not, of themselves, a perfect measure because ADR can narrow the issues in dispute even if it fails to produce a settlement. Justice A M North from the Federal Court wrote in his submission:

As a direct result of mediation, many matters which do not settle proceed to trial with the issues more clearly defined or on the basis of agreed facts settled by the parties with the assistance of the mediator. In some instances the parties also agree that the court should only be asked to determine liability or quantum.¹⁵⁶

Mr Tony Nolan from the Victorian Bar also told the Committee that sometimes ‘the success at mediation is the realisation that the matter has to be litigated, that the parties cannot agree, and therefore setting some timetable and limiting the issues eventually for trial’.¹⁵⁷ NADRAC recognises these benefits in its objectives for ADR, which refer to ADR’s potential to resolve *or limit* disputes.¹⁵⁸

Another problem with settlement rates is that they usually only record settlements achieved *at* the ADR process. Professor Tania Sourdin from the University of Queensland has noted that ADR can also have a ‘catalytic’ effect, where parties negotiate resolutions before ADR takes place or in the wake of ADR.¹⁵⁹ Settlement data rarely captures these agreements.

It stands to reason that, where disputes are resolved or limited through ADR, the parties have less need for contact with the courts. However, since most disputes are settled without the need for a formal hearing, it is difficult to determine the extent to which ADR improves outcomes in this respect. This would require comparison between the settlement rates for ADR and settlement rates achieved through unassisted negotiation.¹⁶⁰

¹⁵⁵ An evaluation of court annexed arbitration in the Sydney District Court reported that requests for judicial rehearing after arbitration were rare: Steve Davidson, ‘Court annexed arbitration in the Sydney District Court: An evaluation of the effectiveness of court annexed arbitration in the disposal of cases in the Sydney Registry (Civil) of the District Court of New South Wales’ (1995) 6(3) *Alternative Dispute Resolution Journal*, 195, 218. However, another study reported that applications for judicial rehearings were made in just over half of arbitrated cases in 1994: Marie Delaney and Ted Wright, *Plaintiffs’ satisfaction with dispute resolution processes: Trial, arbitration, pre-trial conference and mediation* (1997) Justice Research Centre, paragraph 21.

¹⁵⁶ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 7.

¹⁵⁷ Tony Nolan, *Transcript of evidence*, above n 153, 9. See also The Victorian Bar, *Submission no. 13*, 32. This contrasts with the 2004 evaluation of the Magistrates’ Court and DSCV mediation program in non-family violence intervention order disputes, which reported an escalation of disputes in some cases where agreement was not reached at mediation: International Conflict Resolution Centre, *Review of the DSCV Magistrates’ Court Mediation Diversion (Intervention Order) Project* (2004), 34.

¹⁵⁸ NADRAC, above n 146, 13-14.

¹⁵⁹ Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 331.

¹⁶⁰ Mack, above n 147, 25.

Participant satisfaction

People who participate in ADR processes generally report high levels of satisfaction with ADR although, again, evidence about whether people find ADR more satisfying than judicial determination by a court is conflicting.

Socio-legal research shows that participant satisfaction with legal processes is determined not just by the outcome of disputes, but also by what is described as ‘procedural justice’ – that is, being treated with dignity and care, being able to understand the process, being able to participate in the process, having some control and being able to tell their story.¹⁶¹

NADRAC has reported that Australian research into mediation shows that participants have a high level of satisfaction with both the mediation process and the outcomes of mediation, as well as reduced stress.¹⁶²

Once again, there is less evidence available for other ADR processes, although two industry ombudsman schemes – the Financial Industry Complaints Scheme (FICS), now part of the Financial Ombudsman Service, and the Energy and Water Ombudsman (Victoria) (EWOV) – told the Committee they received generally good results in their customer surveys.¹⁶³

However, results are not universally positive and some participants have reported feeling pressured to settle their disputes.¹⁶⁴

Studies that have attempted to compare participant satisfaction with ADR processes against satisfaction with judicial determination have reported mixed results. An evaluation of the New South Wales (NSW) 2002 Settlement Scheme, under which disputes were referred to mediation through the Law Society of NSW, found that participants who used mediation were happier with the way their dispute was dealt with and with the outcome than were participants who used unassisted negotiation or judicial determination. Parties also rated mediation highly in terms of feeling able to participate, having control and having enough time. However, the results for arbitration compared with unassisted negotiation or judicial determination were less positive.¹⁶⁵

¹⁶¹ See, for example, the studies summarised in Just Balstad, 'What do litigants really want? Comparing and evaluating adversarial negotiation and ADR' (2005) 16(4) *Australasian Dispute Resolution Journal*, 244; Sourdin, above n 159, 336-337; Rosemary Hunter, 'Through the looking glass: Clients' perceptions and experiences of Family Law litigation' (2002) 16 *Australian Journal of Family Law*, 7; Delaney and Wright, above n 155, chapter 5.

¹⁶² NADRAC, above n 146, 25.

¹⁶³ Alison Maynard, Chief Executive Officer, Financial Industry Complaints Service, *Transcript of evidence*, Melbourne, 11 February 2008, 8; Fiona McLeod, Energy and Water Ombudsman, Energy and Water Ombudsman (Victoria), *Transcript of evidence*, Melbourne, 4 March 2008, 3. An example of a formal evaluation is the review of dispute resolution processes for credit consumers at VCAT: Tania Sourdin, *Dispute resolution process for credit consumers* (2007) La Trobe University, 51-55.

¹⁶⁴ See, for example, Sourdin, above n 163, 55; Sourdin and Matruglio, above n 154, 25 and the discussion of family mediation in NADRAC, above n 146, 27-28.

¹⁶⁵ Sourdin and Matruglio, above n 154, 67. See also Delaney and Wright, above n 155, paragraphs 45-46. That study of personal injury plaintiffs in NSW looked at four dispute resolution processes – pre-trial conference, mediation, arbitration and trial.

Other studies, particularly in the United States (US), have been less positive about satisfaction with ADR compared with judicial determination. One US study of mediation and early neutral evaluation programs was unable to show any effect on satisfaction or views of fairness.¹⁶⁶

Other research shows that satisfaction is affected by a range of variables, such as participants' expectations of the process and the time taken to resolve disputes, and not just the type of dispute-resolution procedure.¹⁶⁷

Stakeholders who addressed this issue also had conflicting views. Some told the Committee that, in their experience, ADR did generate greater satisfaction. Justice Murray Kellam from the Supreme Court told the Committee:

I have been involved with mediation in one way or the other now for 15 years, and I think the anecdotal evidence is fairly well based, that people are generally happier about the result of a mediation. When I was the president of VCAT I think we were doing about 1400 or 1500 mediations a year and I never got a letter of complaint, and yet I got many complaints about tribunal decisions – constant complaints.¹⁶⁸

Ms Lothian of VCAT told the Committee 'many VCAT mediators report they are thanked from time to time, because "That is the first time (the other party) listened to me"'.¹⁶⁹

Others saw participant satisfaction as an unreliable indicator of success. Mr Nolan from the Victorian Bar noted '[t]here are a lot of people who enter into a settlement very unhappy with the process and remain unhappy about it for the whole of their lives'.¹⁷⁰ Ms Diane Carmody, General Manager of the Banking and Finance Sector Ombudsman (BFSO) – now part of the new Financial Ombudsman Service – told the Committee:

People are satisfied if they get what they want ... people who do not get what they want are cross about neutral things. They can say that they are dissatisfied with things such as your logo or the type of paper that you use. So it is very skewed. Satisfaction is not a useful measure for us.¹⁷¹

¹⁶⁶ Sourdin, above n 159, 25. See also the discussion in Balstad, above n 161, 244. For an Australian example, NADRAC has reported that a 1994 study of investigation and conciliation under Western Australian equal opportunity legislation showed equal levels of satisfaction and dissatisfaction: NADRAC, above n 146, 28-29.

¹⁶⁷ See, for example, Sourdin and Matruglio, above n 154, 18-19, 21; Delaney and Wright, above n 155, chapters 4-5.

¹⁶⁸ Justice Murray Kellam, Supreme Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3.

¹⁶⁹ Margaret Lothian, *Submission no. 17*, 4.

¹⁷⁰ Tony Nolan, *Transcript of evidence*, above n 153, 10.

¹⁷¹ Diane Carmody, General Manager, Banking and Financial Services Ombudsman, *Transcript of evidence*, Melbourne, 11 February 2008, 7. See also Energy and Water Ombudsman (Victoria) (EWOV), *Submission no. 16*, 12. Other stakeholders and commentators argue that people can distinguish between outcomes and processes in terms of satisfaction: Fiona McLeod, *Transcript of evidence*, above n 163, 4; Tania Sourdin, Professor of Law, The University of Queensland (Melbourne Campus), *Transcript of evidence*, Melbourne, 29 November 2007, 8; Melissa Conley Tyler and Jackie Bornstein, 'Court referral to ADR: Lessons from an intervention order mediation pilot' (2006) 16(1) *Journal of Judicial Administration*, 48, 57.

Fairness

Comparing the fairness of ADR processes with judicial determination is equally problematic.

NADRAC's objectives for ADR, along with benchmarks and standards for complaints-handling, generally acknowledge the importance of fairness.¹⁷² However, one of the perceived disadvantages of ADR is that parties do not enjoy the types of procedural protections and safeguards offered by the courts – a problem which is exacerbated where there is an unequal relationship between the parties.¹⁷³

Justice and fairness are terms that resist easy definition in any context, let alone for ADR. Professor Sourdin has previously written that 'fairness, like beauty is said to be in the eye of the beholder'.¹⁷⁴ She told the Committee:

It is so hard to judge whether or not an outcome is fair. At the point in which a matter might be mediated is not a point where everything is finalised, and who is to judge what is fair and what is not? Even if you sit down and try to empirically test whether or not this is fair, it is really up to the parties.¹⁷⁵

Commentators have noted that it is particularly difficult to assess the fairness of agreements reached through ADR.¹⁷⁶ Some service providers do attempt to objectively evaluate the fairness of both outcomes and processes. EWOV's submission stated that it had commissioned an independent evaluation of its compliance with its obligation to function independently and impartially, including compliance with rules of natural justice and procedural fairness in its policies, process and complaint outcomes. It reported that the evaluation was 'very positive'.¹⁷⁷

ADR evaluations more commonly test participants' subjective perceptions about fairness. Although, like participant satisfaction, perceptions of fairness are influenced

¹⁷² Tania Sourdin and Louise Thorpe, 'Consumer perceptions of dispute resolution processes' (2008) 15 *Competition & Consumer Law Journal*, 337, 341-342, referring to, for example, Department of Industry, Science and Tourism, above n 147; Australian Securities & Investments Commission, *Regulatory guide 139: Approval of external complaints resolution schemes* (1999).

¹⁷³ Victorian Law Reform Commission, *Civil justice review: Report* (2008), 214-215; Claire Baylis and Robyn Carroll, 'Power issues in mediation' (2005) 7(8) *The ADR Bulletin*, 133; Claire Baylis and Robyn Carroll, 'The nature and importance of mechanisms for addressing power differences in statutory mediation' (2002) 14 *Bond Law Review*, 285; Bernard Mayer, 'The dynamics of power in mediation and negotiation' (1987) 16 *Mediation Quarterly*, 75; Hilary Astor, 'Some contemporary theories of power in mediation: A primer for the puzzled practitioner' (2005) 16 *Australasian Dispute Resolution Journal*, 30; National Alternative Dispute Resolution Advisory Council (NADRAC), *Issues of fairness and justice in alternative dispute resolution: Discussion paper* (1997), paragraphs 1.04, 1.07; Carrie Menkel-Meadow, 'Do the haves come out ahead in alternative judicial systems? Repeat players in ADR' (1999) 15 *Ohio State Journal on Dispute Resolution*, 19; Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 63-64.

¹⁷⁴ Sourdin, above n 163, 43.

¹⁷⁵ Tania Sourdin, *Transcript of evidence*, above n 171, 7-8. See also NADRAC, above n 173, which discusses a range of variables.

¹⁷⁶ NADRAC, above n 151, 20-21; Sourdin and Thorpe, above n 172, 343-344; Sourdin, above n 163, 43, 64-66.

¹⁷⁷ EWOV, *Submission no. 16*, 11.

by a range of variables,¹⁷⁸ facilitative types of ADR generally report good results against this criterion.¹⁷⁹

Comparative studies of different dispute resolution procedures also show positive results for ADR. A 1997 NSW survey of personal injury plaintiffs, for example, found that 98% of the plaintiffs who participated in a pre-trial conference with a court registrar rated the procedure as fair, compared with 76% of plaintiffs who used mediation, 72% who used court-annexed arbitration and 62% of plaintiffs who went to trial.¹⁸⁰

The lower fairness rating for arbitration is consistent with other surveys that have looked at determinative types of ADR. For example, a 2002 review of the FICS scheme across a number of benchmarks including fairness, found concerns amongst complainants and members about some features, including about the lack of opportunity to contribute or participate except in writing.¹⁸¹ A review of court-annexed arbitration in the Sydney District Court also reported lower ratings regarding fairness and some concerns about bias.¹⁸²

Stakeholders with an interest in industry ombudsman schemes pointed to procedural arrangements designed to promote fairness. The joint submission from the BFSO, FICS and Insurance Ombudsman Service (now merged into the Financial Ombudsman Service or FOS, and referred to by that name in the rest of this chapter) acknowledged that although there are sometimes suggestions that industry ombudsman schemes are too influenced by industry, '[regulatory requirements] provide for certain features that facilitate independent decision-making and serve to overcome any perceived lack of independence'.¹⁸³ They also noted that the inquisitorial nature of their processes can actually have advantages for consumers in terms of fairness.¹⁸⁴ The Consumer Action Law Centre made a similar point in its submission:

As a non-judicial process, the EDR [external dispute resolution] process averts the disadvantage consumers would otherwise suffer as a less powerful party in court litigation (eg. limited resources, limited capacity to bear costs). In other words, EDR can resolve disputes fairly irrespective of the relative power of the parties to the dispute.¹⁸⁵

¹⁷⁸ Sourdin, above n 163, 43; Sourdin and Thorpe, above n 172 338, 344; Delaney and Wright, above n 155, chapter 4.

¹⁷⁹ See, for example, Sourdin and Thorpe, above n 172, 345-348; Sourdin, above n 163, 66-69.

¹⁸⁰ Delaney and Wright, above n 155, paragraph 45. See also the evaluation of the NSW 2002 Settlement Scheme: Sourdin and Matruggio, above n 154, iv, 67.

¹⁸¹ Community Solutions, La Trobe University, University of Western Sydney, *Review of the Financial Industry Complaints Service 2002 - Final report* (2002), 19.

¹⁸² Davidson, above n 155, 219.

¹⁸³ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 9. See also Consumer Action Law Centre, *Submission no. 15*, 2.

¹⁸⁴ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 7.

¹⁸⁵ Consumer Action Law Centre, *Submission no. 15*, 8.

Agreement durability

Another measure that is sometimes used to assess the outcomes of ADR is the durability or ‘stickability’ of agreements – that is, whether the parties abide by agreements over time.

The relative unenforceability of agreements reached through ADR compared with court orders is sometimes mentioned as a disadvantage of ADR.¹⁸⁶

Enforceability depends on the type of ADR process. Some determinative ADR schemes, for example, do have enforceability mechanisms. The FOS noted in its submission that:

industry-based EDR schemes have the ability to make decisions that are binding on their members but are not binding on consumers ... This is because the members agree contractually to be bound by the decisions of the scheme. Decisions on industry-based EDR schemes in the financial services sector can also be enforced by reporting any non-compliance to [the Australian Securities and Investments Commission].¹⁸⁷

There have been some reported problems with other types of ADR such as mediation, where agreements have subsequently fallen apart and parties have had to go back to court facing even greater time, expense and stress.¹⁸⁸

There have been few longitudinal studies to show the extent to which parties abide by ADR agreements over time. NADRAC has reported that research shows that agreements reached at mediation are durable.¹⁸⁹ However, a survey of family dispute resolution clients 12-18 months after mediation had mixed results. Twenty-three per cent of respondents said their mediation agreements were working for only some issues and 15% said the agreements did not work at all.¹⁹⁰

The stakeholders who addressed this issue were positive about the durability of ADR agreements compared with court orders. The County Court’s submission stated ‘[t]he parties may be ... more accepting of a solution when they have been actively involved in the process of negotiation and compromise rather than as witnesses in a trial controlled by the Court’.¹⁹¹ Ms Danielle Huntersmith, one of the Victorian Bar’s accredited mediators, told the Committee:

I do not have the exact figures but I recall reading that there is a huge difference between the compliance rate with the settlement that comes out of mediation and

¹⁸⁶ See, for example, Victorian Law Reform Commission, above n 173, 214.

¹⁸⁷ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 7. See also Consumer Action Law Centre, *Submission no. 15*, 2.

¹⁸⁸ See, for example, Thomas Gibbons, 'When mediation goes wrong' (2007) July 2007 *New Zealand Law Journal*, 205.

¹⁸⁹ NADRAC, above n 146, 25.

¹⁹⁰ Andrew Bickerdike, 'Long-term satisfaction with and durability of family mediation outcomes' (Paper presented at the Third National Alternative Dispute Resolution Research Forum, Melbourne, 13-14 July 2007). See also International Conflict Resolution Centre, above n 157, 35, which reported more positive results.

¹⁹¹ County Court of Victoria, *Submission no. 14*, 3.

court orders ... I think the compliance rate [for mediated settlements] is about 80%, whereas if you go down to court orders they are often not complied with and there is a huge cost associated with trying – and trying – to enforce those.¹⁹²

Time

The ability of ADR to resolve disputes faster than the courts is often claimed to be one of its principal benefits.

The time involved in resolving disputes has a significant impact on the community. The Department of Justice's 2007 community survey on dispute resolution estimated that Victorians spent 30.5 million hours on resolving serious business disputes and family, neighbourhood or association disputes over a 12 month period, at an estimated cost of \$1 billion.¹⁹³ This time has non-financial costs as well, in terms of emotional stress and participant satisfaction with the legal system.¹⁹⁴

It is difficult to judge the extent to which ADR saves time compared with the courts.

The Committee received evidence from a number of ADR service providers about their performance in terms of timeliness. The Accident Compensation and Conciliation Service's submission said that it concluded over 70% of matters within 80 days of lodgement of a conciliation request.¹⁹⁵ Ms Lothian, the Principal Mediator at VCAT, said standard domestic building list matters go to mediation within approximately six weeks.¹⁹⁶ The Small Business Commissioner told the Committee his office's average timeframe from date of application to date of mediation was about 10 weeks.¹⁹⁷ EWOV told the Committee it had key performance measures requiring a certain proportion of cases to be closed within set timeframes.¹⁹⁸

There is a lack of detailed data about timeliness in the courts against which to compare these results. However, the Productivity Commission's annual reports on court administration services do include a 'backlog indicator' which showed that, in Victorian courts in 2007-08, 9.1% of non-appeal cases in the Supreme Court were over 12 months old, as were 28.2% of non-appeal cases in the County Court and 11.1% of cases in the Magistrates' Court.¹⁹⁹ However, ADR may not be quicker than the traditional justice system in all cases. The Principal Mediator at VCAT told the Committee that there are brief hearings for residential tenancy cases at VCAT and stated, 'I suspect that if there were [ADR], the time commitment required of the

¹⁹² Danielle Huntersmith, Vice Chair, Dispute Resolution Committee, Accredited Mediator, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 10. See also Margaret A Shone, 'Law reform and ADR: Pulling strands in the civil justice web' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004), 4.

¹⁹³ Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Community survey 2007* (2007) Department of Justice, Victoria, iii.

¹⁹⁴ *Ibid*, 41-42.

¹⁹⁵ Accident Compensation Conciliation Service, *Submission no. 21*, 4.

¹⁹⁶ Margaret Lothian, *Submission no. 17*, 5.

¹⁹⁷ Mark Brennan, *Transcript of evidence*, above n 152, 5.

¹⁹⁸ Fiona McLeod, *Transcript of evidence*, above n 163, 3.

¹⁹⁹ Steering Committee for the Review of Government Service Provision, *Report on government services 2009* (2009) Productivity Commission, 7.30.

parties would make it less likely that tenant-respondents would attend the Tribunal'.²⁰⁰

Some studies have attempted to directly compare the timeliness of ADR processes with the courts. These studies show that ADR generally resolves disputes faster than the courts, but not always faster than unassisted negotiation between parties. The evaluation of the 2002 NSW Settlement Scheme, for example, found that disputes that went to arbitration and mediation took less time to resolve than disputes that went to hearing, but slightly longer than cases resolved by unassisted negotiation.²⁰¹ Other studies of arbitration and mediation report that ADR can resolve disputes faster than unassisted negotiation, but only marginally.²⁰²

In cases where ADR is unsuccessful in resolving a dispute, it may actually increase delays by adding another step in the litigation process.

Stakeholders were generally positive about ADR's ability to resolve disputes quickly even though some acknowledged this was difficult to show empirically. Ms Lothian, for example, told the Committee:

Research into ADR has difficulty saying for certain that cost and time is reduced. It is not the same as, say, a double-blind drug test, which can say positively how a drug differs from a placebo. However, indications at VCAT are that ADR does resolve many disputes quickly and (relatively) cheaply.²⁰³

The Small Business Commissioner agreed there were flow-on benefits from faster resolution, telling the Committee:

When I was in private practice and involved with litigation, the stress that people experience when they are waiting 18 months to two years to get into court, you notice it and it is very, very bad for them. I think there is an emotional or social benefit that comes out of [ADR] as well.²⁰⁴

Cost

Comparing the costs of ADR with the costs associated with going to court, also raises difficult issues.

While there are generally some costs involved in using ADR, they vary depending on the service provider and whether or not the parties are legally represented. At one end of the scale, the Committee heard that some industry ombudsman schemes provide services to consumers free of charge and, as it is easy for consumers to use

²⁰⁰ Margaret Lothian, *Submission no. 17*, 5.

²⁰¹ Sourdin and Matruglio, above n 154, 54. See also Delaney and Wright, above n 155, paragraph 67.

²⁰² Davidson, above n 155, 218; Fiona Lambeck, 'Rental bond disputes: A comparison of different dispute resolution mechanisms for rental bond disputes in the Australian Capital Territory' (1997) 8(1) *Australian Dispute Resolution Journal*, 27, 31.

²⁰³ Margaret Lothian, *Submission no. 17*, 4. See also Victoria Legal Aid, *Submission no. 30*, 12; The Victorian Bar, *Submission no. 13*, 66, which noted that benefits such as timeliness is difficult to measure.

²⁰⁴ Mark Brennan, *Transcript of evidence*, above n 152, 5. See also The Mediator Group, *Submission no. 3*, 7.

the schemes without a lawyer, they can save on legal costs as well.²⁰⁵ At the other end of the scale, mediators in private practice can charge between \$2000 and \$6000 a day.²⁰⁶

Case study 2 describes the case of one consumer who was able to benefit from accessing ADR via an industry ombudsman scheme.

Case study 2: ‘The complaint with the TIO has protected the consumer from potential legal costs’²⁰⁷

‘A mentally ill consumer entered into a mobile telephone contract. The usage costs for the phone amounted to approximately \$200 per month, and the consumer was unable to pay this. The consumer was then charged large termination fees, such that a total of approximately \$2000 was claimed by the telecommunications provider. Legal representatives of the telecommunications provider threatened court action. By lodging a complaint with the Telecommunications Industry Ombudsman (the TIO), the telecommunications provider was prevented from taking court action until the external dispute resolution process was resolved.

Negotiations are continuing, but the complaint with the TIO has protected the consumer from potential legal costs had the telecommunications provider issued legal proceedings.’

Some studies do suggest that ADR can result in lower legal costs compared to litigation through the courts. The 1997 study of NSW personal injury plaintiffs, for example, found that plaintiffs whose disputes were resolved through judicial determination paid a higher median amount for legal costs than plaintiffs who used arbitration, mediation or pre-trial conference.²⁰⁸

Other data is more ambiguous, particularly when ADR is compared with unassisted negotiation. The evaluation of the 2002 NSW Settlement Scheme found that median case costs for disputes that went to mediation or arbitration were lower than for disputes that went to trial, but there was a much smaller difference compared with disputes that were resolved directly between the parties.²⁰⁹

Cost savings are also largely dependent on whether ADR is successful in resolving disputes. If ADR is unsuccessful and the parties have to proceed to or continue in the courts, the cost of the ADR process has to be added to the overall cost of the

²⁰⁵ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 10. Some schemes may require some contribution from participants but subsidise the costs: Mark Brennan, *Transcript of evidence*, above n 152, 6.

²⁰⁶ Mark Brennan, *Transcript of evidence*, above n 152, 5.

²⁰⁷ Consumer Action Law Centre, *Submission no. 15*, 6.

²⁰⁸ Delaney and Wright, above n 155, 59. See also Davidson, above n 155, 207, citing an estimate from the District Court’s Taxing Master that plaintiffs in personal injury matters saved \$1000-\$1500 in party to party costs through arbitration compared to a one day hearing.

²⁰⁹ Sourdin and Matruglio, above n 154, 73. See also Andrew Bickerdike, above n 190, 3.

dispute.²¹⁰ The Victorian Privacy Commissioner told the Committee that while ‘ADR processes are typically cheaper and faster processes than formal litigation’:

ADR services may not always reduce the time and cost associated with resolving disputes. For example, where a dispute is referred to conciliation under the [Information Privacy Act] and that dispute is not resolved by conciliation, complainants have the option of having their case referred to VCAT. Where this occurs, complainants effectively have to go through both the ADR process and a formal process of litigation.²¹¹

The equivocal nature of ADR’s cost savings is also evident from the Department of Justice’s 2007 community survey about dispute resolution. Participants in the survey were asked an open-ended question about the factors that might encourage them to use ADR services. The cost of ADR was the most common factor cited by participants as encouraging use of ADR services, but also the most common factor likely to deter people from using ADR.²¹²

While some stakeholders noted the cost savings of ADR were difficult to measure,²¹³ others who addressed the issue were generally positive about ADR’s potential.

Ms Lothian from VCAT told the Committee that the ‘saving in legal costs and general agony is enormous’.²¹⁴ The Victorian Bar wrote ‘it is obvious that in a majority of cases the parties avoid the cost of preparation and running a substantial trial’.²¹⁵ The Supreme Court’s submission stated that ‘[t]he cost savings to the parties and the community ... are indisputable’.²¹⁶

Flexibility

The Committee heard that a clearer argument in favour of ADR is that it can provide ‘individualised justice’ in the form of solutions that are tailored to the needs of the participants, rather than the fixed remedies that are offered by the courts, under law.

Industry-based schemes, for example, are able to consider not just legal requirements but also industry codes and guidelines, good industry practice and what might be considered ‘fair and reasonable’ in the circumstances. The Consumer Action Law Centre wrote in its submission that:

industry-based EDR schemes are not judicial bodies, and as such do not need to rely on fixed rules, but are able to apply flexible standards and principles ... (eg. of fairness) ... As non-government regulators, they are not bound to prescriptions in Acts which means it is easier for them to change to adapting marketplace conditions, they are structured to maximise results for consumers and industry, and

²¹⁰ Sourdin, above n 159, 331; Victorian Law Reform Commission, above n 173, 215.

²¹¹ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 2-3.

²¹² Peacock, Bondjakov and Okerstrom, above n 193, 19-22.

²¹³ The Victorian Bar, *Submission no. 13*, 66.

²¹⁴ Margaret Lothian, *Submission no. 17*, 2.

²¹⁵ The Victorian Bar, *Submission no. 13*, 32.

²¹⁶ Supreme Court of Victoria, *Submission no. 18*, 2.

their constitutions typically endow them with enormous flexibility in resolving disputes.²¹⁷

Case studies 2 and 3 describe the cases of consumers who used two such industry ombudsman schemes.

Case study 3: ‘She was at risk of losing her house’²¹⁸

‘The consumer, who was profoundly deaf and in receipt of a disability pension, took out two loans as co-borrower (with her parents) secured over her house. Significant portions of the loan amounts did not benefit her, but benefited her mother. The bank providing the loans was aware that the consumer was deaf but had not provided an interpreter, nor suggested the consumer seek independent legal advice. After taking the matter to the [Banking and Financial Services Ombudsman, now part of the Financial Ombudsman Service], and after some negotiation, the bank agreed to discharge the consumer’s liability for one loan and reduce the consumer’s liability for another loan. In the end, the consumer paid approximately \$12 000, whereas the amount outstanding on the loans was slightly over \$100 000. This result was very beneficial for the consumer, for she was at risk of losing her house.’

Some other ADR service providers also referred to outcomes that ADR can provide but that the courts cannot. Victoria’s Health Services Commissioner, for example, told the Committee, ‘Most of the people who come to my office want three things: they want to know what went wrong; why it went wrong; and they want to make sure that what happened to them does not happen to somebody else’.²¹⁹ She referred to an apology as an example: ‘Most people are always assisted by a genuine apology. The apology is incredibly powerful. You see people angry and upset; if they get a genuine apology, they relax and the dialogue can begin’.²²⁰

ADR also has the ability to provide compromise or ‘win-win’ outcomes compared with judicial determination. Justice Kellam noted that, while the outcome of traditional litigation is that one party wins and one party loses, mediation offers an alternative:

when I hand down a judgment I am determining rights, and the rights will usually be, ‘You win, you lose’, or ‘You own this land, you don’t’, or ‘You’re a beneficiary of this will’, or ‘You’re not’. There is a winner and a loser. Litigation is rights based and mediation, very simply, is interest based.²²¹

²¹⁷ Consumer Action Law Centre, *Submission no. 15*, 9. See also Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 8.

²¹⁸ Consumer Action Law Centre, *Submission no. 15*, 6.

²¹⁹ Beth Wilson, Health Services Commissioner, Office of the Health Services Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 2.

²²⁰ *Ibid.*, 3. See also The Mediator Group, *Submission no. 3*, 3.

²²¹ Justice Kellam, *Transcript of evidence*, above n 168, 2. See also Roger Fisher and William Ury, *Getting to yes: Negotiating agreement without giving in* (1981) Penguin Books: Fisher and Ury popularised the concept of interest-based negotiation, otherwise known as principled negotiation or win-win negotiation; Shone, above n 192, 4.

Confidentiality

One of the additional perceived benefits of ADR is that, as processes are conducted in private, confidentiality is preserved.²²²

This is seen as a particular benefit for certain parts of the community. For example, it has been said that people with mental illness or HIV/AIDS may value ADR's confidentiality as such complaints are not easy to discuss in a public forum or may result in further discrimination if revealed publicly.²²³ According to the Ethnic Communities' Council of Victoria, confidentiality is '[o]ne of the great advantages' of ADR because '[p]eople from CALD [culturally and linguistically diverse] communities may wish to keep disputes and legal issues private due to cultural stigma and traditional views'.²²⁴

The downside, however, is that because ADR 'privatises' dispute resolution, it may be seen as unsuitable where a definitive or authoritative resolution of a dispute is required for precedential value; when public sanctioning is required; when repetitive statutory violations need to be addressed collectively and uniformly; where third parties' rights are significantly affected; or when fundamental rights enshrined in the Constitution require protection.²²⁵ In these cases, the public interest may require a public hearing and a public decision. The Privacy Commissioner, for example, noted that ADR's lack of formal determinations do not permit reporting of systemic issues in the way a public process might.²²⁶

This issue is discussed further in chapter 4.

Participant empowerment

Another argument used by ADR's supporters is that, regardless of its short term impact, ADR offers long term benefits by teaching participants skills needed to resolve conflicts for themselves.²²⁷

Commentators have noted that these benefits are extremely difficult to measure.²²⁸ Some studies have tried to address the issue. An evaluation of a Magistrates' Court and Dispute Settlement Centre of Victoria (DSCV) mediation program for non-family violence intervention order disputes reported a 'positive effect' on many

²²² Shone, above n 192, 4.

²²³ Robert Altamore, 'Alternative dispute resolution and people with disabilities' (2005) 24(2) *The Arbitrator and Mediator*, 41, 45. See also NADRAC, above n 173, 174: For businesses, the confidentiality of ADR processes allows them to avoid disclosing business practices or connections.

²²⁴ Ethnic Communities' Council of Victoria, *Submission no. 40*, 1.

²²⁵ Australian Law Reform Commission, *ADR - Its role in federal dispute resolution: Issues paper 25* (1998) paragraph 5.6. See also Owen Fiss, 'Against settlement' (1984) 93 *Yale Law Journal*, 1073, 1085-1087; Astor and Chinkin, above n 173, 64-67; Sourdin, above n 159, 272; Ireland Law Reform Commission, *Alternative dispute resolution consultation paper* (2008), 18.

²²⁶ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 5.

²²⁷ See, for example, *ibid*, 3; Sourdin and Thorpe, above n 172, 337; Astor and Chinkin, above n 173, 263-264.

²²⁸ Conley Tyler and Bornstein, above n 171, 61; International Conflict Resolution Centre, above n 157, 36; Victoria Legal Aid, *Submission no. 30*, 12; The Victorian Bar, *Submission no. 13*, 65-66.

clients' ability to resolve disputes based on feedback from mediators. It cited factors such as clients being given an opportunity to experience constructive conflict resolution and being encouraged to take responsibility for their own disputes.²²⁹ A survey of participants in family mediation asked whether they had learnt skills that assisted them to resolve other issues. Twenty-three per cent said 'very much' and 25% reported 'somewhat', although 17% responded 'not at all'.²³⁰

Several stakeholders told the Committee that, in their experience, participants did benefit from ADR in the longer term. Ms Lothian from VCAT told the Committee:

Lack of knowledge about how to negotiate is surprisingly common. There is anecdotal evidence from VCAT mediators that we spend time in many mediations teaching people how to negotiate. If they had these skills before the dispute came to VCAT, it might not have got there.²³¹

Magistrate Anne Goldsborough also told the Committee:

One of the benefits of ADR, speaking as a committed mediator, is that engaging in a process to resolve a dispute is what we all need to learn ... unless we can resolve a dispute and have those skills, many of life's hurdles really do stop us.²³²

One stakeholder called for more 'below the iceberg' analysis of ADR to gauge its impact on short and long term relationships and attitudes towards dispute resolution.²³³ Chapter 6 of this report looks at ways to empower people to resolve disputes themselves.

Preserving relationships

The less adversarial, more cooperative nature of ADR is also sometimes presented as offering long term benefits compared with judicial determination because it preserves ongoing relationships between the parties.

Some ADR processes such as collaborative law are expressly aimed at promoting better long term relationships. According to one description, collaborative law 'encourages the parties to communicate more effectively to arrive at a mutually acceptable long-term solution that will not polarise the parties even further'.²³⁴

Although the Committee found little hard data to assess ADR's success in this regard, it was reflected in the experience of some stakeholders. Justice Kellam recounted one commercial dispute between a vineyard owner and a nurseryman that he had referred to mediation, which is set out in case study 4. Another stakeholder

²²⁹ International Conflict Resolution Centre, above n 157, 32-37.

²³⁰ Bickerdike, above n 190, 2.

²³¹ Margaret Lothian, *Submission no. 17*, 4.

²³² Anne Goldsborough, Supervising Magistrate, Family Violence & Family Law, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 29 November 2007, 8. See also Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 7; Office of the Victorian Privacy Commissioner, *Submission no. 8*, 2-3.

²³³ The Mediator Group, *Submission no. 3*, 5.

²³⁴ Quoted in Victorian Law Reform Commission, above n 173, 247.

reported, 'I have experienced a large number of matters in which the relationship building benefits of an ADR process have been more decisive than the commercial outcomes.'²³⁵

Case study 4: 'Sometime later they were still both in commercial arrangements'²³⁶

'I can give you one very brief anecdote. A few years ago I was in a regional city. I was hearing civil cases. There was one case in the list which involved a dispute between a vineyard grower and the nurseryman who supplied him. Before this case came on for trial, and it was in that month's list, it became obvious that for both parties – one was flying experts across from Adelaide and another was flying them up from Melbourne; a half a dozen experts – it did not matter who won or lost it, they were both broke. The winner might have won it, but he was not going to get his money because the other fellow was going bankrupt, and vice versa. I inquired as to whether the matter could be settled by mediation and there was resistance to it. I then got the parties in to the court and said, 'This is ruinous for everybody. This is going to take two weeks. Somebody is going to come to dreadful grief, and probably both of you'. Everybody said, 'It cannot be mediated', and I said, 'Well, it is going to be'. I selected a local solicitor and requested him to come in; I knew he had mediation training. The case settled about three days later. For two and a half days they were out in the jury room and I could hear the loud voices, but it resolved.

The nice thing about that story is that a year later when I went back there – I knew one of the terms of settlement involved something about some free provision of vines over a period of time, I heard that around the traps – sometime later they were still both in commercial arrangements, still years down the track. That is the difference with litigation. It can preserve relationships, it can ensure that parties are looking at their own interests and are generally happier. I do not think there is any doubt about the value of mediation.'

3.1.2 Outcomes for the state

Savings for the justice system

Victoria's civil court system requires substantial public funding. According to the Productivity Commission, in 2007-08 recurrent expenditure on court administration for Victorian civil courts, excluding court income, was \$95.1 million. Recurrent expenditure for all Commonwealth, state and territory civil courts was \$531.3 million.²³⁷

²³⁵ The Mediator Group, *Submission no. 3*, 5.

²³⁶ Justice Kellam, *Transcript of evidence*, above n 168, 2-3.

²³⁷ Steering Committee for the Review of Government Service Provision, above n 199, 7.12.

It is not surprising that ADR's potential to divert disputes from the courts and reduce pressure on their resources is one of its chief attractions for governments.²³⁸

Stakeholders from the courts, the legal profession and ADR service providers all told the Committee that ADR has the potential to reduce the level of litigation and its consequent pressures on the publicly funded court system. The County Court's submission stated that '[r]esolution of a case at mediation, or at case conference, will allow the Court to focus its judicial resources on hearing and determining other cases'.²³⁹ Mr Michael Heaton QC from the Victorian Bar told the Committee:

when you think of what [ADR] saves by virtue of avoiding a lengthy trial or litigation so far as the parties are concerned, it means that whether it is 50 per cent, 60 per cent or 70 per cent it is performing a very significant function so far as savings to the community, and in fact to the government.²⁴⁰

Mr Lawrence Reddaway from the Institute of Arbitrators and Mediators Australia told the Committee that:

the courts in general are overworked – we hear that. They are certainly expensive and there is a great strength for arbitration and other processes in the private sector to take the load off the public sector courts.²⁴¹

Data and research about the extent to which ADR produces savings for the courts, and ultimately for the government and community, is limited.

Some evaluations of court-annexed ADR in Victoria have been positive about the impact on the courts. The Magistrates' Court has reported that its pilot program with DSCV at the Broadmeadows Magistrates' Court, under which all civil claims less than \$10 000 are referred for mediation, has:

- reduced the listing of civil cases at the Broadmeadows court from 10 cases per 'civil day' to four or five cases
- increased certainty in court time-allocation because cases that are listed proceed to judgment and do not settle at the door of the court
- reduced delays in the civil list from 12-14 weeks to six weeks
- saved an estimated half day of magistrates' time and an estimated half day of the time of a judicial registrar.²⁴²

²³⁸ See, for example, Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 39; Philip Ruddock, 'Towards a less litigious Australia: The Australian Government's alternative dispute resolution initiatives' (2004) 23(1) *The Arbitrator and Mediator*, 1.

²³⁹ County Court of Victoria, *Submission no. 14*, 3. See also Victoria Legal Aid, *Submission no. 30*, 12.

²⁴⁰ Michael Heaton, Chair, Dispute Resolution Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 10. See also The Victorian Bar, *Submission no. 13*, 66.

²⁴¹ Lawrence Reddaway, Victorian Chapter Chair, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 3.

²⁴² Magistrates' Court of Victoria, *2007-08 annual report* (2008), 38. See also International Conflict Resolution Centre, above n 157, 41-43; Conley Tyler and Bornstein, above n 171, 60 and Steve Davidson's evaluation of court-annexed arbitration at the Sydney District Court, which estimated that a court-provided arbitrator cost 25% less in salary costs than a judicial officer: Davidson, above n 155, 219.

Other research is less positive. Professors Hilary Astor and Christine Chinkin have written that the evidence does not in fact suggest significant overall savings for courts, although they note ADR promotes greater efficiency by ‘allowing courts to settle efficiently those cases that are going to settle, allowing resources to be focused on cases that need to go to trial’.²⁴³ NADRAC has also commented that some research suggests that court-annexed ADR does not lead to overall savings.²⁴⁴

Any savings that ADR does generate for the courts have to be offset against the cost to the government of funding ADR. Where ADR is court-annexed, it is likely to lead to some additional work for court administration.²⁴⁵ Government-funded ADR service providers like DSCV and the Health Services Commissioner also require public funding.

Savings for the courts also depend on the extent to which ADR is successful in resolving disputes. There is a risk that ADR may actually add to case disposal times if agreements are not durable or because it takes time to resolve complex issues.²⁴⁶ The evaluation of the Magistrates’ Court and DSCV mediation program in non-family violence intervention order disputes, on the other hand, found that only 46% of disputes that failed to settle actually continued in the Court. The authors noted evidence that mediation may have clarified the issues in dispute and reduced the length and complexity of subsequent court proceedings, but it was not possible to judge because of a lack of court data about usual hearing times for intervention order disputes.²⁴⁷

Ms Lothian from VCAT told the Committee:

I imagine that ADR has reduced the use of court time, although the conventional wisdom has long been that only 5% of big cases run to a decision or judgement. Savings to courts, tribunals and hence the public purse should only be seen as a useful by-product of ADR; not as a reason to use it.²⁴⁸

Savings for the state as a litigant

The Committee’s discussion paper noted the Victorian Government is itself a significant party to litigation in Victoria’s courts. In 2006-07, Victorian Government departments and statutory agencies that participated in its legal services panel arrangements spent \$46.68 million on external legal services, a proportion of which would relate to litigation.²⁴⁹

²⁴³ Astor and Chinkin, above n 173, 262.

²⁴⁴ National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for Government policy-makers and legal drafters* (2006), 44. See also Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system* (2000), paragraph 6.59.

²⁴⁵ See, for example, International Conflict Resolution Centre, above n 157, 52-53.

²⁴⁶ NADRAC, above n 151, 29.

²⁴⁷ International Conflict Resolution Centre, above n 157, 41-43; Conley Tyler and Bornstein, above n 171, 60.

²⁴⁸ Margaret Lothian, *Submission no. 17*, 11.

²⁴⁹ Department of Justice, Victoria, *Government legal services annual report 2006-07* (2007), 1.

Some governments are encouraging use of ADR by their departments and agencies as a way to contain legal costs. In 2001, the United Kingdom's Lord Chancellor pledged government departments would use ADR processes in all suitable cases, leading to an estimated £73.08 million saving in 2006-07.²⁵⁰

There is no data available about how much the Victorian Government has, or could, save in legal costs through greater use of ADR. The Committee notes potential savings in this area, but is not able to make any finding.

3.1.3 Outcomes for society

The Committee's discussion paper for the Inquiry also asked about ADR's impact on the community.

Disputes have a significant impact on the economic and social wellbeing of the Victorian community as a whole. The Department of Justice's 2007 community survey on dispute resolution estimated there were 3.3 million disputes in Victoria in the 12 months prior to the survey, which cost the community an estimated \$2.7 billion in money and time to resolve.²⁵¹ This is in addition to social and emotional consequences of disputes in the community. The Committee notes that this survey defined 'dispute' very broadly, describing it as 'a conflict or disagreement between two or more people, businesses or organisations'.²⁵²

Some stakeholders referred to ADR's general economic and social benefits for society in their evidence to the Committee. The Small Business Commissioner told the Committee, 'I think we have made a significant contribution to the economy, because what was in dispute is now resolved and the money that might have been stalled is now flowing'.²⁵³ LEADR – Association of Dispute Resolvers (LEADR), a non-for-profit association that promotes ADR, told the Committee its member surveys showed 'some underlying drivers for many LEADR members is that they see ADR as a way of promoting peace and facilitating justice'.²⁵⁴

There is limited formal research on this issue,²⁵⁵ and some stakeholders noted these kinds of long term and intangible benefits are impossible to measure. Victoria Legal Aid, for example, wrote:

More general benefits for society include less ongoing and unresolved disputes overall, and improved relations between people who would otherwise be involved in disputes. However, it is difficult to envisage how any of these broader benefits could be measured or quantified.²⁵⁶

²⁵⁰ Ministry of Justice, United Kingdom, *The annual pledge report 2006/07* (2007).

²⁵¹ Peacock, Bondjakov and Okerstrom, above n 193, i-ii.

²⁵² Ibid, 1.

²⁵³ Mark Brennan, *Transcript of evidence*, above n 152, 5.

²⁵⁴ Fiona Hollier, Chief Executive Officer, LEADR - Association of Dispute Resolvers (LEADR), *Transcript of evidence*, Melbourne, 4 March 2008, 2.

²⁵⁵ See, for example, International Conflict Resolution Centre, above n 157, 47, which referred to these issues, but was based on anecdotal assessments.

²⁵⁶ Victoria Legal Aid, *Submission no. 30*, 12. See also County Court of Victoria, *Submission no. 14*, 3.

Some of the industry-based schemes that took part in the Inquiry noted they have clear policy and education functions which offer benefits for all consumers. The submission from the FOS advised:

industry-based EDR schemes create valuable feedback to members about the consumer experience that raises the standards of the individual members and the industry as a whole. Industry-based EDR schemes are also proactive in training and educating the industry on best practice.²⁵⁷

The discussion paper noted there are financial costs to industry in operating these schemes which may ultimately be passed on to consumers. The submission from the FOS acknowledged this, but noted that regulatory costs were low.²⁵⁸

3.1.4 The Committee's findings

The evidence before the Committee suggests that ADR clearly has *potential* to improve outcomes for participants, the state and society against a range of criteria, but evidence about whether it *does* improve outcomes is limited and inconclusive. Firstly, there is a lack of consensus about the objectives of ADR and how to measure whether or not it is meeting those objectives. Secondly, while evidence from stakeholders is generally positive, the evidence gaps and contradictions in existing research and data raise many questions.

Based on the evidence that is available, it appears that:

- Facilitative types of ADR like mediation often compare well against judicial determination using criteria such as participant satisfaction; time and cost for participants; flexibility; and intangible benefits like improved conflict resolution skills.
- Some determinative types of ADR, such as arbitration, tend to compare less positively against some criteria such as participant satisfaction.
- ADR does have some limitations compared with judicial determination, such as fewer procedural protections and safeguards, and less public accountability.
- There is less evidence about the extent to which ADR improves outcomes compared with unassisted negotiation.

The Committee considers there is scope for expanding and enhancing ADR in Victoria but, as some commentators have started to suggest, a rigorous and critical approach is required that looks closely at when ADR should be used and how to ensure quality services.²⁵⁹

²⁵⁷ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 10. See also Consumer Action Law Centre, *Submission no. 15*, 8-9; Alison Maynard, *Transcript of evidence*, above n 163, 7.

²⁵⁸ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 10-11.

²⁵⁹ See, for example, Astor and Chinkin, above n 173, 24-26; Australian Law Reform Commission, above n 244, paragraphs 6.59-6.66.

The policy implications of these issues are addressed in the remainder of this part of the report. The following section examines steps that the Government can take to support an evidence-based approach to these tasks in the future.

3.2 An evidence-based approach to ADR

3.2.1 Existing knowledge constraints

Despite the considerable number of evaluations and studies about ADR both in Australia and overseas,²⁶⁰ the previous section identified some sizeable gaps in research and data collection about the outcomes of ADR. In its recent report on Victoria's civil justice system, the Victorian Law Reform Commission (VLRC) raised similar concerns, concluding there was a lack of empirical data on the effectiveness of court-ordered mediation in Victoria, including its cost-effectiveness. It called for more data on narrowing issues and settling disputes; bringing about earlier resolution of disputes; reducing the length and cost of proceedings; assisting the courts to manage their caseloads; and providing fair outcomes.²⁶¹

One problem is the lack of comparative data about the full range of ADR services available in Victoria. In 2001 NADRAC noted that most research focuses on mediation in family disputes or on individual ADR services that are able to fund proper evaluations. It stated 'there has been no comprehensive evaluation of ADR across all sectors in Australia'.²⁶² NADRAC's 2001 report also noted that very little is known about issues such as the appropriateness of alternative forms of ADR for different disputes and the effectiveness of different processes.²⁶³ LEADR told the Committee there was an urgent need for data collection 'across the full spectrum of ADR processes and referral methods'.²⁶⁴

There are also other gaps in the information that is currently available, some of which have already been noted in this chapter. Particular issues identified by stakeholders and commentators include:

- the variables that influence whether ADR processes are successful or not successful²⁶⁵
- what happens to disputes which are not settled through ADR.²⁶⁶ For example, do all disputes return to the courts, does ADR narrow the issues

²⁶⁰ This report refers to only some of the available studies. For more comprehensive lists, see NADRAC, above n 151, 38-41; Mack, above n 147, 91-102; Sourdin, above n 159, 451-472; Australian Law Reform Commission, above n 225, appendix D.

²⁶¹ Victorian Law Reform Commission, above n 173, 278-283, 285. See also Tania Sourdin, *Transcript of evidence*, above n 171, 5

²⁶² NADRAC, above n 146, 26.

²⁶³ *Ibid*, 92.

²⁶⁴ LEADR, *Submission no. 36*, 5.

²⁶⁵ See NADRAC, above n 151, 31-32; Mack, above n 147, 84.

²⁶⁶ The Mediator Group, *Submission no. 3*, 5; Accident Compensation Conciliation Service, *Submission no. 21*, 4-5; David Bryson, Conciliation Officer, Accident Compensation Conciliation Service, *Transcript of evidence*, Melbourne, 11 February 2008, 6; The Victorian Bar, *Submission no. 13*, 16-17.

in dispute, do participants later resolve the dispute themselves or do they simply give up?

- longitudinal studies that look at the long term impacts of ADR on participants.²⁶⁷ Impacts might include tangible factors such as the long term durability of agreements as well as more intangible factors such as improved conflict handling skills and ongoing relationships between participants
- the impact of ADR on the time and resources of courts
- whether and how ADR improves outcomes compared with unassisted negotiation between disputants, not just with judicial determination.²⁶⁸

Another concern is the lack of consistency in existing data collection. Data collection requirements and practices vary widely from provider to provider. The Victorian Bar and the Law Institute told the Committee they did not maintain any records of mediations conducted by their members.²⁶⁹ Amongst courts and tribunals, there is some detailed reporting in VCAT but minimal data collected in the higher courts.²⁷⁰ The Supreme and County Courts noted that Professor Sourdin had been engaged to undertake a data collection project regarding mediations to address these issues.²⁷¹ Statutory schemes, for example the Health Services Commissioner, highlighted annual reporting obligations.²⁷² Industry-based schemes told the Committee they had review and reporting requirements but the Consumer Action Law Centre noted 'inconsistencies between schemes in quality and usefulness of information'.²⁷³

In 2001 NADRAC recommended development of common performance and activity indicators,²⁷⁴ but its submission to the Committee reported '[l]ittle has changed ... If anything, the emergence of new ADR practices and the ongoing growth in service providers has further complicated the situation'.²⁷⁵

3.2.2 Promoting an evidence-based approach to ADR

The current problems with data collection and research about ADR are not just theoretical. They limit the scope for evidence-based policy and practice and make it

²⁶⁷ NADRAC, above n 151, 29; Conley Tyler and Bornstein, above n 171, 62.

²⁶⁸ NADRAC, above n 151, 30.

²⁶⁹ The Victorian Bar, *Submission no. 13*, 16-17; Tony Nolan, *Transcript of evidence*, above n 153, 9; Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3. See also Tania Sourdin, above n 159, 334, who noted there is no consistent data collection amongst private ADR practitioners generally.

²⁷⁰ The Victorian Bar, *Submission no. 13*, 16-18. See, for example, Magistrates' Court of Victoria, above n 242, 7; Victorian Civil and Administrative Tribunal, *Annual report 2007-2008* (2008), 43. The Supreme Court and County Court published some statistics on settlement rates in their 2006-07 annual reports. See also the VLRC's comments about different laws and practices regarding mediation reports: Victorian Law Reform Commission, above n 173, 281-282.

²⁷¹ Judge Sandra Davis, County Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3; Justice Kellam, *Transcript of evidence*, above n 168, 6; County Court of Victoria, *Submission no. 14*, 2.

²⁷² Health Services Commissioner, *Submission no. 19*, 6; Legal Services Commissioner, *Submission no. 31*, 4-5.

²⁷³ Consumer Action Law Centre, *Submission no. 15*, 9. See also Alison Maynard, *Transcript of evidence*, above n 163, 6, 8; EWOV, *Submission no. 16*, 5, 11-12.

²⁷⁴ NADRAC, above n 146, 93.

²⁷⁵ National Alternative Dispute Resolution Advisory Council (NADRAC), *Submission no. 25*, 2.

hard to tell whether public investment in ADR is justified. The VLRC’s civil justice report, for example, noted ‘[m]easuring the outcomes of ADR in Victoria is important for identifying whether ADR programs are meeting their aims and fulfilling their potential’.²⁷⁶ The Law Institute’s submission noted that:

Collecting data on civil ADR outcomes would provide information that would be useful to the government in setting ADR policies. This data could be analysed by an external body to show the settlement rates and would enable calculations of costs savings. In turn, this would assist the government to form a view on whether ADR should be further encouraged.²⁷⁷

In 2001 NADRAC concluded that ‘[i]mproved research, evaluation and data collection is pivotal to the future development of ADR, including ADR standards’.²⁷⁸

The role of government

There have been previous calls for improved knowledge about ADR. In 2001 NADRAC recommended the Commonwealth encourage common performance and activity indicators for ADR in order to improve quality, consistency and comparability in data collection. It also suggested initiatives such as research partnerships between service providers and universities and distribution of practical resources, such as evaluation kits, for service providers.²⁷⁹ In its recent report on Victoria’s civil justice system, the VLRC recommended the government establish a Civil Justice Council to facilitate ongoing review and reform of the civil justice system in Victoria, including ongoing review of ADR processes in the courts. It also recommended that parties should be required to submit reports to the courts at the conclusion of any ADR process.²⁸⁰

At a federal level, NADRAC has taken some steps to improve the quality and consistency of research and data relating to ADR. Along with its attempts to develop common objectives for ADR, noted at the beginning of this chapter, it published a compendium of ADR statistics in 2003.²⁸¹

Stakeholders in this Inquiry had different views about who should be responsible for collecting data and promoting research. Mr Alan Wein from The Mediator Group – a mediation service provider – nominated the VLRC’s proposed Civil Justice Council for this role but said it should collect data about all ADR services and not just those in courts.²⁸² Victoria Legal Aid and LEADR suggested that, because of the breadth and diversity of ADR services, the government or Department of Justice should

²⁷⁶ Victorian Law Reform Commission, above n 173, 278.

²⁷⁷ Law Institute of Victoria, *Submission no. 20*, 10. See also Victoria Legal Aid, *Submission no. 30*, 3; Federation of Community Legal Centres Victoria, *Submission no. 39*, 3; LEADR, *Submission no. 36*, 10.

²⁷⁸ NADRAC, above n 146, 92.

²⁷⁹ *Ibid*, 93.

²⁸⁰ Victorian Law Reform Commission, above n 173, 285.

²⁸¹ National Alternative Dispute Resolution Advisory Council, *ADR statistics: Published statistics on alternative dispute resolution in Australia* (2003).

²⁸² The Mediator Group, *Submission no. 3*, 13.

collect data in collaboration with service providers.²⁸³ Possibilities mentioned by other stakeholders included the courts themselves, individual ADR service providers or an independent monitor for industry-based schemes.²⁸⁴

The Committee's view is that it is time for the Victorian Government to take a more direct and proactive role in promoting consistent data collection and research about ADR. Although bodies like the VLRC's proposed Civil Justice Council and the courts have a key role to play, their focus is necessarily on court-based ADR. There needs to be a central, coordinating body that can address the full range of ADR service providers in Victoria.

The Committee believes the government can act as a champion for improved data collection and reporting by setting reporting standards for both government and court-based ADR schemes, and encouraging reporting by private sector providers through templates and other resources. The government should collect and publish reports of data from all government and court-based ADR schemes, and any data provided by private sector providers, on an annual basis. The government can also assist by commissioning appropriate research into ADR.

What kind of data and research is required?

The Committee heard differing views about the types of data and information that should be collected and reported.

NADRAC has previously called for both quantitative data collection and qualitative research that goes beyond considering whether mediation is successful to look at questions such as which processes work (when and for whom), as well as the types of skills needed by practitioners.²⁸⁵ LEADR made a range of suggestions that address the types of outcomes discussed in this chapter as well as issues such as the number and type of matters that proceed to court when ADR fails.²⁸⁶ The Law Institute also suggested, amongst other things, looking at the stages at which matters are referred to ADR and what happens to disputes in court if ADR fails.²⁸⁷ There was also some support for greater reporting of settlement or agreement outcomes from ADR processes.²⁸⁸

The Committee agrees that there is a need for both data collection and qualitative research to address the evidence gaps identified in this report. At a minimum, the Committee believes there is a need for consistent data collection across ADR service providers about:

²⁸³ Victoria Legal Aid, *Submission no. 30*, 4; LEADR, *Submission no. 36*, 6, 10.

²⁸⁴ The Victorian Bar, *Submission no. 13*, 19, 64; Law Institute of Victoria, *Submission no. 20*, 4, 10; Margaret Lothian, *Submission no. 17*, 2; Federation of Community Legal Centres Victoria, *Submission no. 39*, 3.

²⁸⁵ NADRAC, above n 151, 35, 42.

²⁸⁶ LEADR, *Submission no. 36*, 10.

²⁸⁷ Law Institute of Victoria, *Submission no. 20*, 3-4.

²⁸⁸ Victoria Legal Aid, *Submission no. 30*, 11; Victorian Association for Dispute Resolution Inc., *Submission no. 10*, 2. For other comments about data that should be collected see David Bryson, *Transcript of evidence*, above n 266, 4-5; The Mediator Group, *Submission no. 3*, 5, 13; The Victorian Bar, *Submission no. 13*, 9, 64-65; Margaret Lothian, *Submission no. 17*, 2; Federation of Community Legal Centres Victoria, *Submission no. 39*, 3.

- settlement rates
- factors that may influence settlement rates, such as referral stage
- what happens when disputes are not settled at ADR
- participant satisfaction with ADR and perceptions of fairness
- the time and costs expended by participants and service providers.

The Committee also believes that, as a priority, there should also be qualitative research into the evidence gaps identified in section 3.2.1 of this chapter, and that the government should work with courts, service providers, researchers, academics, and other relevant organisations and individuals to identify additional gaps in existing data and research.

Challenges for data collection

The Committee acknowledges that data collection and research in this area is not a simple task.

Previous studies have noted considerable methodological and conceptual difficulties, not least of which is the lack of agreement within the industry, about the objectives of ADR and appropriate performance measures.²⁸⁹ The Committee's view is that the objectives proposed by NADRAC in 2001 are appropriate:

- ADR should resolve or limit disputes in an effective and efficient way.
- ADR should provide fairness in procedure.
- ADR should achieve outcomes that are broadly consistent with public and party interests.²⁹⁰

The government should collaborate further with NADRAC and service providers to develop agreed performance measures for these objectives.

Another major concern raised by stakeholders was privacy and confidentiality. As noted earlier, the confidentiality of ADR is seen as one of its benefits compared with judicial determination. Some stakeholders opposed extensive data collection on the grounds that it could undermine confidentiality.²⁹¹ The Victorian Privacy Commissioner also drew the Committee's attention to the requirements of Victorian privacy legislation. She noted that public sector organisations must not collect information unless it is necessary for one or more of their functions or activities, must collect information by lawful and fair means and not in an unreasonably intrusive manner.²⁹² The Commissioner and some other stakeholders favoured de-

²⁸⁹ Mack, above n 147, 15-23; Tania Sourdin and Nikola Balvin, *Interim evaluation of Dispute Settlement Centre Victoria projects: The Neighbourhood Justice Centre project; The Corio/Norlane community mediation project* (2008) Australian Centre for Peace and Conflict Studies, the University of Queensland, appendix B.

²⁹⁰ NADRAC, above n 146, 13-14.

²⁹¹ The Victorian Bar, *Submission no. 13*, 7, 19-20. See also Ian Lulham, *Transcript of evidence*, above n 153, 3.

²⁹² Office of the Victorian Privacy Commissioner, *Submission no. 8*, 1. See also *Information Privacy Act 2000* (Vic).

identified data collection,²⁹³ and the Committee believes this would be an appropriate solution to these concerns.

Other challenges include:

- the diversity of ADR services. Ms Lothian from VCAT wrote that ‘I suspect sector-wide reporting would be so general that its use would be limited’.²⁹⁴ Other stakeholders told the Committee their services had distinctive features that made comparison with other services difficult²⁹⁵
- the costs involved for service providers in collecting data or seeking client feedback.²⁹⁶ Some stakeholders suggested templates or agreed data formats might be helpful for service providers,²⁹⁷ and the Committee agrees
- the need for agreed definitions for basic terms like ‘dispute’, ‘resolution’, and ‘agreement’²⁹⁸
- the need for specific collection and evaluation methods in the case of disadvantaged individuals and groups²⁹⁹
- the potential negative impacts of reporting settlement outcomes. The Victorian Privacy Commissioner told the Committee her office published de-identified case notes but there was a risk these could form the basis of ‘standard’ outcomes³⁰⁰
- determining how to compare outcomes of ADR with outcomes in the courts given that data from the courts is also limited, and most disputes in the courts settle through unassisted negotiation even without ADR.³⁰¹

The Committee also acknowledges the concern expressed by NADRAC about problems that might arise ‘if the Commonwealth and each state and territory approached the question of consistent performance and activity data in isolation’.³⁰² Pending a national approach to these issues, the government should work with both NADRAC and ADR service providers to develop consistent data collection and reporting standards and research priorities.

²⁹³ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 1; Victorian Association for Dispute Resolution Inc., *Submission no. 10*, 2; Law Institute of Victoria, *Submission no. 20*, 10.

²⁹⁴ Margaret Lothian, *Submission no. 17*, 11.

²⁹⁵ Accident Compensation Conciliation Service, *Submission no. 21*, 4; Health Services Commissioner, *Submission no. 19*, 6; Victoria Legal Aid, *Submission no. 30*. See also NADRAC, *Submission no. 25*, 2.

²⁹⁶ Tania Sourdin, ‘From accreditation to quality mediation practice - Next steps?’ (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008), 39; Margaret Lothian, *Submission no. 17*, 11.

²⁹⁷ Sourdin, above n 296, 40; The Mediator Group, *Submission no. 3*, 13.

²⁹⁸ NADRAC, above n 146, 93; Mack, above n 147, 22-23.

²⁹⁹ See, for example, National Alternative Dispute Resolution Advisory Council, *Indigenous dispute resolution and conflict management* (2006), 16.

³⁰⁰ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 6.

³⁰¹ Sourdin, above n 159, 326; Mack, above n 147, 25; Australian Law Reform Commission, above n 225, paragraph 2.64. See Mack, above n 147, 26-36, for a summary of research comparing different types of ADR with judicial determination.

³⁰² NADRAC, *Submission no. 25*, 3.

Recommendation 1: Promoting an evidence-based approach to ADR

1.1 The Victorian Government should:

- work with the National Alternative Dispute Resolution Advisory Council and government, statutory, industry-based, community and other private ADR service providers to develop agreed performance measures for ADR services, and consistent data collection and reporting standards
- set data reporting standards for government and court-based ADR services in Victoria. At a minimum, the standards should require data collection regarding settlement rates, factors that may influence settlement rates, what happens to disputes not settled at ADR, participant satisfaction and perceptions of fairness, and the time and costs expended by participants and service providers. The standards should preserve the privacy of participants and confidentiality of ADR processes
- encourage data collection and reporting by private sector ADR services through measures such as reporting templates
- publish the data collected on an annual basis.

1.2 The Victorian Government should commission research into:

- the variables that influence whether ADR processes are successful or not successful
- what happens to disputes that are not settled through ADR
- the long term impacts of ADR on participants, including the long term durability of agreements
- the impact of ADR on the courts
- whether ADR improves outcomes compared with unassisted negotiation.

1.3 The Victorian Government should work cooperatively with courts, service providers, researchers and other interested organisations and individuals to identify further priorities for research, and sponsor research into those priorities.

Chapter 4 – Increasing access to justice through ADR

The terms of reference for this Inquiry asked the Committee to consider how ADR could improve access to justice in the civil court jurisdiction. ADR processes are generally considered to be more accessible than traditional court processes. This chapter considers how ADR services increase access to justice and explores how barriers which may prevent members of the community from accessing ADR services can be removed.

4.1 What is access to justice?

The term ‘access to justice’ first gained currency as part of the access to justice reform movement in the 1960s and 1970s. Access to justice suggested that affirmative measures had to be taken to transform an individual’s formal right to litigate or defend a claim into a right of effective access to the legal system.³⁰³

There is a long standing uncertainty about the meaning of the term access to justice.³⁰⁴ The term is associated with the broader notions of a just society³⁰⁵ and human rights,³⁰⁶ and is ‘alluded to by the implication that delay, cost, complexity and uncertainty inhibit[s] access to justice’.³⁰⁷ In its ideal, access to justice embodies the notion of equality before the law; that is, each person should have an effective means of protecting his or her rights under the substantive law.³⁰⁸

One of the most defining documents on access to justice is Lord Woolf’s 1996 *Access to Justice Report* which focused on the reform of the civil justice system in the United Kingdom.³⁰⁹ The report, written when Lord Woolf was the Master of the Rolls, identified a number of principles which the civil justice system should embody in order to ensure access to justice. The principles are that the civil justice system should be: just; fair; offer appropriate procedures at a reasonable cost; deal with cases with reasonable speed; be understandable to, and responsive to the needs of, those who use it; provide as much certainty as possible; and be adequately resourced and organised.³¹⁰

In Australia, notions of access to justice have been influenced by the work of the Access to Justice Advisory Committee, chaired by Justice Ronald Sackville. The

³⁰³ Ronald Sackville, 'Access to justice: Assumptions and reality checks' (Paper presented at the Law & Justice Foundation of New South Wales Access to Justice Workshop, Sydney, 10 July 2002), 1, referring to Mauro Cappellatti and Bryan Garth (eds.), *Access to justice: a world survey (vol. 1)* (1978) Slijthoff and Noordhoff, 6-10.

³⁰⁴ Laurie Glanfield, 'Access to justice: A perspective from the Director General' (1999) 37(6) *Law Society Journal*, 52, 52.

³⁰⁵ Greg Connellan, 'Access to justice' (2001) 13(3) *Legaldate*, 5, 5.

³⁰⁶ Stan Winford, 'Just for the rich: Legal aid and access to justice in Australia' (2006) 185 *Overland*, 34; James Spigelman, 'Keynote address: Access to justice and human rights treaties' (2000) 22(1) *Sydney Law Review*, 141.

³⁰⁷ Laurie Glanfield, above n 304, 52.

³⁰⁸ Ronald Sackville, 'Some thoughts on access to justice' (Paper presented at the 1st Annual Conference on the Primary Functions of Government, Wellington, New Zealand, 28-29 November 2003), 1.

³⁰⁹ Lord Woolf, *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) Department for Constitutional Affairs overview, paragraph 22.

³¹⁰ *Ibid*, paragraph 1.

Australian Government established that committee in 1993 ‘to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective’.³¹¹ The committee adopted a wide view of access to justice, which was not primarily confined to the courts, and proposed a national strategy which addressed a diverse range of issues including the structure of the legal services market and legal aid, alternative sources of litigation funding, improving consumer access to information, and promoting ADR and consumer complaints schemes.³¹²

4.2 The relationship between access to justice and access to ADR

Access to justice does not merely involve enhanced access to formal court processes, but also access to informal dispute resolution options.³¹³ ADR techniques have developed to ‘minimise the costs of disputing, to provide faster dispute resolution, and to provide non-adversarial processes and remedies that are adaptable to the needs of the disputants’.³¹⁴ Thus ADR has a significant potential to increase access to justice, especially for those with limited means. This was recognised by the Victorian Attorney-General in his recent justice statement.³¹⁵

In its 2008 report on Victoria’s civil justice system, the Victorian Law Reform Commission (VLRC) set out a comprehensive map for reform to reduce the time taken to resolve disputes, reduce costs and simplify the process of civil litigation.³¹⁶ ADR is a key component of the VLRC’s recommendations.³¹⁷

The Committee also recognises the potential of ADR to increase access to justice and that is the focus of this chapter. However, in the section below, the Committee first considers the need for a comprehensive framework for the provision of ADR in Victoria, both in the courts and the community.

4.3 A framework for ADR in Victoria

As chapter 2 noted, the development of ADR services and programs in Victoria has been somewhat ad hoc. In the past few years, as the Victorian Government has placed increased emphasis on ADR, there have been some efforts to coordinate policy development in this area. Dr David Cousins of Consumer Affairs Victoria

³¹¹ Gavin Lee, Department of the Parliamentary Library, Commonwealth of Australia, *Access to justice - an action plan* (1995).

³¹² Sackville, above n 308, 2. See also Access to Justice Advisory Committee, Commonwealth, *Access to justice: An action plan* (1994).

³¹³ Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system* (2000), paragraph 1.82. See also Murray Gleeson, ‘Opening speech’ (Speech delivered at the National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006).

³¹⁴ Attorney-General, Victoria, *Attorney-General’s justice statement: New directions for the Victorian justice system 2004-2014* (2004) Department of Justice, Victoria, 33.

³¹⁵ Attorney-General, Victoria, *Attorney-General’s justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 39.

³¹⁶ Victorian Law Reform Commission, *Civil justice review: Report* (2008), 7.

³¹⁷ *Ibid*, 209-285.

(CAV) told the Committee that ADR has become one of the ‘key priorities’ of the Department of Justice.³¹⁸ The Attorney-General’s 2008 justice statement also provides a blueprint for future reform in relation to ADR, although it focuses on specific rather than general strategies for promoting ADR. An ADR Directorate has been established within the department ‘to create a solid basis on which to grow ADR’.³¹⁹ The initial work of the directorate has focused on improving the evidence base in relation to ADR and it has commissioned a number of research reports.³²⁰

In addition, the Department of Justice has set up a high-level advisory committee, comprising judicial, professional and community representatives to advise the government on the implementation of recommendations made by the VLRC in its civil justice review.³²¹ As the Committee noted above, many of these recommendations relate to ADR.

The recommendations made by the Committee in this report have a wider scope than those of the VLRC in that they cover ADR in the community as well as the courts. The Committee believes the Victorian Government should develop an ADR strategy that covers both community and court-related ADR. The strategy should identify the overarching objectives and principles of ADR provision in Victoria. The Committee believes that these overarching objectives and principles should stipulate that:

- ADR options can provide Victorians with a way of resolving disputes fairly, effectively and efficiently, in a manner that is empowering to participants.
- ADR should be as accessible as possible to Victorians with a dispute.
- Where suitable alternatives are available, courts should be the last resort for resolving disputes.

The strategy should also provide common approaches to data collection, evaluation and research (discussed in chapter 3); regulation (discussed in chapter 5); engaging stakeholders from disadvantaged groups and communities (discussed in this chapter); and resolving more disputes through ADR (discussed in chapter 6). The proposed strategy should also recognise that ADR is not a substitute for the formal justice system but an additional option, albeit a more appropriate option in certain cases.

The proposed strategy would provide a framework for ADR development and would commit the government to continuous ADR development and improvement. This would facilitate the provision of better or more appropriate options to Victorians for resolving disputes.

The Committee also believes that collaboration between the Victorian Government, ADR service providers, courts, the legal profession, professional groups, education providers, consumers, community organisations and other relevant stakeholders is

³¹⁸ David Cousins, Executive Director, Consumer Affairs Victoria, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 2.

³¹⁹ Attorney-General, above n 315, 42.

³²⁰ David Cousins, *Transcript of evidence*, above n 318, 2; Paul Myers, Director, Alternative Dispute Resolution Strategy, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 11.

³²¹ Attorney-General, above n 315, 43.

highly desirable for the continuing development and implementation of ADR policy and services in Victoria. As a result, the Committee recommends that the Victorian Government establish an ADR Committee, with representation from this wide range of stakeholders, to work together to identify and address strategic issues in relation to ADR, advise on best practice ADR policy and collaborate on issues of common interest, including potential reforms at a national level.

The proposed ADR Committee would be broader than the advisory committee that the Department of Justice has established in relation to the VLRC's recommendations and, in particular, would recognise the importance of the provision of ADR in the community. Such a forum has the potential to facilitate networking and to provide a fertile ground for the exchange of ideas and information about ADR.

Recommendation 2: ADR framework

The Victorian Government should develop an ADR framework that:

- sets out the overarching objectives and principles of ADR in Victoria, both in the community and the courts, including that:
 - ADR options can provide Victorians with a way of resolving disputes fairly, effectively and efficiently in a manner that is empowering to participants.
 - ADR should be as accessible as possible to all Victorians with a dispute.
 - Where suitable alternatives are available, courts should be the last resort for resolving disputes.
- provides common approaches to data collection, evaluation and research; regulation; and strategies for engaging stakeholders from disadvantaged groups and communities
- sets out a strategy for disseminating information about ADR to key stakeholders and the general community so as to enhance awareness and understanding of ADR
- establishes a mechanism for sharing information about ADR.

Recommendation 3: ADR Committee

The Victorian Government should establish an ADR committee with representation from a wide range of stakeholders including ADR service providers, courts, the legal profession, professional groups, education providers, consumers and community organisations. The committee should work together to identify and address strategic issues in relation to ADR, advise on best practice ADR policy and collaborate on issues of common interest, including potential reforms at a national level.

4.4 The use and users of ADR services

In considering whether and how ADR services provide access to justice, it is important to understand the extent to which individuals and groups within the community are accessing ADR services.

4.4.1 The use of ADR services

Research commissioned by the Department of Justice in 2007 found that 35% of Victorians and 37% of Victorian small businesses had had at least one dispute in the previous 12 months.³²² The most common types of disputes for members of the community involved electricity, water, gas or phone services (8%), family (6%) and neighbours (5%).³²³ In the small business context, the most prevalent disputes concerned unpaid debts or late payment of bills by a customer (15%) and the quality, timeliness or price of goods or services provided to a customer (7%).³²⁴ Most of these disputes were resolved without the help of a third party. However, help from a third party was sought in 15% of disputes involving members of the community and 18% of disputes involving small businesses.³²⁵

The research found that only a small number of Victorians actually contacted ADR providers when they had a dispute. Only 11% of members of the community and 17% of small businesses had ever contacted CAV about a dispute. The majority of other ADR services providers had only been contacted by 4% of individuals and 5% of small businesses.³²⁶

However, Victorian ADR providers are still handling a significant number of enquiries and complaints. Data indicates:

- CAV received 642 233 enquiries and complaints and referred 8455 matters to an ADR process during 2006-07.³²⁷
- The Dispute Settlement Centre of Victoria (DSCV) received 15 757 consumer contacts and referred 1398 matters to an ADR process during 2006-07.³²⁸
- The Victorian Civil and Administrative Tribunal (VCAT) finalised 548 cases at mediation during 2007-08.³²⁹

³²² Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Community survey 2007* ('Community survey') (2007) Department of Justice, Victoria, i; Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Small business survey 2007* ('Business survey') (2007) Department of Justice, Victoria, 2.

³²³ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, i.

³²⁴ Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 2.

³²⁵ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, i; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 2.

³²⁶ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 13; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 18.

³²⁷ Letter from Rob Hulls, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 8 February 2008, attachment 1, 1.

³²⁸ Ibid, 1.

³²⁹ Victorian Civil and Administrative Tribunal, *Annual report 2007-2008* (2008), 43.

- The Magistrates' Court of Victoria finalised 2402 cases through pre-hearing conferences and mediation, and 3116 cases by arbitration during 2007-08.³³⁰

There is limited data available on court referrals to ADR processes. The Department of Justice recently completed, but has not yet released, a project on the use and effectiveness of mediation in the Supreme and County Courts of Victoria. The Committee understands that the project involved a review of available data and the development of an information collection system.³³¹ The Committee believes that the report may offer further insight on the use and reach of mediation in the Supreme and County Courts of Victoria.

4.4.2 The users of ADR services

One of the difficulties in adopting an evidence-based approach to promoting access to ADR services is that very little is known about the users of ADR.

The compendium of published ADR statistics compiled by the National Alternative Dispute Resolution Advisory Council (NADRAC) shows that few agencies publish detailed statistical information about the background of consumers of ADR services.³³² A survey conducted on behalf of the Department of Justice in 2007 found that for most ADR services, there were no significant differences in contact levels between those who held a concession card (and therefore presumably are from a lower socio-economic group) and those who did not hold a concession card.³³³

Several stakeholders identified the need for data collection on the extent to which members of disadvantaged groups access ADR services, to facilitate better targeting of services. Mr Jieh-Yung Lo, of the Ethnic Communities' Council of Victoria, strongly recommended the collection of data on ADR use by members of the culturally and linguistically diverse (CALD) communities so as to identify any problems with access.³³⁴

The Ethnic Communities' Council of Victoria's submission stated:

There is an immediate need for targeted research and collection of data which identifies the civil ADR use by different groups to identify groups and communities that may be missing out. Such data is difficult to access and the Victorian Government should invest resources to enable a clear picture of CALD communities' utilisation of ADR processes to emerge. While some communities appear to have used ADR programs, there is concern that some new and emerging

³³⁰ Magistrates' Court of Victoria, *2007-08 Annual report* (2008), 21.

³³¹ Judge Sandra Davis, County Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3; Justice Murray Kellam, Supreme Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 6; Tania Sourdin, Professor of Law, The University of Queensland (Melbourne Campus), *Transcript of evidence*, Melbourne, 29 November 2007, 5.

³³² National Alternative Dispute Resolution Advisory Council, *ADR research: A resource paper* (2004), 24.

³³³ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 14.

³³⁴ Jieh-Yung Lo, Policy and Project Officer, Ethnic Communities' Council of Victoria, *Transcript of evidence*, Melbourne, 5 June 2008, 11-12; Ethnic Communities' Council of Victoria, *Submission no. 40*, 3. See also George Lekakis, Chairperson, Victorian Multicultural Commission, *Transcript of evidence*, Melbourne, 25 February 2008, 3.

communities may be under represented in the ADR process. Data is needed to determine whether these concerns are accurate.³³⁵

Similarly, the Victorian Aboriginal Legal Service commented that data should be collected on ADR use by Indigenous persons so that trends can be observed and the need for systemic change identified.³³⁶ Victoria Legal Aid submitted that the Department of Justice should collect data on ADR use by members of disadvantaged groups, including rates of satisfaction with outcome and process.³³⁷ The Victorian Privacy Commissioner's submission emphasised the requirement to collect such data in de-identified form.³³⁸

The Committee notes that there is limited information on the extent to which ADR services are being accessed by the Victorian community, in particular by disadvantaged individuals and groups. The Committee believes that this information would assist in identifying any unmet areas of ADR service provision and any groups that are not accessing ADR services, as well as enabling the customising of programs to increase the accessibility of ADR to particular groups in the community. In addition, this data would assist in identifying further opportunities to enhance ADR services to better meet the needs of all users and potential users.

Recommendation 4: Data collection on access to ADR

The Victorian Government should collect data and publish de-identified information on the extent to which Victorians, including disadvantaged individuals and groups, access ADR services so as to:

- identify any unmet needs in ADR service provision
- identify groups and individuals that are not accessing ADR services
- facilitate the customising of information, activities and services aimed at increasing the accessibility of ADR services for particular groups and individuals
- identify further opportunities to improve ADR services to better meet the needs of users and potential users.

4.5 Features of ADR that promote access to justice

An accessible justice system should provide a range of dispute resolution pathways to reflect the different needs and expectations of the parties involved.³³⁹ ADR promotes access to justice by providing an alternative to court proceedings. In addition, there are several features of ADR processes that have the potential to increase access to justice. These will be discussed in this section.

³³⁵ Ethnic Communities' Council of Victoria, *Submission no. 40*, 3.

³³⁶ Victorian Aboriginal Legal Service, *Submission no. 32*, 22.

³³⁷ Victoria Legal Aid, *Submission no. 30*, 13.

³³⁸ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 9.

³³⁹ Attorney-General, above n 314, 35.

4.5.1 Service diversity

As noted in chapter 2, there are a diverse range of ADR service providers in Victoria. Most stakeholders in this Inquiry recognised the value of having a diverse range of ADR services. For example, Victoria Legal Aid stated:

The diversity of ADR providers does increase access to justice provided these services are well known within the community, especially the type of service which each provides. Diversity should also, ideally, lead to competition between service providers and therefore lower costs as well as stimulating innovation in delivery.³⁴⁰

Ms Fiona Hollier of LEADR – Association of Dispute Resolvers (LEADR), a not-for-profit association that promotes ADR, stated that diversity encourages the development of customised processes and supports a robust system where there is healthy debate.³⁴¹ Further, specialist ADR services have comprehensive knowledge of their respective industries³⁴² and may encourage more consumers to access ADR services.³⁴³

Although the diversity of ADR schemes potentially offers consumers more options for resolving disputes, stakeholders identified a number of issues associated with service diversity. For instance, the Law Institute of Victoria submitted that diversity ‘may lead to confusion on the part of ADR consumers about the type and quality of services on offer’.³⁴⁴ LEADR, however, submitted that service quality could be addressed by appropriate regulation.³⁴⁵ The regulation of ADR is discussed further in chapter 5.

A diverse ADR service system also potentially creates issues with service overlaps and referrals between agencies, as well as confusion about how to access the system. These issues are explored below.

Service overlaps

The Committee’s discussion paper asked if there were any gaps or duplications in ADR services in Victoria. While stakeholders did not identify any service gaps, some pointed out overlaps in ADR services.³⁴⁶ Potential service overlaps were identified in

³⁴⁰ Victoria Legal Aid, *Submission no. 30*, 4. See also Fiona Hollier, Chief Executive Officer, LEADR - Association of Dispute Resolvers (LEADR), *Transcript of evidence*, Melbourne, 4 March 2008, 2; The Victorian Bar, *Submission no. 13*, 31; Health Services Commissioner, *Submission no. 19*, 2; Law Institute of Victoria, *Submission no. 20*, 4.

³⁴¹ Fiona Hollier, *Transcript of evidence*, above n 340, 2-3.

³⁴² See generally Public Transport Ombudsman Victoria, *Submission no. 33*, 22; Legal Services Commissioner, *Submission no. 31*, 4; Fiona Hollier, *Transcript of evidence*, above n 340, 2. See also Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 21; Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 20; Chris Field, *Current issues in consumer law and policy* (2006), 97 cited by Victorian Law Reform Commission, above n 316, 242.

³⁴³ LEADR, *Submission no. 36*, 7.

³⁴⁴ Law Institute of Victoria, *Submission no. 20*, 5. See also Victoria Legal Aid, *Submission no. 30*, 4.

³⁴⁵ LEADR, *Submission no. 36*, 7.

³⁴⁶ Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Submission no. 17*, 1-2; Health Services Commissioner, *Submission no. 19*, 2. Note that a gap was identified in relation to an industry scheme for consumers of credit products and brokerage services: Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 11. However, this gap has since been filled in relation to credit products: see chapter 6.

relation to the Legal Services Commissioner and VCAT in lawyer-client disputes,³⁴⁷ the Victorian Small Business Commissioner and VCAT in retail tenancy disputes,³⁴⁸ and the Victorian Equal Opportunity and Human Rights Commission and VCAT in anti-discrimination disputes.³⁴⁹

However, the stakeholders who identified service overlaps did not believe them to be a significant problem. VCAT's Principal Mediator, Ms Margaret Lothian, submitted:

As long as there is no undue delay to litigants, I do not consider ... these overlaps necessarily wasteful or disadvantageous to those who use the services. Sometimes it is useful for more than one mediator, or more than one institution to encourage the parties to take back control of the outcome of their dispute, before they believe it is possible... Most importantly, it is vital that courts and tribunals have the power to 'have another go' if it is likely that ADR will be in the best interests of the parties.³⁵⁰

Based on the evidence received by the Committee, overlaps in ADR services do not appear to be a significant issue. In particular, the Committee agrees that it is useful to provide people with as many options as possible for resolving their disputes. In the Committee's view, the more pertinent issue is ensuring that people are able to access the appropriate service to assist in the resolution of disputes. This issue is discussed further below.

Referral loss

Some ADR providers report that they receive many queries that are outside their jurisdiction and require referral to another dispute resolution service.³⁵¹ This creates the potential for 'referral loss', where people are referred to an inappropriate agency and/or fail to follow up a referral. The potential for referral loss may be greater when there is a diversity of ADR providers.

Research conducted for the Department of Justice found that most individuals and small businesses with a dispute first contact CAV.³⁵² CAV will then deal with the matter, or refer the person to the appropriate service provider. However, issues may arise if the referral is inaccurate and the person's query is directed from one organisation to another.

It is difficult to establish the extent to which referral loss is a problem, as many agencies do not follow up referrals to determine whether the client had actually accessed the service to which they were referred.³⁵³ A Department of Justice report

³⁴⁷ Legal Services Commissioner, *Submission no. 31*, 3-4.

³⁴⁸ Margaret Lothian, *Submission no. 17*, 1.

³⁴⁹ Ibid, 1; Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 11 February 2008, 3.

³⁵⁰ Margaret Lothian, *Submission no. 17*, 1-2.

³⁵¹ Department of Justice, Victoria, *Alternative dispute resolution supplier survey 2006* (2007), 17-18, 38-39.

³⁵² Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 13; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 18; Department of Justice, above n 351, 17-18.

³⁵³ Chris Field, Chris Field Consulting Pty Ltd, *Alternative dispute resolution in Victoria: Supply-side research project research report* (2007) Department of Justice, Victoria, 77-78.

which considered this issue identified a need for better data to be collected on referrals and a more coordinated approach to referrals.³⁵⁴

Some stakeholders also suggested improved data collection to identify the extent of referral loss.³⁵⁵ For example, Victoria Legal Aid suggested that the Department of Justice should collect information about ‘who acts on a referral, who does not, and why’.³⁵⁶ Dr David Cousins of CAV suggested that there is an evidence gap in relation to why consumers who have been referred to VCAT by CAV have not followed up the referral. He told the Committee:

Why they have dropped out of the system is a fairly important thing where we do need to do more research. Is it because they find that they have explained their complaint once and they do not want to go through the whole process again, or is it just the cost factors in going to VCAT? ... as an agency we are certainly working with VCAT to try and, if you like, streamline our processes to ensure that we do not have people dropping out of the system because it becomes too hard for them.³⁵⁷

The Committee received anecdotal evidence that referral loss may be a problem in Victoria.³⁵⁸ For example, the Office of the Victorian Privacy Commissioner (OVPC) informed the Committee:

The OVPC receives many enquiries out of jurisdiction. Often those enquiries have been referred to us from another organisation. We are sometimes third or fourth in the referral process. OVPC staff often experience disgruntled enquirers who are irritated at being incorrectly referred to this office.³⁵⁹

Mr Paul Myers from the Department of Justice’s ADR Strategy Unit told the Committee that research conducted by the department suggests that people can often be ‘referred on from one organisation to another and then find that might not actually be the right organisation’.³⁶⁰ Ms Nadine Hantke, the Multicultural Access and Support worker at Prahran Mission, stated that referrals ‘need to be very easy and less professional in a way ... people should also not be sent from one place to another, to another, to another. They just get really, really sick of it ...’.³⁶¹

Some stakeholders suggested that referral protocols or guidelines should be implemented to deal with referral loss.³⁶² Mr Myers expressed the view that a more co-ordinated approach between referring agencies may result in more appropriate initial referrals.³⁶³ His colleague, Dr Cousins, suggested that when a referral is made

³⁵⁴ Ibid, 80.

³⁵⁵ See, for example, Office of the Victorian Privacy Commissioner, *Submission no. 8*, 4; Victoria Legal Aid, *Submission no. 30*, 6; Victorian Aboriginal Legal Service, *Submission no. 32*, 22.

³⁵⁶ Victoria Legal Aid, *Submission no. 30*, 6.

³⁵⁷ David Cousins, *Transcript of evidence*, above n 318, 13.

³⁵⁸ See, for example, Office of the Victorian Privacy Commissioner, *Submission no. 8*, 4; Paul Myers, *Transcript of evidence*, above n 320, 13; David Cousins, *Transcript of evidence*, above n 318, 13; Victoria Legal Aid, *Submission no. 30*, 6. See also Field, above n 353, 77-80.

³⁵⁹ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 4.

³⁶⁰ Paul Myers, *Transcript of evidence*, above n 320, 13.

³⁶¹ Nadine Hantke, Multicultural Access and Support Worker, Prahran Mission, *Transcript of evidence*, Melbourne, 5 June 2008, 4.

³⁶² See, for example, Health Services Commissioner, *Submission no. 19*, 4; Victoria Legal Aid, *Submission no. 30*, 6; Victorian Aboriginal Legal Service, *Submission no. 32*, 22; Victorian Multicultural Commission, *Submission no. 34*, 2.

³⁶³ Paul Myers, *Transcript of evidence*, above n 320, 13.

to another organisation there should be a system in place to ensure that the person's file can be transferred with the complaint.³⁶⁴ The Health Services Commissioner submitted that 'ADR services have a responsibility to ensure they have adequate referral protocols that require them to check the suitability of the referral before they make it'.³⁶⁵

The importance of appropriate referrals was particularly emphasised by stakeholders representing CALD communities. Members of CALD communities may be particularly susceptible to referral loss as they may lack understanding of the system as well as English language skills. The Victorian Multicultural Commission submitted that there should be referral protocols between CAV and ADR providers.³⁶⁶

However, not all stakeholders agreed that referral loss is an issue. The submission from the Energy and Water Ombudsman (Victoria) (EWOV) stated that a survey conducted by EWOV found that most customers who were referred back to an industry call centre did contact the centre.³⁶⁷ Other stakeholders emphasised that some people may make a conscious decision not to follow through with the complaint. For example, Ms Lothian of VCAT wrote that sometimes a party will decide 'that they do not need chemotherapy to cure a cold – that they can live with just letting the dispute go'.³⁶⁸

The Committee notes the lack of information about the extent of referral loss in the Victorian ADR service sector. It believes it is important to understand to what extent people do not follow up referrals to another ADR service and the reasons for this, as well as the extent to which inaccurate referrals are made. The Committee therefore recommends further research into these issues. Consistent with the Committee's general approach to data collection about ADR outlined in chapter 3, this research should be conducted in a manner that protects the privacy of individuals' information.³⁶⁹

While there is uncertainty about the extent of the problem, the evidence received by the Committee suggests that there is an issue with referral loss in the Victorian ADR service system. The Committee believes that this has the potential to restrict access to justice, particularly to disadvantaged individuals who may lack the knowledge or confidence to follow through multiple referrals. Therefore, the Committee believes that the Victorian Government should ensure that all government ADR services, including statutory schemes and court-based services, develop and implement referral protocols to facilitate accurate referrals between agencies. To ensure that the protocols are effectively implemented, all relevant staff should receive initial and ongoing training about making referrals in accordance with the protocols.

³⁶⁴ David Cousins, *Transcript of evidence*, above n 318, 14.

³⁶⁵ Health Services Commissioner, *Submission no. 19*, 4.

³⁶⁶ Victorian Multicultural Commission, *Submission no. 34*, 2.

³⁶⁷ Energy and Water Ombudsman (Victoria) (EWOV), *Submission no. 16*, 8.

³⁶⁸ Margaret Lothian, *Submission no. 17*, 6. See also Health Services Commissioner, *Submission no. 19*, 4.

³⁶⁹ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 1; Victorian Association for Dispute Resolution Inc., *Submission no. 10*, 2; Law Institute of Victoria, *Submission no. 20*, 10.

Ideally there should be referral protocols between all ADR providers in the state, and the Committee recommends that the Victorian Government work with other ADR providers in the state, including industry ombudsman (or external dispute resolution) schemes, community-based ADR providers and other private ADR providers to develop and implement statewide referral guidelines and protocols.

Recommendation 5: Research on referrals by ADR service providers

The Victorian Government should undertake research on:

- The extent of referral loss in the ADR service system in Victoria.
- Why members of the community drop out of the ADR system following a referral.
- The extent of inaccurate referrals by ADR service providers to other ADR service providers.

Recommendation 6: ADR referral protocols

- 6.1 The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to develop and implement referral guidelines and protocols to facilitate accurate referrals between ADR service providers.
- 6.2 The Victorian Government should provide initial and ongoing training to staff of government ADR providers on the effective use of these guidelines and protocols.

Central access point

The Committee's discussion paper noted that a central access point or gateway such as a telephone number and/or website providing ADR information, advice and support may be one mechanism for increasing ADR accessibility and reducing referral loss.³⁷⁰

Central access points already exist at a national level for both financial services and family relationships matters.³⁷¹ Mr Shane Quinn of the Greensborough Family Relationship Centre told the Committee that the family relationship advice line is 'the access point for anybody who is trying to find their local services across the country'.³⁷²

³⁷⁰ Victorian Parliament Law Reform Committee, *Alternative dispute resolution: Discussion paper* (2007), 32 referring to Field, above n 353, 81-82.

³⁷¹ See Financial Ombudsman Service, *Financial Ombudsman Service*, <http://www.fos.org.au/centric/home_page.jsp>, viewed 10 February 2009; Family Relationships Online, *Family Relationships Online*, <<http://www.familyrelationships.gov.au/>>, viewed 3 February 2009.

³⁷² Shane Quinn, Manager, Greensborough Family Relationship Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 2.

Several stakeholders highlighted that CAV currently provides a central contact point for members of the Victorian community.³⁷³ Dr Cousins told the Committee that CAV acts ‘almost as a consumer channel, almost an alternative dispute resolution channel’.³⁷⁴

Research conducted for the Department of Justice indicates that CAV has a high level of recognition among Victorians.³⁷⁵ CAV did not provide the Committee with detailed information about how it promotes its services. However, information provided by the Department of Justice stated ‘CAV promotes its own dispute resolution services, including those provided via the Estate Agents Resolution Service and Building Conciliation and Advice Victoria, by a variety of means including publications, media and its website’.³⁷⁶

Research conducted by the Department of Justice found that the internet is one of the most common ports of call for Victorians seeking information about resolving a dispute.³⁷⁷ In addition to the CAV website, the Department of Justice has established a dispute resolution website, *disputeinfo*, which provides information about strategies for resolving common disputes and advice about where to seek assistance to resolve a dispute.³⁷⁸ Dr Cousins informed the Committee that the number of people accessing the *disputeinfo* site is relatively low and that most people access the site through CAV’s website.³⁷⁹

Stakeholders had mixed opinions about the value of a central gateway for accessing ADR. Among those who were supportive of the concept, there were diverse ideas about what it should entail.³⁸⁰ NADRAC submitted that a central gateway should be able refer people to ADR services outside Victoria, and that there was a need to consult widely with existing ADR services to ensure appropriate referrals.³⁸¹ The Law Institute of Victoria endorsed the idea of a ‘central collection point’ through the Department of Justice website, containing information and links to service providers.³⁸² Victoria Legal Aid suggested that there should be a ‘central database of ADR service providers’ maintained by the Department of Justice along with information about how to resolve disputes without third party intervention.³⁸³ LEADR submitted that a central gateway should include user-friendly information

³⁷³ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 14; EWOF, *Submission no. 16*, 9.

³⁷⁴ David Cousins, *Transcript of evidence*, above n 318, 15. See also letter from Rob Hulls, above n 327, 1.

³⁷⁵ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 10-13; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 15-18.

³⁷⁶ Letter from Rob Hulls, above n 327, 4.

³⁷⁷ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 18.

³⁷⁸ See Department of Justice, Victoria, *disputeinfo*, <<http://www.justice.vic.gov.au/disputeinfo>>, viewed 10 March 2009.

³⁷⁹ David Cousins, *Transcript of evidence*, above n 318, 17. See also letter Rob Hulls, above n 327, 8.

³⁸⁰ See, for example, National Alternative Dispute Resolution Advisory Council (NADRAC), *Submission no. 25*, 5; Victoria Legal Aid, *Submission no. 30*, 6; Victorian Aboriginal Legal Service, *Submission no. 32*, 22; The Mediator Group, *Submission no. 3*, 9; Law Institute of Victoria, *Submission no. 20*, 6; Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 9; Office of the Victorian Privacy Commissioner, *Submission no. 8*, 4; Paul Myers, *Transcript of evidence*, above n 320, 14.

³⁸¹ NADRAC, *Submission no. 25*, 5.

³⁸² Law Institute of Victoria, *Submission no. 20*, 6; Elissa Campbell, *Transcript of evidence*, above n 380, 9.

³⁸³ Victoria Legal Aid, *Submission no. 30*, 6.

about the benefits of ADR and an overview of the different ADR processes, as well as links to ADR services.³⁸⁴

Other stakeholders did not support a central gateway. EWOV's submission stated that a central gateway 'would have an awareness problem of its own ... a general gateway to disparate services does not seem to have much to offer'.³⁸⁵ The joint submission from the Banking and Finance Sector Ombudsman, the Financial Industry Complaints Scheme and the Insurance Ombudsman Service (now merged into the Financial Ombudsman Service or FOS) highlighted that there is already a common Australia-wide telephone number and website for contacting FOS regardless of whether the complaint is about financial services, banking or insurance.³⁸⁶ The Office of the Victorian Privacy Commissioner submitted that a central gateway would need to have highly skilled staff, to minimise the risk of inappropriate referrals.³⁸⁷

Several stakeholders commented that a central gateway has the potential to decrease rather than increase access to justice. For example, the Telecommunications Industry Ombudsman expressed concern that a central gateway might just add another step for consumers trying to resolve complaints.³⁸⁸ The Victorian Aboriginal Legal Service submitted that the centralisation of ADR services might disadvantage those living in regional and rural areas and suggested that the focus should instead be on ensuring that current ADR services are equipped to provide appropriate referrals.³⁸⁹

The Committee acknowledges stakeholder concerns about the establishment of a separate central gateway to ADR services. The Committee notes that CAV has a high public profile and is the first point of contact for many Victorians with a dispute. The Committee believes CAV's capacity to play this central role will be enhanced by the implementation of the referral guidelines and protocols recommended above. The Committee has already recommended that staff in government ADR services receive training about implementing these protocols. However, the Committee highlights the need for frequent and highly specialised training for CAV staff, given the key role they play in referring consumers to other ADR providers.

Recommendation 7: Equipping CAV staff to make appropriate referrals to ADR services

The Victorian Government should ensure that all relevant CAV staff receive regular training about the ADR services available in Victoria and the referral guidelines and protocols recommended in recommendation 6.1.

³⁸⁴ LEADR, *Submission no. 36*, 8.

³⁸⁵ EWOV, *Submission no. 16*, 9. See also The Victorian Bar, *Submission no. 13*, 8.

³⁸⁶ Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 13-14. See Financial Ombudsman Service, *Financial Ombudsman Service*, <http://www.fos.org.au/centric/home_page.jsp>, viewed 10 February 2009.

³⁸⁷ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 4.

³⁸⁸ Telecommunications Industry Ombudsman, *Submission no. 23*, 5. See also Margaret Lothian, *Submission no. 17*, 6.

³⁸⁹ Victorian Aboriginal Legal Service, *Submission no. 32*, 22.

The Committee also recognises the increasing importance of internet technology in providing information to the community, and notes that the Department of Justice has established the disputeinfo website to provide a variety of information about resolving disputes.³⁹⁰ However, the Committee found evidence that this website was not widely used or known.

Based on its own experience using this website, the Committee believes that there is significant potential to expand the disputeinfo website to provide more comprehensive information on all aspects of ADR. The Committee also believes that the Victorian Government should disseminate information about the disputeinfo website more widely within the community, particularly to organisations that people commonly approach when they have a dispute. The Committee makes further recommendations about the potential to provide online dispute resolution through the disputeinfo website in chapter 6.

Recommendation 8: Enhancement of the disputeinfo website

The Victorian Government should redevelop the disputeinfo website to provide a practical, user-friendly and accessible service. The website should provide:

- comprehensive information on ADR and ADR processes
- comprehensive information on how to resolve disputes
- a database of ADR providers in Victoria (as well as national ADR schemes)
- links to all ADR service providers in Victoria.

Recommendation 9: Dissemination of information about the disputeinfo website

Following the redevelopment of the disputeinfo website, the Victorian Government should disseminate information about the website widely within the community, including through ADR service providers, other government departments and organisations that people commonly approach when they have a dispute.

4.5.2 User-friendly services

The user-friendly nature of ADR services may also increase access to justice. Research commissioned by the Department of Justice indicates that some of the main factors which encourage people to access ADR services include that it is easier than going to court, it is easier than handling the matter themselves, and it is easy to access.³⁹¹ The Disability Services Commissioner, Mr Laurie Harkin, told the Committee that ‘one of the more useful things that might happen for people of lesser

³⁹⁰ See Department of Justice, above n 378.

³⁹¹ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 19-20; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 21.

capacity ... is to provide opportunities for less-formal, less-foreboding, more user-friendly arrangements that do not confound people'.³⁹²

Stakeholders in this Inquiry identified a range of features that made ADR services user-friendly.

Most stakeholders emphasised that providing a variety of methods to lodge complaints (for example, freecall, facsimile, email, post, in person and online) increases access to ADR services.³⁹³ The Telecommunications Industry Ombudsman (TIO) submitted that having a variety of mechanisms to lodge complaints caters to the needs of different consumers, such as those of people with disabilities and those from CALD communities. The TIO indicated that it is currently exploring the possibility of accepting complaints via text message.³⁹⁴ Ms Lynne Coulson Barr of the Disability Services Commissioner told the Committee that being able to lodge a complaint online is particularly important for people with physical and sensory impairments.³⁹⁵

Both EWOV and the Disability Services Commissioner informed the Committee that they have alternative access arrangements in place for customers with special needs, including the use of the National Relay Service for customers with hearing or speech impediments.³⁹⁶ Many ADR service providers have implemented mechanisms to make their services more accessible to the Indigenous and CALD communities and these are discussed later in this chapter.

The Committee commends the initiative and commitment of ADR service providers participating in this Inquiry to provide services that are user-friendly and accessible. However, the Committee notes that some groups in the community may still experience difficulties in accessing and using ADR services. This issue and strategies to address it are discussed further later in this chapter.

4.5.3 Flexibility

According to NADRAC, flexibility 'is one of the greatest advantages of ADR'.³⁹⁷ In chapter 3 the Committee highlighted the potential for the flexibility of ADR processes to contribute to the outcomes of ADR. In addition, the flexibility of ADR processes may increase access to justice, particularly for disadvantaged individuals.³⁹⁸

³⁹² Laurie Harkin, Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 5 June 2008, 2. See also Victoria Legal Aid, *Submission no. 30*, 13.

³⁹³ See, for example, Office of the Victorian Privacy Commissioner, *Submission no. 8*, 2; Telecommunications Industry Ombudsman, *Submission no. 23*, 2; Victoria Legal Aid, *Submission no. 30*, 5; EWOV, *Submission no. 16*, 5. See also Department of Justice, above n 351, 7.

³⁹⁴ Telecommunications Industry Ombudsman, *Submission no. 23*, 2.

³⁹⁵ Lynne Coulson Barr, Principal Conciliation Officer, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 5 June 2008, 12. Note online dispute resolution services are discussed further in chapter 6.

³⁹⁶ EWOV, *Submission no. 16*, 6; Lynne Coulson Barr, *Transcript of evidence*, above n 395, 8.

³⁹⁷ National Alternative Dispute Resolution Advisory Council (NADRAC), *Issues of fairness and justice in alternative dispute resolution: Discussion paper* (1997), 197.

³⁹⁸ *Ibid*, 38.

Ms Coulson Barr told the Committee that the Disability Services Commissioner uses a flexible co-conciliation model to accommodate the range of issues that arise in complaints, including issues relating to physical, emotional and intellectual capacity. The process includes using preliminary meetings with both complainants and service providers to prepare the parties for conciliation, assessing capacity and support requirements (such as using advocates, support people, pictorial aids and symbols) and shuttle negotiations (where the parties do not meet face-to-face and the conciliator acts as a go-between).³⁹⁹ Ms Coulson Barr also stated that:

There needs to be a lot of flexibility in how you can ensure that the person with a disability who is affected by all this process, that their voice and their concerns are being heard at the same time as protecting them from the potential stress of detailed negotiations that can occur in a conference.⁴⁰⁰

ADR processes can also be adapted to ensure that they are culturally relevant to the parties. Mr Omar Farah, of the Horn-Afrik Employment and Training Advocacy Project, identified the need to ‘customise the service in a way so that it is available in people’s comfort zone’.⁴⁰¹ For example, participants may be able to choose their own mediators (male or female, or from a particular community), and select a culturally appropriate venue for the ADR process to take place.⁴⁰²

The flexible nature of ADR means that it is possible to move away from rules of the formal justice system.⁴⁰³ This is particularly relevant in the Indigenous context. The flexible process of ADR allows for the whole dispute to be considered, including the parties’ values, the historical context, race and culture, which may not be taken into account in court proceedings where the focus is on legal rules.⁴⁰⁴ Mr Rocky Tregonning, Aboriginal Projects Officer at the Dispute Settlement Centre of Victoria, told the Committee that he takes a broad approach to exploring disputes:

In a Koori circle I will go a bit further into it and talk about whether it is men’s business or women’s business, whether it is elders, whether it is youth, whether it is a family issue, whether it is tribal, whether it is someone from Western Australia arguing with someone from Victoria [as] there might be cultural differences within their language communication.⁴⁰⁵

The need to ensure that ADR services are culturally appropriate is discussed further later in this chapter.

³⁹⁹ Lynne Coulson Barr, *Transcript of evidence*, above n 395, 8-9.

⁴⁰⁰ *Ibid*, 9.

⁴⁰¹ Omar Farah, Multicultural Community Development Officer, Horn-Afrik Employment and Training Advocacy Project, *Transcript of evidence*, Melbourne, 5 June 2008, 10. See also Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 18.

⁴⁰² NADRAC, above n 397, 75. See also Loretta Kelly, *Transcript of evidence*, above n 401, 20.

⁴⁰³ NADRAC, above n 397, 75.

⁴⁰⁴ See generally *ibid*, 17.

⁴⁰⁵ Rocky Tregonning, Aboriginal Projects Officer, Dispute Settlement Centre of Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 12.

4.5.4 Cost

In chapter 3 the Committee identified the difficulties in ascertaining the extent to which ADR is cheaper compared with using the court system. Stakeholders in the Inquiry, however, were generally positive about the potential of ADR to resolve disputes quickly and cheaply. Several stakeholders highlighted that many ADR services are free for consumers,⁴⁰⁶ or low cost,⁴⁰⁷ and that this may encourage more people to access their services. Most stakeholders in this Inquiry supported these current arrangements and opposed any suggestion that there should be user-pays charges for accessing ADR services.⁴⁰⁸ For example, the Energy and Water Ombudsman, Ms Fiona McLeod, told the Committee that the guidelines under which industry ombudsmen schemes operate do not allow them to charge fees to consumers.⁴⁰⁹

The Law Institute of Victoria supported user-pays charges for ADR, but acknowledged that the VCAT mediation system, which is fully government funded, and the Small Business Commissioner's subsidised services 'have been successful and increased participants' access to justice'.⁴¹⁰

Private ADR is potentially very costly, with private mediators charging between \$2000 and \$6000 per day.⁴¹¹ Currently, the Law Institute of Victoria's Legal Assistance Scheme can arrange for mediators to assist parties to a dispute where one party is unable to pay for mediation services, at the request of a legal representative acting for a client. A similar service is provided by the Victorian Bar's Legal Assistance Scheme.⁴¹²

4.6 Issues with ADR and access to justice

While ADR has many features which may be seen as promoting access to justice, ADR has the potential to hinder access to justice in some circumstances. This section discusses the potential of ADR to limit access to the court system, considers whether there are particular matters where ADR is not appropriate and examines the issue of access to legal advice and legal representation in ADR processes.

⁴⁰⁶ Department of Justice, above n 351, 1, 20.

⁴⁰⁷ See generally Shane Quinn, *Transcript of evidence*, above n 372, 4; Meg Henham, Manager, Outer-Eastern Branch, Family Mediation Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 4; Ian Goodhardt, Manager, Head Office, Family Mediation Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 4; Department of Justice, above n 351, 20; Mark Brennan, Small Business Commissioner, Office of the Victorian Small Business Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 5.

⁴⁰⁸ See, for example, Health Services Commissioner, *Submission no. 19*, 3; EWOV, *Submission no. 16*, 7; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 4; Gerard Brody, Director, Policy & Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 8; Victorian Aboriginal Legal Service, *Submission no. 32*, 22. Cf The Mediator Group, *Submission no. 3*, 8; LEADR, *Submission no. 36*, 7; Law Institute of Victoria, *Submission no. 20*, 6.

⁴⁰⁹ Department of Industry, Science and Tourism, Commonwealth, *Benchmarks for industry-based customer dispute resolution schemes* (1997), benchmark 1.11; EWOV, *Submission no. 16*, 7.

⁴¹⁰ Law Institute of Victoria, *Submission no. 20*, 6.

⁴¹¹ Mark Brennan, *Transcript of evidence*, above n 407, 5.

⁴¹² Law Institute of Victoria, *Submission no. 20*, 8. See also Justice Kellam, *Transcript of evidence*, above n 331, 5-6.

4.6.1 Access to ADR and access to the courts

The Committee's discussion paper noted that ADR may potentially decrease access to the court system for some groups in the community.⁴¹³ It has been suggested that ADR may result in a two-tiered justice system, where those with sufficient wealth and support resolve their issues in the courts, while individuals of limited means or power are forced to use ADR processes.⁴¹⁴

Few stakeholders addressed this issue, although those that did had divergent views. For example, Victoria Legal Aid stated that there is a risk that increased use of ADR processes could decrease access to the courts for some groups, particularly those on low incomes. Victoria Legal Aid commented:

It is difficult to redress this problem without looking at the access of this group to the justice system in general, including through the increased provision of legal aid to ensure that there is equitable access for all to courts, ADR processes and all other aspects of the justice system.⁴¹⁵

Victoria Legal Aid contended that this issue could be addressed by ensuring that people have access to legal advice prior to participating in ADR.⁴¹⁶ The issue of legal advice is discussed further later in this chapter.

The Victorian Bar did not agree that access to ADR decreases access to the courts. Its submission stated:

there is no evidence to support the proposition that ADR, including mediation, decreases access to the courts. To the contrary, the Bar considers that a mediation conducted by an independent experienced facilitator will reduce the divide between rich and poor and enables the parties to concentrate on the issues involved rather than the costs of trial.⁴¹⁷

Several stakeholders emphasised that ADR is one option for resolving a dispute and not a substitute for the court system. Professor Tania Sourdin from the University of Queensland commented that people should never be constrained from litigating and that it is important to have a strong rights-based system (that is, the formal justice system) around any interest-based system (that is, ADR).⁴¹⁸ Supervising Magistrate Anne Goldsborough stated 'the court process is a backdrop. I am there as a last point of call. I will decide something if nobody can decide it themselves'.⁴¹⁹

The approach the Committee has adopted in this report reflects the views of Professor Sourdin and Magistrate Goldsborough. The Committee recognises that ADR is just one of a range of strategies that can be used to resolve a dispute. The

⁴¹³ Access to Justice Advisory Committee, above n 312, 298.

⁴¹⁴ See generally *ibid*, xxxix.

⁴¹⁵ Victoria Legal Aid, *Submission no. 30*, 9.

⁴¹⁶ *Ibid*, 9. See also Victorian Aboriginal Legal Service, *Submission no. 32*, 7.

⁴¹⁷ The Victorian Bar, *Submission no. 13*, 43.

⁴¹⁸ Tania Sourdin, *Transcript of evidence*, above n 331, 8. See also Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., xi; David Cousins, *Transcript of evidence*, above n 318, 2.

⁴¹⁹ Anne Goldsborough, Supervising Magistrate, Family Violence & Family Law, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 29 November 2007, 9. See also John Griffin, Executive Director, Courts, Department of Justice, *Transcript of evidence*, Melbourne, 11 February 2008, 3.

recommendations in this report aim to encourage ADR where appropriate but also recognise that ADR is a supplement to, rather than a substitute for, the court system.

4.6.2 Matters not suitable for ADR

While ADR has many potential benefits, it may not be an appropriate process for all disputes or all parties. NADRAC has listed the factors that may make a matter unsuitable for facilitative ADR processes, or may require a specially adapted process. These factors include:

- the parties lack an adequate understanding of the issues and implications of the possible outcome
- the parties lack sufficient time to assess any proposed outcome
- there is the possibility of undue practitioner influence
- there are safety risks to the parties, ADR practitioner or third parties
- either party is pursuing strategies which are inconsistent with the ADR process
- either party is using ADR to gather information to further the dispute
- either party cannot participate and negotiate effectively in the process
- there is a significant power imbalance between the parties
- the parties are not willing to participate in good faith.⁴²⁰

The Committee's discussion paper asked stakeholders to comment on whether ADR is suitable for all parties and all disputes. No stakeholders addressed the issue of whether there are any parties that are not suitable to participate in the ADR process in detail.⁴²¹

Stakeholders identified several types of disputes they thought were not appropriate for ADR.⁴²² In particular, it was suggested that cases where there is a power imbalance and cases that require a public hearing are unsuitable for ADR.⁴²³ These two issues are discussed further below.

Cases that require a public hearing

In chapter 3 the Committee noted that as ADR is conducted 'behind closed doors', systemic issues and other matters that are of public interest may be kept hidden.

Some stakeholders in this Inquiry acknowledged that the confidentiality and privacy of ADR proceedings may hide systemic issues from public scrutiny. For example, Mr Gerard Brody of the Consumer Action Law Centre stated:

Businesses involved in systemic conduct can ensure that there is no public airing of their conduct that may impact on hundreds or thousands of other consumers ... This

⁴²⁰ National Alternative Dispute Resolution Advisory Council, *A framework for ADR standards: Report to the Commonwealth Attorney-General* (2001), 110-111.

⁴²¹ Nadine Hantke, *Transcript of evidence*, above n 361, 4; Margaret Lothian, *Submission no. 17*, 10. See also Victorian Parliament Law Reform Committee, *Inquiry into vexatious litigants: Final report* (2008), 94-95.

⁴²² See Health Services Commissioner, *Submission no. 19*, 6; Peter Berlyn, *Submission no. 2*.

⁴²³ See, for example, Health Services Commissioner, *Submission no. 19*, 6; Peter Berlyn, *Submission no. 2*.

is not to say that ADR does not have its advantages, but it can act to keep unfair practices hidden, practices that may contribute or lead many others to disputes.⁴²⁴

Similarly, the Federation of Community Legal Centres' submission stated that consumers in a dispute with a large organisation may negotiate a settlement and that it:

may also be in the interests of the corporation to pay or forgo a comparatively small individual and confidential settlement rather than risk having a test case judgement made against them that would be costly if applied to a large volume of consumers.⁴²⁵

The Office of the Victorian Privacy Commissioner (OVPC) informed the Committee that complaints to that organisation are confidential, and commented:

The OVPC recognises that this restriction on 'naming' respondents is an issue as it does not allow for an education component in the complaints process. This also means that as a regulator, I am unable to disclose where a breach has occurred, which in turn can impact upon perceptions of transparency of the processes employed by my office.

Furthermore, the private nature of ADR processes in general and the lack of formal determinations does not allow for the reporting of systemic issues in the same way that a public process might.⁴²⁶

EWOV told the Committee that, although complaints are confidential, it has a process to ensure systemic issues are identified and reported to the relevant energy or water company and frequently also to the regulator, the Essential Services Commission. EWOV's submission stated that it publishes de-identified binding decisions and case studies which indicate how issues will be treated. The submission concluded, 'Powerful parties cannot use EWOV's processes to circumvent publicity or precedents. Appropriate confidentiality is a strength of industry ombudsman schemes, not a weakness'.⁴²⁷ Several other ADR service providers told the Committee they also publish de-identified information about the outcome of particular cases or report on emerging market trends.⁴²⁸

The Committee recognises that there is a need to balance the benefits to the individual of the confidentiality of the ADR process with the wider public interest. It notes that some ADR providers are already publishing de-identified information about matters of public interest and have systems in place for identifying systemic issues. The Committee supports the regular publication of such information as a means of ensuring that cases which are the subject of ADR, but may have a public interest element, are not hidden from public scrutiny.

⁴²⁴ Gerard Brody, *Transcript of evidence*, above n 408, 3.

⁴²⁵ Federation of Community Legal Centres Victoria, *Submission no. 39*, 2.

⁴²⁶ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 5.

⁴²⁷ EWOV, *Submission no. 16*, 11. See also Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 7-10.

⁴²⁸ Mark Brennan, *Transcript of evidence*, above n 407, 6; Office of the Victorian Privacy Commissioner, *Submission no. 8*, 6.

Recommendation 10: Publishing information about matters of public interest arising in ADR

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to publish – in a de-identified form – regular case studies and reports on systemic issues and any other issues of public interest that arise as part of their ADR processes.

Power imbalances

A power imbalance may arise from differences in financial power, skills, information, education, intelligence, social status, physical ability, or from being from a dominant race or ethnic group.⁴²⁹ A power imbalance may manifest either in the inability of a party to negotiate effectively during an ADR process, or in implicit or explicit threats which may affect the willingness of a party to participate in an ADR process. Power imbalances may exist between individuals, between organisations, or between individuals and organisations. Power is very ‘contextual and situational’ and imbalances of power may not always be readily apparent.⁴³⁰ Ms Margaret Halsmith of LEADR told the Committee about a case she mediated between two individuals, one of whom was illiterate while the other was highly educated. She commented:

One of the things about power, I think, is that it is not what it appears to be, ever. So you might think that the party who had the PhD level education has more power than the party who is illiterate, but in fact that is not necessarily the case. The party who has the PhD qualification is literally suffering emotionally for the horrors that this other person has experienced, so they are feeling like the victim ...⁴³¹

Some stakeholders told the Committee that ADR may not be appropriate in situations where there is an imbalance of power. For example, the Federation of Community Legal Centres submitted that ADR may be problematic if the matter involves a claim by a consumer against a large corporation, especially if the consumer is not legally represented.⁴³² Mr Christof Lancucki of the Polish Community Council of Australia told the Committee that in ‘institution-against-the-person disputes, especially for people who have language difficulties, the parties do not have equal ability to present their case’.⁴³³

There is considerable debate about the appropriateness of the use of ADR processes in family violence cases, as the violence may create a significant power imbalance.⁴³⁴ For example, the *Family Law Act 1975* (Cth) excludes some cases

⁴²⁹ Claire Baylis and Robyn Carroll, 'Power issues in mediation' (2005) 7(8) *The ADR Bulletin*, 133, 133.

⁴³⁰ *Ibid*, 134.

⁴³¹ Margaret Halsmith, Chair, LEADR, *Transcript of evidence*, Melbourne, 4 March 2008, 9.

⁴³² Federation of Community Legal Centres Victoria, *Submission no. 39*, 2.

⁴³³ Christof Lancucki, Honorary President, Polish Community Council of Australia, *Transcript of evidence*, Melbourne, 5 June 2008, 13.

⁴³⁴ See issues Hilary Astor, 'Violence and family mediation policy' (1994) 8(1) *Australian Journal of Family Law*, 3, 4-11; Susan Gribben, 'Violence and family mediation' (1994) 8(1) *Australian Journal of Family Law*, 22; Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 349-355.

where there is a risk of family violence or child abuse from mandatory pre-litigation ADR processes.⁴³⁵ A number of stakeholders in this Inquiry also did not support the use of ADR in matters where there is a history of violence between the parties.⁴³⁶

However, the contrasting view is that automatically excluding cases of family violence from ADR may disempower victims.⁴³⁷ For example, Mr Ian Goodhardt of the Family Mediation Centre, a family dispute resolution service provider, stated:

For some people who have been abused it can be a very empowering thing to be able to sit in a room with their abuser and just declare what has happened to them, and that might be the first time that they have been able to do that.⁴³⁸

A paper prepared for NADRAC found that it is inappropriate to automatically exclude cases involving violence from referral to ADR. Instead it suggested that processes should be available to ensure safety and support throughout the ADR process.⁴³⁹

The Practice Standards of the National Mediation Accreditation Scheme (NMAS), a voluntary accreditation scheme which commenced in January 2008, require mediators to take appropriate measures to ensure the participants' safety if abuse is present, implied or threatened. The options suggested include:

- activating appropriate pre-determined security protocols
- video conferencing or other personal protective and screening arrangements⁴⁴⁰
- separate sessions with the participants
- enabling a friend, representative, advocate, or legal representative to attend the mediation sessions⁴⁴¹
- referring participants to appropriate resources⁴⁴²
- suspending or terminating the mediation session, with measures to ensure the participants' safety.⁴⁴³

Stakeholders in this Inquiry also identified a range of other strategies to address power imbalances between parties.⁴⁴⁴ These include:

⁴³⁵ *Family Law Act 1975* (Cth) s 60J. See also Victoria Legal Aid, *Submission no. 30*, 9.

⁴³⁶ Victoria Legal Aid, *Submission no. 30*, 9; Loretta Kelly, *Transcript of evidence*, above n 401, 19. The use of restorative justice in family violence matters is discussed in chapter 12.

⁴³⁷ Astor, above n 434, 18-19.

⁴³⁸ Ian Goodhardt, *Transcript of evidence*, above n 407, 5.

⁴³⁹ Kathy Mack, *Court referral to ADR: Criteria and research* (2003) National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 58.

⁴⁴⁰ See, for example, Gail Winkworth and Morag McArthur, Family Relationship Centre, *Framework for screening, assessment and referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008) Attorney-General's Department, Commonwealth.

⁴⁴¹ See also Meg Henham, *Transcript of evidence*, above n 407, 3, 5.

⁴⁴² *Ibid.*

⁴⁴³ *Australian National Mediator Standards: Practice standards* (2007) s 4.

⁴⁴⁴ EWOV, *Submission no. 16*, 9; Consumer Action Law Centre, *Submission no. 15*, 8; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 7; Legal Services Commissioner, *Submission no. 31S*, 4; Susan Cibau, Senior Conciliation Officer, Accident Compensation Conciliation Service, *Transcript of evidence*, Melbourne, 11 February 2008, 6; Department of Justice, above n 351, 24-26.

- legislative safeguards about when ADR is or is not appropriate⁴⁴⁵
- thorough screening mechanisms⁴⁴⁶
- co-mediation or co-conciliation, where there are two ADR practitioners present⁴⁴⁷
- seeking feedback from the participants throughout the session.⁴⁴⁸

Several stakeholders also emphasised the importance of legal representation or access to legal advice in addressing power imbalances.⁴⁴⁹ This issue is discussed further in the next section.

NADRAC has highlighted that ADR practitioners must be adequately trained to ensure they have the skills required to identify power imbalances (particularly situations where there may be violence) and to take action to address these.⁴⁵⁰ Stakeholders in this Inquiry also identified the need to train ADR practitioners about identifying and addressing power imbalances.⁴⁵¹ However, they did not provide any detailed information about current training programs or the components of a best practice training program in this area.

The Committee recognises that power imbalances have the potential to significantly impact on the quality of ADR processes and outcomes. It believes it is important for all ADR service providers to have mechanisms in place to identify and address these imbalances. The Committee notes that ADR providers in Victoria currently use a variety of mechanisms to identify and address power imbalances, including screening, providing additional support to participants and modifying the ADR process.

In particular, the Committee believes that it is essential for ADR practitioners and intake staff to have the skills to identify and address power imbalances. Therefore, it emphasises the importance of initial and ongoing training on power issues for these staff. While the Committee did not receive detailed evidence about the possible contents of this training, it believes that the strategies for addressing power imbalances, outlined in the NMAS Practice Standards, provide a useful starting point.

⁴⁴⁵ Victoria Legal Aid, *Submission no. 30*, 9.

⁴⁴⁶ Walter Ibbs, Acting Manager, Roundtable Dispute Management Service, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 25 February 2008, 3; Fiona Hollier, *Transcript of evidence*, above n 340, 10.

⁴⁴⁷ Lynne Coulson Barr, *Transcript of evidence*, above 395, 9.

⁴⁴⁸ Margaret Halsmith, *Transcript of evidence*, above n 431, 10.

⁴⁴⁹ Albert Monichino, Victorian Chapter Committee Member, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 8. See also Walter Ibbs, *Transcript of evidence*, above n 446, 3; Justice Kellam, *Transcript of evidence*, above n 331, 5-6. Cf EWOV, *Submission no. 16*, 9.

⁴⁵⁰ NADRAC, above n 397, 192-193.

⁴⁵¹ Albert Monichino, *Transcript of evidence*, above n 449, 8; Health Services Commissioner, *Submission no. 19*, 6; Victoria Legal Aid, *Submission no. 30*, 9.

Recommendation 11: Training on power imbalances in ADR

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide intake staff and ADR practitioners with initial and ongoing training to ensure that they have the skills to identify and address power imbalances.

4.6.3 Access to legal advice and representation

Some stakeholders suggested that access to legal advice or legal assistance was important to facilitate access to justice in ADR processes.⁴⁵² Ms Meg Henham of the Family Mediation Centre told the Committee that the centre recommends clients seek legal advice throughout the ADR process so that they are aware of their legal entitlements.⁴⁵³ However, Professor Sourdin of the University of Queensland expressed concern about the limited opportunities for parties to obtain legal advice in relation to ADR in the family law area.⁴⁵⁴

Mr Walter Ibbs of Victoria Legal Aid told the Committee that at roundtable dispute management – an ADR process conducted by Victoria Legal Aid in relation to family law issues – one of the parties is always legally aided and the other party is strongly encouraged to seek legal assistance.⁴⁵⁵ Victoria Legal Aid's submission identified the lack of free legal advice for those in need as a major barrier to members of disadvantaged communities accessing ADR services.⁴⁵⁶ The Law Institute of Victoria expressed concern that without access to legal advice, disadvantaged individuals may not be fully informed or aware of what their legal entitlements are and may therefore settle for less in ADR. The Law Institute suggested the restoration of the national legal aid scheme as the best way to address the needs of disadvantaged communities.⁴⁵⁷

The Committee acknowledges that people may require access to legal assistance before and during the ADR process so that they understand their legal entitlements. The Committee therefore is of the view that the government should develop mechanisms to ensure that those accessing ADR services are provided with information about community legal centres and other relevant legal services, and are referred to these services where appropriate.

⁴⁵² See, for example, Victorian Aboriginal Legal Service, *Submission no. 32*, 7; Greta Clarke, Research Officer, Victorian Aboriginal Legal Service, *Transcript of evidence*, Melbourne, 25 February 2008, 3; Federation of Community Legal Centres Victoria, *Submission no. 39*, 1-2.

⁴⁵³ Meg Henham, *Transcript of evidence*, above n 407, 3, 5. See also Shane Quinn, *Transcript of evidence*, above n 372, 4.

⁴⁵⁴ Tania Sourdin, *Transcript of evidence*, above n 331, 5.

⁴⁵⁵ Walter Ibbs, *Transcript of evidence*, above n 446, 2.

⁴⁵⁶ Victoria Legal Aid, *Submission no. 30*, 13.

⁴⁵⁷ Law Institute of Victoria, *Submission no. 20*, 11.

Recommendation 12: ADR and access to legal advice

The Victorian Government should develop mechanisms to ensure that ADR providers provide consumers with information about community legal centres and other relevant legal services, and refer consumers to these services where appropriate.

4.7 Removing barriers to accessing ADR

As noted earlier in this chapter, ADR has many features which potentially increase access to justice. However, ADR services may not be equally accessible to all members of the community. For example, research conducted by Professor Sourdin found that age, gender, socio-economic and geographical factors are determinants of whether people access ADR services.⁴⁵⁸

In this section the Committee identifies a range of barriers that may prevent some members of the community from accessing ADR and highlights strategies for addressing these.

4.7.1 Geographical barriers

Several stakeholders in this Inquiry commented that ADR services are not equally accessible to all Victorians, particularly those living outside Melbourne. Professor Sourdin told the Committee ‘there are very large parts of Victoria that do not have dispute resolution and complaints services’.⁴⁵⁹ Mr Terefe Aborete who manages the Refugee and Settlement Program for Centacare Catholic Family Services informed the Committee:

the presence or location of the service itself really matters. With most of the refugees now, the inner suburbs are becoming out of reach totally, and they are settling in the outer suburbs of Melbourne, so really the location of the service itself matters. Coming to Melbourne itself is made so difficult or almost impossible.⁴⁶⁰

Some ADR service providers participating in this Inquiry identified community visits as a means of facilitating access to their services.⁴⁶¹ Mr Ibbs of Victoria Legal Aid stated ‘[y]ou have to get out there and be able to deliver from where the people are to get access to a service’.⁴⁶² The Accident Compensation Conciliation Service informed the Committee that it provides regional ADR services.⁴⁶³ EWOV’s submission highlighted that it makes regular visits to Victorian regional and urban areas to provide community briefings as well as visiting key community agencies.⁴⁶⁴

⁴⁵⁸ Tania Sourdin, ‘An alternative for who? Access to ADR processes’ (2007) 10(2) *ADR Bulletin*, 26, 26.

⁴⁵⁹ Tania Sourdin, *Transcript of evidence*, above n 331, 7.

⁴⁶⁰ Terefe Aborete, Manager, Refugee & Settlement Program, Centacare Catholic Family Services (Footscray), *Transcript of evidence*, Melbourne, 5 June 2008, 14.

⁴⁶¹ See, for example, Health Services Commissioner, *Submission no. 19*, 3; EWOV, *Submission no. 16*, 7.

⁴⁶² Walter Ibbs, *Transcript of evidence*, above n 446, 6.

⁴⁶³ Accident Compensation Conciliation Service, *Submission no. 21*, 3; Susan Cibau, *Transcript of evidence*, above n 444, 3.

⁴⁶⁴ EWOV, *Submission no. 16*, 7.

Recently, the Victorian Government opened a new Dispute Settlement Centre in Gippsland. The centre provides advice on resolving neighbourhood disputes, and a referral service for clients. It also organises face-to-face mediation and delivers conflict management workshops and mediation training courses. The Victorian Government has stated that it plans to open more ADR services in regional Victoria.⁴⁶⁵

The Committee notes that it is important for all Victorians to have access to ADR services wherever they live and encourages all service providers to implement an active outreach program. The Committee commends the Victorian Government for establishing a dispute settlement centre in Gippsland. It recommends that the government make such resources available throughout Victoria, including in outer suburban, rural and regional areas. The Committee did not receive specific evidence about where such services should be located, but recommends that they be established in a way that ensures maximum accessibility, particularly to members of disadvantaged groups.

Recommendation 13: Dispute settlement centres throughout Victoria

The Victorian Government should establish dispute settlement centres throughout the state to ensure that all Victorians have the opportunity to access these services.

4.7.2 Language barriers

Both the academic literature and evidence from stakeholders in this Inquiry suggest that language can be a significant barrier to some members of the community accessing ADR services. Language barriers may be a problem for both native English speakers as well as people from non-English speaking backgrounds. Mr Lo of the Ethnic Communities' Council of Victoria told the Committee that 'around 20 per cent of Victorians speak a language other than English at home ... a further 5 per cent of Victorians have difficulties with the English language'.⁴⁶⁶

A 2005 report by the National Centre for Vocational Education Research (NCVER) on literacy, numeracy and ADR found:

- While individuals with limited literacy and numeracy may be more likely to end up as parties to disputes such as those arising from interpreting contracts, franchises, building and other social interactions, literacy and numeracy issues may prevent these individuals from accessing or fully participating in ADR.
- ADR processes present high literacy and numeracy demands for those involved.

⁴⁶⁵ Attorney-General Rob Hulls, 'Gippsland first stop for dispute resolution expansion' (Media release, 30 January 2009).

⁴⁶⁶ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 2.

- Many ADR practitioners may not be aware of the limited literacy and numeracy skills of parties to disputes, or may rely on others to identify these prior to ADR.
- While ADR practitioners undertake general training about addressing power imbalances, they may need specific training for dealing with the limited literacy and numeracy of English-speaking Australians.⁴⁶⁷

The NCVER report recommended that literacy and numeracy associations develop specific resources to enable ADR practitioners to deal with issues associated with limited literacy and numeracy. It suggested that the resources should highlight the importance of continued explanation of complex written and numerical information, and provide strategies for addressing literacy and numeracy issues.⁴⁶⁸

Stakeholders recognised that some members of the community may have difficulties lodging complaints because of language difficulties. Both the Privacy Commissioner and the Health Services Commissioner acknowledged that the requirement to submit complaints in writing may create difficulties for people whose first language is not English or who have limited literacy.⁴⁶⁹ The Health Services Commissioner informed the Committee that her staff assists parties to formulate their complaints in writing.⁴⁷⁰

Most of the ADR service providers who participated in this Inquiry indicated that they provided free interpreter or translation services to facilitate access to non-English speakers or those with language difficulties.⁴⁷¹ For example, the Accident Compensation Conciliation Service informed the Committee that it had produced a video/DVD in eight languages, with an accompanying booklet in 12 languages, and also offers to provide a translation of any agreement reached at ADR.⁴⁷² The Disability Services Commissioner provides publications in plain English, with pictures for people with limited literacy skills, as well as brochures in Braille, audio and large print.⁴⁷³

However, Victoria Legal Aid submitted:

one of the main barriers to marginalised individuals accessing civil ADR services is lack of interpreter services ... [this] can be addressed through increased funding for language services (both interpreters for individuals and production of language-specific materials) ...⁴⁷⁴

⁴⁶⁷ J Joy Cumming and Janice M Wilson, *Literacy, numeracy and alternative dispute resolution* (2005) National Centre for Vocational Education Research, 6-7, 39.

⁴⁶⁸ *Ibid.*, 41.

⁴⁶⁹ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 2; Beth Wilson, Health Services Commissioner, Office of the Health Services Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 2.

⁴⁷⁰ Health Services Commissioner, *Submission no. 19*, 3.

⁴⁷¹ See, for example, EWOV, *Submission no. 16*, 6; Accident Compensation Conciliation Service, *Submission no. 21*, 3; Margaret Lothian, *Submission no. 17*, 12; Legal Services Commissioner, *Submission no. 31*, 5; Health Services Commissioner, *Submission no. 19*, 3; Lynne Coulson Barr, *Transcript of evidence*, above n 395, 8.

⁴⁷² Accident Compensation Conciliation Service, *Submission no. 21*, 3; Susan Cibau, *Transcript of evidence*, above n 444, 2.

⁴⁷³ Lynne Coulson Barr, *Transcript of evidence*, above n 395, 8.

⁴⁷⁴ Victoria Legal Aid, *Submission no. 30*, 13-14.

The Victorian Multicultural Commission submitted that interpreters working in ADR environments should receive specialist training and that ADR practitioners should also receive training on the ‘effective use of interpreters’.⁴⁷⁵

Stakeholders participating in the Committee’s Culturally and Linguistically Diverse Communities Forum emphasised the difficulties that language barriers create for members of CALD communities. Mr Lo of the Ethnic Communities’ Council of Victoria described language as ‘the most difficult barrier’ to CALD people accessing ADR.⁴⁷⁶

Ms Hantke of the Prahran Mission told the Committee that people with mental health issues or English language difficulties need someone ‘to sit down with them and fill out a paper’ because they may not understand the questions, or may be unable to write.⁴⁷⁷ She also emphasised the importance of having ‘language-friendly’ ADR services, with interpreters available on demand.⁴⁷⁸

Some stakeholders also emphasised the need for information to be available in non-written form. Mr Lo stated that new and emerging communities are ‘oral communities’, with many people not literate in their own language.⁴⁷⁹ Ms Anna Walker from Action on Disability within Ethnic Communities told the Committee that ‘if you are not literate in your own language, putting out lots of documentation and lots of flyers in your language is not going to enhance your access to the service’.⁴⁸⁰ Ms Walker opined ‘telling stories is a very good way of passing on information’.⁴⁸¹ Mr Aborete of Centacare Catholic Family Services recommended the development of multilingual audiovisual material, such as DVDs.⁴⁸²

Several stakeholders at the forum also emphasised that newly arrived immigrants should be encouraged, and provided with opportunities, to learn English. Mr Farah of the Horn-Afrik Employment and Training Advocacy Project told the Committee:

This is something that I say many times, and I am going to say it again: I think we have to encourage our new migrants to learn the language. Unless we know the language, we will not be able to get the proper choice that we need. We will not be able to present our views. We will not have a voice.⁴⁸³

The Committee notes that language and literacy issues may create barriers to a significant number of Victorians accessing ADR services. The Committee

⁴⁷⁵ Victorian Multicultural Commission, *Submission no. 34*, 3.

⁴⁷⁶ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 2. See also Ethnic Communities’ Council of Victoria, *Submission no. 40*, 2; Chantal Kabamba, President, Congolese Association of Victoria, *Transcript of evidence*, Melbourne, 5 June 2008, 9; Omar Farah, *Transcript of evidence*, above n 401, 11; Jenny Mutembu, Zambian community, *Transcript of evidence*, Melbourne, 5 June 2008, 15.

⁴⁷⁷ Nadine Hantke, *Transcript of evidence*, above n 361, 4.

⁴⁷⁸ *Ibid*, 11.

⁴⁷⁹ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 11.

⁴⁸⁰ Anna Walker, Action on Disability within Ethnic Communities, *Transcript of evidence*, Melbourne, 5 June 2008, 5. See also Omar Farah, *Transcript of evidence*, above n 401, 10; Terefe Aborete, *Transcript of evidence*, above n 460, 12.

⁴⁸¹ Anna Walker, *Transcript of evidence*, above n 480, 13.

⁴⁸² Terefe Aborete, *Transcript of evidence*, above n 460, 12.

⁴⁸³ Omar Farah, *Transcript of evidence*, above n 401, 11. See also Terefe Aborete, *Transcript of evidence*, above n 460, 12; Anna Walker, *Transcript of evidence*, above n 480, 13-14; Nadine Hantke, *Transcript of evidence*, above n 361, 15; Jenny Mutembu, *Transcript of evidence*, above n 476, 15.

acknowledges that ADR service providers in Victoria have already implemented a range of strategies to assist people with these issues including providing interpreters, providing translated materials or materials in plain English or on DVD, and providing assistance with writing complaints. However, the evidence received by the Committee suggests that language barriers may still prevent significant segments of the community from accessing ADR services.

The Committee believes that all ADR services in Victoria should implement strategies to increase access for people with language or literacy issues. This should include the types of mechanisms identified by stakeholders in this Inquiry.

The Committee also notes that there is scope to increase the capacity of ADR practitioners to work effectively with people who have language difficulties. The Committee believes that the Victorian Government, in consultation with relevant organisations in the community, including CALD and literacy organisations, should develop resources to assist ADR practitioners to deal effectively with people who have language difficulties. The resources should identify any potential barriers to effective participation, highlight the importance of continued explanation of complex written information, and suggest strategies for addressing literacy and related issues.⁴⁸⁴

Recommendation 14: Overcoming language barriers in ADR service provision

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide support for people with limited English language or literacy skills. Such support should include providing access to interpreter services; providing translated materials or materials in plain English or on DVD; and providing assistance with writing complaints.

Recommendation 15: Resources to assist ADR practitioners work with people with language difficulties

The Victoria Government should, in consultation with relevant organisations in the community, develop resources to assist ADR practitioners to work with people who have language and literacy issues. The resources should identify any potential barriers to effective participation, highlight the importance of continued explanation of complex written information, and suggest strategies for addressing literacy and related issues.

4.7.3 Awareness of ADR services

Current awareness of ADR and ADR services

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

⁴⁸⁴ Cumming and Wilson, above n 467, 41.

that provide them. 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 do not understand ADR processes or are not aware of ADR services.⁴⁸⁵

A 2006 study conducted by the Department of Justice found that 51% of respondents were aware of agencies able to assist in resolving disputes before they ended up in court.⁴⁸⁶ Another recent survey 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. However, there were low levels of awareness of other organisations, including the Dispute Settlement Centre of Victoria.⁴⁸⁷

Stakeholders participating in this Inquiry also highlighted low levels of awareness of ADR.⁴⁸⁸ NADRAC's submission acknowledged that limited consumer awareness and understanding of both ADR processes and ADR service providers is a 'significant barrier to achieving greater community use of ADR services at the earliest possible opportunity (i.e. before litigation is commenced)'.⁴⁸⁹

The Telecommunications Industry Ombudsman informed the Committee that it conducted a public awareness survey in 2006 and found awareness of that organisation was low among people aged under 25, people with disabilities, proprietors of small businesses, people from Indigenous backgrounds, people from non-English speaking backgrounds, and people living in rural and regional areas.⁴⁹⁰ Similarly, Ms Eliza Collier of the Financial Ombudsman Service highlighted that surveys had identified low levels of awareness of her organisation amongst both the 18 to 25 year age group and older people.⁴⁹¹

Current measures to raise awareness of ADR and ADR services

ADR service providers participating in this Inquiry reported using a variety of strategies to raise awareness both of their services and ADR generally. Some examples of the types of activities that were highlighted in stakeholder submissions are set out in this section.

The Victoria Law Foundation informed the Committee that it has produced a plain language publication, *Working it out: A user's guide to dispute resolution processes*,

⁴⁸⁵ Field, above n 353, 80-81.

⁴⁸⁶ Department of Justice, Victoria, *Victorian perceptions of justice survey (2) October-December 2006* (2007), 5.

⁴⁸⁷ Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 10-12; Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 15-17.

⁴⁸⁸ See, for example, Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 13; NADRAC, *Submission no. 25*, 4; The Mediator Group, *Submission no. 3*, 8; Health Services Commissioner, *Submission no. 19*, 4; Victoria Legal Aid, *Submission no. 30*, 6; Law Institute of Victoria, *Submission no. 20*, 6; Angela O'Brien, Senior Vice President, National Council, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 8; Gerard Brody, *Transcript of evidence*, above n 408.9; Walter Ibbs, Acting *Transcript of evidence*, above n 446, 6; Margaret Lothian, *Submission no. 17*, 5-6.

⁴⁸⁹ NADRAC, *Submission no. 25*, 4. See also Victoria Legal Aid, *Submission no. 30*, 13.

⁴⁹⁰ Telecommunications Industry Ombudsman, *Submission no. 23*, 4.

⁴⁹¹ Eliza Collier, Policy and Public Affairs Manager, Banking and Financial Services Ombudsman, *Transcript of evidence*, Melbourne, 11 February 2008, 6.

which promotes the use of mediation and conciliation.⁴⁹² In addition, the Foundation worked with VCAT to produce a video which aims to introduce the mediation process.⁴⁹³

In terms of promoting specific services, Mr Mark Brennan, the Victorian Small Business Commissioner, emphasised the importance of engaging the media, professional and industry associations, and local councils.⁴⁹⁴ The Victorian Health Services Commissioner, Ms Beth Wilson, told the Committee:

Accessibility has been a big challenge for my office. I do over a hundred speeches a year ... But every time I do one of those, up will go the hands, with 'Why didn't I know about you before? We could have used you.' I have chosen not to engage in heavy, expensive advertising programs partly because I do not want to alienate people who give my office a lot of assistance – the medical profession, for example... If I had advertisements out there saying, 'Have you got a complaint about your doctor?' I would lose a lot of the goodwill that we get at the moment.⁴⁹⁵

Ms Wilson told the Committee that her office also provides information through the Department of Human Services' health channel and through general practitioners and nursing staff.⁴⁹⁶

Ms McLeod, the Energy and Water Ombudsman, told the Committee that EWOV is promoted on each consumer's electricity, gas and water bill once a year and on every disconnection warning notice. EWOV also has an extensive community outreach program.⁴⁹⁷ Other service providers also highlighted their outreach programs as an important component of their services' promotion.⁴⁹⁸

Some service providers also aim to promote awareness of disputes that may arise in specific contexts. For example, the Financial Ombudsman Service and Telecommunications Industry Ombudsman have jointly developed an education package targeted at young people, with case studies on mobile phones, credit cards and buying cars.⁴⁹⁹

Promoting the Dispute Settlement Centre of Victoria

The Dispute Settlement Centre of Victoria (DSCV) is a major supplier of ADR services for the Victorian community. Data provided by the Department of Justice indicates that in 2006-07 the DSCV received 15 757 consumer contacts and referred 1398 matters to an ADR process.⁵⁰⁰ However, as noted earlier in this chapter, the DSCV has a relatively low level of consumer awareness. Research conducted for the Department of Justice found that only 16% of individuals and 20% of small

⁴⁹² Victoria Law Foundation, *Submission no. 4*, 1-2.

⁴⁹³ *Ibid.*, 1-2. The video can be viewed at <<http://www.vcat.vic.gov.au/>>.

⁴⁹⁴ Mark Brennan, *Transcript of evidence*, above n 407, 4.

⁴⁹⁵ Beth Wilson, *Transcript of evidence*, above n 469, 2-3.

⁴⁹⁶ *Ibid.*, 3-5.

⁴⁹⁷ Fiona McLeod, Energy and Water Ombudsman, Energy and Water Ombudsman (Victoria), *Transcript of evidence*, Melbourne, 4 March 2008, 5-6; EWOV, *Submission no. 16*, 6.

⁴⁹⁸ Ombudsman Victoria, *Submission no. 24*, 6-7; Legal Services Commissioner, *Submission no. 31*, 4; Beth Wilson, *Transcript of evidence*, above n 469, 3.

⁴⁹⁹ Eliza Collier, *Transcript of evidence*, above n 491, 6.

⁵⁰⁰ Letter from Rob Hulls, above n 327, 1.

businesses surveyed were aware of the DSCV, compared to 92% of individuals and 97% of small businesses who reported that they were aware of CAV.⁵⁰¹

Mr Myers of the Department of Justice told the Committee:

I suppose it is not surprising that an organisation like CAV would have a very high level of recognition, because it has such a broad mandate. We tended to find that brand recognition was lower for specialist ADR organisations ... For an organisation like CAV, where people tend to come directly to government from a range of locations with problems, high recognition is probably more important than for an organisation like DSCV that tends to work closely with the courts and the community and particular targeted communities.⁵⁰²

His colleague, Mr Griffin, also acknowledged the low profile of the DSCV and suggested that there was scope to promote the centre more widely:

It has a staff of 18 and has a budget of \$2 million. We have not been able to convince successive governments to properly resource the dispute settlement centre, so with the resources that we have we believe the dispute settlement centre is doing a good job. We have tended to focus on our contacts with the community, such as local councils ... We try to promote it through local government and try to promote it through various communities, but we are also conscious of not overstretching the resources that we have.⁵⁰³

The Committee is concerned that the DSCV, which is a key provider of ADR services, is not well known in the Victorian community, and believes that the Victorian Government should ensure that potential users are aware of the services provided by the DSCV. The Committee recognises that a high level of community awareness of the DSCV will be particularly important as dispute settlement centres are increasingly provided throughout the state, as recommended above.

The Victorian Government should use a wide range of communication mechanisms identified by stakeholders in this Inquiry, such as community outreach, printed material, the internet and DVDs and multilingual material to more widely disseminate information about the DSCV, as well as work with community organisations, representatives and elders, which is discussed in further detail below.

Recommendation 16: Increasing public awareness of the Dispute Settlement Centre of Victoria

The Victorian Government should ensure that potential users are aware of the services provided by the DSCV. Strategies to increase awareness of the DSCV should include community outreach, media, printed material, the internet, DVDs and multilingual information, and working with community organisations, representatives and elders.

⁵⁰¹ Peacock, Bondjakov and Okerstrom, Business survey, above n 322, 15-16; Peacock, Bondjakov and Okerstrom, Community survey, above n 322, 10.

⁵⁰² Paul Myers, *Transcript of evidence*, above n 320, 12.

⁵⁰³ John Griffin, *Transcript of evidence*, above n 419, 6.

Figure 4: Koories Know Your Rights! Program⁵⁰⁴

The Koories Know Your Rights! Program commenced in June 2004. The program is coordinated by Consumer Affairs Victoria (CAV), and many government agencies, industry ombudsmen and community organisations are involved in the program's delivery. The program aims to improve access to government services by Indigenous Victorians. The program is delivered throughout Victoria and the format varies according to the needs of the particular audience. Four forums were held in 2006 while ten were run in 2007 in both metropolitan and regional centres.

The forums are designed to:

- inform participants about the range of services available
- facilitate dialogue between agencies and Indigenous people about issues facing Indigenous communities.

The program makes particular use of case studies to highlight examples of people trying to solve problems and the different ways that agencies might assist. Participants are given the opportunity to ask questions and are provided with information in the form of leaflets and tip sheets from the participating organisations.

The program is promoted by host organisations, usually Indigenous organisations, and through Regional Aboriginal Justice Advisory Committees (RAJAC), with support from CAV's regional offices.

Ms Fiona McLeod, the Energy and Water Ombudsman, described the program to the Committee:

We go on a roadshow with them [CAV] and a number of other complaint handling agencies like Ombudsman Victoria, Office of the Public Advocate, Guardianship and Administration Board. We travel around Koori communities, and with Koori staff in the Indigenous Consumers Unit, which makes it much easier obviously than just turning up there on your own. We have seen an increase in the number of complaints from Koori customers. We tend to get complaints at the time. I have certainly been on a number of visits where we have had complaints. Disconnection seems endemic in some of those communities, so it is important to get messages out there.⁵⁰⁵

The Victorian Privacy Commissioner submitted that:

Throughout this project, frontline workers are being targeted with a series of regionally based information and education events designed to inform them of the range of services available. It is hoped that this will also facilitate dialogue with the agencies about the types of issues facing indigenous communities. Events are tailored to suit each individual locality in order to maximise attendance and participation.⁵⁰⁶

Mr Rocky Tregonning of the DSCV informed the Committee that CAV is looking at streamlining the program across different tiers in the community, to schools, communities and workers, as well as to the non-Indigenous workers who work with the communities.⁵⁰⁷

⁵⁰⁴ Letter from Dr David Cousins, Executive Director, Consumer Affairs Victoria, to Chair, Victorian Parliament Law Reform Committee, 7 April 2008.

⁵⁰⁵ Fiona McLeod, *Transcript of evidence*, above n 497, 5.

⁵⁰⁶ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 8.

⁵⁰⁷ Rocky Tregonning, *Transcript of evidence*, above n 405, 15.

Raising awareness of ADR among disadvantaged groups

Many stakeholders, especially those participating in the forums the Committee held for members of the CALD and Indigenous communities, told the Committee that there was a need to raise awareness of ADR among disadvantaged individuals and groups.⁵⁰⁸

Mr Rocky Tregonning, Aboriginal Projects Officer at the DSCV, told the Committee that his organisation is ‘getting mainstream people referred but Kooris are not; they are slipping through the system ... I do not know whether it is fear or a lack of knowledge of our service provision’.⁵⁰⁹

Ms Jenny Mutembu from the Zambian community commented:

I never knew about the ADRs ... If we got educated about what this is all about, maybe we could go back into our own communities and tell them about this alternative that is available to all of us, that instead of going straight to court we can use other means.⁵¹⁰

The Ethnic Communities’ Council of Victoria’s submission also highlighted the low levels of awareness of ADR services among CALD communities, particularly new and emerging communities. Mr Lo of the Council told the Committee:

the current challenge is to develop appropriate and effective mechanisms for communication and awareness, to highlight the advantages of services such as ADR. Major work needs to be done to promote these services to people from CALD and refugee communities to ensure that they are using these services and the services are meeting their needs.⁵¹¹

Several stakeholders praised the Koories Know Your Rights! Program as a highly effective method of increasing awareness of ADR and other services amongst the Indigenous community in Victoria.⁵¹² The program is described in figure 4.

Stakeholders in this Inquiry indicated that a ‘multi-faceted approach’⁵¹³ was required and suggested a range of other mechanisms for enhancing awareness of ADR amongst disadvantaged individuals and groups, including:

⁵⁰⁸ See, for example, Jieh-Yung Lo, *Transcript of evidence*, above n 334, 3; Jenny Mutembu, Zambian community, *Transcript of evidence*, above n 476, 8; Chantal Kabamba, *Transcript of evidence*, above n 476, 9; Terefe Aborete, *Transcript of evidence*, above n 460, 9; Omar Farah, *Transcript of evidence*, above n 401, 10; Rocky Tregonning, *Transcript of evidence*, above n 405, 12; Angela Dupuche, Family Mediator/Family Support Worker, Melbourne Citymission, *Transcript of evidence*, Melbourne, 30 June 2008, 12; Taryn Lee, Indigenous Education and Complaint Officer, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 30 June 2008, 14; Rosie Smith, Project Manager, Koori Programs and Initiatives, Courts and Tribunal Services, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 14; Jean Vickery, Koori Elder, Koori Court, Broadmeadows Magistrates’ Court, *Transcript of evidence*, Melbourne, 30 June 2008, 15. See also Office of the Victorian Privacy Commissioner, *Submission no. 8*, 8; Victoria Legal Aid, *Submission no. 30*, 14; Victorian Aboriginal Legal Service, *Submission no. 32*, 23; LEADR, *Submission no. 36*, 13; Law Institute of Victoria, *Submission no. 20*, 11.

⁵⁰⁹ Rocky Tregonning, *Transcript of evidence*, above n 405, 12.

⁵¹⁰ Jenny Mutembu, *Transcript of evidence*, above n 476, 8.

⁵¹¹ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 3. See also Ethnic Communities’ Council of Victoria, *Submission no. 40*, 2-3.

⁵¹² Rocky Tregonning, *Transcript of evidence*, above n 405, 15; Office of the Victorian Privacy Commissioner, *Submission no. 8*, 8; Fiona McLeod, *Transcript of evidence*, above n 497, 5.

- providing information in a variety of media (for example, print, community radio and internet) and languages⁵¹⁴
- providing case studies and using real examples⁵¹⁵
- using Indigenous colours and artwork on promotional material.⁵¹⁶

Several stakeholders spoke about the need to involve the community in the development of material and to partner with other community groups for its dissemination.⁵¹⁷ Both of these issues are discussed further later in this chapter.

Several stakeholders supported a more coordinated approach to promoting ADR, both between agencies and between agencies and governments.⁵¹⁸ NADRAC's submission stated governments can play a key role in promoting ADR, but argued that promotion should be at a national level:

if each Australian government were to undertake separate promotional campaigns based on differing understandings of the range of ADR services, the benefits of ADR, or that promote different models of ADR, the result is likely to be a level of national confusion ... Accordingly, NADRAC would strongly encourage Australian governments considering undertaking campaigns to promote ADR services to collaborate with other governments to ensure a consistent national message is sent.⁵¹⁹

However, not all stakeholders supported a centralised government awareness program. Both EWOV and the Telecommunications Industry Ombudsman commented that there is an ongoing need to raise ADR awareness as consumers need the information when they have a dispute and that individual services are best placed to provide this information.⁵²⁰

The Committee believes that there is a lack of awareness and understanding of ADR processes and services available in Victoria which may impede access to ADR services. In the Committee's view, active steps need to be taken to increase awareness of ADR services generally but in particular to disadvantaged individuals

⁵¹³ Victorian Multicultural Commission, *Submission no. 34*, 2.

⁵¹⁴ LEADR, *Submission no. 36*, 13; Jieh-Yung Lo, *Transcript of evidence*, above n 334, 3; George Lekakis, *Transcript of evidence*, above n 334, 2-3; Terefe Aborete, *Transcript of evidence*, above n 460, 9-10; Victorian Multicultural Commission, *Submission no. 34*, 2; Ethnic Communities' Council of Victoria, *Submission no. 40*, 3.

⁵¹⁵ Christof Lancucki, *Transcript of evidence*, above n 433, 13; Anna Walker, *Transcript of evidence*, above n 480, 14-15; Nadine Hantke, *Transcript of evidence*, above n 361, 14.

⁵¹⁶ Victorian Aboriginal Legal Service, *Submission no. 32*, 23; Greta Clarke, *Transcript of evidence*, above n 452, 3; Jean Vickery, *Transcript of evidence*, above n 508, 15; Angela Dupuche, *Transcript of evidence*, above n 508, 12; Fiona McLeod, *Transcript of evidence*, above n 497, 5. See also Mandala Consulting Services, *Review of the Dispute Settlement Centre of Victoria Koori program* (2002), 14.

⁵¹⁷ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 8; Law Institute of Victoria, *Submission no. 20*, 6; Victorian Multicultural Commission, *Submission no. 34*, 2-3.

⁵¹⁸ See, for example, Victoria Legal Aid, *Submission no. 30*, 14; The Mediator Group, *Submission no. 3*, 8; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 13; Walter Ibbs, *Transcript of evidence*, above n 446, 6; Angela O'Brien, *Transcript of evidence*, above n 488, 8; Gerard Brody, *Transcript of evidence*, above n 408, 9; Beth Wilson, *Transcript of evidence*, above n 469, 3; NADRAC, *Submission no. 25*, 4.

⁵¹⁹ NADRAC, *Submission no. 25*, 4.

⁵²⁰ EWOV, *Submission no. 16*, 7; Telecommunications Industry Ombudsman, *Submission no. 23*, 4.

and groups. The Committee concludes that both individual service providers and the government generally have a role in raising public awareness of ADR services and they should collaborate wherever possible, including at a national level.

The Committee therefore recommends that the Victorian Government develop a strategy for better informing Victorians about ADR in consultation with ADR providers, professional associations, community organisations and community leaders. The Committee recognises that there is no one-size-fits-all method of increasing public awareness of ADR and that a multi-faceted approach is required to cater to the communication preferences of a diverse range of community groups. Thus, the proposed strategy should include a range of communication media to better disseminate information on ADR, including those suggested by stakeholders in this Inquiry. In particular, the Committee commends the Koories Know Your Rights! Program, which represents a partnership approach to information provision. The Committee believes there is scope for developing similar programs for other disadvantaged groups in Victoria, particularly the CALD community.

Recommendation 17: Increasing public awareness of ADR

The Victorian Government should, in conjunction with ADR service providers, professional associations, community organisations, community leaders and NADRAC, develop a strategy to better inform Victorians about the availability of ADR to ensure that the community – in particular disadvantaged individuals and groups – are aware of the availability of ADR services. This strategy should use a wide range of approaches including community outreach, media, printed material and DVDs, and the internet. This strategy should also include a multilingual component.

Recommendation 18: Increasing awareness of ADR in the CALD community

The Victorian Government should implement an awareness program based on the Koories Know Your Rights! Program to more widely disseminate information about ADR services to the culturally and linguistically diverse community.

Increasing access to ADR through community partnerships

There is limited information available about how community members find out about or are referred to ADR services. A survey of ADR providers conducted by the Department of Justice reported high levels of referral from other service providers, community legal centres, government departments and welfare agencies.⁵²¹ These reflect the types of organisations in the community that people commonly turn to when they have a dispute.

⁵²¹ Department of Justice, above n 351, 17.

Research by the New South Wales Law and Justice Foundation found that non-legal services that are ‘familiar’ (such as government and welfare agencies, insurance companies, banks, trade unions and other professionals) are often the first port-of-call for socially or economically disadvantaged people with legal problems.⁵²² Research conducted by the DSCV noted that Indigenous people with disputes tend to first contact their local Indigenous community organisations.⁵²³

Stakeholder evidence also suggested that there is a wide range of organisations in the community that currently refer people to ADR services, or have the capacity to do so. These include:

- courts⁵²⁴
- community legal centres⁵²⁵
- lawyers⁵²⁶
- educational institutions⁵²⁷
- government departments⁵²⁸
- members of parliament⁵²⁹
- police⁵³⁰
- financial advisors⁵³¹
- local councils⁵³²
- hospitals and general practitioners⁵³³
- multicultural organisations such as migrant resource centres⁵³⁴
- workplaces.⁵³⁵

Ms Hollier of LEADR told the Committee ‘we think that there are a range of other professionals in fields such as education and health who could be also referring through appropriate education’.⁵³⁶ Ms Walker from Action on Disability within Ethnic Communities stated ‘I think having appropriate referrals is important, and

⁵²² Sophie Clarke and Suzie Forell, *Pathways to justice: The role of non-legal services* (2007) New South Wales Law and Justice Foundation Paper 1, 1-2.

⁵²³ Mandala Consulting Services, above n 516, 13.

⁵²⁴ Meg Henham, *Transcript of evidence*, above n 407, 3; Rocky Tregonning, *Transcript of evidence*, above n 405, 4.

⁵²⁵ Meg Henham, *Transcript of evidence*, above n 407, 3.

⁵²⁶ *Ibid*; Fiona Hollier, *Transcript of evidence*, above n 340, 5.

⁵²⁷ Fiona Hollier, *Transcript of evidence*, above n 340, 5.

⁵²⁸ Frances Wood, Policy and Research Officer, Energy and Water Ombudsman (Victoria), *Transcript of evidence*, Melbourne, 4 March 2008, 15; Fiona McLeod, *Transcript of evidence*, above n 497, 15.

⁵²⁹ Frances Wood, *Transcript of evidence*, above n 528, 15; Fiona McLeod, *Transcript of evidence*, above n 497, 15.

⁵³⁰ Anne Goldsborough, *Transcript of evidence*, above n 419, 10; Jieh-Yung Lo, *Transcript of evidence*, above n 334, 12; Rocky Tregonning, *Transcript of evidence*, above n 405, 4.

⁵³¹ Frances Wood, *Transcript of evidence*, above n 528, 15; Fiona McLeod, *Transcript of evidence*, above n 497, 3.

⁵³² Anne Goldsborough, *Transcript of evidence*, above n 419, 10; Rocky Tregonning, *Transcript of evidence*, above n 405, 4; John Griffin, *Transcript of evidence*, above n 419, 6.

⁵³³ Beth Wilson, Health Services Commissioner, *Transcript of evidence*, above n 469, 4; Fiona Hollier, *Transcript of evidence*, above n 340, 5.

⁵³⁴ Ethnic Communities' Council of Victoria, *Submission no. 40*, 3; Jieh-Yung Lo, *Transcript of evidence*, above n 334, 3.

⁵³⁵ Fiona Hollier, *Transcript of evidence*, above n 340, 5.

⁵³⁶ *Ibid*, 5.

again, that depends on the agencies knowing about the system and understanding it'.⁵³⁷

However, only two stakeholders suggested a specific strategy for engaging these potential referrers and educating them about ADR. The Victorian Multicultural Commission suggested that protocols for referrals need to be established between these groups, CAV and ADR service providers.⁵³⁸ The Ethnic Communities' Council of Victoria also supported referral protocols 'between ethno-specific agencies and mainstream legal providers'.⁵³⁹

The Committee recognises that there are a wide range of organisations that members of the community may approach for assistance when they have a problem or dispute. The Committee is of the view that these organisations need to be well informed about ADR and the services provided by the various ADR providers, as well as understanding the specific mechanisms for making a referral.

To assist with appropriate referrals, the Committee believes it is important to develop partnerships or links between ADR providers and organisations that people commonly approach when they have a dispute, including government departments, the police, local councils, welfare services, educational institutions, health services, community legal centres and peak community-based organisations (such as multi-cultural and Indigenous centres, migrant and refugee resource centres and citizen advice bureaus). The Committee recommends that referral protocols should be established between ADR service providers and these organisations to increase appropriate referrals. In addition, the Committee recommends that the Victorian Government develop a strategy for engaging and educating these organisations about ADR so as to facilitate the appropriate referral of cases to ADR services.

Recommendation 19: Referral protocols between ADR providers and other organisations

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to develop referral protocols with other organisations that members of the community (especially members of disadvantaged groups) commonly turn to when they have a dispute.

Recommendation 20: Educating referring organisations about ADR

The Victorian Government should develop an ADR education strategy for organisations that members of the community commonly turn to when they have a dispute. This should include information about:

- the philosophy of ADR and its aims, benefits and potential outcomes
- ADR processes, service providers and how to make a referral to ADR services.

⁵³⁷ Anna Walker, *Transcript of evidence*, above n 480, 5.

⁵³⁸ Victorian Multicultural Commission, *Submission no. 34*, 2.

⁵³⁹ Ethnic Communities' Council of Victoria, *Submission no. 40*, 3.

4.7.4 Culturally appropriate services

The Committee received evidence that ADR processes may be particularly culturally appropriate to members of the Indigenous and CALD communities. For example, the Victorian Aboriginal Legal Service submitted that ‘ADR is closer to Indigenous Australian dispute resolution’.⁵⁴⁰ Similarly, the Victorian Multicultural Commission stated that ADR ‘can be quite consistent with cultural practices within many of Victoria’s migrant and refugee communities’.⁵⁴¹ This section considers how mainstream ADR services can be enhanced to deliver culturally appropriate ADR services to these communities.

Community involvement in service delivery

Community involvement in the delivery of ADR services is essential to facilitate access for a broad range of groups. This is because some members of the community may have a general distrust of government or other formal institutions and processes. For example, Ms Chantal Kabamba of the Congolese Association of Victoria stated that members of the CALD community often do not access services because ‘[t]here is a problem of a lack of trust because some of them come from very traumatic backgrounds, with war and all that. Now there is a big system with bureaucracy. How do I trust that? It becomes a problem’.⁵⁴²

Involving community members in the delivery of the program is one way of making it appear more ‘trustworthy’. NADRAC has acknowledged that the presence of Indigenous mediators and staff has resulted in the use of ADR services by Indigenous persons who had previously avoided such services.⁵⁴³ Research conducted on behalf of the Department of Justice found:

Koori people only feel comfortable accessing mainstream government services when they know that they will be dealing with other Kooris employed by these agencies. This is particularly crucial for agencies associated with courts because of the concern in the community about the way justice services have been historically delivered.⁵⁴⁴

... the use of Indigenous Mediators to conduct mediations involving Indigenous community members was seen as vital: in attracting Kooris to approach and use the service in the first place and then to the ultimate success of the dispute resolution/mediation process itself.⁵⁴⁵

In recognition of the importance of community involvement in ADR service delivery, DSCV has developed a culturally appropriate model for training Indigenous

⁵⁴⁰ Victorian Aboriginal Legal Service, *Submission no. 32*, 16.

⁵⁴¹ Victorian Multicultural Commission, *Submission no. 34*, 3. See also LEADR, *Submission no. 36*, 13.

⁵⁴² Chantal Kabamba, *Transcript of evidence*, above 476, 9. See also Nadine Hantke, *Transcript of evidence*, above n 361, 4; Rocky Tregonning, *Transcript of evidence*, above n 405, 15; Jean Vickery, *Transcript of evidence*, above n 508, 15.

⁵⁴³ National Alternative Dispute Resolution Advisory Council (NADRAC), *Indigenous dispute resolution and conflict management* (2006), 13.

⁵⁴⁴ Mandala Consulting Services, above n 516, 12. See also Beth Wilson, *Transcript of evidence*, above n 469, 2.

⁵⁴⁵ Mandala Consulting Services, above n 516, 18.

mediators.⁵⁴⁶ While the Victorian Aboriginal Legal Service emphasised that, ‘[m]ediators need to be broadly representative of the community and acceptable to the whole community’,⁵⁴⁷ the Committee is not aware of any organisations other than DSCV that provide Koori ADR practitioners. In addition, DSCV has an Aboriginal Project Officer, Mr Rocky Tregonning, who told the Committee: ‘As the only Aboriginal worker in the office, most Aboriginal cases are referred to me’.⁵⁴⁸ The Health Services Commissioner, Ms Beth Wilson, told the Committee that she employs a full-time Aboriginal liaison officer ‘because Koori Australians will not use mainstream agencies unless there is a Koori presence there’.⁵⁴⁹

Similarly, the Committee received evidence that members of the CALD community can also significantly benefit from the presence of multicultural staff. For example, Mr Lo of the Ethnic Communities’ Council of Victoria told the Committee that a multicultural liaison officer can ‘highlight the positives and advantages of ADR services to CALD communities’.⁵⁵⁰ Mr George Lekakis, Chairperson of the Victorian Multicultural Commission, commented:

the best procedure in dealing with mediation is to use bilingual mediators, so you avoid the notion of having interpretative information not being carried properly ... We have had the experience with a dispute resolution centre, where there has been the employment and training of bilingual personnel, and by far that is obviously the optimum scenario. It also acts to provide better skills for people in the community who engage in this sort of work, and it also allows you to tap into some of the candidates in new and emerging languages and new communities, who could possibly act as mediators.⁵⁵¹

The Committee is aware that DSCV has trained mediators from CALD communities, although understands that these mediators act informally in their own communities rather than providing services for DSCV.⁵⁵² This is discussed further in chapter 6.

The Committee believes that ADR practitioners and others working in ADR service providers should be drawn from a range of backgrounds and experience to represent the diversity of the Victorian community. The Committee commends DSCV’s Koori mediator program and encourages other service providers to recruit and train staff with appropriate skills from a wide range of backgrounds and experience. The Committee believes that the presence of CALD and Indigenous ADR practitioners and liaison officers has the potential to encourage members of disadvantaged groups – including those who would otherwise not approach ADR providers – to access ADR services.

⁵⁴⁶ Ibid, 14-17.

⁵⁴⁷ Victorian Aboriginal Legal Service, *Submission no. 32*, 21.

⁵⁴⁸ Rocky Tregonning, *Transcript of evidence*, above n 405, 4.

⁵⁴⁹ Beth Wilson, *Transcript of evidence*, above n 469, 2.

⁵⁵⁰ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 14. See also Nadine Hantke, *Transcript of evidence*, above n 361, 14.

⁵⁵¹ George Lekakis, *Transcript of evidence*, above n 334, 3; Victorian Multicultural Commission, *Submission no. 34*, 3.

⁵⁵² John Griffin, *Transcript of evidence*, above n 419, 6.

Recommendation 21: Recruitment of ADR staff

The Victorian Government should encourage all ADR providers to recruit and train staff with appropriate skills who have a wide range of backgrounds and experience that will enable providers to better meet the needs of the range of clients that they serve, including clients from the Indigenous and CALD communities.

Community involvement in service development

Professor Sourdin of the University of Queensland has noted that unless the ADR service delivery model is culturally appropriate and has community input, it ‘may be simply supporting western norms or understandings’.⁵⁵³ Again, the notion of community involvement in service design was strongly supported by participants in two forums convened by the Committee. For example, Ms Rosie Smith of the Koori Programs and Initiatives Unit at the Department of Justice, told the Committee that ‘[a]nything that is going to be set up needs to be talked about among the community first, to find out what it is that they want to have in it and how they want to run it, so that it is something that is going to provide them with a positive outcome’.⁵⁵⁴

The submission of the Victorian Aboriginal Legal Service (VALS) proposed that Indigenous Victorians should have a choice between a targeted Indigenous ADR service or a culturally sensitive mainstream ADR service.⁵⁵⁵ Ms Greta Clarke of VALS informed the Committee that the DSCV is the only culturally sensitive mainstream ADR organisation. She described a proposal for a targeted Indigenous ADR service to the Committee:

I can talk to you about a proposal that the Victorian Aboriginal Legal Service had on the books for a long time, and this proposal has just never been funded. Ultimately we want to set up a Koori Dispute Settlement Centre. What that would look like is maybe we would employ a project officer at VALS to spend about nine months researching the literature, perhaps talking to communities in two areas – so we would have the pilot in two areas – forming a local reference group and ultimately coming up with a model...

[W]e would have a coordinator role at the Victorian Aboriginal Legal Service ... We would also have an intake worker and we would employ sessional mediators who were Koori, so we would train them up ... The focus of this particular project I am telling you about is around family law, child protection issues, family violence, because there is a huge gap there at the moment.⁵⁵⁶

No other stakeholders commented on the need for an Indigenous-specific service. NADRAC has, however, noted that it is not possible for all disputes involving Indigenous people to be addressed by Indigenous-specific services as legislation may

⁵⁵³ Sourdin, above n 418, 64.

⁵⁵⁴ Rosie Smith, *Transcript of evidence*, above n 508, 9. See also Loretta Kelly, *Transcript of evidence*, above n 401, 17; Victoria Legal Aid, *Submission no. 30*, 14; Victorian Aboriginal Legal Service, *Submission no. 32*, 21; Greta Clarke, *Transcript of evidence*, above n 452, 2-3.

⁵⁵⁵ Victorian Aboriginal Legal Service, *Submission no. 32*, 21.

⁵⁵⁶ Greta Clarke, *Transcript of evidence*, above n 452, 3-4.

require participants to use a mainstream service (such as a court or tribunal). Further, Indigenous-specific services may be inappropriate in disputes between Indigenous and non-Indigenous participants.⁵⁵⁷

The Committee believes that it is important to have wide stakeholder input into ADR service and program set up and delivery. It recognises that this is particularly important for the Indigenous and CALD communities.

The Committee acknowledges that DSCV has a successful Koori mediator program, and has recommended that DSCV should be expanded to operate throughout Victoria. The Committee recommends that a Koori program be implemented throughout Victoria as part of the statewide rollout of dispute settlement centres. The Committee also recommends that staff in regional dispute settlement centres are recruited and trained to enable the centres to better meet the needs of the range of clients they serve. The Committee notes the Victorian Aboriginal Legal Service's suggestion that an Indigenous-specific ADR service should be established, but did not receive sufficient evidence to make recommendations about Indigenous-specific services. The Committee draws the Victorian Aboriginal Legal Service's suggestion to the government's attention for further investigation and consideration.

Recommendation 22: Community involvement in ADR service development

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to consult and involve members of the community, especially community leaders and peak community organisations, in the development and ongoing provision of ADR services and programs.

Recommendation 23: Staffing of regional dispute settlement centres

The Victorian Government should, in establishing dispute settlement centres throughout Victoria as recommended in recommendation 13, ensure that staff are appropriately recruited and trained to enable the centres to better meet the needs of the range of clients that they serve, including offering the Koori mediator program.

Cultural training for ADR service providers

Many stakeholders providing evidence to the Committee emphasised the need for ADR service providers to have an understanding of the people using their services, and recommended cross-cultural training for ADR practitioners.

Ms Kabamba of the Congolese Association of Victoria outlined the rationale for cross-cultural training:

⁵⁵⁷ NADRAC, above n 543, 8.

They should try to understand at least the composition of the community they are serving. They are all different nationalities, they are all different religions, they are all different tribes. You have got to know how to approach them, you have got to have time to try to serve these people.⁵⁵⁸

Similarly, Mr Lekakis of the Victorian Multicultural Commission told the Committee:

Practitioners involved in ADR programs and services obviously need to have cultural sensitivities, so the issue about cross-cultural training for practitioners of ADR services is essential. This includes an understanding of traditional community values, family roles, pre-arrival experiences, the cultural appropriateness of interventions, options and training on the effective use of interpreters. So anybody who does mediation work or is involved in the delivery of these alternative dispute resolution services needs to have that as part of their ongoing training, and familiarity with the different cultural groups they will be dealing with.⁵⁵⁹

Mr Lo of the Ethnic Communities' Council of Victoria agreed that ADR practitioners should have cross-cultural training and suggested that this should include 'case studies, group work and engagements and visits to community groups'.⁵⁶⁰

Stakeholders representing the Indigenous community also emphasised the need for cross-cultural training for ADR service providers. The Victorian Aboriginal Legal Service's submission stated that '[w]here non-Aboriginal mediators are used, these mediators must have undergone cultural awareness training and must have significant experience in dealing with Aboriginal people, families and communities'.⁵⁶¹ Ms Smith of the Department of Justice informed the Committee that the cross-cultural training provided for magistrates in the Koori Court had been highly successful and emphasised that '[i]t is not just the one-off cultural awareness training that stays in people's minds; it is the ongoing listening, seeing and anticipating'.⁵⁶²

The Committee did not receive any evidence about cross-cultural training currently provided to ADR practitioners in Victoria.

A NADRAC discussion paper released over a decade ago suggested the establishment of a national ADR information network to enable ADR providers to share practical information about dispute resolution techniques having regard to the needs of particular groups.⁵⁶³ This was strongly supported by the Ethnic Communities' Council of Victoria and Victoria Legal Aid.⁵⁶⁴ The Victorian Aboriginal Legal Service stated that '[i]nformation should be shared between

⁵⁵⁸ Chantal Kabamba, *Transcript of evidence*, above n 476, 12.

⁵⁵⁹ George Lekakis, *Transcript of evidence*, above n 334, 2.

⁵⁶⁰ Jieh-Yung Lo, *Transcript of evidence*, above n 334, 3; Ethnic Communities' Council of Victoria, *Submission no. 40*, 2.

⁵⁶¹ Victorian Aboriginal Legal Service, *Submission no. 32*, 21.

⁵⁶² Rosie Smith, *Transcript of evidence*, above n 508, 13.

⁵⁶³ NADRAC, above n 397, 194.

⁵⁶⁴ Ethnic Communities' Council of Victoria, *Submission no. 40*, 3; Victoria Legal Aid, *Submission no. 30*, 15.

practitioners about best practice dispute resolution techniques in relation to Indigenous Australians'.⁵⁶⁵

The Committee believes that ADR practitioners need to be able to provide appropriate advice and services to all members of the Victorian community. It therefore recommends that Victorian ADR practitioners and intake staff, at ADR services who are operating in a cross-cultural environment, receive regular cross-cultural training. This will enhance their ability to make any necessary changes to the ADR process or to their communication style to accommodate cultural factors.

In addition, the Committee supports the development of an ADR information network to allow ADR providers and practitioners to share information about ADR, particularly in relation to disadvantaged groups. Such a network would provide a forum for the exchange of ADR best practice techniques, aid ADR learning and development, and enhance ADR practice in Victoria. The Committee did not receive any submissions about how such an information network should be developed. It also notes that this would benefit from a coordinated national approach. The Committee therefore believes that this is a matter which the proposed ADR Committee could explore further in collaboration with NADRAC.

Recommendation 24: Cross-cultural training for ADR providers

The Victorian Government should require all government ADR providers, and encourage all other ADR providers operating in a cross-cultural environment, to provide regular cultural awareness training for intake staff and ADR practitioners. The training should provide an understanding of traditional community values including family roles, pre-arrival migrant and refugee experiences, the cultural appropriateness of ADR interventions, effective use of interpreters and communication styles and preferences.

Recommendation 25: An ADR information network

The Victorian Government should, through the proposed ADR Committee and in consultation with NADRAC, develop an ADR information network to enable ADR providers to share useful practical information, including best practice ADR techniques, particularly in relation to members of the Indigenous and CALD communities.

⁵⁶⁵ Victorian Aboriginal Legal Service, *Submission no. 32*, 21.

Chapter 5 – Regulating ADR

The terms of reference for this Inquiry ask the Committee to consider whether a form of government regulation of ADR providers is appropriate or feasible so as to ensure greater consistency and accountability for Victorians wishing to access ADR. As the demand for ADR services grows, there is increasing interest in mechanisms for ensuring service quality. This chapter considers the current regulation of ADR providers in Victoria and discusses whether further regulation is required.

5.1 What is regulation?

Governments around the world are increasingly moving away from prescriptive approaches to regulation and towards more innovative, less costly, more flexible and more effective approaches.⁵⁶⁶ The Commonwealth Interdepartmental Committee on Quasi-regulation, a Committee established by the Australian Government to consider the extent and benefit of quasi-regulation, defined regulation broadly:

Regulation includes any law or ‘rule’ which influences the way people behave. Regulation is not limited to government legislation; and it need not be mandatory.⁵⁶⁷

The Office of Best Practice Regulation, an agency which promotes the Australian Government’s objective of improving the effectiveness and efficiency of regulation, has claimed that the challenge for government is to deliver regulation which is effective in addressing an identified problem and efficient in maximising the benefits to the community while taking into account the costs.⁵⁶⁸

The principal forms of regulation can be presented along a continuing spectrum of increasing government involvement. At one end of the spectrum lies self-regulation; at the other end lies explicit government regulation. This is illustrated in figure 5.

5.2 Current ADR regulation in Victoria

ADR is subject to various regulatory mechanisms at the Commonwealth, state and territory level.⁵⁶⁹ At a national level there are two accreditation schemes, namely, the National Mediation Accreditation Scheme (NMAS) and the accreditation system for family dispute resolution practitioners. This section provides a brief outline of the current regulation of ADR providers in Victoria, with a particular focus on the two national accreditation schemes. A more detailed summary of the current regulatory framework in Victoria is provided in tables 1 to 4 in appendix E.

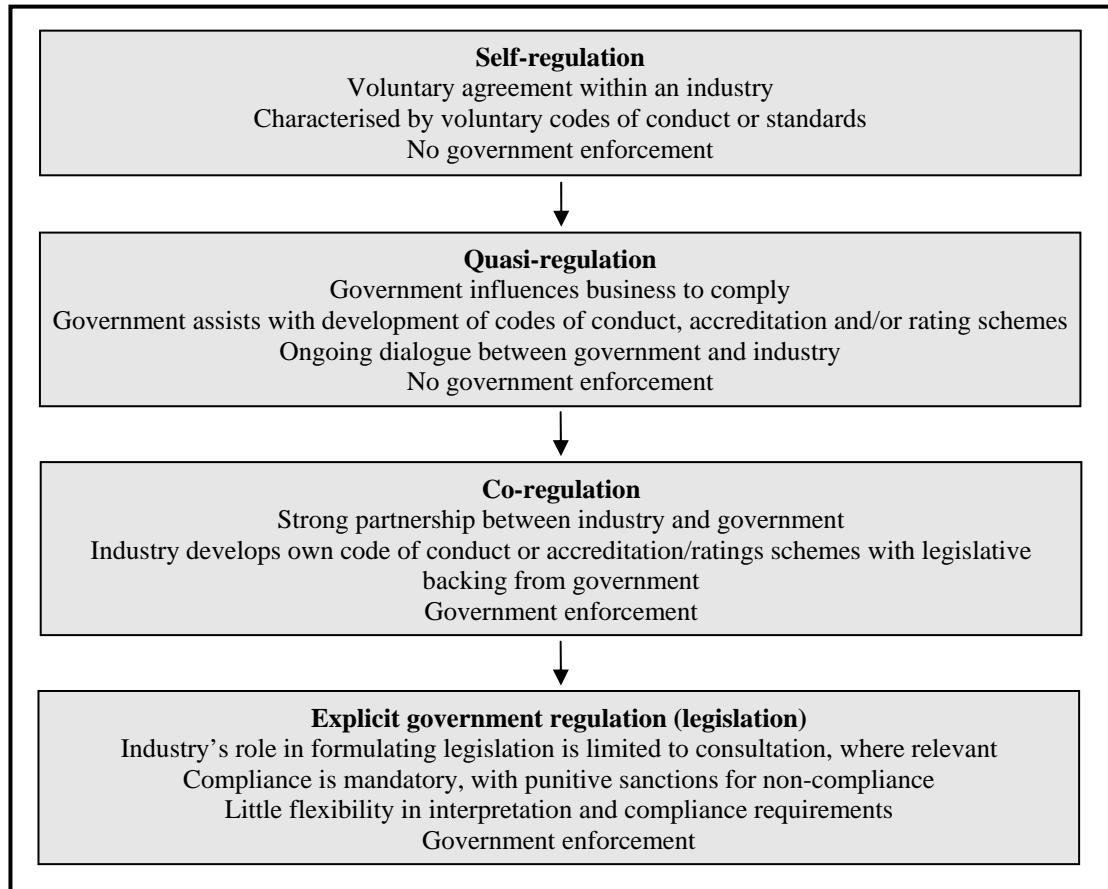
⁵⁶⁶ Office of Best Practice Regulation, Commonwealth, *Best practice regulation handbook* (2006), 95. See also Nadja Alexander, ‘What’s law got to do with it? How the world is regulating mediation’ (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008), 3.

⁵⁶⁷ Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation* (1997), 2.

⁵⁶⁸ Office of Best Practice Regulation, above n 566, 1.

⁵⁶⁹ National Alternative Dispute Resolution Advisory Council (NADRAC), *A framework for ADR standards: Report to the Commonwealth Attorney-General* (2001), 44.

Figure 5: Regulation continuum⁵⁷⁰



5.2.1 Court and tribunal-annexed ADR

The increased use of court-annexed mediation both in Victoria and throughout Australia has led to the introduction of many court and tribunal specific regulatory provisions in legislation and court rules.

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.

⁵⁷⁰ Department of Treasury and Finance, Victoria, *Victorian guide to regulation*, (2nd edition) (2007), 2-9. See also Office of Best Practice Regulation, above n 566, 95-104; Department of Treasury and Finance, Victoria, *Victorian guide to regulation*, (2nd edition) (2007), B1-B4; Commonwealth Interdepartmental Committee on Quasi-regulation, above n 567, 2-3; National Alternative Dispute Resolution Advisory Council (NADRAC), *The development of standards for ADR: Discussion paper* (2000), 92-93.

5.2.2 Public ADR providers

There are various government agencies and departments at the Commonwealth, state and territory levels which provide a wide range of ADR services. In Victoria, the Department of Justice has established the Dispute Settlement Centre of Victoria, an agency which provides advice, assistance and mediation services to resolve community and neighbourhood disputes, and Consumer Affairs Victoria (CAV), which is the Government's main provider of conciliation services for consumer disputes.

In Victoria, publicly funded statutory schemes offering ADR services include the Victorian Equal Opportunity and Human Rights Commission and the Accident Compensation and Conciliation Service. Public ADR providers often have their own standards, codes of conduct and professional rules which cover ADR.

5.2.3 Industry ADR schemes

Industry ombudsman, or external dispute resolution (EDR), schemes are largely a product of the privatisation of services such as energy services, and industry self-regulation.⁵⁷¹ EDR scheme members agree to submit their consumer disputes to the applicable industry scheme for resolution.⁵⁷² However, most EDR schemes rely on 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.⁵⁷³

EDR schemes operate in accordance with their respective charters, constitution, and the *Benchmarks for industry-based customer dispute resolution schemes*.⁵⁷⁴ The requirements of these benchmarks are summarised in figure 6.

Most EDR schemes are members of a peak body which requires compliance with certain standards. For example, the Energy and Water Ombudsman (Victoria), the Public Transport Ombudsman (Victoria) and the Telecommunications Industry Ombudsman are members of the Australian and New Zealand Ombudsman Association Inc (ANZOA).⁵⁷⁵ One of ANZOA's objectives is to formulate and

⁵⁷¹ Anita Stuhmcke, 'The relevance of industry ombudsmen' (2002) *March Law Society Journal*, 73, 73; Chris Field, Chris Field Consulting Pty Ltd, *Alternative dispute resolution in Victoria: Supply-side research project research report* (2007) Department of Justice, Victoria, 29.

⁵⁷² Field, above n 571, 30.

⁵⁷³ Ibid, 34.

⁵⁷⁴ Anita Stuhmcke, 'Resolving consumer disputes: Out of the courts and into private industry' (2003) 31 *Australian Business Law Review*, 48, 51; Fiona McLeod, Alison Maynard, Victoria Marles, Diane Carmody, Jo Benvenuti and Peter Hardham, 'Resolving customer disputes: Case studies and current issues' (Paper presented at the ADR - A Better Way to do Business Conference, Sydney, 4-5 September 2003); Department of Industry, Science and Tourism, Commonwealth, *Benchmarks for industry-based customer dispute resolution schemes* (1997).

⁵⁷⁵ See Australian and New Zealand Ombudsman Association, *About ANZOA*, <<http://www.anzoa.com.au/docs/about.html>>, viewed 16 February 2009.

promote standards of best practice including the adoption of the *Benchmarks for industry-based customer dispute resolution schemes*.⁵⁷⁶

Figure 6: Benchmarks for industry-based customer dispute resolution schemes⁵⁷⁷

<p>1. Accessibility</p> <p>The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.</p>
<p>2. Independence</p> <p>The decision-making process and administration of the scheme are independent from scheme members.</p>
<p>3. Fairness</p> <p>The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.</p>
<p>4. Accountability</p> <p>The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.</p>
<p>5. Efficiency</p> <p>The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.</p>
<p>6. Effectiveness</p> <p>The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.</p>

5.2.4 Private ADR providers

Organisations whose professional members provide ADR services, such as the Victorian Bar, the Law Institute of Victoria, the Institute of Arbitrators & Mediators Australia (IAMA) and LEADR – Association of Dispute Resolvers (LEADR) have their own standards, codes of practice, professional rules, and accreditation requirements.

⁵⁷⁶ See *ibid*; Department of Industry, Science and Tourism, above n 574.

⁵⁷⁷ Department of Industry, Science and Tourism, above n 574, 10.

In addition, a number of peak organisations are Registered Training Organisations under the Australian Recognition Framework and offer nationally accredited courses of study in ADR.⁵⁷⁸

5.2.5 National Mediator Accreditation Scheme (NMAS)

In Australia, work on the development of ADR professional standards has largely been focused on mediators, who are the largest group of ADR practitioners in this country. Following years of discussion and extensive consultations about mediator accreditation and standards, NMAS commenced in 2008. NMAS is described in figure 7.

There is widespread support for NMAS, including among participants in this Inquiry.⁵⁷⁹

LEADR informed the Committee that, since the inception of NMAS, it has set up procedures to function as a Recognised Mediation Accreditation Body (RMAB) and accredit mediators. As of February 2009, it had accredited 260 mediators nationally.⁵⁸⁰ Justice North of the Federal Court of Australia stated that the Federal Court has become a RMAB and from 1 July 2008 would use non-accredited mediators only in exceptional circumstances.⁵⁸¹

In their initial submissions, both the Victorian Bar and the Law Institute of Victoria explained they were against uniform minimum standards applying to all ADR practitioners as they already have their own accreditation systems in place.⁵⁸² However, since that time, the Bar and the Law Institute have both become RMABs and can accredit practitioners under NMAS.⁵⁸³

⁵⁷⁸ NADRAC, above n 569, 23.

⁵⁷⁹ Attorney-General Robert McClelland (Speech delivered at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 10 September 2008); Tania Sourdin, *Australian National Mediator Accreditation System: Report on project* (2007), 4, 6; Tania Sourdin, Professor of Law, The University of Queensland (Melbourne Campus), *Transcript of evidence*, Melbourne, 29 November 2007, 2-3; Victorian Association for Dispute Resolution Inc. (VADR), *Submission no. 10*, 5; LEADR - Association of Dispute Resolvers (LEADR), *Submission no. 36*, 14-15; Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 10; Fiona Hollier, Chief Executive Officer, LEADR, *Transcript of evidence*, Melbourne, 4 March 2008, 3; National Alternative Dispute Resolution Advisory Council (NADRAC), *Submission no. 25*, 7; Accident Compensation Conciliation Service, *Submission no. 21*, 9; Susan Cibau, Senior Conciliation Officer, Accident Compensation Conciliation Service, *Transcript of evidence*, Melbourne, 11 February 2008, 4; The Mediator Group, *Submission no. 3*, 18.

⁵⁸⁰ Letter from Fiona Hollier, Chief Executive Officer, LEADR, to Victorian Parliament Law Reform Committee, 16 February 2009.

⁵⁸¹ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 10. See also Tania Sourdin, *Transcript of evidence*, above n 579, 2-3.

⁵⁸² Law Institute of Victoria, *Submission no. 20*, 14-15; Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 11; The Victorian Bar, *Submission no. 13*, 83, 85-86; Danielle Huntersmith, Vice Chair, Dispute Resolution Committee, Accredited Mediator, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 5, 7-8.

⁵⁸³ See National Alternative Dispute Resolution Advisory Council (NADRAC), *ADR providers*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADR_Providers>, viewed 12 February 2009.

Figure 7: Australian National Mediator Accreditation System⁵⁸⁴

The National Mediator Accreditation Scheme (NMAS), a voluntary accreditation system for mediators, commenced operation on 1 January 2008.

Under NMAS, Recognised Mediation Accreditation Bodies (RMABs) accredit mediators in accordance with the NMAS requirements. Currently, there is a self-recognition framework for RMABs.⁵⁸⁵ RMABs currently include the Federal Court of Australia, the Institute of Arbitrators & Mediators Australia, the Law Institute of Victoria, the Victorian Bar, and the Victorian Civil and Administrative Tribunal.⁵⁸⁶

NMAS sets threshold accreditation and practice standards for mediators. NMAS recognises that a mediator may also be subject to other accreditation schemes. A mediator may therefore seek accreditation under both NMAS and a more specific ADR accreditation scheme, such as that for family dispute resolution practitioners (see figure 8).

The accreditation system specifies approval and practice requirements for mediators through Approval and Practice Standards.

The Approval Standards:

- specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system
- set out minimum qualifications and training
- assist to inform participants, prospective participants and others as to what qualifications and competencies can be expected of mediators.

The Practice Standards specify practice and competency requirements for mediators.

The National Mediator Accreditation Committee (NMAC) has been established to implement NMAS. NMAC has a broad membership, including RMABs, mediator training and education organisations, professional bodies and government representatives. NMAC's role includes:

- developing and reviewing the operation of the standards
- developing a national register of accredited mediators
- monitoring, auditing and supporting complaints-handling processes
- promoting mediation.

NMAC will operate for two years and will establish the permanent National Mediator Standards Body (NMSB) which will oversee the accreditation system from 2010.

⁵⁸⁴ See National Alternative Dispute Resolution Advisory Council (NADRAC), *National Mediator Accreditation System*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem>, viewed 16 February 2009; NADRAC, *Submission no. 25S*.

⁵⁸⁵ See National Alternative Dispute Resolution Advisory Council, *How can my organisation become an RMAB?*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_HowcanmyorganisationbecomeanRMAB>, viewed 16 February 2009.

⁵⁸⁶ See NADRAC, above n 583; NADRAC, *Submission no. 25S*, 3-4.

In a supplementary submission, the Bar informed the Committee that it commenced accreditation under NMAS on 1 April 2008. As of 16 March 2009, the Bar has accredited 237 barristers under NMAS.⁵⁸⁷ The Bar explained:

The Victorian Bar still questions the necessity to introduce global regulation of ADR for those already regulated in the conduct of the professional practice in which they act as mediators – as all legal practitioners are. However, in view of support for the NMAS in the Supreme Court of Victoria and in the Federal Court of Australia, the Bar has chosen to commit to the NMAS and to ‘opt-in’.⁵⁸⁸

5.2.6 Family law accreditation scheme

The Australian Government has established an accreditation system in the family law area to promote quality service provision in line with the recent reforms to the family law system and, in particular, to the responsibilities of family dispute resolution practitioners.⁵⁸⁹ While dispute resolution in relation to family law is a Commonwealth matter and outside the scope of this Inquiry, the Committee has examined the family law accreditation scheme as the only example of a mandatory national scheme regulating ADR practitioners in Australia. The family dispute resolution practitioner accreditation system is set out in figure 8.

5.2.7 International developments

There has also been interest in the regulation of ADR practitioners at an international level.

The International Mediation Institute (IMI), a not-for-profit foundation based in The Hague, offers a worldwide certification scheme for commercial mediators who meet certain requirements.⁵⁹⁰ IMI certification enables users of commercial mediation services to identify experienced, competent mediators worldwide.⁵⁹¹ According to Australian ADR expert, Professor Nadja Alexander, IMI certification ‘offers local mediators a global voice, national bodies an international benchmark, and users of mediation confidence in the mediation profession worldwide’.⁵⁹² The IMI has developed a code of professional conduct that provides users of mediation services with a concise statement of the ethical standards they can expect from mediators who choose to adopt its terms and sets standards that they can be expected to meet.

⁵⁸⁷ Telephone conversation between Ross Nankivell, Legal Policy Officer, The Victorian Bar and Executive Officer, Victorian Parliament Law Reform Committee, 16 March 2009.

⁵⁸⁸ The Victorian Bar, *Submission no. 13S*, 1.

⁵⁸⁹ Australian Government Attorney-General's Department, *Registration process for Family Dispute Resolution providers*, 5.

⁵⁹⁰ The International Mediation Institute (IMI) was created by the Netherlands Mediation Institute, Singapore Mediation Centre/Singapore International Arbitration Centre, and the International Centre for Dispute Resolution/American Arbitration Association. See International Mediation Institute, *About IMI*, <http://www.imimediation.org/about_imi.html>, viewed 16 February 2009.

⁵⁹¹ See International Mediation Institute, *Quick guide to becoming IMI certified via the experience qualification path*, <http://www.imimediation.org/becoming_certified.html>, viewed 16 February 2009.

⁵⁹² See International Mediation Institute, *Quote unquote*, <http://www.imimediation.org/quote_unquote.html>, viewed 16 February 2009.

Figure 8: Accreditation of family dispute resolution practitioners⁵⁹³

The new family law accreditation system has been introduced to ensure that those providing family dispute resolution meet a set of nationally consistent standards. Interim accreditation arrangements are in place from 1 July 2006 to 30 June 2009 and a final accreditation system will be implemented in mid 2009.

The new standards include specific competencies for all family dispute resolution practitioners including:

- responding to family violence
- creating a supportive environment for the safety of vulnerable parties in dispute resolution
- operating in a family law environment.

There are three pathways to meet the accreditation requirements that will take effect from July 2009:

- completion of the full Vocational Graduate Diploma of Family Dispute Resolution (or equivalent)
- an appropriate qualification or accreditation under NMAS and competency in the six compulsory units from the Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent)
- inclusion in the Family Dispute Resolution Register maintained by the Commonwealth Attorney-General's Department before 1 July 2009 and competency in the three specified units (or equivalent).

Registered training organisations and higher education providers will deliver the training and assessment required to be accredited under the new system.

Mr Shane Quinn of the Greensborough Family Relationship Centre, explained the training and accreditation requirements to the Committee:

It is prescribed as a family dispute resolution practitioner in the family law regulations which is about having an appropriate degree, diploma or other appropriate qualifications of three years law, social science backgrounds or backgrounds in conflict management, social sciences. We have two family lawyers, about three or four psychologists, three social workers and other family therapists who make up the team.

The family dispute resolution practitioners need to meet the accreditation and the Attorney-General monitors that. There are two stages. The Attorney-General's Department and Community Services and Health Industry Skills Council, and they are both put in together – a diploma in family dispute resolution which is being rolled out towards the end of this year. It is an interim arrangement at the moment through these three years. People will either have to meet some of the competency they have with earlier experience or they will need to go through the full vocational graduate diploma. That will be in place by the middle of 2009, these interim arrangements will lapse with that accreditation. For family relationship advisers, we ask that people have a background in diplomas, degrees and experience in community services.⁵⁹⁴

⁵⁹³ See National Alternative Dispute Resolution Advisory Council, *Accreditation of family dispute resolution practitioners*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatIsADR_FamilyDisputeResolution_AccreditationofFamilyDisputeResolutionPractitioners>, viewed 20 March 2009; *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth); Australian Government Attorney-General's Department, above n 589.

⁵⁹⁴ Shane Quinn, Manager, Greensborough Family Relationship Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 6.

While IMI-certified mediators are required to make known to users which code of conduct governs their professional mediation practice, they are not required to select IMI's code.⁵⁹⁵ Justice Murray Kellam, a Victorian Supreme Court judge who is also Chair of the National Alternative Dispute Resolution Advisory Council (NADRAC), has noted that NMAS is broadly compatible with the international standards established by the IMI.⁵⁹⁶

The Committee did not receive any information about the extent to which Australian mediators are participating in the IMI.

5.3 Is there a need to further regulate ADR in Victoria?

ADR is increasingly being used across a diverse range of settings in Victoria. The push for increased regulation of ADR arises mainly from the concern that users of these services might suffer because of variable service quality.

NADRAC has articulated that regulation of ADR, in the form of practice standards, is important to:

- enhance the quality and ethics of ADR practice
- protect consumers
- facilitate consumer education about ADR
- build consumer confidence in ADR services
- improve credibility of ADR as an alternative to litigation
- build capacity and coherence of the ADR field.⁵⁹⁷

The drive for increased regulation of ADR has come, in part, from practitioners seeking to have ADR recognised as a profession. ADR expert Professor Hilary Astor has observed that ten years ago 'most people did not know the difference between mediation, medication and meditation. That is beginning to change'.⁵⁹⁸ Mr Alan Wein, from the Mediator Group, an ADR service provider, informed the Committee, 'Mediation and ADR has emerged as a new 'PROFESSION' in its own right and not as a tangent of quasi-para process of an established profession such as legal practice ...',⁵⁹⁹

⁵⁹⁵ See International Mediation Institute, *IMI code of professional conduct*, <http://www.imimediation.org/code_professional_conduct-.html>, viewed 16 February 2009.

⁵⁹⁶ Justice Murray Kellam, 'Transforming the professional landscape - mediation accreditation' (Speech delivered at the 9th National Mediation Conference, Perth, 12 September 2008), 13-14.

⁵⁹⁷ NADRAC, above n 569, 69-70. See also Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 290.

⁵⁹⁸ Hilary Astor, 'Transforming the landscape of mediation' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008), 8.

⁵⁹⁹ The Mediator Group, *Submission no. 3*, 4-5. See generally David Ardagh, 'Is mediation now a profession?' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008); Rachael Field, 'A mediation profession in Australia: An improved framework for mediation ethics' (2007) 18 *Australasian Dispute Resolution Journal*, 178; NADRAC, above n 569, 16; Graeme Fraser and Christine Grice, 'The dispute resolution practitioner: Aiming for professionalism in a deregulated environment' (2008) 27(1) *The Arbitrator and Mediator*, 1.

The Committee received conflicting evidence about whether users of ADR services suffered any loss or detriment as a result of the lack of regulation of ADR services. Several stakeholders highlighted the *potential* for users of ADR services to experience detriment because of unregulated services. The Victorian Association for Dispute Resolution – a not-for-profit ADR interest group – submitted that, currently, ‘there is insufficient information available to consumers about the range and quality of services available, and the accountability mechanisms for ADR providers are inadequate’.⁶⁰⁰

The fact that ADR processes are conducted in private and are not subject to public scrutiny arguably adds to the need to ensure service quality. Justice Kellam of the Supreme Court of Victoria told the Committee:

there are no standards, so anyone can hang up his or her sign and say, ‘I am a mediator.’ And as distinct from a court process, it is not transparent, and I think that is an issue of some significance, if you do not have appropriate standards. Whereas you can sit in court and see what happens and you can analyse the written reasons, if a mediator misbehaves and applies too much pressure to people it is not something you know about because it happens in a room, often in a caucus. I think they are some of the issues which can really only be addressed, I think, through appropriate standards.⁶⁰¹

However, while recognising the potential risk of detriment to service users, some stakeholders argued that there are no *actual* problems.⁶⁰² For example, Mr Lawrence Reddaway of IAMA told the Committee, ‘I do not know that there is any proper evidence that there is insufficient proficiency amongst ADR practitioners’.⁶⁰³ Similarly, Ms Margaret Lothian, Principal Mediator of the Victorian Civil and Administrative Tribunal (VCAT), stated ‘there is the potential for harm in the unregulated environment – intellectually there is the potential for harm – but I am unaware of actual evidence of the harm’.⁶⁰⁴

The Legal Services Commissioner, an independent statutory body which receives complaints about legal practitioners, informed the Committee that while it may receive disciplinary complaints about lawyers providing mediation services, it receives few such complaints.⁶⁰⁵ The Department of Justice advised that CAV has not received any complaints about the services consumers received from ADR practitioners under the *Fair Trading Act 1999* (Vic).⁶⁰⁶ In addition, a report by CAV

⁶⁰⁰ VADR, *Submission no. 10*, 3. See also Victoria Legal Aid, *Submission no. 30*, 15-16.

⁶⁰¹ Justice Murray Kellam, Supreme Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3.

⁶⁰² See, for example, Energy and Water Ombudsman (Victoria) (EWOV), *Submission no. 16*, 15; The Victorian Bar, *Submission no. 13*, 77; Ian Lulham, Chair, ADR Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 4.

⁶⁰³ Lawrence Reddaway, Victorian Chapter Chair, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 2.

⁶⁰⁴ Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 11 February 2008, 3. See also Margaret Lothian, *Submission no. 17*, 13.

⁶⁰⁵ Legal Services Commissioner, *Submission no. 31S*. See also The Mediator Group, *Submission no. 3*, 4.

⁶⁰⁶ Letter from Rob Hulls, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 8 February 2008, attachment, 3.

in 2006, which sought to quantify detriment suffered by consumers in the market, did not identify any detriment caused by ADR practitioners.⁶⁰⁷

The main arguments against further regulation of ADR are that regulation would bar entry for some ADR practitioners, may result in higher costs for consumers and would cause ADR processes to lose their flexibility. All of these points were raised by stakeholders participating in this Inquiry.

Mr Ian Lulham, of the Law Institute of Victoria, told the Committee that ‘if you regulate it [ADR], it just becomes another little parallel court system’.⁶⁰⁸ The Victorian Bar submitted that ‘a less flexible and a more rigidly structured ADR process [will] ultimately increase the cost of ADR and reduce access to justice’.⁶⁰⁹ The Bar emphasised that further government regulation would also create ‘significant barriers to entry and [exclude] many new, as well as many current, experienced and capable ADR practitioners’.⁶¹⁰ The Victorian Aboriginal Legal Service was concerned that ‘bureaucratisation and credentialism’ would further preclude practitioner diversity and, in particular, participation by Indigenous Australians.⁶¹¹

Victoria Legal Aid, while supporting greater regulation of ADR practitioners, acknowledged that low levels of regulation allow services to be tailored for specific sectors and encourages innovation.⁶¹²

A few stakeholders questioned the need for further regulation on the basis that ADR practitioners and providers are already adequately regulated.⁶¹³ The Victorian Bar and the Law Institute of Victoria emphasised that lawyers are already subject to the *Legal Profession Act 2004* (Vic), codes of practice and professional rules.⁶¹⁴ Dr

⁶⁰⁷ Ibid, 6.

⁶⁰⁸ Ian Lulham, *Transcript of evidence*, above n 602, 4.

⁶⁰⁹ The Victorian Bar, *Submission no. 13*, 6. See also Tony Nolan, Advanced Mediator, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 2; Michael Heaton, Chair, Dispute Resolution Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 9; Law Institute of Victoria, *Submission no. 20*, 11-12; Department of Treasury and Finance, above n 570, 3-7.

⁶¹⁰ The Victorian Bar, *Submission no. 13*, 79. See also Margaret Lothian, *Submission no. 17*, 13; New South Wales Law Reform Commission, *Alternative dispute resolution: Training and accreditation of mediators: Discussion paper 21* (1989), paragraphs 4.20-4.23.

⁶¹¹ Victorian Aboriginal Legal Service, *Submission no. 32*, 10.

⁶¹² Victoria Legal Aid, *Submission no. 30*, 15-16. See also New South Wales Law Reform Commission, above n 610, paragraphs 4.20-4.23.

⁶¹³ See, for example, The Victorian Bar, *Submission no. 13*, 10, 30; Law Institute of Victoria, *Submission no. 20*, 5, 15; Tony Nolan, *Transcript of evidence*, above n 609, 3; Danielle Huntersmith, *Transcript of evidence*, above n 582, 5; David Cousins, Executive Director, Consumer Affairs Victoria, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 15; The Institute of Arbitrators & Mediators Australia (IAMA), *Submission no. 11*, 3; Fiona McLeod, Energy and Water Ombudsman, Energy and Water Ombudsman (Victoria), *Transcript of evidence*, Melbourne, 4 March 2008, 7; EWOV, *Submission no. 16*, 2, 15-16; Gerard Brody, Director, Policy & Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 2; Eliza Collier, Policy and Public Affairs Manager, Banking and Financial Services Ombudsman, *Transcript of evidence*, Melbourne, 11 February 2008, 3-4; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 15-16.

⁶¹⁴ The Victorian Bar, *Submission no. 13*, 10, 30; Law Institute of Victoria, *Submission no. 20*, 5, 15; Tony Nolan, *Transcript of evidence*, above n 609, 3; Danielle Huntersmith, *Transcript of evidence*, above n 582, 5. See also Legal Services Commissioner, *Submission no. 31S*.

David Cousins of CAV told the Committee that complaints against people providing ADR services as part of trade in commerce may be lodged under the *Fair Trading Act 1999* (Vic).⁶¹⁵ IAMA recommended weighing the benefits of the ‘new layers of enforcement bureaucracy’ against the benefits that may be more readily achieved through a system of encouragement and discipline enforced through existing professional bodies.⁶¹⁶

Ms Fiona McLeod, the Victorian Energy and Water Ombudsman, told the Committee that most industry ombudsman schemes are members of the Australian and New Zealand Ombudsman Association (ANZOA):

it would be fair to say that the members of ANZOA are satisfied with the current levels of regulation of its various entities. Some of them report directly to Parliament, the Parliamentary Commissioners. All of the others have very robust mechanisms holding them accountable and transparent. I think everyone is satisfied with the current regulatory arrangements in relation to the schemes.⁶¹⁷

The Committee notes that it did not receive any evidence about members of the community who actually experienced detriment as a result of a service provided by an ADR practitioner or provider. It also acknowledges the concerns that some stakeholders raised about the potential for the regulation of ADR processes to impact on the flexibility of ADR processes, as well as increase compliance costs.

However, the Committee recognises that the use of ADR services in Victoria is increasing. The Committee believes that all Victorians accessing ADR services deserve a service of high quality. This is particularly important where the ADR service is government funded or the parties are referred to ADR by a court.

The Committee notes that a national regulatory scheme has been established for mediators and believes there is scope to encourage its wide uptake. In addition, the Committee believes that users of other ADR processes also deserve equivalent protection and guarantees of service quality. The remainder of this chapter discusses how these objectives can be achieved.

5.4 The role of government in regulating ADR

5.4.1 Models of regulation

A number of stakeholders in this Inquiry supported the self-regulation of ADR practitioners or maintaining the current system of regulation.⁶¹⁸ However, other

⁶¹⁵ David Cousins, *Transcript of evidence*, above n 613, 15. See also Law Institute of Victoria, *Submission no. 20*, 5.

⁶¹⁶ IAMA, *Submission no. 11*, 3.

⁶¹⁷ Fiona McLeod, *Transcript of evidence*, above n 613, 7. See also EWOV, *Submission no. 16*, 2, 15-16; Eliza Collier, *Transcript of evidence*, above n 613, 3-4; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 15-16.

⁶¹⁸ NADRAC, *Submission no. 25*, 7; Eliza Collier, *Transcript of evidence*, above n 613, 3-4; Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 15-16; Fiona McLeod, *Transcript of evidence*, above n 613, 7; EWOV, *Submission no.*

stakeholders were of the view that self-regulation was not effective and that government intervention is required.⁶¹⁹

A number of high level reports have suggested that the government has a role in regulating ADR.

The Access to Justice Advisory Committee, established in 1993 by the Australian Government to examine ways in which the Commonwealth justice system could be improved so as to enhance access to justice, acknowledged that:

governments have a special responsibility for the quality, integrity and accountability of the ADR processes provided by their courts and tribunals. Indeed, we would go further and suggest that the responsibility extends to all ADR programs funded by government.⁶²⁰

A number of NADRAC reports and discussion papers have also emphasised the role of government in regulating ADR. For example, in its 1997 report on family law to the Attorney-General, NADRAC stated:

by formally endorsing the role of alternative dispute resolution services within the justice system, the State alters the fundamental character of those services from a private to a public service, thereby requiring a higher level of accountability from those services than would otherwise be necessary.⁶²¹

Similarly, in a 2006 report, NADRAC commented, ‘Particularly where ADR is compulsory, rule-makers, courts and tribunals have a special responsibility for ensuring appropriate standards are maintained in the delivery of their dispute resolution services’.⁶²²

Victoria Legal Aid’s submission to this Inquiry suggested that the government should regulate ADR where the:

- ADR service is court-referred
- ADR service is run by a public authority
- ADR service provider wishes to rely on protection under the law (for example, immunity provisions).⁶²³

Stakeholders who expressed support for government involvement in the regulation of ADR emphasised that, in recognition of the increasingly national nature of the ADR

16, 2, 13-16; The Victorian Bar, *Submission no. 13*, 75-76, 92; Law Institute of Victoria, *Submission no. 20*, 12-15, 17.

⁶¹⁹ See, for example, VADR, *Submission no. 10*, 5; Victoria Legal Aid, *Submission no. 30*, 20; The Mediator Group, *Submission no. 3*, 14.

⁶²⁰ Access to Justice Advisory Committee, Commonwealth, *Access to justice: An action plan* (1994), 294, cited by National Alternative Dispute Resolution Advisory Council (NADRAC), *Primary Dispute Resolution in Family Law: A Report to the Attorney-General on Part 5 of the Family Law Regulations* (1997), 10.

⁶²¹ NADRAC, above n 620, 10.

⁶²² National Alternative Dispute Resolution Advisory Council (NADRAC), *Legislating for alternative dispute resolution: A guide for Government policy-makers and legal drafters* (2006), 58. See also Sourdin, above n 597, 310, 312; Field, above n 571, 74, 89; NADRAC, above n 570, 97, 99.

⁶²³ Victoria Legal Aid, *Submission no. 30*, 16. See also Justice Kellam, *Transcript of evidence*, above n 601, 5.

industry in Australia, regulation needs to be introduced at a national level. For example, the Victorian Association for Dispute Resolution submitted that ‘cooperation between the state and national governments regarding standards in ADR is essential’.⁶²⁴

The Committee’s discussion paper identified a range of options for government involvement in ADR regulation, including a government-approved panel of ADR providers, co-regulation through an industry council advising government, and generalist legislation. The Committee received very limited evidence on this issue and the evidence it did receive was conflicting. For example, Victoria Legal Aid submitted that co-regulation through a government-approved panel might be an effective means to improve minimum standards within the ADR industry.⁶²⁵ The Victorian Bar was opposed to the ‘unnecessary institutionalisation of the otherwise flexible ADR processes’ and was unaware of any dissatisfaction with ADR practitioners that would warrant the implementation of a panel. Further, the Bar submitted that the monitoring of the panel members would add to the administrative burden borne by consumers.⁶²⁶

Similarly, some stakeholders did not support an ADR industry council or saw no need for one.⁶²⁷ The Victorian Bar, for instance, submitted that an industry council would inevitably lead to the introduction of management structures, and result in higher costs that would have to be borne by the government and end users.⁶²⁸ LEADR, however, favoured an industry council, arguing that such a council would capitalise on the expertise of existing ADR bodies and reflect the diversity of ADR approaches and contexts.⁶²⁹

Victoria Legal Aid supported a ‘single national statute covering ADR regulation, or a uniform approach co-ordinated through the Standing Committee of Attorneys-General’.⁶³⁰ However, NADRAC was doubtful about whether generalist Commonwealth legislation could address regulatory issues, many of which are within the states’ jurisdiction, and stated that:

the most desirable option is for joint Commonwealth, State and Territory cooperation on the development of future ADR policy. This could result in greater national consistency in both ADR policy and legislation and a reduction in the large number of existing legislative provisions.⁶³¹

The Committee believes that government does have a role in regulating ADR services, to ensure that consumers receive a high quality service and improving the

⁶²⁴ VADR, *Submission no. 10*, 5. See also Victoria Legal Aid, *Submission no. 30*, 20.

⁶²⁵ Victoria Legal Aid, *Submission no. 30*, 20. See also VADR, *Submission no. 10*, 5; NADRAC, *Submission no. 25*, 7.

⁶²⁶ The Victorian Bar, *Submission no. 13*, 92-93. See also EWOV, *Submission no. 16*, 16; Margaret Lothian, *Submission no. 17*, 15; Margaret Lothian, *Transcript of evidence*, above n 604, 3-4; Law Institute of Victoria, *Submission no. 20*, 18.

⁶²⁷ Law Institute of Victoria, *Submission no. 20*, 18; VADR, *Submission no. 10*, 5.

⁶²⁸ The Victorian Bar, *Submission no. 13*, 93.

⁶²⁹ LEADR, *Submission no. 36*, 16. See also Victoria Legal Aid, *Submission no. 30*, 21.

⁶³⁰ Victoria Legal Aid, *Submission no. 30*, 20. See also VADR, *Submission no. 10*, 5.

⁶³¹ NADRAC, *Submission no. 25*, 7.

credibility of ADR as an alternative to litigation. This is particularly important where the services are provided by government or where people are referred to ADR by courts. The Committee recognises that the ADR field is increasingly national in its scope and that any government involvement in regulation of this sector must be through a coordinated national approach.

The Committee also believes that regulation is not the responsibility of government alone and that the ADR industry itself must be actively involved in ensuring service quality. In addition, the Committee recognises that any regulatory reform should be in line with the current trend in Victoria, which is towards minimising the burden and achievement of best practice regulation.⁶³² In line with this approach of minimising the regulatory burden and involving the industry, the Committee recommends that the Victorian Government support the existing NMAS scheme. The next section discusses how this can be achieved.

5.4.2 The role of government in supporting NMAS

NMAS is a voluntary, opt-in system of regulation, however, some stakeholders recognised the value in a mandatory system of accreditation.⁶³³ For example, Ms Fiona Hollier, Chief Executive Officer of LEADR, said that accreditation should be mandatory after a transition period because there is a need to ‘establish confidence in accreditation standards’.⁶³⁴ Her colleague Ms Margaret Halsmith told the Committee:

The risk of accreditation not being mandatory is that ADR already has a reputation for being second-class justice. If you have a choice about whether you are accredited or not, it is as if to say, ‘We do not bother to get accredited in this area, but we do in the other area.’ It runs the risk of maintaining that image.⁶³⁵

Professor Tania Sourdin of the University of Queensland observed that the Committee had the opportunity to recommend that all mediators comply with NMAS.⁶³⁶

Ms Hollier told the Committee that mandatory accreditation needs to be supported by national legislation and by the ‘government’s insistence within its own services on using accredited mediators’.⁶³⁷

⁶³² Department of Treasury and Finance, above n 570, i, 3-7. See also Victorian Competition & Efficiency Commission, *Is regulation working? Annual report 2007-08* (2008), vii; Office of Best Practice Regulation, above n 566, 1.

⁶³³ See, for example, Fiona Hollier, *Transcript of evidence*, above n 579, 3, 10-11; Margaret Halsmith, Chair, LEADR, *Transcript of evidence*, Melbourne, 4 March 2008, 10-11; The Mediator Group, *Submission no. 3*, 4-5, 18-19; Tania Sourdin, *Transcript of evidence*, above n 579, 3; Victoria Legal Aid, *Submission no. 30*, 18-19, 21.

⁶³⁴ Fiona Hollier, *Transcript of evidence*, above n 579, 3.

⁶³⁵ Margaret Halsmith, *Transcript of evidence*, above n 633, 10-11.

⁶³⁶ Tania Sourdin, *Transcript of evidence*, above n 579, 3.

⁶³⁷ Fiona Hollier, *Transcript of evidence*, above n 579, 11. See also Margaret Lothian, *Transcript of evidence*, above n 604, 4; Margaret Lothian, *Submission no. 17*, 13; VADR, *Submission no. 10*, 5; Victoria Legal Aid, *Submission no. 30*, 18-19, 21.

The Committee notes that there is wide support for NMAS, including among participants in this Inquiry, and that there has been strong initial uptake of the scheme. The Committee believes that NMAS will enhance the quality of ADR practice in Australia and encourage consumer confidence in and use of ADR services.

While there is widespread support for NMAS, the Committee notes that, it is a voluntary scheme, and that some mediators may choose not to participate. The Committee believes that the Victorian Government, as a leader in the provision and promotion of ADR services, should actively support and promote NMAS. The Committee recommends that the Victorian Government should require all mediators providing services through government departments, statutory schemes and courts to be accredited under NMAS. The Committee also notes that the NMAS standards are not overly onerous and can apply in conjunction with the other regulatory obligations on these practitioners.

Recommendation 26: Victorian Government support for the National Mediator Accreditation Scheme

The Victorian Government should require all mediators providing services through government ADR providers, and encourage all other mediators in Victoria, to be accredited under NMAS.

5.5 Practitioner skills and abilities

Training, education and accreditation are now recognised as important means of ensuring ADR practitioners have a certain level of knowledge, competency, and understanding of ADR.⁶³⁸ Appropriately skilled practitioners may enhance the ADR process and contribute to better outcomes.⁶³⁹ The Victorian Association for Dispute Resolution emphasised that well-trained ADR practitioners will result in a higher standard and benchmark for practitioners and raise the public's confidence in engaging the services of an ADR practitioner.⁶⁴⁰

5.5.1 Minimum education requirements

There are currently limited minimum education requirements for people wishing to enter the ADR field.⁶⁴¹ For example, there are no minimum education requirements for accreditation under NMAS, other than successfully completing an ADR training course and assessment.⁶⁴² In contrast, those seeking registration as family dispute

⁶³⁸ See generally New South Wales Law Reform Commission, above n 610, paragraph 3.2; Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 207-208; Field, above n 571, 84; NADRAC, above n 620, 8-9, 17.

⁶³⁹ See generally NADRAC, above n 569, 31.

⁶⁴⁰ VADR, *Submission no. 10*, 4.

⁶⁴¹ NADRAC, above n 570, 69.

⁶⁴² *Australian National Mediator Standards: Approval standards* (2007) ss 5(1), 5(2).

resolution practitioners are required to hold an ‘appropriate degree, diploma or other qualification by an education and training provider’.⁶⁴³

A Victorian survey found that the minimum qualifications required by ADR providers differ. While some ADR providers tend to employ practitioners who have completed recognised ADR courses and are experienced mediators, others such as CAV provide training for their staff and do not necessarily require them to have ADR experience.⁶⁴⁴

NADRAC has written that there should not be a single pathway to recognition as an ADR practitioner and that a prescriptive approach may create duplication or exclude some people who would otherwise be suitable.⁶⁴⁵ Thus NADRAC concluded that the selection process for ADR practitioners should be based on the needs of the ADR provider and that the selection process should be transparent and fair to ensure that parties have access to the best available ADR practitioner.⁶⁴⁶

The Committee received very limited evidence about this issue. It notes that there was generally agreement that a tertiary qualification is not required to become an ADR practitioner.⁶⁴⁷ For example, Ms Lothian of VCAT submitted that tertiary qualifications do not necessarily produce better mediators as ‘theory sometimes trips up the practice’.⁶⁴⁸ The Victorian Bar submitted that:

It is not necessary to require a tertiary qualification in ADR. The imposition of such a specific requirement would impose an inappropriate level of training and expense upon ADR practitioners, limit the pool of available ADR practitioners by creating significant barriers to entry for new practitioners and also exclude many currently qualified practitioners. This would unnecessarily increase the cost of ADR to government, providers, practitioners and ultimately, to the disputants.⁶⁴⁹

The Victorian Association for Dispute Resolution submitted that those wishing to undertake ADR training should have a minimum Certificate IV level, with exceptions to ensure that people from disadvantaged groups are not prevented from participating. The association’s submission stated, ‘Such a requirement provides some minimum assurance to the public that prospective ADR practitioners possess a certain level of conceptual ability to at least undertake and complete the relevant training’.⁶⁵⁰

⁶⁴³ *Family Law Regulations 1984* (Cth) r 58(2)(a)(ii).

⁶⁴⁴ Department of Justice, Victoria, *Alternative dispute resolution supplier survey 2006* (2007), 35-36.

⁶⁴⁵ NADRAC, above n 569, 81.

⁶⁴⁶ *Ibid*, 83-84.

⁶⁴⁷ Margaret Lothian, *Submission no. 17*, 14; Law Institute of Victoria, *Submission no. 20*, 14; The Victorian Bar, *Submission no. 13*, 82-83; LEADR, *Submission no. 36*, 15; The Mediator Group, *Submission no. 3*, 15-16.

⁶⁴⁸ Margaret Lothian, *Submission no. 17*, 14.

⁶⁴⁹ The Victorian Bar, *Submission no. 13*, 82-83.

⁶⁵⁰ VADR, *Submission no. 10*, 4. See also Victoria Legal Aid, *Submission no. 30*, 17.

5.5.2 Training for ADR practitioners

Most ADR service providers participating in this Inquiry indicated they had some form of training for ADR practitioners currently in place. Many ADR service providers indicated that their staff attended courses conducted by LEADR, IAMA and/or Bond University.⁶⁵¹ Completion of these courses satisfies the education requirement under NMAS.⁶⁵² Details of LEADR's course are set out in figure 9 as an example of a mediator training course.

Figure 9: LEADR mediation workshop⁶⁵³

LEADR conducts a 5 day, 38 hour mediation workshop which meets the training requirements to be assessed for accreditation with LEADR and under NMAS.

The workshop provides a theoretical framework and has an emphasis on communication skills and strategies. The workshop has a strong practical focus and includes nine mediation role plays.

Ms Fiona Hollier, CEO of LEADR, described LEADR's training to the Committee:

We advertise mediation training. We are finding that increasingly that is attractive to people from a wide range of professional backgrounds or sometimes non-professional backgrounds. Maybe there is a particular community member who has an interest in mediation. They would, up until the end of 2007, have attended our four-day mediation training course with us; from 2008 onwards it is five days. At the end of that training course when they would have been exposed to a range of theoretical models and lots of simulations and practical experiences, we would then encourage them to go and seek out some opportunities to perhaps observe some mediators in practice, to perhaps work with someone who is already practising in the field. Some do that, others move directly to seeking accreditation. The accreditation is a written assessment which asks various questions about how they would actually approach various aspects of mediation and deal with particular issues, and there is also a video simulation where they have to demonstrate competency in a simulated 2-hour mediation.⁶⁵⁴

However, not all stakeholders agreed that the current training was sufficient. Ms Patricia Marshall, a mediation practitioner and education provider, questioned the adequacy of the current 30-40 hours of training and suggested that training include a theoretical basis, social and emotional competencies, political strategies and extensive practice in a variety of situations and mediation domains.⁶⁵⁵ The Victorian Association for Dispute Resolution submitted that practitioners should be educated in ADR theory, process and techniques, trained in a range of scenarios, and in the complexities commonly encountered in independent practice. The association proposed a mediation training program of between 60 hours (where the educational

⁶⁵¹ See, for example, Beth Wilson, Health Services Commissioner, Office of the Health Services Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 6; Margaret Lothian, *Transcript of evidence*, above n 604, 8; The Mediator Group, *Submission no. 3*, 15; Justice Kellam, *Transcript of evidence*, above n 601 7.

⁶⁵² Bond University Dispute Resolution Centre, *Mediator assessment course*; LEADR, *Training*, <<http://www.leadr.com.au/training.htm>>, viewed 16 February 2009; The Institute of Arbitrators & Mediators Australia (IAMA), *The practitioner's certificate in mediation*.

⁶⁵³ See LEADR, *Accreditation*, <<http://www.leadr.com.au/accreditation.htm>>, viewed 13 February 2009; LEADR, above n 652; Fiona Hollier, *Transcript of evidence*, above n 579, 6.

⁶⁵⁴ Fiona Hollier, *Transcript of evidence*, above n 579, 6.

⁶⁵⁵ Marshall Enterprise Learning Pty Ltd, *Submission no. 6*, 1.

pre-requisite is satisfied) and 140 hours (where the educational pre-requisite is not met), excluding assessment.⁶⁵⁶

Several stakeholders expressed concern about increasing training and education requirements for ADR practitioners. The Victorian Bar urged the Committee to:

keep in mind the self interest of groups, such as educators, who will obviously benefit from regulations which prescribe detailed training requirements. The trend seems to be for longer and more costly courses. This may deter new practitioners from entering into this fledgling area and may also exclude currently accredited and capable practitioners. This issue of self interest is also a cause for concern when considering reaccreditation schemes. The view of those who are practising ADR on a day to day basis should be preferred to the views of theoretical academics that seem to be pushing for compulsory regulation and qualification of ADR practitioners at a greater cost to the end user through a more restricted and closed market.⁶⁵⁷

Ms Lothian of VCAT stated that training alone is insufficient as '[m]oral character and force of character, intelligence, flexibility, creativity, knowledge of the type of dispute and genuine concern for the parties is at least as important'.⁶⁵⁸

Ms McLeod, Victoria's Energy and Water Ombudsman, told the Committee that she did not support common training requirements as the Australian and New Zealand Ombudsman Association is exploring the possibility of national accreditation of staff in ombudsman schemes, with training tailored to their particular requirements. Ms McLeod stated:

There are lots of different forms of alternative dispute resolution. It is a very big space. There is no easy way, I think, to just come up with a national training qualification, because you will inevitably leave something out. Our primary tool is conciliation ... Training around mediation is not of much consequence to us, although there may be some elements of it that would feature in all kinds of ADR roles.⁶⁵⁹

Two stakeholders argued that those providing ADR education should also be subject to minimum education requirements.⁶⁶⁰ The NMAS Approval Standards require principal ADR instructors to have more than three years' experience as both a mediator and an instructor and be accredited under NMAS for at least three years.⁶⁶¹

The Committee has already recommended that the Victorian Government should require those providing mediation services through government departments, statutory schemes and the courts, to be accredited under NMAS, and notes that this accreditation process will require these practitioners to undertake specific training. However, the Committee notes that training should also be required for those practitioners who practice other forms of ADR such as conciliation. Therefore, the

⁶⁵⁶ VADR, *Submission no. 10*, 4.

⁶⁵⁷ The Victorian Bar, *Submission no. 13*, 74.

⁶⁵⁸ Margaret Lothian, *Submission no. 17*, 13.

⁶⁵⁹ Fiona McLeod, *Transcript of evidence*, above n 613, 12.

⁶⁶⁰ Marshall Enterprise Learning Pty Ltd, *Submission no. 6*, 2; The Mediator Group, *Submission no. 3*, 17.

⁶⁶¹ *Australian National Mediator Standards: Approval standards* (2007) s 5(1)(a).

Committee recommends that the Victorian Government ensure that practitioners who are providing forms of ADR other than mediation, also undertake initial and ongoing training equivalent to that required of mediators under NMAS. This should include training on ADR theory, ADR processes and techniques, and the knowledge, skills and ethics required for ADR practice.

Recommendation 27: Training for ADR practitioners

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to provide initial and ongoing training in all aspects of ADR for all staff providing ADR services (including those using forms of ADR other than mediation). This should include training on ADR theory, ADR processes and the knowledge, skills and ethics required for ADR practice.

5.5.3 Performance and competency standards

Performance or competency standards set out the minimum practice requirements of a profession. They are not based on formal qualifications or educational achievements but rather define the tasks of the practitioner and the knowledge, skills, abilities, and other attributes required to perform those tasks.⁶⁶²

Many ADR providers and professional organisations have developed conduct provisions and standards which set out core principles. Common themes include fairness, confidentiality, communication issues, conduct during proceedings, neutrality, impartiality, practitioner competence, and advertising and publicity.⁶⁶³

In a 2001 report, NADRAC recommended that all ADR providers adopt and comply with an appropriate code of practice developed by ADR providers or associations, which takes into account essential areas of the process.⁶⁶⁴ NADRAC stated that while standards had to be tailored to the context in which ADR services are provided, certain minimum standards should apply to all ADR providers.⁶⁶⁵

The NMAS Practice Standards set out competency standards for accredited mediators which include required knowledge, skills and ethical understandings.⁶⁶⁶ These are set out in figure 10.

Some stakeholders agreed that performance and competency standards requirements are appropriate tools to assess whether an ADR practitioner may practice.⁶⁶⁷

⁶⁶² Astor and Chinkin, above n 638, 214.

⁶⁶³ Sourdin, above n 597, 299-300; NADRAC, above n 569, 41. See appendix E, tables 1-4 for more details.

⁶⁶⁴ NADRAC, above n 569, 72.

⁶⁶⁵ Ibid, 71; NADRAC, above n 622, 57.

⁶⁶⁶ *Australian National Mediator Standards: Practice standards* (2007) s 7.

⁶⁶⁷ Victoria Legal Aid, *Submission no. 30*, 18; EWOV, *Submission no. 16*, 16; The Mediator Group, *Submission no. 3*, 17. Cf Margaret Lothian, *Submission no. 17*, 14.

Figure 10: National Mediator Accreditation System practice standards⁶⁶⁸**Description of a mediation process**

The purpose of a mediation process is to maximise participants' decision making.

Starting a mediation process

Before mediating, a mediator should ensure that an outline of the mediation process has been given to the participants.

Power issues

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.

Impartial and ethical practice

A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.

Confidentiality

A mediator should respect the confidentiality of the participants.

Competence

Mediators must be competent and have relevant skills and knowledge.

Inter-professional relations

Mediators should respect the relationships with professional advisers, other mediators and experts which complement their practice of mediation.

Procedural fairness

A mediator will conduct the mediation process in a procedurally fair manner.

Information provided by the mediator

The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome. The mediator can advise upon and determine the mediation process that is used.

Termination of the mediation process

The mediator may suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants.

Charges for services

The mediator should make explicit to parties all charges related to the practitioner's services and how they are calculated.

Making public statements and promotion of services

The mediator should ensure that public statements made by the mediator promoting business are accurate.

⁶⁶⁸ Australian National Mediator Standards: Practice standards (2007) ss 2-13.

5.5.4 Accreditation

NADRAC has defined accreditation as:

a process of formal and public recognition and verification that an individual, organisation or program meets, and continues to meet, defined criteria.⁶⁶⁹

As noted earlier in this chapter, except for mediators who may seek voluntary accreditation under NMAS and family dispute resolution practitioners who have their own accreditation system, there is no national accreditation system for other ADR practitioners in Australia. Many professional organisations such as the Victorian Bar, the Law Institute of Victoria, LEADR and IAMA have developed their own accreditation systems which, in the case of mediation, may also meet the NMAS requirements for accreditation. Many accreditation systems, including NMAS, also require accredited ADR practitioners to undergo reaccreditation regularly, to ensure continuous skill maintenance and development.⁶⁷⁰

Stakeholders in this Inquiry expressed a range of views about whether accreditation should apply to all ADR practitioners. Stakeholders who opposed a system of accreditation for all ADR practitioners raised similar arguments to those who were against regulation generally. For example, the Victorian Bar and the Law Institute of Victoria submitted that individual ADR providers should develop and implement their own minimum standards and an adequate accreditation system already exists for lawyer ADR practitioners.⁶⁷¹ The Victorian Bar submitted:

An inherent problem with any prescribed uniform standards is that by their nature, they inhibit the flexibility necessary to cater for the diversity in the various ADR processes.⁶⁷²

In contrast, Ms Hollier of LEADR argued that accreditation will lift ADR practice to a much higher level of expertise and will enable consumers to be aware whether or not particular ADR practitioners are skilled in the processes they are conducting.⁶⁷³ LEADR submitted that it:

would prefer standards to be national and also considers that accreditation should not be organisationally specific. Both these features give practitioners flexibility, enable organisations to meet the needs of consumers more effectively and help control the costs associated with accreditation.⁶⁷⁴

Mr Wein from The Mediator Group argued, ‘There should be a set of minimum common standards. Each ADR organisation can then add their own additional standards on top of the minimum standards’.⁶⁷⁵ Justice Kellam of the Supreme Court of Victoria told the Committee that ‘there needs to be an appropriate system of

⁶⁶⁹ NADRAC, above n 570, 10.

⁶⁷⁰ See *Australian National Mediator Standards: Approval standards* (2007) s 6.

⁶⁷¹ Law Institute of Victoria, *Submission no. 20*, 15; The Victorian Bar, *Submission no. 13*, 10, 75-78.

⁶⁷² The Victorian Bar, *Submission no. 13*, 86.

⁶⁷³ Fiona Hollier, *Transcript of evidence*, above n 579, 8-10.

⁶⁷⁴ LEADR, *Submission no. 36*, 16.

⁶⁷⁵ The Mediator Group, *Submission no. 3*, 18.

accreditation’ and the fact that an institution such as a state Bar Council has their own standard does not mean that they should not be subject to a national approach.⁶⁷⁶

Very few stakeholders gave feedback on the accreditation model that should be adopted by Victoria and/or nationally. Victoria Legal Aid submitted that the accreditation model needs to be broader than NMAS and suggested that it may be more appropriate for the Department of Justice to develop and run the accreditation system which should cover all ADR practitioners and providers in Victoria.⁶⁷⁷ The Victorian Association for Dispute Resolution (VADR) also argued that a national system was required:

A national body, with legitimacy, authority, access to expertise, and a modest secretariat, is seen as essential for any accreditation process to be effective ... VADR supports the establishment of an overarching national body that would authorise and audit the bodies that carry out training and accreditation; audit the registers of accredited ADR practitioners; respond to complaints not resolved locally; apply sanctions; and from time to time set standards in consultation with the ADR field.⁶⁷⁸

LEADR submitted that an accreditation system should include the following elements:

- threshold training of a prescribed length, covering core topics, with an appropriate balance of theoretical and practical/experiential components
- competency assessment
- ethical framework
- requirement for professional indemnity insurance
- good character reference
- continuing re-accreditation requirements that include practice and professional development.⁶⁷⁹

These elements are all contained in the NMAS system.⁶⁸⁰

Some stakeholders acknowledged the possibility of extending NMAS to other ADR processes. Ms Halsmith and Ms Hollier of LEADR supported extending NMAS to conciliation, arbitration, and early neutral evaluation.⁶⁸¹ NADRAC submitted that the NMAS Practice and Approval Standards apply to mediators who undertake ‘blended processes’ where the mediator also has an advice-giving function such as

⁶⁷⁶ Justice Kellam, *Transcript of evidence*, above n 601, 5.

⁶⁷⁷ Victoria Legal Aid, *Submission no. 30*, 18. See also The Mediator Group, *Submission no. 3*, 18.

⁶⁷⁸ VADR, *Submission no. 10*, 5-6.

⁶⁷⁹ LEADR, *Submission no. 36*, 15.

⁶⁸⁰ See *Australian National Mediator Standards: Practice standards* (2007) s 5 (Impartial and ethical practice), s 7 (Competence); *Australian National Mediator Standards: Approval standards* (2007) s 3 (Approval requirements for mediators), s 5 (Threshold training and education requirements), s 6 (Continuing accreditation requirements).

⁶⁸¹ Fiona Hollier, *Transcript of evidence*, above n 579, 11; Margaret Halsmith, *Transcript of evidence*, above n 633, 11-12. See also VADR, *Submission no. 10*, 3; Victoria Legal Aid, *Submission no. 30*, 16.

conciliation. It stated, 'NADRAC would be keen to see the adoption of national industry standards in other areas of ADR practice...'.⁶⁸²

The Accident Compensation Conciliation Service's submission stated, 'We strongly support the recent national ADR mediator standards as a starting point for conciliation practice in Australia, so long as there is recognition of the important differences between conciliation and mediation practice, and mandatory and voluntary schemes'.⁶⁸³ Professor Sourdin of the University of Queensland told the Committee that NMAS could be extended to other ADR processes such as arbitration:

The standards that I have worked on here have been derived in part from work that I have done in the family area, where we looked specifically at advisory practitioners; at those who gave advice in the family sector. You have to do a lot more work around what the competencies are, understanding that there would be very different competencies required in different content areas; but yes, I think you could actually extend it.

The question is whether you need to extend it. Generally the arbitrator pool is much smaller and is comprised of lawyers, engineers and others. There are already industry groups that operate in that area, but it is also quite clear that some people will hang up a shingle and call themselves an arbitrator when they have no background or qualifications.⁶⁸⁴

Professor Angela O'Brien who gave evidence on behalf of IAMA told the Committee that NMAS does not apply to determinative processes such as arbitration and adjudication, but commented, 'You certainly could have a parallel national accreditation system, but you would need to construct it in such a way that it met the needs of other kinds of ADR processes'.⁶⁸⁵ Other stakeholders also recognised the difficulty of a 'one-size-fits-all' approach to regulating what is a very diverse field of practice.⁶⁸⁶

Regulation of ADR processes other than mediation is made particularly difficult because there are no agreed definitions of the various ADR processes.⁶⁸⁷ For example, while Victoria Legal Aid supported the 'introduction of standard definitions of ADR processes, provided they are in regulations and that they have some element of flexibility to allow a range of interventions for each dispute, depending on what is appropriate',⁶⁸⁸ LEADR stated:

⁶⁸² NADRAC, *Submission no. 25S*, 4-5.

⁶⁸³ Accident Compensation Conciliation Service, *Submission no. 21*, 9. See also Susan Cibau, *Transcript of evidence*, above n 579, 4.

⁶⁸⁴ Tania Sourdin, *Transcript of evidence*, above n 579, 11. See also Law Institute of Victoria, *Submission no. 20*, 12.

⁶⁸⁵ Angela O'Brien, Senior Vice President, National Council, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 9.

⁶⁸⁶ See, for example, Lawrence Reddaway, *Transcript of evidence*, above n 603, 9; Tony Nolan, *Transcript of evidence*, above n 609, 6; Federation of Community Legal Centres Victoria, *Submission no. 39*, 2; EWOV, *Submission no. 16*, 3; Elissa Campbell, *Transcript of evidence*, above n 582, 12. See also New South Wales Law Reform Commission, above n 610, paragraph 4.22.

⁶⁸⁷ See generally Sourdin, above n 597, 4-6.

⁶⁸⁸ Victoria Legal Aid, *Submission no. 30*, 16. See also VADR, *Submission no. 10*, 3.

standard definitions are unlikely ever to be comprehensive because, new, hybrid and combination processes will continue to emerge. As well, ADR is a flexible process that can and should be adapted to particular needs, issues and circumstances. Therefore published definitions should always note the flexibility of the process and the responsibility for consumers to seek, and ADR practitioners to provide information about the particular ADR process that is being used.⁶⁸⁹

The Committee believes that NMAS provides an appropriate model for the regulation of ADR practitioners, and that it provides a mechanism for quality assurance without placing an unreasonable compliance burden on those practitioners. The Committee believes there is the potential to introduce an accreditation system for practitioners engaging in other forms of ADR processes throughout Australia, particularly conciliation, arbitration and early neutral evaluation. This would ensure that users of these processes have the opportunity to receive the same protections as users of mediation services. The Committee believes that the Victorian Government should collaborate with NADRAC and the Standing Committee of Attorneys-General to consider whether there should be regulation of other ADR practitioners based on the NMAS model.

Recommendation 28: Regulation of other ADR practitioners

The Victorian Government should collaborate with NADRAC and the Standing Committee of Attorneys-General to consider whether there should be regulation of other ADR practitioners, including arbitrators and conciliators, using a model based on the National Mediator Accreditation System.

5.6 Immunity, confidentiality and inadmissibility

Three other issues that emerge in considering the regulation of ADR practitioners are the immunity of ADR practitioners from civil action, the confidentiality of the ADR process, and the inadmissibility of matters discussed at ADR in subsequent court proceedings. These are currently dealt with by a variety of codes, legislation, and ethical obligations. In summary:

- There is no general immunity from legal action for ADR practitioners, although immunity may extend to ADR practitioners through statute, contracts or through common law in limited circumstances where there is a quasi-judicial role.⁶⁹⁰
- There is a general principle that communications made during ADR are confidential.⁶⁹¹
- Most legislation dealing with ADR provides that evidence of matters discussed or which have occurred in an ADR session is inadmissible in later proceedings unless the parties consent.⁶⁹²

⁶⁸⁹ LEADR, *Submission no. 36*, 14. See also Law Institute of Victoria, *Submission no. 20*, 13.

⁶⁹⁰ NADRAC, above n 622, 64. See tables 1 to 3 of appendix E for a detailed summary.

⁶⁹¹ NADRAC, above n 622, 73.

NADRAC has described these as ‘vexed issues for the ADR sector’.⁶⁹³ The NMAS Practice Standards offer some guidance on these issues. The standards recognise that, in the various different areas where mediation is used, there may be different requirements on confidentiality.⁶⁹⁴ In addition, the NMAS Approval Standards require mediators who seek accreditation to be either insured or operating with statutory or other immunity.⁶⁹⁵

Stakeholders generally supported the current arrangements about the confidentiality of ADR proceedings. For example, Ms Lothian of VCAT told the Committee:

As a person who conducts mediations, as a person who conducts compulsory conferences, I am very aware of the advantage for the mediation practitioner in being able to say to the parties, ‘What you are saying to me goes no further. No hint of what you say to me will be passed on to the other side unless you tell me I can.’ The problem is that unless we can provide that sort of assurance to parties to a dispute they are likely to be circumspect in what they will tell us. They are likely to be circumspect in the sorts of approaches, the sorts of offers, they will make to the other side.⁶⁹⁶

In relation to ADR practitioner immunity: on one hand, immunity may deny redress to parties who have suffered loss due to an ADR practitioner’s conduct.⁶⁹⁷ On the other hand, Mr Wein from The Mediator Group submitted that immunity protects the mediator from being targeted by disgruntled parties or their lawyers.⁶⁹⁸

NADRAC has argued that governments have a greater obligation to ensure high quality ADR services where statutes confer immunity or where there is an element of coercion on the parties to legal proceedings to use ADR to resolve their dispute.⁶⁹⁹ Justice Kellam of the Supreme Court of Victoria told the Committee:

Why should you have total immunity when there is no basis upon which the court can be satisfied that you are conducting mediations to an appropriate standard? It is a pretty big gift to give total immunity, and why should we not require the accountability of an appropriate standard?⁷⁰⁰

Victoria Legal Aid submitted that ‘there are strong public policy arguments to extend immunity for acts done by ADR practitioners in good faith under legislative ADR schemes, or where ADR is ordered by courts’ and that ADR practitioners outside that scope should rely on ‘comprehensive professional indemnity insurance’.⁷⁰¹ In

⁶⁹² Ibid, 81.

⁶⁹³ NADRAC, *Submission no. 25*, 8.

⁶⁹⁴ Sourdin, above n 597, 246; *Australian National Mediator Standards: Practice standards* (2007) s 6.

⁶⁹⁵ Sourdin, above n 597, 238; *Australian National Mediator Standards: Approval standards* (2007) ss 3(1)(c), 3(4).

⁶⁹⁶ Margaret Lothian, *Transcript of evidence*, above n 604, 3. See also Law Institute of Victoria, *Submission no. 20*, 15-16; Victoria Legal Aid, *Submission no. 30*, 19.

⁶⁹⁷ NADRAC, above n 622, 69-70.

⁶⁹⁸ The Mediator Group, *Submission no. 3*, 19. See also Margaret Lothian, *Submission no. 17*, 15.

⁶⁹⁹ NADRAC, above n 622, 72.

⁷⁰⁰ Justice Kellam, *Transcript of evidence*, above n 601, 5.

⁷⁰¹ Victoria Legal Aid, *Submission no. 30*, 20.

contrast, the Law Institute of Victoria argued that professional indemnity insurance was not necessary but that the consequences of this should be explained to clients.⁷⁰²

In 2001, NADRAC stated in recommendation 11 of its report *A framework for ADR standards* that the Commonwealth, state and territory governments undertake a joint review of statutory provisions applying to ADR services (including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes) so as to:

- provide clarity in relation to the legal rights and obligations of parties, ADR referrers and service providers
- provide the means by which consumers of ADR services can seek remedies for serious misconduct.⁷⁰³

At the time of writing, this review had not yet been undertaken.⁷⁰⁴

The Committee believes that there should be a more uniform and coordinated approach to ADR regulation, including the statutory provisions governing confidentiality of ADR proceedings, inadmissibility of matters discussed in ADR proceedings in subsequent court proceedings, and immunity of ADR practitioners. The piecemeal growth of ADR in Australia has meant that there is no single blanket statutory provision regarding these issues. The Committee agrees with NADRAC that there is a need for greater consistency and clarity relating to existing and proposed statutory provisions governing ADR. The Committee therefore recommends that the Victorian Government should encourage the Australian Government and the state and territory governments to undertake the review of statutory provisions applying to ADR services that NADRAC recommended in 2001. The Committee believes that the Standing Committee of Attorneys-General would be the appropriate forum in which to propose this review.

Recommendation 29: Review of statutory provisions applying to ADR services

The Victorian Government should propose to the Standing Committee of Attorneys-General, that the Commonwealth, state and territory governments undertake a joint review of the statutory provisions that apply to ADR services, as recommended in recommendation 11 of NADRAC's report, *A framework for ADR standards*.

⁷⁰² Law Institute of Victoria, *Submission no. 20*, 17.

⁷⁰³ NADRAC, above n 569, 79.

⁷⁰⁴ NADRAC, *Submission no. 25*, 7.

5.7 Complaints about ADR services

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 ensure their accountability. However, the manner and extent to which ADR practitioners are currently accountable for their services varies greatly across settings and provider organisations. For example, conciliation officers who work for the Accident Compensation Conciliation Service can be removed or suspended from office in certain circumstances, such as where they commit a serious breach of confidentiality requirements.⁷⁰⁵ 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.⁷⁰⁶

In a report released in 2001, NADRAC recommended that ADR providers put in place an effective complaints management system based on appropriate complaints-handling practices. However, NADRAC expressed doubts about the feasibility of having an independent complaints body such as an ADR Ombudsman, because of the diverse ADR environments, the lack of a clearly recognised industry body or professional association, and the difficulties regarding complaints about ADR.⁷⁰⁷

RMABs that accredit mediators under NMAS are required to have a complaints handling system that meets the *Benchmarks for industry-based customer dispute resolution*,⁷⁰⁸ or to be able to refer a complaint to a statutory complaints scheme.⁷⁰⁹ The NMAS Approval Standards allows an RMAB to remove or suspend a mediator when he or she has not complied with the Practice or Approval Standards, other relevant ethical guidelines or professional requirements.⁷¹⁰

The National Mediator Accrediting Committee, the implementing body for NMAS, has established a working group on complaints-handling. Part of this group's role is to monitor, audit and support complaints-handling processes.⁷¹¹

Most stakeholders participating in this Inquiry recognised the need for a complaints-handling mechanism to address complaints against ADR practitioners or providers. However, there was no consensus as to the type of complaints-handling system that should be established.

Some argued that existing complaints processes were adequate. For example, NADRAC's submission noted that the new National Mediator Standards Body to be established under NMAS will play a central role in 'monitoring, auditing and

⁷⁰⁵ *Accident Compensation Act 1985* (Vic) s 52I.

⁷⁰⁶ LEADR, *Accreditation*, above n 653; LEADR, *Scheme for LEADR accreditation of alternative dispute resolution practitioners* (2002), paragraph 15.

⁷⁰⁷ NADRAC, above n 569, 73.

⁷⁰⁸ Department of Industry, Science and Tourism, above n 574.

⁷⁰⁹ *Australian National Mediator Standards: Approval standards* (2007) s 3(5)(c).

⁷¹⁰ *Ibid*, s 6(2).

⁷¹¹ See NADRAC, *National Mediator Accreditation System*, above n 584.

supporting complaints handling processes'.⁷¹² The Victorian Bar and Law Institute of Victoria stated there was an adequate complaints process in relation to lawyer mediators under the *Legal Profession Act 2004* (Vic)⁷¹³ and non-lawyer mediators under the *Fair Trading Act 1999* (Vic).⁷¹⁴ The Energy and Water Ombudsman (Victoria) submitted that industry ombudsman schemes have an internal review process to address complaints, and consumers retain the option of seeking redress in alternative channels if they are unsatisfied with any decision made by an ombudsman.⁷¹⁵

Victoria Legal Aid suggested that ADR complaints mechanisms could include hearings before an industry council, oversight by a government department or agency responsible for accreditation, or an ADR ombudsman.⁷¹⁶ LEADR submitted that the credibility and accountability of the ADR profession requires an appropriate mechanism for handling complaints of a serious nature, particularly of misconduct, not just for NMAS but for ADR in general.⁷¹⁷

The Committee agrees that a clearly articulated complaints policy and an effective complaints system are essential for all ADR service providers. This would ensure accountability on the part of the ADR practitioner and encourage best practice.

The Committee notes that practitioners participating in NMAS will be required to participate in a complaints-handling system. However, the Committee recognises that there may be no mechanism for making a complaint against a mediator who elects not to participate in NMAS, or a practitioner who practices ADR processes other than mediation. The Committee therefore recommends that all ADR providers have a complaints-handling process for responding to complaints received about their practitioners.

Recommendation 30: Complaints mechanism for ADR services

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to implement a clearly articulated complaints policy and complaints-handling system.

⁷¹² NADRAC, *Submission no. 25*, 7. See also VADR, *Submission no. 10*, 6.

⁷¹³ The Victorian Bar, *Submission no. 13*, 30, 95; Law Institute of Victoria, *Submission no. 20*, 18.

⁷¹⁴ Law Institute of Victoria, *Submission no. 20*, 18.

⁷¹⁵ EWOF, *Submission no. 16*, 17; Fiona McLeod, *Transcript of evidence*, above n 613, 4-5. See also Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 16; Alison Maynard, Chief Executive Officer, Financial Industry Complaints Service, *Transcript of evidence*, Melbourne, 11 February 2008, 10.

⁷¹⁶ Victoria Legal Aid, *Submission no. 30*, 22. Cf Margaret Lothian, *Submission no. 17*, 16.

⁷¹⁷ LEADR, *Submission no. 36*, 16.

Chapter 6 – Resolving more disputes through ADR

Each year an estimated 35% of Victorians are involved in a civil dispute.⁷¹⁸ The Committee has identified that ADR has the potential to play a significant role in assisting these Victorians to resolve their disputes. In this chapter the Committee discusses possible strategies to increase the ability of Victorians to resolve their own disputes and to encourage increased referral to, and use of, ADR services.

6.1 Empowering Victorians to resolve disputes themselves

Many people try to resolve their own disputes prior to approaching ADR services or commencing legal action. Research conducted for the Department of Justice found that 89% of those surveyed would always or mostly attempt to resolve a significant dispute by themselves before seeking external help.⁷¹⁹ The study found that almost two-thirds of disputes in Victoria are resolved without assistance from a third party.⁷²⁰

Evidence received by the Committee also emphasised the importance of people trying to resolve their own disputes before seeking assistance. For example, Ms Margaret Halsmith of LEADR – Association of Dispute Resolvers (LEADR), a non-for-profit association that promotes ADR, told the Committee, ‘One of the principles of ADR is that you try first to sort it out yourselves. You try to sort it out causally and then you call in somebody – an ADR practitioner’.⁷²¹

However, during the course of this Inquiry the Committee heard evidence that many disputes that end up at ADR services or in court could have been resolved much earlier if the parties had had higher-level dispute resolution skills, particularly communication skills. Ms Margaret Lothian, Principal Mediator at the Victorian Civil and Administrative Tribunal (VCAT), submitted, ‘There is anecdotal evidence from VCAT mediators that we spend time in many mediations teaching people how to negotiate. If they had these skills before the dispute came to VCAT, it might not have got there’.⁷²²

The Committee was told about a case where an intervention order was sought to stop two children throwing stones into a neighbour’s pool. The matter ended up in court because the neighbours never actually sat down and had a conversation about the

⁷¹⁸ Graeme Peacock, Preslav Bondjakov and Erik Okerstrom, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Community survey 2007* (2007) Department of Justice, Victoria, 3. Note that this survey defined dispute very broadly as ‘A conflict or disagreement between two or more people, businesses or organisations’.

⁷¹⁹ *Ibid*, 17.

⁷²⁰ *Ibid*, 3.

⁷²¹ Margaret Halsmith, Chair, LEADR - Association of Dispute Resolvers, *Transcript of evidence*, Melbourne, 4 March 2008, 11.

⁷²² Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Submission no. 17*, 4.

behaviour. Describing this example to the Committee, Mr John Griffin – Executive Director, Courts – from the Department of Justice stated, ‘I doubt whether that [the intervention order] will effectively stop the kids throwing stones into the pool. I am not trying to trivialise it but to illustrate that neighbourhood disputes are about getting on with one another in the community ...’⁷²³

Ms Lothian provided another example:

a significant number of disputes between home owners and builders arise because of poor communication and lack of understanding about what is serious. A new homeowner who sees a crack in a concrete garage floor does not necessarily know that most hairline cracks are not defects and do not portend the collapse of the whole house.⁷²⁴

The Committee received evidence about two main strategies for increasing the capacity of Victorians to resolve their own disputes. The first is educating Victorians about dispute resolution techniques, starting in schools, and the second involves ADR service providers playing a greater role in preventing disputes and educating members of the community about the skills required to resolve disputes. Both of these strategies are discussed below.

6.1.1 Dispute resolution education in schools

The skills to effectively resolve disputes may be learned and many stakeholders emphasised the need to teach these skills broadly to all Victorians. Ms Lothian told the Committee, ‘I think the more people know about how to negotiate, the better. It is one of those situations where there cannot be too much education about how to sort out your own problems’.⁷²⁵

Several stakeholders told the Committee that dispute resolution skills need to be taught more effectively in Victorian schools.⁷²⁶ For example, Supervising Magistrate Anne Goldsbrough told the Committee that she saw a key approach to increasing the ability to resolve disputes in the community as, ‘[c]hildren in schools learning to resolve disputes and understanding that dispute resolution is part of the society’s fabric, and that they are going to meet it before they perhaps go to a court’.⁷²⁷ However, Mr Gerard Brody of the Consumer Action Law Centre cautioned about expecting too much of education programs:

⁷²³ John Griffin, Executive Director, Courts, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 7.

⁷²⁴ Margaret Lothian, *Submission no. 17*, 6.

⁷²⁵ Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 11 February 2008, 6.

⁷²⁶ Tania Sourdin, Professor of Law, The University of Queensland (Melbourne Campus), *Transcript of evidence*, Melbourne, 29 November 2007, 10; The Mediator Group, *Submission no. 3*, 8; Anne Goldsbrough, Supervising Magistrate, Family Violence & Family Law, Magistrates’ Court of Victoria, *Transcript of evidence*, Melbourne, 29 November 2007, 11 Ragini Rajadurai, Manager, Corporate & Legal Services, Insurance Ombudsman Service, *Transcript of evidence*, Melbourne, 11 February 2008, 8-9.

⁷²⁷ Anne Goldsbrough, *Transcript of evidence*, above n 726, 11.

I would agree that education, starting in schools, plays a very important role. But education will not be enough to deliver fair outcomes for all consumers who have complaints. Assistance services, such as financial counsellors and legal aid services, will be required especially to assist low-income and vulnerable consumers.⁷²⁸

Professor Tania Sourdin of the University of Queensland described the current teaching of mediation and negotiation skills in Victorian schools as ‘pretty haphazard’.⁷²⁹

The Committee received evidence about two programs that have been effective in teaching such skills to students, neither of which is currently operating in Victoria: the Schools Conflict Resolution and Mediation competition (SCRAM) which is described in figure 11 and the Conflict Resolution in Schools (CRES) Program which is discussed further, below. The Committee was told that such programs educate students about constructive approaches to managing conflict in schools and communities.⁷³⁰

Mr Ian Goodhardt of the Family Mediation Centre, a family dispute resolution service provider which was formerly funded by the Victorian Government to provide the CRES Program in Victorian schools, told the Committee that such a program ‘changes the whole way that these children view conflict as they grow up. So if it were done on a really widespread scale, it could have quite a significant societal impact’.⁷³¹ Mr Goodhardt described the CRES Program to the Committee:

Members of a class were trained in the principles of how to be a mediator, and if a dispute broke out between class members, whatever it might be, whether it was a bullying question or somebody giving harm to somebody ... one or other of the class members would step in as the mediator and hear what this person said or that person said on the issues in a traditional settlement-oriented mediation model ... It often worked better for them than getting an adult to come and sort it out, and it solved the problems of snitching and all those things that kids do not like to do.⁷³²

His colleague, Ms Meg Henham stated that she was not sure why the Victorian Government stopped funding the program, but suggested there was some uncertainty about which government department was responsible for the program:

The funding kept changing. It was the department of health, then it was the department of education, then the department of youth; so each year it seemed to go to a different department and it was a real pity when they de-funded the program.⁷³³

⁷²⁸ Gerard Brody, Director, Policy & Campaigns, Consumer Action Law Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 4.

⁷²⁹ Tania Sourdin, *Transcript of evidence*, above n 726, 10.

⁷³⁰ National Alternative Dispute Resolution Advisory Council (NADRAC), *Submission no. 25S*, 5; Ian Goodhardt, Manager, Head Office, Family Mediation Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 6; Meg Henham, Manager, Outer-Eastern Branch, Family Mediation Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 6; Margaret Lothian, *Transcript of evidence*, above n 725, 6; LEADR - Association of Dispute Resolvers (LEADR), *Submission no. 36*, 8 See also Tricia S Jones, ‘Conflict resolution education: The field, the findings, and the future’ (2004) 22(1-2) *Conflict Resolution Quarterly*, 233; Law Society of New South Wales, *Early Dispute Resolution (EDR) Task Force report*, 10-11; Archie Zariski, ‘SCRAM competition: pilot year in WA’ (2002) 5(5) *ADR Bulletin*, 84; Bruce E Barnes, ‘Conflict resolution education in the Asian Pacific’ (2007) 25(1) *Conflict Resolution Quarterly*, 55.

⁷³¹ Ian Goodhardt, *Transcript of evidence*, above n 730, 6.

⁷³² *Ibid*, 6.

⁷³³ Meg Henham, *Transcript of evidence*, above n 730, 6.

Figure 11: Schools Conflict Resolution and Mediation (SCRAM)⁷³⁴

The Schools Conflict Resolution and Mediation (SCRAM) program has been operating in schools across Australia since 1996. The program was the initiative of the Law Society of New South Wales and the Queensland Law Society, who believed that it was important to teach students conflict resolution skills which could then be used throughout their lives.

The Law Institute of Victoria ran the program in Victoria for a time; however, approximately four years ago Victoria ceased participating in the program. Currently, only two states are offering SCRAM: New South Wales and Western Australia.

SCRAM is a role-playing mediation competition for year 9 and 10 students, aimed at improving students' conflict resolution skills such as negotiation and active listening. Students are taught mediation skills within their school environment and practice mock-mediations.

For a competition round, students are given a mediation scenario in advance. The mediation scenarios are created in consultation with teenagers so that they include issues which teenagers may face in everyday life, such as bullying. There are six students in a team: two students act as mediators, two students act as one party to the mediation, and the remaining two act as the opposing party.

Ten minutes before the mock-mediation begins, the students acting as the parties to the mediation are given additional confidential information to 'flesh out' their roles. This information can include instructions on how they are to act and other details about their characters and their motives. They are not allowed to show this information to other students, and can only reveal it during the mediation if it is in character to do so.

Volunteer adjudicators – generally mediators by profession – watch the mock-mediations and see how the students conduct the mediation. They score the students based on how the mediators conducted the session, and on how the parties to the mediation acted, including whether they were good at acting out their roles and whether they realistically negotiated and showed a positive approach.

The team is then given an overall score for the mediation. After a series of mediations, the overall top scoring schools enter into their state's finals scheme. The state winner then enters the national grand final.

Students who had participated in SCRAM said that they did use their new mediation skills outside of the program, and gave examples of how they had used their skills:

- '[My brother] took my SCRAM trophy ... without asking! Instead of screaming and hitting as we usually do, we worked it out quietly so he could look at it but he had to ask.'
- 'My sister had borrowed my jacket and not returned it. At first I saw only my side of the story and I got angry before she could explain. I then realised that both parties needed to be allowed to express their opinion. I asked her to explain and we were able to resolve our conflict.'
- 'In an argument with a friend I was more open to negotiation and really listened to my friend's point of view.'

Teachers and coaches involved with the program also felt that SCRAM had helped students to deal better with conflict and listen to both sides of an argument.

⁷³⁴ Zariski, above n 730; Archie Zariski and Irene Styles, Murdoch University, *The SCRAM program for conflict resolution education in Western Australian secondary schools* (2004) SCRAM; Schools Conflict Resolution and Mediation (SCRAM), *SCRAM: Schools Conflict Resolution And Mediation competition handbook*; Schools Conflict Resolution and Mediation (SCRAM), *Schools Conflict Resolution And Mediation competition manual*.

The Committee did not receive any detailed information about the CRES Program. The Department of Education and Early Childhood Development informed the Committee, ‘No school or Regional Office reported having participated in the CRES program’.⁷³⁵

The Committee acknowledges the important role that schools can play in equipping young Victorians with the skills to resolve disputes. It believes that there would be value in the Victorian Government developing a range of conflict resolution programs aimed at providing young people with the skills to effectively manage conflict in a range of contexts. The Committee notes evidence that the CRES Program was effective in developing these skills in students and believes that this program could be used as a model for the development of a conflict resolution program for all Victorian schools.

The Committee also recognises the value of providing school students with the opportunity to participate in activities like SCRAM, which provide the chance to improve communication and negotiation skills. It encourages the Law Institute of Victoria to resume the SCRAM Program in Victoria.

In part III of this report the Committee discusses restorative practice approaches that are increasingly being used to deal with conflict in schools. The Committee acknowledges that conflict resolution programs such as CRES and SCRAM should be integrated with existing restorative practices approaches.

Recommendation 31: Dispute resolution education in schools

31.1 The Victorian Government should consider developing a conflict resolution program to strengthen the capacity of schools and students to manage and resolve conflict. This program could be based on the former Conflict Resolution in Schools (CRES) Program.

31.2 The Law Institute of Victoria should be encouraged to resume the Schools Conflict Resolution and Mediation (SCRAM) competition in Victoria.

6.1.2 The educative role of ADR service providers

The Committee heard evidence that ADR service providers can play an important educative role in helping potential complainants deal with issues at an early stage before they become disputes. The Victorian Privacy Commissioner’s submission stated:

ADR service providers are in the unique position to assist potential complainants or disputants with timely, relevant information to enable them to resolve their dispute themselves. This educative function of ADR service providers can be overshadowed by the more formal ADR services such as conciliation or mediation. An additional

⁷³⁵ Department of Education and Early Childhood Development, Victoria, supplementary evidence received 25 July 2008, 3.

focus of ADR service providers on assisting potential complainants and respondents to deal with matters before they become formal disputes would be beneficial.⁷³⁶

The Committee was provided with several positive examples of service providers playing a broad educative role about dispute prevention and resolution. The Victorian Small Business Commissioner, Mr Mark Brennan, told the Committee ‘a lot of disputes could have been avoided if people behaved better’.⁷³⁷ His office commissioned a report called *Forming and maintaining winning business relationships* which identifies seven major characteristics of good business behaviour.⁷³⁸ He told the Committee that the report was based on input from the top business leaders in Australia:

they have said to us, ‘This is what we think are the main business behaviours that lead to successful business relationships and avoid getting into disputes’. If you look at our report, those seven business behaviours are not earth-shattering in the idea that you think, ‘Gee! I’ve never thought of that one! Never heard of that!’. They are more confirmation: ‘Yes; that is the way people ought to behave’. Within our role we see that we have got an education function there ...⁷³⁹

The seven principles of good business behaviour identified in the Victorian Small Business Commissioner’s report are summarised in figure 12.

Figure 12: The Victorian Small Business Commissioner’s seven main characteristics of successful business relationships⁷⁴⁰

1. The ALIGNMENT of the values and ethics of a business internally with the day-to-day behaviour of its employees, and externally with its chosen business partner(s).
2. A COMMITMENT wherever possible to a long-term relationship rather than a one-off transaction.
3. The recognition that working towards a common goal based on MUTUAL INTERESTS is the best way to achieve a profitable and sustainable outcome for all parties.
4. Clear, transparent and frequent COMMUNICATION to ensure that all parties fully understand the other’s position, that obligations are met, and that any issues or problems are raised early.
5. All parties recognising that they are ACCOUNTABLE AND RESPONSIBLE to the other for the success of the relationship.
6. PROFESSIONAL CONDUCT in all interactions between all parties.
7. Rapid and satisfactory resolution of disputes/issues through PRE-AGREED DISPUTE RESOLUTION PROCEDURES.

⁷³⁶ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 3.

⁷³⁷ Mark Brennan, Small Business Commissioner, Office of the Victorian Small Business Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 6.

⁷³⁸ *Ibid*, 6; Office of the Victorian Small Business Commissioner, *Forming and maintaining winning business relationships* (2007).

⁷³⁹ Mark Brennan, *Transcript of evidence*, above n 737, 6.

⁷⁴⁰ Office of the Victorian Small Business Commissioner, above n 738, 2.

Consumer Affairs Victoria (CAV) has undertaken a number of initiatives aimed at empowering consumers to handle or resolve disputes themselves. Examples of these initiatives include providing education and training for both landlords and tenants on their rights and responsibilities; providing information to newly arrived migrants on issues such as tenancy and buying a car, and an education program on rooming houses for international students.⁷⁴¹

The Dispute Settlement Centre of Victoria (DSCV) also has a strong emphasis on helping people to resolve their own disputes, providing information and coaching about self-help options and negotiation strategies.⁷⁴² One DSCV program which particularly impressed the Committee is the training of community leaders so that they can assist in the local resolution of disputes. Mr Griffin described the program to the Committee:

So in areas, particularly within the middle-eastern communities, the Lebanese and Cambodian communities, the Sudanese communities more recently and the Chinese communities, we have been very active in terms of seeing the role of the Dispute Settlement Centre not simply as a centre where people come to get their disputes resolved. The philosophy is that without training giving opportunities and skills to various communities, particularly community leaders, to resolve some of those disputes among themselves.⁷⁴³

This work is significant because culturally and linguistically diverse (CALD) communities, particularly new and emerging communities, may experience a broad range of disputes which can be exacerbated by a lack of familiarity with Australian law and mechanisms for resolving disputes in the community.⁷⁴⁴

Participants in the Committee's Culturally and Linguistically Diverse Communities Forum emphasised the role that elders play in resolving community disputes. For example, Mr Terefe Aborete who manages the Refugee and Settlement Program for Centacare Catholic Family Services told the Committee that when an issue arises 'the first place to look for help is elders, relatives and priests or religious leaders, including the Muslim leaders. As you can imagine, first of all these people are not funded at all. Secondly, they do it in a very, very traditional way, just as they do back home'.⁷⁴⁵

Mr Rocky Tregonning, the Aboriginal Projects Officer at the DSCV, told the Committee that, traditionally, Indigenous people also turned to community elders

⁷⁴¹ Letter from Rob Hulls, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 8 February 2008, attachment, 4.

⁷⁴² Ibid, attachment, 5.

⁷⁴³ John Griffin, *Transcript of evidence*, above n 723, 6. See also Anne Goldsborough, *Transcript of evidence*, above n 726, 11.

⁷⁴⁴ George Lekakis, Chairperson, Victorian Multicultural Commission, *Transcript of evidence*, Melbourne, 25 February 2008, 2; Victorian Multicultural Commission, *Submission no. 34*, 2. See also Ethnic Communities' Council of Victoria, *Submission no. 40*, 1-2; Jieh-Yung Lo, Policy and Project Officer, Ethnic Communities' Council of Victoria, *Transcript of evidence*, Melbourne, 5 June 2008, 3.

⁷⁴⁵ Terefe Aborete, Manager, Refugee & Settlement Program, Centacare Catholic Family Services (Footscray), *Transcript of evidence*, Melbourne, 5 June 2008, 9. See also Omar Farah, Multicultural Community Development Officer, Horn-Afrik Employment and Training Advocacy Project, *Transcript of evidence*, Melbourne, 5 June 2008, 7.

when they had disputes.⁷⁴⁶ The Committee did not receive any evidence about any existing programs aimed at building the capacity of elders to help resolve disputes in the Indigenous community. It notes that training community leaders and elders to assist with dispute resolution in their own communities may be an important supplement to Indigenous and CALD community involvement in service delivery through ADR service providers, which was discussed in chapter 4.

The Committee also received evidence that participation in an ADR process may equip people to more effectively resolve their own disputes in future. For example, the Health Services Commissioner's submission stated:

A successful ADR process should teach the complainant (and the service provider) how to complain more effectively in the future. It should show the complainant how to write an effective complaint letter and how to communicate to resolve disputes.⁷⁴⁷

This is consistent with research conducted by the Department of Justice which found that the majority of participants in ADR felt more confident in attempting dispute resolution themselves afterwards.⁷⁴⁸

The evidence received by the Committee demonstrates that ADR service providers can play an important role in helping people to prevent disputes or to resolve them as early as possible. The Committee commends the work undertaken by the Victorian Small Business Commissioner in identifying a best practice model for business to avoid disputes, and the work of the DSCV in educating CALD community leaders about dispute resolution.

The Committee believes that the Victorian Government should develop a strategy to assist ADR service providers throughout Victoria to play an active role in educating consumers about how to prevent disputes and resolve conflicts at an early stage. This strategy should incorporate the types of best practice education strategies that the Committee has identified in this section. The Committee also believes there would be significant benefit in providing dispute resolution training to elders and community leaders in the Indigenous community to assist them to resolve disputes involving community members.

Recommendation 32: Role of ADR providers in education to prevent and resolve disputes

The Victorian Government should develop a strategy to assist ADR providers to play a broader role in educating consumers about preventing disputes and resolving disputes at an early stage. This should include providing information about effective communication and negotiation skills, identifying best practice and educating community leaders from disadvantaged groups, in particular from the CALD and Indigenous communities, about dispute resolution techniques.

⁷⁴⁶ Rocky Tregonning, Aboriginal Projects Officer, Dispute Settlement Centre of Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 4.

⁷⁴⁷ Health Services Commissioner, *Submission no. 19*, 4. See also discussion in chapter 3.

⁷⁴⁸ Department of Justice, Victoria, *ADR Strategic Planning Conference* (2007), slide 6; Peacock, Bondjakov and Okerstrom, above n 718, 35.

6.2 Increasing ADR provision

Chapter 4 discussed the scope for increasing the provision of ADR in the community. This section focuses on the potential to provide more ADR services through industry ombudsman, or external dispute resolution (EDR), schemes and the use of online dispute resolution.

6.2.1 Expanding external dispute resolution schemes

There are a growing number of EDR schemes operating at both a state and national level. These schemes operate across a broad range of industries, including public transport, telecommunications, energy, water and financial services.⁷⁴⁹ In chapter 4 the Committee discussed how features of these schemes facilitate access to justice.

The Victorian Law Reform Commission (VLRC) reviewed EDR schemes in detail as part of its recent report on the civil justice system and recommended more widespread use of such schemes prior to the commencement of legal proceedings.⁷⁵⁰

The Attorney-General's 2008 justice statement indicates that the government is considering options for the more effective use of EDR schemes and states that the government will undertake 'a high-level review of ADR arrangements in the licensed industries within the consumer affairs environment'.⁷⁵¹ The Committee was not provided with any details about this review.

Several stakeholders in this Inquiry also expressed the view that EDR schemes have the potential to be used more broadly. Stakeholders identified credit providers as one industry where consumers may not have access to an EDR scheme since it is not mandatory for credit providers to be a member of one.⁷⁵² However, since that evidence was received, the Victorian Government has passed legislation requiring all credit providers to participate in an Australian Securities and Investments Commission-approved EDR scheme.⁷⁵³

The Consumer Action Law Centre stated that 'industry-based EDR schemes have largely been an effective non court forum for resolving consumer/trader disputes'.⁷⁵⁴

⁷⁴⁹ See chapter 2 for a full summary of current EDR schemes.

⁷⁵⁰ Victorian Law Reform Commission, *Civil justice review: Report* (2008), 245, 284, recommendation 18.

⁷⁵¹ Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 42.

⁷⁵² Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 11; Consumer Action Law Centre, *Submission no. 15*, 9; Gerard Brody, *Transcript of evidence*, above n 728, 3-4; Eliza Collier, Policy and Public Affairs Manager, Banking and Financial Services Ombudsman, *Transcript of evidence*, Melbourne, 11 February 2008, 4.

⁷⁵³ *Consumer Credit (Victoria) and Other Acts Amendment Act 2008* (Vic) s 6. The new credit provider registration scheme had not commenced operation at the time this report was written. The Australian Securities and Investments Commission has approved four EDR schemes for credit providers: Financial Ombudsman Service (FOS), Credit Ombudsman Service Limited (COSL), Credit Union Dispute Resolution Centre (CUDRC), Financial Cooperative Dispute Resolution Scheme. See Consumer Affairs Victoria, *New credit provider registration scheme*, <<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Credit+%26+Debt-Changes+to+the+Credit+Provider++Registration+Scheme?OpenDocument&1=80-Credit+%26+Debt~&2=15-Changes+to+the+Credit+Provider++Registration+Scheme~&3=~>>>, viewed 9 February 2009.

⁷⁵⁴ Consumer Action Law Centre, *Submission no. 15*, 9.

It suggested such schemes should be extended to other licenced industries, such as motor vehicle trading and finance brokers.⁷⁵⁵ Ms Fiona McLeod, the Victorian Energy and Water Ombudsman, stated there was the potential to extend EDR schemes to housing, real estate and hospitality.⁷⁵⁶ No other stakeholders commented on these issues.

The Committee recognises that EDR schemes play an important role in helping resolve disputes quickly and without recourse to the court system, and believes there is potential to use these mechanisms more extensively in Victoria. The Committee received limited evidence about specific areas where these schemes could be implemented. It notes that the Victorian Government is currently reviewing ADR arrangements in licenced industries and encourages the government to fully consider the suggestions of stakeholders in this Inquiry as part of that review.

The Committee notes that there are moves to regulate finance brokers at a national level. The Ministerial Council on Consumer Affairs has released an exposure draft of a bill which outlines a scheme for the national regulation of finance and mortgage brokers. This scheme will, among other things, impose entry requirements and require participation in an EDR scheme.⁷⁵⁷ In light of these developments, the Committee has not made any recommendations in relation to finance brokers.

Recommendation 33: Extending external dispute resolution schemes

As part of its current review of ADR arrangements in licenced industries, the Victorian Government should consider establishing EDR or industry ombudsman schemes for motor car traders and repairers, real estate agents and the hospitality industry.

6.2.2 Online dispute resolution (ODR)

Information technology is increasingly being used to provide a variety of services, including ADR. The internet is one of the most common ports of call for Victorians seeking information about resolving disputes,⁷⁵⁸ and it is likely that it will become even more widely used in the future.⁷⁵⁹ In chapter 4 the Committee recommended a range of enhancements to disputeinfo – the Victorian Government’s online dispute

⁷⁵⁵ Ibid, 9; Gerard Brody, *Transcript of evidence*, above n 728, 4. See also Banking and Financial Services Ombudsman, Financial Industry Complaints Service and Insurance Ombudsman Service, *Submission no. 22*, 11.

⁷⁵⁶ Fiona McLeod, Energy and Water Ombudsman, Energy and Water Ombudsman (Victoria), *Transcript of evidence*, Melbourne, 4 March 2008, 13.

⁷⁵⁷ See Consumer Affairs Victoria, *Finance brokers*, <<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Credit+%26+Debt-Finance+and+Mortgage+Brokers-Finance+Brokers?OpenDocument&1=80-Credit+%26+Debt-&2=20-Finance+and+Mortgage+Brokers~&3=10-Finance+Brokers~>>, viewed 2 March 2009.

⁷⁵⁸ Peacock, Bondjakov and Okerstrom, above n 718, 18.

⁷⁵⁹ Melissa Conley Tyler and Di Bretherton, 'Developing an online mediation culture: The fourth generation of online ADR' (Paper presented at the 2nd Asia-Pacific Mediation Forum: Developing a Mediation Culture, Singapore, 19-22 November 2003), 9; Melissa Conley Tyler and Di Bretherton, 'Lessons for eGovernment: Online dispute resolution' in P J Chen and W Roberts (eds.), *The Australian Electronic Government Conference* (2004) The University of Melbourne - Centre for Public Policy, 10.

resolution site – which provides information about strategies for resolving common disputes.⁷⁶⁰ Those recommendations aim to make the website a comprehensive central access portal for online information about ADR.

In addition to electronic information provision, ODR is becoming increasingly popular. In ODR, eADR and cyber-ADR, all or a substantial part of the communication in the dispute resolution process occurs electronically, especially through the internet.⁷⁶¹ Most automated dispute resolution processes have focused around commercial and insurance claims.⁷⁶²

The Victorian Bar’s submission provided an example of an ODR mechanism:

EBay offers an online dispute resolution service for trading disputes. The webpage claims to offer “a completely automated web-based communications tool” and “is currently free of charge to all users”. It is claimed that this has been used by millions of persons. If the dispute does not resolve it can be referred to paid mediators from an American company known as Square Trade.⁷⁶³

ODR services provide a range of benefits including the fact that they can be accessed anywhere, they allow communications 24 hours per day, and written communications allow for careful consideration of responses.⁷⁶⁴ Ms Melissa Conley Tyler and Associate Professor Di Bretherton of the University of Melbourne have noted 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’.⁷⁶⁵ In addition, online methods may also increase access to ADR services for people with a range of disabilities including mobility, vision and hearing impairments.⁷⁶⁶

Few stakeholders addressed these issues. Two stakeholders commented that ODR has the potential to overcome difficulties associated with distance.⁷⁶⁷ Ms Lynne Coulson Barr of the Disability Services Commissioner stated that use of internet technologies by their clients ‘varies’. She added:

It has been important for a proportion of our complainants to be able to lodge by email or on a website, particularly people with physical and sensory impairments. With some of our matters a lot of our liaison is by email, so it is an important factor. Also, we have found that younger complainants tend to use email.⁷⁶⁸

⁷⁶⁰ See Department of Justice, Victoria, *disputeinfo*, <<http://www.justice.vic.gov.au/disputeinfo>>, viewed 10 March 2009.

⁷⁶¹ Conley Tyler and Bretherton, 'Lessons for eGovernment: Online dispute resolution', above n 759, 5. See also National Alternative Dispute Resolution Advisory Council, *Dispute resolution terms: The use of terms in (alternative) dispute resolution* (2003), 9.

⁷⁶² Conley Tyler and Bretherton, 'Lessons for eGovernment: Online dispute resolution', above n 759, 5; Conley Tyler and Bretherton, 'Developing an online mediation culture', above n 759, 4.

⁷⁶³ The Victorian Bar, *Submission no. 13*, 42, referring to <<http://www.squaretradedisputeresolution.com>>.

⁷⁶⁴ National Alternative Dispute Resolution Advisory Council (NADRAC), *On-line ADR: Background paper* (2001), 14.

⁷⁶⁵ Conley Tyler and Bretherton, 'Lessons for eGovernment: Online dispute resolution', above n 759, 9.

⁷⁶⁶ Attorney-General's Department, Commonwealth, *Federal civil justice strategy paper* (2003), 185.

⁷⁶⁷ Victoria Legal Aid, *Submission no. 30*, 8; Health Services Commissioner, *Submission no. 19*, 5.

⁷⁶⁸ Lynne Coulson Barr, Principal Conciliation Officer, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 5 June 2008, 12.

However, there is a risk that ODR may deny access to some groups. This is because some people may not have access to appropriate infrastructure and/or the skills or confidence to access electronic services.⁷⁶⁹ 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, well-educated, literate and computer literate'.⁷⁷⁰ 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.⁷⁷¹

Participants in the Committee's Culturally and Linguistically Diverse Communities Forum highlighted that language barriers may prevent members of CALD communities accessing services.⁷⁷² The internet was not seen as an effective communication tool for many of these communities. Ms Nadine Hantke, a multicultural access and support worker at Prahran Mission, told the Committee 'most of the people I personally work with do not use the internet as a source of information. They either do not have enough expertise or capability to use the internet, or they are just not used to it'.⁷⁷³

The *Federal civil justice strategy paper*, which was prepared by the Australian Attorney-General's Department in consultation with the courts, the legal profession, legal service providers, and other stakeholders, 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.⁷⁷⁴ Further, the National Alternative Dispute Resolution Advisory Council (NADRAC) has highlighted that, in providing online services, the emphasis should be on the needs and capacity of users, rather than the needs of the service provider (in particular, to reduce costs and streamline processes).⁷⁷⁵

Several stakeholders identified the potential of ODR to provide effective dispute resolution services throughout Australia.⁷⁷⁶ However, even those who were supportive of ODR emphasised that it should just be another option for resolving

⁷⁶⁹ NADRAC, above n 764, 20.

⁷⁷⁰ Ibid, 11.

⁷⁷¹ Conley Tyler and Bretherton, 'Lessons for eGovernment: Online dispute resolution', above n 759, 13.

⁷⁷² Jieh-Yung Lo, *Transcript of evidence*, above n 744, 2; Anna Walker, Action on Disability within Ethnic Communities, *Transcript of evidence*, Melbourne, 5 June 2008, 5; Ethnic Communities' Council of Victoria, *Submission no. 40*, 2; Jenny Mutembu, Zambian community, *Transcript of evidence*, Melbourne, 5 June 2008, 15; George Lekakis, *Transcript of evidence*, above n 744, 2-3; Victorian Multicultural Commission, *Submission no. 34*, 3.

⁷⁷³ Nadine Hantke, Multicultural Access and Support Worker, Prahran Mission, *Transcript of evidence*, Melbourne, 5 June 2008, 4 See also Omar Farah, *Transcript of evidence*, above n 745, 11.

⁷⁷⁴ Attorney-General's Department, above n 766, 181. See also Conley Tyler and Bretherton, 'Lessons for eGovernment: Online dispute resolution', above n 759, 13.

⁷⁷⁵ National Alternative Dispute Resolution Advisory Council, *Submission on ADR in e-Commerce* (2001), 7. See also Melissa Conley Tyler, Di Bretherton and Lucy Firth, *Research into online alternative dispute resolution: Feasibility report prepared for the Department of Justice, Victoria* (2003) University of Melbourne, 12.

⁷⁷⁶ See, for example, Health Services Commissioner, *Submission no. 19*, 5; Gerard Brody, *Transcript of evidence*, above n 728, 10; Victoria Legal Aid, *Submission no. 30*, 8; The Victorian Bar, *Submission no. 13*, 42-43; Law Institute of Victoria, *Submission no. 20*, 8.

disputes and should not replace other services. For example, the Health Services Commissioner stated, ‘Online ADR has possibilities for the resolution of complaints in the health sector. Online ADR is not a substitute for other methods of dispute resolution; it is one option made available to an ADR service provider to the parties in dispute’.⁷⁷⁷

The VLRC’s civil justice review recognised the potential for wider use of ODR, however it did not make any specific recommendations about this issue.⁷⁷⁸ Research commissioned by the Department of Justice found a high level of public interest in, and demand for, ODR among survey respondents. The major factors influencing process choice for the survey respondents were cost, speed and convenience.⁷⁷⁹ The report suggested that the Government should take the lead as an ODR provider in consumer disputes.⁷⁸⁰

The Committee agrees with the VLRC’s finding that there is the potential to utilise ODR more widely in Victoria. The Committee notes that ODR offers a range of possible benefits for some, but acknowledges evidence that it may not be equally accessible to all members of the community. Therefore, the Committee believes that ODR should supplement rather than supplant face-to-face or telephone ADR services. The Committee did not receive sufficient evidence to make comprehensive recommendations about ODR, but recommends that the Victorian Government undertake further research to identify how ODR can be effectively implemented in Victoria.

In chapter 4 the Committee recommended the redevelopment of the *disputeinfo* website to provide a central access point to information about ADR in Victoria. The Committee believes that there is potential for the *disputeinfo* website to be expanded to incorporate ODR services, particularly in relation to consumer disputes.

Recommendation 34: Research on online dispute resolution (ODR)

The Victorian Government should undertake research on how online dispute resolution services can be effectively provided through the *disputeinfo* website.

Recommendation 35: Provision of ODR via *disputeinfo* website

The Victorian Government should implement the findings of this research to provide comprehensive online dispute resolution services to the Victorian community through the *disputeinfo* website.

⁷⁷⁷ Health Services Commissioner, *Submission no. 19*, 5. See also The Victorian Bar, *Submission no. 13*, 42-43; Law Institute of Victoria, *Submission no. 20*, 8.

⁷⁷⁸ Victorian Law Reform Commission, above n 750, 225

⁷⁷⁹ Conley Tyler, Bretherton and Firth, above n 775, 7; Conley Tyler and Bretherton, ‘Lessons for eGovernment: Online dispute resolution’, above n 759, 13.

⁷⁸⁰ Conley Tyler, Bretherton and Firth, above n 775, 22.

6.3 Obligations to use ADR

6.3.1 Pre-action ADR

One mechanism for ensuring greater use of ADR is to require parties to participate in ADR before they commence legal proceedings.⁷⁸¹

Pre-action ADR is used extensively in the family law area. Mr Shane Quinn, Manager of the Greensborough Family Relationship Centre, told the Committee that:

after July [2008] a person applying to court for a parenting order will not be able to do so without attending family dispute resolution and providing a certificate from the family dispute resolution practitioner, except in certain situations.⁷⁸²

Ms Henham from the Family Mediation Centre stated that agreements were reached at 74% of parenting family dispute resolutions conducted by the centre.⁷⁸³

Another example of pre-action ADR exists in relation to retail leases and owner drivers. Mr Brennan, the Victorian Small Business Commissioner, told the Committee:

In respect of the owners drivers legislation and the Retail Leases Act ... if we hold a mediation of the dispute under those two specific pieces of legislation and the mediation fails, I am required to give a certificate to the parties, who can then take the matter further to VCAT. The parties cannot go to VCAT under the Retail Leases Act or the Owner Drivers Act without first coming for mediation at my office. If we mediate it successfully, it is all over; if we mediate and it is unsuccessful, then they can have the matter determined by VCAT according to law.⁷⁸⁴

However, Mr Brennan stated that this requirement does not mean that mediation by his office is mandatory:

Under our three pieces of legislation there is no provision in any of them that makes mediation compulsory. However, under the Retail Leases Act and the [O]wner [D]rivers Act there are provisions that say that if a party refuses to attend mediation or participate in mediation or withdraws from a mediation and the matter proceeds to VCAT – after I give a certificate saying that the mediation failed – VCAT can award costs against the party who would not participate in the mediation, win, lose or draw.⁷⁸⁵

Mr Brennan estimated that his office settled 75% of mediated disputes, with most cases settled within 10 weeks from the date of application.⁷⁸⁶ An example of a

⁷⁸¹ See Victorian Law Reform Commission, above n 750, 133.

⁷⁸² Shane Quinn, Manager, Greensborough Family Relationship Centre, *Transcript of evidence*, Melbourne, 11 February 2008, 2. See also *Family Law Act 1975* (Cth) ss 60I(7) and 60I(8). For exceptions, see s 60I(9). For other examples of pre-trial ADR, see *Farm Debt Mediation Act 1994* (NSW) ss 8, 9 and 10.

⁷⁸³ Meg Henham, *Transcript of evidence*, above n 730, 4.

⁷⁸⁴ Mark Brennan, *Transcript of evidence*, above n 737, 2. See also *Retail Leases Act 2003* (Vic) Part 10 (Dispute Resolution) and s 87; *Owner Drivers and Forestry Contractors Act 2005* (Vic) Part 5 (Dispute Resolution) and s 40.

⁷⁸⁵ Mark Brennan, *Transcript of evidence*, above n 737, 8.

⁷⁸⁶ *Ibid*, 5.

successful mediation by the Victorian Small Business Commissioner is set out in case study 5.

The VLRC's 2008 report on the civil justice system recommended the introduction of pre-action protocols to reduce the number of disputes that need to be resolved by litigation.⁷⁸⁷ These statutory protocols would require that, prior to commencing litigation, the parties make reasonable attempts to resolve the dispute or narrow the issues in dispute. This would include writing a letter stating whether the party is willing to participate in ADR.⁷⁸⁸ A party would not be able to commence litigation unless the protocols were complied with, with the court able to stay proceedings until there is compliance.⁷⁸⁹ The VLRC opined that the proposed protocols are not inconsistent with human rights because, although the parties are expected to meet the pre-action protocol requirements, they are not barred from commencing legal proceedings in the event of non-compliance (although there may be cost and other consequences).⁷⁹⁰

Case study 5: They 'agreed to share the costs of the repairs'⁷⁹¹

'A tenant referred a dispute to the Victorian Small Business Commissioner concerning responsibility for structural repairs.

The Victorian Small Business Commissioner organised mediation between the parties. At mediation both parties believed that the other was legally responsible for the cost of repairs. Despite this, they were also conscious of the time, cost and risk of litigation. The mediator suggested that both parties would benefit from the works being completed in that the tenant would have the ability to attract a larger number of higher fee paying customers and the landlord would have a building with a higher value use. The parties and their legal representatives agreed with this proposition and agreed to share the costs of the repairs. The landlord also agreed to grant the tenant an additional option for a further term in order to amortise the cost of the works that the tenant's share involved, should the tenant intend to take up an additional term. The works program also meant that the tenant had a much more viable business that could now be sold at some future date.'

The Victorian Government has indicated support for the VLRC's proposed pre-action protocols.⁷⁹² These will be considered further by the advisory committee established to help implement the VLRC's recommendations.⁷⁹³

⁷⁸⁷ Victorian Law Reform Commission, above n 750, 142-146, recommendations 1-15; Attorney-General, above n 751, 43. See also Russell Kennedy, *Submission no. 1*, 3: the submission supported exchanging all information as a pre-condition to mediation, failing which there might be cost consequences.

⁷⁸⁸ Victorian Law Reform Commission, above n 750, 143, recommendation 5.

⁷⁸⁹ *Ibid*, 144, recommendations 8 and 9.

⁷⁹⁰ *Ibid*, 109; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

⁷⁹¹ Office of the Victorian Small Business Commissioner, *Annual report 2004-05* (2005), 32.

⁷⁹² Attorney-General, above n 751, 43.

⁷⁹³ *Ibid*, 43.

NADRAC is also currently undertaking research into the potential for the greater use of ADR both before the commencement of litigation and throughout the litigation process.⁷⁹⁴ This work is expected to be completed by September 2009.

Some stakeholders were generally supportive of the wider use of compulsory pre-action ADR.⁷⁹⁵ For example, Mr Alan Wein of The Mediator Group, a mediation service provider, stated in his submission, 'All court issued matters should NOT be listed for hearing until mediation has been conducted in a format similar to the very successful Victorian Small Business Commission (VSBC) format for retail lease disputes'.⁷⁹⁶

Mr Shane Quinn of the Greensborough Family Relationship Centre, an organisation that provides family dispute resolution services, told the Committee that there had been mixed reactions to the use of mandatory pre-litigation ADR in the Family Court:

Some people are quite keen to stay out of the courts because they have been involved with them for so long. Some have exhausted all their funds and resources, so it is not really an avenue they can pursue any further, so they are happy to come to our centre, which is free. On the other hand ... [a] lot of people do not like to be told what to do, and they are upset when it comes across in that way.⁷⁹⁷

While not necessarily agreeing with mandatory pre-litigation ADR, a number of stakeholders acknowledged that it has been relatively successful in the family law⁷⁹⁸ and small business contexts.⁷⁹⁹ Some stakeholders emphasised that if ADR is mandatory, then there should be a mechanism to ensure the quality of the service.⁸⁰⁰ Issues of ensuring service quality were discussed in chapter 5 of this report.

However, a number of stakeholders expressed concern about requiring parties to undertake ADR before their matter could be heard in court, particularly about the impact it might have on disadvantaged individuals.⁸⁰¹ The Consumer Action Law Centre stated:

⁷⁹⁴ National Alternative Dispute Resolution Advisory Council (NADRAC), *ADR and civil proceedings reference*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference>, viewed 29 January 2009.

⁷⁹⁵ See, for example, The Mediator Group, *Submission no. 3*, 7; Russell Kennedy, *Submission no. 1*, 3; Susan Cibau, Senior Conciliation Officer, Accident Compensation Conciliation Service, *Transcript of evidence*, Melbourne, 11 February 2008, 3; LEADR, *Submission no. 36*, 9; Peter Lauritsen, Deputy Chief Magistrate, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 29 November 2007, 2-5 Tania Sourdin, *Transcript of evidence*, above n 726, 5.

⁷⁹⁶ The Mediator Group, *Submission no. 3*, 7.

⁷⁹⁷ Shane Quinn, *Transcript of evidence*, above n 782, 5.

⁷⁹⁸ Cf Tania Sourdin, *Transcript of evidence*, above n 726, 5; Victorian Multicultural Commission, *Submission no. 34*, appendix 2, 8; George Lekakis, *Transcript of evidence*, above n 744, 2.

⁷⁹⁹ Victoria Legal Aid, *Submission no. 30*, 8; Walter Ibbs, Acting Manager, Roundtable Dispute Management Service, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 25 February 2008, 7; The Victorian Bar, *Submission no. 13*, 40-41; Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 5.

⁸⁰⁰ NADRAC, *Submission no. 25*, 5; Accident Compensation Conciliation Service, *Submission no. 21*, 6; Tania Sourdin, *Transcript of evidence*, above n 726, 6.

⁸⁰¹ Consumer Action Law Centre, *Submission no. 15*, 10; Gerard Brody, *Transcript of evidence*, above n 728, 3; Victorian Aboriginal Legal Service, *Submission no. 32*, 7 See also The Victorian Bar, *Submission no. 13*, 8,

If ADR was a condition precedent to commencing legal action, there would be an attrition of valid consumer claims by consumers who give up because of all the ‘hoops’ they are forced to ‘jump through’. It has been the experience of Consumer Action’s legal practice section that many traders only begin serious negotiation for settlement once an application has been issued in the Victorian Civil and Administrative Tribunal ... For these traders, pre-commencement ADR would simply be used as a delaying tactic.⁸⁰²

Similarly, the Victorian Aboriginal Legal Service commented:

if Courts and/or Governments decide that they will use ADR as a hurdle to jump before you can go to the Courts, as the Commonwealth Government have with the family law legislative changes, then there will be nothing alternative about ADR. It will be another part of the bureaucracy and a further source of substantive inequality for inarticulate people and marginalised groups.⁸⁰³

The Committee notes the diversity of views about requiring litigants to participate in ADR before commencing legal action. It acknowledges evidence that the family law and Victorian Small Business Commissioner’s systems are operating to resolve many matters successfully without recourse to the courts. However, the Committee is cognisant that pre-action ADR requirements may be disadvantageous to some members of the community.

The Committee believes that the pre-action protocols suggested by the VLRC also have the potential to contribute positively to the increased use of ADR prior to litigation. The Committee notes that the Victorian Government has already indicated support for the implementation of the pre-action protocols suggested by the VLRC.

6.3.2 Overriding obligations to use ADR

In its civil justice review the VLRC recommended that statutory overriding obligations, including an obligation to attempt to resolve or narrow the issues of a dispute by the use of ADR, be imposed on participants to legal proceedings including the parties, lawyers and law practices.⁸⁰⁴ These would apply to conduct in relation to a civil matter before a Victorian court.⁸⁰⁵

The VLRC proposed that there should be sanctions available if parties fail to comply with the overriding obligations, including ordering legal costs or compensation.⁸⁰⁶

The Victorian Government has indicated that it supports the introduction of overriding obligations and this will be considered further by the advisory committee that has been established to guide the implementation of the VLRC’s

40-41; Law Institute of Victoria, *Submission no. 20*, 8; Elissa Campbell, *Transcript of evidence*, above n 799, 5-6; Monash University Faculty of Law, *Submission no. 7*, 4.

⁸⁰² Consumer Action Law Centre, *Submission no. 15*, 10. See also Gerard Brody, *Transcript of evidence*, above n 728, 3.

⁸⁰³ Victorian Aboriginal Legal Service, *Submission no. 32*, 7.

⁸⁰⁴ Victorian Law Reform Commission, above n 750, 149-150, 190, 205, recommendations 16.3(2), 16.3(4).

⁸⁰⁵ *Ibid*, 150, 190.

⁸⁰⁶ *Ibid*, 151, 206, recommendation 16.3(8).

recommendations.⁸⁰⁷ Stakeholders participating in this Inquiry did not comment on this issue.

The Committee recognises that the overriding obligations proposed by the VLRC have the potential to encourage parties to make a genuine attempt to resolve their dispute through ADR before commencing litigation.

6.3.3 Victorian Government model litigant guidelines

As noted in chapter 3, the Victorian Government is a frequent user of the court system. 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.⁸⁰⁸

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.⁸⁰⁹ In addition, the Victorian Attorney-General has issued *Guidelines on the State of Victoria's obligation to act as a model litigant*. 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'.⁸¹⁰

Victoria's model litigant obligations have a wide 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.⁸¹¹ They extend to all litigation including matters before courts, tribunals, inquiries, arbitration and other ADR processes.⁸¹² They apply to this litigation irrespective of the state's status as plaintiff, defendant or third party.⁸¹³ Further, lawyers engaged in such litigation, whether the Victorian Government Solicitor, in-house or private, must act in accordance with the guidelines.⁸¹⁴

Victoria's guidelines are based on the Commonwealth Government's model litigant guidelines.⁸¹⁵ Victoria's guidelines require the state to 'avoid litigation, wherever possible',⁸¹⁶ which arguably infers an obligation on the state to be open to ADR at all stages of a dispute.⁸¹⁷ However, the Commonwealth guidelines positively obligate the Commonwealth to consider ADR in its behaviour as a model litigant by:

⁸⁰⁷ Attorney-General, above n 751, 43.

⁸⁰⁸ Stephen Lee, 'The State as model litigant' (Speech delivered at the Victorian Government Solicitor's Office Lunchtime Seminar Series, Melbourne, 28 September 2006), 1.

⁸⁰⁹ Ibid, 1.

⁸¹⁰ Attorney-General, Victoria, *Guidelines on the State of Victoria's obligation to act as a model litigant* (2001) note 3.

⁸¹¹ Ibid, note 2.

⁸¹² Ibid, note 2.

⁸¹³ Lee, above n 808, 6.

⁸¹⁴ Attorney-General, above n 810, note 2.

⁸¹⁵ Ibid, note 1.

⁸¹⁶ Ibid, guideline 2(c).

⁸¹⁷ Lee, above n 808, 9.

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.⁸¹⁸

The guidelines also require the Commonwealth and its agencies to participate ‘fully and effectively’ in ADR.⁸¹⁹

In 2008, the Australian Attorney-General amended the guidelines to strengthen the requirement for government agencies to use ADR so that they consider the potential for earlier settlement of disputes. The amendments include requiring the Commonwealth and its agencies to:

- start court proceedings only if ADR has been considered
- continue to consider other methods of dispute resolution during the course of litigation.⁸²⁰

In addition, the Commonwealth Office of Legal Services Coordination is collecting evidence about the Commonwealth’s litigation practices, to identify good practices for successful use of ADR and to identify whether particular ADR strategies should be adopted by the government.⁸²¹

The VLRC has observed that the guidelines provide ‘a tool for managing the behaviour of participants in the civil justice system ... [and] have the potential to be influential in precipitating cultural change’.⁸²²

Stakeholders in the Inquiry also expressed similar views. Professor Sourdin stated, ‘[T]here is a lot to be said for government taking a lead and doing certain things. I mean, government can act as a litigant in certain ways, where other people follow’.⁸²³

The Victorian Privacy Commissioner suggested that there should be a review of the Victorian Government’s compliance with the model litigant guidelines.⁸²⁴

The Committee believes that, as a major litigant, the Victorian Government should set a positive example for other litigants and potential litigants by using ADR processes to resolve disputes as frequently as possible and participating fully in all appropriate ADR processes applicable to the dispute. The Committee therefore

⁸¹⁸ *Legal Services Directions 2005* (Cth), appendix B, paragraph 2(d).

⁸¹⁹ *Ibid*, appendix B, paragraph 5.2.

⁸²⁰ See *Legal Services Amendment Directions 2008* (Cth) explanatory statement and *Legal Services Directions 2005* (Cth), appendix B, paragraphs 2e(iii), 2e(iv), 5.1, 5.2. See also Attorney-General Robert McClelland (Speech delivered at the ADR in Government Forum, Canberra, 4 June 2008), paragraphs 22-44.

⁸²¹ *Ibid*, paragraph 49-54.

⁸²² Victorian Law Reform Commission, above n 750, 170. See also Attorney-General Robert McClelland (Speech delivered at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 10 September 2008), paragraphs 31 and 32.

⁸²³ Tania Sourdin, *Transcript of evidence*, above n 726, 9. See also The Victorian Bar, *Submission no. 13*, 67; Victoria Legal Aid, *Submission no. 30*, 12; Margaret Lothian, *Submission no. 17*, 12; Law Institute of Victoria, *Submission no. 20*, 10.

⁸²⁴ Office of the Victorian Privacy Commissioner, *Submission no. 8*, 5.

recommends that Victoria's model litigant guidelines should be amended to be consistent with the Commonwealth guidelines which more specifically encourage the use of ADR, both prior to the commencement of litigation and throughout the litigation process.

The Committee is also of the view that the Victorian Government should conduct an annual review of compliance with the model litigant guidelines. This would provide additional incentive for government departments and others to comply with the guidelines as well as identifying any issues that need to be addressed to ensure maximum use of alternatives to litigation by the Victorian Government.

Recommendation 36: Encouraging ADR through the model litigant guidelines

The Victorian Government should amend Victoria's model litigant guidelines to include requirements that the State of Victoria, its departments and agencies:

- cannot commence court proceedings until ADR processes have been considered
- continue to consider using ADR and other settlement methods throughout the litigation process
- participate fully and effectively in all appropriate ADR processes applicable to the dispute.

Recommendation 37: Reviewing compliance with the model litigant guidelines

The Victorian Government should undertake an annual review to ascertain compliance of the state, its departments and agencies with the model litigant guidelines. The Victorian Government should publish the results of this review.

6.3.4 The role of lawyers

Many people who have a conflict or dispute seek advice from a legal advisor. Research conducted for the Department of Justice identified that 15% of people would approach a lawyer or legal service in order to find a dispute resolution service.⁸²⁵

The Australian Law Reform Commission has recognised that 'lawyers play a key role in ensuring clients can make informed decisions about the merits of their disputes, in educating clients about avoiding disputes and about alternatives to litigation'.⁸²⁶ This broad role is emphasised by the Law Institute of Victoria's practice rules which state:

⁸²⁵ Peacock, Bondjakov and Okerstrom, above n 718, 19.

⁸²⁶ Australian Law Reform Commission, *ADR - Its role in federal dispute resolution: Issues paper 25* (1998), paragraph 9.17.

A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.⁸²⁷

The Victorian Government has also indicated that it will examine the merits of the 'ADR pledge', which is currently used in the United States.⁸²⁸ This involves law firms committing to prioritising the fast and appropriate resolution of their clients' disputes.⁸²⁹ The ADR pledge conveys the message that willingness to negotiate or mediate is company policy, not a sign of weakness; it promotes systematic, early efforts to resolve disputes and establishes a flexible framework for helping to resolve complex multi-party disputes.⁸³⁰ Stakeholders in this Inquiry did not provide any evidence about ADR pledges.

While the Committee did not receive any information about the rates at which lawyers are engaging in or referring clients to ADR processes, there is evidence that not all lawyers use these processes as extensively as they could. The Australian Law Reform Commission has identified that legal education and training about ADR is not uniform and may be focused on pockets within the legal profession.⁸³¹ Professors Hilary Astor and Christine Chinkin have suggested that some lawyers may still only have rudimentary knowledge of ADR or may be resistant to moving beyond their 'comfort zone of familiar practice'.⁸³²

Some stakeholders thought that lawyers currently have a sufficient understanding of ADR. For example, the Law Institute of Victoria's submission stated:

ADR services and processes are well understood by legal advisors. For over 10 years, there has been a growing focus on increasing lawyers' understanding of, and familiarity with, mediation and, for much longer than that, in relation to arbitration.⁸³³

The Monash University Faculty of Law's submission referred to evidence that there is increasingly a 'settlement' culture among lawyers and observed '[i]t is clear that a cultural change is taking place in relation to use of ADR by the Australian legal profession'.⁸³⁴

⁸²⁷ Law Institute of Victoria, *Professional conduct and practice rules 2005* (2005), 21, paragraph 12.3. These are based on the Law Council of Australia, *Model rules of professional conduct and practice* (2002).

⁸²⁸ Attorney-General Rob Hulls, 'Roadmap of reform for Victoria's justice system' (Media release, 14 October 2008).

⁸²⁹ *Ibid.*

⁸³⁰ International Institute for Conflict Prevention and Resolution, *Why sign the pledge: FAQs*, <<http://www.cpradr.org/AboutCPR/ADRpledge/WhySignThePledgeFAQ/tabid/163/Default.aspx>>, viewed 9 February 2009.

⁸³¹ Australian Law Reform Commission, above n 826, paragraph 9.22

⁸³² Hilary Astor and Christine Chinkin, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths, 281. See also Olivia Rundle, 'Transforming lawyer perspectives of their client's role in mediation: What mediators should know' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008), 341.

⁸³³ Law Institute of Victoria, *Submission no. 20*, 7. See also The Victorian Bar, *Submission no. 13*, 34-35.

⁸³⁴ Monash University Faculty of Law, *Submission no. 7*, 4.

However, Victoria Legal Aid submitted that, ‘Many legal advisors do not currently have sufficient understanding of ADR processes. Increased education of legal advisors would lead [them to] refer to ADR services more often, and more appropriately’.⁸³⁵ Other stakeholders also supported a strategy to educate lawyers about ADR.⁸³⁶ The Health Services Commissioner, Ms Beth Wilson, told the Committee that lawyers sometimes do not advise their clients about the services provided by her office and she is currently working with the Law Institute of Victoria to address this.⁸³⁷

Monash University Faculty of Law’s submission emphasised the importance of both undergraduate and continuing legal education and suggested that teaching about ADR should be placed within the wider context of non-adversarial law:

studies...found that particularly amongst the younger generation of lawyers, there is an increasing acceptance of and orientation towards ADR processes...[T]he key method of increasing the capacity of lawyers to refer appropriate cases to ADR and other comparable non adversarial processes is through high-quality legal education.... law students should not only be educated as to statute and case law in diverse subjects, but also in the different approaches to resolving conflict.⁸³⁸

Monash University has introduced a unit in non-adversarial justice, which includes teaching about ADR and its component processes such as mediation, negotiation, conciliation and arbitration.⁸³⁹ The unit also incorporates teaching about other non-adversarial processes such as restorative justice,⁸⁴⁰ which is discussed in part III of this report.

Professor Sourdin submitted that regional lawyers in particular may not have a full understanding of ADR as they do not have access to continuing legal education to the same extent as metropolitan lawyers.⁸⁴¹

The evidence presented to the Committee suggests that Victorian lawyers have increasing understanding of ADR processes. However, given the key role of lawyers in encouraging their clients to use ADR, the Committee believes that lawyers should receive education about ADR at the undergraduate level and as part of continuing legal education. This education should include information about ADR’s philosophy, aims, benefits, potential outcomes, processes, the skills required for practice and ADR service providers. It should be placed in the context of overall teachings about non-adversarial law.

⁸³⁵ Victoria Legal Aid, *Submission no. 30*, 6. See also Walter Ibbs, *Transcript of evidence*, above n 799, 6.

⁸³⁶ Margaret Lothian, *Submission no. 17*, 6-7; LEADR, *Submission no. 36*, 9; Health Services Commissioner, *Submission no. 19*, 4. See also Victorian Law Reform Commission, above n 750, 283, 285, recommendation 28.

⁸³⁷ Beth Wilson, Health Services Commissioner, Office of the Health Services Commissioner, *Transcript of evidence*, Melbourne, 11 February 2008, 4.

⁸³⁸ Monash University Faculty of Law, *Submission no. 7*, 4-5.

⁸³⁹ *Ibid*, 5, 14.

⁸⁴⁰ *Ibid*, 5, 13

⁸⁴¹ Tania Sourdin, *Transcript of evidence*, above n 726, 7.

The Committee notes evidence that country lawyers may not have the same opportunities to participate in continuing education about ADR. As noted in chapter 4, ADR services are increasingly being provided in rural and regional areas and the Committee believes it is important the residents outside the metropolitan area have equal access to ADR services. Therefore the Committee emphasises the importance of providing opportunities for learning about ADR to lawyers in rural and regional Victoria.

Recommendation 38: Educating lawyers about ADR

The Victorian Government should work with providers of legal education (undergraduate, postgraduate and continuing professional development) and relevant professional bodies to ensure that lawyers and future lawyers receive education about ADR, including its philosophy, aims, benefits, potential outcomes, processes, ADR service providers and the skills required for practice. This education should be placed in the context of overall teachings about non-adversarial law. In particular, the Victorian Government should implement strategies to enhance knowledge and understanding of ADR among lawyers in rural and regional areas.

6.4 Role of the courts

The aim of dispute resolution is to prevent disputes as much as possible and, where they do arise, to resolve them as quickly as possible. The Attorney-General's justice statement states that courts are 'the last resort' in dispute resolution.⁸⁴² However, even when cases do reach court, there is the potential for them to be referred and resolved through ADR rather than judicial determination.

This section outlines strategies the courts may use to increase the use of ADR. The Committee is cognisant of the fact that these issues have been extensively considered by the VLRC in its civil justice review. The Committee's terms of reference required it to consider these issues as well, and this section discusses them and outlines the views of stakeholders in this Inquiry.

6.4.1 Current referrals to ADR by courts and tribunals

Most Australian courts are already empowered by legislation and/or court rules to refer cases to ADR.⁸⁴³

ADR is already extensively used in Victorian courts and tribunals. This was evident in the submissions to this Inquiry.

⁸⁴² Attorney-General, above n 751, 40.

⁸⁴³ Kathy Mack, *Court referral to ADR: Criteria and research* (2003) National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 7. See also Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 171-188.

Figure 13: Magistrates' Court of Victoria's Diversion to Mediation Program⁸⁴⁴

The Magistrates' Court of Victoria's Diversion to Mediation Program commenced as a pilot project in July 2002. The program is conducted by the Dispute Settlement Centre of Victoria (DSCV) in conjunction with the Magistrates' Court of Victoria. The program aims to widen the availability of mediation for complaints for intervention orders that have been initiated in the Magistrates' Court. The program is available at seven metropolitan courts.⁸⁴⁵

The Diversion to Mediation Program concentrates on intervention order applications, which involve stalking (non-family-violence-related), and in particular neighbourhood disputes. An intervention order aims to protect the safety of the aggrieved person by limiting what the other party can do or where he or she can go. Ms Anne Goldsborough, Supervising Magistrate, Family Violence and Family Law, Magistrates' Court of Victoria told the Committee that about 15% to 18% of the 26 500 applications received for intervention orders each year concern business disputes, neighbours, flats, and noise.⁸⁴⁶ In her opinion, 'there is no doubt that much of the behaviour that goes on over the fence – whether it be the jasmine or the dog poo over the fence, which is another favourite – can involve a range of incredibly antisocial behaviours and the imposition of oneself on others'.⁸⁴⁷

Ms Goldsborough told the Committee how the program works:

The system that we have set up at the moment is that I tend to list stalking and neighbourhood disputes on certain days. I regularly have a member from the Dispute Settlement Centre there. Even though they are told the registrar is outside, they might say no, but by the time they get to me we usually get them to go and speak to that person ... you can tell them that in your experience very often people are able to find a resolution, and also reminding them that if they have an intervention order they still have to report it to the police to have it enforced. If they can meet and have some understanding about how they are going to behave tomorrow, instead of yesterday, then it is going to make it better tomorrow and the next day. It is that sort of, I guess, teacherish mode in some ways. It is; I guess it is communication and really making sure they understand what they are getting into. It probably makes it pretty hard to say no – that is my plan anyway!⁸⁴⁸

An independent evaluation of the pilot concluded that the pilot had been successful; resolution rates of 85% and satisfaction rates of 90% were achieved.⁸⁴⁹ Ms Goldsborough spoke about the success of the pilot:

The local council community got to hear about it, they started coming to the court asking about it, some of them would come and sit in the back of the court, and the registrars and the staff got to understand the process so that they could encourage those coming to the court to engage in it. It resolved most of the matters I sent in the beginning...it is now more part of our culture and the court is bringing in a whole range of people from outside court – our applicant support workers, defendant support workers. So we are used to really embracing and I think making great connection between the court and the community.⁸⁵⁰

⁸⁴⁴ Anne Goldsborough, *Transcript of evidence*, above n 726; Melissa Conley Tyler and Jackie Bornstein, 'Court referral to ADR: Lessons from an intervention order mediation pilot' (2006) 16(1) *Journal of Judicial Administration*, 48; International Conflict Resolution Centre, *Review of the DSCV Magistrates' Court Mediation Diversion (Intervention Order) Project* (2004). See also Magistrates' Court of Victoria, *Mediation for neighbourhood disputes*, <[, viewed 7 February 2009.](http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Intervention+Orders-Mediation?OpenDocument&1=37-Intervention+Orders~&2=70-Mediation~&3=~>, viewed 7 February 2009; Magistrates' Court of Victoria, <i>Intervention orders</i>, <<a href=)

⁸⁴⁵ Magistrates' Court of Victoria, *2007-08 annual report* (2008), 43; Department of Justice, Victoria, *Department of Justice annual report 2007-2008* (2008).

⁸⁴⁶ Anne Goldsborough, *Transcript of evidence*, above n 726, 10.

⁸⁴⁷ *Ibid.*, 8.

⁸⁴⁸ *Ibid.*, 9.

The Supreme Court of Victoria wrote that '[r]eferral to mediation has formed a[n] integral part of the Court's case management practices for many years'.⁸⁵¹ Justice Murray Kellam of the Supreme Court told the Committee that most civil matters in the Supreme Court are referred to mediation.⁸⁵² As well as referring matters to private mediators, since 2005 the court has used mediation by associate judges (formerly known as masters) in cases of hardship or where there is an urgent matter. Fifty eight per cent of matters mediated by associate judges have been resolved.⁸⁵³

The County Court's submission described the court's extensive use of ADR:

the court refers nearly all of its cases in the Damages List and Business List to mediation as part of the standard timetabling orders made when matters are set down for hearing. Serious injury applications under section 134AB of the *Accident Compensation Act 1985* are not referred to mediation because they are on a shortened timetable for hearing which occurs against the background of two rounds of compulsory conciliation. Serious injury applications under section 93 of the *Transport Accident Act 1986* are subject to pre-hearing protocols (not involving the Court) concerning exchange of medical reports and information and a common law conference or mediation.⁸⁵⁴

The submission also noted that some County Court judges intensively case manage their matters and hold case conferences in open court to assist parties to resolve the dispute. The court advised that case conferences are particularly successful for commercial cases.⁸⁵⁵

The Magistrates' Court's submission stated that it uses two forms of ADR for civil disputes, both of which have high levels of success. The first form, pre-hearing conferences, is conducted by registrars and deputy registrars and has a 68% success rate. The second, mediation, is conducted by registrars, deputy registrars and private mediators and has a 62% success rate.⁸⁵⁶

Deputy Chief Magistrate Peter Lauriston told the Committee:

every civil dispute – and I am excluding applications for intervention orders – in our court, except for a few, undergoes some form of alternative dispute resolution within the court or annexed to the court before being listed for a hearing before a magistrate or a judicial registrar.⁸⁵⁷

⁸⁴⁹ Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria, *Court-annexed mediation: Mobilising informal dispute resolution in the shadow of the court* (2007) Joint response to the Law Reform Commission of Victoria Enquiry on Civil Justice - Exposure Draft June 2007. For further details on the evaluation see also Conley Tyler and Bornstein, above n 844; International Conflict Resolution Centre, above n 844.

⁸⁵⁰ Anne Goldsborough, *Transcript of evidence*, above n 726, 12.

⁸⁵¹ Supreme Court of Victoria, *Submission no. 18*, 1.

⁸⁵² Justice Murray Kellam, Supreme Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 2.

⁸⁵³ Supreme Court of Victoria, *Submission no. 18*, 1- 4.

⁸⁵⁴ County Court of Victoria, *Submission no. 14*, 1. See also Judge Sandra Davis, County Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 2.

⁸⁵⁵ County Court of Victoria, *Submission no. 14*, 2; Judge Maree Kennedy, County Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 7-8.

⁸⁵⁶ Magistrates' Court of Victoria, *Submission no. 27*, 3.

⁸⁵⁷ Peter Lauritsen, *Transcript of evidence*, above n 795, 2.

In addition, the Magistrates' Court commenced a pilot mediation program at the Broadmeadows Magistrates' Court on 1 October 2007. This program involves diverting defended disputes involving less than \$10 000 and all disputes under the *Associations Incorporation Act 1981* (Vic) to mediation,⁸⁵⁸ and is described in greater detail in figure 14. Following a successful early evaluation of the program, it has been extended for a further 12 month period.⁸⁵⁹ From 2 April 2009, the Broadmeadows pilot has been extended to include all defended civil disputes up to \$40 000.⁸⁶⁰

The program's evaluation supported the staged expansion of the pilot across Victoria and for all civil cases.⁸⁶¹ While the evaluation did not comprehensively assess the program costs and potential savings, it suggested that if it was introduced statewide, it would save the time of up to nine magistrates.⁸⁶² The evaluation suggested that judicial mediation should be considered as part of any expansion of the program's jurisdiction.⁸⁶³ The evaluation also suggested the use of single-mediation as well as the co-mediation model and identified the potential for private mediators to be utilised and means tests for free services.⁸⁶⁴

Further, the Magistrates' Court has a Diversion to Mediation Program which is conducted in partnership with the DSCV. This program provides mediation for intervention order applications (non-family-violence-related) involving stalking and neighbourhood disputes. This program is described in figure 13.

As part of the ongoing development of ADR in the courts, the Victorian Government committed a further \$5.8 million for the Diversion to Mediation Program in the 2008-09 budget. In addition, the Victorian Attorney-General has indicated that the government will be reviewing the legislative arrangements for intervention orders between non-family members to support the referral of disputes to mediation.⁸⁶⁵

Ms Lothian of VCAT informed the Committee that VCAT uses ADR extensively in all of its lists. Her submission described the different processes used for different types of cases. In the Anti-Discrimination List, for example, the VCAT member decides whether the dispute is suitable for mediation at the first directions hearing. Around 42% of disputes in that list are mediated. In the Civil Claims List, disputes involving amounts over \$10 000 are considered for compulsory conference and a handful go to mediation.⁸⁶⁶

⁸⁵⁸ Attorney-General, above n 751, 41. See Magistrates' Court of Victoria, *Submission no. 27*, 3-4 for details on the Broadmeadows pilot mediation program.

⁸⁵⁹ Attorney-General Rob Hulls, 'Mediation an appropriate resolution for Broadmeadows civil disputes' (Media release, 13 August 2008).

⁸⁶⁰ Deputy Premier and Attorney-General, Victoria, 'Higher courts' mediation reducing costs and delay' (Media release, 1 April 2009); Magistrates' Court of Victoria, *Mediation pilot programme: Practice direction no. 1 of 2009* (2009).

⁸⁶¹ Transformation Management Services, *Court-annexed mediation: Broadmeadows pilot - evaluation* (2008), 2.

⁸⁶² *Ibid.*, 3.

⁸⁶³ *Ibid.*, 48-49.

⁸⁶⁴ *Ibid.*, 45, 49.

⁸⁶⁵ Attorney-General, above n 751, 41.

⁸⁶⁶ Margaret Lothian, *Submission no. 17*, 7.

Figure 14: Mediation pilot at the Broadmeadows Magistrates' Court⁸⁶⁷

A mediation pilot was conducted at the Broadmeadows Magistrates' Court between November 2007 and June 2008. Under the pilot, all defended claims under \$10 000 and disputes under the *Associations Incorporation Act 1981* (Vic) are compulsorily referred to mediation. Approximately 100 cases were mediated as part of the pilot, which has since been extended for a further 12 month period.

The mediators are supplied by the Dispute Settlement Centre of Victoria (DSCV). All mediators are legally qualified. Mediations take place at the Broadmeadows Magistrates' Court during court hours. A co-mediation model is used, that is, two mediators work in tandem. Participants do not have to pay for the mediator or the venue. Interpreters are also supplied free of charge if required.

When a claim is filed with the court's registry, the intake officer supplied by the DSCV creates a file on the DSCV database and prepares a file for the mediators. The intake officer also contacts the participants and their solicitors, and explains the program to them, including what mediation is and what happens in a mediation.

If a participant does not have a lawyer then the intake officer will talk to them and ensure that they understand their role in the mediation. If the intake officer believes it is necessary, they may also recommend that the participant seeks legal advice.

The intake officer organises a date for the mediation, usually within four weeks of the claim being filed. The aim of this pilot is to have a 'very rapid turnaround' for mediation cases. Most mediations are completed within three hours.

All matters discussed during mediation are confidential. If the case does not settle at mediation and continues to a hearing, participants are not allowed to use anything said at the mediation as evidence in court unless the participants agree to it in writing.

The pilot program allowed people to use the mediation service without having to file a claim at court. However, this service was not taken up during the pilot.

An independent evaluation of the program found that the pilot was successful. The evaluation report stated:

With a resolution rate well over the target of 75% and major reductions in the need for magistrate's hearing time, the project delivered speedier turnaround times for civil disputes, with fewer court attendances on the part of the litigants and equivalent disposals of cases using less expensive resources.⁸⁶⁸

The evaluation noted that participant satisfaction was high (88%), although the sample size was too small to allow definitive conclusions to be drawn.⁸⁶⁹

The mediation program has been described as 'successful' and as having a 'positive impact'. Attorney-General Rob Hulls described the program as a 'good example of the benefits of mediation'.⁸⁷⁰

⁸⁶⁷ Magistrates' Court of Victoria, above n 845, 7, 37-38; Magistrates' Court of Victoria, *Information about court-annexed mediation*; Magistrates' Court of Victoria, *Submission no. 27*, 3-4; Peter Lauritsen, *Transcript of evidence*, above n 795, 3-6; Transformation Management Services, above n 861, 2; Attorney-General Rob Hulls, above n 859.

⁸⁶⁸ Transformation Management Services, above n 861, 2.

⁸⁶⁹ *Ibid*, 2.

⁸⁷⁰ Attorney-General Rob Hulls, above n 859.

Some stakeholders viewed the current court referral mechanisms as effective. For example, the Victorian Bar's submission stated, 'Almost every civil dispute in the Supreme Court, County Court, Magistrates' Court and VCAT is referred to mediation. The Bar considers there is no need to increase court referral to mediation'.⁸⁷¹

However, several stakeholders suggested that there was capacity to utilise ADR more extensively in the courts. Victoria Legal Aid's submission suggested that the Magistrates' Court intervention order pilot model could be used for other disputes, such as debt matters, property disputes, consumer complaints and motor vehicle accidents.⁸⁷²

The Committee also notes the success of the pilot mediation program at the Broadmeadows Magistrates' Court, and agrees with the independent evaluation that there is scope to implement a program based on this pilot at all Magistrates' Court locations throughout the state. The Committee believes that the program should be rolled out incrementally to other Magistrates' Court locations statewide. This staged approach would allow for ongoing evaluation and the trial of different approaches, such as the use of private mediators and a single-mediator model as suggested by the evaluation. The Committee believes that the evaluation of the proposed statewide program should include more extensive surveys to gauge participant satisfaction as well as to measure cost effectiveness and efficiency of the program.⁸⁷³

A staged rollout would also allow for a trial to be conducted for disputes of larger quantum. The Committee notes that the jurisdictional limit of the Broadmeadows pilot has been increased from \$10 000 to \$40 000. Currently, the Magistrates' Court can decide disputes up to the value of \$100 000. The court's general civil jurisdiction is broad and includes claims for debts, damages for breach of contract or damage to property or for injury (for example, motor car collisions), and some neighbourhood matters (for example, fences disputes).⁸⁷⁴ The Committee believes there is scope to increase the jurisdictional limit of matters referred to mediation in the Magistrates' Court, subject to the findings of the evaluation of the expanded pilot program at the Broadmeadows Magistrates' Court.

Recommendation 39: Pre-action ADR in the Magistrates' Court

39.1 The Victorian Government should implement a staged rollout to all Magistrates' Court locations throughout the state of a program for all defended civil disputes up to \$10 000 based on the successfully evaluated pilot mediation program at the Broadmeadows Magistrates' Court.

39.2 Subject to the findings of the evaluation of the expanded pilot mediation program at the Broadmeadows Magistrates' Court, the Victorian Government should consider increasing the jurisdiction of the statewide mediation program in recommendation 39.1 to disputes up to \$40 000.

⁸⁷¹ The Victorian Bar, *Submission no. 13*, 35. See also Health Services Commissioner, *Submission no. 19*, 4.

⁸⁷² Victoria Legal Aid, *Submission no. 30*, 7. See also Law Institute of Victoria, *Submission no. 20*, 7.

⁸⁷³ Transformation Management Services, above n 861, 3.

⁸⁷⁴ Magistrates' Court of Victoria, *Civil and money matters*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Civil+and+Money+Matters/>>, viewed 3 March 2009; *Magistrates' Court Act 1989* (Vic) s 3(1).

The remainder of this section looks at how referrals to ADR can be expanded.

6.4.2 Court referral to a wider range of ADR processes

Mediation is currently the most commonly used ADR process in Victorian courts.⁸⁷⁵ Although some courts can refer disputes to other types of ADR processes, this ability appears to be rarely used. The Supreme Court's submission noted that the court could also refer matters for arbitration or to a special referee (who will decide a question or give an opinion about an issue),⁸⁷⁶ but the Committee heard that these processes are not commonly used.⁸⁷⁷ Judge Maree Kennedy and Judge Sandra Davis from the County Court also told the Committee that the County Court does not use its power to refer matters to arbitration. Judge Kennedy stated, 'We very rarely have people requesting arbitration. I do not know why that is, really'.⁸⁷⁸ Her colleague Judge Davis suggested that ordering matters to arbitration may be seen as 'an abrogation' of their judicial responsibility:

The idea of forcing parties who have engaged in and who have issued in the County Court, forcing them to go to arbitration where the outcome is binding, is the equivalent of saying 'We are not going to hear your case, let somebody else hear it'.⁸⁷⁹

In relation to special referees, Mr Ian Lulham of the Law Institute of Victoria suggested that they were not used because:

If you are there in court anyway and you have got all the witnesses and the judge is able really to deal with matters of quantum, then I think you can get through a lot of these things quite quickly. Inevitably if the court says, 'Right, I will stop now and appoint a special referee', you are effectively running another court case. It takes a month to get the thing up and running ... On top of which, the very fact that the referee's report is not the court's decision – that there is then a next layer where you argue about whether the court should accept the referee's opinion – just adds more expense.⁸⁸⁰

Recommendation 17 of the VLRC's civil justice review recommended expanding the ADR options available to Victorian courts to include early neutral evaluation, case appraisal, mini-trial/case presentation, special masters, court-annexed arbitration, special referees, conciliation, conferencing and hybrid processes.⁸⁸¹ The VLRC

⁸⁷⁵ Mack, above n 843, 3. See also Albert Monichino, Victorian Chapter Committee Member, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 6; The Victorian Bar, *Submission no. 13*, 12; County Court of Victoria, *Submission no. 14*, 1; Justice Kellam, *Transcript of evidence*, above n 852, 2; Supreme Court of Victoria, *Submission no. 18*, 2.

⁸⁷⁶ Supreme Court of Victoria, *Submission no. 18*, 4-5; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 50.08, 50.01.

⁸⁷⁷ Supreme Court of Victoria, *Submission no. 18*, 5; The Victorian Bar, *Submission no. 13*, 15; Justice Kellam, above n 852, *Transcript of evidence*, 2.

⁸⁷⁸ Judge Kennedy, *Transcript of evidence*, above n 855, 11.

⁸⁷⁹ Judge Davis, *Transcript of evidence*, above n 854, 11.

⁸⁸⁰ Ian Lulham, Chair, ADR Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3.

⁸⁸¹ Victorian Law Reform Commission, above n 750, 219, 240, 284, recommendation 17.

expressed the view this would facilitate more efficient and effective management of the diverse range of disputes before the courts.⁸⁸²

Some stakeholders in this Inquiry also supported increasing the capacity of courts to refer matters to a wider range of ADR processes. In its submission to the VLRC, the Institute of Arbitrators and Mediators Australia observed, ‘The present culture in Victoria is to refer proceedings out to mediation or not at all’ and stated that the best outcome for the administration of justice will flow from the parties having a range of measures at their disposal for resolution of their disputes.⁸⁸³ The Victorian Bar submitted that the Supreme and County Courts should make greater use of their powers to refer to arbitration and special referees, and should be empowered to order a wide range of other ADR processes, including non-binding case appraisal.⁸⁸⁴ The Supreme Court’s submission suggested that ‘there should be an evaluation of alternative forms of ADR, other than mediation, which may appropriately be employed by the Court as part of its broader focus on externally provided ADR services as an integral part of case management’.⁸⁸⁵

The Committee agrees that there should be a wider range of ADR options available to the courts such as those suggested in recommendation 17 of the VLRC’s civil justice review.⁸⁸⁶ The Committee acknowledges that not all of these will be appropriate in all cases, but recognises the importance of having a wide range of tools available to assist people to resolve disputes. Different disputes may be more suited to particular ADR processes. If a dispute is referred to the most appropriate ADR process from the start, there is a greater likelihood that a fair settlement will be reached and that the parties will be more satisfied with the process and will be encouraged to use ADR again. There may be the potential for savings in time and money.⁸⁸⁷ The Committee believes that the availability of a wider range of ADR processes would allow parties to be directed to the ADR process which is most appropriate for their dispute.

Recommendation 40: Referral to a wider range of ADR processes

The Victorian Government should ensure that the widest possible range of ADR options, such as those recommended in recommendation 17 of the Victorian Law Reform Commission’s *Civil justice review report*, are available to the courts.

6.4.3 Timing of referrals

There are a range of times at which a court can refer a matter to ADR, from when it first enters the court system until just before a final determination is made.

⁸⁸² Ibid, 219, 240.

⁸⁸³ The Institute of Arbitrators & Mediators Australia (IAMA) and The Chartered Institute of Arbitrators (Australia) Ltd (CI Arb), *Civil justice review: Joint submission by IAMA and CI Arb in response to the VLRC consultation paper* (2006), 8.

⁸⁸⁴ The Victorian Bar, *Submission no. 13*, 14-15, 35.

⁸⁸⁵ Supreme Court of Victoria, *Submission no. 18*, 9-10.

⁸⁸⁶ Victorian Law Reform Commission, above n 750, 219, 240, 284, recommendation 17.

⁸⁸⁷ Astor and Chinkin, above n 832, 276.

Amongst ADR experts, it is generally accepted that there is no right or wrong time for referral of a case to ADR.⁸⁸⁸ The readiness (or ‘ripeness’) of a case to be resolved at a certain stage will be different in each case and depends on the ADR process used.⁸⁸⁹ For instance, referring a case to mediation may be futile if the parties are too overwhelmed emotionally to be able to negotiate with each other in the presence of a mediator.⁸⁹⁰ Many factors change over time and a dispute which is not considered amenable to an ADR process at one point in time may become more amenable at another time, or vice versa.⁸⁹¹

There was no consensus amongst stakeholders in this Inquiry as to when a case should be referred to ADR.⁸⁹² Justice North of the Federal Court of Australia stated that the timing of ADR interventions is critical to their success but this will depend on the individual circumstances of a dispute.⁸⁹³ LEADR submitted that early referral of cases to ADR could further reduce the time taken to resolve civil disputes.⁸⁹⁴ While supporting early mediation, the Victorian Bar cautioned, ‘This benefit may be lost if the mediation is ordered when the issues remain unclear’.⁸⁹⁵ The Victorian Bar also acknowledged that ‘each case is different. Some matters are best mediated at an early stage and some others at a later stage’.⁸⁹⁶ Professor Sourdin submitted that some people are more ready to resolve a matter once they have incurred legal costs and understand how much litigation is going to cost, while for others, it may be difficult for them to look at other alternatives once they have incurred legal costs.⁸⁹⁷ The Supreme Court’s submission said, ‘It is never too late in a case to try ADR. Many cases – even ones previously seen to be unsuitable – can be successfully subjected to ADR, following appropriate direction by the judge’.⁸⁹⁸ Several stakeholders agreed that the judge is best placed to determine when referral to ADR is appropriate.⁸⁹⁹

The Committee recognises that there is no consensus about when a case should be referred to ADR and appropriate timing depends on the individual circumstances of each case. Some cases may benefit from early referral especially if the issues have crystallised, while other cases may benefit from a later referral. The Committee agrees that the judicial officer who is dealing with the dispute will be in the best position to determine when a referral to ADR should be made. This is reflected in the referral guidelines that the Committee recommends below.

⁸⁸⁸ Mack, above n 843, 40-41.

⁸⁸⁹ Australian Law Reform Commission, above n 826, paragraph 5.78; Astor and Chinkin, above n 832, 280.

⁸⁹⁰ Astor and Chinkin, above n 832, 280.

⁸⁹¹ Mack, above n 843, 40.

⁸⁹² See, for example, Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 4; Margaret Lothian, *Submission no. 17*, 9; LEADR, *Submission no. 36*, 7; The Victorian Bar, *Submission no. 13*, 32; Tania Sourdin, *Transcript of evidence*, above n 726, 6; Supreme Court of Victoria, *Submission no. 18*, 2.

⁸⁹³ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 4.

⁸⁹⁴ LEADR, *Submission no. 36*, 7.

⁸⁹⁵ The Victorian Bar, *Submission no. 13*, 32.

⁸⁹⁶ *Ibid*, 32.

⁸⁹⁷ Tania Sourdin, *Transcript of evidence*, above n 726, 6.

⁸⁹⁸ Supreme Court of Victoria, *Submission no. 18*, 2.

⁸⁹⁹ Justice Kellam, *Transcript of evidence*, above n 852, 4; Russell Kennedy, *Submission no. 1*, 4; The Victorian Bar, *Submission no. 13*, 33.

6.4.4 Referral to whom?

Courts can refer cases to external ADR practitioners and providers, or they can conduct ADR processes internally within the court itself.

The Magistrates' Court pilot mediation program at Broadmeadows described in figure 14 above, is an example of referral to an external provider. Under that program, mediation is conducted by mediators provided by the DSCV. The Supreme Court's submission indicated that it refers most matters to ADR conducted by private mediators, with parties selecting their own mediator.⁹⁰⁰

Victorian courts do sometimes provide ADR internally. Supreme Court masters (now known as associate judges) have conducted mediations since 2005. The court may order mediation by an associate judge at any stage of the proceedings and with or without the consent of either party.⁹⁰¹ As noted earlier, mediation by associate judges is generally limited to cases of financial hardship or urgent cases.⁹⁰² Justice Kellam told the Committee that the form of mediation carried out by associate judges is the 'pure Harvard model', that is, one of facilitation rather than any evaluative process.⁹⁰³ There is a similar power in the Court of Appeal.⁹⁰⁴ The Magistrates' Court and the County Court do not have judges or masters providing mediation,⁹⁰⁵ although the Magistrates' Court has three judicial registrars who mediate civil disputes in the Court's Industrial Division,⁹⁰⁶ and County Court judges conduct compulsory conferences in open court.⁹⁰⁷ The evaluation of court-annexed mediation at the Broadmeadows Magistrates' Court suggested that mediation by magistrates should be included as a component to increase the jurisdiction for court-annexed mediation.⁹⁰⁸

At VCAT mediation is provided free of charge by sessional mediators.⁹⁰⁹

The Victorian Government recently announced an expansion of judge-led mediation in Victoria.⁹¹⁰ The Government allocated \$3.7 million for judge-led mediation pilots in both the Supreme and County Courts.⁹¹¹ The Attorney-General's 2008 justice statement also stated that the government will identify further opportunities for ADR in all courts and at VCAT.⁹¹² In addition, the Government will be introducing new

⁹⁰⁰ Supreme Court of Victoria, *Submission no. 18*, 1-2.

⁹⁰¹ Victorian Law Reform Commission, above n 750, 248; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07.1; Supreme Court of Victoria, *Submission no. 18*, 3-4.

⁹⁰² Supreme Court of Victoria, *Submission no. 18*, 4.

⁹⁰³ Justice Kellam, *Transcript of evidence*, above n 852, 3.

⁹⁰⁴ Victorian Law Reform Commission, above n 750, 249; Supreme Court of Victoria, *Court of Appeal practice statement no. 1 of 2006* (2006).

⁹⁰⁵ Peter Lauritsen, *Transcript of evidence*, above n 795, 5; Judge Davis, *Transcript of evidence*, above n 854, 3; County Court of Victoria, *Submission no. 14*.

⁹⁰⁶ Magistrates' Court of Victoria, *Submission no. 27*, 4.

⁹⁰⁷ Judge Davis, *Transcript of evidence*, above n 854, 6-7; County Court of Victoria, *Submission no. 14*, 2.

⁹⁰⁸ Transformation Management Services, above n 861, 48-49.

⁹⁰⁹ Margaret Lothian, *Submission no. 17*, 5; Margaret Lothian, *Transcript of evidence*, above n 725, 3; Judge Davis, *Transcript of evidence*, above n 854, 10; Law Institute of Victoria, *Submission no. 20*, 6.

⁹¹⁰ Attorney-General, above n 751, 39-43; Victorian Law Reform Commission, above n 750, 248.

⁹¹¹ Attorney-General, above n 751, 41.

⁹¹² *Ibid*, 39.

legislation to empower the courts and VCAT to make better use of judge-led mediation.⁹¹³

Mediation by judicial officers is not without controversy.⁹¹⁴ Arguments commonly raised against mediation by judges include:

- Mediators often meet privately with each party. However, private access to a judge is contrary to basic principles of fairness and undermines confidence in the courts.⁹¹⁵
- There is a risk that a mediating judge may reveal information obtained in a private session to another judge who later adjudicates the case.⁹¹⁶
- The integrity of the court may be undermined if it is seen to be involved in two forms of dispute resolution. The public will not appreciate the difference between judicial mediation and the judge's role in a hearing.⁹¹⁷
- Mediation by judges may infringe constitutional principles that prohibit judges from performing functions that are incompatible with their judicial functions.⁹¹⁸

Stakeholders in this Inquiry raised some similar concerns, as well as expressing the view that mediation by judicial officers is not an appropriate use of scarce judicial resources.⁹¹⁹ A minority argued that ADR processes should be conducted by external providers only.⁹²⁰ The Victorian Bar stated that the current system of referring matters to private mediators has been successful as they have a range of lateral commercial solutions which may not be available to judges at trial.⁹²¹ Mr Michael Redfern, a consultant with law firm Russell Kennedy, suggested establishing a special mediation office for mediations required by the courts.⁹²²

⁹¹³ Ibid, 40.

⁹¹⁴ See issues raised in Astor and Chinkin, above n 832, 264-269; Sourdin, above n 843, 188-195.

⁹¹⁵ Astor and Chinkin, above n 832, 266; *Duke Group (in liq) v Alamain Investments Ltd* [2003] SASC 272, 23 (Debelle J) cited by Sourdin, above n 843, 193. See also Judge Davis, *Transcript of evidence*, above n 854, 6; The Victorian Bar, *Submission no. 13*, 38; John Griffin, *Transcript of evidence*, above n 723, 6.

⁹¹⁶ Sourdin, above n 843, 194; Tony Nolan, Advanced Mediator, The Victorian Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 4; Lawrence Reddaway, Victorian Chapter Chair, The Institute of Arbitrators & Mediators Australia (IAMA), *Transcript of evidence*, Melbourne, 29 November 2007, 2; The Victorian Bar, *Submission no. 13*, 39; Ian Lulham, *Transcript of evidence*, above n 880, 7.

⁹¹⁷ Astor and Chinkin, above n 832, 267; *Duke Group (in liq) v Alamain Investments Ltd* [2003] SASC 272, 29 (Debelle J) cited by Sourdin, above n 843, 193-194. See also Judge Davis, *Transcript of evidence*, above n 854, 6.

⁹¹⁸ Victorian Law Reform Commission, above n 750, citing Michael Moore, 'Judges as mediators: A Chapter III prohibition or accommodation?' (2003) 14 *Australian Dispute Resolution Journal*, 188. See also Justice Kellam, *Transcript of evidence*, above n 852, 4; Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 9.

⁹¹⁹ The Institute of Arbitrators & Mediators Australia (IAMA) and The Chartered Institute of Arbitrators (Australia) Ltd (CI Arb), above n 883, 17; Law Institute of Victoria, *Submission no. 20*, 7; The Victorian Bar, *Submission no. 13*, 36-37; Ian Lulham, *Transcript of evidence*, above n 880, 7.

⁹²⁰ See, for example, Albert Monichino, *Transcript of evidence*, above n 875, 6; The Victorian Bar, *Submission no. 13*, 14, 37; LEADR, *Submission no. 36*, 9.

⁹²¹ The Victorian Bar, *Submission no. 13*, 14.

⁹²² Russell Kennedy, *Submission no. 1*, 3.

Other stakeholders saw benefits in judicial mediation. Justice North of the Federal Court of Australia listed several advantages of court-conducted ADR in his submission:

- The court can monitor the quality of service provided.
- Court-annexed mediations usually cost the parties less than if they used an external ADR provider.
- Registrars can advise parties on the court's estimate and taxation of cost procedures that may assist them in the mediation.
- If the matter does not settle at mediation, the court officer may make directions or orders to further manage the matter to resolution.⁹²³

Justice Kellam told the Committee that mediation by associate judges in the Supreme Court carries the weight and authority of the court.⁹²⁴ He also stated that mediation by associate judges in the Supreme Court had 'exceeded the expectations of the Court and demonstrated the capacity for this type of mediation to generate significant time and resource savings for the parties, and the Court'.⁹²⁵

Most stakeholders also welcomed the flexibility of courts being able to deal with some matters in-house, while referring others to external ADR practitioners.⁹²⁶ Judge Kennedy of the County Court said that given the case load of the court it was not possible to provide mediation services in all cases, unless there was a pool of sessional ADR providers such as retired judges, law experts, or other mediators who were selected on the basis of their expertise for a particular case.⁹²⁷

The VLRC thoroughly examined the arguments for and against judicial mediation in its civil justice review.⁹²⁸ The VLRC concluded that court-conducted mediation should be encouraged but, given limited court resources, it should be limited to cases of financial hardship or where there has already been an unsuccessful external mediation.⁹²⁹ The VLRC also recommended that a judge should not subsequently preside over the hearing of a matter where he or she has conducted an unsuccessful mediation in that matter unless the parties otherwise consent.⁹³⁰

Another issue that has been raised in previous inquiries as well as in this Inquiry is training for judicial officers. The VLRC recognised that judicial officers need to be

⁹²³ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 9.

⁹²⁴ Justice Kellam, *Transcript of evidence*, above n 852, 3. See also John Griffin, *Transcript of evidence*, above n 723, 4; in relation to case conferencing in the County Court see Judge Davis, *Transcript of evidence*, above n 854, 7.

⁹²⁵ Supreme Court of Victoria, *Submission no. 18*, 4. Although the Supreme Court of Victoria, *Annual report 2005-2006* (2006) stated that judicial mediation has proved to be a great success, the Victorian Bar stated that no statistics support this assertion: The Victorian Bar, *Submission no. 13*, 16.

⁹²⁶ See, for example, The Mediator Group, *Submission no. 3*, 11; Victoria Legal Aid, *Submission no. 30*, 7; Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 8; Margaret Lothian, *Submission no. 17*, 8; John Griffin, *Transcript of evidence*, above n 723, 5; Supreme Court of Victoria, *Submission no. 18*, 2.

⁹²⁷ Judge Kennedy, *Transcript of evidence*, above n 855, 10.

⁹²⁸ Victorian Law Reform Commission, above n 750, 248-257.

⁹²⁹ *Ibid*, 256, 284, recommendation 20.

⁹³⁰ *Ibid*, 257, 284, recommendation 21.

appropriately trained if they are to conduct ADR.⁹³¹ A number of submissions to the Inquiry also emphasised that mediation is a unique skill, quite different to the usual role of a judicial officer.⁹³² Justice Kellam told the Committee that all of the Supreme Court associate judges had done the week-long LEADR mediation course and were being encouraged to undertake advanced mediation courses at a university level.⁹³³ Judge Davis told the Committee that she and some of her fellow County Court judges have also received training in mediation.⁹³⁴ The Magistrates' Court advised that its judicial registrars 'are qualified mediators and were so at the time of their appointments'.⁹³⁵

Training and expertise also needs to be considered where the courts refer disputes to external providers. To ensure that ADR services provided are of a high quality, the VLRC recommended the courts have a panel of suitably qualified and experienced dispute resolution practitioners to undertake ADR processes.⁹³⁶ In its submission to the Inquiry, Victoria Legal Aid supported a register of qualified ADR practitioners to increase the confidence of the courts in referring matters to ADR.⁹³⁷ Ms Halsmith of LEADR stated that most courts have a list of ADR practitioners but that the list may not be up-to-date.⁹³⁸

The Committee's view is that the diversity of disputes before the courts, and the various ADR processes to which parties may be referred, demands a range of referral options for courts. This should include the ability to refer matters to ADR processes that are conducted internally within the court or externally by other providers.

The Committee recognises that given the financial pressures on the court, referrals to internal ADR processes should only be made in the limited circumstances recommended by the VLRC. There should be additional checks, such as the judicial officer not subsequently hearing a matter that he or she has mediated. The Committee recognises that the skills required to undertake a facilitative process like mediation are quite different to those required for adjudication. Therefore, the Committee emphasises the importance of initial and ongoing training for judicial officers conducting mediation.

The Committee also believes it would be useful for courts to maintain an up-to-date list of suitably qualified and experienced external ADR practitioners to help ensure that courts refer cases to ADR practitioners who have the necessary skills, qualifications and experience.

⁹³¹ Ibid, 257, 284, recommendation 22.

⁹³² See, for example, The Victorian Bar, *Submission no. 13*, 37-38; Margaret Halsmith, *Transcript of evidence*, above n 721, 7; Judge Davis, *Transcript of evidence*, above n 854, 6; John Griffin, *Transcript of evidence*, above n 723, 4. Cf Margaret Lothian, *Transcript of evidence*, above n 725, 6. See also Sourdin, above n 843, 194-195.

⁹³³ Justice Kellam, *Transcript of evidence*, above n 852, 7.

⁹³⁴ Judge Davis, *Transcript of evidence*, above n 854, 6.

⁹³⁵ Magistrates' Court of Victoria, *Submission no. 27*, 5.

⁹³⁶ Victorian Law Reform Commission, above n 750, 278, 285, recommendation 25.

⁹³⁷ Victoria Legal Aid, *Submission no. 30*, 7.

⁹³⁸ Margaret Halsmith, *Transcript of evidence*, above n 721, 7.

Recommendation 41: Courts to maintain a list of ADR practitioners

The courts and VCAT should maintain an up-to-date list of appropriately qualified and experienced ADR practitioners to whom they can refer the parties to a dispute.

Recommendation 42: Training for judicial officers providing ADR

The Judicial College of Victoria, in collaboration with ADR education providers, should consider providing information and training about ADR, including education about different types of ADR and the skills required to practice it, for judicial officers who provide ADR.

6.4.5 Mandatory court referral to ADR

Many courts throughout Australia already have the capacity to refer matters to mediation with or without the parties' consent. In Victoria, the Supreme, County and Magistrates' Courts all have this power.⁹³⁹ The Supreme Court's submission stated that in court-ordered mediation:

Parties generally select their own mediator. However, in some instances the Judge or Master managing the proceeding may suggest to the parties or even order that the mediation be conducted before a particular mediator or a mediator with particular qualifications.

The mediator is generally ordered to report to the Court whether the mediation has concluded but is not permitted to provide any further information to the Court ...⁹⁴⁰

Parties may be referred to other ADR processes such as neutral evaluation, case appraisal and pre-trial conferencing without their consent in some Australian jurisdictions.⁹⁴¹ In Victoria, the County Court may compulsorily refer parties to arbitration in accordance with the *Commercial Arbitration Act 1984* (Vic) and the Magistrates' Court has a compulsory arbitration scheme for civil debt claims of less than \$10 000.⁹⁴²

⁹³⁹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 50.07, 50.07.1; *County Court Act 1958* (Vic) s 47A; *County Court Civil Procedure Rules 2008* (Vic) r 34A.21; *Magistrates' Court Act 1989* (Vic) s 108(1); *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 22A.01. See also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 88(1) and 88(2); *Federal Court of Australia Act 1976* (Cth) s 53A; *Federal Magistrates Act 1999* (Cth) s 34; *Civil Procedure Act 2005* (NSW) s 26 (referral is with the consent of the parties); *Magistrates Court Act 1991* (SA) s 27(1); *District Court Act 1991* (SA) s 32(1); *Supreme Court Act 1935* (SA) s 65(1); *Supreme Court Rules 2000* (Tas) r 518; *Court Procedure Rules 2006* (ACT) r 1179 (whether parties' consent is required or not is not mentioned); *Consumer Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1) (whether parties' consent is required or not is not mentioned); *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3 (whether parties' consent is required or not is not mentioned).

⁹⁴⁰ Supreme Court of Victoria, *Submission no. 18*, 3.

⁹⁴¹ See Victorian Law Reform Commission, above n 750, 260.

⁹⁴² *County Court Act 1958* (Vic) s 47A; *County Court Civil Procedure Rules 2008* (Vic) r 34A.21; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.08. In the Supreme Court of Victoria, arbitration under the *Commercial Arbitration Act 1984* (Vic) is with the parties' consent; *Magistrates' Court Act 1989* (Vic) s 102.

It has been suggested that mandatory mediation is useful because litigants may not choose mediation independently.⁹⁴³ As the overriding purpose of the courts is to facilitate the just, quick and cheap resolution of the real issues, courts which are empowered to compel parties to attend mediation will do so where the mediation process is likely to result in resolution of the case or a narrowing of the issues.⁹⁴⁴

On the other hand, it has been argued that mandatory referral to ADR is contrary to the philosophical underpinnings of ADR because mediation is a consensual process which relies on the willingness of the parties to participate.⁹⁴⁵ Justice Einstein of the New South Wales Supreme Court has stated:

[There is] some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR, which generally encompass a voluntary, consensual process. It is important to note however, that whilst parties may be compelled to attend mediation sessions, they are not forced to settle and may continue with litigation without penalty.⁹⁴⁶

There are also concerns that mandatory ADR may breach human rights, in particular the right to have a civil dispute decided by a competent, independent and impartial court or tribunal after a fair and public hearing, as contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁹⁴⁷

The VLRC examined this issue in detail in its civil justice review and concluded that mandatory mediation would not deny access to the courts as long as mediation does not cause any undue delay or expense.⁹⁴⁸ In the VLRC's view:

The fact that litigants who are referred to mediation retain the right to a judicial adjudication of their dispute if they are unable to resolve it by agreement tends to negate the contention that non-binding ADR options such as mediation are incompatible with human rights guarantees and other legal or constitutional principles protecting rights of access to the courts.⁹⁴⁹

The VLRC therefore supported empowering courts to compulsorily refer parties to non-binding ADR processes including early neutral evaluation, case appraisal, conciliation and conferencing, with or without the parties' consent.⁹⁵⁰ However, it acknowledged that different considerations may arise where parties are mandated to

⁹⁴³ Astor and Chinkin, above n 832, 272-273. See also National Alternative Dispute Resolution Advisory Council (NADRAC), *Legislating for alternative dispute resolution: A guide for Government policy-makers and legal drafters* (2006), 48; *Idaport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, paragraph 40 (per Einstein J).

⁹⁴⁴ See generally Andrew Robertson, 'Compulsion, delegation and disclosure: Changing forces in commercial mediation' (2006) 25(2) *The Arbitrator and Mediator*, 91, 94-96; Bronwyn Lincoln, 'Diversity of cultural perspectives on mediation: face-saving, attitudes, relationship to courts and other considerations: Mediation in Australia' (2007) 3(2) *Mediation Committee Newsletter*, 8, 12.

⁹⁴⁵ Astor and Chinkin, above n 832, 273; Mack, above n 843, 47.

⁹⁴⁶ *Idaport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, paragraph 24 with reference to Tom Altobelli, 'NSW Supreme Court makes mediation mandatory' (2000) 3(3) *ADR Bulletin*, 43 cited by Sourdin, above n 843, 196.

⁹⁴⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24. For a thorough discussion of this issue see Victorian Law Reform Commission, above n 750, 262.

⁹⁴⁸ Victorian Law Reform Commission, above n 750, 263.

⁹⁴⁹ *Ibid*, 262.

⁹⁵⁰ *Ibid*, 264, 284, recommendation 23.

attend ADR processes which have a final and binding award such as arbitration.⁹⁵¹ Thus, the VLRC did not recommend the compulsory referral of cases to arbitration but recommended the appointment of special referees in appropriate circumstances to make provisional determinations to the court. Under this recommendation, the parties would retain their right to present arguments before the court against the adoption of the special referee's report.⁹⁵²

NADRAC is currently undertaking research into whether mandatory requirements to use ADR should be introduced.⁹⁵³ A previous report prepared for NADRAC by Professor Kathy Mack of Flinders University found that research is inconclusive about the impact of orders for mandatory mediation on the success or failure of mediation.⁹⁵⁴ Research does indicate that those mandated to attend ADR do not generally object after the fact nor do they opt out if given the choice.⁹⁵⁵ Professor Mack also found that '[p]arties who have been compelled to participate in ADR may still achieve outcomes they regard as satisfactory through a process they find fair'.⁹⁵⁶ For instance, mandatory ADR may have a 'cathartic effect' and may change even an 'entrenched point of view'.⁹⁵⁷ Even if parties are initially reluctant to mediate, a skilled mediator may be able to assist them to reach agreement.⁹⁵⁸

A later report by NADRAC stated that compulsory participation in ADR is only appropriate where there has been assessment of the suitability of the case for ADR and where appropriate professional standards are maintained and enforced. It also noted that the legislative framework should be clear about the ADR process the dispute is being referred to and there needs to be general public confidence in ADR.⁹⁵⁹

In this Inquiry, a significant number of stakeholders supported court-ordered ADR.⁹⁶⁰ Justice North of the Federal Court of Australia stated that, based on his experience, parties who have initially objected to compulsory mediation have later reached agreement and expressed satisfaction with the process.⁹⁶¹ Similarly, Professor Sourdin wrote, 'Most times in the mandatory setting parties are more likely to come in and say something like, "There is no way that this matter will resolve"

⁹⁵¹ Ibid, 262, 265-266.

⁹⁵² Ibid, 266-267, 284-285, recommendation 24

⁹⁵³ NADRAC, above n 794.

⁹⁵⁴ Mack, above n 843, 4, 47-48.

⁹⁵⁵ Ibid, 4, 50.

⁹⁵⁶ Ibid, 54. See also *Idaport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, paragraph 40 (per Einstein J).

⁹⁵⁷ *Azmin Firoz Daya v CAN Reinsurance Co Ltd and Ors* [2004] NSWSC 795, paragraph 12 (per Einstein J).

⁹⁵⁸ Bronwyn Lincoln, 'Diversity of cultural perspectives on mediation: face-saving, attitudes, relationship to courts and other considerations: Mediation in Australia' (2007) 3(2) *Mediation Committee Newsletter*, 8, 11.

⁹⁵⁹ NADRAC, above n 943, 36, 44.

⁹⁶⁰ Russell Kennedy, *Submission no. 1*, 4; The Mediator Group, *Submission no. 3*, 12; The Victorian Bar, *Submission no. 13*, 8; Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria, above n 849, 13; Supreme Court of Victoria, *Submission no. 18*, 2; Tania Sourdin, *Transcript of evidence*, above n 726, 6; Law Institute of Victoria, *Submission no. 20*, 8; Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 7; Margaret Lothian, *Submission no. 17*, 9.

⁹⁶¹ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 7.

and surprisingly after a number of hours it generally does'.⁹⁶² She added that whether mandatory mediation is appropriate will depend on the circumstances of the case:

it is probably again a cost-benefit equation. There is no sense in having mandatory mediation referral in a very small matter unless there is some other reason why you are referring matters to mediation ... In the community sector, for example, having mandatory referral might be appropriate if you are trying to actually build relationships in a community or if you are looking at capacity building ...⁹⁶³

Some stakeholders did raise concerns about mandatory referral to ADR.⁹⁶⁴ The Victorian Aboriginal Legal Service stated, 'Mandatory ADR is a contradiction in terms'.⁹⁶⁵ In particular, the submission emphasised the importance of people receiving legal advice before entering ADR. Other issues raised include the voluntariness and willingness of the parties to attend ADR and the inability of some parties to distinguish between coercion to enter ADR and coercion to settle.⁹⁶⁶ As with mandatory pre-litigation ADR, stakeholders emphasised the need to ensure that service quality is assured if there are mandatory orders for people to use ADR.⁹⁶⁷

The Committee notes that courts are currently empowered to mandate ADR in some cases. The Committee also notes evidence that, in some cases, the referral may be successful even though parties are initially reluctant to participate. The Committee therefore supports the VLRC's recommendation that courts should have the power to order non-binding ADR with or without parties' consent in appropriate cases.⁹⁶⁸ As acknowledged earlier, if such referrals are made it is important to ensure that cases are referred to appropriately qualified and experienced ADR practitioners.

The Committee notes that NADRAC is currently undertaking research on whether there should be mandatory requirements to use ADR and believes that this will clarify some of the issues raised concerning mandatory ADR.⁹⁶⁹

6.4.6 Sanctions for non-participation

A related issue is whether sanctions should be imposed on a party who does not participate in, or does not fully participate in, an ADR process referred or ordered by a court.

⁹⁶² Tania Sourdin, *Transcript of evidence*, above n 726, 6.

⁹⁶³ *Ibid*, 6.

⁹⁶⁴ Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 5; Federation of Community Legal Centres Victoria, *Submission no. 39*, 1-2; Health Services Commissioner, *Submission no. 19*, 5.

⁹⁶⁵ Victorian Aboriginal Legal Service, *Submission no. 32*, 7.

⁹⁶⁶ *Ibid*, 7-9. See also Federation of Community Legal Centres Victoria, *Submission no. 39*, 1-2; Health Services Commissioner, *Submission no. 19*, 5; Elissa Campbell, Solicitor, Litigation Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 5; Margaret Lothian, *Submission no. 17*, 9.

⁹⁶⁷ NADRAC, *Submission no. 25*, 5-6; Accident Compensation Conciliation Service, *Submission no. 21*, 6; Tania Sourdin, *Transcript of evidence*, above n 726, 6.

⁹⁶⁸ Victorian Law Reform Commission, above n 750, 264, 284, recommendation 23.

⁹⁶⁹ NADRAC, above n 794.

The sanction most commonly discussed in this context involves costs orders. Some United Kingdom authorities suggest there is potential for courts to compel or induce parties to mediate through the court's approach to cost orders.⁹⁷⁰

In Australia, some courts can also use cost penalties or other sanctions where there has been failure to participate in ADR, or failure to participate in good faith.⁹⁷¹ For example, in family law financial cases parties are obliged to make a 'genuine effort' to resolve their dispute by ADR before commencing proceedings in the Family Court.⁹⁷² A failure to do so may attract cost penalties or other sanctions.⁹⁷³

VCAT also has the power to impose costs orders on parties who do not participate in mediation. A party who fails to attend mediation at VCAT without a good reason may have a cost order made against him or her.⁹⁷⁴ In addition, a VCAT member may also determine the proceeding adversely against a party who does not attend a compulsory conference.⁹⁷⁵ Under the *Retail Leases Act 2003* (Vic), VCAT may order a party to pay some or all of the other party's costs if a party refuses to take part in or withdraws from mediation conducted by the Victorian Small Business Commissioner (VSBC) and the matter proceeds to VCAT.⁹⁷⁶

The VSBC has investigatory powers and a party may be the subject of an investigation if he or she does not attend mediation. The Small Business Commissioner, Mr Brennan, explained how his office uses this power to encourage parties to mediate:

where a business will not come to mediation, we have used – an often loose term – the 'shame sanction', where we say 'We can investigate this matter. We have got one side of the story from the applicant; you are not telling us anything. We still have to prepare a report, because we have got this investigation function. At the moment the report is going to look like this because we have only got one side of the story; it does not paint you in a particularly good picture. Here is a draft of the report. This is what is going to be given to the minister, and this is what he will table in Parliament'. We have never had a report tabled in Parliament of that kind, because once we get down that path businesses see that it is in their better interests to try to resolve the matter or to explain where they are coming from.⁹⁷⁷

As noted earlier, the VLRC has recommended that courts should be able to impose sanctions such as legal costs, expenses or compensation on participants who fail to satisfy the overriding obligations.⁹⁷⁸ Those obligations include an obligation to use reasonable endeavours to resolve a dispute by agreement, including by use of

⁹⁷⁰ See Andrew Robertson, 'Compulsion, delegation and disclosure: Changing forces in commercial mediation' (2006) 25(2) *The Arbitrator and Mediator*, 91, 98; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, paragraph 16; Ireland Law Reform Commission, *Alternative dispute resolution consultation paper* (2008), 341-345.

⁹⁷¹ See, for example, *Family Law Act 1975* (Cth) note to s 60I(8).

⁹⁷² *Family Law Rules 2004* (Cth) schedule 1 (Pre-action procedures, Part 1 (Financial cases), paragraph 1(1).

⁹⁷³ *Family Law Rules 2004* (Cth) schedule 1, Part 1, 1(3). See Schedule 1, Part 1, paragraph 1(4) for exceptions.

⁹⁷⁴ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(3)(a).

⁹⁷⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 87(b)(i).

⁹⁷⁶ *Retail Leases Act 2003* (Vic) s 92(2)(b).

⁹⁷⁷ Mark Brennan, *Transcript of evidence*, above n 737, 8. See also *Small Business Commissioner Act 2003* (Vic) s 6.

⁹⁷⁸ Victorian Law Reform Commission, above n 750, 206, recommendations 16.3(7), 16.3(8).

ADR.⁹⁷⁹ The Attorney-General’s justice statement indicates that the Victorian Government intends to strengthen incentives for early resolution and sanctions for delay, and will also review the basis on which costs are awarded and assessed.⁹⁸⁰ NADRAC is also considering whether there should be changes to cost structures and civil procedures to provide incentives to use ADR.⁹⁸¹

Some stakeholders in this Inquiry supported sanctions for non-participation in ADR, including cost consequences for lawyers who discourage their clients from participating in mandatory ADR and for parties who do not exchange all information as a pre-condition for mediation.⁹⁸²

Both the Victorian Bar and the Law Institute of Victoria, on the other hand, opposed sanctions for non-participation.⁹⁸³ The Bar’s submission stated:

The Bar opposes any imposition of a “penalty” for a person who does not participate or participates in an unsatisfactory way at mediation. Who will decide what is unsatisfactory? The Bar considers that it would be a breach of the confidentiality of the mediation process if the conduct of one or other of the parties at mediation was disclosed to the Court. It may cast the role of the mediator as a decision-maker, to decide who is negotiating in good faith. This is directly contrary to the mediator’s primary role as a facilitator.⁹⁸⁴

Ms Lothian of VCAT commented that sanctions need ‘to be handled carefully. Parties who have agreed to attend ADR should be encouraged to stick to their bargain. On the other hand, there needs to be great care to ensure parties are not coerced to settle.’⁹⁸⁵

The Committee supports the direction taken by the VLRC in proposing that the overriding obligations include the imposition of sanctions to empower the court to deal with non-conforming behaviour in ADR. This may help to encourage the settlement of disputes at the lowest possible level. The Committee notes that currently there are legislative provisions which empower the courts to impose sanctions for non-participation or lack of good faith participation in ADR.

As noted earlier, NADRAC is currently considering whether there should be changes to cost structures and civil procedures to provide incentives to use ADR⁹⁸⁶ and the Committee believes this will offer clarification in this area.

6.4.7 Facilitating appropriate referrals

In a report prepared for NADRAC on court referral to ADR, Professor Kathy Mack noted that, although most Australian courts have the power to refer cases to an ADR

⁹⁷⁹ Ibid, 205, recommendation 16.3(4)(f).

⁹⁸⁰ Attorney-General, Victoria, above n 751, 42.

⁹⁸¹ NADRAC, above n 794.

⁹⁸² See, for example, The Mediator Group, *Submission no. 3*, 12; Russell Kennedy, *Submission no. 1*, 3; LEADR, *Submission no. 36*, 9; Mark Brennan, *Transcript of evidence*, above n 737, 8.

⁹⁸³ The Victorian Bar, *Submission no. 13*, 41; Law Institute of Victoria, *Submission no. 20*, 8.

⁹⁸⁴ The Victorian Bar, *Submission no. 13*, 41.

⁹⁸⁵ Margaret Lothian, *Submission no. 17*, 9.

⁹⁸⁶ NADRAC, above n 794.

process, there is limited guidance about which types of cases are appropriate for ADR and which ADR process should be used.⁹⁸⁷ This is true of the County and Supreme Courts in Victoria where the court rules permit judges to refer matters to ADR processes such as mediation and arbitration but give no guidance about when this power should be exercised.⁹⁸⁸ This section discusses two strategies for increasing court referral of appropriate cases to ADR, namely referral guidelines and training for judicial officers.

Referral guidelines

Some Australian courts have adopted referral criteria or guidelines to help judicial officers decide when to refer cases to ADR. The NSW Supreme Court's ADR Steering Committee, for example, has suggested that referral of cases to ADR should proceed on the basis that 'no case is not suitable for referral', and has formulated referral criteria for processes including mediation, non-binding evaluation, conciliation and arbitration.⁹⁸⁹ Some of the factors listed were:

- whether the matter is complex or likely to be lengthy
- whether the parties have a continuing relationship
- whether the possible outcome of the matter may be flexible.⁹⁹⁰

In Victoria, the mediation pilot for non-family-violence-related intervention orders, conducted by the Magistrates' Court of Victoria, used referral guidelines. The evaluation of the program identified the development of clear guidelines and procedures for referral as critical to the success of the program.⁹⁹¹

ADR experts have stressed the need for a sophisticated approach in this area. According to Professor Sourdin, there is no 'one size fits all' set of criteria to refer cases to ADR processes because no classification system can reflect the 'individual and multifaceted nature of the human beings who are in conflict'.⁹⁹² In her report, Professor Mack also noted that generalised ADR referral checklists can be unhelpful because of the many complex and dynamic qualities involved in matching disputes with the most appropriate ADR process, but criteria can 'enable predictability or consistency [and] ... provide grounds on which a party can persuade a court to make a referral or a basis for a party to oppose a referral'.⁹⁹³ She suggested each court and tribunal should develop its own referral processes and criteria 'in light of particular local features such as program goals, jurisdiction, case mix, potential ADR users,

⁹⁸⁷ Mack, above n 843, 7. See also Sourdin, above n 843, 197.

⁹⁸⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic), rr 50.07, 50.08; *County Court Civil Procedure Rules 2008* (Vic) rr 50.07, 50.08. Cf The Victorian Bar, *Submission no. 13*, 35.

⁹⁸⁹ Sourdin, above n 843, 272-274: reference to Tania Sourdin, *ADR strategies and proposals for the future: Recommendations of the ADR Steering Committee of the Supreme Court of NSW* (1995) Supreme Court of NSW. See also Chris Field, Chris Field Consulting Pty Ltd, *Alternative dispute resolution in Victoria: Supply-side research project research report* (2007) Department of Justice, Victoria, 71.

⁹⁹⁰ Sourdin, above n 843, 273.

⁹⁹¹ Conley Tyler and Bornstein, above n 844, 62. See also International Conflict Resolution Centre, above n 844.

⁹⁹² Sourdin, above n 843, 279.

⁹⁹³ Mack, above n 843, 8. See also Astor and Chinkin, above n 832, 277.

local legal profession and culture, internal resources and external service providers’.⁹⁹⁴

Some of the referral criteria identified by Professor Mack were:

- the parties’ capacity to participate safely or effectively of their own accord (this may be affected by factors such as the fear of violence by a party, cognitive disability, power imbalances, or any applicable court orders which make ADR difficult)
- the relative costs of ADR and litigation
- cultural factors
- the need for a flexible outcome that would not be possible in adjudication
- whether the public interest requires a formal, public, binding determination, or an authoritative interpretation and application of statute or case law.⁹⁹⁵

The Committee’s discussion paper asked stakeholders to identify what type of disputes they thought were most suitable for referral to ADR. Stakeholders identified a range of types of cases including native title cases,⁹⁹⁶ almost all cases on the County Court’s damages and business list, de facto domestic property disputes,⁹⁹⁷ money and debt matters,⁹⁹⁸ property disputes,⁹⁹⁹ consumer complaints¹⁰⁰⁰ and motor vehicle accidents.¹⁰⁰¹ The Law Institute of Victoria commented that court referral to ADR is more suited to complex cases because simple cases will benefit from having a quick determinative hearing.¹⁰⁰²

It is the Committee’s view that the success of any court-referred ADR program is dependent to a significant extent on the development of appropriate referral guidelines. The Committee agrees that it may not be feasible to develop across-the-board fixed criteria to match disputes/disputants with an ADR process because of the variables involved, nevertheless, it believes that each court and tribunal should consider developing specific guidelines to facilitate the appropriate referral of cases to ADR in their respective jurisdictions. The guidelines could require judicial officers to consider each case for suitability for ADR.

In chapter 4, the Committee noted that ADR may be unsuitable for certain categories of cases. Therefore, it is essential to have appropriate referral criteria to ensure that inappropriate cases are not referred to ADR, and that a case, when referred, is referred to the most appropriate ADR process. In addition, as discussed earlier in this

⁹⁹⁴ Mack, above n 843, 2, 8.

⁹⁹⁵ Ibid, 5-8.

⁹⁹⁶ Justice A. M. North, Federal Court of Australia, *Submission no. 37*, 3-4.

⁹⁹⁷ Judge Davis, *Transcript of evidence*, above n 854, 2-3; County Court of Victoria, *Submission no. 14*, 1.

⁹⁹⁸ Victoria Legal Aid, *Submission no. 30*, 7.

⁹⁹⁹ Ibid, 7.

¹⁰⁰⁰ Ibid, 7.

¹⁰⁰¹ Ibid, 7.

¹⁰⁰² Law Institute of Victoria, *Submission no. 20*, 7. See also Margaret Lothian, *Submission no. 17*, 5; Peter Lauritsen, *Transcript of evidence*, above n 795, 3.

chapter, the guidelines could allow for the referral of a matter to ADR at any time in the proceedings.

Recommendation 43: Judicial guidelines on referral to ADR

The courts and VCAT should consider developing and implementing guidelines for their respective jurisdictions to ensure appropriate referral of cases to ADR. The guidelines could require judicial officers to consider each case's suitability for referral to ADR and consider the appropriate ADR process to refer the case to. In addition, the guidelines could include criteria to help judicial and court officers determine at which point referral to ADR is appropriate.

Training

The Australian Law Reform Commission has acknowledged that the 'success of ADR referral schemes may depend largely on the skills of the referring party'.¹⁰⁰³

There is no research on whether any category of referrers (such as judicial officers, court staff or ADR providers) has any greater success rate in referrals to ADR than other categories.¹⁰⁰⁴

According to Professors Hilary Astor and Christine Chinkin, those referring cases to ADR should have:

- extensive experience of the jurisdiction and of the case characteristics
- comprehensive understanding of all forms of dispute resolution available through the court
- ADR training which provides more than a brief introduction to the subject
- a clear understanding of the strengths and weaknesses of all ADR processes
- good judgement and commitment to use ADR in appropriate cases.¹⁰⁰⁵

In the civil justice review, the VLRC recommended more training for judicial and court officers about ADR, especially:

- the need for different types of ADR in a modern court
- the different ADR processes that are available and how they operate
- the circumstances in which different ADR options might be appropriate
- the stage of the proceeding at which a dispute should be referred to ADR.¹⁰⁰⁶

¹⁰⁰³ Australian Law Reform Commission, above n 826, paragraph 5.47. See also Astor and Chinkin, above n 832, 277.

¹⁰⁰⁴ Mack, above n 843, 4.

¹⁰⁰⁵ Astor and Chinkin, above n 832, 278.

¹⁰⁰⁶ Victorian Law Reform Commission, above n 750, 283, 285, recommendation 28.

The Committee did not receive any evidence about training currently provided to judicial officers on ADR. It notes that the 2009 prospectus for the Judicial College of Victoria, the main provider of judicial education and professional development in Victoria, does contain a one day seminar offering judicial perspectives on the VLRC's recommendations, including ADR.¹⁰⁰⁷ In 2008, the College also held a workshop on judicial dispute resolution which considered non-adversarial approaches to dispute resolution, including ADR.¹⁰⁰⁸

Several stakeholders in this Inquiry suggested that judicial officers' understanding of ADR processes could be improved.¹⁰⁰⁹ It was suggested that this should come through education of judicial officers about the 'philosophy and culture of ADR' and non-adversarial law generally.¹⁰¹⁰ Ms Lothian of VCAT suggested that Professor Mack's publication on court referral to ADR, which was prepared for NADRAC, should be made available to judicial officers and added, 'Perhaps she needs to be invited to lecture to judges and tribunal members more frequently'.¹⁰¹¹

The Committee agrees that the success of ADR may well depend on the skills of the referrer. The Committee recognises that judicial officers who make referrals to ADR need adequate training. Referrers need to be aware of the types of cases which are appropriate for ADR, as well as which ADR process is most appropriate for a particular case, and should be able to explain the ADR process to the parties so they know what to expect. It notes that the Judicial College of Victoria has already conducted and planned training sessions in this regard and it encourages the college to continue to do so.

Recommendation 44: Training program for court referrers to ADR

The Judicial College of Victoria should consider developing, in consultation with relevant professional organisations, ongoing training programs for judicial officers about ADR and how to make appropriate referrals.

¹⁰⁰⁷ Judicial College of Victoria, *2009 prospectus: Excellence in judicial education* (2009), 25.

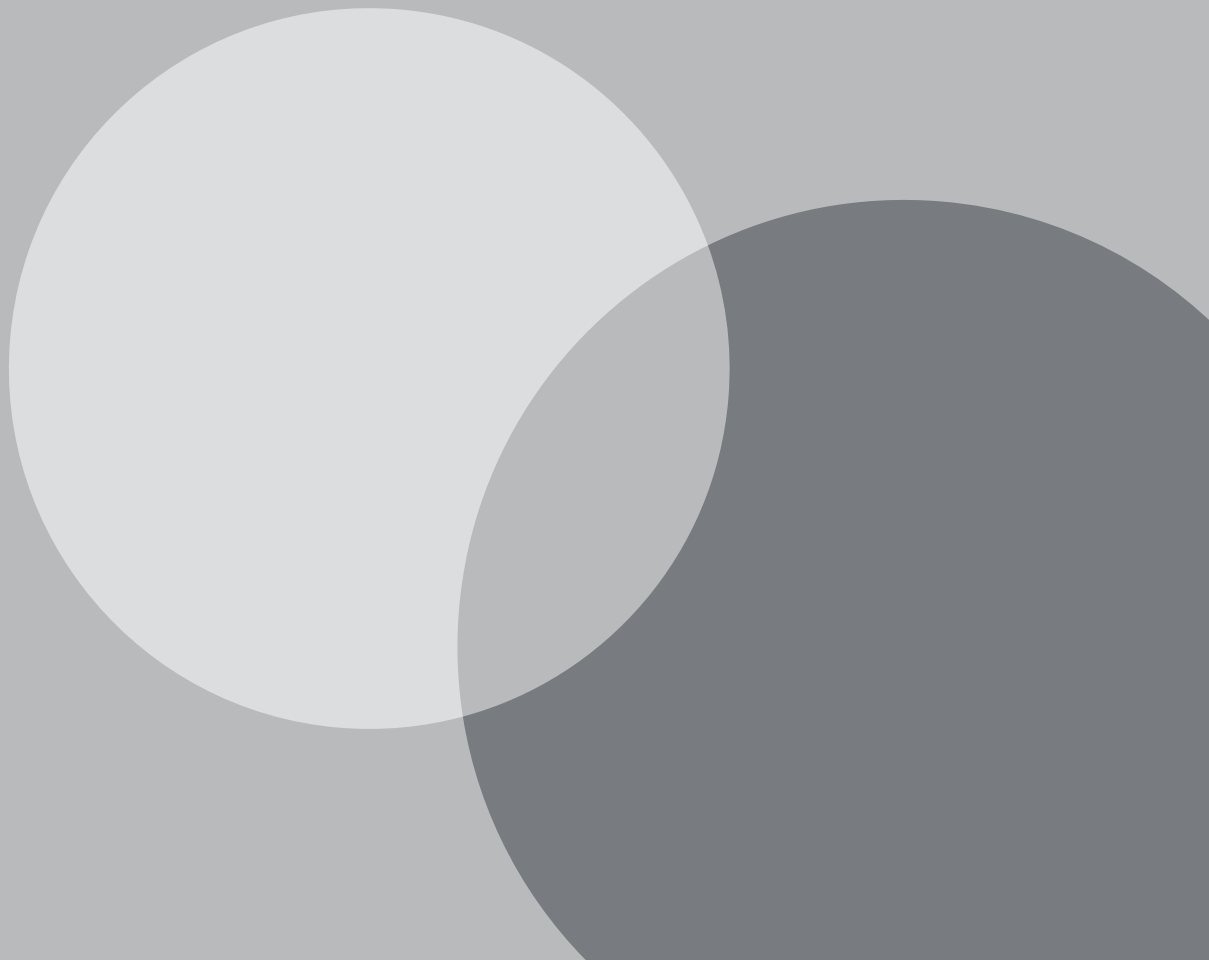
¹⁰⁰⁸ Judicial College of Victoria, *Annual report 2007-2008* (2008), 17.

¹⁰⁰⁹ See, for example, NADRAC, *Submission no. 25*, 6; NADRAC, *Submission no. 25S*, 7; Tania Sourdin, *Transcript of evidence*, above n 726, 10; Victoria Legal Aid, *Submission no. 30*, 7; Margaret Lothian, *Submission no. 17*, 8; Russell Kennedy, *Submission no. 1*, 4; Monash University Faculty of Law, *Submission no. 7*, 5.

¹⁰¹⁰ Russell Kennedy, *Submission no. 1*, 4; Monash University Faculty of Law, *Submission no. 7*, 5.

¹⁰¹¹ Margaret Lothian, *Submission no. 17*, 8. See also Mack, above n 843.

PART III
RESTORATIVE
JUSTICE



Chapter 7 – Restorative justice: History and background

Restorative justice provides a different framework for responding to crime. It is part of a broader approach to dealing with conflict and wrongdoing in society, which focuses on healing and repairing harm. This chapter provides an overview of restorative justice including its history and underlying philosophy and principles. The relationship between restorative justice and traditional criminal justice, and the related principles of restorative practices and therapeutic jurisprudence, are also explored.

7.1 The history and development of restorative justice

The principles of restorative justice can be traced back to early civilisations which responded to wrongdoing by focusing on forgiveness, reparation and healing, rather than on punishment. Australian academic John Braithwaite has argued that, historically, restorative justice has been a common approach to addressing conflict in most societies.¹⁰¹² Restorative justice approaches have been observed in cultures as diverse as the Maori of New Zealand, the Celtic of Ireland and the Navajo of North America.¹⁰¹³

However, the notion that modern restorative justice revives Indigenous or folk approaches to conflict resolution has not been universally accepted. For example, Declan Roche of the London School of Economics has argued that the primitive origins of restorative justice have been exaggerated to promote and give credibility to the contemporary use of restorative justice.¹⁰¹⁴

The concept of restorative justice was ‘re-discovered’ in the 1970s and 1980s when restorative justice principles began to be applied to resolve conflicts and respond to criminal behaviour as part of victim-offender mediation programs in North America and group conferencing in New Zealand.¹⁰¹⁵ The emergence of restorative justice as a modern, alternative form of conflict resolution was driven by a number of factors, including the rise of the victims’ rights movement,¹⁰¹⁶ concern about the social and

¹⁰¹² John Braithwaite, *Crime, shame and reintegration* (1989) Cambridge University Press, 58-65.

¹⁰¹³ Tina S Ikpa, 'Balancing restorative justice principles and due process rights in order to reform the criminal justice system' (2007) 24 *Journal of Law & Policy*, 301, 306-307. See also Daniel W Van Ness, 'An overview of restorative justice around the world' (Paper presented at the 11th United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18-25 April 2005), 2; Tony E Marshall, *Restorative justice: An overview* (1999) Home Office, United Kingdom, 7; Heather Strang, *Restorative justice programs in Australia: A report to the Criminology Research Council* (2001), 3.

¹⁰¹⁴ Declan Roche, 'Dimensions of restorative justice' (2006) 62(2) *Journal of Social Issues*, 217, 222-223. See also Harry Blagg, 'A just measure of shame?' (1997) 37(4) *British Journal of Criminology*, 481, 483-487.

¹⁰¹⁵ Jeff Latimer and Steven Kleinknecht, *The effects of restorative justice programming: A review of the empirical* (2000) Department of Justice, Canada, 5; Les McCrimmon and Melissa Lewis, 'The role of ADR processes in the criminal justice system: A view from Australia' (Paper presented at the Association of Law Reform Agencies for Eastern and Southern Africa Conference, Uganda, 6 September 2005), 6, 8.

¹⁰¹⁶ Donald Schmid, 'Restorative justice: A new paradigm for criminal justice policy' (2003) 34(1) *Victoria University of Wellington Law Review*, 91, 97; Gabrielle Maxwell, 'The youth justice system in New Zealand: Restorative justice delivered through the family group conference' in Gabrielle Maxwell and James H Liu

economic costs of increasing incarceration rates¹⁰¹⁷ and growing awareness of the failure of the traditional justice system to address the underlying causes of offending and re-offending.¹⁰¹⁸

The development of restorative justice processes in Australia has been heavily influenced by the pioneering experiences of New Zealand. The historical development of restorative justice in both New Zealand and Australia is described briefly below.

7.1.1 The development of restorative justice in New Zealand

In the late 1980s there was increasing dissatisfaction in New Zealand about the treatment of young offenders and the disempowerment of families in decisions about responses to offending, particularly in relation to Maori offenders.¹⁰¹⁹ In 1989 the *Children, Young Persons and Their Families Act 1989* (NZ) made major changes to the way juvenile justice and family welfare were addressed. The Act brought about a fundamental ideological shift from a welfare-based model, where the state had the decision-making power, to a system where the affected parties and the broader community shared responsibility for addressing offending and its consequences.¹⁰²⁰

The Act created a specialist Youth Court and introduced family group conferences (FGCs), which aim to involve the young offender, the victim and the offender's family in the decisions about how to respond to an offence. The legislation does not specifically mention restorative justice and New Zealand District Court Judge Fred McElrea has observed that 'it is essentially the practice of youth justice, as experienced by practitioners that is restorative, rather than the legislation underlying that practice'.¹⁰²¹

In particular, Judge McElrea has observed that the role of victims has been pivotal in framing family group conferences as a restorative model:

FGCs were not designed as a victim-centred process but once participants saw the powerful difference made by the presence of victims, and the way in which important needs of both victims and offenders could be met by this process, the connection with restorative justice became obvious.¹⁰²²

(eds.), *Restorative justice and practices in New Zealand: Towards a restorative society* (2007) Institute of Policy Studies, 47-48.

¹⁰¹⁷ Schmid, above n 1016, 98; Kenneth Polk, 'Part B: Criminal justice reform in Australia' in, *The Australian criminal justice system - The mid 1990s* (1994) Butterworths, 299-300.

¹⁰¹⁸ Schmid, above n 1016, 98; Van Ness, above n 1013, 2.

¹⁰¹⁹ Maxwell, above n 1016, 46-47.

¹⁰²⁰ Andrew Becroft, 'Youth justice - The New Zealand experience: Past lessons and future challenges' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003), 4.

¹⁰²¹ Frederick W M McElrea, 'The New Zealand Youth Court: A model for use with adults' in Burt Galaway and Joe Hudson (eds.), *Restorative Justice: International Perspectives* (1996) Kugler Publications, 74

¹⁰²² F W M McElrea, 'Restorative justice - The long view' (Paper presented at the Beyond Retribution: Advancing the Law and Order Debate Conference, Silverstream, New Zealand, 12-14 May 2006), 3.

In the 1990s restorative justice programs became available for some adult offenders in New Zealand.¹⁰²³ The Ministry of Justice currently funds 30 community groups to provide restorative justice programs.¹⁰²⁴ In 2002, restorative justice was formally recognised in New Zealand legislation with sentencing, parole and victims' rights legislation now encouraging the use of restorative justice where appropriate and allowing the courts and the Parole Board to take the outcomes of restorative justice processes into account in their sentencing and parole decisions.¹⁰²⁵

7.1.2 The development of restorative justice in Australia

The New South Wales Police Service commenced the first Australian restorative justice program in Wagga Wagga in 1991. Under the pilot program, police facilitators held group conferences with juvenile offenders who had committed minor offences and had accepted responsibility for the offence.¹⁰²⁶ Successful conferences resulted in the offender being cautioned rather than charged with an offence. The police-run model was subsequently replaced by a program administered by the New South Wales Department of Juvenile Justice.

Early restorative justice initiatives in Australia, including the Wagga Wagga program, drew heavily on New Zealand's family group conferencing model.¹⁰²⁷ In addition, the development of restorative justice in Australia was informed by the work of Australian academic John Braithwaite. According to Braithwaite's *reintegrative shaming theory*, traditional responses to crime serve only to stigmatise, shame and further alienate offenders, whereas shame can be used constructively to reintegrate offenders into the community.¹⁰²⁸ This theory formed the basis of the Reintegrative Shaming Experiments (RISE) – a conferencing program operated by the Australian Federal Police based on the 'Wagga' model – which commenced in the Australian Capital Territory in 1994.¹⁰²⁹ RISE is significant because it was the first comprehensively evaluated restorative justice program in Australia. The results of the RISE evaluations are considered in chapter 9, which examines the outcomes of restorative justice.

¹⁰²³ F W M McElrea, 'Restorative justice for adult offenders: Practice in New Zealand today' in Maxwell and Liu (eds.), above n 1016, 95.

¹⁰²⁴ Ministry of Justice, New Zealand, *Crime Prevention Unit - Restorative justice*, <<http://www.justice.govt.nz/cpu/restorative-justice/index.html>>, viewed 23 January 2009.

¹⁰²⁵ *Parole Act 2002* (NZ) ss 7, 35, 36, 43; *Victims' Rights Act 2002* (NZ) ss 9-10; *Sentencing Act 2002* (NZ) ss 7-10, 25-27, 32, 62, 110-111. See generally Ministry of Justice, New Zealand, *Crime Prevention Unit: Restorative Justice: Restorative justice provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002*, <<http://www.justice.govt.nz/cpu/restorative-justice/restorative-justice-paper.html>>, viewed 30 January 2009.

¹⁰²⁶ D Moore and T O'Connell, 'Family conferencing in Wagga Wagga: A communitarian model of justice' in Christine Adler and Joy Wundersitz (eds.), *Family conferencing and juvenile justice: The way forward or misplaced optimism?* (1994) Australian Institute of Criminology, 46.

¹⁰²⁷ Kathleen Daly and Hennessey Hayes, *Restorative justice and conferencing in Australia* (2001) Australian Institute of Criminology, 2; Schmid, above n 1016, 106.

¹⁰²⁸ Braithwaite, above n 1012, 99-104. See also McCrimmon and Lewis, above n 1015, 8; D Moore, 'Managing social conflict: The evolution of a practical theory' (2004) 21(1) *Journal of Sociology and Social Welfare*, 72, 75-76.

¹⁰²⁹ Strang, above n 1013, 24.

Since the 1990s all Australian states and territories have developed conferencing programs for young offenders, principally with the aim of diverting offenders from entering or being drawn further into the criminal justice system.¹⁰³⁰ The conferences typically involve the offender, victim and communities of concern, including family members. The scope of restorative justice programs in Australia is being increasingly broadened to include young adult and adult offenders, as well as interventions at a variety of stages throughout the criminal justice process, for example, at the post-sentence stage, while an offender is serving a sentence in a correctional institution.

A pilot youth justice group conferencing program commenced in Victoria in 1995. Following a further pilot, the Youth Justice Group Conferencing Program was rolled out statewide in October 2006. Victoria's first adult group conferencing program was launched at the Neighbourhood Justice Centre in Collingwood in March 2008 as a two year pilot. Both of these current programs are discussed in more detail in chapter 8.

7.2 What is restorative justice?

7.2.1 Defining restorative justice

The term 'restorative justice' gained currency in the 1990s as a way of describing a range of programs – such as victim-offender mediation and conferencing – that had been operating for some time.¹⁰³¹

There is no universally accepted definition of restorative justice,¹⁰³² nor is there consensus about which processes fall within its scope.¹⁰³³ The most widely accepted definition of restorative justice internationally is that of Tony Marshall of the United Kingdom Home Office: 'Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future'.¹⁰³⁴ This is the definition that the Committee uses in this report.

The United Nations' *Basic principles on the use of restorative justice programs in criminal matters* take a different approach. Rather than trying to provide a definition of restorative justice, the principles focus on restorative justice processes and outcomes:

“Restorative process” means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a

¹⁰³⁰ See generally Gabrielle Maxwell and Hennessey Hayes, 'Restorative justice developments in the Pacific region: A comprehensive survey' (2006) 9(2) *Contemporary Justice Review*, 127, 135-144.

¹⁰³¹ McCrimmon and Lewis, above n 1015, 6.

¹⁰³² Van Ness, above n 1013, 2-4.

¹⁰³³ Standing Committee on Education Training and Young People, ACT, *Restorative justice principles in youth settings: Final report* (2008) Parliament of the Australian Capital Territory, 17-20.

¹⁰³⁴ Marshall, above n 1013, 5. See also Howard Zehr, *The little book of restorative justice* (2002) Good Books, 36-37.

crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator ...

“Restorative outcome” means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.¹⁰³⁵

The submission of the Victorian Association for Restorative Justice (VARJ) suggested that restorative justice should be defined as ‘a process that seeks to heal the impact of offending and make things right for victims, offenders and their respective communities’.¹⁰³⁶ Healing is not specifically mentioned in the Marshall definition the Committee has adopted in this report. However, the Committee acknowledges that healing is an important concept underpinning restorative justice and incorporates the notion of healing in this report through a focus on restorative justice principles.

Dr David Moore, who gave evidence on behalf of VARJ, told the Committee that uncertainty about the definition of restorative justice has arisen in Australia because:

we took terminology from North America — from Canada and the States; the language of restorative justice — and aligned it up with a conferencing process that was developed essentially in Australasia. It is only running these various programs in parallel and observing them over quite a few years that we will become increasingly clear on the need for much greater definitional clarity.¹⁰³⁷

Both VARJ and the Victorian Bar emphasised the importance of settling a definition so that restorative justice programs currently operating in Victoria can be clearly identified.¹⁰³⁸ The Committee identifies the programs that it considers to be restorative for the purposes of this report in chapter 8.

7.2.2 Restorative justice principles

Traditionally crime has been conceptualised as a violation of the rules of law and an act against the state. The criminal justice system has responded to crime with mechanisms such as deterrence, denunciation and punishment of offenders.¹⁰³⁹ Restorative justice offers a new ‘lens’ through which to view both the harm caused by offending and responses to it.¹⁰⁴⁰ American academic Howard Zehr describes this ‘lens’ as built on three foundations:

¹⁰³⁵ United Nations Economic and Social Council, ‘Basic principles on the use of restorative justice programmes in criminal matters (Resolution 2002/12)’ in United Nations, Office on Drugs and Crime (ed.), *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006), principles 1-3.

¹⁰³⁶ Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 4.

¹⁰³⁷ David Moore, Committee Member, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 3.

¹⁰³⁸ The Victorian Bar, *Submission no. 13*, 22. See also VARJ, *Submission no. 28*, 7.

¹⁰³⁹ See, for example, *Sentencing Act 1991* (Vic) s 5. See also Arie Freiberg, ‘Non-adversarial approaches to criminal justice’ (2007) 16 *Journal of Judicial Administration*, 205, 215.

¹⁰⁴⁰ Zehr, above n 1034, 32-33; Howard Zehr, *Changing lenses* (1995) Herald Press, 180, 184-185.

- Crime is a violation of people and of interpersonal relationships.
- Violations create obligations.
- The central obligation is to put right the wrongs.¹⁰⁴¹

Thus, the fundamental principles that underpin a restorative justice approach include offenders taking responsibility for their actions; offenders participating in constructive reparations for harm caused; a focus on healing and reparation rather than punishment; and victim and community participation.¹⁰⁴² These principles are reflected in many policy documents that relate to restorative justice, most notably in the United Nations' *Handbook on restorative justice programmes*.¹⁰⁴³

These principles, in particular healing and reparation, featured in stakeholder evidence to the Inquiry. Mr Peter Condliffe of VARJ stated: 'restorative justice is concerned with reparation and bringing together families of victims and so on in some sort of dialogue'.¹⁰⁴⁴ Reverend Jonathan Chambers of Anglicare told the Committee, 'the value of restorative justice we see is about healing and restoration'.¹⁰⁴⁵

The fundamental principles of restorative justice have underpinned the Committee's consideration of restorative justice and are reflected throughout this report.

7.2.3 Restorative justice and criminal justice

Restorative justice offers a different framework for responding to offending than is provided by the traditional criminal justice system. Restorative justice shifts the focus away from a rights-based approach to one where the participants engage actively and honestly and seek to repair the harm caused by offending.¹⁰⁴⁶ While the traditional criminal justice system has a focus primarily on the offender, a restorative justice approach broadens this out to involve victims and the wider community.¹⁰⁴⁷ Figure 15 below illustrates Australian academic Kathleen Daly's conceptualisation of the key differences between traditional justice and restorative justice.

However, despite their different emphases, most restorative justice experts do not view restorative justice and traditional criminal justice as being in opposition. In a review of restorative justice research in the United Kingdom, academics Lawrence Sherman and Heather Strang concluded that restorative justice offers 'both a promising alternative to those [traditional] conventions and a compatible extension

¹⁰⁴¹ Zehr, above n 1034, 19.

¹⁰⁴² Zehr, *Changing lenses*, above n 1040, 202-203; John Braithwaite, 'Encourage restorative justice' (2007) 6(4) *Criminology & Public Policy*, 689, 689; Latimer and Kleinknecht, above n 1015, 6.

¹⁰⁴³ United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes* (2006), 8. See also Ministry of Justice, New Zealand, *Restorative justice in New Zealand: Best practice* (2004), 23-27.

¹⁰⁴⁴ Peter Condliffe, President, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 2.

¹⁰⁴⁵ Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 2.

¹⁰⁴⁶ Zehr, *Changing lenses*, above n 1040, 184-185.

¹⁰⁴⁷ McElrea, above n 1022, 5.

of them'.¹⁰⁴⁸ Others, for example New Zealand District Court Judge Fred McElrea, have observed that the two systems can complement each other, with restorative justice being strong in areas where the traditional criminal justice system is weak.¹⁰⁴⁹

Figure 15: Traditional and restorative justice¹⁰⁵⁰

Traditional justice (retributive and rehabilitative)	Restorative justice
<p>Victims are peripheral to the process</p> <p>The focus is on punishing <i>or</i> on treating an offender</p> <p>The community is represented by the state</p> <p>The process is characterised by adversarial relationships among the parties</p>	<p>Victims are central to the process</p> <p>The focus is on repairing the harm between an offender and their victim, and perhaps also an offender and the wider community</p> <p>Community members or organisations take a more active role</p> <p>The process is characterised by dialogue and negotiation among the parties</p>

Australian restorative justice experts and VARJ members, Peter Condliffe and Kathy Douglas, have observed that restorative justice processes are being incorporated within the traditional criminal justice system in three overlapping ways:

- (a) a gradual replacement of traditional correctional practices with restorative justice programs;
- (b) attempts to allow restorative and traditional programs to co-exist independently of one another; and
- (c) the integration of principles and practices into the repertoire of the States' court correctional interventions.¹⁰⁵¹

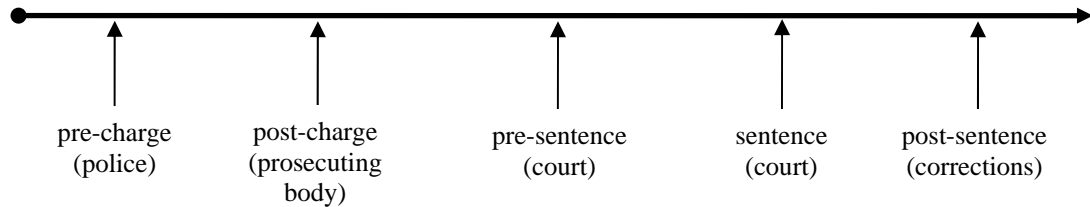
7.2.4 Restorative justice processes

Restorative justice interventions may be used at any stage of the criminal justice process.¹⁰⁵² Figure 16 summarises the stages at which offenders may be referred to restorative justice programs. In general, more serious offences are referred to

¹⁰⁴⁸ Lawrence W Sherman and Heather Strang, *Restorative justice: The evidence* (2007) The Smith Institute, 44.
¹⁰⁴⁹ F W M McElrea, 'Restorative justice as a procedural revolution: some lessons from the adversary system' (Paper presented at the 4th International Winchester Restorative Justice Conference, Winchester, United Kingdom, 10 October 2007), 2. See also McCrimmon and Lewis, above n 1015, 7; Peter Condliffe, 'Putting the pieces together: The opportunity for restorative justice in Victoria' (2005) 79 *Law Institute Journal*, 54, 58.
¹⁰⁵⁰ Kathleen Daly, 'Revisiting the relationship between retributive and restorative justice' in Heather Strang and John Braithwaite (eds.), *Restorative justice: Philosophy to practice* (2000) Ashgate Publishing Company, 36. See also McElrea, above n 1049, 2.
¹⁰⁵¹ Peter Condliffe and Kathy Douglas, 'Reflections on conferencing practice: The need for accreditation and the dangerous debate?' (2007) 18(3) *Australasian Dispute Resolution Journal*, 140, 145-146.
¹⁰⁵² United Nations Office on Drugs and Crime, above n 1043, 13.

restorative justice later in the criminal justice process.¹⁰⁵³ There is considerable diversity in the entry points to restorative justice programs throughout Australia.¹⁰⁵⁴

Figure 16: Stages of referral to restorative justice¹⁰⁵⁵



There are also a number of different types of programs and processes that may be considered to be restorative.¹⁰⁵⁶ The Victorian Bar and VARJ identified the Marshall typology, which is derived from the work of Tony Marshall of the United Kingdom Home Office, as a useful way of conceptualising restorative justice programs in terms of the parties involved. The Marshall typology is set out in figure 17, below.

Stakeholders in the Inquiry suggested that a wide variety of processes fall within restorative justice, including:

- Conferencing: where those most affected by the crime, including the victim, offender, family and friends, meet to discuss the harm caused by the offence and how it might be repaired.
- Victim-offender mediation: a meeting of the victim and offender which is professionally facilitated. While the focus of the session is not primarily on achieving a settlement, many mediations do result in a restitution agreement.
- Circle sentencing: a meeting of victims, offenders, friends and family and community elders to discuss the crime and identify the actions required to heal all affected parties and prevent re-offending.
- Practices such as reparation boards (where trained members of the community meet with offenders and develop an outcome agreement), reconciliation commissions, and meetings between offenders in correctional institutions and victims.¹⁰⁵⁷

For the purposes of this report, the Committee accepts that these processes fall within the definition of restorative justice. Conferencing is the most common type of restorative justice process currently utilised both in Victoria and nationwide.¹⁰⁵⁸

¹⁰⁵³ Latimer and Kleinknecht, above n 1015, 7.

¹⁰⁵⁴ See, for example, VARJ, *Submission no. 28*, 15-16; The Victorian Bar, *Submission no. 13*, 58-59. See chapter 12 for further discussion about the points of referral to restorative justice programs.

¹⁰⁵⁵ Based on VARJ, *Submission no. 28*, 15.

¹⁰⁵⁶ Zehr, above n 1034, 10, 47-57.

¹⁰⁵⁷ VARJ, *Submission no. 28*, 7; Anglicare Victoria, *Submission no. 26*, 7; The Victorian Bar, *Submission no. 13*, 21-22. See also Gordon Bazemore and Mark Umbreit, 'A comparison of four restorative conferencing models' (2001) *Juvenile Justice Bulletin*, 1, 2-7; United Nations Economic and Social Council, above n 1035, principle 2.

¹⁰⁵⁸ Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, research findings, and prospects' in Allison Morris and Gabrielle Maxwell (eds.), *Restorative justice for juveniles: Conferencing, mediation and circles* (2001) Hart, 59.

Figure 17: Marshall typology of restorative justice programs¹⁰⁵⁹

Parties	Programs
Victim – Offender	Victim-offender mediation and/or reparation.
Victim – Community	Community group support for victims.
Offender – Community	Community programs that support offenders. For example: jobs, retraining, literacy, education, relationship counselling, drug/alcohol counselling, accommodation, support for isolated offenders, activities to release energy and integrate people, and family support.
Victim – Offender – Community	Community involvement in victim-offender mediation.
Justice Agency – Victim	The justice agency takes a pro-active role with respect to victims.
Justice Agency – Offender	The justice agency actively tries to reintegrate the offender.
Justice Agency – Community	The justice agency is integrated into the community. Examples may include probation services and opportunities for volunteering in relation to the criminal justice agencies. For example, in Vermont USA, non-violent offenders are sentenced by the court to a hearing before a community reparative board composed of local citizens.

Some stakeholders considered restorative justice to include a wide range of initiatives. The Law Institute of Victoria submitted that the diversion program in the Magistrates' Court, which gives mainly first-time offenders an opportunity to avoid a criminal record by undertaking conditions that benefit the offender, victim and community, is restorative.¹⁰⁶⁰ Others commented that the Koori and Drug Courts in Victoria have restorative elements.¹⁰⁶¹ Two stakeholders also suggested that victim awareness programs, which aim to give offenders a greater understanding of the impact of their offending on victims, are restorative.¹⁰⁶²

¹⁰⁵⁹ The Victorian Bar, *Submission no. 13*, 21; VARJ, *Submission no. 28*, 6. See also Marshall, above n 1013, 11-17.

¹⁰⁶⁰ Law Institute of Victoria, *Submission no. 20S*, 3-4.

¹⁰⁶¹ The Victorian Bar, *Submission no. 13*, 69-70; David Fanning, Magistrate, Neighbourhood Justice Centre, *Transcript of evidence*, Melbourne, 4 March 2008, 8-9; Peter Condliffe, *Transcript of evidence*, above n 1044, 8; VARJ, *Submission no. 28*, 21. See also Michael S King, 'Towards a more comprehensive resolution of conflict: The role of restorative justice' (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008).

¹⁰⁶² Arthur Bolkas, Director, Communities of Restoration, Prison Fellowship Australia (Victoria), *Transcript of evidence*, Melbourne, 5 June 2008, 3; Letter from Bob Cameron, Minister for Corrections, to Chair, Victorian Parliament Law Reform Committee, 31 July 2008, attachment B.

The Committee notes that these programs have restorative components but does not consider them to be restorative processes in their current forms as they do not typically engage the victim or actively address the issue of restoration. The Committee discusses the therapeutic approaches of the Koori and Drug Courts further in section 7.4, and the Magistrates' Court diversion program and victim awareness programs are considered in chapter 8.

7.3 Restorative practices

VARJ urged the Committee to take a broad approach to restorative justice, giving consideration to the increasing use of restorative practices in other parts of society.¹⁰⁶³ For example, restorative approaches which are based on the same underlying principles as restorative justice, may be used to deal with conflict and wrongdoing in schools and workplaces. In some cases these approaches are used instead of bringing a matter into the criminal justice system.¹⁰⁶⁴

Australian academic John Braithwaite has written that 'restorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics'.¹⁰⁶⁵ VARJ strongly endorsed this approach:

A distinction should be drawn between a system of justice that utilises restorative processes as a voluntary diversion from mainstream justice, such as is currently operational in Victoria, and a justice system that has the restoration of citizen relationships as one of its primary objectives. While VARJ supports the gradual introduction of restorative principles and approaches into the Victorian criminal justice framework, VARJ advocates long-term strategic visioning towards a system of justice that reflects the need to repair the impact of crime on individuals and society for each and every occasion that such impact occurs.¹⁰⁶⁶

VARJ pressed the Committee to consider the use of restorative practices in schools, where they are being used as 'a platform for cultural change'.¹⁰⁶⁷ In that setting, misconduct is viewed not as rule breaking and a violation of the institution, but rather 'as a violation against people and relationships in the school and wider community'.¹⁰⁶⁸

VARJ's submission emphasised that restorative practices can be applied both proactively and reactively in the education sector:

¹⁰⁶³ VARJ, *Submission no. 28*, 4-5.

¹⁰⁶⁴ United Nations Office on Drugs and Crime, above n 1043, 14.

¹⁰⁶⁵ John Braithwaite, 'Principles of restorative justice' in A von Hirsch, J V Roberts, A E Bottoms, K Roach and M Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) Hart Publishing, 1.

¹⁰⁶⁶ VARJ, *Submission no. 28*, 4. See also David Moore, *Transcript of evidence*, above n 1037, 3.

¹⁰⁶⁷ VARJ, *Submission no. 28*, 5.

¹⁰⁶⁸ Lisa Cameron and Margaret Thorsborne, 'Restorative justice and school discipline: mutually exclusive?' in John Braithwaite and Heather Strang (eds.), *Restorative justice and civil society* (2001) Cambridge University Press, 183.

schools are looking at restorative practices from the perspectives of both proactive prevention and active effective intervention. Schools prevent harm occurring or remaining unresolved between students, staff and the community by skilling students and educators to develop and manage relationships and emotions. Restorative interventions are used to resolve conflict and harm done in inclusive and cooperative ways, primarily by way of (community) conferences. The salient point is that it is the broad spectrum of restorative approaches from prevention to intervention that has the greatest impact on the number and impact of incidents such as bullying and violence within the school community.¹⁰⁶⁹

Restorative approaches, particularly conferencing, are also increasingly being utilised in child care and protection settings. According to Australian academic Heather Strang, the utility of restorative approaches in this arena is ‘that families ought to have the main responsibility for making decisions about care arrangements for family members because, given the resources, information and power, families themselves are in the best position to make the right choices’.¹⁰⁷⁰

While the Committee’s terms of reference require it to focus on restorative justice, the Committee acknowledges that the use of restorative justice in the criminal justice system is influenced by broader restorative practice approaches. Therefore the Committee draws on the knowledge gained from the use of restorative practices in other settings throughout this report.

7.4 Restorative justice and therapeutic jurisprudence

In chapter 1 the Committee discussed non-adversarial justice which forms a platform for alternative approaches to dispute and conflict resolution in relation to both civil and criminal matters. The Committee noted that restorative justice falls within the umbrella of non-adversarial justice. A related and overlapping concept, which also falls within the ambit of non-adversarial justice, is therapeutic jurisprudence.

Therapeutic jurisprudence is a holistic approach that looks at the impact of the law (and its agents) on emotional and psychological health. This concept considers the law as a social force which produces behaviours and consequences that are either therapeutic or anti-therapeutic.¹⁰⁷¹ Therapeutic jurisprudence initiatives focus on maximising therapeutic outcomes, such as physical and psychological wellbeing, for all participants in the legal process. In Victoria, a therapeutic approach has informed

¹⁰⁶⁹ VARJ, *Submission no. 28*, 5.

¹⁰⁷⁰ Strang, above n 1013, 30.

¹⁰⁷¹ International Network on Therapeutic Jurisprudence, *International Network on Therapeutic Jurisprudence* (2007), <<http://www.law.arizona.edu/depts/upr-intj/>>, viewed 5 March 2009. See also Michael S King and Kate Auty, 'Therapeutic jurisprudence: An emerging trend in courts of summary jurisdiction' (2005) 30(2) *Alternative Law Journal*, 69, 73; Michael King, 'Applying therapeutic jurisprudence from the Bench: Challenges and opportunities' (2003) 28(4) *Alternative Law Journal*, 172, 172; Mark Harris, 'The Koori Court and the promise of therapeutic jurisprudence' in Michael S King and Kate Auty (eds.), *The therapeutic role of Magistrates' Courts* (2006) E Law Special Series - Volume 1, 129.

the development and operation of problem-solving courts such as the Drug Court, the Koori Court and the Family Violence Court.¹⁰⁷²

There is some overlap between restorative justice and therapeutic jurisprudence. The Monash University Faculty of Law's submission noted that, like ADR in the civil jurisdiction, both therapeutic jurisprudence and restorative justice 'seek to promote the voice, validation, respect and self-determination of the parties involved'.¹⁰⁷³ Both approaches also endeavour to encourage healing and prevent further offending.¹⁰⁷⁴

The close relationship between therapeutic and restorative approaches can be seen in the operations of the Neighbourhood Justice Centre (NJC). The legislation establishing the NJC's Court states that the Court is to apply both therapeutic and restorative approaches.¹⁰⁷⁵ The NJC's magistrate, David Fanning, explained the key differences in these methods:

The therapeutic approach is really having a judge-led or judicial officer/magistrate-led approach to problem-solving. The centre of it in a sense, or the person who is directing the traffic, is the judicial officer, in managing what interventions are taking place ... it might involve housing, it might involve drug and alcohol, mental health — a whole range of interventions that might occur during the course of the time that the person is actually before the court. It is of course based on the presumption that the person has pleaded guilty to the offence and then the interventions start ... The restorative justice approach really is that the magistrate or the judge is not involved in that process at all, but he or she hands it over to a convener who works with the offender and the victim and conducts those conferences, and really it is after all that is over, that restorative justice approach has concluded, that it then comes back before the judicial officer.¹⁰⁷⁶

Mr Findlay McRae of Victoria Police offered an alternative way of distinguishing these two approaches, suggesting that therapeutic jurisprudence has a focus on the offender, whereas restorative justice also emphasises the role of victim.¹⁰⁷⁷

Magistrate Fanning told the Committee that therapeutic and restorative approaches are not mutually exclusive and may be used in conjunction with each other.¹⁰⁷⁸ Monash University Faculty of Law's submission observed that 'there is no reason why a court applying therapeutic jurisprudence should not also use restorative

¹⁰⁷² Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 31.

¹⁰⁷³ Monash University Faculty of Law, *Submission no. 7*, 2.

¹⁰⁷⁴ Diane Sivasubramaniam and Jane Goodman-Delahunty, 'Trust and power-distance: A psychological perspective on fairness in restorative justice conferences' (2006) 13(2) *Psychiatry, Psychology and Law*, 203, 203.

¹⁰⁷⁵ *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1. See also Kathy Douglas, 'Therapeutic jurisprudence, restorative justice and the law' (2007) 32(2) *Alternative Law Journal*, 63, 107.

¹⁰⁷⁶ David Fanning, *Transcript of evidence*, above n 1061, 8.

¹⁰⁷⁷ Findlay McRae, Director, Legal Services Department, Victoria Police, *Transcript of evidence*, Melbourne, 25 February 2008, 3. See also Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review*, 415, 425; Clare Cappa, 'The social, political and theoretical context of drug courts' (2006) 32(1) *Monash University Law Review*, 145, 165-6.

¹⁰⁷⁸ David Fanning, *Transcript of evidence*, above n 1061, 9.

justice. Thus, some problem solving courts applying therapeutic jurisprudence will order an offender to take part in victim-offender mediation’.¹⁰⁷⁹

Several stakeholders suggested that problem-solving courts are restorative, or contain elements that are restorative in nature.¹⁰⁸⁰ For example, New South Wales academic Dr Loretta Kelly, a participant in the Committee’s Indigenous Australian Communities Forum, described the Koori Court process as involving the presence of ‘communities of concern’ which act to facilitate a transformation in the offender.¹⁰⁸¹

While recognising that Victorian problem-solving courts do incorporate some restorative elements, as noted earlier in this chapter, the Committee does not consider these courts to be restorative justice programs for the purpose of this Inquiry. However, the Committee does recognise the synergies between therapeutic and restorative approaches and considers the potential to utilise restorative justice approaches in the problem-solving courts in chapter 12.

7.5 Potential issues with restorative justice

This chapter has reviewed the history and philosophy of restorative justice, noting its potential to respond to crime more holistically than traditional criminal justice approaches. However, while restorative justice has the potential to provide more appropriate responses to offending in some cases, the Committee’s research also identified a number of potential issues with restorative justice.

7.5.1 Human rights issues

The Committee’s Inquiry has taken place in an environment of increased awareness of human rights issues, driven primarily by Victoria’s *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the charter’). The charter contains a number of relevant protections, including the right to have a criminal charge or civil proceeding decided by a court and due process protections for parties involved in criminal proceedings.¹⁰⁸²

It is vital that the use of restorative justice, as an alternative pathway for responding to offending, protects the fundamental rights of all parties. While restorative justice processes may enhance the rights of participants, including providing opportunities for increased offender-accountability and victim and community empowerment, the Committee recognises the potential for poorly designed restorative justice programs

¹⁰⁷⁹ Monash University Faculty of Law, *Submission no. 7*, 3.

¹⁰⁸⁰ The Victorian Bar, *Submission no. 13*, 69-70; David Fanning, *Transcript of evidence*, above n 1061, 8-9; Peter Condliffe, *Transcript of evidence*, above n 1044, 8; VARJ, *Submission no. 28*, 21. See also King, above n 1061, 7, 12; Attorney-General, above n 1072, 29.

¹⁰⁸¹ Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 20.

¹⁰⁸² *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24-26.

to infringe on the rights of the accused. Examples of rights that could be at risk are the right to a fair hearing and the presumption of innocence.¹⁰⁸³

The United Nations' *Basic principles on the use of restorative justice programmes in criminal matters* provide a number of safeguards aimed at protecting the rights of participants in restorative justice programs. These include procedural safeguards guaranteeing fairness to all parties, ensuring confidentiality and mechanisms to protect offenders from double-jeopardy.¹⁰⁸⁴

The Committee acknowledges and addresses a range of potential human rights issues raised by restorative justice throughout this report.

7.5.2 The limitations of restorative justice

The Committee recognises that it is important not to expect too much from restorative justice: it alone cannot solve all of the issues associated with the criminal justice system and it must be implemented cautiously. As Australian academic, John Braithwaite has observed, 'all justice interventions, including restorative justice, frequently fail with terrible consequences'.¹⁰⁸⁵

Some stakeholders also acknowledged the limitations of restorative justice. Jesuit Social Services' submission stated, in relation to the use of restorative justice in the youth justice area, '[w]hilst it is not a panacea for all the issues facing these young people, restorative justice does have a greater capacity to improve the existing response of the Victorian youth justice system'.¹⁰⁸⁶

The Monash University Faculty of Law's submission suggested that there are situations in which restorative justice interventions might not be appropriate, such as where the offender is not 'psychologically strong enough to deal with the possible shame and other emotions arising from restorative justice approaches'.¹⁰⁸⁷

The Committee concurs with the Monash University Faculty of Law's submission that restorative justice approaches are just one of a range of tools that need to be available to resolve conflict. The approach taken in this report reflects the view that restorative justice should supplement innovative alternatives both inside and outside the justice system. As the Monash University Faculty of Law stated, 'It then becomes a question of identifying which approach is best suited to addressing the particular problem'.¹⁰⁸⁸ The Committee believes that the evidence presented in this report demonstrates that, in many cases, restorative justice will be the appropriate tool.

¹⁰⁸³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24(1), 25(1).

¹⁰⁸⁴ United Nations Economic and Social Council, above n 1035, principles 13-15. Double jeopardy refers to prosecution for an offence for which the offender has already been prosecuted.

¹⁰⁸⁵ Braithwaite, above n 1042, 694. See also McCrimmon and Lewis, above n 1015, 11; Zehr, above n 1034, 12; Roche, above n 1014, 235; Jason Nadeau, *Critical analysis of the United Nations declaration of basic principles on the use of restorative justice programs in criminal matters* (2001), 38.

¹⁰⁸⁶ Jesuit Social Services, *Submission no. 35*, 5-6. See also Victoria Police, *Submission no. 12*, 4.

¹⁰⁸⁷ Monash University Faculty of Law, *Submission no. 7*, 3.

¹⁰⁸⁸ *Ibid.*

Chapter 8 – Current restorative justice programs in Victoria

A growing number of restorative justice programs are being implemented around the globe as governments and communities look for new ways to respond to offending. This chapter provides an overview of current restorative justice programs in the Victorian criminal justice system. In addition, the Committee briefly explores the use of restorative practices in other contexts such as education and child welfare. The purpose of this chapter is to provide a snapshot of the existing restorative justice service system. This overview forms the basis for the policy discussions contained in the remainder of this report.

8.1 The need to map restorative justice programs

The development of restorative justice programs in the Victorian criminal justice system has been both piecemeal and ad hoc, with individual programs developed in response to various perceived needs within the community.

The Victorian Association for Restorative Justice's (VARJ) submission to the Inquiry suggested that it would be useful to undertake a mapping exercise to identify all restorative programs currently operating in Victoria.¹⁰⁸⁹ The Committee notes that the Standing Committee of Attorneys-General – the ministerial council of Commonwealth, state and territory Attorneys-General in Australia – is currently conducting an Australia-wide audit of restorative justice programs.¹⁰⁹⁰ The results of the audit were not available at the time this report was written, however, the Committee believes the audit will provide a useful snapshot of restorative justice programs around the nation.

This chapter presents the results of the Committee's own research into restorative justice programs in Victoria.

8.2 Youth Justice Group Conferencing Program

The Youth Justice Group Conferencing (YJGC) Program operating in the Criminal Division of the Children's Court of Victoria, is the longest-running restorative justice program in Victoria. The program provides a problem-solving approach to offending that engages the offender and those affected by the offence.¹⁰⁹¹

8.2.1 History and development

The Victorian juvenile justice system has long been underpinned by a commitment to dealing with young people in the least punitive and intrusive manner possible. This

¹⁰⁸⁹ Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 4.

¹⁰⁹⁰ Standing Committee of Attorneys General, *Communique: 25 July 2008* (2008), <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_25July2008-Communique-StandingCommitteeofAttorneys-General>, viewed 27 January 2009. See also Letter from Neil Twist, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009, attachment, 1.

¹⁰⁹¹ Department of Human Services, Victoria, *Youth justice group conferencing: Youth justice fact sheet* (2007).

approach was formalised with the introduction of the *Children and Young Persons Act 1989* (Vic) which focused on promoting young people's best interests, rehabilitation, personal development and positive relationships with family and the community.¹⁰⁹²

The YJGC Program commenced as a pre-sentence diversionary pilot program in the Criminal Division of the Melbourne Children's Court in 1995.¹⁰⁹³ The program was operated by Anglicare and funded by a philanthropic trust.¹⁰⁹⁴

Between 1998 and 2001 the program was funded by the Department of Justice. In 2001 responsibility for the program was transferred to the Department of Human Services (DHS) as part of the Juvenile Justice Reform Strategy. In 2002-03 the program was expanded to include a pilot across all Children's Courts in metropolitan Melbourne as well as two rural pilot programs in the Gippsland and Hume regions.¹⁰⁹⁵

Three early evaluations of the program were conducted in 1997 and 1999. These found slightly lower or comparable re-offending rates and reported positive feedback from offenders, victims, family members and professionals involved in the conferences.¹⁰⁹⁶ The 1999 evaluation recommended that conferencing be offered as an option in all Children's Courts throughout Victoria.

The program has been operating statewide since October 2006.¹⁰⁹⁷

8.2.2 Operation under the *Children, Youth and Families Act*

Program administration and delivery

There was no legislative basis for the YJGC Program prior to the *Children, Youth and Families Act 2005* (Vic). The Act stipulates that rehabilitation is the primary goal in sentencing young offenders.¹⁰⁹⁸ Provisions that came into effect on 27 April

¹⁰⁹² Effective Change Pty Ltd, *Report on the juvenile justice group conferencing program* (2006) Department of Human Services, Victoria, 7.

¹⁰⁹³ Children's Court of Victoria, *Criminal Division: Group conferencing*, <[¹⁰⁹⁴ Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008, 4.](http://www.childrenscourt.vic.gov.au/CA256CA800014B4A/page/Criminal+Division-Group+Conferencing?OpenDocument&1=30-Criminal+Division~&2=30Group+Conferencing~&3=~>, viewed 10 March 2009. Note the earlier pilot programs had different titles. To avoid confusion the terminology 'Youth Justice Group Conferencing Program' is used in this report to describe the current program, as well as the earlier programs.</p></div><div data-bbox=)

¹⁰⁹⁵ Ibid, 4; Effective Change Pty Ltd, above n 1092, 6.

¹⁰⁹⁶ Anne Markiewicz, *Juvenile justice group conferencing in Victoria: An evaluation of a pilot program* (1997) University of Melbourne; Anne Markiewicz, Bruce Lagay, Helen Murray and Lynda Campbell, *Juvenile justice group conferencing in Victoria: An evaluation of a pilot program: Phase two* (1997) University of Melbourne; Success Works Pty Ltd, *Juvenile justice group conferencing project evaluation* (1999).

¹⁰⁹⁷ Department of Human Services, above n 1094, 4.

¹⁰⁹⁸ Children's Court of Victoria, *Criminal Division: Sentencing*, <[202](http://www.childrenscourt.vic.gov.au/CA256CA800014B4A/page/Criminal+Division-Sentencing?OpenDocument&1=30-Criminal+Division~&2=20-Sentencing~&3=~>, viewed 10 March 2009. See also <i>Children, Youth and Families Act 2005</i> (Vic) s 362.</p></div><div data-bbox=)

2007 allow the Children’s Court to defer sentencing to enable a young person to participate in a group conference, if the court is considering imposing a sentence of probation or a youth supervision order.¹⁰⁹⁹

The program is administered by DHS which approves agencies under the Act and funds them to deliver the program in six different regions across Victoria.¹¹⁰⁰ The agencies currently approved to deliver the program are listed in figure 18. The aims of the program are set out in figure 19.

Figure 18: Providers of the Youth Justice Group Conferencing Program¹¹⁰¹

Region	Service provider
Metropolitan Melbourne	Jesuit Social Services
Barwon South West	Barwon Youth & Brophy Youth and Family Services
Gippsland	Anglicare
Grampians	Centacare Ballarat
Hume	Salvation Army – Brayton Youth and Family Services
Loddon Mallee	Centacare Sandhurst

The Committee has been greatly assisted in this Inquiry by the active participation of three of these service providers: Anglicare, Jesuit Social Services and the Salvation Army – Brayton Youth and Family Services. These services made written submissions, as well as appearing as witnesses at the Committee’s public hearings. The Committee also received written and oral evidence from DHS.

Figure 19: Aims of the Youth Justice Group Conferencing Program¹¹⁰²

- to provide an effective community rehabilitation intervention to the Children’s Court at the pre-sentence stage of the court process
- to address issues contributing to the young person’s offending behaviour
- to divert the young person from more intensive supervisory court outcomes (for example probation or a youth supervisory order)
- to involve family members, significant others, community members, the police, and victims in the decision-making process
- to enhance the satisfaction of those other parties with the justice process
- to effectively reintegrate young people into the community following the conference process
- to reduce the frequency and seriousness of re-offending of young people referred to the program, as compared to young people on supervisory orders
- to reduce costs to the youth justice system as compared to statutory court orders including custody.

¹⁰⁹⁹ *Children, Youth and Families Act 2005* (Vic) s 415(1).

¹¹⁰⁰ *Children, Youth and Families Act 2005* (Vic) s 480.

¹¹⁰¹ Department of Human Services, above n 1094, 7.

¹¹⁰² Department of Human Services, Victoria, *Youth Justice Group Conferencing Program guidelines* (2007), 2-3.

Program process

The YJGC Program operates in the Criminal Division of the Children's Court as a voluntary, pre-sentence diversionary intervention. It is available for young people aged between 10 and 18 years at the time of the offence.¹¹⁰³

The Act does not specify which offences make an offender eligible to participate in the program, although DHS guidelines exclude homicide, manslaughter, sex offences and serious crimes of violence.¹¹⁰⁴ To be referred to the program the offender must have been found guilty or have pleaded guilty, the court must be considering imposing a sentence of probation or a youth supervision order, and the offender must agree to participate.¹¹⁰⁵

Judge Paul Grant, President of the Children's Court of Victoria, told the Committee that, in contrast to other jurisdictions where conferences may be limited to minor offending, only offenders who have committed more serious offences are referred to conferencing in Victoria:

In the Children's Court of Victoria our most common orders are good behaviour bonds and fines. A person has to have committed a relatively serious offence to be at the probation or youth supervision level. There are a whole lot of people who are excluded from conferencing. I think that that is not a bad thing.¹¹⁰⁶

Judge Grant described how the Children's Court makes referrals to the YJGC Program:

I have to first come to the conclusion that this offending warrants a probation order or a youth supervision order. Then I have an assessment made by a youth justice worker, because the legislation requires the secretary to have some input into this process, and the delegate for the secretary of the department is a youth justice worker attached to our court. If I get the report back that the person is suitable for a conference, then I adjourn the case – I defer sentence for a period of time, usually about six to eight weeks. That means that the case sentence is deferred and the conference is then to take place during the period of the deferral.¹¹⁰⁷

DHS has developed guidelines for service providers delivering the YJGC Program. In addition, DHS has developed a list of factors to take into consideration when assessing an offender's suitability to participate, including:

- the young person's level of motivation to participate
- the young person's informed consent
- the young person's level of remorse, including their degree of victim empathy

¹¹⁰³ *Children, Youth and Families Act 2005* (Vic) s 3.

¹¹⁰⁴ Department of Human Services, above n 1102, 6

¹¹⁰⁵ *Children, Youth and Families Act 2005* (Vic) ss 414(1), 415(1); Department of Human Services, above n 1102, 6.

¹¹⁰⁶ Judge Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3.

¹¹⁰⁷ *Ibid.*

- the level of support available to the young person
- issues such as intellectual functioning, substance abuse or level of interpersonal skills which may impact on the young person's ability to participate in the conference.¹¹⁰⁸

Once the court has deferred sentencing the matter is referred to the relevant service provider to organise and convene a conference. The DHS guidelines state that convenors should endeavour to commence a conference within four to six weeks of the court referral.¹¹⁰⁹ The conference convenor is tasked with arranging the time and place of the conference, preparing the parties and facilitating the conference. The DHS guidelines direct that, '[i]n preparing participants for the conference the convenor is required to prioritise preparing the young offender and the victim followed by their family and/or significant others'.¹¹¹⁰

The Act specifies that the purpose of a group conference is:

- to increase the child's understanding of the impact of their offending on both the victim and the community
- to reduce the likelihood that the child will re-offend
- to negotiate an outcome plan that the child agrees to.¹¹¹¹

The conference must be attended by the young person, their legal practitioner, the informant or other member of the police force, and the convenor.¹¹¹² In addition, a number of other parties may also attend, including members of the young person's family, persons of significance to the young person and the victim of the offence or the victim's representative.¹¹¹³

Jesuit Social Services, a YJGC Program service provider participating in the Inquiry, informed the Committee that, on average, conferences have seven to nine attendees, although it indicated that it has convened conferences of up to 30 people.¹¹¹⁴

The main outcome of a conference is an outcome plan which the Act defines as 'a plan designed to assist the child to take responsibility and make reparation for his or her actions and to reduce the likelihood of the child re-offending'.¹¹¹⁵ Jesuit Social Services provided the Committee with some examples of the type of outcomes that have been included in the outcome plans for young people participating in group conferencing in metropolitan Melbourne. These are summarised in figure 20.

¹¹⁰⁸ Department of Human Services, above n 1102, 7, 31; Department of Human Services, Victoria, *Youth justice group conferencing program: Suitability assessment guide*, supplementary evidence received 22 February 2008.

¹¹⁰⁹ Department of Human Services, above n 1102, 8-9.

¹¹¹⁰ *Ibid*, 12.

¹¹¹¹ *Children, Youth and Families Act 2005* (Vic) s 415(4).

¹¹¹² *Children, Youth and Families Act 2005* (Vic) s 415(6).

¹¹¹³ *Children, Youth and Families Act 2005* (Vic) s 415(7).

¹¹¹⁴ Jesuit Social Services, *Submission no. 35*, 16.

¹¹¹⁵ *Children, Youth and Families Act 2005* (Vic) s 415(5).

Figure 20: Examples of outcome plans from youth justice group conferences¹¹¹⁶

Examples of voluntary work agreed to by the young person

20 hours

- Work over three Saturdays at a camp site for young people
- Assist over three Saturdays at a community car racing event
- Build a barbeque for a youth club

16 hours

- Assist the physical education teacher take classes of younger students at his previous secondary school

12 hours

- Make bird boxes for a primary school after doing criminal damage at the school
- Work for a Salvation Army Opportunity Shop

8 hours

- Clean up graffiti
- Paint the interior of a Blue Light boxing gym

Examples of ‘Statements of Intent’ by young people about how they intend to prevent re-offending in the future

Employment

- To look for part time work and finish TAFE course
- To keep working and complete motor mechanic apprenticeship

Education

- To complete Year 10 schooling
- To continue with hospitality studies at TAFE Monday to Friday

Professional referrals

- To participate in a violence prevention program
- To attend counselling with his parents
- To continue anger management counselling
- To participate in a drug withdrawal program

¹¹¹⁶ Jesuit Social Services, *Submission no. 35*, 13-14.

The conference convenor plays an active role in assisting the participants to negotiate an outcome plan. The convenor must also ensure that the outcome plan is fair and reasonable, is not overly onerous and does not require others, for example parents, to make restitution on the young person's behalf.¹¹¹⁷

The proceedings of a group conference, including the conference reports are confidential.¹¹¹⁸

Following the conference the convenor prepares a group conference report for the court that includes the outcome plan if one has been agreed to by the young person.¹¹¹⁹ The magistrate then sentences the young person and considers the report in deciding the sentence. The legislation provides that, if a young person has participated in a group conference and has agreed to the outcome plan, the court must impose a sentence that is less severe than it would have imposed had the young person not participated in the conference.¹¹²⁰

The group conferencing process is summarised in figure 21 and recounted in Case study 6. Case study 7 describes a YJGC Program conference observed by a Committee representative as part of this Inquiry.

Program evaluation

In addition to the 1997 and 1999 studies, a further evaluation of the program was undertaken in 2006 using data from 2003 and 2004. The evaluation found that the YJGC Program is successful in its aim of diverting young people from being drawn further into the criminal justice system and contributes to a reduction in the frequency and seriousness of re-offending behaviour. It also found that stakeholders were supportive of the program.¹¹²¹ The results of the program evaluations are described in more detail in chapter 9.

DHS informed the Committee that a further evaluation of the program will be conducted in 2009.¹¹²²

Detailed information about program participation rates is provided in chapter 10.

¹¹¹⁷ For a full list of relevant considerations see Department of Human Services, above n 1102, 19-21.

¹¹¹⁸ *Children, Youth and Families Act 2005* (Vic) s 415(9).

¹¹¹⁹ *Children, Youth and Families Act 2005* (Vic) s 415(8).

¹¹²⁰ *Children, Youth and Families Act 2005* (Vic) s 362(3). See also s 362(4).

¹¹²¹ Effective Change Pty Ltd, above n 1092, vi-vii, 30-34.

¹¹²² Paul McDonald, Executive Director, Children, Youth and Families Division, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

Case study 6: A convenor's description of the conferencing process¹¹²³

‘With a young person, when he or she is referred to a group conference ... it is the magistrate or the legal rep who normally suggests it. Once the magistrate agrees initially that it is okay, the young person is assessed as suitable by the youth justice court advice worker ...

[Then] the matter is stood down for about 8 to 10 weeks normally and within that period the convener works with the young person, and potentially the victim, to prepare them for the conference. The two happen in parallel, of course ...

[At the conference] essentially there are three questions: what happened, how are people affected and what needs to happen in the future? ... It's tried and true and we pretty much stick to that format. The way we run them begins with the police giving a summary of what happened. The reason for that is essentially that it is undisputed that that is what happened, and it gets that on the table straightaway.

What will happen then is that we will go to the young person and ask what happened and he will tell his story. They cannot just turn around and say, ‘Well, like I told you, Russ, at that home meeting the other day, it is okay. I was with friends. I might have been drinking right through to the offence’, and what happened afterwards. What it was like to get arrested by police, what it was like when his parents or his caregiver came to collect him from the police station and how things have been since. We ask, ‘What effect has this had on you; how do you think this has affected others’, so it is what happened and the effect of that.

After the young person has spoken we will normally go to the victim ... they will go through and talk about their experience in the same way: what happened and then how they are affected.

Then we will continue to ask the victim's supporters, ‘How did this affect you, when did you first find out that [“Sally”] had been robbed and what effect has this had on her? How did you feel about that and how has it affected you?’. There is a real transparency and a real feeling of reality in a conference. It is an emotional process.

We will then go to the young person's supporters ... We have been through this preparation so hopefully things do not come out for the first time, in terms of what parents might feel about the young person, but they do not tend to hold back. They tend to say how disappointed they are and how it has affected them ... So it goes from police to young person, to victims, then the young person's support, and then the professionals in the room.

Normally the professionals take a professional approach in terms of, if there are any youth workers involved, they can talk about their disappointment with the young person and how it has affected them, right through to the legal representative who is invited to speak — sometimes they do and sometimes they do not ...

¹¹²³ Russell Jeffrey, Youth Justice Group Conference Convenor, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 3-6.

Then what I will do is just open it up for questioning. Very often you can sense that a victim might be holding on to something; you can sense that somebody might want to ask something. It might just be like, ‘Why did you do it?’ or ‘What did you do with my camera after you stole it?’ or ‘Why did you trash my car?’ — very simple straightforward things.

It is important to get all that hurt out and as a convener you can sense when that occurs. Then you will look to the young person and they might say something like, ‘Is there something you would like to say?’, or there is a pause and at that stage that is the appropriate time to apologise. If you can imagine a balloon being full of anger, once that young person has said sorry it is just like the wind is taken right out of it ...

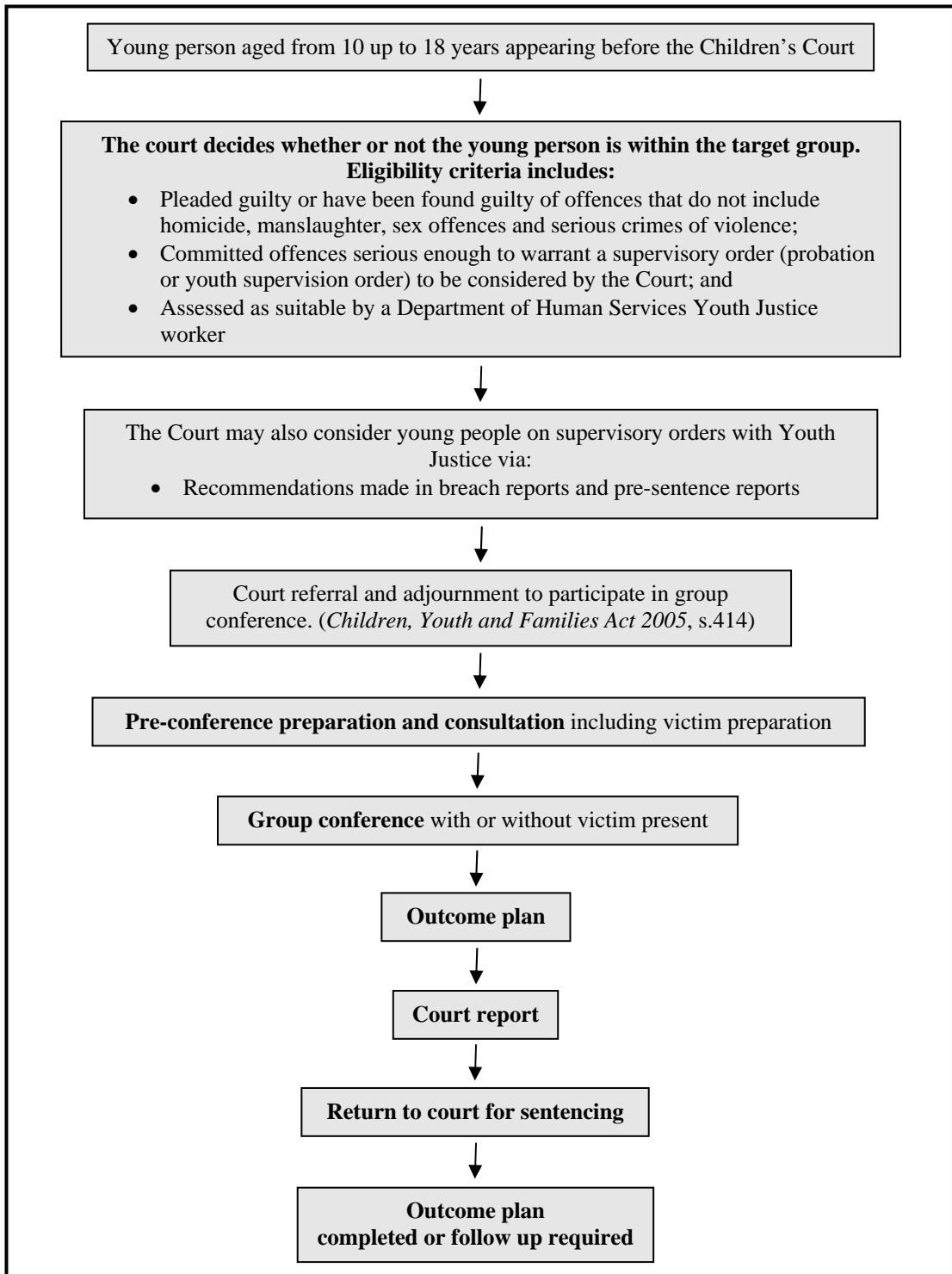
It is after that point that then we can talk about moving on and talk about the future and what that young person needs to do to make amends to the victim for some of the harm caused and how to prevent further offending. Then, again, we will go through the participants and ask them and everybody has an opportunity to have a say on what they think should happen.

At that point the participants ... who do not know the young person that well have an understanding about their capacity to make amends and maybe what they need to do to keep out of trouble; so they can have an informed discussion about that at that particular time. Once that has happened ... the young person will meet in private with their support people. They might or might not include their lawyer, but invariably it is their parents or caregivers, and they will talk about what they are going to do to make amends and prevent further offending. They come back to the meeting after a break and then they will talk about that plan ... It is important that that plan is fair. What I mean by that is that it can be no more onerous on the young person than what they might have got had they not volunteered to go through the conferencing process, and that is the reason their legal rep is there ...

Once agreement is reached about the plan, that is the end of the meeting. Hopefully everybody gets up and shakes hands and everybody feels a lot better afterwards than they did beforehand. We have got plenty of anecdotes about victims actually feeling that sense of relief ... So there is a sense of letting go of that fear and it can be almost therapeutic ...

At that point a court report is written. The young person goes back to court, the magistrate has read the report, the legal rep and the young person have a copy of that, and the magistrate sentences the young person. Normally what they do is place a condition on the order ... that the young person comply with their group conference outcome plan ... So for instance if a young person has agreed to do community work ... or restitution, we will ensure that that is followed up ... Similarly, if we feel like the victim might need some support afterwards I will certainly contact them and ... ensure that that person has dealt with the conference and whatever came up from it.’

Figure 21: Youth Justice Group Conference Program process¹¹²⁴



¹¹²⁴ Department of Human Services, above n 1108.

Case study 7: ‘This is your opportunity to be your best self’

In July 2008 a representative of the Committee observed a YJGC Program conference. The conference took place in a location central to participants and lasted for about one hour. Seven people were present: the convenor, young person 1, young person 2, young person 1’s solicitor, young person 2’s grandfather, a victim representative (the manager of the sports centre) and a police representative. The young people had been part of a small group who had broken into the local sports centre and caused extensive damage.

First, the convenor explained the process and set some ground rules, such as one person speaking at a time. Then, the convenor asked the young people to talk about the incident that led to the conference. Both youths looked down at the table. Young person 1 said that they had ‘trashed everything’ and apologised to the victim unprompted.

The victim told the young people that the staff were ‘very distressed’ by the damage caused to the centre. The victim also said that other young people who were members of sports clubs at the centre were ‘devastated’. She spoke about the costs of cleaning the centre and the wages lost by staff.

The police representative told the young people that ‘damaging property is not a way to get rid of your frustration.’ He said that their behaviour frustrated him, because young person 1, who he knew, had ‘a really good personality.’

Young person 2’s grandfather spoke about how he had found it stressful having his grandson on bail as a result of the incident, as he was concerned about his grandson meeting the bail conditions, which included a curfew. The convenor said that she had spoken to young person 1’s father and he was very upset by what had happened. Young person 1 nodded and looked down.

The convenor asked the young people if there was anything they wanted to say to the victim. Both young people apologised. One young person said ‘if I could take back time I wouldn’t have done it,’ then asked the victim ‘what can we do to help?’

The victim described a youth planning group that organised youth events in the area. She asked if they would be willing to join the planning group and contribute to the community, especially young people in the area. She told the young people, ‘I’m challenging you to go on the journey with me ... This is your opportunity to be your best self ... You will be coming to the committee as my friends. You will be starting afresh.’

The police representative spoke about the opportunities of the victim’s proposal and told the young people ‘this is the turning point’. He pointed out alternative activities available to the young people, such as organised sports activities on Friday nights.

The convenor asked both young people if they were happy for the outcome plan to include the victim’s idea to join the planning group. Both young people agreed and all participants supported the plan. Young person 1 told the manager that he wanted to ‘go on the journey’.

As the conference was coming to an end, young person 1 said ‘one more thing’ then apologised to young person 2’s grandfather for getting young person 2 ‘into trouble’.

The police representative said, ‘don’t forget there may be setbacks, but don’t let it stop you. We’re here to help you’.

8.3 Young Adult Restorative Justice Group Conferencing Program

Victoria's first adult restorative justice program commenced in early 2008 at the Neighbourhood Justice Centre (NJC). The Young Adult Restorative Justice Group Conferencing (YARJGC) Program is a two-year pilot, offering restorative justice conferences to offenders aged between 18 and 25 years.¹¹²⁵

8.3.1 History and development

In 2005, Jesuit Social Services released a policy discussion paper proposing the extension of the group conferencing approach used in the Children's Court to young adults up to the age of 25 years.¹¹²⁶

The proposals outlined in the discussion paper received widespread stakeholder support and Jesuit Social Services subsequently released its final report in July 2006.¹¹²⁷ The report recommended the implementation of group conferencing options for young offenders aged 18-25 years in two stages. At stage 1, the Magistrates' Court would make referrals via the Criminal Justice Diversion Program or deferral of sentence.¹¹²⁸ At stage 2, young adults on existing correctional orders would be referred as part of their rehabilitation or case management plan.¹¹²⁹

8.3.2 Neighbourhood Justice Centre pilot

Program administration and delivery

The NJC opened in Collingwood in March 2007. The NJC's court hears matters including Magistrates' Court matters and Children's Court Criminal Division matters.¹¹³⁰ The legislation establishing the NJC specifically incorporates restorative justice principles.¹¹³¹ The Victorian Attorney-General has stated, 'Restorative justice is a key part of the NJC, which as a community justice centre provides a supportive environment in which to trial restorative approaches'.¹¹³²

The YARJGC Program was launched at the NJC in March 2008, although the first referrals to the program were not made until September 2008.¹¹³³ The program

¹¹²⁵ Attorney-General Rob Hulls, 'Hulls launches young adult conferencing program' (Media release, 4 March 2008).

¹¹²⁶ Jesuit Social Services, *A policy discussion paper on the development of a young adult restorative justice conferencing program in Victoria* (2005), 2.

¹¹²⁷ Jesuit Social Services, *Development of a young adult restorative justice conferencing proposal for Victoria: Final report* (2006), 2, 21-24.

¹¹²⁸ *Ibid*, 11-12.

¹¹²⁹ *Ibid*, 14-15.

¹¹³⁰ *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1(a).

¹¹³¹ *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1(b).

¹¹³² Attorney-General Rob Hulls, 'Hulls opens Law Week restorative justice conference' (Media release, 14 May 2008).

¹¹³³ Letter from Neil Twist, above n 1090, attachment, 3.

provides opportunities for offenders aged between 18 and 25 years to participate in a group conference.

The program objectives are to:

- Improve victims' satisfaction with the justice process and assist in their recovery from crime
- Promote greater participation in the justice process by victims, offenders, their families and support persons
- Increase offenders' awareness of the consequences of their offence for victims and the community and encourage them to accept responsibility and to make reparation
- Promote the rehabilitation and reintegration of 18-25 year old offenders into the community
- Enhance the community's confidence in the justice system.¹¹³⁴

The restorative justice services at the NJC are provided by Anglicare, which is also a provider of the YJGC Program in the Children's Court of Victoria.

The program does not have a legislative basis; however, guidelines have been developed to provide a framework for the program.¹¹³⁵

Program process

There are three distinct referral pathways into the YARJGC Program, which are detailed in the next section. However, the conference process is the same, regardless of the referral pathway.

Where an offender is identified as potentially suitable for a conference under one of the three referral pathways, the head convenor conducts an individual assessment against suitability criteria in collaboration with the NJC team.¹¹³⁶ The suitability criteria are similar to those for the YJGC Program and include factors such as the offender's level of acceptance of responsibility for the offence and the offender's willingness and motivation to participate fully in the conference.¹¹³⁷

The people who may attend a group YARJGC Program group conference are:

- the offender
- the victim or a victim representative
- the police informant
- the offender's legal representative
- the offender's support person

¹¹³⁴ Neighbourhood Justice Centre, *The Young Adult Restorative Justice Group Conferencing program: Summary of guidelines*, 1.

¹¹³⁵ Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)*.

¹¹³⁶ Neighbourhood Justice Centre, above n 1134, 3.

¹¹³⁷ Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing: Suitability assessment criteria*.

Figure 22: Format of Young Adult Restorative Justice Group Conference Program conferences¹¹³⁸

Prior to the conference, the Convenor has meetings with each participant, to assess whether a conference is appropriate and to provide information about the conference process and its likely outcomes. All details about the conference, such as time and venue, will be arranged with the involvement and by agreement of all participants.

Each group conference follows a similar format:

1. The convenor provides introductions and describes each person's role or contribution plus the aims of the conference.
2. The convenor explains the ground rules to be followed during the conference concerning confidentiality of discussions, respectful language and behaviour, and reporting from the conference.
3. The offender talks about the offence and the events leading up to it. The offender may also share details of his life or background if it helps him or her to explain the offence.
4. The police informant, if present, discusses the circumstances of the offence, charge and court process.
5. The victim and/or other people affected by the offence discuss the offence and its impacts on them, including what has happened since the offence. During this time, they may also question the offender regarding the offence.
6. Family members, support people and professionals present are encouraged to provide input into the discussion concerning the offence and the people involved.
7. The police informant or the legal representative may explain the impact of the type of offence on the general community and current range of sentencing options available.
8. The participants have the opportunity to discuss how to repair the harm caused by the offence and help the offender address his/her behaviour and take a more positive direction in his/her life. These ideas, once agreed to by all parties, become a written, signed agreement which is presented at the court when the offender returns.
9. The conference closes with any final comments by the convenor and the participants.

¹¹³⁸ Neighbourhood Justice Centre, *Restorative justice group conferencing program: What happens at a restorative justice group conference?*

- the victim’s support person
- any other person invited by the convenor to attend after consultation with the victim and offender, such as an interpreter or community elder.¹¹³⁹

There is an intensive preparation process, including meetings with each potential participant.¹¹⁴⁰

Unlike the YJGC Program, where the offender’s legal representative is required to attend, the YARJGC Program guidelines state that legal representatives only attend a group conference upon the offender’s request. However, the guidelines suggest that the legal representative should be available by telephone if the offender requires legal advice during the conference.¹¹⁴¹

The program guidelines state that securing victim involvement in a conference is a priority.¹¹⁴² There are a range of options available to involve victims in a conference, including allowing them to present their story in a written or recorded form, or through a representative.

The format for a YARJGC Program group conference is described in figure 22.

Referral pathways

While the YJGC Program only has one referral pathway – by a magistrate deferring sentence – there are three distinct referral pathways to the YARJGC Program. These are summarised in figure 23 and discussed further below.

Figure 23: Referral pathways to the Young Adult Restorative Justice Group Conference Program¹¹⁴³

Pathway	Referral stage	Referring entity	Referral mechanism
1.	Post-charge, Pre-finding of guilt	NJC magistrate	Criminal Justice Diversion Program
2.	Post-finding of guilt, Pre-sentence	NJC magistrate	Deferral of sentence
3.	Post-sentence	Corrections Victoria Victims’ support and assistance programs Offender or offender’s family	Offender case management Victims’ support and assistance programs

¹¹³⁹ Neighbourhood Justice Centre, above n 1135, 33.

¹¹⁴⁰ Ibid, 31-39.

¹¹⁴¹ Ibid, 38.

¹¹⁴² Ibid, 35.

¹¹⁴³ Ibid, 7.

Referrals under pathways 1 and 2 are made by the NJC magistrate. Thus, referrals are only possible in matters where the NJC Court has jurisdiction, namely where the offender:

- resides in the City of Yarra
- is homeless, but is alleged to have committed the offence in the City of Yarra, or is living in accommodation in that municipality
- is an Indigenous person with a close connection to the City of Yarra and is alleged to have committed the offence in that municipality.¹¹⁴⁴

The NJC Court also does not have jurisdiction to deal with sex offences.¹¹⁴⁵

Pathway 1: Referrals post-charge, pre-finding of guilt

The NJC magistrate may make referrals to the YARJGC Program as part of the Criminal Justice Diversion Program (CJDP). The CJDP is summarised in figure 24.

Figure 24: The Criminal Justice Diversion Program¹¹⁴⁶

The Criminal Justice Diversion Program (CJDP) commenced as a pilot at the Broadmeadows Magistrates' Court in 1997 and was expanded to all Magistrates' Courts in Victoria in 2001. It is available in relation to all offences in the Magistrates' Court except for those with a minimum or fixed penalty.

The CJDP operates under the *Magistrates' Court Act 1989 (Vic)* which provides that before a formal plea is made, a magistrate may adjourn proceedings for up to 12 months to allow the offender to participate in the program. The offender is required to acknowledge responsibility for the offence, and both the prosecution and the defence must consent to the diversion.

If the offender completes the conditions of their diversion plan, the charges are dismissed and the outcome is recorded in a manner similar to a caution. Therefore the offence does not form part of the person's formal criminal record. If the diversion plan is not completed, the person is then charged. Common conditions undertaken by offenders completing diversion plans include apologising to the victim, compensating the victim and making a donation. The program has a very high success rate, with over 90% of participants fulfilling the requirements of their diversion plan.

As noted in the previous chapter, two stakeholders told the Committee that they consider the CJDP, as it currently operates in Magistrates' Courts throughout Victoria, to be a form of restorative justice.¹¹⁴⁷ In particular, these stakeholders

¹¹⁴⁴ *Magistrates' Court Act 1989 (Vic)* s 40; *Children, Youth and Families Act 2005 (Vic)* s 520C. See also Neighbourhood Justice Centre, above n 1135, 12.

¹¹⁴⁵ *Magistrates' Court Act 1989 (Vic)* s 40; *Children, Youth and Families Act 2005 (Vic)* s 520C. See also Neighbourhood Justice Centre, above n 1135, 12.

¹¹⁴⁶ Magistrates' Court of Victoria, *2007-08 Annual report* (2008), 68-70; Magistrates' Court of Victoria, *Guide to court support & diversion services* (2007), 8; Julian King, Bevan Fletcher, Silvia Alberi and Jim Hales, *Process evaluation and policy & legislation review: Final report* (2004), 42; Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria* (2008), 2; *Magistrates' Court Act 1989 (Vic)* s 128A.

¹¹⁴⁷ Victoria Police, *Submission no. 12*, 4; Law Institute of Victoria, *Submission no. 20S*, 3-4.

emphasised that victims have the opportunity to become involved as part of this process.¹¹⁴⁸ While the CJDP has some restorative aspects, such as requiring the offender to be accountable for the offence and involving victims, the Committee does not consider the program in its entirety to be restorative as it does not involve a restorative forum or conference. However, the Committee recognises that the YARJGC Program, whereby the NJC magistrate is able to refer offenders to group conferences as a CJDP condition, is clearly a restorative process.

The YARJGC Program operating guidelines state that referrals to group conferences under the CJDP will be made for offences where the court is considering a community-based order.¹¹⁴⁹

The guidelines provide that, where a diversion to a conference is made, the conference should be completed within eight weeks of the diversion hearing and the outcome plan should be completed within 12 weeks of the conference.¹¹⁵⁰ The convenor will prepare a report which is forwarded to the NJC magistrate.

Where the diversion plan, including the conference and outcome plan, is completed to the satisfaction of the NJC magistrate, the offender will be discharged without a finding of guilt. Where the diversion plan is not completed, the matter is returned to the court for sentencing. If the offender is found guilty, the magistrate must take into account, when sentencing, the extent to which the offender has completed the diversion plan.

The Department of Justice advised the Committee that between September 2008, when referrals were first made to the program, and 31 December 2008, no referrals were made under this pathway.¹¹⁵¹

Pathway 2: Referrals post-finding or plea of guilt, pre-sentence

The *Sentencing Act 1991* (Vic) enables a magistrate to defer sentencing of a matter heard in the Magistrates' Court for a period not exceeding six months for offenders aged between 18 and 25 years.¹¹⁵² The NJC magistrate can use this power to defer sentencing to allow for a restorative justice group conference to occur at the pre-sentence stage. This is similar to the process in the Children's Court.

The YARJGC Program guidelines state that serious crimes of violence are excluded from referral to the program at the pre-sentence stage.¹¹⁵³ However, offenders with prior convictions are not automatically excluded, with suitability decided on a case-by-case basis in accordance with the suitability assessment criteria.

¹¹⁴⁸ Victoria Police, *Submission no. 12*, 4. See also Paul Hayes, Legal Services Department, Victoria Police, *Transcript of evidence*, Melbourne, 25 February 2008, 8.

¹¹⁴⁹ Neighbourhood Justice Centre, above n 1135, 12.

¹¹⁵⁰ *Ibid*, 14.

¹¹⁵¹ Letter from Neil Twist, above n 1090, attachment, 3.

¹¹⁵² *Sentencing Act 1991* (Vic) s 83A. Note that *Magistrates' Court Act 1989* (Vic) s 4Q(3) allows the NJC magistrate to defer sentencing even if the offender is aged over 25, although the current pilot restricts referrals to conferences to those aged under 25.

¹¹⁵³ Neighbourhood Justice Centre, above n 1135, 16.

According to the program guidelines, the group conference is held within eight weeks of the deferral of sentence and the offender needs to implement the agreement within 12 weeks of the conference. After the conference, the court is provided with a report detailing the conference process and the outcome agreement.¹¹⁵⁴ In sentencing the offender, the magistrate takes into account the offender's participation in the conference and the outcomes of the process.

Information provided by the Department of Justice indicates that all four referrals to group conferencing under the YARJGC Program up to 31 December 2008 have been pre-sentence. The matters referred predominantly involved assaults and property offences.¹¹⁵⁵ The Department advised that the sentencing outcome in two of these cases was a good behaviour bond, with the other two cases still awaiting sentencing at the time this report was written.

Pathway 3: Referrals post-sentence

The YARJGC Program is the first government-auspiced program in Victoria to offer a post-sentence component. There are three possible entry points to the post-sentence program:

- during imprisonment in a participating prison
- post-release or during parole for a client of Community Correctional Services at the NJC
- during a community-based order for a client of Community Correctional Services at the NJC.¹¹⁵⁶

There are no offences excluded from the program, other than sex offences, which are not dealt with by Community Correctional Services at the NJC. An offender is not automatically excluded from the program if they have pleaded not guilty.¹¹⁵⁷ In addition, where an offender is in custody, there is no exclusion based on length of sentence, time served or the prison in which the prisoner is located.¹¹⁵⁸

The program guidelines state that possible reasons for post-sentence referrals include:

- To promote victims' healing
- To assist the offender's case management and rehabilitation objectives
- To support families anticipating the offender's release from custody and assist the offender's restoration to the community
- To address unresolved conflict and issues between the victim and offender and negotiate a contact agreement if contact is to continue.¹¹⁵⁹

¹¹⁵⁴ Ibid, 17.

¹¹⁵⁵ Letter from Neil Twist, above n 1090, attachment, 3.

¹¹⁵⁶ Letter from Bob Cameron, Minister for Corrections, to Chair, Victorian Parliament Law Reform Committee, 31 July 2008, 2; Neighbourhood Justice Centre, above n 1135, 19-25.

¹¹⁵⁷ Neighbourhood Justice Centre, above n 1135, 19.

¹¹⁵⁸ Ibid, 22.

¹¹⁵⁹ Neighbourhood Justice Centre, above n 1134, 3. See also Neighbourhood Justice Centre, above n 1135, 19.

The prisons participating in the YARJGC Program are yet to be finalised. According to the program guidelines, ‘Participating prisons are likely to be those with a strong programmatic fit and within geographical reach of the NJC’.¹¹⁶⁰ Where an offender is in custody, an application to participate in the program can only be initiated by a victim, whereas for the other mechanisms referrals can also come from other sources such as prison staff and the offender.¹¹⁶¹ While all other conferences conducted as part of the NJC pilot take place at the NJC, where an offender is in custody the location of the conference is subject to consultations with Corrections Victoria.¹¹⁶²

In addition to the program’s operating guidelines, Corrections Victoria has developed principles and processes for post-sentence referrals under the pilot.¹¹⁶³

No referrals had been made under this pathway to 31 December 2008.¹¹⁶⁴

Program operation and evaluation

While the Department of Justice did not provide the Committee with detailed information about the YARJGC Program’s operation, the Committee is aware that there is a total target of 15-20 conferences for the pilot’s first year and a target of 20-25 conferences for the second year.¹¹⁶⁵ Jesuit Social Services’ submission to the Committee stated that its original young adult pilot program proposal had called for a pilot to be conducted at more than one court. Jesuit Social Services indicated that it has concerns about the ability of one court to make sufficient referrals to the program.¹¹⁶⁶

The YARJGC Program is being evaluated over a three-year period.¹¹⁶⁷ Factors to be evaluated include the process, the outcomes and the cost-effectiveness. Victims will also have the opportunity to provide input into the evaluation.¹¹⁶⁸

8.4 Post-sentence programs

Apart from the post-sentence referrals to conferencing possible under the pilot YARJGC Program, the Committee received evidence of several other programs operating in the post-sentence context that may be characterised as restorative.

8.4.1 Prison Fellowship programs

Prison Fellowship Victoria (Prison Fellowship) runs Communities of Restoration, a suite of pre- and post-prison release programs. Prison Fellowship Victoria is part of

¹¹⁶⁰ Neighbourhood Justice Centre, above n 1135, 20.

¹¹⁶¹ *Ibid*, 23.

¹¹⁶² *Ibid*, 22, 31.

¹¹⁶³ Letter from Bob Cameron, above n 1156, attachment A.

¹¹⁶⁴ Letter from Neil Twist, above n 1090, attachment, 3. See also *ibid*, 2.

¹¹⁶⁵ Letter from Bob Cameron, above n 1156, attachment A, 1.

¹¹⁶⁶ Jesuit Social Services, *Submission no. 35*, 5.

¹¹⁶⁷ Attorney-General Rob Hulls, above n 1125.

¹¹⁶⁸ Letter from Neil Twist, above n 1090, attachment, 8; Attorney-General Rob Hulls, above n 1132. See figure 27 in chapter 9 which sets out the evaluation indicators.

Prison Fellowship International, a worldwide multi-denominational Christian organisation.

The major Prison Fellowship program offered in Victoria is Lives in Transition, a life-skills and mentor-based program. The program is approved by the Commissioner of Correctional Services and commenced at Barwon Prison in 2004. It was transferred to Port Phillip Prison in May 2007, where it currently operates.¹¹⁶⁹ The Prison Fellowship's submission to the Committee stated that the 'program is based on restorative principles in that it mobilises volunteers to assist program graduates' reintegration into the community'.¹¹⁷⁰ Lives in Transition runs over 14 to 16 weeks and the program content includes parenting and life skills, prisoner mentoring and victim awareness.

Mr Arthur Bolkas, of the Prison Fellowship, described the victim awareness component of the Lives in Transition Program as the only program of its kind in the Victorian prison system:

Victim Awareness teaches offenders about the cycle of victimisation — that is, that victims of personal and social abuse often go on to victimise other people — and it is in their interests to try to break this cycle. Using systematic teaching, victims' recorded testimony and group discussion, offenders are sensitised to the fact that their victims are real people, and that for every victim of crime there is a ripple effect of associated victims, including the perpetrators themselves and their own families. The object of Victim Awareness is to raise offenders' awareness of both their behaviour and their victims', to become empathetic people who are more responsible for their actions and who are less likely to go on and harm others.¹¹⁷¹

Victim awareness programs generally do not fit within the definition of restorative justice used by the Committee in this Inquiry. However, the Committee discusses Prison Fellowship programs further in chapter 12 where it considers the scope to expand restorative justice programs in the post-sentence environment.

8.4.2 Other post-sentence programs

Corrections Victoria provided the Committee with information about a range of programs that are available in Victoria, such as the Victim Awareness and Empathy session delivered as part of the Moderate Intensity Violence Intervention Program and the Victim Empathy Module within the Sex Offender Programs.¹¹⁷² While many of these include a victim-awareness component, the Committee does not consider them to be restorative justice programs for the purpose of this Inquiry.

In addition, it appears that restorative justice conferences may be available on an ad-hoc basis in Victoria. For example, Jesuit Social Services' submission to the Inquiry

¹¹⁶⁹ Arthur Bolkas, Director, Communities of Restoration, Prison Fellowship Australia (Victoria), *Submission no. 41*, 3-4.

¹¹⁷⁰ *Ibid.*, 3.

¹¹⁷¹ Arthur Bolkas, Director, Communities of Restoration, Prison Fellowship Australia (Victoria), *Transcript of evidence*, Melbourne, 5 June 2008, 3.

¹¹⁷² Letter from Bob Cameron, above n 1156, attachment B, 2-3.

stated that it had conducted a restorative justice meeting with a young person serving a custodial sentence, although it did not provide details of the meeting.¹¹⁷³ Mr Noel McNamara of the Crime Victims Support Association told the Committee that his organisation also facilitates meetings between victims and non-violent offenders at the post-sentence stage in association with the Brosnan Centre.¹¹⁷⁴

8.5 Restorative practices in other settings

As was noted in the previous chapter, several stakeholders encouraged the Committee to consider lessons from the use of restorative practices in other settings, particularly in the education system. VARJ's submission declared that Victorian schools are 'at the forefront of the implementation of restorative processes'.¹¹⁷⁵ In addition, the Committee received evidence about the use of restorative practices in the child welfare setting. While a detailed consideration of these areas is outside the scope of this Inquiry, the Committee outlines both briefly below and draws on the lessons from the use of restorative practices in these settings throughout this report.

8.5.1 Restorative practices in the Victorian education system

The first use of restorative practices in Australian schools was in Queensland in 1994.¹¹⁷⁶ These practices were then trialled on an ad hoc basis in schools throughout Queensland, New South Wales and Victoria.¹¹⁷⁷

In 2002, a nine month Restorative Practices/Community Conferencing Pilot was undertaken involving 23 government, Catholic and alternative schools in Victoria. The pilot was designed 'to support and evaluate the application of restorative practices as a strategy in the management of incidents and in order to reduce the number of young people at risk of being alienated from mainstream education'.¹¹⁷⁸

The evaluation of the pilot found that parties involved in conferences, including facilitators, parents and students were satisfied with the outcomes of conferences and appreciated the benefits of restorative practices compared with the other means available to them.¹¹⁷⁹ The majority of participating schools reported that the use of restorative practices had a positive impact on the school environment and 'had been effective in holding offenders accountable'.¹¹⁸⁰

¹¹⁷³ Jesuit Social Services, *Submission no. 35*, 4.

¹¹⁷⁴ Noel McNamara, Chief Executive Officer, Crime Victims Support Association, *Transcript of evidence*, Melbourne, 25 February 2008, 2.

¹¹⁷⁵ VARJ, *Submission no. 28*, 5.

¹¹⁷⁶ Victorian Association for Restorative Justice, *Restorative practices in education* (2007), <<http://www.varj.asn.au/rp/education.htm>>, viewed 23 January 2009.

¹¹⁷⁷ Gary Shaw and Ani Wierenga, *Restorative practices/community conferencing pilot 2002 evaluation: Final report* (2002) University of Melbourne, 7.

¹¹⁷⁸ *Ibid.*, 3.

¹¹⁷⁹ *Ibid.*, 4.

¹¹⁸⁰ *Ibid.*, 19.

Figure 25: The Upper Hume Interagency Team's Student Engagement Project¹¹⁸¹

The Student Engagement Project is a restorative program that has been running in five participating schools in the Wodonga area since 2004. The project aims to address issues of student disengagement and school non-attendance through a collaborative approach. The project is managed by the Upper Hume Interagency Team (UHIT) which has a membership drawn from a broad range of sectors including education, welfare, health and police.

A restorative practices framework, which includes the use of restorative conferencing to address issues of discipline and behaviour management, has been introduced in participating schools. In addition, family and community group conferencing is being utilised to engage families and communities to support young people at risk of disengaging. Referrals to family and community group conferencing have been made for matters such as drug offences, sexual abuse issues, assaults, thefts, criminal damage to school property and threats of violence to other students.

Conferences are run by trained facilitators and bring together key stakeholders such as offenders, victims, families and school staff. The conferences aim to produce an agreement that facilitates reparation and healing.

Approximately 80% of teachers at participating schools have undertaken restorative practices training. In addition, 35 people from local schools, police and community agencies have undertaken training in family and community group conferencing.

Between 2004 and March 2008, six restorative and 29 family group conferences have been conducted following referrals made by participating schools.

According to the UHIT, the project has seen significant outcomes for young people, including re-engagement with schools and families, and diversion from the youth justice system.

Wodonga Police have reported that police attendances for incidents at these schools have significantly declined in the past 12 months.

The participating schools have indicated that suspension rates have decreased significantly and no expulsions have been recorded for the past 12 months. In addition, the schools report that teachers increasingly use restorative practices to manage other problems that emerge at the school, rather than adopting a punitive style of conflict resolution.

¹¹⁸¹ Upper Hume Interagency Team, *Submission no. 42*.

A second pilot was commenced in 2004 and evaluated in 2005. The evaluation noted that schools participating in the restorative practices pilot reported ‘improved student behaviour’ and ‘changes in the numbers of discipline incidents’.¹¹⁸² The evaluation recommended that schools should implement restorative practices as a whole school approach, integrating restorative practices ‘into many levels of the total school program’.¹¹⁸³ However, one major challenge identified by the evaluation was the time taken to build a whole school restorative approach, which was estimated to be approximately three years.¹¹⁸⁴

Restorative practices were subsequently incorporated as a supporting strategy in the Department of Education and Early Childhood Development’s *Safe schools are effective schools* resource which is aimed at developing safe and supportive school environments.¹¹⁸⁵ This resource was sent to all Victorian government schools in 2006 and is also available on the Department’s website. It identifies restorative practices as one of the strategies available to intervene in bullying incidents and describes community conferences, small group individual conferences and classroom conferences, as well as giving general guidance on their application.¹¹⁸⁶

The Department informed the Committee that it does not collect data on the use of restorative practices or other conflict resolution process in Victorian schools.¹¹⁸⁷ However, available evidence indicates that restorative practices are increasingly being used by government, Catholic and independent schools alike.¹¹⁸⁸

Figure 25, based on a submission by the Upper Hume Interagency Team, provides an example of the use of restorative practices in schools in the Wodonga area.

8.5.2 Restorative practices in the Family Division of the Children’s Court of Victoria

In addition to the use of group conferencing in the Criminal Division of the Children’s Court of Victoria, restorative practices have been used in the Family Division of that court since 1992, initially through pre-hearing conferences, and since 1 October 2007, in the form of dispute resolution conferences.¹¹⁸⁹ These conferences are used to deal with matters such as protection applications and applications to vary, breach, extend or revoke a protection order.¹¹⁹⁰

¹¹⁸² Helen Stokes and Gary Shaw, *Restorative practices pilot in Victorian schools: Evaluation report* (2005) Youth Research Centre, University of Melbourne, 6.

¹¹⁸³ *Ibid*, 16-17.

¹¹⁸⁴ *Ibid*, 48.

¹¹⁸⁵ Department of Education and Early Childhood Development, Victoria, supplementary evidence received 25 July 2008, attachment, 3.

¹¹⁸⁶ Department of Education & Training, Victoria, *Safe schools are effective schools: A resource for developing safe and supportive school environments* (2006), 11-12.

¹¹⁸⁷ Department of Education and Early Childhood Development, above n 1185, attachment, 4.

¹¹⁸⁸ *Ibid*; Catholic Education Office Melbourne, *CEOM annual report 2007* (2007), 32.

¹¹⁸⁹ Jeanette Maughan and Andrea Dagleis, *An evaluation of pre-hearing conferences in the Family Division of the Children’s Court of Victoria* (2005), 4; *Children, Youth and Families Act 2005* (Vic) Part 4.7, Division 2.

¹¹⁹⁰ Department of Human Services, Victoria, *Child Protection and Family Services: Children Youth and Families: Children’s Court Dispute Resolution Conference: Program data*, supplementary evidence received 22 February 2008 figure 2. See also Paul McDonald, *Transcript of evidence*, above n 1122, 8.

An evaluation of pre-hearing conferences was conducted in 2005. The evaluation's recommendations focused predominantly on the need to train convenors and improve the clarity and consistency of roles and procedures.¹¹⁹¹

Provisions in the Children Youth and Families Act effective from April 2007 provide that the purpose of a dispute resolution conference is to give parties 'the opportunity to agree or advise on the action that should be taken in the best interests of the child'.¹¹⁹² Judge Grant of the Children's Court of Victoria, described dispute resolution conferences as 'an exercise in negotiation and joint problem solving' and explained that:

It establishes a process for parties to an action and other certain approved persons to meet together in an environment that is controlled by an independent convenor. Through the process the participants, with the assistance of the convenor, attempt to identify and clarify disputed issues, identify and clarify areas of agreement, develop options and consider alternatives, enhance communication and reach agreement on issues of dispute between the parties in order to avoid or limit the scope of a hearing. A dispute resolution conference gives participants a greater opportunity to be heard and speak for themselves than the traditional court proceedings.¹¹⁹³

Any matter before the Family Division of the Children's Court may be referred to a dispute resolution conference.¹¹⁹⁴ While referral is not mandatory, DHS indicated that most matters are referred to a conference.¹¹⁹⁵

There are two types of dispute resolution conferences under the legislation: facilitative conferences which involve a convenor providing assistance in the dispute resolution process and advisory conferences which involve the convenor providing advice on the possible outcomes.¹¹⁹⁶ Both types of conferences result in a report to the court, with the report from a facilitative conference recording the conclusions reached at the conference and the report from an advisory conference containing advice about possible outcomes and recommendations about how these might be achieved. The court considers the report in determining the appropriate order or finding in the case.¹¹⁹⁷ Evidence from both the Children's Court and DHS suggested that advisory conferences are not being utilised at present due to concerns about the ability of the convenor to make recommendations to the court following a conference.¹¹⁹⁸

The Children's Court of Victoria has issued guidelines for dispute resolution conferences.¹¹⁹⁹

¹¹⁹¹ Maughan and Dagleis, above n 1189, 65-70.

¹¹⁹² *Children, Youth and Families Act 2005* (Vic) s 217(2).

¹¹⁹³ Judge Grant, *Transcript of evidence*, above n 1106, 9.

¹¹⁹⁴ *Children, Youth and Families Act 2005* (Vic) s 217(1).

¹¹⁹⁵ Sophie Robinson, Principal Policy Advisor, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 12.

¹¹⁹⁶ *Children, Youth and Families Act 2005* (Vic) ss 217(3), 218, 219. See also Paul McDonald, *Transcript of evidence*, above n 1122, 7.

¹¹⁹⁷ *Children, Youth and Families Act 2005* (Vic) s 224.

¹¹⁹⁸ Paul McDonald, *Transcript of evidence*, above n 1122, 7. See also Judge Grant, *Transcript of evidence*, Melbourne, above n 1106, 9.

¹¹⁹⁹ Children's Court of Victoria, *Guidelines for dispute resolution conferences* (2007).

Data provided by DHS indicates that in 2007, 2479 child protection matters were referred to dispute resolution conferences.¹²⁰⁰ Approximately a third of matters are settled through dispute resolution conferences, although both Mr Paul McDonald of DHS and Judge Grant of the Children's Court agreed that the conferences probably also play a role in the settlement of matters prior to hearing.¹²⁰¹

The Children, Youth and Families Act stipulates that members of the Aboriginal community in particular should be actively involved in decision making about the welfare of Aboriginal children.¹²⁰² Evidence from stakeholders at the Indigenous forum held by the Committee indicated that a restorative approach can have positive outcomes for Indigenous people in relation to child welfare issues.¹²⁰³ In her evidence to the Committee, Ms Greta Clarke, of the Victorian Aboriginal Legal Service explained the process from an Indigenous perspective:

Basically the family and people interested in the welfare of the child come together and they come up with a plan for what will happen with the child, where they will stay, how much contact there will be with the biological parents and things like that. I think the distinction between that and, say, something that just the Department of Human Services case manages is that with Aboriginal decision making the DHS worker and the VACCA [Victorian Aboriginal Child Care Agency] worker go out of the room at some point. That is when the family can talk and ultimately it is their decision provided it meets the bottom line for the DHS worker.¹²⁰⁴

The Committee received limited evidence about the use of restorative practices in the Family Division of the Children's Court. Thus, it does not explore this area in detail in this report; however, in chapter 10 the Committee does highlight two suggestions for reform that were identified by stakeholders.

¹²⁰⁰ Department of Human Services, above n 1190, figure 1.

¹²⁰¹ Paul McDonald, *Transcript of evidence*, above n 1122, 8-9. See also Judge Grant, *Transcript of evidence*, above n 1106, 9.

¹²⁰² *Children, Youth and Families Act 2005* (Vic) s 12; Greta Clarke, Research Officer, Victorian Aboriginal Legal Service, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹²⁰³ Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 18-19; Joyce Cooper, Respected Person, Koori Court, Broadmeadows Magistrates' Court, *Transcript of evidence*, Melbourne, 30 June 2008, 19. See also Loretta Kelly, 'Using restorative justice principles to address family violence in Aboriginal communities' in Heather Strang and John Braithwaite (eds.), *Restorative Justice and Family Violence* (2002) Cambridge University Press; Dr Kelly told the Committee that while this article relates to restorative justice principles in relation to family violence, it can be equally applied to child abuse and neglect matters.

¹²⁰⁴ Greta Clarke, *Transcript of evidence*, above n 1202, 4.

Chapter 9 – Improving outcomes through restorative justice

Restorative justice advocates claim that this process has the potential to provide better outcomes for all parties affected by crime. However, there continues to be considerable debate about the benefits of restorative justice.

This chapter considers the available evidence about the outcomes of restorative justice for offenders, victims and the community as a whole and, as far as possible, tries to compare these with the outcomes of traditional criminal justice processes. It identifies strategies for filling evidence gaps and for improving understanding of the outcomes of restorative justice.

9.1 Outcomes of restorative justice

This section identifies and discusses a number of outcomes that have been associated with restorative justice interventions for offenders, victims and for the state and society generally. The Committee notes there are inherent difficulties in effectively measuring restorative justice outcomes. As with ADR in the civil jurisdiction, there are no agreed objectives of restorative justice and no agreed outcome measures. Even where objectives are clearly identified, measuring outcomes can present difficulties. For example, one Department of Justice publication states, ‘The goals of restorative justice, such as healing harm and ensuring accountability, make evaluation a challenge’.¹²⁰⁵

As noted in chapter 7, a diverse range of processes fall within the umbrella of ‘restorative justice’ and these processes may occur at a variety of different points in the criminal justice process. There is very little research comparing the relative outcomes of these different processes and interventions at different stages of the criminal justice process. Therefore, in this chapter the Committee discusses the outcomes of restorative justice processes generally.

9.1.1 Outcome for offenders

Diversion

A common objective of restorative justice programs is to divert offenders from entering or being drawn further into the criminal justice system.

Stakeholders emphasised that the Youth Justice Group Conferencing (YJGC) Program has been very successful in diverting young offenders from supervisory orders.¹²⁰⁶ Mr Paul McDonald from the Department of Human Services (DHS) described the findings of the program evaluation conducted in 2006:

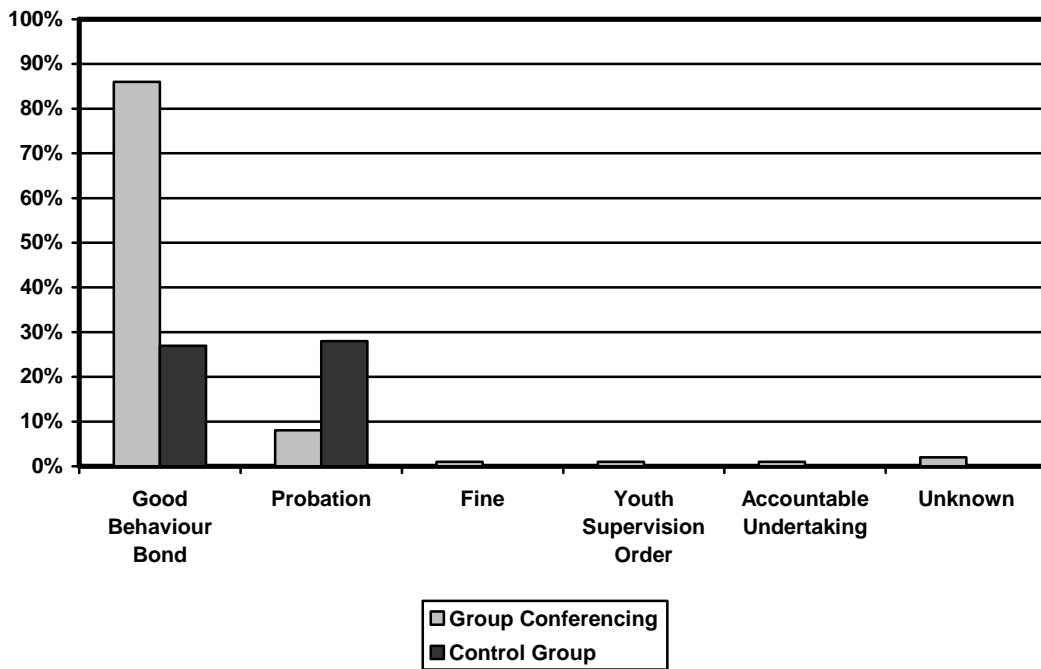
¹²⁰⁵ Neighbourhood Justice Centre Project Team, *Restorative justice: Background and discussion paper* (2007) Department of Justice, Victoria, 4.

¹²⁰⁶ Jesuit Social Services, *Submission no. 35*, 6; The Salvation Army – Brayton Youth and Family Services (BYFS), *Submission no. 9*, 6; Judge Paul Grant, President, Children’s Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 2, 4.

86 per cent of those participating received a good behaviour bond, which is a non-supervisory order without conviction ... In relation to the program, diverting people away from the supervised court orders and from further penetrating the criminal justice system is an obvious outcome that this program delivers.¹²⁰⁷

These results are summarised in figure 26. Case study 8 offers a grandmother's perspective on how participation in the YJGC Program diverted her grandson from the justice system.

Figure 26: Court outcomes for Youth Justice Group Conference Program participants and control group¹²⁰⁸



There have been mixed results in relation to diversionary outcomes for adult offenders. A New Zealand study found that conference participants were less likely to be sentenced to imprisonment than offenders who did not participate in a conference.¹²⁰⁹ In contrast, the recent evaluation of a pilot restorative justice program for young adults in New South Wales found that, contrary to predictions, participation in a group conference had no effect on the numbers of offenders who were sentenced to imprisonment.¹²¹⁰

¹²⁰⁷ Paul McDonald, Executive Director, Children, Youth and Families Division, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹²⁰⁸ Effective Change Pty Ltd, *Report on the juvenile justice group conferencing program* (2006), Department of Human Services, Victoria, 25.

¹²⁰⁹ Crime and Justice Research Centre, Victoria University and Sue Triggs, Ministry of Justice, 'A summary of: New Zealand court-referred restorative justice pilot: Evaluation' ('Summary') (2005) 39(June 2005) *Just Published*, 1, 3; Crime and Justice Research Centre, Victoria University and Sue Triggs, Ministry of Justice, New Zealand, *New Zealand court-referred restorative justice pilot evaluation* ('Evaluation') (2005), paragraph 7.5.2.

¹²¹⁰ Julie People and Lily Trimboli, *An evaluation of the NSW Community Conferencing for Young Adults pilot program* (2007) NSW Bureau of Crime Statistics and Research, 55.

Case study 8: ‘Without this opportunity he would have entered the justice system’,¹²¹¹

‘Earlier this year my grandson, BJ, who lives with me underwent the Juvenile Justice Group Conferencing Program, we believe, very successfully ...

BJ was on medication for ADHD, had lived in numerous foster homes, been under the care of the Dept of Human Services at least 6 times since he was only 3 months old and generally had had a pretty tough time during his life and also had a bit of an attitude at times. He was doing OK up until a few months before he offended. He was attending Army Cadets and completing Year 10 at the local College.

BJ was only 15 years old when he offended ... Around the time of his offence he was starting to become quite rebellious, had a very bad attitude, very self centred and I believe was well on his way to becoming suicidal ...

After he was charged with the offences he thought that his goals of joining the Army were over, everyone would treat him as a criminal, he had no future and that he would be sent away to a detention school.

Luckily for BJ, the Magistrate at Court gave him the opportunity to participate in the JJ Group Conferencing Program. The Group Conferencing Convener explained in detail to BJ what the Group Conferencing was all about and although he was afraid of facing his victims he was prepared to have a go at it.

The Group Conferencing Convener visited BJ at home on a couple of occasions where they discussed further what the Group Conferencing was all about and talked at great length about how BJ was feeling and the plans that BJ wanted to bring along to the Conference and how he thought that he could compensate the victims.

BJ was very nervous prior to the Conference about facing his victims. The Convenor had spoken to all parties concerned and his Solicitor. The Police Officer, the Convenor, myself and my partner as well as the victim was present at the Conference. The victim was a very nice man and believed that BJ should have another chance and commented that he wished that they had met under better circumstances, as he believed that they would have got along very well ...

After the Group Conference BJ wrote to his victims (through the Police Officer) apologising for the harm/hurt he had caused, undertook Counselling, attended a Youth Leadership Course, and has applied himself to his school work and has been made a Sergeant in the Army Cadets.

BJ’s confidence in himself has grown enormously and [he] sees that he does have a future now to pursue his goals.

Last night we talked about what did he think about undertaking the JJ Group Conferencing, he stated the following:

“gave me a chance” “helped me redeem myself” “meeting the victim shows how they are affected” and stated that he was **“treated like a person not a criminal”**

In closing I would like to take this opportunity to thank the Justice System for providing the opportunity to BJ to take an active role in redeeming himself. Without this opportunity he would have entered the justice system and perhaps the dire consequences from this would have been he may never have come out.’

¹²¹¹ Letter from grandmother of youth justice conference participant (name confidential), to Chris Hammat, Team Leader, Community Justice, Anglicare Victoria, 28 August 2003.

Recidivism

The rate of recidivism – or re-offending – is one of the most commonly used measures for assessing the outcomes of interventions, both in relation to restorative justice programs and to traditional criminal justice interventions.¹²¹² However, the literature notes that, in both contexts, recidivism is a narrow measure that may not recognise the broader benefits that can result from an intervention.¹²¹³ This was also reflected in evidence to the Inquiry, with stakeholders encouraging the Committee to ‘look at outcomes as a whole and not to focus purely on recidivism rates’ in relation to restorative justice interventions.¹²¹⁴

Both in Australia and internationally, there is mixed data about the recidivism rates associated with restorative justice initiatives.

Early evaluations of the YJGC Program in Victoria found little difference in re-offending rates between offenders who had attended group conferences and a control group.¹²¹⁵ However, the 2006 evaluation found that only 17% of those who had participated in a conference re-offended within 12 months, compared to 36% of the control group (those who were assessed as suitable for conferencing but did not participate) and 40% of the probation group (those who received a probation order for the first time). Group conference participants who did re-offend demonstrated a decrease in the frequency and seriousness of re-offending behaviour compared to the probation group.¹²¹⁶ Judge Paul Grant, President of the Children’s Court of Victoria, told the Committee that ‘the writers of the report say the results are unequivocal in terms of seriousness of re-offending. They say that that is a significant result in favour of the group conferencing process’.¹²¹⁷

One limitation of the 2006 study was that it tracked re-offending for only 12 months after a conference. Mr Tony Hayes of Jesuit Social Services, a YJGC Program provider, observed, ‘It is promising, but you would need to follow it up after three years and five years’.¹²¹⁸

Reductions in recidivism rates were also found in evaluations of youth justice conferencing in New South Wales and of a diversionary conferencing program for

¹²¹² Chris Cunneen and Garth Luke, ‘Recidivism and the effectiveness of criminal justice interventions: Juvenile offenders and post release support’ (2007) 19(2) *Current Issues in Criminal Justice*, 197, 197; Steering Committee for the Review of Government Service Provision, *Report on government services 2009* (2009) Productivity Commission, C.7.

¹²¹³ Cunneen and Luke, above n 1212, 198; Mark Umbreit, B Vos and R B Coates, *Restorative justice dialogue: Evidence-based practice* (2006) Center for Restorative Justice and Peacemaking, 9; Howard Zehr, *The little book of restorative justice* (2002) Good Books, 9-10.

¹²¹⁴ Law Institute of Victoria, *Submission no. 20S*, 7. See also Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 9.

¹²¹⁵ Anne Markiewicz, Bruce Lagay, Helen Murray and Lynda Campbell, *Juvenile justice group conferencing in Victoria: An evaluation of a pilot program: Phase two* (1997) University of Melbourne, vii; Success Works Pty Ltd, *Juvenile justice group conferencing project evaluation* (1999).

¹²¹⁶ Effective Change Pty Ltd, above n 1208, 27-28.

¹²¹⁷ Judge Grant, *Transcript of evidence*, above n 1206, 4.

¹²¹⁸ Tony Hayes, Project Coordinator, Community Justice Program, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 9.

violent offenders in the Australian Capital Territory.¹²¹⁹ A meta-analysis of 35 restorative justice programs internationally found that, on average, these programs led to a reduction in recidivism compared to traditional criminal justice interventions.¹²²⁰

In contrast, two recent evaluations of restorative justice programs for adult offenders in New Zealand and New South Wales were inconclusive about the impact of participation on recidivism.¹²²¹ Similarly, a review of the evaluations of six adult restorative justice programs operating around the globe found that, on average, they did not result in lower recidivism rates.¹²²²

There is evidence that participation in restorative justice may not reduce offending evenly among all groups. Re-offending rates have been found to be higher among males,¹²²³ younger offenders,¹²²⁴ those living in rural or regional areas,¹²²⁵ those with a history of offending¹²²⁶ and among Indigenous offenders.¹²²⁷

Research has also identified that restorative justice responses may not have the same outcomes for all crimes. A study of restorative justice participants in the Australian Capital Territory found that, while there was a reduction in re-offending among violent offenders, there was an increase in re-offending for those convicted of drink driving offences and no change in offending rates among those who committed property offences.¹²²⁸

In addition, it has been suggested that the offender's experience of participating in a restorative justice process may impact on re-offending. New Zealand academics Gabrielle Maxwell and Allison Morris have identified a number of factors associated with the offender's experience of the restorative justice process that reduce re-offending. These include the conference being memorable, the offender feeling involved in the conference, the offender agreeing with the conference outcome and the offender feeling remorseful.¹²²⁹

¹²¹⁹ Garth Luke and Bronwyn Lind, 'Reducing juvenile crime: Conferencing versus Court' (2002) 69 *Crime and Justice Bulletin*, 1, 13; Lawrence Sherman, Heather Strang and Daniel Woods, *Recidivism patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (2000), 12.

¹²²⁰ Jeff Latimer, Craig Dowden and Danielle Muise, *The effectiveness of restorative justice practices: A meta-analysis* (2001) Department of Justice, Canada, 19.

¹²²¹ Sue Triggs, *New Zealand court-referred restorative justice pilot: Two year follow-up of reoffending* (2005) Ministry of Justice, New Zealand, paragraphs 3.1-3.5; People and Trimboli, above n 1210, xi, 51.

¹²²² Washington State Institute for Public Policy, *Evidence-based adult corrections programs: What works and what does not* (2006), 6.

¹²²³ Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference' (2006) 103 *Crime and Justice Bulletin*, 1, 13; Hennessey Hayes and Kathleen Daly, 'Conferencing and re-offending in Queensland' (2004) 37(2) *The Australian and New Zealand Journal of Criminology*, 167, 187.

¹²²⁴ Vignaendra and Fitzgerald, above n 1223, 13; Hayes and Daly, above n 1223, 187.

¹²²⁵ Kathleen J Bergseth and Jeffrey A Bouffard, 'The long-term impact of restorative justice programming for juvenile offenders' (2007) 35(4) *Journal of Criminal Justice*, 433, 448.

¹²²⁶ Hayes and Daly, above n 1223, 187.

¹²²⁷ Vignaendra and Fitzgerald, above n 1223, 13.

¹²²⁸ Sherman, Strang and Woods, above n 1219, 3. See also David Moore, Committee Member, Victorian Association for Restorative Justice, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹²²⁹ Gabrielle Maxwell and Allison Morris, 'Restorative justice and reoffending' in Heather Strang and John Braithwaite (eds.), *Restorative Justice: Philosophy to practice* (2000) Ashgate Publishing Company, 99-100. See also Hayes and Daly, above n 1223, 187.

Effective outcome plans

The major tangible outcome of a restorative justice process is an outcome plan which sets out how the offender will make amends for the harm caused and how he or she 'will stay out of trouble in the future'.¹²³⁰ The types of outcomes commonly included in YJGC Program outcome plans include agreements to make a written apology, undertake voluntary work, seek employment and complete a drug withdrawal program.¹²³¹

Anglicare's submission stated that the development of an outcome plan provides 'enhanced opportunities for issues affecting behaviour to be addressed and new strategies undertaken'.¹²³² This was echoed in Youthlaw's submission:

The advantages of restorative justice processes are that the programs focus on the offender and try to address the underlying causes of their criminal behaviour ... they may receive support and assistance around a range of issues including drug and alcohol abuse, homelessness and mental health etc. without them being involved in the criminal (youth) justice system and thereby avoiding possible contamination.¹²³³

Ms Laura Simmons of the Salvation Army – Brayton Youth and Family Services (Salvation Army – BYFS) shared a case study with the Committee which demonstrated how conferences can turn young people's lives around. In that particular case the outcome plan contained agreements that the offenders would participate in a job placement and training program and cooperate with the police (case study 9).

Case study 9: 'I am really sorry for what I have done'¹²³⁴

'[T]his is a case study of two clients who were referred [to the] youth justice group conferencing program from the Seymour Children's Court. At the time of ... their offences they were 17 years old ...

Young person 1 had [been charged with] assault police both indictable and summary, obstruct police, assault in company, and resist police. Young person 2 had a much more extensive list of charges: use indecent language in a public place; refuse/fail to state name and/or address; resist police, assault police – both indictable and summary, assault in company, behave in offensive manner in a public place, and escape from lawful custody.

The police summaries also indicated that both young people were abusive and/or insulting, physically aggressive, uncooperative and intoxicated during their police interviews. From the summaries and charges my initial thoughts as a convenor were those of apprehension and concern due to the serious nature of their offences ...

Both young people presented with a diagnosed learning difficulty ... They had both exited mainstream education early and had significant deficits with regard to literacy and numeracy. They were both unemployed when they were referred to the program with minimal opportunities for employment ...

¹²³⁰ Tony Hayes, *Transcript of evidence*, above n 1218, 2.

¹²³¹ Jesuit Social Services, *Submission no. 35*, 13-15; Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008, figures 6 and 14. See also figure 20 in chapter 8 of this report.

¹²³² Anglicare Victoria, *Submission no. 26*, 19.

¹²³³ Youthlaw, *Submission no. 38*, 5.

¹²³⁴ Laura Simmons, Program Co-ordinator, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 3-7.

In the initial stages of the interview both young people were difficult to engage. They both presented as withdrawn and uncooperative, and they had an unwillingness to accept full responsibility. Both young people indicated they thought the police should be apologising to them and they believed it was a two-sided issue. They appeared to have difficulty in understanding their role in the offending and the full impact of what they had done.

Upon the young people expressing their views about the nature of their offending I was able to explain to them both the court and conference process and to ensure they understood it was a voluntary program and they did not have to participate in it ...

I noticed a significant shift in their attitude as they gained a better understanding of the conference process and the role of the convenor ...

I move on to interviews with other conference participants. This case was a unique case because the informant was also the victim. In this case another police member attended the conference to act as the informant so that the victim could actually still maintain that role within the conference ...

The solicitor: I was able to discuss possible options for the young people with the solicitor to ensure they were consistent with the Children's Court and the legislation without pre-empting any potential agreements that might be made in the conference.

The support person for the young people: young person 1 identified his brother's girlfriend's mother, and likewise young person 2 identified his girlfriend's mother ... It was quite a complex case in that respect, with no family support ...

I move to the conference now ... It is always a neutral venue — never at the courts or the police stations ... It was at the [Wallan] library in actual fact... The reason for the conference being held in Wallan is that that is where the offences occurred, and we always ensure that the conference is held where the offence has actually occurred. Those in attendance were obviously the victim, the informant, the legal representative and the young people. It was interesting. When the young people entered the conference venue they were asked to sit where they felt comfortable, and one young person sat away in the corner from the table. Subsequently he was asked to sit at the table. It was an interesting point to note that that is how he was feeling when he entered ...

Post-conference: there is the youth justice group conferencing program outcome plan and the court outcome. I will go to the outcome plan first. Prior to the conference both young people had a predisposition that the police were out to get them. However, upon hearing from the victim in the conference and the victim being able to explain to them the role of the police, the young people appear to have heard and understood what the police were relaying. This was evident in an apology from a young person, when he said, 'I am really sorry for what I have done. You were just doing your job'. Furthermore this is evidenced by the commitments both young people made. Firstly they have obviously both apologised verbally to the victim ...

[The young people] agreed to contact the police member who was the victim two months after the conference ... [and] to cooperate with the police in the future.

[Both young men undertook to participate in the Job Placement Employment and Training (JPET) Program.] The JPET Program agreement was also very significant in light of the initial feelings of hopelessness and frustration that both young people felt about being unable to gain employment. They are the outcome plans that we have in our conference. After the conference I write a report that goes back to the Court that includes the outcome plan for the Magistrate for consideration in sentencing. Both young people have gone back to court, they have both received a good behaviour bond for six months and were to comply with the outcome plan which I have just talked to you about ...

[About three months after the conference I have spoken] with the young people, the JPET worker and the police ... By all accounts they have actioned and completed their outcome plan. They ... are in full-time employment through the JPET Program. They have gone to see the police member who was the victim and have been in no further trouble with the law.'

There is evidence that agreements reached in restorative justice conferences are more likely to be complied with than traditional court orders.¹²³⁵ YJGC Program service providers reported high levels of compliance with outcome plans. For example, Jesuit Social Services informed the Committee that 87% of outcome plans developed at conferences that it convened were ‘fully completed’ by the young people, with the remainder ‘partially completed’.¹²³⁶ In contrast, Youthlaw expressed frustration with traditional sentencing outcomes, stating, ‘It is our experience that sentencing options such as community based orders have failed many young offenders. In part, this is reflected by a high breach rate’.¹²³⁷ It has been suggested that the high compliance rate with restorative justice outcome plans may be due, at least in part, to the active participation of offenders in the plan’s development¹²³⁸ and the fact that they are monitored largely by family and friends.¹²³⁹

Issues about the adequacy of the follow-up of outcome plans in the YJGC Program are discussed further in the next chapter.

Offender accountability

It has been argued that traditional criminal justice approaches do not generally provide offenders with the opportunity to appreciate the impact of their offending on other parties, including their families, the victims and the community.¹²⁴⁰

In contrast, restorative justice processes aim to make an offender accountable for the offence they have committed. Youthlaw’s submission stated that restorative justice ‘requires offenders to be accountable for their crimes by personalising the situation, the problem and the solution’.¹²⁴¹ This view was echoed by YJGC Program providers. For example, Anglicare commented that participation in a restorative justice program provides ‘acceptance and responsibility for destructive behaviour by the offender ... [and] extensive opportunities for personal transformation, restoration and healing’.¹²⁴²

Mr Hayes from Jesuit Social Services described how participation in a restorative justice conference forces young people to be accountable:

Young people make bad decisions, like the rest of us. But the opportunity for them to go to a conference and have to stand on their own two feet, face people, accept

¹²³⁵ Declan Roche, ‘Dimensions of restorative justice’ (2006) 62(2) *Journal of Social Issues*, 217, 221; Latimer, Dowden and Muise, above n 1220, 17-18; Lawrence W Sherman and Heather Strang, *Restorative justice: The evidence* (2007) The Smith Institute, 58-59.

¹²³⁶ Jesuit Social Services, *Submission no. 35*, 16. See also Mark Longmuir, Manager, Community Services, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 5. Note these completion rates are higher than reported for the YJGC Program generally. DHS advised that 68% of plans from conferences held in metropolitan Melbourne and 55% of plans from conferences held in rural and regional areas were fully completed: see Department of Human Services, above n 1231, figures 7 and 15.

¹²³⁷ Youthlaw, *Submission no. 38*, 5.

¹²³⁸ Jaimie P Beven, Guy Hall, Irene Froyland, Brian Steels and Dorothy Goulding, ‘Restoration or renovation? Evaluating restorative justice outcomes’ (2005) 12(1) *Psychiatry, Psychology and Law*, 194, 195.

¹²³⁹ John Braithwaite, ‘Encourage restorative justice’ (2007) 6(4) *Criminology & Public Policy*, 689, 691.

¹²⁴⁰ Charles Pollard, ‘Victims and the criminal justice system: A new vision’ (2000) *Criminal Law Review*, 5, 12.

¹²⁴¹ Youthlaw, *Submission no. 38*, 3. See also Beven, Hall, Froyland, Steels and Goulding, above n 1238, 203.

¹²⁴² Anglicare Victoria, *Submission no. 26*, 19-20. See also The Salvation Army – BYFS, *Submission no. 9*, 6.

responsibility, say sorry, make amends, and work out some idea of how they will stay out of trouble in the future and not reoffend is a really good process, compared to going to court, sitting behind a lawyer, not saying anything and walking out of the court with a sentence and then saying to the lawyer, 'What actually happened?'. I have worked with young offenders for a long time and this process helps them think about the effects of their behaviour. While sitting behind a lawyer in court they may not do that; in fact I am pretty sure a lot of them do not.¹²⁴³

Restorative justice processes also have the potential to make an offender more aware of the impact of his or her crime. Mr Noel McNamara from the Crime Victims Support Agency told the Committee about an offender who stole a young woman's car:

It was torched in a paddock out in the eastern suburbs ... the baby's clothes, the pram, everything in it was totally wiped out plus the car. She was actually devastated, but she met with the perpetrator, and the perpetrator met with her. It was a bit tense but she explained it all and by the time that was over the guy was just about in tears over the damage he had done to her personal life. She wanted to know why she was targeted, why her car of all things — which was not the greatest car in the world — was picked out and taken away and this damage was done to it. Anyhow they finished up with him offering types of restitution, and he has got on with his life and so has she ...¹²⁴⁴

The Committee heard evidence that realising the true impact of their crimes can have a very profound impact on offenders. Mr Mark Longmuir of Anglicare told the Committee, 'You have some very tough kids who are reduced to tears when they actually understand the impact of what they did on the victim'.¹²⁴⁵

The evidence received by the Committee is consistent with literature which suggests that participants in restorative justice processes are more apologetic, more remorseful and twice as likely to repay their debt to society compared to offenders participating in traditional justice processes.¹²⁴⁶ In addition, it has been found that offenders who feel that they have been forgiven by their victim are more amenable to reintegration into society.¹²⁴⁷

Perceptions of fairness

Offenders participating in restorative justice processes in Australia and internationally consistently report high levels of satisfaction with both the conference processes and outcomes.¹²⁴⁸

¹²⁴³ Tony Hayes, *Transcript of evidence*, above n 1218, 8-9. See also Debbie Laycock, 'Restorative justice: Saves people, time & money' (2007) 20(1) *Law Society Bulletin*, 4.

¹²⁴⁴ Noel McNamara, Chief Executive Officer, Crime Victims Support Association, *Transcript of evidence*, Melbourne, 25 February 2008, 2. See also David Fanning, Magistrate, Neighbourhood Justice Centre, *Transcript of evidence*, Melbourne, 4 March 2008, 3; Mark Longmuir, *Transcript of evidence*, above n 1236, 3; Youthlaw, *Submission no. 38*, 4.

¹²⁴⁵ Mark Longmuir, *Transcript of evidence*, above n 1236, 4.

¹²⁴⁶ Heather Strang and Lawrence W Sherman, *Reintegrative Shaming Experiments (RISE): The victim's perspective* (1997) Australian Institute of Criminology, RISE Working Papers, no. 2, 2.

¹²⁴⁷ Adela Ristovski and Eleanor H Wertheim, 'Investigation of compensation source, trait empathy, satisfaction with outcome and forgiveness in the criminal context' (2005) 40(1) *Australian Psychologist*, 63, 64.

¹²⁴⁸ People and Trimboli, above n 1210, 39; Latimer, Dowden and Muiise, above n 1220, 14-15; Umbreit, Vos and Coates, above n 1213, 6-7; Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James

A number of Australian studies have also compared the satisfaction levels and perceptions of fairness between participants in restorative justice processes and traditional court processes and found that restorative justice participants report significantly higher levels of satisfaction with the justice system generally.¹²⁴⁹ For example, an evaluation of youth conferencing in Queensland found that 97% of young offenders who participated in a conference felt that the justice system was fair, compared with 87% of young people processed by the courts.¹²⁵⁰

It has been suggested that offenders' perceptions that conference outcomes are fair may increase the likelihood of other positive outcomes, such as compliance with the outcome plan¹²⁵¹ and a reduced risk of re-offending.¹²⁵²

9.1.2 Outcomes for victims

Victim empowerment

Traditional criminal justice approaches place the state as the community's representative at the centre of responses to crime and, in doing so, may marginalise and disempower victims.¹²⁵³ New Zealand District Court Judge and restorative justice advocate, Fred McElrea, has claimed that victim empowerment is one of the most significant benefits of restorative justice processes.¹²⁵⁴

Stakeholders providing evidence to the Committee emphasised the importance of restorative justice processes in empowering victims. Anglicare's submission stated 'victims express more of a sense of having been heard (than is evidenced by victims' experiences of the dominant, court-centred system)'.¹²⁵⁵

Judge Grant of the Children's Court of Victoria told the Committee:

It gives the victims a voice which is not that well heard in the court process generally and not that well heard by offenders. In mainstream court the offenders just sit there and even if there are victim impact statements it all just washes over them. I think if they are in a conference and they are hearing from the victim about how much it cost that victim because she did not have her car and she could not take

Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, Centre for Criminological Research, University of Sheffield, *Restorative justice: The views of victims and offenders: The third report from the evaluation of three schemes* (2007) Ministry of Justice, United Kingdom, 3.

¹²⁴⁹ Beven, Hall, Froyland, Steels and Goulding, above n 1238, 196.

¹²⁵⁰ Hennessey Hayes, Tim Prenzler and Richard Wortley, *Making amends: Final evaluation of the Queensland Community Conferencing Pilot* (1998). See also Hayes and Daly, above n 1223, 168.

¹²⁵¹ Beven, Hall, Froyland, Steels and Goulding, above n 1238, 204.

¹²⁵² Lawrence W Sherman and Geoffrey C Barnes, *Restorative justice and offenders' respect for the law* (1997) Australian Institute of Criminology, RISE Working Papers, no. 3, 4. See also Pollard, above n 1240, 16.

¹²⁵³ Zehr, above n 1213, 21. See also Tracey Booth, 'Altered perceptions of conflict in homicide matters: The role of victim-offender conferencing' (2003) 14 *Australasian Dispute Resolution Journal*, 290, 291; Beven, Hall, Froyland, Steels and Goulding, above n 1238, 197.

¹²⁵⁴ F W M McElrea, 'Restorative justice as a procedural revolution: some lessons from the adversary system' (Paper presented at the 4th International Winchester Restorative Justice Conference, Winchester, United Kingdom, 10 October 2007), 10.

¹²⁵⁵ Anglicare Victoria, *Submission no. 26*, 14. See also The Victorian Bar, *Submission no. 13*, 53; The Salvation Army – BYFS, *Submission no. 9*, 2; Noel McNamara, *Transcript of evidence*, above n 1244, 5; Law Institute of Victoria, *Submission no. 20S*, 5.

her child to hospital and she could not get the shopping and she could not go to school — these are powerful testaments that I think offenders should hear and listen to.¹²⁵⁶

Similarly, Dr David Moore from the Victorian Association for Restorative Justice (VARJ) stated:

victims of crime will consistently report that it was valuable to be able to have their story heard, in a sense to be vindicated, that their experience was what they experienced, and also the confidence that they have had an impact by way of a shared understanding and probably contributed to decreasing the likelihood of recidivism ...¹²⁵⁷

Understanding and forgiveness

Restorative justice processes also provide the victim with the chance to listen as well as to speak. Many victims value the opportunity to ask questions about the offender and the offence.¹²⁵⁸ Anglicare's submission stated 'victims gain a deeper understanding of: why the offence against them occurred; the offender's own situation; and connections between cause and effect'.¹²⁵⁹

Research has also identified that victims who participate in restorative justice processes have an increased understanding of the offender and their circumstances and feel more positively towards the offender than victims who had their cases dealt with by traditional court processes.¹²⁶⁰ This may result in forgiveness, which has been shown to have benefits such as promoting personal healing and reducing a victim's desire to harm the offender.¹²⁶¹ However, Australian academic Hennessey Hayes has cautioned that while victim forgiveness of offenders is more frequent in matters that are conferenced compared to cases that are traditionally processed by courts, a significant number of victims participating in youth justice conferencing programs report feeling indifferent or unforgiving towards offenders.¹²⁶²

Healing

Victims of crime often experience a large amount of fear and stress resulting from the crime. This may have a significant impact on the way they live. Mr John Griffin from the Department of Justice told the Committee:

Whilst a bag snatching may involve a bag snatching and a loss of money, if that results in the person being fearful in travelling alone, going to the supermarket, going to the glee club or whatever, then there is a very significant consequence.¹²⁶³

¹²⁵⁶ Judge Grant, *Transcript of evidence*, above n 1206, 13. See also David Fanning, *Transcript of evidence*, above n 1244, 3.

¹²⁵⁷ David Moore, *Transcript of evidence*, above n 1228 4.

¹²⁵⁸ Beven, Hall, Froyland, Steels and Goulding, above n 1238, 197.

¹²⁵⁹ Anglicare Victoria, *Submission no. 26*, 14.

¹²⁶⁰ Beven, Hall, Froyland, Steels and Goulding, above n 1238, 204.

¹²⁶¹ Ristovski and Wertheim, above n 1247, 63.

¹²⁶² Hennessey Hayes, 'Apologies and accounts in youth justice conferencing: Reinterpreting research outcomes' (2006) 9(4) *Contemporary Justice Review*, 369, 377.

¹²⁶³ John Griffin, Executive Director, Courts, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 9. See also Noel McNamara, *Transcript of evidence*, above n 1244, 60.

Participating in criminal justice proceedings may be very stressful for victims, potentially increasing the trauma associated with being a crime victim.¹²⁶⁴ In contrast, restorative justice has been described as ‘a healing process for victims’.¹²⁶⁵ While participating in a restorative justice process may be very confronting for victims, it also offers them the chance to deal with emotions such as fear and stress and, in a sense, be liberated from the ongoing impact of the crime. Again, this was strongly reflected in stakeholder evidence to the Inquiry. Mr Russell Jeffrey of Jesuit Social Services stated:

We have got plenty of anecdotes about victims actually feeling that sense of relief and making statements like — the typical one might be, ‘I thought you were a lot bigger when you assaulted me. All this time I’ve been carrying this image of a big huge person. But you’re not. And I’m not scared of you anymore’. They will not say that to the offender, but they might come up to me afterwards. So there is a sense of letting go of that fear and it can be almost therapeutic ...¹²⁶⁶

Apology and reparations

A common outcome of a restorative justice process is that the offender will apologise to the victim. Apologies are generally not an outcome of traditional criminal justice processes, and in fact offenders’ legal representatives may actively discourage apologising as it may be construed as an admission of guilt.¹²⁶⁷

Charles Pollard, Chief Constable of the Thames Valley Police in the United Kingdom, has written that the very nature of a restorative justice meeting is likely to be conducive to apologising:

An apology is most likely to be forthcoming when victim and offender meet face to face, not in the emotionally defensive atmosphere of the courtroom but, in a setting where they are both allowed the luxury of feeling vulnerable ...¹²⁶⁸

Research conducted in the Australian Capital Territory found that 74% of victims who attended a conference received an apology, as opposed to 11% of victims whose cases were tried in court.¹²⁶⁹ The researchers noted that this was particularly important because almost all victims stated that they believed that the offender should apologise to them.

Apologies may have powerful impacts for both victims and offenders as observed by Dr Moore of VARJ:

¹²⁶⁴ Dot Goulding and Brian Steels, ‘Developing, implementing and researching a communitarian model of restorative & transformative justice for adult offenders in Magistrates’ Courts’ in Michael S King and Kate Auty (eds.), *The therapeutic role of Magistrates’ Courts* (2006) E Law Special Series - Volume 1, 27.

¹²⁶⁵ Peter Condliffe, President, Victorian Association for Restorative Justice, *Transcript of evidence*, Melbourne, 25 February 2008, 6. See also Heather Strang, Lawrence Sherman, Caroline M Angel, Daniel J Woods, Sarah Bennett, Dorothy Newbury-Birch and Nova Inkpen, ‘Victim evaluations of face-to-face restorative justice conferences: A quasi-experimental analysis’ (2006) 62(2) *Journal of Social Issues*, 302.

¹²⁶⁶ Russell Jeffrey, Youth Justice Group Conference Convenor, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 7. See also Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 10; Anglicare Victoria, *Submission no. 26*, 14.

¹²⁶⁷ Booth, above n 1253, 292-3.

¹²⁶⁸ Pollard, above n 1240, 8.

¹²⁶⁹ Strang and Sherman, above n 1246, 2. See also Shapland, Atkinson, Atkinson, Chapman, Dignan, Howes, Johnstone, Robinson and Sorsby, above n 1248, 24-25.

there is opportunity given for apology and forgiveness if that is appropriate at that time; and it usually is at that time — it is quite remarkable as a participant in the room or as an observer how powerfully the mood has changed so that people are then actually as a group looking for a constructive response. How can we make sure that we, to the extent that it is possible, repair damage that has been done, and how can we make sure this is as unlikely as possible to occur again?¹²⁷⁰

Victims who participate in restorative justice processes may also be more likely to receive some other form of reparation. One study found that victims participating in a conference were ten times more likely to receive an apology, money, services or some other form of material compensation than victims whose cases were dealt with in court.¹²⁷¹ Another study found that compensation provided voluntarily (rather than being ordered) led to greater forgiveness by victims as they perceived the offender as being remorseful and having learnt from the experience.¹²⁷²

However, it must be noted that apologies are not received in all conferenced matters, and when they are received, some victims may doubt that they are genuine.¹²⁷³

Data provided to the Committee by Jesuit Social Services shows that, in relation to the 135 conferences that it convened in the Melbourne and metropolitan areas between 2003 and 2007, verbal apologies were made at 65 conferences and restitution payments were agreed to at 75 conferences.¹²⁷⁴

Victim satisfaction

Victims who participate in restorative justice programs consistently report high levels of satisfaction with the process. This is true in both the youth and adult contexts.

For example, the 2007 evaluation of a young adult pilot restorative justice program in New South Wales found that participating victims reported high levels of satisfaction with both the way their case was dealt with at the conference and the content and fairness of the outcome plan.¹²⁷⁵ Many victims participating in adult conferencing programs in New Zealand and South Australia indicated that they would participate again and would recommend the process to other victims.¹²⁷⁶

A meta-analysis of 13 studies internationally found that victims participating in restorative justice processes were, in general, more satisfied than those who had participated in traditional court processes.¹²⁷⁷

¹²⁷⁰ David Moore, *Transcript of evidence*, above n 1228, 5-6.

¹²⁷¹ Strang and Sherman, above n 1246, 2. See also Sherman and Strang, above n 1235, 58.

¹²⁷² Ristovski and Wertheim, above n 1247, 68.

¹²⁷³ Hayes, above n 1262, 377-378

¹²⁷⁴ Jesuit Social Services, *Submission no. 35*, 16. See also Department of Human Services, above n 1231, figure 6.

¹²⁷⁵ People and Trimboli, above n 1210, viii, 25-26, 32-34. See also Shapland, Atkinson, Atkinson, Chapman, Dignan, Howes, Johnstone, Robinson and Sorsby, above n 1248, 27.

¹²⁷⁶ Andrew Goldsmith, Mark Halsey, and David Bamford, *Adult restorative justice conferencing pilot: An evaluation: Final report* (2005), South Australian Courts Administration Authority, 25; Crime and Justice Research Centre and Triggs, Summary, above n 1209, paragraph 8.7.

¹²⁷⁷ Latimer, Dowden and Muise, above n 1220, 12-13. See Sherman and Strang, above n 1235, 62; Shapland, Atkinson, Atkinson, Chapman, Dignan, Howes, Johnstone, Robinson and Sorsby, above n 1248, 4.

Dr Moore from VARJ highlighted the high level of victim satisfaction with restorative justice processes:

there is a very high degree of satisfaction in the process and the outcomes. So people, including the primary victims, feel that the preparation ... was fair and gave them this degree of an opportunity to be heard, listened to and supported. One of the things that people are looking for is a genuine degree of understanding and how they were affected; not just what happened, but what affect the incident had on them.¹²⁷⁸

Research has also identified that victim satisfaction with a restorative justice process translates to satisfaction with the criminal justice system generally.¹²⁷⁹ This was emphasised by Reverend Jonathan Chambers of Anglicare:

Our feeling is that there would certainly be a better outcome for both victim, offender and community, and the evidence would suggest that there is a greater satisfaction with the justice system, particularly for victims, when they know they have been heard. I think this has been quite evident, as we have seen, with the whole 'sorry' business — the fact that there has been an acknowledgement that harm was done and that the person says they are sorry. I think the great value of restorative justice is that it moves out of the area of just compensation or retribution or, 'If you do the crime, you do the time', to doing something that actually says, 'How do we heal this?'¹²⁸⁰

There has been limited research on the specific elements of a restorative justice process that have an impact on victim satisfaction. However, one study identified three factors influencing victim satisfaction: how the victim felt about the convenor; the victim's perception of the fairness of the outcome; and the strength of the victim's desire to meet with the offender.¹²⁸¹

Research has also identified a number of factors that lead to victim dissatisfaction with a restorative justice process. These include a belief that the offender would have received a harsher (or more just) penalty if they had gone to court,¹²⁸² a perception that an apology is not sincere and doubt that an offender will really change.¹²⁸³ One academic has noted that there is a danger that participation in a restorative justice process may make victims feel worse. He warned that if restorative justice is not carefully applied, the 'prospect is not of things being put right; but of the victim being re-victimised'.¹²⁸⁴ The Committee further considers victims' rights and needs in restorative justice processes in chapter 10.

¹²⁷⁸ David Moore, *Transcript of evidence*, above n 1228, 5.

¹²⁷⁹ Umbreit, Vos and Coates, above n 1213, 4. See also Shapland, Atkinson, Atkinson, Chapman, Dignan, Howes, Johnstone, Robinson and Sorsby, above n 1248, 4.

¹²⁸⁰ Jonathan Chambers, *Transcript of evidence*, above n 1214, 2.

¹²⁸¹ William Bradshaw and Mark S Umbreit, 'Crime victims meet juvenile offenders: Contributing factors to victim satisfaction with mediated dialogue' (1998) Summer *Juvenile and Family Court Journal*, 17, 21-22. See also Diane Sivasubramaniam and Jane Goodman-Delahunty, 'Trust and power-distance: A psychological perspective on fairness in restorative justice conferences' (2006) 13(2) *Psychiatry, Psychology and Law*, 203, 216-217.

¹²⁸² Kathleen Daly and Sarah Curtis-Fawley, 'Restorative justice for victims of sexual assault' in Karen Heimer and Candace Kruttschnitt (eds.), *Gender and Crime: Patterns in Victimization and Offending* (2006) New York University Press, 253.

¹²⁸³ Hennessey Hayes and Kathleen Daly, 'Youth justice conferencing and reoffending' (2003) 20(4) *Justice Quarterly*, 725, 757.

¹²⁸⁴ Marco Piazza, 'Mandatory victim offender mediation - Valuable fruit or rotten tomato' (2006) 17 *Australian Dispute Resolution Journal*, 233, 235-237.

9.1.3 Outcomes for disadvantaged individuals and groups

Disadvantaged individuals make up a disproportionate number of both defendants appearing before the courts and victims of crime.¹²⁸⁵ The Committee's discussion paper noted the limited research in this area and concluded that, while restorative justice processes have the potential to provide benefits for disadvantaged individuals and groups, they may not be reaching their full potential in this regard.

The discussion paper asked whether restorative justice has particular advantages for members of disadvantaged groups, be they victims or offenders. Very few submissions addressed this issue in detail.

Anglicare's submission commented that one of the benefits of ADR is 'counteracting much of the marginalisation and exclusion that marginalised people may otherwise experience'.¹²⁸⁶ Mr Longmuir of Anglicare told the Committee 'I have to say that our experience has been that it has been very beneficial for young Koori kids'¹²⁸⁷ although he did not elaborate on this.

VARJ's submission stated that restorative justice 'has the capacity to respond sensitively to the needs of marginalised individuals by reflecting traditional practices and moderating the potentially negative impacts of bureaucratic Western systems of justice ... restorative justice processes can bridge the gap between communities that is exacerbated by the current criminal justice system'.¹²⁸⁸

VARJ gave an example of how restorative justice processes can have positive benefits for members of disadvantaged cultural groups:

if a group of young muslims offend against members of a non-muslim community, this may inadvertently feed into the contemporary cultural assumptions surrounding that community as a consequence of 'the war on terror'. Charging, convicting and sentencing that young person under the current system serves to further isolate the community of the offenders from the community of the victims, perhaps contributing to prevailing misconceptions. A restorative conference, on the other hand, would give victims an opportunity to share with the offenders the impact of the offending upon them, and also to hear from the offenders about their experiences leading up to and contributing to their offending ... A common result is that the respective communities of victims and offenders come to realise that they in fact share a community and have a common interest in preserving the safety and connectedness within that community.¹²⁸⁹

¹²⁸⁵ Anglicare Victoria, *Submission no. 26*, 20; Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 31; Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander social survey 2002* (2004), 13-14; Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A partnership between the Victorian Government and the Koori Community* (2006), 12-13.

¹²⁸⁶ Anglicare Victoria, *Submission no. 26*, 22. See also Tiffany D Baffour, 'Ethnic and gender differences in offending patterns: Examining family group conferencing interventions among at-risk adolescents' (2006) 23(5-6) *Child and Adolescent Social Work Journal*, 557, 575.

¹²⁸⁷ Mark Longmuir, *Transcript of evidence*, above n 1236, 7.

¹²⁸⁸ VARJ, *Submission no. 28*, 20.

¹²⁸⁹ VARJ, *Submission no. 28*, 20-21.

Reverend Chambers of Anglicare also commented that restorative justice processes have a significant social inclusion potential: 'it really does build on that whole idea of how we bring people together rather than separate them into all these different groups which the justice system seems to facilitate'.¹²⁹⁰

Academics Laurence Sherman and Heather Strang have noted that restorative justice may not work in the same way for different people or different groups and that this phenomenon is not well understood.¹²⁹¹ In particular, research has suggested that the cultural identity of both the victim and offender has the potential to significantly impact on the outcomes of restorative justice interventions. For example, the Committee noted earlier in this chapter that Indigenous offenders have been found to have higher levels of re-offending following a conference than non-Indigenous offenders.¹²⁹² Another study found that victims were more likely to participate in restorative justice if both the offender and victim were white.¹²⁹³

It was noted earlier that both victims and offenders report consistently high rates of satisfaction with restorative justice processes, and an analysis of 53 studies of victim-offender mediation found that satisfaction levels were consistently high across participants from different cultures.¹²⁹⁴ However, the Committee recognises that caution needs to be exercised in measuring perceptions of fairness and satisfaction, as members of disadvantaged groups may have lower expectations about their rights and needs.¹²⁹⁵

The gender of participants may also affect the experience and outcomes of restorative justice processes but again there has been limited research in this area. It has been claimed that restorative justice has the potential to significantly benefit young women offenders, giving them a voice and treating them with respect,¹²⁹⁶ although Queensland academic Rachael Field has argued that the process risks accentuating power imbalances, thereby increasing the risk of unfair outcomes for female participants.¹²⁹⁷

Research in New Zealand has identified that males and females do have different experiences of restorative justice conferencing, with females less likely than males to report that the restorative justice process was fair, that they were shown forgiveness and that they were consulted in the process.¹²⁹⁸

¹²⁹⁰ Jonathan Chambers, *Transcript of evidence*, above n 1214, 3.

¹²⁹¹ Sherman and Strang, above n 1235, 8.

¹²⁹² Vignaendra and Fitzgerald, above n 1223, 13. Cf Baffour, above n 1286, 573, who found that in the US ethnicity was not a statistically significant indicator of re-arrest.

¹²⁹³ John Gehm, 'Mediated victim-offender restitution agreements: An exploratory analysis of factors related to victim participation' in Burt Galaway and Joe Hudson (eds.), *Criminal justice, restitution and reconciliation* (1990) Sage, 179. See also Umbreit, Vos and Coates, above n 1213, 3.

¹²⁹⁴ Umbreit, Vos and Coates, above n 1213, 3.

¹²⁹⁵ Sivasubramaniam and Goodman-Delahunty, above n 1281, 208.

¹²⁹⁶ Christine Alder, 'Young women offenders and the challenge for restorative justice' in Strang and Braithwaite (eds.), *Restorative Justice: Philosophy to practice* (2000) Ashgate Publishing Company, 117-118; Baffour, above n 1286, 572.

¹²⁹⁷ Rachael Field, 'Victim-offender conferencing: Issues of power imbalance for women juvenile participants' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003), 18.

¹²⁹⁸ Quoted in Christine Alder, 'Young women and the criminal justice system' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road Map for the Future Conference, Sydney, 1-2 December 2003), 5-6.

9.1.4 Outcomes for the state and society

Restorative justice interventions have the potential to provide benefits for all of society, including decreased crime rates, decreased justice costs, increased public confidence in the justice system and improved relationships in the community. The potential for restorative justice to reduce crime rates through reducing recidivism was discussed earlier in this chapter. Cost, increased public confidence in the justice system and the restoration of relationships are discussed further, below.

Cost

There is limited evidence about the cost-effectiveness of restorative justice interventions compared to traditional justice processes. The Committee also recognises that many potential restorative justice outcomes such as reduced recidivism and victim empowerment are social benefits that are difficult to quantify and often not evident in the short term.¹²⁹⁹

An international study which examined the cost-effectiveness of a range of criminal justice initiatives, found that youth restorative justice programs led to an 8.7% reduction in crime, cost \$US880 per participant to run and resulted in benefits to taxpayers and crime victims of \$US7829 per participant. This compared favourably to other interventions such as intensive parole supervision which cost \$US6460 and had no benefits to victims and taxpayers.¹³⁰⁰ The researchers did not find sufficient evidence to draw any conclusions in relation to the costs of adult restorative justice programs.

Australasian studies have not attempted to quantify the broader costs and cost savings of restorative justice programs. DHS informed the Committee that it provides \$4000 for each conference conducted in the YJGC Program.¹³⁰¹ While the most recent evaluation of the program did not consider the cost implications, an earlier evaluation found that a group conference cost approximately the same as a 12-month probation period (about \$3000).¹³⁰² An evaluation of an adult conferencing program in New Zealand also found similar costs between conferences and supervision orders.¹³⁰³

Restorative processes are relatively resource intensive. Processes such as screening, preparation, conferencing and post-conference follow-up may be seen as significantly adding to the costs of restorative justice programs, although these components are necessary to ensure their success.¹³⁰⁴ Neighbourhood Justice Centre

¹²⁹⁹ Piazza, above n 1284, 238.

¹³⁰⁰ Washington State Institute for Public Policy, *Evidence-based public policy options to reduce future prison construction, criminal justice costs, and crime rates* (2006), 9.

¹³⁰¹ Department of Human Services, above n 1231, 15.

¹³⁰² Success Works Pty Ltd, above n 1215.

¹³⁰³ Crime and Justice Research Centre and Triggs, Summary, above n 1209, paragraph 1.6.

¹³⁰⁴ Piazza, above n 1284, 238. See also John Hinchey, Manager, Restorative Justice Unit, Department of Justice and Community Safety, Australian Capital Territory, *Transcript of evidence* for the Inquiry into Restorative Justice, Standing Committee on Education, Training and Young People, Legislative Assembly for the Australian Capital Territory, Canberra, 25 October 2007, 179.

magistrate David Fanning observed that court-referred restorative justice programs may also consume more court time: ‘It is another case that is part heard, it is another case that needs allocation of court time, so it is not, as you might say, efficient because it does not deal with a case in a short amount of time ...’,¹³⁰⁵

To the extent that restorative justice programs divert offenders from custodial sentences, they are cost-effective. Academics Lawrence Sherman and Heather Strang writing in the United Kingdom (UK) context found that ‘At the pro rata cost of some £35,000 per year for each UK prison sentence, one offender kept out of prison for one year would cover the costs of more than 50 RJ [restorative justice] conferences ...’,¹³⁰⁶

Restorative justice programs have the potential to reduce demand for community services generally. Mr Peter Condliffe of VARJ referred the Committee to current research which ‘is showing there is likely to be considerable savings for the community in terms of psychiatric health and other services for victims as a result of participation in RJ-type processes’.¹³⁰⁷ Quantifying these savings is inherently difficult and is the subject of ongoing research.¹³⁰⁸

Restoring community relationships

Crime has been described as ‘a fracture of relationships within a community’ and restorative justice may be viewed as one way of rebuilding those relationships between individuals and communities.¹³⁰⁹ Anglicare’s submission to the Inquiry stated, ‘It is clear that the restorative justice model has a capacity to facilitate reconciliation far beyond the immediate circle of individual offenders and victims’.¹³¹⁰ Similarly, Youthlaw commented, ‘The process provides an opportunity for the offender to make amends to society as a whole ...’¹³¹¹

The Committee also received evidence that restorative justice plays an important role in community building. Reverend Chambers of Anglicare told the Committee:

That is the key that we see to the whole restorative justice process, that it will help to restore right relationships and which the current process really does not do because it keeps people at arm’s length, and people tend to then only know the stereotypes of, ‘These people who have done this to me’, whether they are a housebreaker or whatever the stereotype, and that gets in the way of both healing communities and it helps with the alienation that we see in our community ...¹³¹²

¹³⁰⁵ David Fanning, *Transcript of evidence*, above n 1244, 6.

¹³⁰⁶ Sherman and Strang, above n 1235, 23. See also Laycock, above n 1243, 4; McElrea, above n 1254, 20-21; Tony E Marshall, *Restorative justice: An overview* (1999) Home Office, United Kingdom, 21-22.

¹³⁰⁷ Peter Condliffe, *Transcript of evidence*, above n 1265, 6. See also Sherman and Strang, above n 1235, 8, 23; Marshall, above n 1306, 21.

¹³⁰⁸ Strang, Sherman, Angel, Woods, Bennett, Newbury-Birch and Inkpen, above n 1265, 304.

¹³⁰⁹ Goulding and Steels, above n 1264, 28.

¹³¹⁰ Anglicare Victoria, *Submission no. 26*, 22.

¹³¹¹ Youthlaw, *Submission no. 38*, 2.

¹³¹² Jonathan Chambers, *Transcript of evidence*, above n 1214, 2. See also Jesuit Social Services, *A policy discussion paper on the development of a young adult restorative justice conferencing program in Victoria* (2005), 7.

Community confidence in the justice system

Restorative justice initiatives may strengthen community confidence in the justice system as a whole. Mr McNamara from the Crime Victims Support Agency told the Committee that restorative justice ‘builds up community confidence that offenders are making amends for their wrongdoings’.¹³¹³ Reverend Chambers stated, ‘we believe it is in everybody’s interests not just to administer justice, which is generally seen as punishment, but to enable healing and reparation, and that will help make the justice system appear to be much more effective’.¹³¹⁴

However, the Committee notes that perceptions that restorative justice is a ‘soft option’ have the potential to decrease public confidence in the justice system. This issue is considered further in chapter 12.

9.1.5 The Committee’s findings

In this section the Committee has examined the outcomes of restorative justice processes for offenders, victims and the state and society as a whole. The evidence examined demonstrates that restorative justice has the *potential* to provide a range of positive outcomes for all of these groups, although the Committee acknowledges that there are significant evidence gaps and considerable contradictions between the results of research in some areas.

Based on the available evidence, the Committee has identified that the possible positive outcomes of restorative justice processes include:

- diverting offenders from entering or being drawn further into the criminal justice system
- making offenders accountable for their offending
- empowering victims, offenders and other participants in the process
- increasing satisfaction for victims with both processes and outcomes
- promoting outcome plans that address the underlying causes of offending
- increasing the likelihood of apologies and reparations
- restoring relationships and healing harms
- promoting confidence in the justice system as a whole.

In many of these areas, where carefully administered, restorative justice processes have the potential to provide benefits that exceed the outcomes of traditional criminal justice processes.

The Committee acknowledges that there are significant evidence gaps in relation to the outcomes of restorative justice. It concurs with the view expressed by Mr Longmuir of Anglicare who told the Committee:

¹³¹³ Noel McNamara, *Transcript of evidence*, above n 1244, 8. See also The Victorian Bar, *Submission no. 13*, 68; Marshall, above n 1306, 21; David Fanning, *Transcript of evidence*, above n 1244, 9.

¹³¹⁴ Jonathan Chambers, *Transcript of evidence*, above n 1214, 3.

What we need is a lot more data around outcome as opposed to output ... One of the things that we would be saying is that there needs to be a lot more empirical research and longitudinal research into the impact of restorative justice programs, basically.¹³¹⁵

In particular, the Committee acknowledges that there is a limited understanding of why restorative justice works and which process components and features contribute to its success and influence participant satisfaction levels.¹³¹⁶ Other evidence gaps identified by the Committee are the cost-effectiveness of restorative justice interventions, how conference features affect re-offending, and the outcomes of restorative justice processes for disadvantaged individuals and groups. In particular, there is a lack of research about the impact of gender and ethnicity on restorative justice processes and outcomes for both victims and offenders.

The Committee also notes the varying data about recidivism rates following participation in a restorative justice process. The need to collect more meaningful data in relation to recidivism is discussed in the next section.

Recommendation 45: Research on the outcomes of restorative justice processes

The Victorian Government should commission research to identify and measure the outcomes of restorative justice processes. This should include research on:

- the comparative outcomes of different restorative justice processes and interventions at different stages of the criminal justice process
- the features of restorative justice processes that contribute to their success
- the features of restorative justice processes that impact on re-offending
- the elements of restorative justice processes that affect participant satisfaction levels
- the outcomes of restorative justice processes for disadvantaged individuals and groups and, in particular, the impact of gender and ethnicity on restorative justice processes and outcomes for both victims and offenders, including on satisfaction levels
- the cost-effectiveness of restorative justice interventions, compared to other interventions.

¹³¹⁵ Mark Longmuir, *Transcript of evidence*, above n 1236, 5. See also Victorian Association for Restorative Justice, *VARJ colloquium (16 July 2008): Discussion outcomes* (2008), <www.varj.asn.au/pdf/080716_PrioritiesNotes.pdf>, viewed 10 February 2009, paragraph 14.

¹³¹⁶ Beven, Hall, Froyland, Steels and Goulding, above n 1238, 205; Hennessey Hayes, 'Assessing reoffending in restorative justice conferences' (2005) 38(1) *The Australian and New Zealand Journal of Criminology*, 77, 96; Sivasubramaniam and Goodman-Delahunty, above n 1281, 206.

9.2 Monitoring and evaluation

9.2.1 Current data collection in Victoria

Several stakeholders, including some restorative justice service providers, emphasised the importance of collecting quality data to assist the effective monitoring and evaluation of these programs. The Salvation Army – BYFS clearly articulated the rationale for data collection in its submission: ‘Quality data also provides evidence to develop, review and refine practices within programs, which in turn enables programs to continually maintain credibility and consistency in their service delivery’.¹³¹⁷ Similarly, the Law Institute of Victoria stated that good data collection practices ‘will ensure that programs can be appropriately evaluated and that effective programs can be extended and replicated in other areas’.¹³¹⁸

The Australian Bureau of Statistics collects a range of data on the criminal justice system nationwide but this does not include information about participation in restorative justice programs. Even when a defendant participates in a court-referred program and is subsequently sentenced by the court, data is not collected about the defendant’s participation in the restorative justice program.¹³¹⁹ Thus, data about restorative justice initiatives is currently collected on an ad hoc, program-by-program basis.

Youth Justice Group Conferencing Program

DHS requires YJGC Program providers to report against key performance indicators on a quarterly basis. The key performance indicators are:

- number of group conferences per annum
- percentage of conferences with victim participation
- percentage of referrals progressing to the group conference stage
- percentage of group conferences occurring within eight weeks of court referral
- percentage of outcome plans actioned prior to the return to court
- percentage receiving good behaviour bonds
- number of Koori young people subject to a group conference.¹³²⁰

This data is not publicly reported by DHS. Nor are service providers given any aggregated data with which to assess the performance of their service.¹³²¹

¹³¹⁷ The Salvation Army – BYFS, *Submission no. 9*, 9.

¹³¹⁸ Law Institute of Victoria, *Submission no. 20S*, 5. See also The Victorian Bar, *Submission no. 13*, 23.

¹³¹⁹ Australian Bureau of Statistics, *Criminal courts 2006-07*, 4513.0 (2008).

¹³²⁰ Department of Human Services, above n 1231, appendix 2.

¹³²¹ The Salvation Army – BYFS, *Submission no. 9*, 2.

Figure 27: Neighbourhood Justice Centre evaluation indicators¹³²²

Program objectives	Indicators
1. Improve victims' satisfaction with the justice process and assist in their recovery from crime.	<ul style="list-style-type: none"> • Satisfaction with conferencing process and outcomes, recognition of fairness of the conferencing process and opportunities for meaningful participation • No. of referrals to and uptake of victims' support services • Self reports and ratings by victims or victims' support services of the impact the conferencing process had on their recovery
2. Promote greater participation by offenders, victims, and families and support persons of victims and offender in the justice process.	<ul style="list-style-type: none"> • Participation by victims, offenders and community members in conferencing • Involvement of participants in development of agreements • Involvement of community members in monitoring agreements • Referral rates • Conversion rates
3. Promote the rehabilitation and reintegration of 18-25 year old offenders into the community.	<ul style="list-style-type: none"> • Agreements actioned and/or completed • No. and percent of offenders linked to treatment, social service or community-based service (as per NJC evaluation) • Formation of new networks with and/or support offered from community members through the conferencing process <p>Longer term</p> <ul style="list-style-type: none"> • Increase in diversion plan completion compared with comparison group • Reduction in breach rates for program participants compared with comparison group for intensive corrections orders, community-based orders and parole • Reduction in the frequency and serious of re-offending compared with comparison group
4. Increase offenders' awareness of the consequences of their offence for their victims and the community and encourage them to make reparation.	<ul style="list-style-type: none"> • Apologies given during the conferencing process • Offenders' awareness of impact on victim as measured during suitability assessment process and after conferencing process • Assessment by offender's case manager • Reparative elements of agreements implemented.
5. Promote the community's confidence in the justice system.	<ul style="list-style-type: none"> • As per item 3 above for victims • Offenders' and supporters' satisfaction with the conferencing process and outcomes, recognition of fairness of the conferencing process and opportunities for meaningful participation • Participants confidence in the justice system before and after the conferencing process

¹³²² Letter from Jodi Cornish, Community Engagement and Volunteer Coordinator, Neighbourhood Justice Centre, to Research Officer, Victorian Parliament Law Reform Committee, 7 April 2008.

In addition, DHS requires service providers to collect a range of data in relation to each case including the offender's age, gender and ethnicity, as well as information about the conference process such as the form of victim participation and the contents of the outcome plan.¹³²³

The Children's Court collects very limited data about youth justice group conferences. The court's president, Judge Grant, informed the Committee:

The court itself does not have a sophisticated record-keeping system. What we are able to do is to keep a record of the orders we make for defendants, but we do not have a sophisticated breakdown of the number of young people who we send off for group conferences.¹³²⁴

Young Adult Restorative Justice Group Conferencing Program

The Committee did not receive any information about how data will be collected in relation to the young adult conferencing program at the Neighbourhood Justice Centre.

However, the Committee was provided with the indicators against which the program will be evaluated over a three year period. These are set out in figure 27.

The Department of Justice advised that the evaluation has three components:

- process: Is the program being implemented in accordance with its aims, methods, procedures, operating guidelines and design?
- outcomes: What are the program outcomes?
- Cost-effectiveness: Have resources been used efficiently and is the cost reasonable in relation to the benefits?¹³²⁵

9.2.2 The role of government in data collection

The Committee's discussion paper asked stakeholders to comment on who should be responsible for collecting and reporting data in relation to restorative justice initiatives. In particular, the Committee requested views on the role of government in data collection and reporting.

Stakeholders responding to this question overwhelmingly supported government playing a central role in the collection of data about restorative justice. For example, the Victorian Bar stated:

the Government must be involved in the process to better gauge and assess future funding needs and allocations ... As most of these services are government funded

¹³²³ Department of Human Services, above n 1231, appendix 3.

¹³²⁴ Judge Grant, *Transcript of evidence*, above n 1206, 3.

¹³²⁵ Letter from Neil Twist, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009, 7-8.

it is imperative that Government take a leading role in monitoring and evaluating programs.¹³²⁶

Several stakeholders commented that a central data collection point provides consistency of data and methodology.¹³²⁷ The Law Institute of Victoria stated that this consistency was particularly important given the fragmentation of service delivery in the youth justice arena.¹³²⁸ The Salvation Army – BYFS’s submission emphasised the need for the data collected to be analysed and reported to enable service providers to draw comparisons with each other and assess their own performance. It suggested that there should be:

a centralised body established that evaluates and distributes data across specific programs such as the YJGCP and more broadly across all restorative justice service providers. For example the Department of Human Services Youth Services Branch could oversee the evaluation and delivery of more comprehensive data from each service provider that would then be distributed quarterly to service providers and possibly more broadly across other programs ... The development of specific roles ... such as resource officers or research officers who[se] primary role would be to conduct more in-depth evaluations of restorative justice programs over a longer period of time, and regularly collect, analyse, evaluate and distribute data across all restorative justice providers.¹³²⁹

The Committee agrees with stakeholder submissions that the Victorian Government, as the funder of restorative justice services in the adult and juvenile jurisdictions, should play a central role in data collection, analysis and reporting. While the Committee notes that the division of responsibility for the adult and juvenile programs between the Department of Justice and the Department of Human Services respectively creates a number of issues in relation to data collection, the Committee recommends that these can be dealt with through improved collaboration rather than by one department assuming responsibility for all data collection.

The Committee believes that there should be greater harmonisation of data collection including consistency of data collected, methodologies and reporting. In particular, the Department of Justice and the Department of Human Services should collaborate to develop consistent key performance indicators across the two existing programs. These could be applied to any other programs implemented in Victoria in the future, for instance any restorative justice programs provided in correctional institutions.

Recommendation 46: Consistent performance indicators and data collection methodologies for restorative justice programs

The Victorian Government should develop consistent performance indicators and data collection methodologies to apply to all government-funded restorative justice programs in Victoria.

¹³²⁶ The Victorian Bar, *Submission no. 13*, 25. See also VARJ, *Submission no. 28*, 9; Anglicare Victoria, *Submission no. 26*, 10-11; The Salvation Army – BYFS, *Submission no. 9*, 1-2.

¹³²⁷ Anglicare Victoria, *Submission no. 26*, 10-11.

¹³²⁸ Law Institute of Victoria, *Submission no. 20S*, 5. See also VARJ, *Submission no. 28*, 9.

¹³²⁹ The Salvation Army – BYFS, *Submission no. 9*, 6-7.

9.2.3 What kind of data should be collected?

The Committee's discussion paper noted the limited amount of data that is currently available in relation to the use, users and outcomes of restorative justice processes both in Victoria and nationwide.

The limitations of the data currently collected in relation to restorative justice programs in Victoria were noted by a number of stakeholders providing evidence to the Committee.¹³³⁰ Jesuit Social Services was the only stakeholder that expressed the view that the data currently collected is adequate, stating 'Victoria has very good program intervention information which is collected by the service providers except for the post conference stage'.¹³³¹

A number of specific data gaps were identified by stakeholders. These are discussed below.

User demographics

The National Criminal Justice Statistical Framework acknowledges that collecting information about offenders' demographic and personal characteristics is important in order to gain an understanding of how various factors affect offending and re-offending, as well as an individual's interaction with the justice system.¹³³²

The 2006 evaluation of the Victorian YJGC Program provided some demographic information about participants, such as gender and ethnicity, as did information provided to the Committee by DHS.¹³³³ This information is discussed in chapter 10.

Several stakeholder submissions stressed the need to collect more information on the socio-demographic characteristics of persons accessing group conferencing. The Salvation Army – BYFS informed the Committee 'there is very limited data available on the extent to which marginalised groups are accessing restorative justice programs'.¹³³⁴

Anglicare argued that there is a need to collect a wide range of information about program users to ensure that services are accessible. Anglicare's submission stated, 'Additional data would also address and analyse the capacity of people with mental illness, acquired brain injury and/or intellectual disabilities to access restorative justice services'.¹³³⁵

¹³³⁰ The Salvation Army – BYFS, *Submission no. 9*, 1-2; The Victorian Bar, *Submission no. 13*, 23 VARJ, *Submission no. 28*, 8; Law Institute of Victoria, *Submission no. 20S*, 5; Anglicare Victoria, *Submission no. 26*, 10.

¹³³¹ Jesuit Social Services, *Submission no. 35*, 5.

¹³³² Australian Bureau of Statistics, *National criminal justice statistical framework - Australia: Information paper* (2007), 28.

¹³³³ Effective Change Pty Ltd, above n 1208, 18-21; Department of Human Services, above n 1231, 7-9, figures 2, 3, 10, 11.

¹³³⁴ The Salvation Army – BYFS, *Submission no. 9*, 7.

¹³³⁵ Anglicare Victoria, *Submission no. 26*, 21.

Anglicare informed the Committee that a high proportion of young people accessing the program in Gippsland were victims of sexual abuse and that collecting data about this is ‘vital for longer-term strategies addressing issues such as family violence, antisocial behaviour, young offending, recidivism, and – ideally – prevention’.¹³³⁶ No other stakeholders raised these issues.

Participant satisfaction

There are currently no systems in place to routinely measure the satisfaction of participants in restorative justice programs in Victoria. The 2006 YJGC Program evaluation did not include an assessment of participant satisfaction, although earlier evaluations did examine this.¹³³⁷ Jesuit Social Services told the Committee that ‘satisfaction levels are not routinely followed up except by the service providers themselves’.¹³³⁸

The Committee notes that the evaluation of the Young Adult Restorative Justice Group Conferencing Program at the Neighbourhood Justice Centre will include a participant satisfaction component, as noted in figure 27, above.

A number of stakeholders supported surveying both victims and offenders to assess their levels of satisfaction with the process and, in particular, their perceptions of procedural fairness.¹³³⁹ The Salvation Army – BYFS suggested that it would be beneficial to conduct ‘in-depth semi-structured interviews with conference participants post-conference’.¹³⁴⁰

Three stakeholders stressed the particular importance of measuring victim satisfaction.¹³⁴¹

Recidivism

Several stakeholders emphasised the need for the collection of data about recidivism. This information is collected only by evaluations of the YJGC Program, which are conducted on an ad hoc basis. Ms Simmons of the Salvation Army – BYFS told the Committee that the key performance indicators, on which service providers report to DHS on a quarterly and annual basis, ‘are very limited in terms of gaining any understanding of recidivism’.¹³⁴² The Salvation Army – BYFS’s submission suggested that DHS should collect information about the ‘seriousness and frequency of re-offending’ and that it would be useful to conduct a longitudinal study of recidivism over a five-year period.¹³⁴³

¹³³⁶ Ibid, 21.

¹³³⁷ Markiewicz, Lagay, Murray and Campbell, above n 1215, vi, 110. See also Success Works Pty Ltd, above n 1215.

¹³³⁸ Jesuit Social Services, *Submission no. 35*, 6.

¹³³⁹ The Victorian Bar, *Submission no. 13*, 24; The Salvation Army – BYFS, *Submission no. 9*, 1; VARJ, *Submission no. 28*, 8.

¹³⁴⁰ The Salvation Army – BYFS, *Submission no. 9*, 6.

¹³⁴¹ Ibid, 1; Victoria Police, *Submission no. 12*, 1-2; John Griffin, *Transcript of evidence*, above n 1263, 9.

¹³⁴² Laura Simmons, *Transcript of evidence*, above n 1234, 8.

¹³⁴³ The Salvation Army – BYFS, *Submission no. 9*, 1, 6.

Victoria Police suggested that it would be useful to collect data on re-offending rates over two years and that recidivism rates of restorative justice participants should be compared to those of offenders dealt with using traditional justice approaches. In addition, Victoria Police’s submission emphasised the need to collect information about offence types as well as re-offending rates.¹³⁴⁴

Offender participation/non-participation

At present no information is available about offender participation and why offenders do or do not choose to participate in Victorian restorative justice programs. The Victorian Bar stated, ‘This information might be useful to determine how increased participation rates might be achieved’.¹³⁴⁵ In addition, Jesuit Social Services observed that no information is available about offenders who are denied access to the programs at the pre-assessment or assessment stages.¹³⁴⁶

Other data

Stakeholders also identified a range of other data that they felt should be collected to inform program development and refinement, including information about:

- point of referral
- participation rate of victims and others
- offender and victim follow-up, with an emphasis on the cost of crimes, including an analysis of ‘emotional restoration’ for victims
- sentencing outcomes
- program costs
- type of agreements reached and how they are implemented.¹³⁴⁷

9.2.4 Data collection issues

Data collection methodology

Several submissions to the Inquiry also emphasised the importance of sound data collection methodology. Anglicare’s submission stressed the need to ensure that data quality and integrity is maintained by having consistency ‘in terms of methodology, questions asked and means of acquiring such data’.¹³⁴⁸

Jesuit Social Services suggested that research and data collection about restorative justice initiatives should be innovative, ‘with both qualitative and quantitative

¹³⁴⁴ Victoria Police, *Submission no. 12*, 1-2. See also Sherman and Strang, above n 1235, 70.

¹³⁴⁵ The Victorian Bar, *Submission no. 13*, 24.

¹³⁴⁶ Jesuit Social Services, *Submission no. 35*, 5.

¹³⁴⁷ The Victorian Bar, *Submission no. 13*, 24; VARJ, *Submission no. 28*, 8-9; The Salvation Army – BYFS, *Submission no. 9.1*. See generally United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes* (2006), 82.

¹³⁴⁸ Anglicare Victoria, *Submission no. 26*, 10.

research methods used combined with action research methods that test new approaches to enhancing reachability of the program and access to new populations'.¹³⁴⁹

There are a range of points at which data about restorative justice interventions could be collected. The Victorian Association for Restorative Justice stated that there was value in collecting data at four points:

- the point of referral
- the point of contact with the restorative justice service provider
- the point of contact with the providers of complementary services to offenders (that is, youth justice, corrections and community corrections)
- the point of contact with the providers of complementary services to victims (for example, victim support agencies and family violence services).¹³⁵⁰

Privacy considerations

The submissions of the Victorian Privacy Commissioner and the Victorian Bar emphasised the importance of protecting participants' privacy. The Bar stated that in collecting data about restorative justice initiatives, 'privacy and civil liberty issues must be protected at all costs'.¹³⁵¹

Victorian public sector agencies are bound by the Information Privacy Principles contained in Schedule 1 of the *Information Privacy Act 2000* (Vic) ('IPA'). The Privacy Commissioner's submission to the Committee stated:

Under Information Privacy Principle ('IPP') 1 in Schedule 1 of the IPA, a Victorian public sector organisation must not collect personal information unless the information is necessary for one or more of its functions or activities. Information must be collected by lawful and fair means and not in an unreasonably intrusive way.

The collection of recorded information that does not identify an individual, or de-identified information, would pose no concerns under the IPA. If, however, recorded information was collected that does reasonably identify an individual, caution needs to be taken.

There is a distinction between collecting information which is *useful* and collecting information which is *necessary* ...

When collecting data relating to restorative justice programs, particular caution is required as collecting this data may inadvertently involve the collection of criminal history, which is considered sensitive information under the IPA and therefore subject to more stringent protection ... This type of data should only be collected in a de-identified form unless there is no reasonable alternative to the collection of identifiable data and it is impracticable for the organisation to seek consent ...¹³⁵²

¹³⁴⁹ Jesuit Social Services, *Submission no. 35*, 5.

¹³⁵⁰ VARJ, *Submission no. 28*, 10.

¹³⁵¹ The Victorian Bar, *Submission no. 13*, 25.

¹³⁵² Office of the Victorian Privacy Commissioner, *Submission no. 8*, 1.

Data management systems

One YJGC Program service provider was quite critical of DHS's current data management system, informing the Committee:

While DHS's existing client management system has the capacity for further integration of data (both quantitative and qualitative), case management and analysis, the NGO [non-government organisation] component of this system (CRISSP) is far from adequate as a data collection and reporting tool.¹³⁵³

The Committee did not receive any other evidence relating to the specific tools used to manage data collected about restorative justice programs.

National collaboration

The Committee noted earlier that there is no data collected nationally in relation to restorative justice programs and as a result it is difficult to draw comparisons between programs operating in different jurisdictions. The Victorian Bar and VARJ were the only stakeholders who commented on this issue, with the Bar suggesting that there should be 'cross-program and cross-jurisdictional analysis of program features, by reference to program outcomes ...'¹³⁵⁴

While commenting on the need for increased inter-governmental collaboration to develop nationally consistent restorative justice principles, NADRAC's submission did not address the issue of national data collection.¹³⁵⁵

9.2.5 The Committee's view

The Committee believes that a range of quality data is required to assess the effectiveness of existing restorative justice programs and inform policy and service development. It considers that there is a need to improve the collection and reporting of data in Victoria.

Stakeholders have brought to the Committee's attention a number of data gaps in relation to current restorative justice programs in Victoria. These include a lack of information about the demographic characteristics of participants, participant satisfaction levels, recidivism rates and the reasons for participation or non-participation in restorative justice programs. The Committee believes that the capture of this information will contribute to better assessment of the outcomes of restorative justice programs and help inform ongoing policy and program development.

In collecting data about restorative justice interventions, the Committee emphasises the value of consistent research methodologies and the importance of collecting data at a range of points, as well as using innovative methods.

¹³⁵³ Anglicare Victoria, *Submission no. 26*, 11.

¹³⁵⁴ The Victorian Bar, *Submission no. 13*, 68. See also VARJ, *Submission no. 28*, 9.

¹³⁵⁵ National Alternative Dispute Resolution Advisory Council, *Submission no. 255*, 10.

The Committee recognises the utmost importance of protecting the privacy of participants in restorative justice processes. It appreciates the sensitive nature of some of the information it has recommended be collected and emphasises that data collection needs to be undertaken sensitively and in keeping with privacy requirements.

The Committee also concurs with the view expressed by several stakeholders that data collected in relation to restorative justice programs should be regularly reported. This will provide for greater transparency in relation to restorative justice outcomes and enable comparisons to be drawn between different programs and service providers in Victoria, with a view to enhancing understanding of restorative justice and improving program delivery and policy development.

The Committee notes that one stakeholder raised a concern about the adequacy of DHS's current data management system, however it does not consider that it has sufficient evidence to make a recommendation about this issue. The Committee encourages both DHS and the Department of Justice to review their systems to ensure that they have appropriate capacity to collect and report the types of data that the Committee has recommended be collected.

The Committee recognises that there has been limited national collaboration to date in relation to the collection and analysis of information on restorative justice initiatives and recommends that the Victorian Government play a leadership role in establishing a national framework for collecting and reporting data on restorative justice programs. The performance indicators recommended earlier in this chapter should be consistent with the national framework for data collection and reporting.

Recommendation 47: Collecting and reporting data about restorative justice

The Victorian Government should collect and report on an annual basis a wide range of data about restorative justice processes and outcomes in Victoria in relation to both adults and young people. This should include data on user demographics, participant satisfaction, recidivism rates and the reason for participation or non-participation in restorative justice programs.

Recommendation 48: National framework for collecting and reporting data on restorative justice

The Victorian Government should work with other Australian jurisdictions and NADRAC to develop a national framework for collecting and reporting data on restorative justice programs.

9.2.6 Evaluations

The United Nations' guidelines on restorative justice emphasise the importance of ongoing research and evaluation to guide policy and program development. The guidelines provide that member states should:

promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes.¹³⁵⁶

Several stakeholders emphasised the need for ongoing evaluation of restorative justice initiatives in Victoria. For example, Mr Hayes of Jesuit Social Services told the Committee:

We believe that there should be ongoing evaluation of the [youth justice] group conferencing program and that funding should be provided for that evaluation to continue on. That means that data should be collected from the service providers that will assist in an ongoing evaluation rather than appointing someone every few years to do an evaluation of the program and to see how things are going.¹³⁵⁷

In general, stakeholders were positive about the evaluations of the YJGC Program conducted to date, acknowledging that they were methodologically sound.¹³⁵⁸ However, some stakeholders noted issues with the relatively small sample sizes.¹³⁵⁹

As noted in chapter 8, the YJGC Program will again be evaluated in 2009 and the Young Adult Restorative Justice Group Conferencing Program will be evaluated over a three-year period.¹³⁶⁰

The Committee acknowledges stakeholder concerns about the ad hoc nature of restorative justice program evaluations in Victoria. The Committee recommends that program evaluation should be regular and ongoing to ensure that programs are meeting their objectives and to identify any areas for improvement. The use of consistent methodologies will ensure that effective comparisons can be made between programs and evaluations undertaken at different times.

Recommendation 49: Evaluation of restorative justice programs

The Victorian Government should regularly evaluate all government-funded restorative justice programs.

¹³⁵⁶ United Nations Economic and Social Council, 'Basic principles on the use of restorative justice programmes in criminal matters (Resolution 2002/12)' in United Nations Office on Drugs and Crime (ed.), *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006), principle 22. See also Standing Committee on Education Training and Young People, ACT, *Restorative justice principles in youth settings: Final report* (2008) Parliament of the Australian Capital Territory, 28-30.

¹³⁵⁷ Tony Hayes, *Transcript of evidence*, above n 1218, 2. See also The Salvation Army – BYFS, *Submission no. 9*, 6-7; VARJ, *Submission no. 28*, 8-9; Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, research findings, and prospects' in Allison Morris and Gabrielle Maxwell (eds.), *Restorative justice for juveniles: Conferencing, mediation and circles* (2001) Hart, 80-81.

¹³⁵⁸ VARJ, *Submission no. 28*, 8.

¹³⁵⁹ Mark Longmuir, *Transcript of evidence*, above n 1236, 5; VARJ, *Submission no. 28*, 8; The Victorian Bar, *Submission no. 13*, 23-24.

¹³⁶⁰ Paul McDonald, *Transcript of evidence*, above n 1207, 4; Attorney-General Rob Hulls, 'Hulls launches young adult conferencing program' (Media release, 4 March 2008).

Chapter 10 – Improving current restorative justice programs in Victoria

This chapter examines the issues associated with the current provision of restorative justice in the Victorian criminal justice system. As the Youth Justice Group Conferencing (YJGC) Program is the sole non-pilot restorative justice conferencing process currently operating in the Victorian criminal justice system, the discussion primarily focuses on challenges identified by various stakeholders in the Inquiry who are involved in that program. The discussion focuses around the themes:

- a framework for the provision of restorative justice in Victoria
- offender referral and participation
- victim participation
- police understanding and support
- outcome plans
- issues associated with fragmented service delivery.

The Committee hopes that the knowledge gained from the YJGC Program can inform the development and implementation of other restorative justice programs in the Victorian criminal justice system. Thus, while the recommendations in this chapter relate specifically to the YJGC Program, the Committee also encourages the Victorian Government to consider these issues in the implementation of the pilot Young Adult Restorative Justice Group Conferencing (YARJGC) Program at the Neighbourhood Justice Centre (NJC) and any other restorative justice programs in Victoria.

10.1 A framework for restorative justice in Victoria

There is currently no coordinated approach to the provision of restorative justice programs in Victoria. As observed in chapter 8, the two restorative justice programs currently operating in Victoria, the YJGC Program in the Children's Court and the pilot YARJGC Program at the NJC, have evolved in different contexts and operate quite separately. While the Committee was informed that the development of the YARJGC Program has taken into account lessons from the YJGC Program, the young adult program has developed as a distinct program with quite separate goals and performance indicators.¹³⁶¹

The Department of Justice facilitates a Restorative Justice Advisory Group which includes representatives from the Department of Human Services (DHS), the Victorian Association for Restorative Justice (VARJ) and restorative justice service providers.¹³⁶² The main functions of this advisory group are to oversee the

¹³⁶¹ See figure 19 in chapter 8 and figure 27 in chapter 9.

¹³⁶² Letter from Neil Twist, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009, attachment, 4-6. See also Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008, 17.

implementation of the YARJGC Program and to advise on the development of a restorative justice framework for the Department of Justice.¹³⁶³

The Committee was not provided with details of the proposed contents of the restorative justice framework currently being developed by the Department of Justice.¹³⁶⁴ However, the Committee understands that this is a departmental rather than a whole-of-government framework and that it will not include the YJGC Program which is administered by DHS. The Department of Justice advised the Committee that it anticipates the framework will be launched in the first half of 2009.¹³⁶⁵

Divisions between adult and juvenile restorative justice programs are not unique to Victoria; most Australian states that have adult restorative justice programs maintain this distinction.¹³⁶⁶ However, a different approach is taken in the Australian Capital Territory, where one statute provides restorative justice processes that apply to both juvenile and adult offenders, although that legislation has not yet been implemented in relation to adult offenders.¹³⁶⁷

The Committee believes that there is a need for a more coordinated approach to restorative justice in Victoria. It believes that the underlying principles and philosophies are the same across both the adult and juvenile justice systems. Therefore, the Committee recommends that the Victorian Government develop a whole-of-government restorative justice framework. This should identify the overarching objectives and principles of restorative justice programs in Victoria. It should also provide a common framework for the practice of restorative justice in Victoria, including common approaches to data collection, evaluation and research (discussed in chapter 9); practitioner training and accreditation (discussed in chapter 11); required standards of practice (discussed in chapter 11); and engaging offenders and victims from particular groups, such as the Indigenous and culturally and linguistically diverse communities (discussed in this chapter).

This framework should also include a mechanism for sharing information, knowledge and lessons about restorative justice between and amongst the Government departments administering the programs and the agencies and individuals delivering them. This would enable issues, such as those raised in the remainder of this chapter in relation to the YJGC Program, to be shared and resolved in a consistent manner. The framework should also set out a strategy for increasing awareness – both among key stakeholders (discussed in this chapter) and the wider

¹³⁶³ Letter from Neil Twist, above n 1362, attachment, 6.

¹³⁶⁴ Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 29.

¹³⁶⁵ Letter from Neil Twist, above n 1362, attachment, 2.

¹³⁶⁶ For example, in New South Wales the youth justice conferencing program is run by the Department of Juvenile Justice, while the pre-sentence adult forum sentencing program is run by the Attorney General's Department and the post-sentence adult program is run by the Department of Corrective Services. See Department of Corrective Services, New South Wales, *Restorative Justice Unit: Information brochure*; NSW Attorney General's Department, *Forum sentencing: Facing up to crime*; Department of Juvenile Justice, New South Wales, *Youth justice conferencing policy and procedures manual* (2005).

¹³⁶⁷ *Crimes (Restorative Justice) Act 2004* (ACT).

community (discussed in chapter 12) – about restorative justice programs and restorative justice in general.

The Committee believes that this framework should clearly place restorative justice in the context of non-adversarial law and should contain links to the use of restorative practices in other sectors, particularly in schools. The Committee discusses the importance of developing a broader statewide restorative practices approach in chapter 12.

Recommendation 50: Restorative justice framework

The Victorian Government should develop a whole-of-government restorative justice framework that:

- sets out the overarching objectives and principles of restorative justice in Victoria
- provides a blueprint for the consistent practice of restorative justice in Victoria, including providing common approaches to data collection, evaluation and research; practitioner training and collaboration; required standards of practice; and engaging victims and offenders from particular groups (for example Indigenous and CALD)
- sets out a strategy for promoting restorative justice to key stakeholders and the general community
- establishes a mechanism for sharing information and knowledge about restorative justice generally between those involved in administering and delivering restorative justice programs.

10.2 Offender referral and participation

Offender participation rates in the YJGC Program vary between Children’s Court locations throughout Victoria. Figure 28 sets out data about offender referral to, and participation in, the program. The 2006 evaluation of the YJGC Program considered data from 2003-04 and 2004-05 and identified that referrals fell significantly short of the targets in those years. In both years the target number of conferences in metropolitan Melbourne was 85, while only 22 conferences were actually held in 2003-04 and 24 in 2004-05.¹³⁶⁸ In the Gippsland and Hume regions the number of conferences held in those years was closer to, and in some cases exceeded, their targets. In Gippsland in 2004-05 there were 38 conferences held, nearly double the target of 20.

The Committee notes that there has been a marked increase in the number of conferences held in metropolitan Melbourne from 2004-05, with 43 conferences held

¹³⁶⁸ Effective Change Pty Ltd, *Report on the juvenile justice group conferencing program* (2006) Department of Human Services, Victoria, 36; Department of Human Services, above n 1362, 7.

in 2006-07 and 55 conferences held in 2007-08.¹³⁶⁹ Information provided by DHS shows that referrals to the program are continuing to increase. DHS informed the Committee that in the first half of 2008-09 all group conference providers in the state received their highest number of referrals since the program's commencement.¹³⁷⁰

Figure 28: Young people referred to, and participating in, the Youth Justice Group Conference Program between 2004-05 and 2007-08¹³⁷¹

Region(s)	2004-05		2005-06		2006-07		2007-08	
	Ref.	Conf.	Ref.	Conf.	Ref.	Conf.	Ref.	Conf.
Metro Melbourne	30	24	30	28	40	43	61	55
Gippsland	40	38	26	25	35	30	44	35
Hume	17	16	12	12	34	32	25	25
Barwon South West	N/A	N/A	N/A	N/A	4	4	24	22
Loddon Mallee	N/A	N/A	N/A	N/A	5	5	13	12
Grampians	N/A	N/A	N/A	N/A	3	3	12	18
Total	87	78	68	65	121	117	179	167

Conferences are used in only a small proportion of total Children's Court criminal matters. In 2006-07 the Criminal Division of the Children's Court of Victoria finalised 17 308 matters, while only 117 conferences were held in that period.¹³⁷² Mr Peter Condliffe of VARJ suggested that Victoria's rate of youth justice conferencing lagged behind that of other states.¹³⁷³

This data raises two issues. Firstly, if there is capacity to increase referrals to the YJGC Program and, secondly, if there is scope to increase offender participation following referral. In considering these issues – both of which are discussed in the next section – the Committee is mindful of concerns about the need to ensure that offenders' rights are protected and that the integrity of the process is maintained. Therefore, the Committee's focus is on ensuring that suitable offenders have the opportunity to participate in restorative justice processes if they wish to do so.

¹³⁶⁹ Department of Human Services, above n 1362, 7; Letter from Jan Noblett, Director, Youth Services and Youth Justice, Department of Human Services, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 6 February 2009.

¹³⁷⁰ Letter from Jan Noblett, above n 1369.

¹³⁷¹ Department of Human Services, above n 1362, 7; Letter from Jan Noblett, above n 1369.

¹³⁷² Children's Court of Victoria, *Annual report 2006-2007* (2008), 16; Department of Human Services, above n 1362, 7. See also Findlay McRae, Director, Legal Services Department, Victoria Police, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹³⁷³ Peter Condliffe, President, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 2. See also The Victorian Bar, *Submission no. 13*, 54; VARJ, *Submission no. 28*, 12.

10.2.1 Increasing referral to the YJGC Program

Referral by magistrates

The Children’s Court magistrates act as the gatekeepers of the YJGC Program. As noted in chapter 8, a magistrate may defer sentencing to enable a young person to participate in a group conference in matters where the magistrate is considering imposing a sentence of probation or a youth supervision order.¹³⁷⁴ Referral to a conference is subject to a suitability assessment by a DHS youth justice court advice worker, conducted in accordance with the *Youth Justice Group Conferencing program guidelines* (‘the DHS guidelines’).¹³⁷⁵ In addition, the young person must agree to participate.¹³⁷⁶

Evidence provided by program service providers suggested that referrals to the YJGC Program are currently ad hoc and inconsistent both within courts and across court locations. According to Jesuit Social Services, ‘Certain magistrates routinely use the program ... Other courts fail to make use of the program’.¹³⁷⁷ Mr Mark Longmuir of Anglicare told the Committee that in his organisation’s experience not all appropriate cases are referred to group conferencing:

Some members of the magistracy will embrace group conferencing very robustly, and others will not ... There have been many instances on the ground where our worker in court would have thought this is a prime group conferencing kind of case, but the magistrate will not allow it to go ahead. There is not a lot of scope for there to be much discussion around that in the court, particularly from our workers’ point of view. We are not recognised as an officer of the court, so we cannot necessarily stand up and say, ‘We think it should’ ...¹³⁷⁸

This problem is not unique to Victoria. In a study of restorative justice programs throughout Australia, academic Heather Strang observed that courts have ‘no imperative for referral ... nor any external oversight as to whether they do so or not’.¹³⁷⁹

The following section considers a number of options for increasing the referral of appropriate matters to the YJGC Program. The Committee notes that the pilot young adult program at the NJC should not encounter issues with court referrals as the NJC court is a single-magistrate court and restorative justice approaches are one of the

¹³⁷⁴ *Children, Youth and Families Act 2005* (Vic) ss 414, 415(1).

¹³⁷⁵ Department of Human Services, Victoria, *Youth Justice Group Conferencing Program guidelines* (‘YJGC Program guidelines’) (2007), 6-7, 31-33; Department of Human Services, Victoria, *Youth Justice Group Conferencing Program: Suitability assessment guide*, supplementary evidence received 22 February 2008.

¹³⁷⁶ *Children, Youth and Families Act 2005* (Vic) s 414(1).

¹³⁷⁷ Jesuit Social Services, *Submission no. 35*, 6. See also The Salvation Army – Brayton Youth and Family Services (BYFS), *Submission no. 9*, 8; Mark Rumble, Director, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 2; Anglicare Victoria, *Submission no. 26*, 12.

¹³⁷⁸ Mark Longmuir, Manager, Community Services, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 6.

¹³⁷⁹ Heather Strang, *Restorative justice programs in Australia: A report to the Criminology Research Council* (2001), 35.

court's fundamental principles.¹³⁸⁰ However, if group conferencing is rolled out to adults or young adults more broadly across the state, the Committee envisages that consistency of referrals will potentially be an issue and the approaches suggested here will be equally applicable.

Educating magistrates

Two of the YJGC Program service providers participating in this Inquiry identified a need to provide education and training to magistrates about the program and about restorative justice generally.¹³⁸¹ In addition, VARJ suggested that there should be 'mandatory training' for all relevant judicial officers.¹³⁸² However, none of these stakeholders provided any details about the type of training they felt was required.

The United Nations' handbook on restorative justice encourages member states to provide training to the judiciary as '[t]he legal training of judges and magistrates does not always expose them to the principles and practices of restorative justice'.¹³⁸³ The Monash University Faculty of Law's submission also highlighted this issue:

Traditional legal education has prepared lawyers and judges to act in an adversarial context. The interpersonal skills necessary to engage in therapeutic, collaborative, team based and holistic processes have not been a part of their training. While courses in mediation and other forms of alternative dispute resolution have begun to emerge and to be undertaken by members of the legal profession, there has been no comprehensive approach to continuing legal and judicial education that includes all of the principal aspects of non-adversarial processes available today.¹³⁸⁴

Heather Strang has suggested that, where the courts have a discretion to refer offenders to restorative justice programs (such as the YJGC Program), judicial officers require ongoing information and training about restorative justice to enable them to make informed decisions about appropriate referrals.¹³⁸⁵

DHS informed the Committee that it distributed posters and brochures about the program to the Children's Court venues throughout the state, although this material is not specifically targeted at magistrates.¹³⁸⁶ The Committee did not receive any information about education currently provided to Children's Court magistrates about the YJGC Program and restorative justice generally. However, the Committee notes that the Judicial College of Victoria did not provide any training on restorative justice in 2008 and nor is any scheduled for 2009.¹³⁸⁷

¹³⁸⁰ *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 1.

¹³⁸¹ Anglicare Victoria, *Submission no. 26*, 25; The Salvation Army – BYFS, *Submission no. 9*, 8.

¹³⁸² VARJ, *Submission no. 28*, 12.

¹³⁸³ United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes* (2006), 64.

¹³⁸⁴ Monash University Faculty of Law, *Submission no. 7*, 5.

¹³⁸⁵ Strang, above n 1379, 39.

¹³⁸⁶ Letter from Jan Noblett, above n 1369.

¹³⁸⁷ Judicial College of Victoria, *2009 prospectus: Excellence in judicial education* (2009); Judicial College of Victoria, *Annual report 2007-2008* (2008).

The Committee believes that the Children’s Court magistrates’ awareness of, and commitment to, the YJGC Program is integral to the program’s success. Given that the YJGC Program is now operating statewide, the Committee believes there is a need to ensure that all Children’s Court magistrates fully understand the program including its aims, underlying philosophy, the benefits of participation, the process and the suitability criteria. Therefore, the Committee recommends that magistrates receive information and training on an ongoing basis with a view to ensuring that all appropriate cases are referred to the YJGC Program.

Recommendation 51: Educating Children’s Court magistrates about the YJGC Program

The Judicial College of Victoria should consider providing, in collaboration with the Department of Human Services, information and training for Children’s Court magistrates about the YJGC Program, including its aims, underlying philosophy, the benefits of participation, the process and the suitability criteria.

Mandatory referral

Participation rates in restorative justice programs are generally lower where the judicial officer has discretion whether or not to refer an offender to the program.¹³⁸⁸ Some magistrates appear reluctant to refer offenders to restorative justice programs of their own accord, with participation usually negotiated by the young person, their lawyer and their family.¹³⁸⁹

Another method of increasing referrals to restorative justice programs is to make it mandatory for magistrates to refer all matters. Such a model operates in New Zealand where the Youth Court is required to refer to a group conference all matters where a young person ‘does not deny’ a charge. However, the convenor does have some discretion not to convene a conference in cases that are not suitable.¹³⁹⁰

An alternative model operates in Queensland where the court is required to *consider* referring a young offender to a conference if he or she has been found guilty of an offence.¹³⁹¹

Many stakeholders viewed mandatory referral to conferencing as contrary to the fundamental principle that participation in conferences should be voluntary. For example, Anglicare’s submission stated:

¹³⁸⁸ Crime and Justice Research Centre, Victoria University, and Sue Triggs, Ministry of Justice, New Zealand, *New Zealand court-referred restorative justice pilot evaluation* (2005), paragraph 3.8.

¹³⁸⁹ Jesuit Social Services, *A policy discussion paper on the development of a young adult restorative justice conferencing program in Victoria* (2005), 18.

¹³⁹⁰ *Children, Young Persons, and Their Families Act 1989* (NZ) ss 246, 248.

¹³⁹¹ *Juvenile Justice Act 1992* (Qld) s 161.

To apply mandatory referrals ... would be to undermine the restorative justice ethic reflecting a willingness of participants to undertake group conferencing voluntarily and without duress.

In all cases legislative and judicial processes must be flexible enough to permit the assessment of cases on their individual merits. Mandatory referral requirements would limit this capacity.¹³⁹²

Stakeholders identified a range of issues associated with a requirement that courts refer cases to conferences, including the possibility of offenders not taking responsibility for their offending and the risk of victim re-victimisation.¹³⁹³

However, VARJ suggested that these issues could be addressed by a model under which:

all guilty pleas [are] considered for referral to a restorative justice program. The people best placed to determine suitability of a case for conferencing are the administrators and convenors of restorative justice programs. Guidelines could ensure some consistency in the types of cases that are considered to be suitable for conferencing.¹³⁹⁴

While supporting the model proposed by VARJ, Jesuit Social Services' submission warned of the risks of 'overload, routinization and bureaucratization of the program'.¹³⁹⁵

The Committee recognises the issues raised by mandatory referral to conferencing. It agrees that a detailed assessment of the potential suitability for referral of each offender should be conducted and that the DHS court advice worker is best placed to conduct this assessment. The Committee received no evidence indicating that the current program suitability criteria, contained in the DHS guidelines, were not operating effectively, and considers that these criteria should continue to be used in assessing an offender's suitability to participate in the YJGC Program.

The Committee concludes that educating magistrates about the program and restorative justice generally as suggested above is a more appropriate method of increasing referrals to the program.

The Committee believes that referral rates to the YJGC Program should be monitored. If there are continuing low referral rates, consideration should be given to

¹³⁹² Anglicare Victoria, *Submission no. 26*, 18. See also Federation of Community Legal Centres Victoria, *Submission no. 39*, 3; Law Institute of Victoria, *Submission no. 20S*, 6-7; The Salvation Army – BYFS, *Submission no. 9*, 4-5; Youthlaw, *Submission no. 38*, 5; United Nations Economic and Social Council, 'Basic principles on the use of restorative justice programmes in criminal matters (Resolution 2002/12)' in United Nations Office on Drugs and Crime (ed.), *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006), principles 7 and 12. Cf The Victorian Bar, *Submission no. 13*, 59-60; VARJ, *Submission no. 28*, 16.

¹³⁹³ The Salvation Army – BYFS, *Submission no. 9*, 4-5; VARJ, *Submission no. 28*, 16; Law Institute of Victoria, *Submission no. 20S*, 6-7. See generally Marco Piazza, 'Mandatory victim offender mediation - Valuable fruit or rotten tomato' (2006) 17 *Australian Dispute Resolution Journal*, 233.

¹³⁹⁴ VARJ, *Submission no. 28*, 27, 17. See also The Victorian Bar, *Submission no. 13*, 59; Piazza, above n 1393, 239.

¹³⁹⁵ Jesuit Social Services, *Submission no. 35*, 6.

the introduction of legislation based on the Queensland model. This would require magistrates to consider referring all matters where an offender has pleaded guilty or been found guilty to an assessment of suitability to participate in a group conference.

Referral guidelines

Several stakeholders suggested that inconsistent referrals to the YJGC Program could be addressed by the introduction of referral guidelines for magistrates. For example, Mr Findlay McRae of Victoria Police told the Committee, ‘we think guidelines for referral would be useful for the magistracy and for the judiciary, because it promotes consistency and predictability for other players in the court system ...’¹³⁹⁶ VARJ, on the other hand, stated that its preferred model would be the mandatory referral of all guilty pleas for a suitability assessment by the court advice worker.¹³⁹⁷

The submission of the Salvation Army – Brayton Youth and Family Services (Salvation Army – BYFS) suggested that a requirement for magistrates to clearly articulate their reasons when referring an offender to the program would be more useful than referral guidelines.¹³⁹⁸ This is consistent with suggestions made by stakeholders interviewed as part of the recent evaluation of a conferencing program for young adults in New South Wales.¹³⁹⁹

The Committee believes that referrals to the YJGC Program should continue to be made in line with the suitability criteria outlined in the DHS guidelines. It is of the view that the approach recommended above of increased education for Children’s Court magistrates, particularly about the criteria, will help ensure that appropriate referrals are made. Therefore, the Committee does not believe that judicial referral guidelines are required.

The role of legal representatives

Several stakeholders commented that legal representatives may also have a significant influence on whether a matter is referred to a YJGC Program conference. Noting that some magistrates are more likely to refer to the program than others, Jesuit Social Services also acknowledged, ‘Certain lawyers make more effective use with some of their clients’.¹⁴⁰⁰

The DHS guidelines state that the conference convenor may consult with a young person and their legal representatives prior to a court hearing to discuss a potential

¹³⁹⁶ Findlay McRae, *Transcript of evidence*, above n 1372, 4. See also Anglicare Victoria, *Submission no. 26*, 25.

¹³⁹⁷ VARJ, *Submission no. 28*, 27, 12.

¹³⁹⁸ The Salvation Army – BYFS, *Submission no. 9*, 3.

¹³⁹⁹ Julie People and Lily Trimboli, *An evaluation of the NSW Community Conferencing for Young Adults pilot program* (2007) NSW Bureau of Crime Statistics and Research, x, 50.

¹⁴⁰⁰ Jesuit Social Services, *Submission no. 35*, 6. See also Anglicare Victoria, *Submission no. 26*, 12.

referral to a group conference.¹⁴⁰¹ Further, the young person's legal practitioner is required to attend the conference.¹⁴⁰²

DHS has produced an information sheet for lawyers about the YJGC Program and the role of lawyers in the conference process.¹⁴⁰³ In addition, DHS distributed posters and brochures about the program to Victoria Legal Aid officers throughout the state.¹⁴⁰⁴

The Law Institute of Victoria emphasised the importance of offenders receiving legal advice prior to deciding whether to participate in a restorative justice program. The Institute's submission stated: 'This ensures that offender participants are able to make fully informed decisions about their options and the consequences of their involvement in the program'.¹⁴⁰⁵ This is also consistent with recognised international best practice.¹⁴⁰⁶

However, if a young person's lawyer does not fully understand the YJGC Program and its underlying rationale, the young person may not always receive appropriate advice. International research has identified that sometimes offenders receive legal advice that they should not participate in restorative justice interventions, even when it may be appropriate for them to do so.¹⁴⁰⁷

Magistrate David Fanning of the NJC agreed that understanding among the legal profession of restorative justice generally and, in particular, of the YJGC Program, was limited. However, he observed that 'the Children's Court is a fairly discrete area. It has a limited number of practitioners who regularly appear in it, so it is not part of the mainstream of the criminal law either at the Bar or among solicitors'.¹⁴⁰⁸

Evaluations in other jurisdictions have also identified the need to educate lawyers about restorative justice programs. For example, judges interviewed as part of the evaluation of New Zealand's pilot court-referred adult restorative justice program emphasised the need for 'better communication with the legal profession, the promotion of restorative justice by the Law Society, [and] more education of lawyers ...',¹⁴⁰⁹

¹⁴⁰¹ Department of Human Services, YJGC Program guidelines, above n 1375, 6.

¹⁴⁰² *Children, Youth and Families Act 2005* (Vic) s 415(6). Note that in the pilot young adult program at the NJC, the offender's legal representative is not required to attend the conference: see Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)*, 38.

¹⁴⁰³ Department of Human Services, Victoria, *Youth justice group conferencing: Information for legal representatives* (2007).

¹⁴⁰⁴ Letter from Jan Noblett, above n 1369.

¹⁴⁰⁵ Law Institute of Victoria, *Submission no. 20S*, 5.

¹⁴⁰⁶ United Nations Economic and Social Council, above n 1392, principle 12.

¹⁴⁰⁷ Mark Umbreit, B Vos and R B Coates, *Restorative justice dialogue: Evidence-based practice* (2006) Center for Restorative Justice and Peacemaking, 3.

¹⁴⁰⁸ David Fanning, Magistrate, Neighbourhood Justice Centre, *Transcript of evidence*, Melbourne, 4 March 2008, 7.

¹⁴⁰⁹ Crime and Justice Research Centre and Triggs, above n 1388, paragraph 3.8.

The Committee agrees with stakeholder submissions that improving lawyers' knowledge and understanding of the YJGC Program will contribute to more informed decisions about the appropriateness of participation, potentially increasing access to the program for young offenders. The Committee believes that training and information should be provided to lawyers practising in the Children's Court of Victoria. This should include information about the program's aims, its underlying philosophy, the benefits of participation, the process and the suitability criteria. This information and training should be developed in consultation with the Law Institute and the Victorian Bar.

The Committee considers the education of lawyers in non-adversarial approaches in general in chapter 12.

Recommendation 52: Educating lawyers about the YJGC Program

The Victorian Government should work with professional bodies to provide regular training and information for lawyers about the YJGC Program, including its aims, its underlying philosophy, the benefits of participation, the process and the suitability criteria.

The role of DHS court advice workers

As noted earlier, participation in a group conference is usually instigated by the young person, their lawyer or the young person's family. Jesuit Social Services' submission suggested that DHS youth justice court advice workers could adopt 'a more proactive advisory function that requires them to consider this (group conferencing) option in all matters where a supervisory order is being considered by the Magistrate'.¹⁴¹⁰ No other stakeholders commented on the role of DHS youth justice court advice workers.

A proactive approach has proven to be an effective strategy in some other jurisdictions. For instance, referrals to restorative justice 'reparative mediations' in Western Australia increased significantly when the program administrators carried out an 'aggressive awareness raising campaign including staffing the courts dealing with guilty pleas so that the mediation option was always very much in the mind of those involved in the sentencing process'.¹⁴¹¹

The Committee did not receive sufficient evidence to make a recommendation about this issue, but encourages DHS to consider the role of youth justice court advice workers and identify strategies for these workers to promote and encourage participation in the YJGC Program.

¹⁴¹⁰ Jesuit Social Services, *Submission no. 35*, 7.

¹⁴¹¹ Andrew Goldsmith, Mark Halsey, and David Bamford, *Adult restorative justice conferencing pilot: An evaluation: Final report* (2005) South Australian Courts Administration Authority, 11.

10.2.2 Increasing offender participation in the YJGC Program

In chapter 9 the Committee noted that very little is known about the reasons for offender participation or non-participation in restorative justice programs and recommended more research in this area.

The *Children, Youth and Families Act 2005* (Vic) requires the young person to agree to participate in a conference before the court can defer sentencing to allow a conference to be held.¹⁴¹² Following the deferral the young person may decline to participate in the conference, in which case the matter is returned to court for sentencing.¹⁴¹³

In this section the Committee considers a range of strategies for encouraging the participation of suitable offenders in the YJGC Program. These issues will also be relevant in encouraging offender participation in the YARJGC Program and any other restorative justice processes that may be implemented in Victoria.

Provision of information about the program

A number of stakeholders suggested that providing information about the YJGC Program to potentially suitable young offenders at an early stage will encourage their participation. The Salvation Army – BYFS’s submission stated that where ‘accurate information is imparted to the offender there is less chance that the offender will decline participation in the conference’.¹⁴¹⁴ Ms Laura Simmons of the Salvation Army – BYFS shared a case study with the Committee that demonstrated how a full explanation of the conference process and the role of the convenor encouraged two young offenders who were initially hesitant to participate in a conference (see case study 9 in chapter 9).¹⁴¹⁵

The Victorian Bar’s submission emphasised that ‘greater exchange of information to potential participants may assist in alleviating fear or discomfort on the offender’s part’.¹⁴¹⁶ Similarly the Law Institute of Victoria suggested that providing more detailed information, including case studies and testimonials, might encourage offenders to participate.¹⁴¹⁷

The DHS guidelines suggest that, prior to the young person’s appearance in court, the convenor may consult with young people and their legal representatives to clarify the program’s expectations, discuss the suitability of the case and address any

¹⁴¹² *Children, Youth and Families Act 2005* (Vic) s 414(1)(c). Note that in the pilot young adult program at the NJC the offender must also agree to participate in a conference: see Neighbourhood Justice Centre, above n 1402, 8.

¹⁴¹³ Department of Human Services, YJGC Program guidelines, above n 1375, 15; *Children, Youth and Families Act 2005* (Vic) s 416(4).

¹⁴¹⁴ The Salvation Army – BYFS, *Submission no. 9*, 3.

¹⁴¹⁵ Laura Simmons, Program Co-ordinator, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 3-7.

¹⁴¹⁶ The Victorian Bar, *Submission no. 13*, 54.

¹⁴¹⁷ Law Institute of Victoria, *Submission no. 20S*, 5-6.

concerns about the conference process.¹⁴¹⁸ In addition, the guidelines set out the matters to be covered during the convenor's initial contact with potential conference participants, including the offender. The convenor is required to:

- explain the purpose of the conference and the conference process
- explain the benefits of attendance
- explain the role of a police officer at the conference as an information provider, not as a prosecutor or co-convenor
- ascertain any special specific needs of participants
- emphasise the confidentiality of matters discussed at the conference.¹⁴¹⁹

The Victorian Government has also published a plain-language brochure and a fact sheet that provide information to young offenders about the YJGC Program and the conference process.¹⁴²⁰

The Committee agrees with evidence received that the provision of information to young offenders prior to their participation in the YJGC Program is important to ensure they fully understand the program and the consequences of participation. The Committee did not receive any evidence about the adequacy of information currently provided to offenders about the program. However, it is clear that convenors play a key role in providing information and explanations to young people and the Committee believes that this should be emphasised in training received by convenors. Training is discussed more in chapter 11.

Rewards for participation

The Children, Youth and Families Act provides an incentive for offenders to participate in the conference process, stipulating that if a young person has participated in a conference and agreed to the outcome plan, the court must impose a sentence that is less severe than if the young person had not participated in the conference.¹⁴²¹ The legislation also provides that a young person who has been referred to a conference cannot be given a harsher sentence because they did not participate.¹⁴²²

¹⁴¹⁸ Department of Human Services, YJGC Program guidelines, above n 1375, 6.

¹⁴¹⁹ Ibid, 10. Note, there are similar requirements in relation to explaining the conference process to offenders participating in the pilot young adult program at the NJC: see Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)* (2008), 34.

¹⁴²⁰ Department of Human Services, Victoria, *Youth justice group conferencing: Information for young people*; Department of Human Services, Victoria, *Youth justice group conferencing: Information for the young person - fact sheet*. Note, an information sheet has also been prepared to inform offenders about the pilot young adult program at the NJC: see Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program: Information for a young adult who is appearing at the Neighbourhood Justice Centre*.

¹⁴²¹ *Children, Youth and Families Act 2005* (Vic) s 362(3).

¹⁴²² *Children, Youth and Families Act 2005* (Vic) s 362(4).

Many stakeholders supported the current legislative arrangements, stating that they provide an effective incentive for offenders to participate in the YJGC Program.¹⁴²³ The Salvation Army – BYFS emphasised:

It is important to note that the young person needs to have actively participated and agreed and actioned their outcome plan, the Court will receive a report following the conference which details what took place at the conference and includes the outcome plan.¹⁴²⁴

The Salvation Army – BYFS’s submission pointed out that there may be double jeopardy issues where young people ‘have actively participated in the conference and return to court for sentencing and are given a supervisory order’.¹⁴²⁵ The submission suggested that magistrates should be required to state how the offender’s participation in a group conference has been taken into consideration in the sentencing decision. The Committee did not receive any other evidence on this issue.

While most submissions advocated rewards for participation in a conference rather than sanctions for non-participation, VARJ’s suggested:

Refusal to participate should be construed as an assertion that the offender is disinterested in the impact of the offence upon the victim and the community and that the offender is unwilling to take responsibility for repairing the harm caused by that impact.¹⁴²⁶

Jesuit Social Services’ submission specifically opposed VARJ’s suggestion, as did many others implicitly through their opposition to the imposition of sanctions for non-participation in a conference.¹⁴²⁷ The Law Institute of Victoria commented that ‘The existence of sanctions for failure to participate restricts the free participation of individuals in the process and would have similar impacts as the mandatory referral of offenders’.¹⁴²⁸

The Committee believes that the current legislation, whereby participation is rewarded through sentencing but non-participation is not sanctioned, is functioning effectively to encourage offenders to participate in conferences. It is important that offenders are fully aware of the potential benefits of participating in the conference process. Thus it is essential that offenders receive appropriate information from the DHS youth justice court advice worker, the convenor and their legal representative.

¹⁴²³ Federation of Community Legal Centres Victoria, *Submission no. 39*, 3; Youthlaw, *Submission no. 38*, 5; Victorian Association for Restorative Justice (VARJ), *The Victorian Association for Restorative Justice*, <<http://varj.asn.au/>>, viewed 27 February 2009, 18; Anglicare Victoria, *Submission no. 26*, 18; Noel McNamara, Chief Executive Officer, Crime Victims Support Association, *Transcript of evidence*, Melbourne, 25 February 2008, 7; Jesuit Social Services, *Submission no. 35*, 7; The Victorian Bar, *Submission no. 13*, 60; Findlay McRae, *Transcript of evidence*, above n 1372, 3.

¹⁴²⁴ The Salvation Army – BYFS, *Submission no. 9*, 5.

¹⁴²⁵ *Ibid.*, 3. Double jeopardy refers to prosecution for an offence for which the offender has already been prosecuted.

¹⁴²⁶ VARJ, *Submission no. 28*, 17.

¹⁴²⁷ Jesuit Social Services, *Submission no. 35*, 7. See also The Salvation Army – BYFS, *Submission no. 9*, 5; Victoria Police, *Submission no. 12*, 3; The Victorian Bar, *Submission no. 13*, 60; Youthlaw, *Submission no. 38*, 5; Anglicare Victoria, *Submission no. 26*, 18; Law Institute of Victoria, *Submission no. 20S*, 7; Australian Law Reform Commission, *Same crime, same time: Sentencing of federal offenders* (2006), 197.

¹⁴²⁸ Law Institute of Victoria, *Submission no. 20S*, 7.

Indefinite referral to a conference

Jesuit Social Services' submission stated that a system whereby the court has the option of not requiring the young person to return to the court if the conference is successful and the outcome plan is fulfilled 'would provide more incentive for some families and young people to take up the option and complete the conference and outcome plan'.¹⁴²⁹ Under Jesuit Social Services' proposed model, the court would still receive a report on the conference and the convenor would be able to refer the matter back to court if it was thought that was appropriate, for example if the young person does not comply with the outcome plan.

Such a model exists in Queensland. In that state, when a young offender is found guilty, the court has the option of making an indefinite referral to a conference (in which case the matter does not go back to court for sentencing) or a referral to a conference before sentence.¹⁴³⁰

No other stakeholders commented on this issue.

The Committee notes that in Queensland group conferences may be used in relation to all offences committed by young offenders, including less serious offences. However, in Victoria conferences are currently only available for offenders who have committed more serious offences – those where the court is considering imposing a sentence of probation or a youth supervisory order.¹⁴³¹ The Committee believes that, in the case of these more serious offences, it is appropriate for the matter to return to court for sentencing. In the Committee's view, the current system of rewarding conference participants through a lesser sentence, as discussed above, provides an appropriate incentive for young offenders to participate in conferences.

Mandatory participation

Another way of increasing conference participation rates is to mandate the offender's participation. When considering the suitability of a young person to participate in the program, the DHS youth justice court advice worker considers a range of factors including the young person's level of motivation to attend and participate.¹⁴³² In addition, there is a legislative requirement that the young person consent to participate in the conference.¹⁴³³

¹⁴²⁹ Jesuit Social Services, *Submission no. 35*, 7.

¹⁴³⁰ *Juvenile Justice Act 1992* (Qld) s 161(3).

¹⁴³¹ *Children, Youth and Families Act 2005* (Vic) s 415(1). See also Judge Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 3.

¹⁴³² Department of Human Services, YJGC Program guidelines, above n 1375, 6-7; Department of Human Services, Victoria, *Youth justice group conferencing program: Suitability assessment guide*, supplementary evidence received 22 February 2008.

¹⁴³³ *Children, Youth and Families Act 2005* (Vic) s 414(1).

Not all Australian youth courts require the offender's consent to order a conference. However, in all Australian jurisdictions the young person has a right not to proceed and to have the matter dealt with by a court.¹⁴³⁴

A majority of stakeholders who commented on this issue supported the principle that the offender's participation in a restorative justice program should be voluntary.¹⁴³⁵ This is consistent with international best practice.¹⁴³⁶ The Salvation Army – BYFS's submission summarised the risks associated with mandatory offender participation in restorative justice programs:

(YJGCP) Restorative justice is a voluntary program based on the premise of restoring harm, taking responsibility and balancing the needs of both victims(s) and offenders. Where an active effort is made to increase offenders participation it can lack credibility, as offenders may not assume genuine responsibility or demonstrate remorse and victim empathy. Where these crucial ingredients are missing or lacking there is concern that the victim could be re-victimised by an offender who is not actively engaging or understanding their role in the process. Furthermore issues concerning the offender's motivation to attend the conference as well as their ability to follow through with any commitment that they make at that time may be jeopardised.¹⁴³⁷

Reverend Jonathan Chambers of Anglicare also emphasised that referring inappropriate cases to conferencing will impact on the quality of the conference. He told the Committee, 'If you have an offender who is really there just because they think this is going to help get them out or get off a bit easier or whatever, it will make it more difficult to actually come up with a good outcome'.¹⁴³⁸

However, a contrary view was taken by VARJ and the Victorian Bar which both stated 'there appears to be no reason why an offender cannot be ordered by a court to proceed to a conference or other restorative justice program'.¹⁴³⁹ These submissions cited the New South Wales youth conference scheme under which an offender can elect to have a matter heard by court rather than by a conference, however the court can still order a conference.¹⁴⁴⁰

The Committee is mindful of the human rights concerns of stakeholders on this issue. In particular, it notes that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that an offender has a right to have a matter heard by a 'competent, independent and impartial' court.¹⁴⁴¹ The Committee also concurs with stakeholder submissions that restorative justice processes are most likely to have constructive

¹⁴³⁴ See, for example, *Young Offenders Act 1997* (NSW) ss 40, 44(1); *Juvenile Justice Act 1992* (Qld) ss 161, 162; *Youth Justice Act 1997* (Tas) ss 37, 42, 47.

¹⁴³⁵ Law Institute of Victoria, *Submission no. 20S*, 6; Anglicare Victoria, *Submission no. 26*, 15, 18; The Salvation Army – BYFS, *Submission no. 9*, 3; Victoria Police, *Submission no. 12*, 3; Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 9.

¹⁴³⁶ United Nations Economic and Social Council, above n 1392, principles 7 and 12.

¹⁴³⁷ The Salvation Army – BYFS, *Submission no. 9*, 3. See also Piazza, above n 1393, 236.

¹⁴³⁸ Jonathan Chambers, *Transcript of evidence*, above n 1435, 9.

¹⁴³⁹ The Victorian Bar, *Submission no. 13*, 59-60; VARJ, *Submission no. 28*, 16.

¹⁴⁴⁰ *Young Offenders Act 1997* (NSW) ss 40(3), 44(1).

¹⁴⁴¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

outcomes where the offender participates fully and freely. It therefore supports current arrangements whereby the offender is required to consent and demonstrate motivation to attend the conference.

Participation by disadvantaged offenders

In chapter 9 the Committee noted the dearth of demographic information about offenders participating in restorative justice programs and identified a need for further research and data collection. However, consistent with available research, stakeholders suggested that the participation of disadvantaged groups in the YJGC Program is low. Jesuit Social Services' submission emphasised that it is important to ensure 'that restorative justice interventions reach this [more disadvantaged] population and are not offered only to those with higher levels of community and family support'.¹⁴⁴²

In particular, the Committee received evidence that Indigenous and culturally and linguistically diverse young people have low participation rates in the YJGC Program.

Indigenous offenders

The 2006 evaluation of the YJGC Program found low levels of participation by Indigenous offenders in metropolitan Melbourne. The evaluation suggested that increasing the rate of referral to the conferencing program will 'assist in the management of the over-representation of Aboriginal Australian youth in the criminal justice system'.¹⁴⁴³ It suggested a range of strategies to increase the participation rates of Indigenous offenders including that elders or other community members be encouraged and supported to attend conferences and that DHS implement a key performance indicator relating to the participation of Indigenous youths in the program. The latter recommendation was implemented in June 2007.¹⁴⁴⁴

DHS informed the Committee that it has taken a number of steps to increase the participation rates of Indigenous offenders in the YJGC Program. These include requesting program service providers throughout the state to make contact with local Indigenous organisations to have respected elders participate in conferences where appropriate. According to DHS, 'All service providers have these links and many utilise the cooperative's staff when formulating outcome plans for indigenous young people'.¹⁴⁴⁵

¹⁴⁴² Jesuit Social Services, *Submission no. 35*, 4. See also The Salvation Army – BYFS, *Submission no. 9*, 7.

¹⁴⁴³ Effective Change Pty Ltd, above n 1368, viii.

¹⁴⁴⁴ Department of Human Services, above n 1362, 6.

¹⁴⁴⁵ Letter from Jan Noblett, above n 1369. Note, Tasmanian legislation requires conference convenors to invite an elder or community representative to attend a conference where a young offender is a member of an Aboriginal community: see *Youth Justice Act 1997* (Tas) s 38(2).

In addition, DHS advised the Committee that the 2009 training program for youth justice staff and group conferencing convenors will include a module on increasing the level of participation of Indigenous young people.¹⁴⁴⁶ However, the Committee was not provided with detail about the components of this training.

Data provided to the Committee indicates that between 2003 and 2007, 18% of conference participants in rural and regional Victoria were Indigenous.¹⁴⁴⁷ In contrast, only two Indigenous young people were referred to the program in metropolitan Melbourne over the same period.¹⁴⁴⁸ Low rates of referral of Indigenous young people to conferencing programs have also been observed in other Australian jurisdictions.¹⁴⁴⁹

Mr Paul McDonald of DHS told the Committee that in his view the number of Indigenous young people referred to the program in rural and regional areas was positive:

that probably demonstrates some of the closer linkages that the convenors have had in the rural areas to attract Indigenous young people, and that would be a positive over-representation ... in relation to the numbers of Indigenous young people we have in the juvenile justice system.¹⁴⁵⁰

Mr Longmuir from Anglicare, the Gippsland region YJGC Program service provider, informed the Committee that between 10% and 30% of the conferences convened by Anglicare involved Indigenous young people. He stated that group conferences were highly beneficial for Indigenous young people and suggested that the process could be further enhanced by greater involvement of elders.¹⁴⁵¹ Several participants in the Committee's Indigenous Australian Communities Forum emphasised that elders should be treated as consultants and properly respected and remunerated for any such involvement.¹⁴⁵²

Mr McDonald observed that the low numbers of Indigenous youth participating in the YJGC Program in metropolitan Melbourne may be related to the fact that, since October 2005, Indigenous young people have had the option to have matters heard by the Koori Children's Court:

The low number of Indigenous referrals in the metropolitan area may be due to the process of the Koori justice court and some of the choices that are being chosen in relation to taking up the youth justice group conferencing, as opposed to the Koori

¹⁴⁴⁶ Letter from Jan Noblett, above n 1369.

¹⁴⁴⁷ Department of Human Services, above n 1362, figure 11. 18% is equivalent to 47 participants.

¹⁴⁴⁸ *Ibid*, 13.

¹⁴⁴⁹ See, for example, Lucy Snowball, *Diversion of Indigenous juvenile offenders* (2008) Australian Institute of Criminology, 5; NSW Attorney General's Department, *Report on the review of the Young Offenders Act 1997* (2002), 50-51.

¹⁴⁵⁰ Paul McDonald, Executive Director, Children, Youth and Families Division, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 3.

¹⁴⁵¹ Mark Longmuir, *Transcript of evidence*, above n 1378, 7.

¹⁴⁵² Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 17; Rosie Smith, Project Manager, Koori Programs and Initiatives, Courts and Tribunal Services, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 17.

youth justice court. We have also talked to our provider in the city about some further work to promote such a scheme to the Indigenous community within the metropolitan area.¹⁴⁵³

Judge Paul Grant, President of the Children’s Court of Victoria, also expressed the view that low rates of Indigenous young people in Melbourne may be due to matters being heard by the Koori Court. He cautioned:

I think going into Koori Court is much more onerous than being dealt with in the mainstream court, there is a question, then, of whether you would subject a young Aboriginal person to the process of Koori Court and then require them to participate in a conference. Because it really is requiring them to participate in two fairly significant and fairly onerous processes.¹⁴⁵⁴

DHS informed the Committee that the YJGC Program provider in metropolitan Melbourne regularly attends the Children’s Koori Court ‘and has invited the elders who sit on the Court to attend suitable group conferences to orientate them to the program and the outcomes it can provide for young people’.¹⁴⁵⁵

The scope to utilise restorative justice more extensively in the Koori Court is discussed further in chapter 12.

The *Attorney-General’s justice statement 2* states that the Victorian Government will identify opportunities to extend restorative justice initiatives for Indigenous communities.¹⁴⁵⁶ The Committee did not receive any information about this proposal.

The notion of restorative justice services for Indigenous people was supported by stakeholders. Giving evidence to the Committee on behalf of the Victorian Aboriginal Legal Service, Ms Greta Clarke highlighted the success of the Koori Court and commented, ‘There is also a need to create space for the utilisation of Indigenous Australian knowledge in the development of ADR processes, particularly restorative justice programs’.¹⁴⁵⁷

The Committee believes that young Indigenous people have the potential to significantly benefit from involvement in the YJGC Program and that efforts should be made to increase their involvement where appropriate, particularly in metropolitan Melbourne. The Committee agrees with suggestions that mechanisms should be established for including elders and other members of the Indigenous community in group conferences and commends the preliminary work that DHS has done to educate elders about the program. As the Committee received limited evidence about other strategies to increase the participation of Indigenous people in restorative

¹⁴⁵³ Paul McDonald, *Transcript of evidence*, above n 1450, 3-4.

¹⁴⁵⁴ Judge Grant, *Transcript of evidence*, above n 1431, 8.

¹⁴⁵⁵ Letter from Jan Noblett, above n 1369.

¹⁴⁵⁶ Attorney-General, above n 1364, 24.

¹⁴⁵⁷ Greta Clarke, Research Officer, Victorian Aboriginal Legal Service, *Transcript of evidence*, Melbourne, 25 February 2008, 2.

justice programs, it recommends that the Victorian Government undertake further research on this issue.

The Committee acknowledges that Indigenous participation rates may also be an issue for the pilot YARJGC Program and any adult restorative justice programs implemented in Victoria in the future. It therefore recommends that the proposed research not be confined to the YJGC Program but consider strategies for increasing the involvement of Indigenous offenders in restorative justice programs generally.

While the Committee did not specifically receive any information about the participation of Indigenous victims of crime in conferencing processes, it acknowledges research that identifies that Indigenous people are over-represented as victims of crime.¹⁴⁵⁸ Therefore, it recommends that the proposed research also consider strategies for engaging Indigenous victims in restorative justice processes.

The Committee also recognises the importance of restorative justice service providers having links with the Indigenous community, and staff being trained in strategies to engage that community in restorative justice programs. The Committee recognises the work that DHS has undertaken in this regard and believes that these components should be incorporated into the training of all restorative justice practitioners in the state. Training is discussed further in chapter 11.

Recommendation 53: Participation of Indigenous offenders and victims in restorative justice processes

53.1 The Victorian Government should establish a mechanism for the participation of Indigenous elders and other community representatives in appropriate YJGC Program conferences.

53.2 The Victorian Government should undertake research on the engagement of Indigenous victims and offenders in restorative justice processes. This research should be conducted in a manner that actively engages with Indigenous stakeholders to harness Indigenous culture and expertise.

Culturally and linguistically diverse offenders

The 2006 evaluation of the YJGC Program found that only 9% of group conference participants were from culturally and linguistically diverse (CALD) backgrounds compared to 27% of offenders in the control group.¹⁴⁵⁹ The evaluation concluded that efforts should be made to increase the participation of CALD young people in the program and suggested the implementation of strategies similar to those used to engage young Indigenous people.

¹⁴⁵⁸ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander social survey 2002* (2004), 23; Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A partnership between the Victorian Government and the Koori Community* (2006), 12-13.

¹⁴⁵⁹ Effective Change Pty Ltd, above n 1368, 20-21, viii.

Ms Jan Noblett of DHS advised the Committee, ‘It is very early days in terms of the development of any particularly new model, but it is certainly on our horizon as something we need to continue to evolve and develop’.¹⁴⁶⁰ She emphasised that increasing the capacity of convenors to understand particular groups and providing a flexible model were important in improving access to CALD young people.

While YJGC Program services providers are required to collect information about offenders’ ethnicity, the number of CALD young people subject to a group conference is not a key performance indicator for the program.¹⁴⁶¹ Ms Noblett told the Committee in relation to CALD youth:

In terms of measures, I think we would be probably needing to embed performance measures or KPIs around what we anticipate would be relative targets, and that would probably be based on proportionality of those groups represented in youth justice more broadly.¹⁴⁶²

No other stakeholders commented on the participation rates of CALD young people.

The Committee notes that the Attorney-General’s justice statement also signals that the Victorian Government will identify opportunities to extend restorative justice initiatives to refugee communities, although the Department of Justice did not provide the Committee with any details about this proposal.¹⁴⁶³

The Committee believes it is important to ensure that young people from CALD backgrounds have the opportunity to participate in youth justice conferences where appropriate. The Committee recommends that DHS should introduce a key performance indicator of the YJGC Program that relates to the participation of offenders from CALD backgrounds in the program.

The Committee did not receive any evidence about specific strategies that could be implemented to increase CALD participation in restorative justice initiatives. It suggests that the Victorian Government conduct research on this issue, drawing on lessons learned from strategies used to engage Indigenous offenders. In particular, the Committee believes that there may be benefit in considering strategies to involve CALD community representatives and elders in restorative justice processes.

Consistent with its recommendations to encourage the participation of Indigenous Australians in restorative justice processes, the Committee recommends that this research should not be limited to the YJGC Program but should consider strategies for increasing CALD involvement in restorative justice programs generally and should also include strategies for engaging victims from CALD backgrounds. The Committee also highlights the importance of actively involving CALD stakeholders in this research.

¹⁴⁶⁰ Jan Noblett, Director, Youth Services and Youth Justice, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 6.

¹⁴⁶¹ Department of Human Services, above n 1362, 6. As noted above, the number of Koori young people subject to a group conference was added as a KPI in 2007-08.

¹⁴⁶² Jan Noblett, *Transcript of evidence*, above n 1460, 6.

¹⁴⁶³ Attorney-General, above n 1364, 24.

Recommendation 54: Participation of CALD offenders and victims in restorative justice processes

54.1 The Department of Human Services should introduce a key performance indicator of the YJGC Program that relates to the participation of offenders from CALD backgrounds in the program.

54.2 The Victorian Government should undertake research on the engagement of CALD victims and offenders in restorative justice processes. This research should be conducted in a manner that actively engages with CALD stakeholders to harness CALD culture and expertise.

10.2.3 Program demand

In this section the Committee has identified a number of strategies for increasing offender referral to and participation in the YJGC Program. It acknowledges that one implication of the implementation of the Committee's recommendations may be an increased demand for the program. The Committee received evidence from one service provider that demand already exceeds its ability to provide the program. Anglicare's submission stated:

In every geographic area, anecdotal evidence suggests that the demand for these services is many times greater than the capacity to deliver.

Anglicare Victoria's experience within the Gippsland youth justice group conferencing program reflects identical trends ... The Gippsland program is achieving an annual target of 30 cases, and yet:

- there is still greater demand, especially in regions the existing program cannot reach;
- there is no capacity to extend the service or increase targets (to 200 cases per year, for example);
- it is clear that long travel times and rising fuel costs are also significant pressure points for the Anglicare Victoria staff servicing the Gippsland region.¹⁴⁶⁴

Mr Longmuir of Anglicare told the Committee that he expects demand for the program to increase even further:

we think we probably still have not got the message through to everyone who we want to get it through to, so we think that once we have been able to do that — talk to a whole range of solicitors who we probably have not got to, just sort of building the program up — within the next year or two there is probably going to be even more demand.¹⁴⁶⁵

¹⁴⁶⁴ Anglicare Victoria, *Submission no. 26*, 8-9. See also Mark Longmuir, *Transcript of evidence*, above n 1378, 8.

¹⁴⁶⁵ Mark Longmuir, *Transcript of evidence*, above n 1378, 8. See also Anglicare Victoria, *Submission no. 26*, 12.

The Committee acknowledges Anglicare’s concerns, although it notes that no other service providers raised these issues. Restorative justice is currently a priority of the Victorian Government and, in light of this, the Committee believes the government should undertake work to identify progressive demand for restorative justice services. Therefore the Committee suggests that the Victorian Government should undertake a review to identify the potential demand for the YJGC Program throughout Victoria over the next five years. This will help inform decisions around funding to ensure service providers are adequately resourced to meet demand.

Recommendation 55: Review of YJGC Program demand

The Victorian Government should undertake a review to identify the likely demand for the YJGC Program throughout Victoria over the next five years.

10.3 Victim participation

Victims are entitled to attend or be represented at YJGC Program conferences but their presence is not necessary for the conference to occur or for an outcome plan to be agreed upon.¹⁴⁶⁶ The victim’s participation in the YJGC Program is voluntary at all times. Several stakeholders highlighted the importance of the victim’s participation in restorative justice initiatives being voluntary.¹⁴⁶⁷

Ms Noblett of DHS informed the Committee that victims are involved either personally or through representatives in over 80% of YJGC Program conferences. She added, ‘research indicates a conference is more effective if a victim participates, and we are quite pleased with that high rate ...’¹⁴⁶⁸ However, one program service provider, Jesuit Social Services, reported that actual victims – as opposed to victim representatives – attended only 52% of conferences it convened and suggested that the rate of actual victim attendance could be improved.¹⁴⁶⁹

Several other stakeholders also emphasised the importance of victim involvement in YJGC Program conferences. For example, Mr Mark Rumble of the Salvation Army –

¹⁴⁶⁶ *Children, Youth and Families Act 2005* (Vic) s 415(7). Note, the victim’s participation in the pilot young adult program at the NJC is encouraged but not essential: see Neighbourhood Justice Centre, above n 1402, 35.

¹⁴⁶⁷ Noel McNamara, *Transcript of evidence*, above n 1423, 4; VARJ, *Submission no. 28*, 16; David Fanning, *Transcript of evidence*, above n 1408, 2-3; The Victorian Bar, *Submission no. 13*, 60; Peter Condliffe, *Transcript of evidence*, above n 1373, 7. See also United Nations Economic and Social Council, above n 1392, principle 7.

¹⁴⁶⁸ Jan Noblett, *Transcript of evidence*, above n 1460, 4. See also Department of Human Services, above n 1362, figures 5 and 13. Similar or higher rates of victim involvement have been found in some other Australian programs, for example: People and Trimboli, above n 1399, vii; Heather Strang and Lawrence W Sherman, *Reintegrative Shaming Experiments (RISE): The victim’s perspective* (1997) Australian Institute of Criminology, RISE Working Papers, no. 2, 2.

¹⁴⁶⁹ Tony Hayes, Project Coordinator, Community Justice Program, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 4. See also Jesuit Social Services, *Submission no. 35*, 8.

BYFS told the Committee that victim involvement is ‘absolutely critical’ to the success of a conference.¹⁴⁷⁰

The Committee notes that the YJGC Program victim participation rate is high compared to that of some other comparable programs.¹⁴⁷¹ However, given the evidence of the benefits of victim involvement in restorative justice processes, both for the victim as an individual and for the outcomes of the process, the Committee believes that it is vital that ongoing efforts are made to encourage victims to participate in the YJGC Program.

In the following section the Committee identifies a number of strategies for encouraging victim participation and ensuring that victims’ rights and interests are fully protected in the process. While the focus of the discussion is on the YJGC Program, the issues are also of relevance to encouraging victim involvement in restorative justice in other contexts, for example the YARJGC Program.

10.3.1 Contacting victims

The Salvation Army – BYFS’s submission explained how it encourages the participation of victims in YJGC Program conferences:

In our practice we always endeavour to contact the victim and inform them about the process and what will be happening. The victim is provided with information about the Program and is informed as to how they can be involved. If they choose not to attend the conference they are informed of other ways of having victim input enabling them to relay to the convenor how they have been impacted, to write a victim impact statement, to send someone to represent them, or use a formal victim agency representative.¹⁴⁷²

Mr Russell Jeffery, a convenor with Jesuit Social Services, told the Committee it is the police, rather than the convenor, who makes the initial contact with victims:

in the Victorian model we are reliant on the police to pass on the victim’s details, so in the initial part of the program we will contact the informant, talk to them a little bit about the program and ask them to contact the victim and gain their permission to have their contact details shared with us so that we can talk to them.¹⁴⁷³

His colleague Mr Tony Hayes added:

¹⁴⁷⁰ Mark Rumble, *Transcript of evidence*, above n 1377, 7-8. See also David Fanning, *Transcript of evidence*, above n 1408, 2-3.

¹⁴⁷¹ See, for example, Umbreit, Vos and Coates, above n 1407, 2. They found that victim participation rates range between 40% and 60%. See also Department of Justice and Community Safety, Australian Capital Territory, *First phase review of restorative justice* (2006), 15.

¹⁴⁷² The Salvation Army – BYFS, *Submission no. 9*, 2.

¹⁴⁷³ Russell Jeffrey, Youth Justice Group Conference Convenor, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 3.

you have got 10 000 police in Victoria and you rely on whoever you talk to – either a constable or a senior constable or a detective – to explain this program to the victim.¹⁴⁷⁴

DHS publishes a fact sheet on the YJGC Program for police. The fact sheet states that the role of police is to ‘[d]iscuss the group conferencing program with the victim, and with permission of the victim provide his/her details to the convenor following the referral by the Court’.¹⁴⁷⁵

Mr Hayes suggested that the system currently in place in New South Wales provides a better model for contacting victims. He told the Committee that in New South Wales ‘the court will send victim details through the coordinator of the program, who will then allocate it to a sessional convenor’.¹⁴⁷⁶ The convenor then makes contact directly with the victim.

No other stakeholders mentioned this issue.

The Committee acknowledges that the idea of participating in a group conference may be very confronting for victims. Therefore, it is important that the initial contact with victims is made by a person who fully understands the conference process and the opportunities it provides. The Committee believes that the conference convenor is better placed than police to provide this initial information to victims. It therefore recommends the implementation of a system similar to that operating in New South Wales where convenors are provided with victims’ contact details and are able to contact them directly to inform them about the group conference process and encourage their participation.

Recommendation 56: Informing victims about the YJGC Program

The Victorian Government should develop and implement a system which allows for conference convenors to contact victims directly to inform them about the opportunity to participate in a YJGC Program conference.

10.3.2 Providing information to victims

Research has identified a number of reasons for victims choosing not to participate in restorative justice processes, including feeling that the process is not worthwhile and being afraid of the offender.¹⁴⁷⁷ This suggests that strategies that provide information

¹⁴⁷⁴ Tony Hayes, *Transcript of evidence*, above n 1469, 4.

¹⁴⁷⁵ Department of Human Services, Victoria, *Youth justice group conferencing: Information for police* (2007). Note, police have a similar role in the young adult program at the NJC: see Neighbourhood Justice Centre, *Restorative justice group conferencing at Neighbourhood Justice Centre: Introductory information for police in City of Yarra*.

¹⁴⁷⁶ Tony Hayes, *Transcript of evidence*, above n 1469, 4. See also Department of Juvenile Justice, New South Wales, above n 1366, 2–13; *Young Offenders Act 1997* (NSW) s 45(2).

¹⁴⁷⁷ Umbreit, Vos and Coates, above n 1407, 3.

to victims and address any concerns they have about the program may potentially increase victim involvement.¹⁴⁷⁸ For example, VARJ's submission commented, 'Victims who participate in restorative justice conferencing processes including group conferencing need to feel confident that their concerns will be sufficiently dealt with'.¹⁴⁷⁹

The DHS guidelines outline the information that the convenor should provide to potential conference participants, including the victim, when making initial contact. This includes information about their rights and the benefits of attending.¹⁴⁸⁰ In addition, the guidelines state that prior to the conference the convenor should explain the conference process and the victim's role.¹⁴⁸¹ DHS has also published an information sheet for victims about the YJGC Program.¹⁴⁸²

Mr Ian Lulham, who gave evidence on behalf of the Law Institute of Victoria, shared an example that demonstrates the importance of providing adequate information to the victim prior to a conference:

I have just come across that [conferencing] on behalf of a client in the last few weeks. My experience of that was not very positive. Unfortunately, because they seem to be so keen to be informal and alternative, they did not really explain, I did not think, to the victim of the crime what on earth was going on. It tended to make the person very uncomfortable and vulnerable.¹⁴⁸³

The Committee notes that this example relates to a conference held in another state.

The Committee did not receive any evidence of victims having negative experiences of participation in the YJGC Program. The Committee believes that this reflects the high quality of services provided by Victorian YJGC Program providers. However, the Committee acknowledges the vulnerability of victims in restorative justice processes and in particular notes the risk of re-victimisation. Therefore, the Committee encourages DHS and service providers to give ongoing consideration to the needs of victims. The ability of convenors to provide the necessary information and support to victims will be enhanced by them receiving training on victims' issues, which is discussed in the next section.

¹⁴⁷⁸ Tony E Marshall, *Restorative justice: An overview* (1999) Home Office, United Kingdom, 23-24.

¹⁴⁷⁹ VARJ, *Submission no. 28*, 10.

¹⁴⁸⁰ Department of Human Services, YJGC Program guidelines, above n 1375, 11.

¹⁴⁸¹ *Ibid.*, 13. Note, similar requirements for informing and preparing victims are also part of program guidelines for the pilot young adult program at the NJC: see Neighbourhood Justice Centre, above n 1402, 35-37.

¹⁴⁸² Department of Human Services, Victoria, *Youth justice group conferencing: Information for victims* (2007). Note, an information sheet has also been prepared to inform victims about the young adult program at the NJC: see Neighbourhood Justice Centre, *Restorative justice group conferencing program: Information for someone who has been affected by offending behaviour*.

¹⁴⁸³ Ian Lulham, Chair, ADR Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 4.

10.3.3 Training convenors about victims' rights and needs

VARJ told the Committee that group conference convenors need to have training about victims' rights to ensure that victims' rights and interests are protected.¹⁴⁸⁴

VARJ developed and provided recent training for YJGC Program providers, but it informed the Committee that this training does not provide a comprehensive understanding of victims' experiences, concerns, rights and needs:

The present short course training provided to convenors, and other interested persons in the process of group conferencing, is constrained by time and therefore provides a less than comprehensive understanding of victims' concerns. VARJ believes that the training for the conferencing process needs to be more extensive and place a greater emphasis upon victims' issues. This may be accomplished by providing more time for the training and including the victim referral agency in the training preparation and delivery.¹⁴⁸⁵

The Salvation Army – BYFS also suggested that conference convenors should receive 'victim empathy training'.¹⁴⁸⁶

The Committee notes evidence that the training provided currently to YJGC Program convenors does not adequately address victims' rights issues. The Committee believes it is important for all convenors to have a comprehensive understanding of victims' rights and potential concerns. It therefore recommends that all YJGC Program convenors receive training on these issues. This training should be developed in conjunction with victims' groups and agencies to ensure that all relevant issues are fully addressed.

The training requirements of conference convenors are discussed in more detail in chapter 11.

Recommendation 57: Training YJGC Program providers about victims' rights and needs

The Victorian Government should, in consultation with victims' groups, develop and provide training for YJGC Program providers about victims' experiences, concerns, rights and needs.

10.3.4 Post-conference follow-up with victims

The Salvation Army – BYFS informed the Committee that there is a lack of follow-up with the victim following a YJGC Program conference, particularly in relation to

¹⁴⁸⁴ VARJ, *Submission no. 28*, 10.

¹⁴⁸⁵ Ibid.

¹⁴⁸⁶ The Salvation Army – BYFS, *Submission no. 9*, 8.

the offender's implementation of the outcome plan. According to the Salvation Army – BYFS's submission:

The pre-conference and conference phases provide for the victim to be engaged with the program, however, post-conference the victim is not followed up, which possibly decreases some of their satisfaction with the overall process.¹⁴⁸⁷

The DHS guidelines do not make any mention of following up the victim after the conference, other than suggesting that the victim be referred to a victim support agency where a reparation agreement has not been fulfilled.¹⁴⁸⁸

The Salvation Army – BYFS suggested that service providers be required to notify the victim of the completion or non-completion of an outcome plan as well as about the outcome of the sentencing process.¹⁴⁸⁹ Judge Grant of the Children's Court of Victoria suggested that service providers could be required to contact the victim following the conference to identify and address any concerns or needs they may have.¹⁴⁹⁰

Restorative justice programs in some other jurisdictions have formal requirements for following up with victims. For example, legislation in New South Wales requires conference administrators in that state to give victims written notice about whether the outcome plan has been satisfactorily completed by a young offender.¹⁴⁹¹

The Committee recognises that victims have a right to be supported and informed following a group conference. This may have a positive influence on a victim's satisfaction with the conference process. The Committee therefore recommends that, following a YJGC Program conference, the service provider be required to follow up with the victim to address any needs or concerns he or she might have. In addition, the victim should be provided with written notice about the completion or non-completion of the agreed outcome plan and the outcome at court.

In chapter 9, the Committee noted the importance of measuring the satisfaction level of participants in restorative justice processes, particularly victims. The Committee believes that, after a conference, it is important to obtain feedback from victims about their experiences participating in the process. Following up with victims after a conference provides an opportunity to gather this feedback, in addition to providing any additional support that a victim may require.

¹⁴⁸⁷ Ibid, 2.

¹⁴⁸⁸ Department of Human Services, YJGC Program guidelines, above n 1375, 24-25. Note, limited follow up with victims is included in the guidelines for the pilot young adult program at the NJC: see Neighbourhood Justice Centre, above n 1402, 43.

¹⁴⁸⁹ The Salvation Army – BYFS, *Submission no. 9*, 1.

¹⁴⁹⁰ Judge Grant, *Transcript of evidence*, above n 1431, 12.

¹⁴⁹¹ *Young Offenders Act 1997* (NSW) s 56. See also Department of Juvenile Justice, New South Wales, above n 1366, 2-42; Department of Communities, Queensland, *Youth Justice Conferencing practice manual* (2008), chapter 9, 12.

Recommendation 58: Follow-up with victims after a YJGC Program conference

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to require service providers to:

- contact the victim following the conference to identify and address any concerns or needs
- notify the victim of the completion or non-completion of an outcome plan
- notify the victim of the court outcome
- seek feedback from victims about their experiences participating in the program, in particular in relation to their satisfaction with the process.

10.4 Information and training on the YJGC Program for Victoria Police

The participation and co-operation of Victoria Police and its members is an important factor in the success of the YJGC Program. The Children, Youth and Families Act provides that a group conference cannot proceed unless the informant or another member of the police force attends.¹⁴⁹² Ms Simmons of the Salvation Army – BYFS told the Committee that this ‘is why we need to have an even better relationship built with them in our areas’.¹⁴⁹³

Mr Rumble, also of the Salvation Army – BYFS, stated that ‘a high level of co-operation from the police and a willingness to achieve a positive outcome ... are absolutely critical to any conference working. The police have to value the process’.¹⁴⁹⁴ He informed the Committee that this has not always occurred:

We have had times where the police have not valued it, and it has been a very difficult process when the police are thinking, ‘This is just a load of rubbish, the kids need a kick in the tail’, that type of thing. Thankfully that is lesser than the positive response we are getting from the police.¹⁴⁹⁵

VARJ recommended mandatory training for all police about the services provided by restorative justice programs and the role of police in restorative justice processes.¹⁴⁹⁶ The Committee did not receive any information about training currently provided to

¹⁴⁹² *Children, Youth and Families Act 2005* (Vic) s 415(6).

¹⁴⁹³ Laura Simmons, *Transcript of evidence*, above n 1415, 8.

¹⁴⁹⁴ Mark Rumble, *Transcript of evidence*, above n 1377, 7.

¹⁴⁹⁵ *Ibid*, 7.

¹⁴⁹⁶ VARJ, *Submission no. 28*, 12.

police about the YJGC Program but notes that DHS has published a fact sheet for police about the program.¹⁴⁹⁷

Police training about restorative justice programs has contributed to successful outcomes in other jurisdictions. For example, research in Queensland found that training police officers about youth justice conferencing ‘increased belief in the efficacy of conferencing, increased their confidence and understanding of the procedures associated with conferencing, and reduced the perceived time and effort in being involved in conferencing’.¹⁴⁹⁸

Given that police attendance at YJGC Program conferences is now mandatory, the Committee believes it is essential that police officers have a full understanding of the process and play an active role in the conference. Therefore, the Committee recommends that all police officers receive training about the YJGC Program which identifies and explains the role of police in group conferences as well as the program aims, its underlying philosophy, the benefits of participation and the process generally. The training should be supported by a section in the Victoria Police Manual on participating in a conference.

The Committee notes that police engagement with restorative justice processes will be even more important if these processes are further expanded in Victoria. In particular, it recognises the role that police play in requesting diversions to group conferencing under the Criminal Justice Diversion Program at the NJC as part of the YARJGC Program – although it is the magistrate who ultimately makes the decision to refer a matter.¹⁴⁹⁹ The further expansion of restorative justice programs in Victoria using this referral mechanism will require the education and support of police.

Recommendation 59: Information and training on the YJGC Program for police

59.1 The Victorian Government should provide training and information for police about the YJGC Program, including its aims, underlying philosophy, the benefits of participation, the process, the suitability criteria and the role of police in conferences.

59.2 Victoria Police should amend the *Victoria police manual* to provide information about the YJGC Program and the role of police in group conferences.

¹⁴⁹⁷ Department of Human Services, above n 1475. Note, an information sheet has also been prepared to inform police in the City of Yarra about the young adult program at the NJC: see Neighbourhood Justice Centre, above n 1475.

¹⁴⁹⁸ Anna Louise Stewart and Frances Smith, 'Youth justice conferencing and police referrals: The gatekeeping role of police in Queensland, Australia' (2004) 32 *Journal of Criminal Justice*, 351. See also People and Trimboli, above n 1399, 47-48.

¹⁴⁹⁹ Victoria Police, 'Magistrates' Court diversion' in *Victoria Police Manual* (2007).

10.5 Outcome plans

The main tangible outcome of a group conference is an outcome plan. These plans set out how a young person will make amends for the harm caused and how they will make sure it does not happen again. The Committee received evidence that there are a number of issues associated with the implementation of outcome plans agreed to at YJGC Program conferences.

10.5.1 The use of outcome plans in sentencing

After a group conference the convenor is required to prepare a report for the court, which must attach the outcome plan.¹⁵⁰⁰ The court is required to take this report into account in sentencing the young person.¹⁵⁰¹ However, the court is not required to approve the plan. Nor is the court required to include the agreements contained in the outcome plan into an offender's sentence, although Judge Grant of the Children's Court of Victoria told the Committee that he often does this:

if I get an outcome plan that suggests someone needs to do 10 hours of community service or something, I would try to incorporate that in the order I make. So I would make a good behaviour bond with the condition that the person completes the outcome plan that has been negotiated. If the person did not do it, it could be brought back before the court as a breach of the bond ... it is very hard for the court to control the process beyond what we are empowered to control, which is what happens in the courtroom.¹⁵⁰²

The Committee did not receive any evidence about the extent to which other Children's Court magistrates incorporate outcome plans into offenders' sentences.

The Committee also notes that this will not always be an issue as some outcome plans will be completed before the offender returns to court for sentencing. The DHS guidelines encourage the group conference to be held as early as possible after the deferral of sentence to enable the young person to commence fulfilling the outcome plan requirements prior to sentencing.¹⁵⁰³ In other cases the court may further defer sentencing to allow the outcome plan to be completed. Magistrate Fanning of the NJC described his approach:

If people say they are going to give restitution, then I will adjourn it to enable that to happen. Otherwise you make the restitution order and it might be paid or might not be paid ... If you want the benefit of having paid the restitution, then I will adjourn the matter, you come back to court, show me the receipt and then I will take it into account.¹⁵⁰⁴

¹⁵⁰⁰ *Children, Youth and Families Act 2005* (Vic) s 415(8). See also Department of Human Services, YJGC Program guidelines, above n 1375, 38.

¹⁵⁰¹ *Children, Youth and Families Act 2005* (Vic) s 416(3). See also s 362(3).

¹⁵⁰² Judge Grant, *Transcript of evidence*, above n 1431, 12.

¹⁵⁰³ Department of Human Services, YJGC Program guidelines, above n 1375, 8-9. Note, the guidelines for the pilot young adult program at the NJC also encourage conferences to be held as early as possible after the referral: see Neighbourhood Justice Centre, above n 1402, 29.

¹⁵⁰⁴ David Fanning, *Transcript of evidence*, above n 1408, 6.

Earlier in this chapter the Committee noted widespread stakeholder support for the existing arrangements whereby participation in a group conference is rewarded at sentencing through the court imposing a sentence that is less severe than it would have imposed if the young person had not participated in a group conference. Mr Noel McNamara of the Crime Victims Support Association told the Committee that offenders who have participated in a restorative justice process ‘should get a lesser sentence if they are showing all signs of contrition’.¹⁵⁰⁵ However, he also stated that the offender ‘would only get one chance at it. If you break the condition, then the sentence applies’.¹⁵⁰⁶ This cannot be achieved unless the outcome plan was completed prior to sentencing or the plan was incorporated into the sentence.

The United Nations’ *Basic principles on the use of restorative justice programmes in criminal matters* provide that outcome plans should be incorporated into offenders’ sentences:

The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.¹⁵⁰⁷

Legislation in some other Australian jurisdictions specifically provides for courts to approve outcome plans or to incorporate them into sentences. For example, legislation in Queensland states that the court may include all or any of the terms of the conference agreement in or as part of the sentencing agreement and impose conditions about compliance with those terms.¹⁵⁰⁸

The Committee believes that magistrates should incorporate the outcome plan into an offender’s sentence where appropriate. This clarifies the legal status of the plan and provides added incentive for the offender to complete the plan. It would also ensure that the practice in Victoria is consistent with international best practice. The Committee believes that this is best achieved through an amendment to the Children, Youth and Families Act.

Recommendation 60: Incorporating the YJGC Program conference outcome plan into the offender’s sentence

The Victorian Government should amend the *Children, Youth and Families Act 2005* (Vic) to specify that the court may include all or any of the terms of the YJGC Program conference outcome plan in or as part of the sentence order.

¹⁵⁰⁵ Noel McNamara, *Transcript of evidence*, above n 1423, 7.

¹⁵⁰⁶ *Ibid.*

¹⁵⁰⁷ United Nations Economic and Social Council, above n 1392, principle 15.

¹⁵⁰⁸ *Juvenile Justice Act 1992* (Qld) s 165(4). See also *Young Offenders Act 1997* (NSW) s 54.

10.5.2 Monitoring outcome plans

YJGC Program service providers informed the Committee that there is currently limited monitoring of outcome plans in Victoria and no reporting on their completion. For example, the Salvation Army – BYFS’s submission commented:

The absence of a formal “outcome follow up process” has the potential to tarnish a successful conference in that should the young offender not complete the agreed task, the victim would rightfully feel that the process was for nothing, potentially leading to an increase in victim dissatisfaction.¹⁵⁰⁹

Jesuit Social Services’ submission emphasised that following up the completion of outcome plans is important because the fulfilment of a plan may reduce the risk that an offender will re-offend.¹⁵¹⁰ In addition, the submission noted that completion of plans contributes to community support for restorative justice programs. This is consistent with research identifying that the completion of outcome plans by offenders increases victim satisfaction with the conferencing process.¹⁵¹¹

Both the Salvation Army – BYFS and Jesuit Social Services emphasised that their organisations are not funded to monitor or follow up the completion of outcome plans. Mr Hayes of Jesuit Social Services told the Committee:

In terms of our funding and in terms of the program guidelines we had from DHS, there is no acknowledgement or recognition of that phase in the conferencing process. Basically the view is that once a conference is finished, the follow-up on that outcome plan and its implementation belongs to the participants – that is, the young person, his or her family and also whoever has been appointed as a key person. Since we started our program we have always made it a point to follow up because we believe it is a practice issue. To have good practice you have to follow up because if the young person does not do what they agreed to, the victim is re-victimised or unsatisfied with the process ... We consider that service providers should be funded for that and that it should be acknowledged in the program guidelines because that is such an important part.¹⁵¹²

The DHS guidelines state that the outcome plan should identify a key person who will voluntarily supervise and support the young person in implementing the plan.¹⁵¹³ Further, the guidelines specify that the implementation of the outcome plan is the responsibility of the young person, the key person and the young person’s support network.¹⁵¹⁴

Ms Noblett of DHS told the Committee that the rationale for not requiring service providers to monitor outcome plans was to protect young people:

¹⁵⁰⁹ The Salvation Army – BYFS, *Submission no. 9*, 2-3.

¹⁵¹⁰ Jesuit Social Services, *Submission no. 35*, 6.

¹⁵¹¹ Department of Justice and Community Safety, Australian Capital Territory, above n 1471, 21.

¹⁵¹² Tony Hayes, *Transcript of evidence*, above n 1469, 2-3. See also Mark Rumble, *Transcript of evidence*, above n 1377, 8; Judge Grant, *Transcript of evidence*, above n 1431, 12; Jesuit Social Services, *Submission no. 35*, 5-6.

¹⁵¹³ Department of Human Services, YJGC Program guidelines, above n 1375, 20. Note, the program guidelines for the young adult program at the NJC suggest that the head convenor does have a role in monitoring and supervising outcome plans, but provides limited guidance about this: see Neighbourhood Justice Centre, above n 1402, 24.

¹⁵¹⁴ Department of Human Services, YJGC Program guidelines, above n 1375, 25.

It was never our intention to draw the young person closer to the criminal justice system by either the supervision of outcome plans, or affording them other avenues through which they were supervised, especially if the outcome was good behaviour bonds, or things of that kind, which are not in any way supervisory orders. In circumstances where there are supervisory orders, then the role of support and case management is managed through these justice programs, so there are youth justice social workers who would provide supervision to young people and case management ... If it was deemed that an outcome plan required that level of intervention, then it was our proposition that the court would order a supervisory order ...¹⁵¹⁵

However, Ms Noblett acknowledged, 'I think perhaps we could do a little more to track outcome plans'.¹⁵¹⁶

DHS did provide the Committee with some information about YJGC Program outcome plan completion rates. This indicated that, of outcome plans from conferences held in regional areas between 2003 and 2007, 55% were fully completed, 6% were partially completed, and 1% were still in progress.¹⁵¹⁷ Significantly, in 25% of cases it was 'not known' whether the plan had been completed or not. Outcome plan completion rates were higher in metropolitan Melbourne, with 68% of plans completed.¹⁵¹⁸ These are lower than compliance rates recorded in some other Australian jurisdictions.¹⁵¹⁹

The Committee notes that legislation in some other Australian jurisdictions specifically requires monitoring of the outcome plan and the reporting of its completion. Mr Rumble of the Salvation Army – BYFS drew the Committee's attention to the situation in Queensland.¹⁵²⁰ Legislation in that state requires an outcome plan to contain provisions under which the young person's compliance is monitored.¹⁵²¹ The Queensland Department of Communities' *Youth justice conferencing practice manual* specifies that the Department's Youth Justice Conferencing Service is responsible for monitoring a young person's compliance with the plan on at least a monthly basis.¹⁵²² The manual also outlines a graded process for responding to non-compliance, including amending the plan, warning the offender and notifying the referring court which may then re-sentence the offender.¹⁵²³ When an agreement is completed the Youth Justice Conferencing Service is required to notify a range of people including the victim and the young person's parents.¹⁵²⁴

¹⁵¹⁵ Jan Noblett, *Transcript of evidence*, above n 1460, 13.

¹⁵¹⁶ *Ibid.*, 14. See also Paul McDonald, *Transcript of evidence*, above n 1450, 14-15.

¹⁵¹⁷ Department of Human Services, above n 1362, figure 17. Note, 8% of conferences were cancelled.

¹⁵¹⁸ *Ibid.*, figure 7.

¹⁵¹⁹ For example, a review in the ACT found a 98% agreement compliance rate: Department of Justice and Community Safety, Australian Capital Territory, above n 1471, 21.

¹⁵²⁰ Mark Rumble, *Transcript of evidence*, above n 1377, 8.

¹⁵²¹ *Juvenile Justice Act 1992* (Qld) s 37(3). See also, for example, *Young Offenders Act 1997* (NSW) s 56; *Criminal Procedure Regulation 2005* (NSW) r 24; *Crimes (Restorative Justice) Act 2004* (ACT) ss 57-58.

¹⁵²² Department of Communities, Queensland, above n 1491, chapter 9, 2.

¹⁵²³ *Ibid.*, chapter 9, 6-11; *Juvenile Justice Act 1992* (Qld) s 165(5). See also *Juvenile Justice Act 1992* (Qld) s24(3) in relation to police referrals.

¹⁵²⁴ Department of Communities, Queensland, above n 1491, chapter 9, 12.

The Committee believes that monitoring outcome plans and reporting on their completion will increase the confidence of both victims and the general community in the YJGC Program, as well as helping to ensure that the needs of young offenders are met. The Committee therefore recommends that DHS should require YJGC Program service providers to monitor the completion of outcome plans. This is in line with practice in other Australian jurisdictions. The Committee acknowledges that some service providers are already undertaking this monitoring role, even though they are not currently funded to do so.

The Committee recommended in recommendation 58 that service providers should be required to notify the victim about the completion or non-completion of an outcome plan. The Committee believes that service providers should also be required to report to DHS and the Children’s Court about completion of outcome plans. This will provide greater transparency in the process and contribute to community confidence in the program. In the Committee’s view it is important to have a system in place for responding to the non-completion of outcome plans. Therefore, the Committee recommends that the DHS guidelines should be amended to provide a graded response to the non-completion of the plan. This should focus on supporting the offender to complete the plan, as is discussed in the next section.

Recommendation 61: Monitoring YJGC Program conference outcome plans

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to:

- require service providers to monitor the completion of outcome plans
- set out a mechanism for a graded response to non-compliance with outcome plans
- require service providers to report to DHS and the Children’s Court on the completion or non-completion of an outcome plan.

10.5.3 Support for offenders to complete outcome plans

There is currently no formal mechanism for ensuring that young persons in Victoria are supported in completing outcome plans agreed at YJGC Program conferences. As noted above, the DHS guidelines provide that the implementation of the outcome plan should be the responsibility of the young person and their support network.¹⁵²⁵ Ms Noblett of DHS told the Committee that DHS’s approach is that a young person should be able to fulfil an outcome plan without assistance:

if a plan was developed that was more ambitious than a young person could actually fulfil then it defeated the purpose. On occasion we have heard people say that the young person needs support to do this, this and this, and we say, ‘How is it their plan?’ ... It is very difficult for young people to anticipate large distances ahead of

¹⁵²⁵ Department of Human Services, YJGC Program guidelines, above n 1375, 25.

schedule. They will make an undertaking and have all the best intentions that, ‘Yes, I will refrain from drug use’, and, ‘Yes, I will attend drug and alcohol treatment’, without anticipating the longevity of that commitment. Whereas the restorative approach probably has much more of an impact, such as, ‘I will write you a letter of apology’, ‘I will clean your car’, ‘I will clean your fence’. By so doing, this sort of connection and reparation is immediate and has a direct impact. They are making a promise that is immediately tangible. That is the philosophical aspect.¹⁵²⁶

However, several submissions to the Inquiry highlighted the complex needs of young offenders. For example, Youthlaw’s submission emphasised that young offenders often experience ‘family dysfunction, homelessness, drug and alcohol, and mental health issues’.¹⁵²⁷ Jesuit Social Services’ submission characterised DHS’s current approach as ‘unreliable and failing to take account of the marginal living conditions of most young people in this system’.¹⁵²⁸ The submission called for service providers to be funded to assist young people and their support network to implement the outcome plan.

The practice in Victoria is consistent with that in other Australian jurisdictions, where the young offender and their support network are primarily responsible for implementing the plan. The New South Wales *Youth justice conferencing policy and procedures manual* states:

Experience has shown that outcome plans are completed more quickly and ongoing linkages to other agencies are more likely to be made when a monitor is independent. It has also resulted directly in the inclusion of the young person in community groups, activities and even in some cases, employment.¹⁵²⁹

However, in that state the program administrator may reconvene a conference in a number of circumstances, including if the outcome plan has become unsuitable or unworkable.¹⁵³⁰ The plan may be varied at the conference. Neither the Victorian legislation or DHS guidelines give any guidance about what should occur if a plan becomes unworkable.¹⁵³¹

The Committee recognises that group conferences aim to make offenders accountable for the offence and that this means that offenders should be primarily responsible for completion of their own outcome plans. However, the Committee also notes that many young offenders may require support in implementing their outcome plan. While this should be primarily in the form of support from the key person identified in the plan and the young person’s support network, the Committee recognises that the young person may need additional support and linkages to other services. Therefore, the Committee recommends that, as part of their monitoring role, service providers should provide support to young people, where required, to complete the plan.

¹⁵²⁶ Jan Noblett, Director, *Transcript of evidence*, above n 1460, 14.

¹⁵²⁷ Youthlaw, *Submission no. 38*, 4. See also Anglicare Victoria, *Submission no. 26*, 21.

¹⁵²⁸ Jesuit Social Services, *Submission no. 35*, 6.

¹⁵²⁹ Department of Juvenile Justice, New South Wales, above n 1366, 2–43.

¹⁵³⁰ *Young Offenders Act 1997* (NSW) s 55. See also *Juvenile Justice Act 1992* (Qld) s 38.

¹⁵³¹ Note, the guidelines for the young adult program at the NJC also fail to provide guidance on this issue.

The Committee notes that in some cases an agreement contained in an outcome plan may be unachievable or unworkable. Therefore there should be a mechanism for reconvening a conference to amend any aspect of the plan if necessary.

Recommendation 62: Support for offenders to complete YJGC Program conference outcome plans

The Department of Human Services should amend the *Youth Justice Group Conferencing program guidelines* to provide that service providers should provide support to young people where necessary to ensure that the young person completes their outcome plan. This may include reconvening a conference and amending the plan if any aspect of the plan is unworkable.

10.6 Fragmented service delivery

As noted in chapter 8, there are currently six different service providers delivering the YJGC Program throughout Victoria. Some stakeholders identified issues associated with this service fragmentation. The Victorian Bar's submission emphasised the need to have central evaluation and monitoring.¹⁵³² Mr Condliffe of VARJ expressed the view that the division of the program between different providers in different regions meant that it was 'geographically isolated'. He observed that there was limited communication between program providers. He told the Committee:

I am not sure of the answer if you asked them [the Government], 'Why don't you run it yourselves? Why don't we have a state-coordinated system with one umbrella organisation?'. Give it to Anglicare across the whole state, if you like, give it to the Jesuits or give it to someone else. It makes more sense to me, but the approach seems to be about establishing silos here, silos there and silos over there.¹⁵³³

Service providers offered a different perspective. For example, Anglicare's submission commented that community-based organisations are better placed than government to 'respond directly to the needs of individuals and families in a place-based, effective and proactive way'.¹⁵³⁴

The Victorian model of program delivery is similar to that used in New Zealand, where the Ministry of Justice funds 30 community groups to provide restorative justice programs nationwide.¹⁵³⁵ Recently in New Zealand there has been a push to ensure greater service accountability and standardisation. This is discussed in chapter

¹⁵³² The Victorian Bar, *Submission no. 13*, 25.

¹⁵³³ Peter Condliffe, *Transcript of evidence*, above n 1373, 8.

¹⁵³⁴ Anglicare Victoria, *Submission no. 26*, 26. See also The Salvation Army – BYFS, *Submission no. 9*, 8; Jonathan Chambers, *Transcript of evidence*, above n 1435, 3.

¹⁵³⁵ Ministry of Justice, New Zealand, *Crime Prevention Unit - Restorative justice*, <<http://www.justice.govt.nz/cpu/restorative-justice/index.html>>, viewed 23 January 2009.

11. Most conferencing programs in other Australian jurisdictions are provided directly by the relevant government department.¹⁵³⁶

The Committee notes that the fragmentation of service delivery in Victoria does create some issues, particularly in relation to variable service standards and quality. However, the Committee acknowledges the dedication and achievement of the current YJGC Program service providers. There was no evidence to suggest that the program delivery in Victoria is anything less than the highest quality. Therefore, the Committee concludes that the issues associated with service fragmentation in the YJGC Program can be addressed through improvements in monitoring, oversight and collaboration. These issues are discussed in chapters 9, 11 and 12 respectively. However, in chapter 12, the Committee suggests that there is potential for a different approach to be taken in relation to any future statewide restorative justice program for adults, with the Victorian Government either providing conferences itself, or through a single service provider statewide.

10.7 Dispute resolution conferences in the Children's Court

As noted in chapter 8, restorative practices are used in the Family Division of the Children's Court of Victoria in the form of dispute resolution conferences (DRCs). The Committee received very limited evidence about these conferences, however two issues raised by Judge Grant of the Children's Court warrant discussion.

Firstly, Judge Grant indicated that DHS is often not represented at the hearings by senior staff:

The protective workers that would go into the pre-hearing often are fairly young, fairly inexperienced and, although they may be managing the file, they are not authorised to make any decisions, so often they are required to leave the conference to ring someone else in another office to get that person's permission to sign off on some agreement, and we find that frustrating because the person in the office has not been part of the process, has not heard the discussion and we do not think that is very helpful.¹⁵³⁷

He told the Committee that the Children's Court's *Guidelines of dispute resolution conferences* also state that 'the process is assisted where protective workers are legally represented or have the necessary authority to negotiate a range of possible outcomes and make decisions that would lead to settlement'.¹⁵³⁸

Mr McDonald of DHS told the Committee that DHS's practice direction is that team leaders should attend the conferences:

If there are a number of matters with which they cannot proceed or that they are seeking, the decision to pursue or not to pursue may be a decision that requires a

¹⁵³⁶ See, for example, *Young Offenders Act 1997* (NSW) schedule 1; *Juvenile Justice Act 1992* (Qld) s 31.

¹⁵³⁷ Judge Grant, *Transcript of evidence*, above n 1431, 11.

¹⁵³⁸ *Ibid.*, 11. See also Children's Court of Victoria, *Guidelines for dispute resolution conferences* (2007), 5.

higher manager than the team leader to make those occasional decisions, which would be a unit manager. I think it would be in our interest that we send in staff – that is why we have got it as a team leader requirement – that can make the decision on the spot. The DRCs are negotiating environments where you want to capitalise on the moment, if I can put it like that, and that is our intention.¹⁵³⁹

The Committee encourages DHS to continue to monitor staff attendance at dispute resolution conferences to ensure that staff with the ability to make decisions attend the conferences.

Judge Grant told the Committee that a second issue affecting the effectiveness of dispute resolution conferences is that ‘in Melbourne we have had particular difficulty with some of our lawyers being particularly adversarial in the process and some of our convenors finding that difficult to deal with’.¹⁵⁴⁰ He drew the Committee’s attention to the Children’s Court guidelines which state, ‘In a DRC, a lawyer is required to adopt a role that is not adversarial. A lawyer maintains the role of an advocate representing a client but does so with an understanding of the DRC process’.¹⁵⁴¹

The Committee recognises that lawyers’ attitudes and approaches have a significant influence on the outcome of dispute resolution conferences. The Committee believes that training and information about dispute resolution conferences should be provided to lawyers practicing in the Children’s Court of Victoria. This should include information about the aims of the conferences, the philosophy of conferences and the role of lawyers in the process. There should be a particular focus on the need to adopt a non-adversarial approach, in line with the Children’s Court’s *Guidelines of dispute resolution conferences*. This information and training should be developed in consultation with the Law Institute and the Victorian Bar.

The Committee discusses the education of lawyers in relation to non-adversarial approaches in general in chapter 12.

Recommendation 63: Educating lawyers about dispute resolution conferences

The Victorian Government should work with professional bodies to provide regular training and information for lawyers about dispute resolution conferences in the Family Division of the Children’s Court of Victoria. This should include information about the purpose of the conferences and the role of the lawyer in the conference, with a particular emphasis on the need to adopt a cooperative, non-adversarial approach.

¹⁵³⁹ Paul McDonald, *Transcript of evidence*, above n 1450, 10. See also Department of Human Services, Victoria, *Child Protection and Family Services: Children Youth and Families: Children’s Court Dispute Resolution Conference: Program data*, supplementary evidence received 22 February 2008, 9.

¹⁵⁴⁰ Judge Grant, *Transcript of evidence*, above n 1431, 10.

¹⁵⁴¹ Children’s Court of Victoria, *Guidelines for dispute resolution conferences* (2007), 4.

Chapter 11 – Regulating restorative justice

The increasing use of restorative justice interventions in Victoria and other jurisdictions has led to growing interest in mechanisms for ensuring the quality and consistency of these programs and processes. This chapter explores the current regulation of restorative justice providers in Victoria and examines whether further regulation is required.

11.1 Current regulation of restorative justice programs in Victoria

11.1.1 Regulation of the Youth Justice Group Conferencing Program

The Youth Justice Group Conferencing (YJGC) Program is currently regulated under legislation and by Department of Human Services' (DHS) guidelines.

The *Children, Youth and Families Act 2005* (Vic) provides that the DHS Secretary may approve a service as a group conferencing program.¹⁵⁴² DHS has approved six organisations as group conference service providers.¹⁵⁴³ The approved organisations are generally community welfare agencies with experience in the delivery of community services. The DHS Secretary may withdraw the approval at any time if satisfied that the program is 'unable to provide services of an adequate standard'.¹⁵⁴⁴ The Committee understands that this power has not been exercised to date.

The Minister for Community Services may issue directions about the standards of approved YJGC Program services and establish procedures to ensure that those directions are implemented.¹⁵⁴⁵ No relevant directions have been issued under this power.

DHS has published *Youth Justice Group Conferencing program guidelines* which provide information and directions for agencies delivering the YJGC Program. The guidelines cover:

- the philosophy and objectives of group conferencing
- the initial processes, including court referral and suitability assessment
- the key components of the conference process
- the post-conference phase including sentencing outcome and implementation of outcome plans.¹⁵⁴⁶

¹⁵⁴² *Children, Youth and Families Act 2005* (Vic) s 480.

¹⁵⁴³ The YJGC Program providers are listed in figure 18 in chapter 8.

¹⁵⁴⁴ *Children, Youth and Families Act 2005* (Vic) s 480(2)(c).

¹⁵⁴⁵ *Children, Youth and Families Act 2005* (Vic) s 481.

¹⁵⁴⁶ Department of Human Services, Victoria, *Youth Justice Group Conferencing Program guidelines* (2007).

As discussed in chapter 9, service providers are also required to provide DHS with a range of information, including case data and quarterly reports against key performance indicators.¹⁵⁴⁷

YJGC Program convenors are employed directly by the service providers. However, DHS informed the Committee that it provides formal training for convenors.¹⁵⁴⁸ The training was developed and conducted by the Victorian Association for Restorative Justice (VARJ) and was delivered to all new service providers and DHS court staff in November 2006 and March 2008.¹⁵⁴⁹

DHS also funded VARJ to produce promotional and training DVDs. The Committee received positive feedback from stakeholders about the training DVD and was also impressed by its own viewing of this material.¹⁵⁵⁰

Ms Jan Noblett of DHS told the Committee that the department meets with service providers 'on a frequent basis' to discuss service delivery issues, with a view to ensuring service consistency.¹⁵⁵¹ In addition, DHS participates in the statewide Restorative Justice Advisory Group facilitated by the Department of Justice and the Juvenile Justice Group Conferencing Advisory Committee.¹⁵⁵² Mr Paul McDonald of DHS described DHS's role in the Juvenile Justice Group Conferencing Advisory Committee:

In relation to the role of the department in group conferencing, there is program development and the ability to take feedback in the development of this program. We participate in the state advisory group, of which Judge Grant is the chair, which has a membership of representatives from all the pilot service providers, legal reps and judiciary, just to talk in relation to this program.¹⁵⁵³

11.1.2 Regulation of the Young Adult Restorative Justice Group Conferencing Program

The Restorative Justice Advisory Committee was established in 2006 to advise the Department of Justice on the development and implementation of the Young Adult Restorative Justice Group Conferencing (YARJGC) Program at the Neighbourhood Justice Centre (NJC).¹⁵⁵⁴ The Advisory Committee includes representatives of DHS,

¹⁵⁴⁷ Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008, 6, appendix 2.

¹⁵⁴⁸ Jan Noblett, Director, Youth Services and Youth Justice, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 5.

¹⁵⁴⁹ Department of Human Services, above n 1547, 4; Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 2.

¹⁵⁵⁰ Judge Paul Grant, President, Children's Court of Victoria, *The Children's Koori Court (Criminal Division)*, supplementary evidence received 10 December 2007, 13.

¹⁵⁵¹ Jan Noblett, *Transcript of evidence*, above n 1548, 5.

¹⁵⁵² Department of Human Services, above n 1547, 17.

¹⁵⁵³ Paul McDonald, Executive Director, Children, Youth and Families Division, Department of Human Services, Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹⁵⁵⁴ Letter from Neil Twist, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009, attachment, 4-6.

YJGC program service providers and other relevant agencies, such as Victoria Police and Victoria Legal Aid. This Committee met monthly between 21 December 2006 and 28 June 2007.

The program is now overseen by a project board which meets monthly and comprises representatives of the Department of Justice and the NJC.¹⁵⁵⁵ The project board is responsible for the overall direction and management of the YARJGC Program.

The Department of Justice has engaged Anglicare to provide the YARJGC Program. Anglicare employs one full-time convenor and one sessional convenor to deliver the program. The department informed the Committee that both convenors have social work qualifications. In addition, the full-time convenor has extensive experience working with both youth and adult offenders and the sessional convenor has qualifications in law.¹⁵⁵⁶

The convenors received two days' training, provided by Anglicare. The department advised that this training focused on 'restorative justice principles and practice' but did not provide any specific details.¹⁵⁵⁷ The head convenor is responsible for assessing and responding to the training needs of program staff on an ongoing basis.¹⁵⁵⁸

Guidelines have been developed to provide a framework for the operation of the YARJGC Program. The guidelines set out:

- background information about restorative justice and the NJC
- information about the program's objectives
- details of the referral pathways
- details of the conference process
- information about the community education campaign and program evaluation.¹⁵⁵⁹

11.2 Is there a need to further regulate restorative justice in Victoria?

In chapter 5 the Committee noted the strong push for increased regulation of ADR practitioners both in Australia and internationally. In Australia, that push has culminated in the introduction of the National Mediator Accreditation System (NMAS), a national voluntary accreditation scheme for mediators which has been in place since January 2008.¹⁵⁶⁰ There is growing support for the increased regulation

¹⁵⁵⁵ Ibid, attachment, 6. See also Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)*, 26.

¹⁵⁵⁶ Letter from Neil Twist, above n 1554, attachment, 4.

¹⁵⁵⁷ Ibid, attachment, 4.

¹⁵⁵⁸ Neighbourhood Justice Centre, above n 1555, 26.

¹⁵⁵⁹ Ibid.

¹⁵⁶⁰ Tania Sourdin, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co., 288. See figure 7 in chapter 5 for a description of NMAS.

of restorative justice practitioners, with some practitioners recognising the potential to use NMAS as a model.¹⁵⁶¹

The calls for increased regulation arise predominantly out of concerns about the potential for restorative justice processes to impact on the human rights of participants. Key issues include the lack of due process protections for participants, and the lack of transparency of conference processes and outcomes compared with court processes (which provide clear procedural safeguards and involve a public hearing).¹⁵⁶² Proponents of restorative justice argue that these issues can be addressed by ensuring that restorative justice practitioners are appropriately trained and that they practice in accordance with human rights instruments and agreed practice standards.¹⁵⁶³

Regulation also has the potential to increase community support for restorative justice initiatives by promoting high service quality. For example, a review of the need for regulation of these programs in the United Kingdom concluded that:

High standards are essential to the success of restorative justice, to ensure that it succeeds in its goal of finding a positive way forward for everyone following a crime or an incident of harm. High standards are also essential to build confidence in restorative approaches in the criminal justice system, especially among victims and in communities.¹⁵⁶⁴

The advantages of regulation in relation to ADR were fully explored in chapter 5. VARJ submitted that some of these benefits, such as protecting consumers and building consumer confidence in the process, are equally relevant to restorative justice.¹⁵⁶⁵ However, there are also a number of differences. VARJ members Peter Condliffe and Kathy Douglas have highlighted the divergent issues raised by the regulation of restorative justice as opposed to ADR:

These [differences] include the comparative “newness” of the conferencing field and its dependence upon government subsidies or outsourced government-funded services. Related to this is the fact that the practice of conferencing, unlike a substantial amount of mediation, occurs principally within highly regulated contexts. Conferencing mostly occurs as an adjunct to court-based schemes ... Arguably, since the bulk of conferencing practice occurs in agencies rather than in private practice, the overall need for accreditation in the conferencing sphere may be

¹⁵⁶¹ Peter Condliffe and Kathy Douglas, 'Reflections on conferencing practice: The need for accreditation and the dangerous debate?' (2007) 18(3) *Australasian Dispute Resolution Journal*, 140, 142-144.

¹⁵⁶² Julie Webb-Pullman, 'Towards human rights based juvenile justice: group conferencing' (2001) *Australasian Dispute Resolution Journal*, 146, 154; Jenny Borgen, 'Kids, cops, courts, conferencing and children's rights - A note on perspectives' (1996) 2(2) *Australian Journal of Human Rights*, 209, 227; Tony E Marshall, *Restorative justice: An overview* (1999) Home Office, United Kingdom, 23; John Braithwaite, 'Setting standards for restorative justice' (2002) 42(3) *British Journal of Criminology*, 563, 566.

¹⁵⁶³ John Braithwaite, 'Principles of restorative justice' in A von Hirsch, J V Roberts, A E Bottoms, K Roach and M Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) Hart Publishing, 15-16.

¹⁵⁶⁴ Training and Accreditation Policy Group, *Best practice guidance for restorative practitioners and their case supervisors and line managers; and conclusions and recommendations of the training and accreditation policy group* (2004), 4.

¹⁵⁶⁵ VARJ, *Submission no. 28*, 24-25. See also Condliffe and Douglas, above n 1561, 143-144.

less evident than in the mediation industry due to the institutional regulation that most likely already occurs. However, this argument should be tempered with the knowledge that, due to the paucity of research into conferencing practice, conferencing standards in agencies are unclear and it may be the case that practice is somewhat “ad hoc”.¹⁵⁶⁶

However, regulation does pose some fundamental issues for restorative justice. Australian academic and restorative justice expert, John Braithwaite, has observed that restorative justice is concerned with transferring power to the people and any regulation results in that power being shifted back to the state.¹⁵⁶⁷ In addition, he has warned that regulating restorative justice processes risks stifling innovation and compromising some of the greatest strengths of the process, namely flexibility and responsiveness to individual circumstances.¹⁵⁶⁸

In other areas, such as mediation, the desire to be recognised as a ‘profession’ has underpinned the drive for regulation.¹⁵⁶⁹ Not only has this motivation been weaker in relation to restorative justice, but considerable concerns have also been raised about the professionalisation of the field. For example, both VARJ and the Bar observed:

training, education qualifications and perceived “professionalism” will have a significant impact upon the way these programs are run and administered ... this will lend itself to the relative formalization of restorative justice within the criminal justice system ...¹⁵⁷⁰

The Committee received differing views on whether there is a need for increased regulation of restorative justice services and service providers in Victoria. Anglicare suggested that ‘there is less need for regulation and a far greater need for resourcing of best practice and consistency of process ...’¹⁵⁷¹ In contrast, VARJ and the Salvation Army – Brayton Youth and Family Services (Salvation Army – BYFS) indicated that they felt greater regulation was required.¹⁵⁷²

The Committee did not receive evidence about any specific issues with the quality of restorative justice services in Victoria. The service providers which participated in this Inquiry all demonstrated high levels of commitment and professionalism. However, in the previous chapter the Committee noted a number of issues in relation to service consistency and convenor training.

The Committee believes that quality control is particularly important in restorative justice services because users do not have a choice of service providers and are often in a situation of extreme vulnerability. While quality and consistency can be

¹⁵⁶⁶ Condliffe and Douglas, above n 1561, 144.

¹⁵⁶⁷ Braithwaite, above n 1562, 563-564.

¹⁵⁶⁸ Ibid, 564-565.

¹⁵⁶⁹ Hilary Astor, 'Transforming the landscape of mediation' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008), 8.

¹⁵⁷⁰ The Victorian Bar, *Submission no. 13*, 63; VARJ, *Submission no. 28*, 26. See also Braithwaite, above n 1562, 573-574; Condliffe and Douglas, above n 1561, 145; Training and Accreditation Policy Group, above n 1564, 5.

¹⁵⁷¹ Anglicare Victoria, *Submission no. 26*, 24.

¹⁵⁷² VARJ, *Submission no. 28*, 23. See also The Salvation Army – Brayton Youth and Family Services (BYFS), *Submission no. 9*, 8.

enhanced through improved communication and coordination, as recommended in chapters 10 and 12, the Committee is of the view that additional protections are required. In the remainder of this chapter the Committee identifies a number of areas requiring regulatory reform.

11.3 Who should regulate restorative justice?

As noted throughout this report, restorative justice programs for juvenile and adult offenders are administered by different Victorian Government departments, with the YJGC Program administered by DHS and the YARJGC Program administered by the Department of Justice. In the previous chapter the Committee called for increased collaboration between these two government departments to ensure greater service consistency.

Several stakeholders noted the central role that government plays in the provision of restorative justice in Victoria. For example, Anglicare's submission stated:

Ultimately, it is state governments who are responsible for all aspects of ADR regulation and practice – funding, human resources, training, accreditation, data collection and reporting ...¹⁵⁷³

However, some stakeholders suggested that there was scope for the increased self-regulation of restorative justice practitioners. The National Alternative Dispute Resolution Advisory Council's (NADRAC) submission stated that it would like to see the development of national, voluntary industry accreditation standards, based on the NMAS model for restorative justice.¹⁵⁷⁴

While VARJ's original submission to the Committee stated 'it is still too early to know if accreditation and standards setting are the best way forward',¹⁵⁷⁵ a supplementary submission made in early 2009 indicated that VARJ has initiated a project to develop voluntary best practice standards and accreditation protocols for Victorian restorative justice providers.¹⁵⁷⁶ VARJ anticipates that this project will be completed by the end of 2009. DHS informed the Committee that it is participating in the project control group overseeing development of this accreditation system.¹⁵⁷⁷

The Committee is of the view that there is a role for both government and the profession in the regulation of restorative justice practitioners. It believes that Victorian Government departments administering restorative justice programs have an important role to play in training conference convenors and ensuring high service standards. In chapter 10 the Committee recommended a whole-of-government

¹⁵⁷³ Anglicare Victoria, *Submission no. 26*, 25. See also VARJ, *Submission no. 28*, 27.

¹⁵⁷⁴ National Alternative Dispute Resolution Advisory Council, *Submission no. 25S*, 5.

¹⁵⁷⁵ VARJ, *Submission no. 28*, 26. See also The Victorian Bar, *Submission no. 13*, 63.

¹⁵⁷⁶ VARJ, *Submission no. 28S*. See also VARJ, *VARJ colloquium (16 July 2008): Discussion outcomes*, <www.varj.asn.au/pdf/080716_PrioritiesNotes.pdf>, viewed 10 February 2009, 3.

¹⁵⁷⁷ Letter from Jan Noblett, Director, Youth Services and Youth Justice, Department of Human Services, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 6 February 2009, attachment, 1.

restorative justice framework to provide greater coordination and information sharing between departments administering restorative justice programs. The Committee believes that this increased collaboration should include a consistent approach to the regulation of restorative justice practitioners and services.

The Committee commends VARJ for initiating the development of voluntary standards and accreditation protocols in Victoria. The Committee believes that these standards and protocols have the potential to supplement and enhance the regulatory measures implemented by government. How this can be achieved is discussed further, below.

11.4 Practitioner skills and abilities

A practitioner's skills and abilities can have a significant impact on both participants' experiences of the restorative justice process and on the outcomes of the process.¹⁵⁷⁸ Tony Marshall of the United Kingdom Home Office has claimed that '[m]ediation between people who have been divided by crime is one of the most skilled and sensitive tasks to which anyone could be assigned'.¹⁵⁷⁹ In this section the Committee considers the selection and training of restorative justice practitioners.

11.4.1 The selection of restorative justice practitioners

As noted earlier, the selection of convenors in both the YJGC Program and the YARJGC Program is the responsibility of the individual service providers. There is currently no minimum education requirement for conference convenors in Victoria and stakeholders informed the Committee that convenors are recruited by individual service providers based on their skills and attributes rather than specific qualifications. For example, Mr Mark Longmuir of Anglicare told the Committee:

it is not so much a qualification per se, although we want someone with certain competencies in terms of ability to make assessments, to facilitate appropriately and obviously with a knowledge of the justice system. But it is not so much an issue of qualifications; it is about certain qualities that people have to be able to manage a very complex process of bringing together the needs of victims, the needs of the offender and the needs of the community to get a positive outcome. It is fairly hard to describe the set of skills that are actually required.¹⁵⁸⁰

His colleague, Reverend Jonathan Chambers, stressed the fundamental skill that convenors require is the ability to build effective relationships with a wide range of stakeholders.¹⁵⁸¹

¹⁵⁷⁸ United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes* (2006), 65.

¹⁵⁷⁹ Marshall, above n 1562, 27

¹⁵⁸⁰ Mark Longmuir, Manager, Community Services, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 6. See also Anglicare Victoria, *Submission no. 26*, 24-25.

¹⁵⁸¹ Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 6.

VARJ, the Victorian Bar and Anglicare all acknowledged that the current practice of restorative justice in Victoria is very diverse and argued that there is a need to more clearly identify the skills and experience that practitioners require.¹⁵⁸²

The submissions of VARJ and the Victorian Bar drew the Committee's attention to the work of the Training and Accreditation Policy Group in the United Kingdom. That group's final report identified that the core skills of restorative practice were the same, regardless of the context in which it was practiced, for instance in the justice system, in schools or in the community.¹⁵⁸³

The report identified the core knowledge required for restorative practice, including an understanding of restorative justice and its underlying philosophy, as well as the core skills of restorative justice practice. These skills include communication skills, the ability to create a safe environment for participation and the ability to treat people fairly.¹⁵⁸⁴ However, it was also noted that additional specialist skills are required in sensitive and complex cases.

The core knowledge and skill sets identified in the report have been incorporated into a voluntary code for educators providing restorative justice training to facilitators in the United Kingdom, as well as into the Scottish restorative justice best practice guidelines.¹⁵⁸⁵

The New Zealand Ministry of Justice has developed a toolkit to assist restorative justice service providers recruit people who are capable of being successful restorative justice practitioners. The toolkit includes a generic job description as well as a list of the essential and desirable skills and attributes of a conference facilitator.¹⁵⁸⁶ There is considerable overlap between these skills and attributes and those identified by the Training and Accreditation Policy Group in the United Kingdom.

Stakeholders in the Inquiry emphasised that focusing on the skills and abilities of potential restorative justice practitioners, rather than setting minimum educational requirements, avoids creating an entry barrier to members of disadvantaged groups. For example, Reverend Chambers of Anglicare told the Committee it is important that:

¹⁵⁸² The Victorian Bar, *Submission no. 13*, 62; VARJ, *Submission no. 28*, 26; Anglicare Victoria, *Submission no. 26*, 24. See also Mark Rumble, Director, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 6; Condliffe and Douglas, above n 1561, 145.

¹⁵⁸³ Training and Accreditation Policy Group, above n 1564, 6. See also The Victorian Bar, *Submission no. 13*, 61-62; VARJ, *Submission no. 28*, 25-26; Condliffe and Douglas, above n 1561, 145.

¹⁵⁸⁴ Training and Accreditation Policy Group, above n 1564, 17-19

¹⁵⁸⁵ Restorative Justice Consortium, *Regulating RJ*, <http://www.restorativejustice.org.uk/?RJ_in_the_UK:Regulating_RJ>, viewed 27 January 2009; Restorative Justice Consortium, *Introduction to RJC voluntary code of practice for trainers and training organisations of restorative practices facilitator training and the associated RJC complaints procedure* (2007); The Scottish Government, *Best practice guidance for restorative justice practitioners and their case supervisors and line managers (Scotland)*, <<http://www.scotland.gov.uk/Publications/2008/06/10144026/1>>, viewed 27 January 2009.

¹⁵⁸⁶ Ministry of Justice, New Zealand, *Restorative justice: Facilitator selection toolkit* (2008).

resources are available for training, but it is important to be able to train good local people rather than to over-professionalise the function ... it would be a great pity if you had somebody, say an elder in an Aboriginal community who could actually be trained up as a facilitator of conferences but if it became over-professional and perhaps run by lawyers it would then lose the value of people feeling as though we are involved in the justice process ...¹⁵⁸⁷

The Committee agrees that the selection of restorative justice practitioners should be based on a core set of skills and attributes rather than formal qualifications so as to recruit practitioners from a diverse range of backgrounds. It therefore recommends that the Victorian Government develop a list of core skills and attributes for restorative justice practitioners in consultation with current practitioners and VARJ. This list will assist service providers in the recruitment of appropriate staff and will inform the development of training for restorative justice practitioners, which is discussed further below.

Recommendation 64: Identification of core skills and attributes of restorative justice practitioners

The Victorian Government, in consultation with practitioners and the Victorian Association for Restorative Justice, should develop a list of core skills and attributes required by restorative justice practitioners.

11.4.2 Training for restorative justice practitioners

The United Nations' *Basic principles on the use of restorative justice programmes in criminal matters* emphasise the importance of restorative justice practitioners receiving 'initial training before taking up facilitation duties'.¹⁵⁸⁸

It was noted above that DHS provides initial training to YJGC Program convenors and Anglicare has provided initial training for the staff it has employed to run the YARJGC Program. Ms Laura Simmons of the Salvation Army – BYFS suggested that the training provided for staff delivering the YJGC Program was not adequate. She told the Committee that she had attended a week-long introductory course when she commenced as Program Coordinator, but has not had any ongoing training.¹⁵⁸⁹

The two other YJGC Program service providers participating in this Inquiry also highlighted the importance of training. Anglicare's submission emphasised the need

¹⁵⁸⁷ Jonathan Chambers, *Transcript of evidence*, above n 1581, 3. See also Anglicare Victoria, *Submission no. 26*, 24-25; Braithwaite, above n 1562, 575-574.

¹⁵⁸⁸ United Nations Economic and Social Council, 'Basic principles on the use of restorative justice programmes in criminal matters (Resolution 2002/12)' in United Nations Office on Drugs and Crime (ed.), *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006), principle 19.

¹⁵⁸⁹ Laura Simmons, Program Co-ordinator, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 5.

for convenors to be ‘consistently and appropriately trained’.¹⁵⁹⁰ Mr Tony Hayes of Jesuit Social Services told the Committee:

there should be some effort made to have qualifications and standards available for people who run conferences so that the recipients of the service can be sure they are getting the service from people who are qualified or trained properly ...¹⁵⁹¹

Some other jurisdictions have developed a much more comprehensive approach to training restorative justice practitioners. For example, the New Zealand Ministry of Justice has developed a seven step training process for restorative justice practitioners. This includes:

- assistance with the selection of new facilitators (discussed above)
- a self-study training manual for new facilitators which covers a range of topics and requires between four and eight hours to complete
- a five day face-to-face training course for new facilitators, delivered in a small group
- a minimum two month ‘apprenticeship’ where the new facilitator participates in restorative justice conferences under the guidance of an experienced practitioner
- a practice assessment with an external assessor
- accreditation (discussed further below)
- continuing training on an as-needs basis.¹⁵⁹²

Stakeholders in the Inquiry expressed support for a practical approach to training restorative justice practitioners, including mentoring and peer review. For example, VARJ told the Committee:

VARJ believes that peer and collegial support and collective review are essential parts of an effective training program for restorative justice convenors. Training for these practitioners would be an ongoing reflective process of “learning by doing” occurring over a period of time so that individuals and teams can most effectively build individual and collective knowledge and skills.¹⁵⁹³

The Committee believes that there is scope to improve the training currently provided to restorative justice practitioners in Victoria. While the Committee recognises that individual programs will have different program-specific processes and requirements, it believes that the skills required by practitioners working in different programs are fundamentally the same. Therefore, the Committee believes that there is scope for DHS and the Department of Justice to take a collaborative approach in relation to training restorative justice practitioners.

¹⁵⁹⁰ Anglicare Victoria, *Submission no. 26*, 24.

¹⁵⁹¹ Tony Hayes, Project Coordinator, Community Justice Program, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 3.

¹⁵⁹² Ministry of Justice, New Zealand, *Restorative justice: Facilitator induction training and accreditation*, 2-3.

¹⁵⁹³ VARJ, *Submission no. 28*, 11.

The Committee is of the view that the Victorian Government should provide a comprehensive training program for restorative justice practitioners. This should include initial training, a period of mentoring and peer support and then regular ongoing training. The training should be based around the core skills and knowledge that these practitioners require to undertake the role successfully.

In chapter 10 the Committee noted that stakeholders identified a particular training gap in relation to the rights and needs of victims and recommended that training on this particular issue be developed in consultation with victims' groups. That chapter also noted the important role that convenors play in providing information and encouraging young people to participate in the YJGC program, as well as engaging the local Indigenous community. The Committee believes that these skills should be emphasised in the training provided to restorative justice practitioners.

Recommendation 65: Training for restorative justice practitioners

The Victorian Government should provide a comprehensive training program for all restorative justice practitioners employed by contracted service providers. This training program should include initial training for all new practitioners, a period of mentoring and regular ongoing training.

11.5 Accreditation

An issue associated with training is the potential for practitioner accreditation. As noted earlier, the New Zealand model of practitioner training culminates in the practitioner's accreditation. The Ministry of Justice has indicated that, in future, this will be linked to quality assurance standards for government-funded restorative justice services in that country.¹⁵⁹⁴

There is currently no accreditation system for restorative justice practitioners in Victoria. Ms Noblett of DHS told the Committee, 'I think the thing that we find a challenge or a potential developmental opportunity is the question of accreditation ...'¹⁵⁹⁵ She indicated that DHS has been communicating with other Australian jurisdictions about this issue and that the Queensland accreditation model was of particular interest to DHS.¹⁵⁹⁶

In Queensland, conference convenors are approved under the *Juvenile Justice Act 1992* (Qld). The Act provides that, before approving a person as a convenor, the chief executive must be satisfied that the person has appropriate experience or training to be a convenor.¹⁵⁹⁷ The selection of convenors is skills-based and there are

¹⁵⁹⁴ Ministry of Justice, New Zealand, above n 1592, 3.

¹⁵⁹⁵ Jan Noblett, *Transcript of evidence*, above n 1548, 5.

¹⁵⁹⁶ *Ibid.*, 6.

¹⁵⁹⁷ *Juvenile Justice Act 1992* (Qld) 31(4). The chief executive is the chief executive of the department administering the *Child Protection Act 1999* (Qld).

no minimum formal qualifications.¹⁵⁹⁸ Convenors are required to attend and successfully complete a five-day training program. An accreditation process then follows, which involves demonstrating competency in a series of observed practice situations. Convenors are mentored by an experienced convenor until assessment has been completed.¹⁵⁹⁹ Convenors must maintain their accreditation on an annual basis. This requires the convenor to have conducted a minimum of three conferences over the twelve months. In addition, the practitioner must complete a practical assessment.¹⁶⁰⁰

As noted above, VARJ is currently developing voluntary accreditation protocols for Victorian restorative justice practitioners.¹⁶⁰¹ DHS informed the Committee that it is working with VARJ to develop this framework and is represented on the project control group.¹⁶⁰²

Stakeholders who commented on this issue were generally supportive of the accreditation of restorative justice practitioners. Jesuit Social Services stated that it supports a voluntary accreditation program under the auspices of VARJ, while the Salvation Army – BYFS advocated that accreditation should be mandatory.¹⁶⁰³ The Victorian Bar suggested that NADRAC could be involved in further work to identify the need for an accreditation system at a national level.¹⁶⁰⁴

The Committee recognises the value of an accreditation scheme in promoting confidence in the ability of practitioners to perform their role to the highest level. It believes the Victorian Government should implement an accreditation system for restorative justice practitioners working for contracted service providers. This should include initial and ongoing assessment based on the observation of the practitioner's skills and be linked to the ongoing training program recommended above.

The Committee commends the pioneering work of VARJ in developing an accreditation system for restorative justice practitioners in Victoria. The Committee believes that VARJ's proposed accreditation system has the potential to form the basis for the accreditation of practitioners employed by restorative justice service providers contracted by the Victorian Government. The Committee acknowledges that DHS has been involved in the preliminary work for VARJ's accreditation system and encourages ongoing participation by both DHS and the Department of Justice.

¹⁵⁹⁸ Department of Communities, Queensland, *Youth justice conferencing convenor*, <<http://www.communities.qld.gov.au/department/employment/youth-justice-conferencing-convenor.html>>, viewed 25 July 2008.

¹⁵⁹⁹ Department of Communities, Queensland, *Youth justice conferencing convenor: Approval and reapproval*, 2.

¹⁶⁰⁰ *Ibid*, 3.

¹⁶⁰¹ VARJ, *Submission no. 28S*. See also VARJ, *VARJ colloquium*, above n 1576, 3.

¹⁶⁰² Letter from Jan Noblett, above n 1577, attachment, 1.

¹⁶⁰³ Tony Hayes, *Transcript of evidence*, above n 1591, 3; The Salvation Army – BYFS, *Submission no. 9*, 8.

¹⁶⁰⁴ The Victorian Bar, *Submission no. 13*, 63.

Recommendation 66: Restorative justice practitioner accreditation

The Victorian Government should implement an accreditation system for restorative justice practitioners working for contracted service providers. This should include initial and periodic assessment of practitioners' practical skills and be linked to an ongoing training program.

11.6 Practice standards

An increasing number of jurisdictions around the globe are implementing practice standards for restorative justice. The United Nations' *Basic principles on the use of restorative justice programmes in criminal matters* recognise the importance of developing guidelines and standards for best practice in the delivery of restorative justice programs. The principles provide:

Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in the present instrument and should address, inter alia:

- a) The conditions for the referral of cases to restorative justice programmes;
- b) The handling of cases following a restorative process;
- c) The qualifications, training and assessment of facilitators;
- d) The administration of restorative justice programs;
- e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.¹⁶⁰⁵

The Committee's discussion paper noted the work that has been undertaken in New Zealand to ensure quality and consistency in the provision of restorative justice. In 2004 the New Zealand Ministry of Justice released *Principles of best practice for restorative justice processes in criminal cases* which were developed in consultation with restorative justice practitioners. The principles seek to provide a best practice framework for the provision of restorative justice processes, while recognising that 'restorative justice processes should be flexible and responsive to the needs of participants, particularly the victim and offender'.¹⁶⁰⁶ The principles are set out in figure 29.

The New Zealand Ministry of Justice is currently developing draft national practice standards based on the 2004 principles. Once finalised, these will be included as quality assurance standards in contracts with service providers.¹⁶⁰⁷

Stakeholders who commented on this issue were overwhelmingly positive about the New Zealand principles and supported the development of principles and standards

¹⁶⁰⁵ United Nations Economic and Social Council, above n 1588, principle 12.

¹⁶⁰⁶ Ministry of Justice, New Zealand, *Restorative justice in New Zealand: Best practice* (2004), 16.

¹⁶⁰⁷ Ministry of Justice, New Zealand, *Crime Prevention Unit: Reviewing arrangements for the delivery of restorative justice services*, <<http://www.justice.govt.nz/cpu/restorative-justice/review.html>>, viewed 19 January 2009.

in Victoria.¹⁶⁰⁸ However, the Bar's submission supported a national approach to the development of practice standards and stated that NADRAC 'may be best placed to set and co-ordinate appropriate standards for these services'.¹⁶⁰⁹ The Bar also emphasised that such standards should be voluntary.

Figure 29: New Zealand's *Principles of best practice for restorative justice processes in criminal cases*¹⁶¹⁰

1. Restorative justice processes are underpinned by voluntariness.
2. Full participation of the victim and offender should be encouraged.
3. Effective participation requires that participants, particularly the victim and offender, are well-informed.
4. Restorative justice processes must hold the offender accountable.
5. Flexibility and responsiveness are inherent characteristics of restorative justice processes.
Restorative justice processes should be guided by restorative justice values including:
 - respect and dignity for participants
 - safeguarding offenders' and victims' rights
 - balance and fairness
 - voluntariness
 - transparency (of process and outcomes) and
 - empowerment of participants.
6. Emotional and physical safety of participants is an over-riding concern.
7. Restorative justice providers (and facilitators) must ensure the delivery of an effective process.
8. Restorative justice processes should only be undertaken in appropriate cases.

The Committee notes the work being undertaken by VARJ in relation to the development of voluntary best practice standards for Victoria. The Committee believes that VARJ's proposed practice standards have the potential to be implemented as the practice standards for practitioners and services delivering restorative justice programs on behalf of the Victorian Government. The Committee therefore encourages the Victorian Government to actively participate in the development of these standards.

¹⁶⁰⁸ Anglicare Victoria, *Submission no. 26*, 24; The Victorian Bar, *Submission no. 13*, 61, 96-97; The Salvation Army – BYFS, *Submission no. 9*.

¹⁶⁰⁹ The Victorian Bar, *Submission no. 13*, 61. See also VARJ, *Submission no. 28*, 18.

¹⁶¹⁰ Ministry of Justice, New Zealand, above n 1606, 11-19.

Recommendation 67: Restorative justice practice standards

The Victorian Government should implement practice standards which clearly articulate the key practice requirements for contracted restorative justice service providers and their staff, and require service providers and their staff to comply with these standards as a condition of their contract.

11.7 Complaints about restorative justice services

The Committee did not receive any evidence about how complaints about Victorian restorative justice services are currently managed. As noted in chapter 9, program evaluations generally indicate high rates of participant satisfaction with restorative justice processes. However, given the vulnerability of participants and the sensitive nature of the process, it is important that any participant with a concern about how a matter has been handled is able to make a complaint.

Neither the guidelines for the YARJGC Program nor the YJGC Program contain information about managing complaints arising out of those programs.

Other Australian jurisdictions have implemented detailed complaints processes as part of their restorative justice programs. For example, the New South Wales Department of Juvenile Justice has included a section about dealing with complaints in its *Youth justice conferencing policy and procedures manual*.¹⁶¹¹ Complaints about conferences are dealt with under the department's *Policy and procedures for the resolution of client complaints*. Under that policy, complaints about convenors are investigated by an appointed departmental staff member.¹⁶¹²

The Committee notes that the best practice standards and accreditation protocols currently being developed by VARJ may include a complaints-handling mechanism.¹⁶¹³ The Committee believes it is important that all restorative justice programs in Victoria have a clearly articulated process for receiving, investigating and resolving complaints. Thus it recommends that a complaints-handling mechanism is incorporated into all restorative justice programs implemented by the Victorian Government. As a first step, such a mechanism should be specifically included in the *Youth Justice Group Conferencing program guidelines* and the *Young Adult Restorative Justice Group Conferencing Program at the Neighbourhood Justice Centre operating guidelines*.

¹⁶¹¹ Department of Juvenile Justice, New South Wales, *Youth justice conferencing policy and procedures manual* (2005), 1-22.

¹⁶¹² Department of Juvenile Justice, New South Wales, *Policy and procedures for the resolution of client complaints* (2002), 10. Note this policy was under review at the time this report was written. See also Ministry of Justice, New Zealand, above n 1606, 18.

¹⁶¹³ VARJ, *Submission no. 28*, 27.

Recommendation 68: Complaints about restorative justice services

The Victorian Government should ensure that all restorative justice programs implemented in Victoria have a clearly articulated complaints policy and complaints-handling system.

Chapter 12 – Expanding restorative approaches in Victoria

Restorative justice processes are currently used only in a narrow range of situations in Victoria. This chapter considers the potential to expand these programs in the Victorian criminal justice system, applying restorative justice approaches to a greater range of offences, at a number of different stages in the criminal justice system and in problem-solving courts. This chapter also discusses the need to promote restorative justice and explores the opportunities for adopting broader restorative approaches throughout society.

12.1 Expanding restorative justice programs in Victoria

Several stakeholders emphasised that restorative justice processes could be used more extensively in Victoria. For example, the Law Institute of Victoria's submission commented that 'restorative justice programs remain on the margins of the criminal justice system'.¹⁶¹⁴ This section discusses how restorative justice can be used more comprehensively throughout the criminal justice system.

12.1.1 Restorative justice for adult offenders

Both in Australia and internationally, restorative justice programs are predominantly restricted to the juvenile justice arena.¹⁶¹⁵ Even in jurisdictions where adults are potentially able to participate in restorative justice programs, the experience has been that it is mostly young people who are referred.¹⁶¹⁶ This focus on young offenders may be purely historical, as restorative justice evolved in the juvenile justice sphere, however it has been suggested that it reflects a view that young offenders are 'more amendable and deserving of rehabilitation'.¹⁶¹⁷

Restorative justice processes were initially introduced in Victoria in relation to juvenile offenders and are still used predominantly for that group. However, the two-year pilot Young Adult Restorative Justice Group Conferencing (YARJGC) Program at the Neighbourhood Justice Centre (NJC) has made group conferencing available for adult offenders in Victoria, although it is restricted to those aged between 18 and

¹⁶¹⁴ Law Institute of Victoria, *Submission no. 20S*, 4. See also Anglicare Victoria, *Submission no. 26*, 15-16.

¹⁶¹⁵ Heather Strang, *Restorative justice programs in Australia: A report to the Criminology Research Council* (2001), 4; Peter Condliffe, President, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 2.

¹⁶¹⁶ Strang, above n 1615, 4. In the ACT, while legislation allows adults to be referred, at the time of writing, it is only being applied to young offenders: Department of Justice and Community Safety, Australian Capital Territory, *Restorative Justice Unit*, <<http://www.jcs.act.gov.au/restorativejustice/Home.htm>>, viewed 5 March 2009.

¹⁶¹⁷ Sarah Curtis-Fawley and Kathleen Daly, 'Gendered violence and restorative justice: the views of victim advocates' (2005) 11(5) *Violence Against Women*, 603, 629. See also John Hinchey, Manager, Restorative Justice Unit, Department of Justice and Community Safety, Australian Capital Territory, *Transcript of evidence* for the Inquiry into Restorative Justice, Standing Committee on Education, Training and Young People, Legislative Assembly for the Australian Capital Territory, Canberra, 25 October 2007, 180.

Figure 30: Summary of adult restorative justice programs in Australia¹⁶¹⁸

Jurisdiction	Program	Offences	Stage of referral
NSW	Forum sentencing	Excludes persons who have been convicted of murder or manslaughter, serious personal violence offences, drug offences and serious fire arms offences. ¹⁶¹⁹	Court: pre-sentence after finding of guilt.
	Victim-offender mediation	No limitations on offence types.	Post-sentence: referrals come from victims, offenders or anyone working with victims and offenders. ¹⁶²⁰
Queensland	Justice mediation	Usually for offences heard by Magistrates' Court. More serious matters can be mediated if parties agree. ¹⁶²¹	Police Director of Public Prosecutions Court ¹⁶²²
Tasmania ¹⁶²³	Victim/offender mediation	No offences explicitly excluded.	Referrals may be made at any time from the victim, the victim's family or the offender.
Western Australia	Reparative mediation	Non-violent or property offences. ¹⁶²⁴	Court: pre-sentence after finding of guilt. ¹⁶²⁵ Community Justice Services: post-sentence.

¹⁶¹⁸ Note that the ACT has legislated for an adult restorative justice program under the *Crimes (Restorative Justice) Act 2004* (ACT) but this legislation is not yet in force in relation to adults. This table also excludes the YARJGC Program in Victoria which is described in chapter 8. Note also that the programs listed in this table are all delivered directly by the relevant government department, rather than delivered by a contracted non-government organisation as is the case in Victoria.

¹⁶¹⁹ *Criminal Procedure Regulation 2005* (NSW) r 7.

¹⁶²⁰ Department of Corrective Services, New South Wales, *Victim offender mediation: Information for participants*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/victim_offender_mediation.asp>, viewed 10 March 2009.

¹⁶²¹ Department of Justice and Attorney-General, Queensland Government, *Justice mediation: How justice mediation works*, <<http://www.justice.qld.gov.au/1061.htm>>, viewed 6 March 2009.

¹⁶²² Department of Justice and Attorney-General, Queensland Government, *Justice mediation: If you are a defendant*, <<http://www.justice.qld.gov.au/1058.htm>>, viewed 6 March 2009. See also *Justices Act 1886* (Qld) s 53A; *Dispute Resolution Centres Act 1990* (Qld) s 2.

¹⁶²³ Department of Justice, Tasmania, *Victim Support Services: Victim/offender mediation*, <<http://www.justice.tas.gov.au/victims/mediation>>, viewed 20 February 2009.

¹⁶²⁴ Department of Corrective Services, Government of Western Australia, *Reparative mediation: General information*, <<http://www.correctiveservices.wa.gov.au/R/reparativemediation.aspx?uid=0976-6788-3446-1791>>, viewed 6 March 2009.

¹⁶²⁵ *Sentencing Act 1995* (WA) ss 16(1), 27.

25 years. The YARJGC Program had its genesis in research and consultation conducted by Jesuit Social Services which identified that adults could potentially benefit just as much as young offenders from many restorative justice outcomes such as accepting responsibility for their actions and diversion from correctional institutions.¹⁶²⁶ The YARJGC Program will be evaluated over a three-year period.¹⁶²⁷

Restorative justice processes are available to adult offenders in several Australian jurisdictions, as summarised in figure 30.

Evaluations of adult conferencing programs in other Australasian jurisdictions have found high levels of victim¹⁶²⁸ and offender¹⁶²⁹ satisfaction with the process, an increase in offenders accepting responsibility for their offences,¹⁶³⁰ reduced recidivism¹⁶³¹ and increased diversion of offenders from correctional orders.¹⁶³²

The 2007 evaluation of a two-year pilot conferencing program for young adult offenders aged between 18 and 24 years in New South Wales, found that most stakeholders, with the exception of police, supported broadening the program's eligibility criteria to apply to all adult offenders.¹⁶³³ The program, now known as the Forum Sentencing Program, is currently being rolled out to include adult offenders of all ages at an increasing number of court locations throughout New South Wales.¹⁶³⁴

The Committee did not receive any evidence from stakeholders that advocated restricting restorative justice processes solely to young offenders. All stakeholders

¹⁶²⁶ Jesuit Social Services, *Development of a young adult restorative justice conferencing proposal for Victoria: Final report* (2006), 9-10.

¹⁶²⁷ Letter from Neil Twist, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009 attachment, 7-8; Attorney-General Rob Hulls, 'Hulls launches young adult conferencing program' (Media release, 4 March 2008).

¹⁶²⁸ Andrew Goldsmith, Mark Halsey and David Bamford, *Adult restorative justice conferencing pilot: An evaluation: Final report* (2005) South Australian Courts Administration Authority, 4; Crime and Justice Research Centre, Victoria University and Sue Triggs, Ministry of Justice, New Zealand, *New Zealand court-referred restorative justice pilot evaluation* (2005), chapters 8, 9. See also Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, Centre for Criminological Research, University of Sheffield, *Restorative justice: The views of victims and offenders: The third report from the evaluation of three schemes* (2007) Ministry of Justice, United Kingdom, 46.

¹⁶²⁹ Crime and Justice Research Centre, Victoria University and Sue Triggs, Ministry of Justice, 'A summary of: New Zealand court-referred restorative justice pilot: Evaluation' (2005) 39 (June 2005) *Just Published*, 1, 2-3; Crime and Justice Research Centre and Triggs, above n 1628, chapter 8. See also Shapland, Atkinson, Atkinson, Chapman, Dignan, Howes, Johnstone, Robinson and Sorsby, above n 1628, 46.

¹⁶³⁰ Julie People and Lily Trimboli, *An evaluation of the NSW Community Conferencing for Young Adults pilot program* (2007) NSW Bureau of Crime Statistics and Research, 43.

¹⁶³¹ Crime and Justice Research Centre and Triggs, above n 1629, 2-3; Crime and Justice Research Centre and Triggs, above n 1628, paragraph 10.3; Sue Triggs, *New Zealand court-referred restorative justice pilot: Two year follow-up of reoffending* (2005) Ministry of Justice, New Zealand, paragraphs 3.1-3.5. Cf People and Trimboli, above n 1630, 51; Washington State Institute for Public Policy, *Evidence-based adult corrections programs: What works and what does not* (2006), 3.

¹⁶³² Crime and Justice Research Centre and Triggs, above n 1629, 2-3; Crime and Justice Research Centre and Triggs, above n 1628, paragraph 7.5. Cf People and Trimboli, above n 1630, 51.

¹⁶³³ People and Trimboli, above n 1630, 43.

¹⁶³⁴ New South Wales Attorney-General John Hatzistergos, 'Victims of crime have a say in sentencing' (Media release, 4 June 2008).

who provided evidence on this issue supported extending restorative justice programs either to offenders aged 18 to 25 years or to all adult offenders. Both of these options are discussed below.

Restorative justice for offenders aged 18 to 25 years

The Law Institute of Victoria and the Crime Victims Support Association argued that restorative justice should be available for offenders aged 18 to 25 years.¹⁶³⁵ Mr Noel McNamara of the Crime Victims Support Association told the Committee ‘we believe it is only suitable for people up to 25 years of age really. If they are over 25 years of age ... usually they are well into a life of crime by then, anyhow’.¹⁶³⁶ Youthlaw, while not supporting an age restriction on those accessing restorative justice, emphasised that rehabilitation should be the guiding principle in the sentencing of young offenders up to age 25.¹⁶³⁷

Several stakeholders noted that the existing power of the Magistrates’ Court to defer sentencing offenders aged between 18 and 25 years could be utilised to refer appropriate cases to restorative justice programs.¹⁶³⁸ This mechanism is currently being used in the pilot YARJGC Program.

Restorative justice for all adult offenders

Several stakeholders argued that restorative justice should be available for suitable adult offenders regardless of age.¹⁶³⁹ Mr Peter Condliffe of the Victorian Association for Restorative Justice (VARJ) told the Committee there was no sound policy basis for restricting restorative justice programs to young offenders:

the management of juvenile programs and getting juveniles involved in programs which are seen to be aimed at rehabilitation and so forth has always been easier and politically less sensitive than involving adults. We seem to have this idea that they have more chance of success, but I think that is a one-dimensional view, because restorative justice is really about talking, involving community care with the offender, whatever their age.¹⁶⁴⁰

Anglicare’s submission stated that older offenders are also open to the personal development and growth that may arise out of participation in restorative justice processes:

Anglicare Victoria’s experience in conducting prison chaplaincy indicates that while young people are certainly capable of change, many offenders who have been in the

¹⁶³⁵ Law Institute of Victoria, *Submission no. 20S*, 6; Crime Victims Support Association, *Submission no. 29*. See also Judge Paul Grant, President, Children’s Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 12-13.

¹⁶³⁶ Noel McNamara, Chief Executive Officer, Crime Victims Support Association, *Transcript of evidence*, Melbourne, 25 February 2008, 5.

¹⁶³⁷ Youthlaw, *Submission no. 38*, 1.

¹⁶³⁸ *Ibid*; Law Institute of Victoria, *Submission no. 20S*, 6; Judge Grant, *Transcript of evidence*, above n 1635, 12-13.

¹⁶³⁹ Victoria Police, *Submission no. 12*, 4; The Victorian Bar, *Submission no. 13*, 57; Anglicare Victoria, *Submission no. 26*, 17; Victorian Association for Restorative Justice (VARJ), *Submission no. 28*, 14-15; Jesuit Social Services, *Submission no. 35*, 5; Youthlaw, *Submission no. 38*, 4.

¹⁶⁴⁰ Peter Condliffe, *Transcript of evidence*, above n 1615, 3.

criminal justice system for many years are open to radical personal change around the age of 35 – 40.¹⁶⁴¹

The Victorian Bar and VARJ both observed that limiting restorative justice programs to young offenders means that the victims of adult offenders are denied the benefit of participation. Mr Condliffe told the Committee:

if you are a victim of crime, should you be denied access to a process because the offender happens to be an adult rather than a juvenile in terms of the criminal justice system? — does that make rational sense? Not particularly; not if you are a victim. You still suffer in many of the same ways. You still have the same repercussions and you can still benefit from meeting the offender, whether they are a juvenile or an adult.¹⁶⁴²

Jesuit Social Services' submission to the Inquiry stated that its proposal for the extension of conferencing to offenders aged 18 to 25 years, which has been implemented as a trial at the NJC, 'was only a temporary step towards a model for all adult defendants to be considered for such a scheme providing the suitability assessment stage and voluntary nature of the program is maintained'.¹⁶⁴³ Mr John Griffin from the Department of Justice acknowledged that, following the pilot, the Department would be 'looking in the future to broadening it to include all first-time vulnerable people coming before the court'.¹⁶⁴⁴ The *Attorney-General's justice statement 2* also foreshadows the rollout of restorative justice initiatives more broadly to adult offenders.¹⁶⁴⁵

Mr Condliffe told the Committee that the safeguards that would need to be in place for an adult program are the same as those in the current Victorian youth justice program. These safeguards involve conducting a suitability assessment of the offender's understanding of the process, their motivations to participate, and their ability to fully participate. It also involves ensuring that the victim will not be re-victimised.¹⁶⁴⁶

The Committee's view

The Committee believes that restorative justice has the potential to benefit offenders, victims and the community regardless of the offender's age. The Committee notes that the stakeholders commenting on this issue were overwhelmingly in favour of making restorative justice processes available to adult offenders throughout Victoria, although some did advocate restricting this to offenders aged up to 25 years.

The Committee commends the pilot YARJGC Program at the NJC and believes the evaluation of that program will be an important starting point for informing the

¹⁶⁴¹ Anglicare Victoria, *Submission no. 26*, 17. See also The Victorian Bar, *Submission no. 13*, 57-58.

¹⁶⁴² Peter Condliffe, *Transcript of evidence*, above n 1615, 3. See also The Victorian Bar, *Submission no. 13*, 57-58; VARJ, *Submission no. 28*, 14-15.

¹⁶⁴³ Jesuit Social Services, *Submission no. 35*, 5.

¹⁶⁴⁴ John Griffin, Executive Director, Courts, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 9.

¹⁶⁴⁵ Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria, 24.

¹⁶⁴⁶ Peter Condliffe, *Transcript of evidence*, above n 1615, 4.

further expansion of adult restorative justice programs in Victoria. However, the Committee notes that two stakeholders expressed concern about whether a single court would be able to provide a sufficient number of referrals to inform a comprehensive evaluation.¹⁶⁴⁷

The Committee does not wish to pre-empt the findings of the YARJGC Program evaluation, although it notes the positive findings of evaluations of adult restorative justice programs in other jurisdictions. The Committee therefore recommends that, following evaluation of the YARJGC Program, and taking into consideration any relevant findings of that evaluation, the Victorian Government implement a staged rollout of group conferencing for all suitable adult offenders throughout Victoria. The Committee proposes that the program should initially be implemented in at least two Magistrates' Court locations, with a view to expanding the program to the Magistrates' Court statewide, subject to the results of ongoing monitoring and evaluation. This staged approach will expand the evidence base in relation to the use of restorative justice for adult offenders and will allow any issues to be identified and addressed at an early stage.

The Committee believes that, subject to any relevant findings of the YARJGC Program evaluation, the adult conferencing program should use the same model as the YARJGC Program, with three referral points, namely:

- prior to a formal plea via the Criminal Justice Diversion Program
- pre-sentence using the deferral of sentence mechanism
- post-sentence.

These multiple access points will ensure that the program is widely available to all offenders who wish to participate, subject to a suitability assessment.

In the Committee's view a comprehensive suitability assessment is an important safeguard for the process, ensuring that only appropriate offenders are referred to a group conference. The suitability criteria for the proposed adult program should include matters contained in the Youth Justice Group Conferencing (YJGC) Program and YARJGC Program suitability assessment criteria, namely:

- the offender's level of acceptance of responsibility for the offence
- the offender's level of motivation to participate
- the offender's understanding of the conference process and informed consent
- the offender's level of remorse, including their degree of victim empathy
- the level of support available to the offender
- issues which may impact on the offender's ability to participate in the conference such as intellectual functioning, substance abuse or level of interpersonal skills.¹⁶⁴⁸

¹⁶⁴⁷ Jesuit Social Services, *Submission no. 35*, 5; Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 8.

¹⁶⁴⁸ Department of Human Services, Victoria, *Youth Justice Group Conferencing Program guidelines* ('YJGCP guidelines'), (2007), 7, 31; Department of Human Services, Victoria, *Youth justice group conferencing*

The Committee notes that all juvenile justice conferencing schemes throughout Australia, including in Victoria, have a statutory basis.¹⁶⁴⁹ While no stakeholders mentioned the issue, the Committee also believes that it is important that the proposed adult conferencing program has a legislative foundation. This will formalise the program, providing a strong basis for referrals, as well as ensuring consistency in service delivery. In addition, the Committee believes that legislation is the best way of ensuring appropriate safeguards for participants.¹⁶⁵⁰

In chapter 10 the Committee considered a wide range of issues impacting on the success of the YJGC Program, including the importance of educating stakeholders about the program, engaging victims and encouraging the participation of offenders and victims from disadvantaged backgrounds. The Committee encourages the Victorian Government to fully consider the issues raised in that chapter in developing and implementing the proposed statewide adult conferencing program. In particular, the Committee suggests that the Victorian Government address the issues associated with service fragmentation that were identified in chapter 10, either by providing conferencing services itself, or through one service provider statewide.

In chapter 9 the Committee noted evidence that restorative justice processes may make offenders more accountable for their offending than traditional justice processes and may increase the likelihood of apologies and reparations. However, the Committee also recognises that some members of the community may have concerns about the expansion of restorative justice programs to adult offenders and, in particular, may perceive them as a ‘soft option’. The Committee discusses the need to increase community awareness and understanding of restorative justice further in section 12.2.

Recommendation 69: Restorative justice for adult offenders

Subject to the findings of the evaluation of the YARJGC Program, the Victorian Government should implement a staged rollout of a group conferencing program based on the YARJGC Program model for all suitable adult offenders, initially at two Magistrates’ Court locations. This program should have a legislative basis.

12.1.2 Restorative justice for serious offences

Restorative justice programs, both in Australia and internationally, have generally been used to deal with less serious offences.¹⁶⁵¹ VARJ’s submission highlighted this,

program: Suitability assessment guide (‘YJGCP suitability assessment guide’), supplementary evidence received 22 February 2008; Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing: Suitability assessment criteria*.

¹⁶⁴⁹ See figure 32. Note, the adult Forum Sentencing Program in NSW also has a legislative base, as does the yet-to-be implemented adult program in the ACT: see *Criminal Procedure Regulation 2005* (NSW); *Crimes (Restorative Justice) Act 2004* (ACT).

¹⁶⁵⁰ Goldsmith, Halsey, and Bamford, above n 1628, 3-4.

¹⁶⁵¹ Tracey Booth, ‘Altered perceptions of conflict in homicide matters: The role of victim-offender conferencing’ (2003) 14 *Australasian Dispute Resolution Journal*, 290, 295.

stating, 'In Australia to date, most victim offender conferencing has been identified with addressing non-violent property crimes and minor assaults'.¹⁶⁵² Serious offences are often excluded from restorative justice programs by legislation, referral practice or guidelines.¹⁶⁵³

The Children's Court of Victoria can defer sentencing to allow a young person to participate in a group conference if the court is considering imposing a sentence of probation or a youth supervision order.¹⁶⁵⁴ The court's President, Judge Paul Grant, told the Committee this means that a young person has to have committed a relatively serious offence to be referred to a group conference.¹⁶⁵⁵

However, Mr Mark Longmuir of Anglicare informed the Committee that most conferences run by Anglicare involve offences 'at the lower end of the spectrum. It could range from kids putting railway sleepers on tracks and the inherent risks of that; property theft a lot of time; criminal damage and those sort of offences'.¹⁶⁵⁶

While the *Children, Youth and Families Act 2005* (Vic) does not set any limits on the types of offences that can be referred to group conferencing, the Department of Human Services' (DHS) *Youth Justice Group Conferencing program guidelines* provide that a young person is only eligible to participate in group conferencing if he or she has 'pleaded guilty or has been found guilty of offence(s) that do not include homicide, manslaughter, sex offences or serious crimes of violence'.¹⁶⁵⁷ Mr Tony Hayes of Jesuit Social Services told the Committee that there is some confusion about the extent to which serious offences may be referred to group conferencing:

One of the guidelines talks about the excluded offences categories. Manslaughter and sex offences cannot be referred to conferencing, not crimes of serious violence ... We do get some problems sometimes when police say, 'How come this has been referred to conferencing? It is too serious.' ... there is no stipulation in the Act about what offences cannot come to conferencing, so therefore magistrates are not restricted by types of offences. They know manslaughter and sex offences will not come to conferencing, but the serious offences category is a bit unclear. We have asked DHS to clarify that, but the response we got was, 'Leave it up to the magistrates'.¹⁶⁵⁸

DHS provided the Committee with information about the types of offences committed by offenders participating in the YJGC Program. These are summarised in figure 31.

¹⁶⁵² VARJ, *Submission no. 28*, 12. See also The Victorian Bar, *Submission no. 13*, 55.

¹⁶⁵³ See, for example, *Young Offenders Act 1994* (WA) s 25(1); *Youth Justice Act 1997* (Tas) s 3; *Young Offenders Act 1997* (NSW) s 8.

¹⁶⁵⁴ *Children, Youth and Families Act 2005* (Vic) s 415(1). See chapter 8 for a full discussion of this process.

¹⁶⁵⁵ Judge Grant, *Transcript of evidence*, above n 1635, 3.

¹⁶⁵⁶ Mark Longmuir, Manager, Community Services, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, 5.

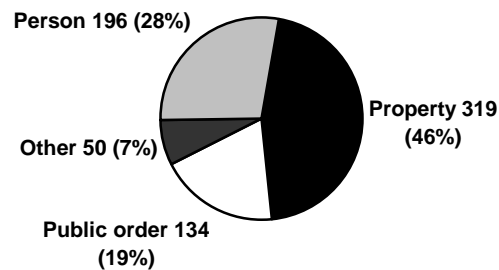
¹⁶⁵⁷ Department of Human Services, YJGCP guidelines, above n 1648, 31. See also Department of Human Services, YGJCP suitability assessment guide, above n 1648.

¹⁶⁵⁸ Tony Hayes, Project Coordinator, Community Justice Program, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 4. See also Jesuit Social Services, *Submission no. 35*, 4.

Mr Griffin from the Department of Justice told the Committee that sexual offences and family violence matters are currently excluded from the YARJGC Program:

We have chosen to deliberately exclude them at the present time with a view that I am not sure the community would agree with in the initial stages to having sex offenders, and you have only to look at the treatment in the media on sex offending generally. Our view is to establish a credible program and then do an assessment as to whether or not they were appropriate cases to come before them ... We have no intentions of extending it at this time until we do the evaluation ...¹⁶⁵⁹

Figure 31: Youth Justice Group Conference Program conferences by offence type. Metropolitan Melbourne 2003-07¹⁶⁶⁰



In addition, serious crimes of violence are also excluded from the deferral of sentence pathway, although they may be included at the post-sentence stage.¹⁶⁶¹

Information provided by the Department of Justice indicates that the cases referred to the pilot YARJGC Program to date predominantly involved assaults and property damage.¹⁶⁶²

There is considerable variation in the offences for which restorative justice programs are available to adult and juvenile offenders in different Australian jurisdictions. The offences for which restorative justice processes may be used for adult and young offenders throughout Australia are summarised in figures 30 (above) and 32 (below) respectively.

The effective use of restorative justice to respond to serious offences in other Australian jurisdictions was noted by several stakeholders in the Inquiry. For example, Mr Condliffe from VARJ highlighted the use of restorative justice both pre- and post-sentence for serious offences in Queensland and asked:

¹⁶⁵⁹ John Griffin, *Transcript of evidence*, above n 1644, 10. See also *Magistrates' Court Act 1989* (Vic) s 40.

¹⁶⁶⁰ Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008, figure 4. See also figure 12.

¹⁶⁶¹ Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)* (2008), 16, 19. Note that sex offences are still excluded at the post-sentence stage.

¹⁶⁶² Letter from Neil Twist, above n 1627, attachment, 3.

Why is that the case in Queensland, and why will it not work in Victoria? Nobody has answered why in South Australia they allow sexual offenders to be considered for conferencing, but it seems to be a big no-no in Victoria. The reasons are often political and administrative, and what bureaucracy – criminal, police, corrections or otherwise – is comfortable with. In philosophical terms, there is no reason why you cannot use these processes across the broad spectrum ...¹⁶⁶³

Figure 32: Offences for which young offenders may be referred to restorative justice throughout Australia¹⁶⁶⁴

Jurisdiction	Offences
ACT	Less serious offences, excluding less serious sexual and domestic violence offences. ¹⁶⁶⁵
NSW	Excludes offences causing the death of a person and certain drug, traffic, domestic violence and sexual offences. ¹⁶⁶⁶
Northern Territory	Police referral for non-serious offences only. ¹⁶⁶⁷ No limitations on offence types for court referrals.
Queensland	No limitations on offence types. ¹⁶⁶⁸
Tasmania	Excludes offences such as murder, serious sexual offences and armed robbery. ¹⁶⁶⁹
South Australia	Police referral for minor offences only. ¹⁶⁷⁰ No limitations of offence types for court referrals.
Western Australia	Excludes serious offences such as murder, crimes of violence and sex, drug and traffic offences. ¹⁶⁷¹

Several other witnesses also argued that restorative justice is potentially applicable to a wide range of crimes. For example, Reverend Jonathan Chambers from Anglicare stated:

¹⁶⁶³ Peter Condliffe, *Transcript of evidence*, above n 1615, 7. See also Law Institute of Victoria, *Submission no. 20S*, 6; David Fanning, Magistrate, Neighbourhood Justice Centre, *Transcript of evidence*, Melbourne, 4 March 2008, 10.

¹⁶⁶⁴ Note, this table excludes the YJGC Program in Victoria. The offences for which young offenders may be referred to group conferencing under that program are summarised in chapter 8.

¹⁶⁶⁵ *Crimes (Restorative Justice) Act 2004* (ACT) ss 14, 16. Note, the legislation will apply to less serious sexual and domestic violence offences from the start of phase 2 of the legislation's implementation.

¹⁶⁶⁶ *Young Offenders Act 1997* (NSW) s 8.

¹⁶⁶⁷ *Youth Justice Act 2005* (NT) s 39(4).

¹⁶⁶⁸ Department of Communities, Queensland, *Youth Justice Conferencing practice manual* (2008), chapter 1, 2-3. See also *Juvenile Justice Act 1992* (Qld).

¹⁶⁶⁹ *Youth Justice Act 1997* (Tas) s 3.

¹⁶⁷⁰ *Young Offenders Act 1993* (SA) s 7(1).

¹⁶⁷¹ *Young Offenders Act 1994* (WA) s 25.

my feeling is that there will be opportunities for all sorts of offences. I do not see any reason why restorative justice should be restricted to the bottom end only, because the whole thing is predicated on the victim and offender both being prepared to engage; that is really what it turns on ... Obviously you do not want to encourage people into doing something that they should not, but if they are both willing to participate and you have a skilled and qualified facilitator, then I think: 'Is there any harm?' It can always be called off. That is one of the rules of the conference: it can be called off if necessary.¹⁶⁷²

This was echoed by Youthlaw which commented, 'Given its therapeutic value, restorative justice should be made available to potentially all offences, where both parties consent'.¹⁶⁷³ Magistrate David Fanning of the NJC suggested that restorative justice could play an important role pre-sentence in more serious cases: 'Obviously in those more serious offences it is not going to be the complete answer to the sentencing of the individual, but it can be a very important component'.¹⁶⁷⁴ He told the Committee that restorative justice could even be used at a pre-sentence stage in relation to murder:

It is possible to have a restorative justice approach in a murder offence. It does not mean that the offender might not be committed to a lengthy term of imprisonment, but it does mean that, as part of the sentence, it be taken into account that the person was engaged in the restorative justice approach.¹⁶⁷⁵

Indeed, it has been argued that a restorative approach may be even more appropriate in responding to serious offences than it is for non-serious offences. American academic Mark Umbreit has suggested that 'the deepest healing impact of restorative justice is to be found in addressing and responding to such violent crime'.¹⁶⁷⁶ His research on the use of restorative justice processes with offenders and victims of serious crimes found high levels of satisfaction among participants, as well as healing for both victims and offenders.¹⁶⁷⁷

Stakeholders emphasised the importance of adequate program resourcing and convenor training if restorative justice programs are expanded to include serious offences.¹⁶⁷⁸ In particular, the need for appropriate preparation was stressed. Mr

¹⁶⁷² Jonathan Chambers, *Transcript of evidence*, above n 1647, 7.

¹⁶⁷³ Youthlaw, *Submission no. 38*, 4.

¹⁶⁷⁴ David Fanning, *Transcript of evidence*, above n 1663, 10.

¹⁶⁷⁵ *Ibid.* See case study 10 for an example of post-sentence restorative justice for a murder offence.

¹⁶⁷⁶ Mark Umbreit and Betty Vos, 'Homicide survivors meet the offender prior to execution: Restorative justice through dialogue' (2000) 4(1) *Homicide Studies*, 63, 64. See also Joshua Wachtel, International Institute for Restorative Practices, *RJ in the Land of the Long White Cloud: New Zealand embraces restorative justice for adult offenders* (2007), 2; Dot Goulding and Brian Steels, 'Developing, implementing and researching a communitarian model of restorative & transformative justice for adult offenders in Magistrates' Courts' in Michael S King and Kate Auty (eds.), *The therapeutic role of Magistrates' Courts* (2006) E Law Special Series - Volume 1, 46; Department of Justice and Community Safety, Australian Capital Territory, *First phase review of restorative justice* (2006), 11.

¹⁶⁷⁷ Mark S Umbreit, 'Violent offenders and their victims' in Martin Wright and Burt Galaway (eds.), *Mediation and criminal justice: Victims, offenders and community* (1989), 102-107. See also Umbreit and Vos, above n 1676, 65, 84.

¹⁶⁷⁸ The Salvation Army – Brayton Youth and Family Services (BYFS), *Submission no. 9*, 4; VARJ, *Submission no. 28*, 14; The Victorian Bar, *Submission no. 13*, 57. See also Mark Umbreit, William Bradshaw and Robert B Coates, 'Victims of severe violence meet the offender: Restorative justice through dialogue' (1999) 6(4) *International Review of Victimology*, 321, 340.

Condliffe told the Committee that ‘if you are arranging a conference between a murderer and the victim’s mother ... you have to do a lot more preliminary work than in the case of a burglary of a local store’.¹⁶⁷⁹

Several stakeholders also highlighted the need for the careful screening of program participants, with suitability assessments made on a case-by-case basis. For example, the Law Institute of Victoria submitted that ‘it is better to consider whether each individual case is appropriate on its own merits rather than having a blanket exclusion of particular serious offences’.¹⁶⁸⁰

Magistrate Fanning noted that there is a danger that offenders might use restorative justice for their own advantage, for instance to obtain a discount on a sentence, but suggested this could be overcome by a robust and transparent process.¹⁶⁸¹

Given the potential controversy surrounding this area, some stakeholders suggested a trial, or incremental, approach to using restorative justice for more serious offences in Victoria.¹⁶⁸²

However, there was not universal stakeholder support for expanding the categories of offences to which restorative justice applies. Victoria Police stated that it is difficult to support expanding restorative justice to a greater range of offences ‘without data’.¹⁶⁸³ Mr McNamara from the Crime Victims Support Association expressed support for the use of restorative justice for minor property offences such as car thefts and house burglary but not for crimes of ‘heavy violence’.¹⁶⁸⁴ Mr McNamara told the Committee that, in his association’s experience, victims of crimes such as homicide and sexual assaults are not interested in participating in restorative justice processes.¹⁶⁸⁵

The Committee acknowledges that there is considerable evidence that restorative justice processes can be effective responses for both adult and juvenile offenders who have committed serious offences. The Committee notes that DHS guidelines currently exclude serious crimes of violence from the YJGC Program, although there is some confusion among service providers about the crimes that fall into this category.

The Committee believes that there is scope for more serious crimes to be referred to group conferencing under the YJGC Program and recommends that a pilot program be implemented for more serious offences within the YJGC Program. This pilot

¹⁶⁷⁹ Peter Condliffe, *Transcript of evidence*, above n 1615, 7. See also Umbreit, Bradshaw and Coates, above n 1678, 323-4; Goldsmith, Halsey, and Bamford, above n 1628, 4; Booth, above n 1651, 298.

¹⁶⁸⁰ Law Institute of Victoria, *Submission no. 20S*, 6. See also VARJ, *Submission no. 28*, 14; Diane Spicer, Programs Manager, Prison Fellowship Australia - Victoria, *Transcript of evidence*, Melbourne, 5 June 2008, 9; Youthlaw, *Submission no. 38*, 4; Anglicare Victoria, *Submission no. 26*, 16; Victoria Police, *Submission no. 12*, 4.

¹⁶⁸¹ David Fanning, *Transcript of evidence*, above n 1663, 10.

¹⁶⁸² *Ibid*, Law Institute of Victoria, *Submission no. 20S*, 6.

¹⁶⁸³ Victoria Police, *Submission no. 12*, 4. See also The Victorian Bar, *Submission no. 13*, 55.

¹⁶⁸⁴ Noel McNamara, *Transcript of evidence*, above n 1636, 2-4. See also Crime Victims Support Association, *Submission no. 29*, 1.

¹⁶⁸⁵ Noel McNamara, *Transcript of evidence*, above n 1636, 2. Cf Umbreit and Vos, above n 1676, 64.

should include serious crimes of violence but exclude family violence and sexual offences. The use of restorative justice processes for family violence and sexual offences is discussed further, below.

The Committee believes that clear eligibility and screening guidelines should be developed to ensure that only suitable offenders are referred and that, in particular, victims are adequately protected. It is also important that facilitators are appropriately trained to deal with the issues that may arise in a conference for a more serious offence. In addition, the proposed pilot must be adequately resourced to ensure that enough time is available to prepare participants for the conference and to provide any necessary support for participants both before and after the conference. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Recommendation 70: YJGC Program serious offences pilot

The Victorian Government should implement a pilot for more serious offences within the YJGC Program. The pilot should include serious crimes of violence, but exclude family violence and sexual offences. The Victorian Government should develop clear eligibility guidelines for participation in the pilot and provide comprehensive specialist training for conference convenors. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

In the Committee's view there is also scope for restorative justice to be used in relation to serious offences committed by adult offenders. Earlier in this chapter the Committee recommended that the Victorian Government implement a staged rollout of an adult group conferencing program to the Magistrates' Court throughout the state. The Committee recommends that this should include a pilot program for serious offences, including crimes of violence, but excluding family violence and sexual offences. Again, the Committee emphasises the importance of appropriate screening guidelines, facilitator training and pre- and post-conference follow-up. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Recommendation 71: Adult restorative justice serious offences pilot

The Victorian Government should conduct a pilot for more serious offences as part of the adult restorative justice program recommended in recommendation 69. The pilot should include serious crimes of violence, but exclude family violence and sexual offences. The Victorian Government should develop clear eligibility guidelines for participation in the pilot and provide comprehensive specialist training for conference convenors. The pilot should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

Restorative justice responses to sexual offences and family violence

The appropriateness of restorative justice responses to family violence and sexual offences is particularly controversial.¹⁶⁸⁶ A range of issues have been identified in relation to applying restorative justice to these offences, including the danger of re-victimising the victim and the risk that restorative justice will be perceived as a soft option by both the offender and the general community.¹⁶⁸⁷ In addition, there is concern that restorative justice approaches may reprivatise gendered violence¹⁶⁸⁸ and risks 'creating a second rate justice that offers little protection for battered women'.¹⁶⁸⁹

However, proponents of restorative justice in these areas point to the failings of the conventional criminal justice system in dealing with family violence and sexual offences. There are low reporting rates among victims of sexual and family violence,¹⁶⁹⁰ and low prosecution and conviction rates, even when crimes are reported.¹⁶⁹¹ Court processes can be highly traumatic for victims of these crimes, with long delays, intimidating questioning and the public airing of their experiences.¹⁶⁹²

Restorative justice advocates have identified that the process offers a range of benefits for victims of sexual offences and family violence, including that it:

- condemns violence in a meaningful manner¹⁶⁹³
- gives victims the opportunity to tell their story¹⁶⁹⁴
- encourages admissions of offending¹⁶⁹⁵
- validates the victim's experiences¹⁶⁹⁶
- recognises that the victim and offender may be in an ongoing relationship¹⁶⁹⁷

¹⁶⁸⁶ The use of ADR to respond to family violence in the civil jurisdiction is equally controversial, as discussed in chapter 4.

¹⁶⁸⁷ Ruth Busch, 'Domestic violence and restorative justice initiatives: Who pays if we get it wrong?' in Heather Strang and John Braithwaite (eds.), *Restorative Justice and Family Violence* (2002), 236-7; Curtis-Fawley and Daly, above n 1617, 607-608; Angela Cameron, *Restorative justice: A literature review* (2005) The British Columbia Institute Against Family Violence, 22, 26-27.

¹⁶⁸⁸ Curtis-Fawley and Daly, above n 1617, 608; Marcia Neave, 'Restorative justice: When is it appropriate?' (Paper presented at the Restorative Justice Forum, Melbourne, 6 October 2004), 2; Cameron, above n 1687, 27.

¹⁶⁸⁹ VARJ, *Submission no. 28*, 22, quoting Donna Coker, 'Transformative justice: Anti-subordination processes in cases of domestic violence' in Strang and Braithwaite (eds.), above n 1687, 149. See also Findlay McRae, Director, Legal Services Department, Victoria Police, *Transcript of evidence*, Melbourne, 25 February 2008, 2-3.

¹⁶⁹⁰ Australian Bureau of Statistics, *Personal safety survey 2005, 4906.0* (2006), 8.

¹⁶⁹¹ Curtis-Fawley and Daly, above n 1617, 604; Kathleen Daly, 'Restorative justice and sexual assault: An archival study of court and conference cases' (2006) 46(2) *British Journal of Criminology*, 334, 342-3.

¹⁶⁹² Kathleen Daly and Sarah Curtis-Fawley, 'Restorative justice for victims of sexual assault' in Karen Heimer and Candace Kruttschnitt (eds.), *Gender and Crime: Patterns in Victimization and Offending* (2006) New York University Press, 232-233. See also Curtis-Fawley and Daly, above n 1617, 614-615.

¹⁶⁹³ Curtis-Fawley and Daly, above n 1617, 609.

¹⁶⁹⁴ *Ibid.*, 621; Victorian Law Reform Commission, *Review of family violence laws: Consultation paper* (2004), 52; Daly and Curtis-Fawley, above n 1692, 258.

¹⁶⁹⁵ Curtis-Fawley and Daly, above n 1617, 609; Victorian Law Reform Commission, above n 1694, 52; Daly and Curtis-Fawley, above n 1692, 258; Daly, above n 1691, 352-2.

¹⁶⁹⁶ Daly and Curtis-Fawley, above n 1692, 253.

- focuses on rehabilitation rather than retribution¹⁶⁹⁸
- promotes a more holistic understanding of the offence¹⁶⁹⁹
- may encourage the reporting of these crimes.¹⁷⁰⁰

In South Australia young offenders who have admitted sexual assault may be referred to group conferencing.¹⁷⁰¹ Studies of group conferencing for sexual offences in that state have found that the process can offer a greater degree of justice for victims than court. Offenders participating in a conference must have admitted their guilt, whereas, in court, offenders can deny the offence. One study found that only half the charges were proven in court, with the more serious charges the least likely to be proved.¹⁷⁰² Court cases took, on average, twice as long to finalise as conferenced cases, and even when cases were proved, penalties were not necessarily imposed.¹⁷⁰³ Based on this evidence, one study concludes that ‘our data suggest that the court, not the conference, is the site of cheap justice’.¹⁷⁰⁴

In contrast, an evaluation of the use of restorative justice for family violence offences in New Zealand concluded that restorative justice processes in family violence cases is appropriate for offences that are of low to medium seriousness, for example assaults that have not required the victim’s hospitalisation.¹⁷⁰⁵

The Victorian Law Reform Commission (VLRC) has examined the possibility of using restorative justice approaches for both family violence and sexual offences. In its report on family violence, the VLRC concluded that:

Establishing any restorative justice model for family violence matters depends on the development of appropriate models based on rigorous research. The commission’s position is that there is insufficient clarity in the research to support the adoption of restorative practices for use in family violence matters and little experience in using such practices. Common standards of practice have not been developed and it would be necessary to train practitioners to use these practices in family violence matters.¹⁷⁰⁶

In its report on sexual offences, the VLRC noted the high proportion of sexual offenders who commit their first offence as an adolescent and recommended the establishment of a joint working party to consider options for responding.¹⁷⁰⁷ In

¹⁶⁹⁷ Victorian Law Reform Commission, above n 1694, 52.

¹⁶⁹⁸ Curtis-Fawley and Daly, above n 1617, 620; Daly, above n 1691, 351.

¹⁶⁹⁹ Curtis-Fawley and Daly, above n 1617, 609.

¹⁷⁰⁰ Neave, above n 1688, 3.

¹⁷⁰¹ VARJ, *Submission no. 28*, 13.

¹⁷⁰² Daly, above n 1691, 342, 351.

¹⁷⁰³ Kathleen Daly, Brigitte Bouhours, Sarah Curtis-Fawley, Leanne Weber and Rita Scholl, *Sexual Assault Archival Study (SAAS): An archival study of sexual offence cases disposed in Youth Court and by conference and formal caution in South Australia (2007)* South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing, Technical Report No. 3, 61; Daly and Curtis-Fawley, above n 1692, 232-233; Daly, above n 1691, 351.

¹⁷⁰⁴ Daly, Bouhours, Curtis-Fawley, Weber and Scholl, above n 1703, 64.

¹⁷⁰⁵ Venezia Kingi, Judy Paulin and Laurie Porima, Crime and Justice Research Centre, Victoria University of Wellington, *Review of the delivery of restorative justice in family violence cases by providers funded by the Ministry of Justice* (2008) Ministry of Justice, New Zealand, 92.

¹⁷⁰⁶ Victorian Law Reform Commission, *Review of family violence laws: Report* (2006), 84.

¹⁷⁰⁷ Victorian Law Reform Commission, *Sexual offences: Final report* (2004), xlii, 478.

particular, it recommended that the conferencing model used in South Australia should be further examined in relation to juvenile sex offending in Victoria.¹⁷⁰⁸

Stakeholders providing evidence to the Committee expressed a diverse range of views about the appropriateness of using restorative justice approaches to sexual offences and family violence. Ms Diane Spicer of the Prison Fellowship shared her personal experience with the Committee:

As a victim of sexual abuse as a child, it was really important for me to make that connection for my healing. I know I would not be sitting here today had that not happened, because that was a real turning point in my life to be able to actually receive forgiveness and to give forgiveness to that man.¹⁷⁰⁹

Both Anglicare and Jesuit Social Services supported the expansion of restorative justice processes to sexual offences. In particular, Jesuit Social Services suggested that a sex offenders pilot program should be commenced ‘in conjunction with correctional therapeutic interventions’.¹⁷¹⁰

Youthlaw stated that it was ‘supportive of piloting a restorative justice response to family violence offences that is premised on consent of the victim and mindful of the inherent power imbalances these matters involve’.¹⁷¹¹ Anglicare’s submission to the Inquiry noted the controversy surrounding the use of restorative justice for family violence matters and concluded that family violence matters should be dealt with by the courts.¹⁷¹² While acknowledging that not all family violence victims will want to seek redress through the courts, Victoria Police argued that restorative justice processes are not appropriate due to the inherent power imbalances in these situations.¹⁷¹³

A number of stakeholders emphasised the need for further research into the appropriateness of restorative justice processes as a response to family violence and sexual offences.¹⁷¹⁴

Several stakeholders acknowledged that if restorative justice was to be used in relation to family violence and sexual offences, safeguards would be required to ensure that victims are not re-victimised. In particular, stakeholders emphasised the importance of adequate screening, case-specific preparation, facilitator training and post-conference follow-up.¹⁷¹⁵ For example, in its submission VARJ quoted feminist academic Ruth Busch:

¹⁷⁰⁸ Ibid, 478.

¹⁷⁰⁹ Diane Spicer, *Transcript of evidence*, above n 1680, 9.

¹⁷¹⁰ Jesuit Social Services, *Submission no. 35*, 7. See also Anglicare Victoria, *Submission no. 26*, 16.

¹⁷¹¹ Youthlaw, *Submission no. 38*, 6.

¹⁷¹² Anglicare Victoria, *Submission no. 26*, 23.

¹⁷¹³ Victoria Police, *Submission no. 12*, 7.

¹⁷¹⁴ Ibid, 7-8; Law Institute of Victoria, *Submission no. 20S*, 8; VARJ, *Submission no. 28*, 23. See also The Victorian Bar, *Submission no. 13*, 70; Federation of Community Legal Centres Victoria, *Submission no. 39*, 3; Cameron, above n 1687, 52.

¹⁷¹⁵ Youthlaw, *Submission no. 38*, 6; Federation of Community Legal Centres Victoria, *Submission no. 39*, 3; Cameron, above n 1687, 53-54; Kingi, Paulin and Porima, above n 1705, 27-28.

facilitators must be highly skilled in the dynamics of domestic violence, lethality risk assessment, and domestic violence screening techniques in order to recognise the warning signs for further violence and address the high levels of emotion and duress which might be involved.¹⁷¹⁶

Most advocates acknowledge that restorative justice approaches are not a stand-alone response to family violence and sexual offences, rather they should be used in conjunction with more traditional criminal justice responses.¹⁷¹⁷ An evaluation of the use of restorative justice in family violence offences in New Zealand concluded that restorative justice processes should be offered ‘as one of a suite of potential responses to family violence’.¹⁷¹⁸

Restorative justice responses to family violence in the Indigenous community

There is considerable debate about the appropriateness of restorative justice responses to family violence in the Indigenous community.¹⁷¹⁹ It has been argued that restorative justice responses to family violence in the Indigenous community empower local communities,¹⁷²⁰ address the underlying causes of family violence,¹⁷²¹ recognise that family violence affects all members of the family,¹⁷²² display community disapproval of violence¹⁷²³ and help repair relationships between the victim and offender and the offender and the community.¹⁷²⁴

Restorative justice approaches may also address issues with traditional criminal justice responses to family violence in the Indigenous community. Ms Greta Clarke of the Victorian Aboriginal Legal Service (VALS) told the Committee that Indigenous community support for restorative justice responses is motivated to some degree by:

problems with the criminal justice system – allegations that police do not respond to calls ... There is also the problem of deaths in custody, and Aboriginal women who

¹⁷¹⁶ VARJ, *Submission no. 28*, 22-23 quoting Busch, above n 1687, 229. See also Victorian Law Reform Commission, above n 1706, 84-85; Goldsmith, Halsey and Bamford, above n 1628, 4; Julie Stubbs, ‘Beyond apology? Domestic violence and critical questions for restorative justice’ (2007) 7(2) *Criminology & Criminal Justice*, 169, 181-182; Daly and Curtis-Fawley, above n 1692, 258.

¹⁷¹⁷ See Victorian Law Reform Commission, above n 1706, 84.

¹⁷¹⁸ Kingi, Paulin and Porima, above n 1705, 92.

¹⁷¹⁹ Victorian Aboriginal Legal Service, *Submission no. 32*, 24; Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples, Southern Cross University, *Transcript of evidence*, Melbourne, 30 June 2008, 19.

¹⁷²⁰ Loretta Kelly, *Transcript of evidence*, above n 1719, 19; Loretta Kelly, ‘Using restorative justice principles to address family violence in Aboriginal communities’ in Heather Strang and John Braithwaite (eds.), *Restorative Justice and Family Violence* (2002) Cambridge University Press, 220; Victorian Law Reform Commission, above n 1694, 52; Nicole Maree Bluett-Boyd, Department of Criminology, University of Melbourne, ‘In search of justice in family violence’: *Exploring alternative justice responses in the Victorian Indigenous Australian community* (2005) Victorian Aboriginal Legal Service, ii.

¹⁷²¹ Loretta Kelly, *Transcript of evidence*, above n 1719, 21; Kelly, above n 1720, 219.

¹⁷²² Kelly, above n 1720, 219.

¹⁷²³ Kelly, above n 1720, 218. See also Bluett-Boyd, above n 1720, 12; Loretta Kelly, ‘Mediation in Aboriginal communities: Familiar dilemmas, fresh developments’ (2002) 5(14) *Indigenous Law Bulletin*, 7, 9; Victorian Aboriginal Legal Service, *Submission no. 32*, 24.

¹⁷²⁴ Bluett-Boyd, above n 1720, 12.

have a shared consciousness with the Aboriginal men, not wanting to put their men in a position where there is a risk of death in custody, so they do not call the police ...¹⁷²⁵

Ms Clarke informed the Committee of research conducted by VALS, which found that:

non-Aboriginal women prefer a criminal justice response to family violence over restorative justice. Flip that around and it is the opposite for Aboriginal people. They prefer a restorative justice approach as opposed to a criminal justice approach ...¹⁷²⁶

The VLRC's report on family violence found qualified support among the Indigenous community for alternative responses to family violence.¹⁷²⁷ The VLRC concluded that there was no existing restorative justice model that could be applied to family violence in Victoria. It also stated that any such models would need to be developed by the Indigenous community and that this would require the dedication of specific resources to raise the community's capacity.¹⁷²⁸

Evidence provided to the Committee by VALS and Dr Loretta Kelly of Southern Cross University acknowledged the varying views on the appropriateness of restorative justice in cases of family violence, although both noted community support for the use of such models.¹⁷²⁹ VALS argued that protections such as appropriate screening and access to legal advice would need to be in place for a restorative justice model to function effectively.¹⁷³⁰

At a public hearing Ms Clarke stated, 'Restorative justice can either operate alongside the criminal justice system in a formal court structure or be completely separate. In the instance of family violence it would probably operate alongside'.¹⁷³¹

Both VALS and Dr Kelly acknowledged that it was unrealistic to expect any one approach to fully address the issue of family violence in either the Indigenous or non-Indigenous community. Dr Kelly has previously written that any 'restorative justice program would not be a panacea. An holistic strategy with a number of interventions must be adopted to effectively address the problem of family violence in our communities'.¹⁷³² Dr Kelly elaborated on this at the Committee's Indigenous Australian Communities Forum, stating:

¹⁷²⁵ Greta Clarke, Research Officer, Victorian Aboriginal Legal Service, *Transcript of evidence*, Melbourne, 25 February 2008, 7. See also Loretta Kelly, *Transcript of evidence*, above n 1719, 21; Bluett-Boyd, above n 1720, 8-10.

¹⁷²⁶ Greta Clarke, *Transcript of evidence*, above n 1725, 7. See also Bluett-Boyd, above n 1720, 12; Victorian Aboriginal Legal Service, *Submission no. 32*, 25.

¹⁷²⁷ Victorian Law Reform Commission, above n 1706, 81.

¹⁷²⁸ *Ibid.*, 84. See also Bluett-Boyd, above n 1720, 2; Julie Stubbs, *Restorative justice, domestic violence and family violence: Issues paper 9* (2004) Australian Domestic & Family Violence Clearinghouse, 12.

¹⁷²⁹ Victorian Aboriginal Legal Service, *Submission no. 32*, 24; Loretta Kelly, *Transcript of evidence*, above n 1719, 19.

¹⁷³⁰ Victorian Aboriginal Legal Service, *Submission no. 32*, 33.

¹⁷³¹ Greta Clarke, *Transcript of evidence*, above n 1725, 7.

¹⁷³² Kelly, above n 1720, 221. See also Victorian Law Reform Commission, above n 1706, 80.

You do not just have a program without a completely holistic, Koori-specific education campaign around family violence, not general but specific to that community because for each community the dynamics in family violence will differ. I would not even commence some sort of court without having probably at least 12 months of full-on community education programs.¹⁷³³

The Committee's view

The Committee notes the sensitivities and conflicting evidence about using restorative justice processes for family violence and sexual offences. While the Committee is aware that a restorative justice approach has the potential to offer a range of benefits in relation to these offences, it does not believe there is currently sufficient evidence for it to make further recommendations about these issues. It therefore suggests that further research be conducted in relation to the potential to apply restorative justice to family violence and sexual offences committed by both juveniles and adults. The Committee emphasises that any restorative justice approaches would only be one part of a comprehensive strategy to respond to these issues.

The Committee also notes that there is evidence that restorative justice responses have the potential to provide significant benefits as one part of a broader strategy to respond to family violence in the Indigenous community. However, again the Committee does not feel that there is sufficient evidence to make concrete recommendations about this issue. The Committee believes that there is a need for further research in relation to the use of restorative justice responses to family violence in the Indigenous community.

Recommendation 72: Restorative justice responses to sexual offences

The Victorian Government should undertake further research into whether, and if so, how, restorative justice processes might be effectively and appropriately applied to sexual offences in Victoria.

Recommendation 73: Restorative justice responses to family violence

The Victorian Government should undertake further research into whether, and if so, how, restorative justice processes might be effectively and appropriately applied to family violence offences in Victoria, including in relation to family violence in the Indigenous community.

12.1.3 Expanding referral pathways

Restorative justice interventions may be used at any stage of the criminal justice process.¹⁷³⁴ At present, young offenders are referred to the YJGC Program by the Children's Court prior to sentencing. The pilot YARJGC Program provides three

¹⁷³³ Loretta Kelly, *Transcript of evidence*, above n 1719, 21.

¹⁷³⁴ See figure 16 in chapter 7.

different referral points: post-charge but pre-finding of guilt, post-finding of guilt but pre-sentence and post-sentence. The program's operating guidelines state, 'The program's multiple pathways reflect the learnings of other jurisdictions ... The program provides benefits across the criminal justice system and creates additional opportunities for participation'.¹⁷³⁵

In its evidence to the Committee, VARJ emphasised that restorative justice is a philosophical approach that can be applied at any stage of the criminal justice system. While the process may differ in terms of administrative arrangements, it is fundamentally the same approach, as VARJ's president, Mr Condliffe, explained:

It seems to me that if you say 'We are only going to isolate this to one particular area of the criminal justice process', you have to ask yourself, 'Why does that make sense in terms of social utility in the broader philosophical sense', and I do not think it does make much sense ... In philosophical terms there is no reason why you cannot use these processes across the broad spectrum ... we are not talking about a process here. We are talking about a philosophical approach to managing wrongdoing in the broad sense of the word. Whether you are a policeman, a magistrate, a judge or someone working in corrections, we say your whole approach should be informed by restorative justice.¹⁷³⁶

Other stakeholders also strongly supported the use of restorative justice for suitable offenders and cases at all stages of the criminal justice process.¹⁷³⁷

VARJ and the Victorian Bar noted the diversity of referral points that exist in restorative justice programs throughout Australia.¹⁷³⁸ These are summarised in figure 30 (above) for adult offenders and figure 33 (below) for juvenile offenders.

This section considers the potential to use restorative justice at the pre-charge stage by police or at the post-sentence stage. The first option is not currently being used in Victoria. The second is being implemented as a pilot at the NJC.

Police diversion to restorative justice

The police are the gatekeepers of the criminal justice system and their decisions have significant impacts on the flow of cases into the system.¹⁷³⁹ At present Victorian police have a range of options when apprehending both adults and juveniles suspected of committing a crime, including cautioning and prosecution.¹⁷⁴⁰

Mr Findlay McRae of the Victoria Police told the Committee that, as far as possible, police try to deal with matters quickly at 'the front end', particularly with young offenders:

¹⁷³⁵ Neighbourhood Justice Centre, above n 1661, 9.

¹⁷³⁶ Peter Condliffe, *Transcript of evidence*, above n 1615, 7.

¹⁷³⁷ Anglicare Victoria, *Submission no. 26*, 17; The Salvation Army – BYFS, *Submission no. 9*, 4; The Victorian Bar, *Submission no. 13*, 58; Victoria Police, *Submission no. 12*, 4; Youthlaw, *Submission no. 38*, 4-5.

¹⁷³⁸ VARJ, *Submission no. 28*, 15-16; The Victorian Bar, *Submission no. 13*, 58-9.

¹⁷³⁹ Howard Broad, 'Restorative policing' in Gabrielle Maxwell and James H Liu (eds.), *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) Institute of Policy Studies, 125-6.

¹⁷⁴⁰ See, for example, Victoria Police, 'Police cautioning and drug diversion programs' in *Victoria Police Manual* (2007).

Figure 33: Stage of referral to juvenile conferencing schemes in Australia

Jurisdiction	Stage of referral
ACT	Police: pre-charge. Director of Public Prosecution: in early court proceedings. Court: <ul style="list-style-type: none"> • if offender does not plead guilty: in early court proceedings • if offender pleads guilty or is found guilty: at any time. Chief Executive Children and Young People: Post-sentence. ¹⁷⁴¹
NSW and Northern Territory	Police: pre-charge. ¹⁷⁴² Court: at any stage. ¹⁷⁴³
Queensland and Tasmania	Police: pre-charge. ¹⁷⁴⁴ Court: pre-sentence after finding of guilt. ¹⁷⁴⁵
South Australia	Police: pre-charge. ¹⁷⁴⁶ Court: after finding of guilt. ¹⁷⁴⁷
Victoria	Court: pre-sentence after finding of guilt. ¹⁷⁴⁸
Western Australia	Police/prosecutor: pre-charge. ¹⁷⁴⁹ Court: <ul style="list-style-type: none"> • before dealing with the charge • after a plea of guilty or a finding of guilt but before the court records a finding of guilt.¹⁷⁵⁰

¹⁷⁴¹ *Crimes (Restorative Justice) Act 2004* (ACT) s 22, table 22. Note, the Chief Executive Children and Young People means the chief executive of the administrative unit responsible for administering the *Children and Young People Act 2008* (ACT): s 22(2). See also Department of Justice and Community Safety, Australian Capital Territory, *Referral process*, <<http://www.jcs.act.gov.au/restorativejustice/ReferralProcess.htm>>, viewed 6 March 2009.

¹⁷⁴² *Young Offenders Act 1997* (NSW) s 9; *Youth Justice Act 2005* (NT) s 39(2).

¹⁷⁴³ *Young Offenders Act 1997* (NSW) s 40. Note, the Director of Public Prosecutions may also make a referral under this section. *Youth Justice Act 2005* (NT) ss 64, 84.

¹⁷⁴⁴ *Juvenile Justice Act 1992* (Qld) s 22; *Youth Justice Act 1997* (Tas) s 9(1).

¹⁷⁴⁵ *Juvenile Justice Act 1992* (Qld) s 161; *Youth Justice Act 1997* (Tas) s 37(1).

¹⁷⁴⁶ *Young Offenders Act 1993* (SA) s 8(7).

¹⁷⁴⁷ *Young Offenders Act 1993* (SA) s 17(2).

¹⁷⁴⁸ *Children, Youth and Families Act 2005* (Vic) s 414(1).

¹⁷⁴⁹ *Young Offenders Act 1994* (WA) s 27.

¹⁷⁵⁰ *Young Offenders Act 1994* (WA) s 28.

with first-time offenders, in looking at the severity of the offence our members will try to deal with the situation at the time, speak to the parents or an independent person and resolve matters so that people can get on with their lives.¹⁷⁵¹

He informed the Committee that approximately 40% of reported matters result in cautions.¹⁷⁵² In 2006-07 Victoria Police issued approximately 9000 cautions to young offenders and 5000 cautions to adult offenders.¹⁷⁵³

In all other Australian jurisdictions police are able to refer young offenders to restorative justice conferencing. The offences for which this is permitted vary between the jurisdictions. For example, in the Australian Capital Territory and the Northern Territory, police may only refer those who have committed minor offences, whereas in Queensland there is no restriction on the type of offence which may be referred by police to conferencing.¹⁷⁵⁴ In general, in these jurisdictions a successful conference will result in police finalising the matter without prosecution.

In the Northern Territory restorative justice conferences are organised and facilitated by police; however, in all other Australian jurisdictions the programs are administered externally.¹⁷⁵⁵

Queensland is the only Australian jurisdiction which allows police to refer adult offenders to a restorative justice conference (called 'justice mediation').¹⁷⁵⁶ Police in New Zealand can also divert adult offenders to restorative justice conferences.¹⁷⁵⁷

When deciding whether to divert an offender to restorative justice conferencing, the various legislative schemes throughout Australia place a number of limitations on police officers' decision-making powers. For example, in Queensland and New South Wales the legislation sets out a graded system, with conferences being the most severe response.¹⁷⁵⁸ In addition, participation in conferencing is voluntary in all

¹⁷⁵¹ Findlay McRae, *Transcript of evidence*, above n 1689, Melbourne, 25 February 2008, 3.

¹⁷⁵² *Ibid.*

¹⁷⁵³ *Ibid.*, 7; Victoria Police, *Victoria Police crime statistics 2006/07* (2007), 38.

¹⁷⁵⁴ *Youth Justice Act 2005* (NT) s 39(4); *Crimes (Restorative Justice) Act 2004* (ACT) s 14(1), table 22; *Juvenile Justice Act 1992* (Qld) ss 22, 30(5).

¹⁷⁵⁵ Northern Territory Police, *Juvenile pre-court diversion scheme FAQs*, <<http://www.nt.gov.au/pfes/index.cfm?fuseaction=page&p=141&m=25&sm=80&ssm=23>>, viewed 19 February 2009. For details about police-facilitated restorative justice schemes see David O'Mahony and Jonathan Doak, 'Restorative justice - Is more better? The experience of police-led restorative cautioning pilots in Northern Ireland' (2004) 43(5) *The Howard Journal*, 484; Paul McCold, 'Police-facilitated restorative conferencing: What the data show' (Paper presented at the 2nd Annual International Conference on Restorative Justice for Juveniles, Florida, 7-9 November 2008), 1-3.

¹⁷⁵⁶ Department of Justice and Attorney-General, Queensland Government, above n 1621. Note, legislation passed but not yet in force in the ACT allows police to refer adult offenders to restorative justice conferences *Crimes (Restorative Justice) Act 2004* (ACT) s 22, table 22.

¹⁷⁵⁷ New Zealand Police, *Police Adult Diversion Scheme policy*, <<http://www.police.govt.nz/service/diversion/policy.html>>, viewed 10 March 2009. Note, this scheme relies on police discretion and does not have a legislative basis.

¹⁷⁵⁸ *Young Offenders Act 1997* (NSW) ss 7, 13, 14, 18-20, 35-37; *Juvenile Justice Act 1992* (Qld) s 11. See also Jenny Barga, Janet Chan, Garth Luke and Garner Clancey, 'Regulating police discretion: An assessment of the impact of the New South Wales Young Offenders Act 1997' (2004) 28(2) *Criminal Law Journal*, 74, 134.

jurisdictions and in all jurisdictions other than New South Wales and Queensland, the young person's consent is required for a police officer to make a referral.¹⁷⁵⁹

Studies of police referrals to restorative justice conferences have found these interventions are successful in diverting young people from court.¹⁷⁶⁰

Several stakeholders supported Victorian police being able to refer offenders to restorative justice processes. For example, Mr Longmuir of Anglicare argued, although potentially more onerous for the offender, pre-charge referrals could lead to more effective outcomes:

What we would say is that there would be definite beneficial outcomes for the offender very early in the piece, even at that cautionary stage, of having to participate in some sort of conferencing. So, yes, the ante would be up, so they would be in a sense receiving an outcome that is much higher than just a warning from a police person, but I think the effectiveness in terms of reducing crime, if we get at it at that very early stage ...¹⁷⁶¹

The Salvation Army – Brayton Youth and Family Services' (Salvation Army – BYFS) submission supported the referral of young people to a conference by police as is currently provided in Queensland legislation.¹⁷⁶²

Ms Clarke of the Victorian Aboriginal Legal Service told the Committee that the service supported early diversion to restorative justice, but noted it was vital that it be equally accessible to Indigenous people.¹⁷⁶³ Ms Clarke stated that Indigenous people were not accessing diversion programs in proportion to their representation in the criminal justice system. Evaluations of police-referred conferencing programs in other jurisdictions have also observed this problem.¹⁷⁶⁴

The only stakeholder that expressly opposed police referral to restorative justice programs was the Law Institute of Victoria (LIV), which suggested that this may increase the number of young people brought into the criminal justice system (a phenomenon known as 'net widening'):

The LIV supports the current situation in Victoria where police do not have responsibility for referring offenders to restorative justice programs. The LIV submits that this helps to ensure that matters which might otherwise be dealt with by a caution or similar [are] not dealt with more seriously than they otherwise would.¹⁷⁶⁵

¹⁷⁵⁹ *Juvenile Justice Act 1992* (Qld) s 22(2); *Young Offenders Act 1997* (NSW) s 40(1).

¹⁷⁶⁰ Terry Hutchinson and Russell Smandych, 'Juvenile justice in Queensland and Canada: New legislation reflecting new directions' (2005) 23(1) *Australasian Canadian Studies*, 101, 126; McCold, above n 1755, 11; Janet Chan, Sally Doran, Elizabeth Maloney, Natasha Petkoska, Jenny Barga, Garth Luke and Garner Clancey, School of Social Science and Policy, University of New South Wales, *Reshaping juvenile justice: A study of the NSW Young Offenders Act 1997 (final report)* (2004), 28-29.

¹⁷⁶¹ Mark Longmuir, *Transcript of evidence*, above n 1656, 9. See also Anglicare Victoria, *Submission no. 26*, 14-15.

¹⁷⁶² The Salvation Army – BYFS, *Submission no. 9*, 8 citing *Juvenile Justice Act 1992* (Qld) ss 22-23.

¹⁷⁶³ Greta Clarke, *Transcript of evidence*, above n 1725, 5.

¹⁷⁶⁴ Chan, Doran, Maloney, Petkoska, Barga, Luke and Clancey, above n 1760, 29-30. See also Barga, Chan, Luke and Clancey, above n 1758, 148.

¹⁷⁶⁵ Law Institute of Victoria, *Submission no. 20S*, 5. Cf Anglicare Victoria, *Submission no. 26*, 14-15.

However, an alternative view was put by the Victorian Bar:

The Bar does not consider that restorative justice programs will bring more offenders into the criminal justice system, as the total number of offenders will not be significantly different, merely how those offenders might be dealt with within the judicial framework.¹⁷⁶⁶

Legislation in other Australian jurisdictions attempts to limit net widening in a number of ways. For example, New South Wales legislation sets out a hierarchy of interventions from warnings to cautions to conferences and guides police discretion in the use of each of these interventions.¹⁷⁶⁷ In the Australian Capital Territory an external monitor has the power to determine that an offender who has been referred is not eligible for restorative justice.¹⁷⁶⁸

An evaluation of the New South Wales legislation found that it did not result in net widening, with a rise in warnings, cautions and conferences resulting in correspondingly fewer matters dealt with by court.¹⁷⁶⁹

The Committee acknowledges that Victoria is the only Australian jurisdiction which does not allow police to divert young offenders to restorative justice programs and that there was some stakeholder support for introducing such a referral mechanism in Victoria. However, the Committee notes evidence from Jesuit Social Services that, at the time youth justice group conferencing was first introduced in Victoria in 1995, a police-referral component was not included because it was felt that the police cautioning program was 'adequately diverting most minor young offenders away from the criminal justice system without the need for more intrusive interventions'.¹⁷⁷⁰ A similar conclusion was reached when various possible referral pathways were being considered for the YARJGC Program.¹⁷⁷¹ The Committee has not received any evidence to indicate that the cautioning program run by Victoria Police is not operating effectively at present. Therefore, it is the Committee's view that police powers as they stand currently are adequate to deal with offenders at the pre-charge stage.

As noted in chapter 10, Victorian police have a role in diverting offenders to restorative justice programs through the Criminal Justice Diversion Program (CJDP) at the NJC. While it is ultimately the magistrate who makes the decision to refer a matter to conferencing under the CJDP, the police may be active in initiating the referral. The Committee believes this pathway, which provides oversight by a magistrate, is a more appropriate mechanism than the referral of matters directly by police. The Committee has recommended earlier in this chapter that this referral pathway be made available in the Magistrates' Court throughout Victoria.

¹⁷⁶⁶ The Victorian Bar, *Submission no. 13*, 54.

¹⁷⁶⁷ *Young Offenders Act 1997* (NSW) ss 7, 13, 14, 18-20, 35-37. See also Barga, Chan, Luke and Clancey, above n 1758, 134.

¹⁷⁶⁸ *Crimes (Restorative Justice) Act 2004* (ACT) s 31(2)(b).

¹⁷⁶⁹ Chan, Doran, Maloney, Petkoska, Barga, Luke and Clancey, above n 1760, 28-29. See also Barga, Chan, Luke and Clancey, above n 1758, 125.

¹⁷⁷⁰ Jesuit Social Services, *Submission no. 35*, 3-4.

¹⁷⁷¹ Neighbourhood Justice Centre, above n 1661, 10.

Post-sentence restorative justice

The YARJGC Program pilot offers offenders access to restorative justice after they have been sentenced by the court. As discussed in chapter 8, the post-sentence pathway has three entry points:

- during imprisonment in a participating prison
- post-release or during parole for a client of Community Correctional Services at the NJC
- during a community-based order for a Community Correctional Services client at the NJC.¹⁷⁷²

Data provided by the Department of Justice indicates that no post-sentence referrals to restorative justice were made through the YARJGC Program between September 2008, when referrals were first made to the program, and 31 December 2008.¹⁷⁷³ The Committee notes that the evaluation of the YARJGC Program will provide valuable data and information about the program's operation which will inform further policy development in this area. However, the Committee also notes evidence that the evaluation of the post-sentence component of the program may be somewhat limited by the size of the sample.¹⁷⁷⁴

Post-sentence restorative justice programs are available in a number of other Australian jurisdictions, including Western Australia and New South Wales.¹⁷⁷⁵ One of the longest running post-sentence programs in Australia is administered by the New South Wales Department of Corrective Services which has offered victim-offender conferencing (face-to-face dialogue), victim-offender mediation (facilitated information sharing between offenders and victims) and family group conferencing since 1999.¹⁷⁷⁶ The program is open to all suitable offenders regardless of their age or the type of offence they have committed. The processes take place after conviction or sentencing, prior to release from a correction centre, during probation or during parole. An example of a post-sentence restorative justice process, conducted in New South Wales with an offender who had committed homicide, is set out in case study 10.

While the New South Wales program has not been formally evaluated, anecdotal evidence suggests that it has benefits for both victims and offenders, such as meeting emotional needs, holding offenders accountable and providing parties with the opportunity to tell their story.¹⁷⁷⁷ Dr David Moore of VARJ highlighted the program's outcomes:

¹⁷⁷² Letter from Bob Cameron, Minister for Corrections, to Chair, Victorian Parliament Law Reform Committee, 31 July 2008, 2; Neighbourhood Justice Centre, above n 1661, 12-25.

¹⁷⁷³ Letter from Neil Twist, above n 1627, attachment, 3.

¹⁷⁷⁴ Jonathan Chambers, *Transcript of evidence*, above n 1647, 8.

¹⁷⁷⁵ See figure 30.

¹⁷⁷⁶ Department of Corrective Services, New South Wales, *The NSW Department of Corrective Services Restorative Justice Unit*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/index.asp>, viewed 4 March 2009.

¹⁷⁷⁷ Booth, above n 1651, 295.

Case study 10: Post-sentence restorative justice for a homicide offence¹⁷⁷⁸

‘Johnny is a forty five year old, knock about kind of a bloke with a lengthy history of drug and alcohol abuse and involvement with the criminal justice system ... Johnny [was sentenced to twenty years for] murdering a loving husband and father of four.

About three years into his sentence the wife of the deceased ... wanted to tell the offender about the impact of the loss of her husband on her and her children.

At the victim offender conference the offender acknowledged full responsibility for his actions and answered all of the wife’s questions about the offence and what he has done in custody to address his offending behaviour. A comprehensive outcome agreement was reached.

As a result of the victim offender conference the wife reported that she was able to make the offender understand how her family has been affected by his actions, had all her questions answered and felt the best she had since the offence.

The offender reported that ... he felt that he could begin to forgive himself and stop using the drugs that he used to blot out his feelings of guilt.

But has anything really changed for Johnny ... [since] the victim offender conference? ...

In the three and a half years leading up to the victim offender conference, Johnny failed numerous urinalysis tests ... Across that period he spent almost three quarters of the period on boxed, non-contact visits. For a quarter of that same period he was also off either buy-ups, leisure activities, amenities or the right to watch TV. Johnny was penalised on half a dozen other occasions for a range of breaches of discipline.

For a while Johnny was seen as potentially violent towards officers and other inmates ... There were also periods where he was assessed as at risk of self-harm.

In the year after [the conference], Johnny has come good on his undertaking to stop his habitual drug use. Not one positive urinalysis result or failure to supply a sample for testing has occurred. In fact, he incurred no fresh institutional charges at all. Nor were there any longer the concerns regarding risk to himself or others ...

In the same month as the victim offender conference, he applied for and won a four year apprenticeship. He has stuck with this ... and is reported to be a great worker. In addition, Johnny has worked diligently toward achieving his General Certificate of Education for Adults ... and was noted for great classroom contribution.

In 2008 Johnny continues to work with staff in addressing his offending behaviour. He is now undertaking more courses and is in the process of completing his referral assessment for an intensive custodial therapeutic program.’

¹⁷⁷⁸ Department of Corrective Services, New South Wales, ‘Participation in a victim offender conference presents offenders with a number of opportunities’ (2008) April 2008 *Restorative Justice Unit Newsletter*, 1.

The statistical data from that, but also the anecdotal reports of participants — the direct victims of the crime and their families and other supporters, the perpetrator and their family and other supporters — is that it is a powerful process because of the symbolic and practical exercise of getting a more complete understanding of what happened and some sense of being able to move on. People use terminology like, ‘I can get on with my life now’, rather than being fixed somehow at the time of the crime.¹⁷⁷⁹

In addition, the Committee received evidence about the Sycamore Tree Project which is run by Prison Fellowship International in 20 countries, as well as in New South Wales and Western Australia, here in Australia.¹⁷⁸⁰ Under the program incarcerated offenders and victims of similar (but not related) crimes meet for approximately two hours per week over eight weeks and participate in group discussions, victim and offender story telling and role plays. Mr Arthur Bolkas of Prison Fellowship Victoria described the Sycamore Tree Project to the Committee:

You have a trained facilitator who interviews inmates who are eligible to do the course. You bring six to eight inmates together with six to eight victims of crime, but they are unrelated victims and offenders. Over eight 2 to 3-hour sessions these parties come together and they are put through a program that is structured. It incorporates workshop activity and the opportunity to share feelings and sentiments. It is biblically based, in the sense that many of the precepts that undergird the course are about restoring people, in terms of confession, repentance, forgiveness and restitution ...¹⁷⁸¹

A 2005 evaluation of the Sycamore Tree Project in New Zealand found that the project had a number of positive outcomes for offenders, including reducing their expectation that they will re-offend and making them less likely to feel that crime was worthwhile.¹⁷⁸² However, the evaluation noted that victim empathy was not increased as much as anticipated, although offenders who completed the program were more empathetic to victims than the general prison population.¹⁷⁸³

The Prison Fellowship runs other programs in Victorian prisons, most notably the Lives in Transition program at Port Phillip Prison, which was described in chapter 8. However, the Sycamore Tree Project does not currently operate in Victoria. Mr Bolkas told the Committee that there has been a reluctance to permit victims to enter Victorian prisons. However, he stated that he believes corrections authorities are increasingly receptive to introducing the project in Victoria.¹⁷⁸⁴

The academic literature also supports the value of restorative justice interventions at the post-sentence stage. For example, as post-sentence restorative justice is likely to take place a considerable time after the crime event, it may be particularly helpful for

¹⁷⁷⁹ David Moore, Committee Member, Victorian Association for Restorative Justice (VARJ), *Transcript of evidence*, Melbourne, 25 February 2008, 4.

¹⁷⁸⁰ Arthur Bolkas, Director, Communities of Restoration, Prison Fellowship Australia (Victoria), *Submission no. 41*, 3.

¹⁷⁸¹ Arthur Bolkas, Director, Communities of Restoration, Prison Fellowship Australia (Victoria), *Transcript of evidence*, Melbourne, 5 June 2008, 7.

¹⁷⁸² Leon Bakker, *Sycamore Tree Project impact evaluation for Prison Fellowship New Zealand*, 6-8.

¹⁷⁸³ *Ibid*, 9.

¹⁷⁸⁴ Arthur Bolkas, *Transcript of evidence*, above n 1781, 7.

the victims of more serious crime as it may allow victims ‘an opportunity to work through issues of anger, grief and loss before meeting with the offender to work constructively towards healing in the conference forum’.¹⁷⁸⁵

In addition to those stakeholders who supported restorative justice at all stages of the criminal justice system, several stakeholders expressed particular support for restorative justice interventions at the post-sentence stage.

Dr Moore of VARJ commented that the utility of restorative justice processes is not linked to any impact they might have on sentencing:

Certainly the experience in those [post-sentence] programs has been that there has been quite a large take-up rate, with the requests coming from both the people who have been on the receiving end of crime and their supporters and the people who have committed the crime and their supporters. It is quite interesting to observe in practice from the empirical data that we have got that there is from both sides of the crime event an understanding that there is value in this exercise quite independent of what the state imposes as a sentence.¹⁷⁸⁶

Reverend Chambers of Anglicare stated that post-sentence restorative justice processes may be particularly beneficial for prisoners and victims who are family members, serving both to ease the prisoner’s transition back into the community and to establish boundaries for interactions with their family post-release.¹⁷⁸⁷

Jesuit Social Services informed the Committee that it recently conducted a restorative justice meeting with a young person serving a custodial sentence and commented, ‘We would like more young people currently subject to, or likely to be subject to, supervisory orders in youth justice to be considered for a restorative justice intervention’.¹⁷⁸⁸

Mr Condliffe of VARJ told the Committee that post-sentence restorative justice programs may require a greater degree of assessment and preparation, given the seriousness of the offences committed by the offender.¹⁷⁸⁹ This been the experience in New South Wales where both victims and offenders have been found to need a considerable degree of support both before and after the conference.¹⁷⁹⁰

The Prison Fellowship’s evidence emphasised the need for prison management and staff as well as Corrections Victoria to be supportive of restorative justice interventions in prisons.¹⁷⁹¹

¹⁷⁸⁵ Booth, above n 1651, 297.

¹⁷⁸⁶ David Moore, *Transcript of evidence*, above n 1779, 4. See also Peter Condliffe, *Transcript of evidence*, above n 1615, 7.

¹⁷⁸⁷ Jonathan Chambers, *Transcript of evidence*, above n 1647, 7.

¹⁷⁸⁸ Jesuit Social Services, *Submission no. 35*, 4.

¹⁷⁸⁹ Peter Condliffe, *Transcript of evidence*, above n 1615, 7. See also Jesuit Social Services, *A policy discussion paper on the development of a young adult restorative justice conferencing program in Victoria* (2005), 9.

¹⁷⁹⁰ Booth, above n 1651, 294-5.

¹⁷⁹¹ Diane Spicer, *Transcript of evidence*, above n 1680, 6; Arthur Bolkas, *Transcript of evidence*, above n 1781, 7.

VARJ's submission called for training for all people involved in restorative justice programs, including corrections staff.¹⁷⁹² Corrections Victoria informed the Committee that Community Correctional Services staff located at the NJC will receive training about the YARJGC Program and that these staff will attend restorative justice conferences when requested.¹⁷⁹³ Both Corrections Victoria and the NJC have developed program guidelines to support the operation of the YARJGC Program at the post-sentence stage. These guidelines emphasise the role of the head convenor at the NJC and the Community Correctional Services staff based at the NJC in educating community corrections staff, prison personnel and the Adult Parole Board about the program.¹⁷⁹⁴

The Committee believes that restorative justice programs at the post-sentence stage have the potential to provide significant benefits for victims, offenders and the general community. The Committee does not wish to pre-empt the findings of the evaluation of the YARJGC Program, which will include consideration of post-sentence conferencing, however, it believes there is considerable scope to expand post-sentence restorative justice programs to make them available to all offenders, including young offenders, throughout the state, subject to a comprehensive suitability assessment. The Committee believes that a comprehensively evaluated trial of a post-sentence group conferencing program for adult and young offenders will significantly contribute to the evidence-base in relation to post-sentence restorative justice programs in Victoria.

The Committee recognises that the success of post-sentence restorative justice programs depends to a significant extent on the support of corrections staff. The rollout of post-sentence restorative justice programs should be accompanied by comprehensive training for all relevant corrections staff in all aspects of restorative justice, including its underlying philosophy, the benefits of participation, the process and the eligibility criteria.

Recommendation 74: Post-sentence restorative justice

Subject to the findings of the evaluation of the YARJGC Program, the Victorian Government should implement a trial group conferencing program for adult and young offenders at the post-sentence stage, based on the YARJGC model. The trial should be conducted for a sufficient period of time to allow it to be comprehensively evaluated.

The impact of participation in restorative justice on sentence management

An important issue associated with the use of restorative justice processes at the post-sentence stage, is whether the offender's participation in the process should be taken into consideration in the management of the offender's sentence, for example, in

¹⁷⁹² VARJ, *Submission no. 28*, 12

¹⁷⁹³ Letter from Bob Cameron, above n 1772, 2.

¹⁷⁹⁴ *Ibid*; Neighbourhood Justice Centre, above n 1661, 20.

granting parole. The guidelines developed for the YARJGC Program stipulate that the outcomes of a restorative justice conference will not have any impact on an offender's eligibility for parole.¹⁷⁹⁵ This is consistent with the operation of such programs in other Australian states, including New South Wales.¹⁷⁹⁶

In New Zealand the *Parole Act 2002* (NZ) provides that any restorative justice outcomes are to be taken into consideration when making a decision about an offender's parole.¹⁷⁹⁷ To facilitate this, the Department of Corrections is required to provide the Parole Board with any reports of restorative justice processes in which an offender has participated.¹⁷⁹⁸

Supreme Court judge and former chair of the Victorian Adult Parole Board, Justice Murray Kellam, told the Committee that:

The New Zealand model has worked particularly well with indigenous offenders and victims, and of course they have a much larger group of both categories. I think it is a bit more difficult for us. I think it is worth looking at, but the Parole Board has not at the moment ... I still think it would be a fairly small category of cases.¹⁷⁹⁹

Mr Bolkas of the Prison Fellowship told the Committee that there is no formal recognition of the Fellowship's Lives in Transition program by the Adult Parole Board:

One question we often get asked it is, 'Will this help me with my parole?' Some of them come with mixed motives, and some of them come because they want to get it over you and get ahead and get out, but by and large the guys who come into our program are clear that this program will not necessarily get them parole, but what we are prepared to do – and we have done it on quite a few occasions – is to write a letter of reference and tell people they have done the course and how we found them in terms of the program. If that helps, it helps. That is about the extent of it.¹⁸⁰⁰

His colleague, Ms Spicer, commented that there should be greater acknowledgement of the benefits of participation in the Prison Fellowship's programs. She suggested that participation in a Prison Fellowship program could be specified as a prerequisite for an offender's parole.¹⁸⁰¹ This avenue has been incorporated into the pilot YARJGC Program: attending a conference can be stipulated as a parole condition, subject to a suitability assessment.¹⁸⁰²

While generally supporting an offender's participation in a restorative justice process being taken into account when determining parole, the Victorian Bar commented that

¹⁷⁹⁵ Letter from Bob Cameron, above n 1772, attachment A, 3; Neighbourhood Justice Centre, above n 1661, 24.
¹⁷⁹⁶ Queensland Corrective Services, *Procedure - Justice mediation*, <http://www.dcs.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofimprovicoffmed.shtml>, viewed 4 March 2009; Department of Corrective Services, New South Wales, *What is restorative justice?*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/what_is_restorative_justice.asp>, viewed 10 March 2009.
¹⁷⁹⁷ *Parole Act 2002* (NZ) s 7(2).
¹⁷⁹⁸ *Parole Act 2002* (NZ) s 43(1).
¹⁷⁹⁹ Justice Murray Kellam, Supreme Court of Victoria, *Transcript of evidence*, Melbourne, 10 December 2007, 8.
¹⁸⁰⁰ Arthur Bolkas, *Submission no. 41*, 11.
¹⁸⁰¹ Diane Spicer, *Transcript of evidence*, above n 1680, 10.
¹⁸⁰² Neighbourhood Justice Centre, above n 1661, 20.

that caution should be exercised at the parole stage as ‘[t]here are other systems of support and assistance which might be more appropriate to assist reintegration of prisoners in the community’.¹⁸⁰³

The Committee notes that the Adult Parole Board currently takes a range of factors into account in assessing prisoners’ eligibility for parole. These factors include:

- the nature and circumstances of the offence
- the comments made by the judge when sentencing the offender
- the offender’s criminal history
- the potential risk to the community and/or the offender
- reports made by a variety of professionals, including medical practitioners, psychiatrists, psychologists, custodial staff and community corrections officers
- submissions made by the offender, the offender’s family, friends and potential employers or any other relevant individuals
- representations made by the victim or by persons related to the victim
- representations made by the offender or others with an interest in the case
- the offender’s willingness to participate in relevant programs and courses while in custody.¹⁸⁰⁴

The Committee believes that there should be the opportunity to take participation in restorative justice processes into consideration in offenders’ sentence management in Victoria, particularly in granting parole. The Committee notes that participation in a restorative justice process is just one of a range of factors that should be taken into account at that stage. Careful screening of offenders participating in post-sentence restorative justice, as recommended above, will ensure that participants have genuine motivation for participation. The Committee notes that the Adult Parole Board already takes a range of factors into account in determining an offender’s eligibility for parole, and encourages the board to also consider participation in a restorative justice process as part of this process.

The Committee therefore recommends that, subject to the evaluation of the YARJGC Program, when rolling out the post-sentence restorative justice program recommended above, the program guidelines should specify that participation in the program may be taken into account as one of the range of factors taken into account in the offender’s sentence management, including in determining eligibility for parole.

Recommendation 75: Effect of participation in restorative justice on offender’s sentence management

The Victorian Government should specify in the program guidelines for the post-sentence restorative justice program in recommendation 74 that participation in the program may be taken into account in the offender’s sentence management.

¹⁸⁰³ The Victorian Bar, *Submission no. 13*, 59.

¹⁸⁰⁴ Adult Parole Board, *Board Members Manual* (2005).

12.1.4 Restorative justice in problem-solving courts

Earlier in this report the Committee noted the overlap between restorative justice and therapeutic jurisprudence, the latter of which has informed the development of problem-solving courts in Victoria. Some stakeholders characterised the current processes in Victorian problem-solving courts, such as the Drug Court and the Koori Courts, as restorative.¹⁸⁰⁵ While not including problem-solving approaches within its definition of restorative justice, the Committee recognises the overlap between therapeutic jurisprudence and restorative justice. This section examines whether there is potential to use restorative justice approaches as part of the processes in problem-solving courts in Victoria.

An Indigenous defendant who pleads guilty may choose to have their sentence determined by the Koori Court, which operates as part of the Children's, Magistrates' and County Courts.¹⁸⁰⁶ 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.¹⁸⁰⁷ A Koori elder or respected person provides advice to the court on cultural matters. While the magistrate or judge retains full sentencing alternatives, the Court aims to make sentences that are more culturally appropriate to Koori offenders.¹⁸⁰⁸

Ms Rosie Smith, Project Manager of Koori Programs and Initiatives at the Department of Justice, described the Koori Court's approach to the Committee:

Even though it is a foreign system — it is still the old court system — it is a system which allows Aboriginal people to have a voice, and that includes the elders. The role that the elders play is very significant in not only reprimanding an individual who might come before the court but also in providing that person — that they belong to the community and that they show respect. The Koori Court is based on respect.¹⁸⁰⁹

Judge Grant of the Children's Court of Victoria, told the Committee the Koori Court process is very similar to a conferencing process in that it actively engages the offender and the community around them. He noted that:

The difference with conferencing, of course, is that victims or victims' representatives are invited to attend as a matter of right.

In the Koori Court victims will only attend if they feel up to it, if they want to and if the police have advised them. We do not always have victims there.¹⁸¹⁰

¹⁸⁰⁵ See discussion in section 7.4.

¹⁸⁰⁶ *Magistrates' Court Act 1989* (Vic) s 4F; *County Court Act 1958* (Vic) s 4E; *Children, Youth and Families Act 2005* (Vic) s 519.

¹⁸⁰⁷ Department of Justice, Victoria, *Overview of the Koori Court* (2006).

¹⁸⁰⁸ Magistrates' Court of Victoria, *Koori Court - FAQs*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Koori+Court/MAGISTRATES++Koori+Court++FAQs>>, viewed 10 March 2009. See also Joyce Cooper, Respected Person, Koori Court, Broadmeadows Magistrates' Court, *Transcript of evidence*, Melbourne, 30 June 2008, 6.

¹⁸⁰⁹ Rosie Smith, Project Manager, Koori Programs and Initiatives, Courts and Tribunal Services, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 8.

¹⁸¹⁰ Judge Grant, *Transcript of evidence*, above n 1635, 5-6.

The Committee notes that the involvement of victims is not one of the stated aims of the Koori Court as it is for equivalent initiatives in other jurisdictions. For example, one of the primary aims of the Ngambra Circle Court in the Australian Capital Territory is ‘to provide support to victims of crime and enhance the rights and place of victims in the sentencing process’.¹⁸¹¹ In that state the prosecutor contacts the victim, explains the process and invites them to attend.¹⁸¹²

The evaluation of the Koori Court pilot program noted that while the court was designed to focus on the defendant, in some cases the participation of victims has had very positive results. For example, one police officer interviewed as part of the evaluation observed ‘one vehicle accident victim had the offender in tears due to realisation of the harm that she could have done to that victim’.¹⁸¹³

Another example of a problem-solving court is the Drug Court, which is run as part of the specialist jurisdiction of the Magistrates’ Court of Victoria. The court deals specifically with offenders who have committed an offence punishable by imprisonment, who have a dependency on alcohol or drugs and who are willing to plead guilty.¹⁸¹⁴ The court is empowered to sentence an offender by use of a drug treatment order which aims to rehabilitate the offender by preferring treatment options and attempting to avoid incarceration.¹⁸¹⁵

In New Zealand the Drug Court operates alongside restorative justice interventions for young offenders. Thus the Youth Drug Court may order a family group conference if it considers that the offender is suitable. There is no difference between a family group conference ordered by the Youth Drug Court and the Youth Court, although the Youth Drug Court regularly monitors the family group conference plan with fortnightly or monthly remands over a longer period.¹⁸¹⁶

An evaluation of the Youth Drug Court in New Zealand identified a number of issues with a dual approach to conferencing and drug treatment orders. Most of these focused on the fact that victims’ rights may be marginalised as the focus is on the

¹⁸¹¹ Department of Justice and Community Safety, Australian Capital Territory, *Ngambra Circle Sentencing Court: Community information for Aboriginal and Torres Strait Islander people in the ACT*. See also Judicial Commission of New South Wales and NSW Aboriginal Justice Advisory Council, *Circle sentencing in New South Wales: A review and evaluation* (2003) Potas, Ivan, Smart, Jane, Brignell, Georgia, Thomas, Brendan, and Lawrie, Rowena, 47-48.

¹⁸¹² Department of Justice and Community Safety, Australian Capital Territory, *Ngambra Circle Sentencing Court: Final interim practice direction* (2004) direction 27.

¹⁸¹³ Mark Harris, *Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) Department of Justice, Victoria, 56.

¹⁸¹⁴ Magistrates' Court of Victoria, *Drug Court*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Drug+Court/>>, viewed 10 March 2009. See also *Sentencing Act 1991* (Vic) s 18Z(2).

¹⁸¹⁵ *Sentencing Act 1991* (Vic) s 18X.

¹⁸¹⁶ Sue Carswell, *Process evaluation of the Christchurch Youth Drug Court Pilot* (2004) New Zealand Ministry of Justice, 64. See also Michael S King, 'Towards a more comprehensive resolution of conflict: The role of restorative justice' (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008), 11 in relation to the use of restorative justice in the Perth Drug Court in Western Australia.

drug and alcohol issues of the offender.¹⁸¹⁷ The evaluation suggested that these issues could be overcome by the provision of information to victims.¹⁸¹⁸

The Committee's discussion paper for this Inquiry asked whether the Koori and Drug Courts could more fully utilise restorative justice processes. Several stakeholders supported the Koori Court offering a restorative justice component.¹⁸¹⁹ VARJ stated 'the Koori Court would become restorative simply by allowing family members and victims to participate in the existing round-table proceedings'.¹⁸²⁰

Judge Grant noted the potential for victims to be more involved in existing Koori Court proceedings but stated that the Koori Court process was 'fairly onerous' for young offenders and voiced reservations about involving young offenders in both Koori Court and restorative justice processes.¹⁸²¹

There was also stakeholder support for the use of restorative approaches in the Drug Court. For example, VARJ stated, 'Drug courts could also benefit from restorative approaches that include victims and the offender's family and community of care in diversionary responses'.¹⁸²² Some stakeholders commented that a significant number of offenders, particularly young offenders, have drug and alcohol issues.¹⁸²³

Mr Condliffe of VARJ told the Committee that:

there has been a carefully thought-out process of interacting with offenders and victims as part of conferencing processes so that you maximise your chances of healing in the process. Why do we not try to look at the processes that the drug courts are using to actually bring some of that into the process? Also, could we use referral out to specialist conference conveners and others in some of these courts?¹⁸²⁴

Dr Moore also of VARJ told the Committee that there is room for greater alignment of restorative justice and related initiatives, including both the Koori and Drug Courts:

we have essentially cherry picked four programs — the Neighbourhood Justice Centre is modelled on the Red Hook court in New York; the Koori Court is modelled on projects that started in Canada, in Manitoba and Saskatchewan; the Drug Court was essentially modelled on the Michigan drug court; and then we have got conferencing as well, which was developed here in Australasia. So we have got these four very philosophically similar processes, and once you get up to that number it does seem that it is time for an audit ... it makes sense to sit down and say, 'Let's look at the common features here and also to what extent they can benefit from a greater coordination'.¹⁸²⁵

¹⁸¹⁷ Carswell, above n 1816, 67.

¹⁸¹⁸ Ibid, 68.

¹⁸¹⁹ VARJ, *Submission no. 28*, 21; Annette Vickery, Manager, Koori Programs and Initiatives, Courts and Tribunal Services, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 30 June 2008, 8-9.

¹⁸²⁰ VARJ, *Submission no. 28*, 21.

¹⁸²¹ Judge Grant, *Transcript of evidence*, above n 1635, 8.

¹⁸²² VARJ, *Submission no. 28*, 21. See also David Fanning, *Transcript of evidence*, above n 1663, 8.

¹⁸²³ Youthlaw, *Submission no. 38*, 2; Russell Jeffrey, Youth Justice Group Conference Convenor, Jesuit Social Services, *Transcript of evidence*, Melbourne, 25 February 2008, 5.

¹⁸²⁴ Peter Condliffe, *Transcript of evidence*, above n 1615, 8.

¹⁸²⁵ David Moore, *Transcript of evidence*, above n 1779, 9.

The Committee considers that there is considerable overlap between these approaches and that there would be benefit in a more detailed consideration of their inter-relationships and how they can be used together. In particular, the Committee believes restorative justice approaches have the potential to contribute to the outcomes in problem-solving courts. The Committee recognises that the Koori and Drug Courts already incorporate restorative aspects and believes there is scope to expand these, particularly in relation to the involvement of victims and the offender's community of care. The Committee recommends that the Victorian Government consider whether there are suitable ways to allow for greater involvement of victims and the offender's community of care, including families, in existing Koori and Drug Court proceedings. This would capitalise on the restorative nature of these courts' current processes.

The Committee notes that it is also possible to allow the Koori and Drug Courts to refer appropriate matters to restorative justice conferencing, as occurs in the New Zealand Youth Drug Court. However, the Committee is mindful of concerns that this would expose vulnerable offenders to two very demanding processes, and therefore does not recommend such an approach at this stage. However, this issue should be further considered as part of the research about engaging Indigenous offenders in restorative justice processes that the Committee recommended in chapter 10.

Recommendation 76: Restorative justice in problem-solving courts

The Victorian Government should consider whether there are suitable ways to allow for victims and for the offender's community of care to be more fully involved in proceedings in the Koori and Drug Courts.

12.2 Community awareness and understanding of restorative justice

One of the potential benefits of restorative justice is that it may build community confidence in the justice system as a whole. However, one of the greatest barriers to widespread community acceptance of restorative justice approaches is the perception that they are a 'soft option'.

Indeed, several stakeholders commented that there is a prevalent community view that restorative justice is a 'soft option'.¹⁸²⁶ The media was largely blamed for this misconception.¹⁸²⁷

The Victorian Aboriginal Legal Service's submission stated that restorative justice 'is often rejected due to fear because it is the 'unknown''.¹⁸²⁸ The submission cited research conducted by the Sentencing Advisory Council which found the general

¹⁸²⁶ Mark Longmuir, *Transcript of evidence*, above n 1656, 4; Youthlaw, *Submission no. 38*, 3. See also Hinchey, above n 1617, 180.

¹⁸²⁷ Victorian Aboriginal Legal Service, *Submission no. 32*, 12. See also Karen Gelb, *Myths and misconceptions: Public opinion versus public judgment about sentencing* (2006) Sentencing Advisory Council, 15-16.

¹⁸²⁸ Victorian Aboriginal Legal Service, *Submission no. 32*, 12.

community has a poor understanding of the criminal justice system and that people generally become more supportive of less punitive sentencing when provided with more accurate information.¹⁸²⁹

Some stakeholders observed that participants in the process, such as victims and police, may also see restorative justice as a soft option. For example, Mr Hayes of Jesuit Social Services stated:

we have also sometimes got to deal with police unhappiness with why this has gone to conferencing, because they are dealing with the victims in a direct fashion, and victims sometimes say, 'How come this is going for a conference? It is a soft option; they will get off easy'.¹⁸³⁰

Strategies for improving the knowledge and understanding of key stakeholders (such as police, magistrates and victims) about restorative justice, were identified in chapter 10.

Stakeholders overwhelmingly agreed that restorative justice is not a 'soft option'. Several stakeholders emphasised that restorative justice may be even more confronting for offenders than traditional criminal justice responses. Magistrate Fanning from the NJC told the Committee:

It is also very confronting for offenders to have the victim sitting there and eyeballing them about it. That is often the last thing that they want to do: 'Just give me the fine or give me the sentence or put me on the community-based order'. But to actually have to face the victim and to be confronted with their pain, anguish and distress as to the effect that it has had upon them is quite confronting ...¹⁸³¹

Similarly, Mr Longmuir of Anglicare stated:

I think in the beginning some of the offenders think it is a bit of a soft option too, but I can assure you that through the process of the group conference and the lead up to it, I think the process is anything but a soft option for the offender. I think it takes real courage to participate in the process, to front up to the victim, to be honest with them about what was going on and in a sense to apologise and make reparation. We have found that that process is not a soft option. It is not easy. In fact for some of the young people it is much easier to get probation or something like that. I think the offender has to accept a lot more responsibility for what they have done by fronting up to the victim than if they were just going through the normal court process.¹⁸³²

Research in other jurisdictions has identified the importance of educating the general community about restorative justice principles and the benefits of such programs.¹⁸³³

¹⁸²⁹ Victorian Aboriginal Legal Service, *Submission no. 32*, 12. See also John Griffin, *Transcript of evidence*, above n 1644, 10; Gelb, above n 1827, 17-18; Julian Roberts and Mike Hough, 'Sentencing young offenders: Public opinion in England and Wales' (2005) 5(3) *Criminal Justice*, 211, 220-221.

¹⁸³⁰ Tony Hayes, *Transcript of evidence*, above n 1658, 4. See also Mark Rumble, Director, The Salvation Army – BYFS, *Transcript of evidence*, Melbourne, 29 November 2007, 7; Anglicare Victoria, *Submission no. 26*, 11.

¹⁸³¹ David Fanning, *Transcript of evidence*, above n 1663, 3. See also Youthlaw, *Submission no. 38*, 3; Noel McNamara, *Transcript of evidence*, above n 1636, 5.

¹⁸³² Mark Longmuir, *Transcript of evidence*, above n 1656, 4.

¹⁸³³ Chan, Doran, Maloney, Petkoska, Barga, Luke and Clancey, above n 1760, 29-90; Crime and Justice Research Centre and Triggs, Ministry of Justice, above n 1629, paragraph 12.6.1.

Jenny Barga, Director of Youth Justice Conferencing in New South Wales, has described the education of the public as ‘vital to the longer term success’ of a restorative justice program.¹⁸³⁴ She argues that the attitudes of the general public can have a significant impact on the way a program is administered by key players, particularly the police.¹⁸³⁵

The New Zealand Commissioner of Police, Howard Broad, has also emphasised the risk of not effectively promoting restorative justice programs:

The approach needs to be communicated effectively. To the extent that this is seen as a ‘soft’ option by those participating and by those who will be called to comment (the media and so on) is a risk. Unless there are clear and compelling grounds, those in influential positions market the approach, and sufficient early progress is made to support those publicly promoting the approach, the fear of the community would be easily activated by those who will be promoting the ‘tough, hard-line, throw away the key’ model.¹⁸³⁶

The operating guidelines for the YARJGC Program at the NJC state that a community education program will be developed to support the program.¹⁸³⁷ The target audience for the program will include potential participants and key stakeholders as well as the media and broader community. The Committee did not receive any detailed information about the components of this campaign.

Stakeholders in this Inquiry suggested a number of strategies to increase community awareness and understanding of restorative justice and correct perceptions that restorative justice is a ‘soft option’.

Magistrate Fanning told the Committee:

restorative justice needs a few champions, I suppose. It needs to be argued, needs to be tested and needs to be piloted rather than laying it out and saying it is a wonderful thing and we will roll it out everywhere. I think there are good strategic reasons for having pilots prior to extending it out any further or extending it across the board. Also it would only require a few badly managed cases, I suppose, for it to lose credibility because of that perception by some in the community that it is, as I say, a soft option.¹⁸³⁸

Magistrate Fanning went on to say that one of the best ways to explain restorative justice to the community is by using real examples.¹⁸³⁹ The Committee notes that the NJC publishes regular newsletters which are distributed to the local community, through which it disseminates information on restorative justice, including using case studies of successful conferences.¹⁸⁴⁰

¹⁸³⁴ Barga, Chan, Luke and Clancey, above n 1758, 149.

¹⁸³⁵ Ibid.

¹⁸³⁶ Broad, above n 1739, 137. See also Peter Condliffe, ‘Putting the pieces together: The opportunity for restorative justice in Victoria’ (2005) 79 *Law Institute Journal*, 54, 58.

¹⁸³⁷ Neighbourhood Justice Centre, above n 1661, 46.

¹⁸³⁸ David Fanning, *Transcript of evidence*, above n 1663, 6.

¹⁸³⁹ Ibid, 7. See also Law Institute of Victoria, *Submission no. 20S*, 5-6; Victorian Association for Restorative Justice, *VARJ colloquium (16 July 2008): Discussion outcomes*, <www.varj.asn.au/pdf/080716_PrioritiesNotes.pdf>, viewed 10 February 2009, 1; Hinchey, above n 1617, 180.

¹⁸⁴⁰ See, for example, Neighbourhood Justice Centre, ‘Neighbourhood News’ (2008) Issue 2, 2.

Anglicare suggested that the government should actively promote restorative justice. Reverend Chambers told the Committee:

it would actually be worthwhile putting money into an ad campaign, in the same way as we have with the Transport Accident Commission and domestic violence, to actually help to change and educate the community about the value of restoring both victims and offenders.¹⁸⁴¹

VARJ supported a ‘concerted and targeted campaign informing all possible stakeholders of the benefits and availability of restorative justice programs for victims and offenders’.¹⁸⁴²

The Victorian Bar and the Victorian Aboriginal Legal Service both submitted that improved data collection and reporting would provide the community with access to better information about the outcomes of restorative justice.¹⁸⁴³

The Committee acknowledges that public opinion is becoming increasingly important in influencing policy in relation to the criminal justice system.¹⁸⁴⁴ Therefore it is essential that the implementation of restorative justice initiatives in Victoria is supported by a comprehensive community awareness campaign aimed at promoting understanding of the underlying philosophy of restorative justice, as well as the process and its outcomes. The Committee believes that stakeholders in this Inquiry have provided valuable ideas about what this campaign should include, such as publicising data about restorative justice outcomes and using ‘champions’, such as victims who have participated in restorative justice processes.

The Committee recommends that the proposed campaign be coordinated with the education of key stakeholders as recommended in chapter 10.

The Committee also encourages individual restorative justice service providers to promote their service’s own ‘success stories’ in their local community.

Recommendation 77: Increasing community awareness and understanding of restorative justice

The Victorian Government should develop and implement a campaign to increase community awareness of restorative justice, including its underlying philosophy, the process and its outcomes. This should include using real examples and stories to promote restorative justice at a community level and widespread reporting of data and information about the outcomes of restorative justice programs.

¹⁸⁴¹ Jonathan Chambers, *Transcript of evidence*, above n 1647, 3. See also Anglicare Victoria, *Submission no. 26*, 11.

¹⁸⁴² VARJ, *Submission no. 28*, 12.

¹⁸⁴³ The Victorian Bar, *Submission no. 13*, 68; Victorian Aboriginal Legal Service, *Submission no. 32*, 15. See also Neighbourhood Justice Centre Project Team, *Restorative justice: Background and discussion paper* (2007) Department of Justice, Victoria, 6.

¹⁸⁴⁴ Gelb, above n 1827, 3.

12.3 Information sharing and collaboration

As the Committee has emphasised throughout this report, there is a diverse range of restorative justice programs operating throughout Australia.¹⁸⁴⁵ Many programs have been established in response to local issues and needs, and indicate a flexible and localised response to dealing with crime.¹⁸⁴⁶ Mr Condliffe of VARJ has argued for a more nationally consistent approach to restorative justice:

It is surprising to look back over a decade of development to see that very few of the various jurisdictions seem to learn from each other. Rather, they continually start from first principles ... 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.¹⁸⁴⁷

On the other hand, Les McCrimmon and Melissa Lewis of the Australian Law Reform Commission have argued that diversity and responsiveness to local needs are features of restorative justice programs, but suggest that there is a greater need to share information and experiences, particularly in relation to successes.¹⁸⁴⁸

The Salvation Army – BYFS argued that there should be more sharing of information and know-how at a national level:

There are a myriad of evaluation papers on different restorative programs that have operated in Australia however there appears to be no formal national body which could co-ordinate and integrate programs and practitioners. A common understanding of the issues confronted by Convenors/Practitioners across the program base would assist in developing consistency across all programs, and would form the basis for ongoing discussion. [There would be benefit in a s]tate/nation-wide newsletter, which has as part of its agenda to allow opportunities for questions, answers and information sharing across all programs.¹⁸⁴⁹

The Committee notes that the National Alternative Dispute Resolution Advisory Committee's (NADRAC) charter now includes restorative justice, however NADRAC advised the Committee that it has 'not yet considered in depth' issues relating to restorative justice and has not undertaken any research in this area.¹⁸⁵⁰ NADRAC's submission noted that 'currently issues in restorative justice are being addressed in different jurisdictions and greater inter-governmental collaboration in this area in order to develop some consistent national principles would be desirable'.¹⁸⁵¹ In particular, NADRAC's submission emphasised that there is a need to increase networking of Indigenous practitioners:

¹⁸⁴⁵ Kathleen Daly and Hennessey Hayes, *Restorative justice and conferencing in Australia* (2001) Australian Institute of Criminology, 2-3.

¹⁸⁴⁶ Condliffe, above n 1836, 56.

¹⁸⁴⁷ *Ibid*, 56-57.

¹⁸⁴⁸ Les McCrimmon and Melissa Lewis, 'The role of ADR processes in the criminal justice system: A view from Australia' (Paper presented at the Association of Law Reform Agencies for Eastern and Southern Africa Conference, Uganda, 6 September 2005), 12.

¹⁸⁴⁹ The Salvation Army – BYFS, *Submission no. 9*, 5

¹⁸⁵⁰ National Alternative Dispute Resolution Advisory Council (NADRAC), *Submission no. 25*, 2. See also NADRAC, *Submission no. 25S*, 10.

¹⁸⁵¹ NADRAC, *Submission no. 25S*, 10.

In *Indigenous Dispute Resolution and Conflict Management*, NADRAC recommended that Australian governments evaluate an existing proposal to establish a national network of Indigenous dispute resolution practitioners and consider how to involve this consultative network in relevant services such as restorative justice programs.¹⁸⁵²

The Victorian Bar suggested there should be sharing of information about ‘what works’ and ‘why’. The Bar’s submission stated, ‘Common approaches may well also have significant costs benefits, and it is submitted that sharing of information would aid the development of best practice programs’.¹⁸⁵³

Several stakeholders highlighted the key role that VARJ plays in facilitating information-sharing between restorative justice practitioners and providers in Victoria. For example, Anglicare’s submission stated, ‘Most restorative justice service providers would be members of VARJ, the Victorian Association of Restorative Justice, with all the information-sharing advantages that membership of this network would bring’.¹⁸⁵⁴ VARJ’s aims and activities are summarised in figure 34.

Figure 34: The Victorian Association for Restorative Justice (VARJ)¹⁸⁵⁵

‘The Victorian Association for Restorative Justice (VARJ) is an incorporated association of restorative practitioners, policy makers and academics from throughout Victoria.

The stated aims of VARJ are:

- i. To promote and advocate the use of restorative practices in schools, the community, prisons, the criminal justice system, the workplace and any other situation where conflict arises.
- ii. To disseminate information about, and act as a resource for, restorative practices.
- iii. To develop and promote agreed standards and principles for evaluating and guiding restorative practice.
- iv. To encourage, and to undertake, research on restorative practice.

VARJ conducts regular public presentations on all matters restorative ...’

The Committee was represented at a conference and a colloquium organised by VARJ in 2008.¹⁸⁵⁶ Both events were well attended and provided a valuable opportunity to share ideas and gain knowledge about developments in restorative justice. VARJ’s website also provides information about a range of networking events and other meetings organised by the association, as well as information about other relevant conferences and events.¹⁸⁵⁷

¹⁸⁵² Ibid.

¹⁸⁵³ The Victorian Bar, *Submission no. 13*, 63.

¹⁸⁵⁴ Anglicare Victoria, *Submission no. 26*, 19. See also VARJ, *Submission no. 28*, 2.

¹⁸⁵⁵ VARJ, *Submission no. 28*, 2. See also Peter Condliffe, *Transcript of evidence*, above n 1615, 2.

¹⁸⁵⁶ See appendix D.

¹⁸⁵⁷ Victorian Association for Restorative Justice, *News & events*, <<http://www.varj.asn.au/news.htm>>, viewed 27 January 2009.

VARJ was also involved in the establishment of Restorative Practices International (RPI), which VARJ’s submission describes as ‘an Australian based international association of restorative practitioners ...’¹⁸⁵⁸ RPI held its inaugural conference in October 2007 on the Gold Coast and plans to hold a second in Canada in mid 2009.¹⁸⁵⁹

During the Committee’s study tour to New Zealand, Committee representatives met with members of New Zealand’s Restorative Justice Aotearoa (RJA), a national professional association of restorative justice providers. RJA has over 30 service provider members and is active across a range of areas, contributing to the drafting of a national performance framework and training package and assisting in the development of a restorative justice qualification.¹⁸⁶⁰ The success of RJA in contributing to the development of a consistent national approach demonstrates the benefits of a strong national association.

The Committee believes that there is considerable scope for improving the sharing of information about restorative justice programs and practices, both within Victoria and nationally. As the Committee noted in chapter 8, the Standing Committee of Attorneys-General (SCAG) – the ministerial council of Commonwealth, state and territory Attorneys-General in Australia – is currently conducting an audit of restorative justice systems in Australia and New Zealand.¹⁸⁶¹ The Committee believes that this ‘map’ of the restorative justice landscape will be an important starting point for the establishment of a national knowledge-sharing network. The Committee recommends that the Victorian Government propose to SCAG the establishment of a national network to share knowledge and information about restorative justice policy and programs.

The Committee believes that VARJ, with its existing emphasis on professional development and information sharing, and NADRAC, with its brief to consider restorative justice nationally, will also be key players in efforts to improve national collaboration in relation to restorative justice.

Recommendation 78: Increasing information sharing and collaboration

The Victorian Government should propose to the Standing Committee of Attorneys-General the establishment of a national network to share information about restorative justice in Australia.

¹⁸⁵⁸ VARJ, *Submission no. 28*, 2-3.

¹⁸⁵⁹ Ibid; Restorative Practices International, *2nd Restorative Practices International Conference*, <<http://restorativepracticesinternational.org/9.html>>, viewed 27 January 2009.

¹⁸⁶⁰ Restorative Justice Aotearoa, *Projects in progress* (2007), <<http://www.restorativejusticeaotearoa.org.nz/node/24>>, viewed 27 January 2009.

¹⁸⁶¹ Standing Committee of Attorneys-General, *SCAG summary of decisions - July 2008* (2008).

12.4 Towards a restorative society

The recommendations made throughout this report aim to achieve a more mainstream approach to restorative justice, incorporating it as a key component in the Victorian justice system for both adult and juvenile offenders. However, stakeholders also commented that a broader non-adversarial context is needed for restorative justice in this state.

12.4.1 Educating lawyers and future lawyers about restorative justice

In this report the Committee has noted the important role that lawyers play in restorative justice processes. For example, chapter 10 acknowledged the role of lawyers in encouraging young offenders to participate in the YJGC Program and the impact of lawyers' approaches to dispute resolution conferences in the Family Division of the Children's Court.

Professor Arie Freiberg of Monash University has written, 'If legal practice and culture are to change, those changes must start at the point when students are formally socialised into the profession – when they enter law school'.¹⁸⁶² The Monash University Faculty of Law's submission to the Inquiry emphasised the importance of including non-adversarial philosophies and processes such as restorative justice in the curriculum of law schools:

As tertiary educators, it is our belief that the key method of increasing the capacity of lawyers to refer appropriate cases to ADR and other comparable non-adversarial processes is through high quality legal education. The emergence of ADR, restorative justice, therapeutic jurisprudence and the other aspects of the comprehensive law movement has significant implications for legal education. It suggests that law students should not only be educated as to statute and case law in diverse subjects, but also in the different approaches to resolving conflict.¹⁸⁶³

The Monash University Faculty of Law commenced teaching an undergraduate unit in non-adversarial justice in 2007. This subject includes restorative justice as a type of non-adversarial justice, and victim-offender conferencing, sentencing circles and the NJC as examples of non-adversarial applications in the criminal justice system.¹⁸⁶⁴ The use of non-adversarial approaches in the civil court jurisdiction are also considered.

The Committee commends Monash University's Faculty of Law for its pioneering work in the area of non-adversarial legal education. It encourages all those involved in legal education, both undergraduate and continuing, to incorporate and promote philosophies and practices of non-adversarial law, including restorative justice, into their curricula. The Committee believes that this education will, over time, make a

¹⁸⁶² Arie Freiberg, 'Non-adversarial approaches to criminal justice' (2007) 16 *Journal of Judicial Administration*, 205, 219.

¹⁸⁶³ Monash University Faculty of Law, *Submission no. 7*, 5.

¹⁸⁶⁴ *Ibid*, 16.

significant contribution to the better use and practice of restorative approaches by lawyers.

12.4.2 Moving towards a restorative society

As highlighted throughout this report, restorative practice is a philosophical approach that has potential application outside the justice system. Restorative practices can be used to deal with a broad range of issues across society from homelessness to healthcare.¹⁸⁶⁵ New Zealand District Court judge and restorative justice advocate, Fred McElrea, has claimed that restorative approaches can be used in any situation ‘where conflict is sought to be resolved without the imposition of outcomes by power and authority’.¹⁸⁶⁶

VARJ’s submission argued that the rise of restorative practices outside the justice system will increase pressure on the justice system to adopt restorative approaches to offending. In particular, VARJ observed that as an increasing number of young people experience restorative approaches at school, they ‘will graduate expecting a system of justice that meets the needs of victims, offenders and their communities to repair the relationships harmed by the wrongdoing’.¹⁸⁶⁷

VARJ’s submission argued for a comprehensive approach to restorative justice:

A distinction should be drawn between a system of justice that utilises restorative processes as a voluntary diversion from mainstream justice, such as is currently operational in Victoria, and a justice system that has the restoration of citizen relationships as one of its primary objectives ... VARJ advocates long-term strategic visioning towards a system of justice that reflects the need to repair the impact of crime on individuals and society for each and every occasion that such impact occurs ... From this perspective justice becomes less a matter of crime and punishment and more a process of developing a community’s engagement with its individual citizens.¹⁸⁶⁸

Such a broad restorative approach is being applied at the NJC. In addition to the group conferencing program for young adults conducted at the centre, there is an attempt to integrate restorative justice approaches ‘into the life and the learnings of the Neighbourhood Justice Centre, as it applies some aspirational ways of bringing the court, the service infrastructure and community strengthening focus to a problem solving approach that will find resonance with the community’.¹⁸⁶⁹

Judge McElrea has claimed that moving restorative justice into the mainstream will require restorative approaches ‘both inside and outside of the courts, in parallel

¹⁸⁶⁵ Strang, above n 1615, 34.

¹⁸⁶⁶ F W M McElrea, 'Restorative justice - The long view' (Paper presented at the Beyond Retribution: Advancing the Law and Order Debate Conference, Silverstream, New Zealand, 12-14 May 2006), 5.

¹⁸⁶⁷ VARJ, *Submission no. 28*, 5-6.

¹⁸⁶⁸ *Ibid*, 4.

¹⁸⁶⁹ Neighbourhood Justice Centre, above n 1661, 6.

structures ...'¹⁸⁷⁰ Inside the courts, Judge McElrea has called for strong leadership from the judiciary and outside the courts he has advocated the establishment of 'community resolution centres'.¹⁸⁷¹

Judge McElrea's community resolution centres would be community partnerships between government and community-based organisations and would adopt a non-adversarial approach to dispute resolution along the lines of the NJC but operating on a much greater scale. According to Judge McElrea's vision, community resolution centres would deal with civil disputes using ADR processes such as negotiation.¹⁸⁷² Criminal matters would be dealt with by restorative justice process 'but operating at a much more significant level than existing police diversion for first offenders'.¹⁸⁷³ Referrals would come from a range of sources, including from victims themselves and would not necessarily be linked to criminal prosecution.

Anglicare's submission contained a similar vision, suggesting that existing community legal services and rights centres could be used as a basis for the further development of restorative justice services throughout Victoria. The submission states:

These services are locally-based and therefore accessible; they are geared towards services for marginalised persons; and they operate in a beneficially separate way from the courts.¹⁸⁷⁴

The Committee did not receive any other evidence about such a model.

The Committee notes the increasing use of restorative practices in all aspects of society, both in Australia and internationally. The Committee recognises that the broad use of restorative practices as a more holistic approach to dealing with conflict has a significant impact on community expectations about how the criminal justice system will respond to the harms caused by crime. In this context, approaches like those being trialled at the NJC provide an important avenue for responding to conflict in all aspects of society, including criminal offending.

While making specific recommendations about the use of restorative practices in other aspects of society is outside the scope of this Inquiry, the Committee recognises the influence of restorative practices on restorative justice in the justice system and encourages the Victorian Government to fully consider these in the development of the restorative justice framework that the Committee recommended in chapter 10.

¹⁸⁷⁰ F W M McElrea, 'Restorative justice as a procedural revolution: some lessons from the adversary system' (Paper presented at the 4th International Winchester Restorative Justice Conference, Winchester, United Kingdom, 10 October 2007), 24.

¹⁸⁷¹ Ibid, 23-24.

¹⁸⁷² McElrea, above n 1866, 8-9. See also F W M McElrea, 'Restorative justice for adult offenders: Practice in New Zealand today' in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative justice and practices in New Zealand: Towards a restorative society* (2007) Institute of Policy Studies, 107-109.

¹⁸⁷³ McElrea, above n 1872, 108-109. See also McElrea, above n 1866, 9.

¹⁸⁷⁴ Anglicare Victoria, *Submission no. 26*, 12.

PART IV
CONCLUSION



Chapter 13 – Conclusion

This report aimed to map out future directions for ADR and restorative justice in Victoria.

Stakeholders in this Inquiry were optimistic about the potential of ADR and restorative justice to improve the delivery of justice in Victoria. The Committee heard that ADR produces higher levels of satisfaction and is often faster, cheaper and more flexible than traditional litigation, and also reduces demands on the courts and taxpayers. The Committee also heard ADR offers less tangible long term benefits in terms of preserving relationships and teaching people skills to resolve disputes into the future.

In the case of restorative justice, the Committee was told that benefits for offenders include diversion from the criminal justice system and lower rates of re-offending, while benefits for victims include empowerment and reparation.

ADR and restorative justice are currently at very different stages of development in Victoria.

ADR is now well-established but the Committee heard that more can be done to harness its benefits. The Committee believes there needs to be more research and data collection to support rigorous policy and program development, new initiatives to ensure all Victorians can share in the benefits of ADR, regulatory measures to promote consistent quality in ADR services and work to increase ADR's use and influence in appropriate cases.

Restorative justice, on the other hand, is still operating at the margins of the justice system. The Committee has recommended steps to improve and expand existing restorative justice programs in Victoria. However, this is unlikely to succeed unless we build our knowledge base about restorative justice and support within the justice system and the broader community. The Committee has suggested a more careful and staged approach in this area.

Throughout this report the Committee has stressed that ADR and restorative justice are not a solution to every legal problem or a substitute for independent courts and tribunals. However, in appropriate cases they can and will continue to provide a valuable alternative to the traditional adversarial approach to justice.

The recommendations in this report propose a range of changes to the law, policies and programs, new collaborative forums, more education and training, and better research and data collection. They also require cooperation between governments, courts and tribunals, the legal profession, services providers, industries and community organisations. The Committee is confident that this multifaceted and collaborative approach will secure a strong future for ADR and restorative justice in Victoria.

**Adopted by the Law Reform Committee
2 April 2009**

Appendix A – List of written submissions

	Name of individual or organisation	Date received
1	Russell Kennedy	26 September 2007
2	Mr Peter Berlyn	18 October 2007
3	The Mediator Group	23 October 2007
4	Victoria Law Foundation	7 November 2007
5	Confidential (individual)	7 November 2007
6	Marshall Enterprise Learning Pty Ltd	8 November 2007
7	Monash University Faculty of Law <ul style="list-style-type: none"> - Professor Arie Freiberg, Dean - Dr Michael King, Senior Research Fellow - Mr Ross Hyams, Senior Lecturer - Ms Becky Bagatol, Lecturer 	9 November 2007
8	Office of the Victorian Privacy Commissioner	9 November 2007
9	The Salvation Army – Brayton Youth and Family Services	9 November 2007
10	Victorian Association for Dispute Resolution Inc.	12 November 2007
11	The Institute of Arbitrators & Mediators Australia	13 November 2007
12	Victoria Police	13 November 2007
13	The Victorian Bar	6 December 2007
13S	The Victorian Bar – supplementary submission	20 June 2008
14	County Court of Victoria	13 November 2007
15	Consumer Action Law Centre	14 November 2007
16	Energy and Water Ombudsman (Victoria)	15 November 2007
17	Ms Margaret Lothian, Principal Mediator, Victorian Civil and Administrative Tribunal (VCAT)	16 November 2007
18	Supreme Court of Victoria	21 November 2007
19	Health Services Commissioner	22 November 2007
20	Law Institute of Victoria	22 November 2007
20S	Law Institute of Victoria – supplementary submission	9 April 2008
21	Accident Compensation Conciliation Service	23 November 2007

	Name of individual or organisation	Date received
22	Banking and Financial Services Ombudsman (BFSO) Financial Industry Complaints Service (FICS) Insurance Ombudsman Scheme (IOS) (These services merged to form the Financial Ombudsman Service (FOS) as of 1 July 2008)	23 November 2007
23	Telecommunications Industry Ombudsman	27 November 2007
24	Ombudsman Victoria	3 December 2007
25	National Alternative Dispute Resolution Advisory Council (NADRAC)	3 December 2007
25S	National Alternative Dispute Resolution Advisory Council (NADRAC) – supplementary submission	21 May 2008
26	Anglicare Victoria	3 December 2007
27	Magistrates' Court of Victoria	3 December 2007
28	Victorian Association for Restorative Justice (VARJ)	4 December 2007
28S	Victorian Association for Restorative Justice (VARJ) – supplementary submission	22 December 2008
29	Crime Victims Support Association	5 December 2007
30	Victoria Legal Aid	10 December 2007
31	Legal Services Commissioner	12 December 2007
31S	Legal Services Commissioner – supplementary submission	21 January 2008
32	Victorian Aboriginal Legal Service	18 December 2007
33	Public Transport Ombudsman Victoria	1 February 2008
34	Victorian Multicultural Commission	14 February 2008
35	Jesuit Social Services	18 February 2008
36	LEADR – Association of Dispute Resolvers	13 March 2008
37	Justice A.M. North, Federal Court of Australia	5 March 2008
38	Youthlaw	25 March 2008
39	Federation of Community Legal Centres Victoria	3 April 2008
40	Ethnic Communities' Council of Victoria	3 June 2008
41	Mr Arthur Bolkas, Prison Fellowship of Australia (Victoria)	4 June 2008
42	Upper Hume Interagency Team	30 June 2008

Appendix B – List of witnesses

Public Hearing, 29 November 2007
Room G1, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Mr Lawrence Reddaway, Victorian Chapter Chair Professor Angela O'Brien, Senior Vice President, National Council Mr Albert Monichino, Victorian Chapter Committee Member Mr Gordon Tippett, Chief Executive Officer Ms Gianna Totaro, Executive Assistant	The Institute of Arbitrators & Mediators Australia (IAMA)
Professor Tania Sourdin, Professor of Law	The University of Queensland (Melbourne Campus)
Mr Peter Lauritsen, Deputy Chief Magistrate Ms Anne Goldsbrough, Supervising Magistrate, Family Violence & Family Law	Magistrates' Court of Victoria
Mr Mark Rumble, Director Ms Laura Simmons, Program Co-ordinator	The Salvation Army – Brayton Youth and Family Services

Public Hearing, 10 December 2007
Room G1, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Mr Michael Heaton QC, Chair, Dispute Resolution Committee Mr Tony Nolan SC, Advanced Mediator Ms Danielle Huntersmith, Vice Chair, Dispute Resolution Committee, Accredited Mediator Mr Ross Nankivell, Legal Policy Officer	The Victorian Bar
Mr Ian Lulham, Chair, ADR Committee Ms Elissa Campbell, Solicitor, Litigation Section	Law Institute of Victoria
Her Honour Judge Sandra Davis Her Honour Judge Maree Kennedy	County Court of Victoria
The Honourable Justice Murray Kellam AO	Supreme Court of Victoria
Judge Paul Grant, President	Children's Court of Victoria

**Public Hearing, 11 February 2008
Room G1, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Paul Myers, Director, Alternative Dispute Resolution Strategy Dr David Cousins, Executive Director, Consumer Affairs Victoria Mr John Griffin, Executive Director, Courts	Department of Justice
Mr Gerard Brody, Director, Policy & Campaigns	Consumer Action Law Centre
Ms Susan Cibau, Senior Conciliation Officer Mr David Bryson, Conciliation Officer Ms Anita Kaminski, Conciliation Officer	Accident Compensation Conciliation Service
Ms Eliza Collier, Policy and Public Affairs Manager, BFSO Ms Diane Carmody, General Manager, BFSO Ms Alison Maynard, Chief Executive Officer, FICS Ms Ragini Rajadurai, Manager, Corporate & Legal Services, IOS	Banking and Financial Services Ombudsman (BFSO) Financial Industry Complaints Service (FICS) Insurance Ombudsman Scheme (IOS) (These services merged to form the Financial Ombudsman Service (FOS) as of 1 July 2008)
Ms Meg Henham, Manager, Outer-Eastern Branch Mr Ian Goodhardt, Manager, Head Office	Family Mediation Centre
Mr Shane Quinn, Manager	Greensborough Family Relationship Centre
Mr Mark Brennan, Small Business Commissioner	Office of the Victorian Small Business Commissioner
Ms Beth Wilson, Health Services Commissioner	Office of the Health Services Commissioner
Ms Margaret Lothian, Principal Mediator	Victorian Civil and Administrative Tribunal (VCAT)

**Public Hearing, 25 February 2008
Room G3, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Commander Trevor Carter, Manager, Policy and Secretariat Division Mr Findlay McRae, Director, Legal Services Department Inspector Paul Hayes, Legal Services Department	Victoria Police
Reverend Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry Mr Peter Thompson, General Manager, Community Programs Mr Mark Longmuir, Manager, Community Services	Anglicare Victoria
Mr Peter Condliffe, President Ms Isobelle Morgan, Committee Member Dr David Moore, Committee Member	Victorian Association for Restorative Justice (VARJ)
Mr Walter Ibbs, Acting Manager, Roundtable Dispute Management Service Mr Alistair Lawrie, Policy Officer, Law Reform	Victoria Legal Aid
Mr George Lekakis, Chairperson Mr Con Pagonis, Senior Policy Advisor Mr Stephen Dimopoulos, Manager, Policy and Projects	Victorian Multicultural Commission
Mr Tony Hayes, Project Coordinator, Community Justice Program Mr Russell Jeffrey, Youth Justice Group Conference Convenor	Jesuit Social Services
Ms Greta Clarke, Research Officer	Victorian Aboriginal Legal Service
Mr Noel McNamara, Chief Executive Officer	Crime Victims Support Association
Mr Paul McDonald, Executive Director, Children, Youth and Families Division Ms Jan Noblett, Director, Youth Services and Youth Justice Ms Sophie Robinson, Principal Policy Adviser	Department of Human Services

**Public Hearing, 4 March 2008
Energy and Water Ombudsman (Victoria)
Level 19, 31 Queen Street, Melbourne**

Witness(es)	Organisation
Ms Fiona McLeod, Energy and Water Ombudsman Ms Frances Wood, Policy and Research Officer Mr Stephen Gatford, Manager, Public Affairs and Policy	Energy and Water Ombudsman (Victoria)

**Public Hearing, 4 March 2008
Room G1, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Ms Fiona Hollier, Chief Executive Officer Ms Margaret Halsmith, Chair	LEADR – Association of Dispute Resolvers

**Public Hearing, 4 March 2008
Neighbourhood Justice Centre
241 Wellington Street, Collingwood**

Witness(es)	Organisation
Mr David Fanning, Magistrate	Neighbourhood Justice Centre

**Public hearing and Culturally and Linguistically Diverse Communities
forum, 5 June 2008
K Room, Parliament House, Spring Street, East Melbourne**

Witness(es)	Organisation
Mr Arthur Bolkas, Director, Communities of Restoration Ms Diane Spicer, Programs Manager	Prison Fellowship Australia (Victoria)
Mr Jieh-Yung Lo, Policy and Project Officer	Ethnic Communities' Council of Victoria
Ms Nadine Hantke, Multicultural Access and Support Worker	Prahran Mission
Mr Jimmy Choo, consumer of mental health service providers	
Ms Anna Walker	Action on Disability within Ethnic Communities
Mr Christof Lancucki, Honorary President	Polish Community Council of Australia
Mr Omar Farah, Multicultural Community Development Officer	Horn-Afrik Employment and Training Advocacy Project
Ms Jenny Mutembu	Zambian community
Ms Chantal Kabamba, President	Congolese Association of Victoria
Mr Terefe Aborete, Manager, Refugee & Settlement Program	Centacare Catholic Family Services (Footscray)
Mr Laurie Harkin, Commissioner Ms Lynne Coulson Barr, Principal Conciliation Officer	Office of the Disability Services Commissioner

**Indigenous Australian Communities forum, 30 June 2008
Koorie Heritage Trust, 295 King Street, Melbourne**

Witness(es)	Organisation
Dr Loretta Kelly, Lecturer, Gnibi College of Indigenous Australian Peoples	Southern Cross University
Mr Rocky Tregonning, Aboriginal Projects Officer	Dispute Settlement Centre of Victoria
Ms Annette Vickery, Manager, Koori Programs and Initiatives, Courts and Tribunal Services	Department of Justice
Ms Rosie Smith, Project Manager, Koori Programs and Initiatives, Courts and Tribunal Services	Department of Justice
Ms Lisa Ahmet, Project Manager, Koori Programs and Initiatives, Courts and Tribunal Services	Department of Justice
Ms Joyce Cooper, Respected Person, Koori Court	Broadmeadows Magistrates' Court
Ms Jean Vickery, Koori Elder, Koori Court	Broadmeadows Magistrates' Court
Ms Miranda Staniford, Policy Officer	Corrections Victoria
Mr Anthony Fricker, President	Monash Postgraduate Association
Mr Neil Twist, Acting Director, Alternative Dispute Resolution Chief Executive Officer	Department of Justice County Court of Victoria
Ms Angela Dupuche, Family Mediator/Family Support Worker	Melbourne Citymission
Ms Maria Georgiou, Administrator	Darebin Community Legal Centre
Ms Tracey Callander, Aboriginal Liaison Worker	Darebin Community Legal Centre
Ms Greta Clarke, Acting Executive Officer, Research Planning and Development Unit	Victorian Aboriginal Legal Service
Mr Ali Besiroglu, Intern, Project Research	Victorian Aboriginal Legal Service

Indigenous Australian Communities forum, 30 June 2008 (continued)

Witness(es)	Organisation
Mr Clayton Ison, Koori Support Officer, Parkville Youth Residential Centre	Department of Human Services
Ms Taryn Lee, Indigenous Education and Complaint Officer	Victorian Equal Opportunity and Human Rights Commission
Ms Norma Langford, Committee Member	Broadmeadows Legal Service
Ms Helen Archibald, Aboriginal Support Worker, Parkville Youth Residential Centre	Department of Human Services

Appendix C – List of meetings and site visits

Organisation	Event	Date
New Zealand Justice and Electoral Committee	Meeting	8 August 2007
New Zealand Ministry of Justice, Crime Prevention Unit <ul style="list-style-type: none"> • Mr Jeremy Wood, Director • Ms Alison Hill, Manager, Restorative Justice • Ms Justine Cornwall, Manager, Families and Communities 	Meeting	18 February 2008
New Zealand Parole Board <ul style="list-style-type: none"> • Judge David Carruthers, Chair • Judge Marion Frater, Member • Mr Alistair Spierling, Manager, Administrative Support Service 	Meeting	18 February 2008
New Zealand Police <ul style="list-style-type: none"> • Ms Susan Roberts, Senior Policy Adviser, Police Prosecution Service • Superintendent Graham Thomas, National Manager, Police Prosecution Service • Superintendent Bill Harrison, National Manager, Youth Services 	Meeting	18 February 2008
The Hon Rick Barker, Associate Minister for Justice and Minister for Courts, New Zealand	Meeting	18 February 2008
Youth Court of New Zealand <ul style="list-style-type: none"> • Judge Andrew Becroft, Principal Youth Court Judge 	Meeting	19 February 2008
New Zealand District Court <ul style="list-style-type: none"> • Judge Fred McElrea 	Meeting	19 February 2008
Prison Fellowship New Zealand <ul style="list-style-type: none"> • Mr Kim Workman, National Director • Judge Stan Thorburn, Deputy Chair 	Meeting	20 February 2008
Restorative Justice Aotearoa, New Zealand <ul style="list-style-type: none"> • Ms Fiona Landon, Executive Member • Ms Mariameno Kapa, Executive Member • Mr Iain Fraser, Executive Member • Ms June Jackson, CEO, Mana Kai Marae Authority, member of New Zealand Parole Board 	Meeting	20 February 2008
Energy and Water Ombudsman (Victoria)	Site visit	4 March 2008

Organisation	Event	Date
Neighbourhood Justice Centre	Site visit	4 March 2008
New South Wales Attorney General's Department, Aboriginal Programs Unit <ul style="list-style-type: none"> • Mr Bradley Delaney, Manager, Circle Sentencing Program • Mr Brian Dennison, Project Officer, Circle Sentencing Program 	Meeting	12 May 2008
New South Wales Police Force <ul style="list-style-type: none"> • Commander Rod Smith, Policy and Programs • Ms Cathy Mackson, Principal Policy Analyst, Ministry of Police 	Meeting	12 May 2008
New South Wales Department of Juvenile Justice, Youth Justice Conferencing Directorate <ul style="list-style-type: none"> • Mr Peter Muir, A/Director General • Ms Anne Meagher, A/Deputy Director General (Operations) • Ms Michaela Wengert, Senior Project Director, Youth Justice Conferencing Operations Review • Ms Christine Sheeley, Project Officer, Youth Justice Conferencing Operations 	Meeting	12 May 2008
New South Wales Attorney General's Department, Community Justice Centres <ul style="list-style-type: none"> • Mr Paul Crowley, Director • Ms Gabriela Pirc, Policy Advisor • Ms Janelle Clarke, Senior Aboriginal Programs Officer 	Meeting	13 May 2008
New South Wales Attorney General's Department, Crime Prevention Division <ul style="list-style-type: none"> • Mr Bruce Flaherty, Manager, Crime Prevention Division • Mr Dean Hart, Manager, Adult Conferencing 	Meeting	13 May 2008
New South Wales Department of Corrective Services, Restorative Justice Unit <ul style="list-style-type: none"> • Ms Rhonda Booby, Director, Offender Services and Programs • Mr Luke Grant, Assistant Commissioner, Offender Services and Programs • Mr Glenn Duhigg, Mediator and Facilitator, A/Manager, Restorative Justice Unit 	Meeting	13 May 2008

Appendix D – List of events attended

Organisation	Event	Date
Department of Justice	ADR Strategic Planning Conference	22 June 2007
National Alternative Dispute Resolution Advisory Council	Research forum	13-14 July 2007
Institute of Arbitrators & Mediators Australia	'Innovative hybrid dispute resolution processes' seminar	25 September 2007
Institute of Arbitrators & Mediators Australia	'Arbitration in the fast lane' seminar	29 October 2007
The Victorian Bar	Observation of mediation by accredited mediator	February 2008
Australian Institute of Criminology	'Young people, crime and community safety: engagement and early interventions' conference	25-26 February 2008
Neighbourhood Justice Centre	First anniversary	4 March 2008
Law Institute of Victoria	'Criminal Law' Continuing Professional Development Intensive Program	17 March 2008
Critical Agendas	Restorative Practice in Schools	1-2 May 2008
Victorian Association for Restorative Justice	'Bringing Justice and Community Together' conference	14 May 2008
Law Institute of Victoria	Presentation on Justice Statement 2	19 May 2008
Victorian Law Reform Commission	Civil Justice Review Report launch	28 May 2008
Youth justice group conferencing provider	Observation of group conference	July 2008

Organisation	Event	Date
Victorian Association for Restorative Justice	VARJ Colloquium	16 July 2008
National Mediation Conference Committee	9th National Mediation Conference	10-12 September 2008
Australian Centre for Peace and Conflict Studies	'Working With High Conflict Clients' seminar	23 September 2008
Centre for Comparative Constitutional Studies	2008 'Protecting Human Rights' conference	3 October 2008

Appendix E – Summary of ADR regulation

The following tables provide a snapshot of the various regulatory regimes governing ADR providers in Victoria. This information is meant to be indicative of the current regulatory landscape and does not purport to be an exhaustive list of regulators and regulations.

Table 1: Regulation of court- and tribunal-connected ADR

Court/tribunal	Supreme Court of Victoria
Regulation source	<i>Supreme Court Act 1986</i> (Vic) <i>Supreme Court (General Civil Procedure) Rules 2005</i> (Vic)
Accreditation	The Supreme Court of Victoria website lists the Victorian Bar, Law Institute of Victoria, IAMA and LEADR as sources of mediators. ¹⁸⁷⁵
Standards/ethics	Standards for court-connected mediation in Victoria: approved by the Dispute Resolution Committee of the Victorian Bar and by the Law Institute of Victoria. ¹⁸⁷⁶
Confidentiality and admissibility	s 24A: Where the Court refers a proceeding or any part of a proceeding to mediation, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation. r 50.07: (4) The mediator may and shall if so ordered report to the Court whether the mediation is finished. (5) The mediator shall not make any report to the Court other than a report under paragraph (4). (6) Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation. r 50.07.1: (4) Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.
Immunity	s 27A: (1) A special referee, mediator or arbitrator to whom a proceeding, part of a proceeding or question arising in a proceeding is referred under the Rules has, in the performance of his or her duties in connection with the reference, the same protection and immunity as a Judge of the Court has in the performance of his or her duties as a Judge.

¹⁸⁷⁵ See Supreme Court of Victoria, *Mediation*, <<http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Support+Services/Mediation/>>, viewed 12 February 2009.

¹⁸⁷⁶ Richard Ingleby, *Standards for court-connected mediation in Victoria: Approved by the Dispute Resolution Committee of the Victorian Bar and by the Law Institute of Victoria* (1994) Victoria Law Foundation.

Table 1: Regulation of court- and tribunal-connected ADR (continued)

Court/tribunal	County Court of Victoria
Regulation source	<i>County Court Act 1958</i> (Vic) <i>County Court Rules of Procedure in Civil Proceedings 1999</i> (Vic)
Accreditation	The County Court of Victoria website lists the Victorian Bar, Law Institute of Victoria, IAMA and LEADR as sources of ADR mediators. ¹⁸⁷⁷
Standards/ethics	Standards for court-connected mediation in Victoria: approved by the Dispute Resolution Committee of the Victorian Bar and by the Law Institute of Victoria. ¹⁸⁷⁸
Confidentiality and admissibility	s 47B: Where the Court refers a proceeding or any part of a proceeding to mediation, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation. r 50.07: (5) The mediator may and shall if so ordered report to the Court whether the mediation is finished. (6) The mediator shall not make any report to the Court other than a report under paragraph (5). (7) Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.
Immunity	s 48C: (1) A special referee, mediator or arbitrator to whom a civil proceeding, part of a civil proceeding or question arising in a civil proceeding is referred under this Act and the Rules has, in the performance of his or her duties in connection with the reference, the same protection and immunity as a judge of the Court has in the performance of his or her duties as a judge.

¹⁸⁷⁷ See County Court of Victoria, *Mediation*, <<http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Support+Services-Mediation?OpenDocument&1=70-Support+Services~&2=0-Mediation~&3=~>>, viewed 12 February 2009.

¹⁸⁷⁸ Ingleby, above n 1876.

Table 1: Regulation of court- and tribunal-connected ADR (continued)

Court/tribunal	Magistrates' Court of Victoria
Regulation source	<i>Magistrates' Court Act 1989</i> (Vic) <i>Magistrates' Court Civil Procedure Rules 1999</i> (Vic)
Accreditation	r 22A.02 defines an acceptable mediator to include (a) a registrar or deputy registrar; (b) a local legal practitioner who has been approved as a mediator by the Law Institute; (c) a local legal practitioner who has been approved as a mediator by the Victorian Bar; (d) a mediator accredited by IAMA; (e) if the amount of monetary relief sought in a complaint is less than \$10 000, a mediator within the meaning of s 21K, <i>Evidence Act 1958</i> (Vic), or a person working with or for the DSCV.
Standards/ethics	Standards for court-connected mediation in Victoria: approved by the Dispute Resolution Committee of the Victorian Bar and by the Law Institute of Victoria. ¹⁸⁷⁹
Confidentiality and admissibility	s 108: (2) Unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation. r 22A.07: Within 7 days of a mediation having been completed, the mediator must file a mediation report in Form 22AA and provide a copy of the report to each party who attended the mediation. r 22A.08: Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.
Immunity	s 108A: A mediator to whom a civil proceeding or any part of a civil proceeding has been referred has, in the performance of his or her duties in connection with the reference, the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.

¹⁸⁷⁹ Ingleby, above n 1876.

Table 1: Regulation of court- and tribunal-connected ADR (continued)

Court/tribunal	Victorian Civil and Administrative Tribunal (VCAT)
Regulation source	<i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic)
Accreditation	<p>Mediations are conducted by a panel of mediators drawn from VCAT’s full time and sessional members. Additionally there are some non-member mediators.¹⁸⁸⁰</p> <p>VCAT mediators have completed a Bond University or a LEADR course and have substantial experience in mediation (conducted 200 to 300 mediations). VCAT provides two after work seminars per year for mediators, and four lunchtime sessions in which a mediator leads a discussion in a particular area.¹⁸⁸¹</p> <p>The NADRAC website lists VCAT as complying with the requirements for Recognised Mediator Accreditation Bodies (RMABs) under the National Mediator Accreditation System (NMAS).¹⁸⁸²</p>
Standards/ethics	<i>Mediation Code of Conduct</i> ¹⁸⁸³
Confidentiality and admissibility	<p>s 85: Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the Tribunal in the proceeding, except – (a) where all parties agree to the giving of the evidence; or (b) evidence of directions given at a compulsory conference or the reasons for those directions; or (c) evidence of anything said or done that is relevant to – (i) a proceeding for an offence in relation to the giving of false or misleading information; or (ii) a proceeding under section 137 (contempt); or (iii) a proceeding in relation to an order made under section 87(b)(i).</p> <p>s 92: 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 the evidence.</p> <p>s 26: (1) Evidence of anything said or done in the course of a mediation in a proceeding under the <i>Equal Opportunity Act 1995</i> (Vic) is not admissible in any hearing before the Tribunal in the proceeding, whether or not the parties agree to the giving of the evidence.</p>
Immunity	<p>s 143: (6) A mediator has, in the performance of his or her functions as mediator, the same protection and immunity as a member of the Tribunal. (7) An expert or special referee has, in the performance of his or her functions under Division 6 of Part 4, the same protection and immunity as a member of the Tribunal. (8) The principal registrar or another registrar – (b) has, in exercising the powers of the Tribunal as permitted by this Act or an enabling enactment and in performing functions under section 71 (rejection of applications) and 83 (compulsory conferences), the same protection and immunity as a member of the Tribunal.</p>

¹⁸⁸⁰ VCAT, *Annual report 2007-2008* (2008), 42.

¹⁸⁸¹ Margaret Lothian, Principal Mediator, VCAT, *Transcript of evidence*, Melbourne, 11 February 2008, 8.

¹⁸⁸² See National Alternative Dispute Resolution Advisory Council (NADRAC), *ADR providers*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADR_Providers>, viewed 12 February 2009; VCAT, above n 1880, 42.

¹⁸⁸³ See VCAT, *Code of conduct*, <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation-Code+of+Conduct?OpenDocument&l=30-Mediation~&2=10-Code+of+Conduct~&3=~>>>, viewed 12 February 2009.

Table 2: Regulation of public ADR providers

Public ADR supplier	Dispute Settlement Centre Victoria (DSCV)
Regulation source	<i>Evidence Act 1958 (Vic)</i>
Training/ educational requirements	<p>DSCV self-regulates by training its own mediators via a 6-day course which covers the relevant subjects of the Certificate IV of Community Mediation. DSCV only employs mediators who successfully pass the training and have exhibited the skills required by DSCV.¹⁸⁸⁴</p> <p>Those who have successfully completed the course may be eligible to be gazetted as a ‘DSCV mediator’ in the Government Gazette. DSCV only uses gazetted mediators as they are afforded protection of confidentiality under the <i>Evidence Act 1958 (Vic)</i>. Specialist training courses have also been developed for Koori and culturally and linguistically diverse (CALD) groups.¹⁸⁸⁵</p>
Accreditation	s21K: mediator means a person who is declared, by notice by the Secretary to the Department of Justice published in the Government Gazette, to be a mediator.
Standards/ ethics	<p>DSCV Code of Conduct.</p> <p>DSCV has a quality assurance process which utilises feedback from client satisfaction surveys, mandatory debriefing report and verbal feedback from co-mediators to ensure that training gaps are met and under-performance issues are addressed.</p>
Confidentiality and admissibility	<p>s 21L: Evidence of anything said or of any admission or agreement made at, or of any document prepared for the purpose of, a conference with a mediator in connection with a dispute settlement centre is not admissible in any court or legal proceeding, except with the consent of all persons who were present at that conference.</p> <p>s 21M: (1) A person who is or has been – (a) a mediator; or (b) a member or employee of a dispute settlement centre; or (c) a person working with or for a dispute settlement centre (whether or not for fee or reward) – shall not communicate to any other person or publish any information or document acquired by the person by reason of being such a mediator, member, employee or person unless the communication or publication – (d) is made with the consent of the person from whom the information or document was obtained; or (e) is made for the purposes of evaluating the operation and activities of neighbourhood mediation centres and does not disclose the identity of any person without his or her consent; or (f) is made by a person who reasonably considers that it is necessary to disclose the information or document for the purpose of preventing or minimising injury or damage to any person or property.</p>
Immunity	s 21N: A matter or thing done in good faith for the purpose of a conference with a mediator by a person who is – (a) a mediator; or (b) a member or employee of a dispute settlement centre; or (c) a person working with or for a dispute settlement centre (whether or not for fee or reward) – does not subject the person to any action, liability, claim or demand.

¹⁸⁸⁴ Letter from Rob Hulls, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 8 February 2008, 5

¹⁸⁸⁵ See Department of Justice, Victoria, *Information about Dispute Settlement Centre Victoria training courses*, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/JUSTICE++Information+About+Dispute+Settlement+Centre+Victoria+Training+Courses%28PDF%29>>, viewed 12 February 2009; Dispute Settlement Centre of Victoria, *Mediation training program: Your questions answered*; Magistrates' Court of Victoria, *Submission no. 27*; Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria, *Court-annexed mediation: Mobilising informal dispute resolution in the shadow of the court* (2007) Joint response to the Law Reform Commission of Victoria Enquiry on Civil Justice - Exposure Draft June 2007, 6; John Griffin, Executive Director, Courts, Department of Justice, Victoria, *Transcript of evidence*, Melbourne, 11 February 2008, 6.

Table 2: Regulation of public ADR providers (continued)

Public ADR supplier	Accident Compensation Conciliation Service (ACCS)
Regulation source	<i>Accident Compensation Act 1985</i> (Vic)
Training/ educational requirements	Conciliation officers must have undertaken a recognised ADR training program. ¹⁸⁸⁶ The ACCS employs conciliation officers who meet its ‘core competencies’ (the characteristics lie somewhere between a lawyer and a counsellor) ¹⁸⁸⁷ and has a very detailed professional development program. ¹⁸⁸⁸ ACCS’s conciliators observe each other’s conferences regularly to develop new dispute resolution skills and to learn from colleagues with different skills. The senior conciliator observes and evaluates each conciliator in a conference situation twice a year and develops professional development options with the conciliator. There are also small, voluntary, learning groups which have activities including conciliation conference observations and feedback, co-conciliation, case presentations and group discussions, with an emphasis on individual learning goals and experimentation with the conciliation model. ¹⁸⁸⁹
Accreditation	s 52D(1): Conciliation officers are appointed by the Governor in Council.
Standards/ ethics	Code of Conduct, Protocols, ¹⁸⁹⁰ Ministerial Guidelines for the Arrangement of the Business of Conciliation Officers. ¹⁸⁹¹
Confidentiality and admissibility	s 61A: Evidence of – (a) anything said at, and any admission or agreement made at or during; or (b) any document prepared for the purposes of – a conciliation of a dispute is not admissible in any court or tribunal in any proceedings other than proceedings for – (c) the enforcement of such an agreement; or (d) an offence against this Act, the <i>Accident Compensation (WorkCover Insurance) Act 1993</i> (Vic) or the <i>Workers Compensation Act 1958</i> (Vic); or (e) an offence against the <i>Crimes Act 1958</i> (Vic) which arises in connection with a claim for compensation under this Act. s 243: (1) Subject to this section, a person who is, or has at any time been – (a) appointed for the purposes of this Act shall not, except to the extent necessary to perform official duties, or to perform or exercise such a function or power, either directly or indirectly, make a record of, or divulge or communicate to any person, any information that is or was acquired by the person by reason of being or having been so appointed, engaged or authorized, or make use of any such information, for any purpose other than the performance of official duties or the performance or exercise of that function or power. See <i>Accident Compensation Act 1985</i> (Vic), s 243(2) for exceptions. The <i>Information Privacy Act 2000</i> (Vic) and the <i>Health Records Act 2001</i> (Vic) impose obligations on the ACCS in relation to the collection, use, disclosure and handling of personal, sensitive and health information. ¹⁸⁹²
Immunity	s 58: (1) A Conciliation Officer is not personally liable for anything done or omitted to be done in good faith – (a) in the exercise of a power or the discharge of a duty under this Act; or (b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act. (2) Any liability resulting from an act or omission that would but for subsection (1) attach to a Conciliation Officer attaches instead to the Service.

¹⁸⁸⁶ Department of Justice, Victoria, *Alternative dispute resolution supplier survey 2006* (2007), 35.

¹⁸⁸⁷ ACCS, *Submission no. 21*, 8-9.

¹⁸⁸⁸ Susan Cibau, Senior Conciliation Officer, ACCS, *Transcript of evidence*, Melbourne, 11 February 2008, 7.

¹⁸⁸⁹ ACCS, *Submission no. 21*.

¹⁸⁹⁰ See ACCS, *Code of conduct*.

¹⁸⁹¹ See Minister for WorkCover, Victoria, *Ministerial Guidelines for the arrangement of the business of conciliation officers*.

¹⁸⁹² See ACCS, *Privacy policy* (2002).

Table 3: Regulation of industry ADR schemes

ADR provider	Energy and Water Ombudsman (Victoria) (EWOV)
Regulation source	EWOV Charter ¹⁸⁹³ and EWOV Constitution. ¹⁸⁹⁴ EWOV is governed by a Board of Directors with an equal number of scheme participants and consumer representatives, and an independent chairperson. ¹⁸⁹⁵ EWOV is approved by the state regulator, the Essential Services Commission, and has relationships with the national regulators, the Australian Energy Regulator and the Australian Energy Market Commission. ¹⁸⁹⁶
Training/ educational requirements	Tertiary qualifications are required but no specialist ADR accreditation is necessary. Approximately half of the conciliation staff have a legal qualification. ¹⁸⁹⁷ EWOV employs people who already have critical, analytical and judgement skills. EWOV uses a Competency Based Framework which ensures that staff receive adequate training and experience in key areas of conciliation. This framework is used as an assessment tool and to identify individual learning and development needs. New conciliators have a buddy for a number of months; conciliators have a manager at all times. There are peer reviews where conciliators sit around and discuss cases together. ¹⁸⁹⁸
Standards/ ethics	As determined by the organisation. For example, EWOV has its own performance and competency standards, key performance indicators, or KSAO (knowledge, skills, abilities and other attributes) requirements. ¹⁸⁹⁹ <i>Benchmarks for industry-based customer dispute resolution schemes.</i> ¹⁹⁰⁰
Confidentiality and admissibility	EWOV is subject to the <i>Privacy Act 1988</i> (Cth) and is required to comply with the <i>National Privacy Principles</i> . ¹⁹⁰¹
Immunity	There is no particular immunity for EWOV conciliators.

¹⁸⁹³ Fiona McLeod, EWOV, *Transcript of evidence*, Melbourne, 4 March 2008, 10; EWOV, *Energy and Water Ombudsman Charter* ('EWOV charter') (2006).

¹⁸⁹⁴ Fiona McLeod, *Transcript of evidence*, above n 1893, 10; EWOV, *Constitution of Energy and Water Ombudsman (Victoria) Limited* (2006).

¹⁸⁹⁵ Department of Justice, above n 1886, 22; EWOV, *Constitution of Energy and Water Ombudsman (Victoria) Limited* (2006), clauses 14.2 and 14.3; EWOV, EWOV charter, above n 1893, clauses 9-11.

¹⁸⁹⁶ EWOV, *Submission no. 16*, 13-15.

¹⁸⁹⁷ Department of Justice, above n 1886, 36.

¹⁸⁹⁸ EWOV, *Submission no. 16*, 16; Fiona McLeod, *Transcript of evidence*, above n 1893, 10-11.

¹⁸⁹⁹ Fiona McLeod, *Transcript of evidence*, above n 1893, 16.

¹⁹⁰⁰ Department of Industry, Science and Tourism, Commonwealth, *Benchmarks for industry-based customer dispute resolution schemes* (1997); Fiona McLeod, *Transcript of evidence*, above n 1893, 2

¹⁹⁰¹ EWOV, *Submission no. 16*, 10-11, 16; Fiona McLeod, *Transcript of evidence*, above n 1893, 10; EWOV, *Privacy policy*, <<http://www.ewov.com.au/html/Privacy.htm>>, viewed 12 February 2009.

Table 3: Regulation of industry ADR schemes (continued)

ADR provider	Public Transport Ombudsman Victoria (PTOV)
Regulation source	PTOV Charter, ¹⁹⁰² PTOV Constitution. ¹⁹⁰³ The PTOV is governed by a Board of Directors with an equal number of scheme participants and consumer representatives, and an independent chairperson. ¹⁹⁰⁴
Training/ educational requirements	Tertiary qualifications in a relevant field are highly desirable. ¹⁹⁰⁵ PTOV has consistently employed experienced senior conciliators/lawyers to oversee its casework. Junior conciliators have all had industry experience and/or formal training in ADR ¹⁹⁰⁶ (that is, they have undertaken training with LEADR). ¹⁹⁰⁷
Standards/ ethics	As determined by the organisation. For example, the Complaint and Dispute Resolution Service Guidelines (CDRS) guide PTOV officers in dealing with complaints. ¹⁹⁰⁸ <i>Benchmarks for industry-based customer dispute resolution schemes.</i> ¹⁹⁰⁹
Confidentiality and admissibility	PTOV is subject to the <i>Privacy Act 1988</i> (Cth) and is required to comply with the <i>National Privacy Principles</i> . ¹⁹¹⁰
Immunity	There is no particular immunity for PTOV conciliators.

¹⁹⁰² PTOV, *Submission no. 33*, 6-9; PTOV, *Public Transport Ombudsman Limited Charter* ('PTOV charter') (2007).

¹⁹⁰³ PTOV, *Submission no. 33*, 6-9; PTOV, *Constitution of Public Transport Ombudsman Limited* ('PTOV constitution')(2008).

¹⁹⁰⁴ Department of Justice, above n 1895, 36; PTOV, *What is the Public Transport Ombudsman Scheme*, <<http://www.ptovic.com.au/content/whatispto.html>>, viewed 12 February 2009; PTOV, PTOV constitution, above n 1903, clauses 14.3-14.8, 15.1; PTOV, PTOV charter, above n 1902, clauses 9-10.

¹⁹⁰⁵ Department of Justice, above n 1886, 36.

¹⁹⁰⁶ PTOV, *Submission no. 33*, 23.

¹⁹⁰⁷ Department of Justice, above n 1886, 36.

¹⁹⁰⁸ See PTOV, *CDRS guidelines*, <<http://www.ptovic.com.au/content/guidelines.html>>, viewed 12 February 2009.

¹⁹⁰⁹ Department of Industry, Science and Tourism, Commonwealth, above n 1900; PTOV, *Submission no. 33*, 10.

¹⁹¹⁰ See PTOV, *Privacy statements*, <<http://www.ptovic.com.au/content/privacy.html>>, viewed 12 February 2009.

Table 4: Regulation of private ADR providers

ADR provider	Law Institute of Victoria (LIV)
Regulation source	<i>Legal Profession Act 2004</i> (Vic)
Training/ educational requirements for accreditation	<p>LIV accredited mediators must be legal practitioners under the <i>Legal Profession Act 2004</i> (Vic) and complete approved mediation training.</p> <p>To become an accredited LIV mediator, a person has to complete a mediation training course of at least three days duration that satisfies set criteria conducted by established trainers. A substantial part of the course includes role plays and simulated mediations. LIV mediators who wish to be accredited as specialist mediators have to undertake additional training, education and assessment, including a written examination and an assessment of a simulated mediation.¹⁹¹¹</p> <p>The NADRAC website lists LIV as complying with the requirements for Recognised Mediator Accreditation Bodies (RMABs) under the National Mediator Accreditation System (NMAS).¹⁹¹²</p>
Accreditation	<p>The LIV provides a list of legal practitioners who are accredited as mediators.¹⁹¹³</p> <p>Legal practitioners who meet the prerequisites for specialist accreditation may apply to become an LIV Accredited Mediation Specialist.¹⁹¹⁴ Re-accreditation is required every three years.¹⁹¹⁵ The LIV provides a list of Accredited Mediation Specialists.¹⁹¹⁶</p>
Standards/ ethics	<p>Current standards for solicitor mediators are comprised of organisational guidelines, codes of conduct and court rules.¹⁹¹⁷</p> <p>For example, Law Institute of Victoria Professional Conduct and Practice Rules 2005,¹⁹¹⁸ Law Council of Australia Ethical Guidelines for Mediators 2006,¹⁹¹⁹ Law Council of Australia Guidelines for Lawyers in Mediation 2007.¹⁹²⁰</p>
Confidentiality and admissibility	Applicable court rules and mediation agreements. ¹⁹²¹
Immunity	Immunity is dependent on the setting in which the solicitor operates.

¹⁹¹¹ LIV, *Submission no. 20*, 13; Ian Lulham, Chair, ADR Committee, LIV, *Transcript of evidence*, Melbourne, 10 December 2007, 2; Elissa Campbell, Solicitor, Litigation Section, LIV, *Transcript of evidence*, Melbourne, 10 December 2007, 2; LIV, *Mediation*, <<http://www.cpd.liv.asn.au/categories.asp?cID=77&c=123314>>, viewed 12 February 2009; LIV, *Specialisation scheme rules* ('scheme rules') (2006).

¹⁹¹² See NADRAC, above n 1882.

¹⁹¹³ LIV, *Mediators directory*, <<http://members.liv.asn.au/livweb/Mediators.aspx>>, viewed 12 February 2009.

¹⁹¹⁴ LIV, *scheme rules*, above n 1911; LIV, *Why become an accredited specialist?*, <<http://www.cpd.liv.asn.au/categories.asp?cID=66&c=185336>>, viewed 18 February 2009.

¹⁹¹⁵ LIV, *scheme rules*, above n 1911, clause 5.10.1; LIV, *Why become an accredited specialist?*, above n 1914.

¹⁹¹⁶ LIV, *Accredited specialists directory*, <http://members.liv.asn.au/livweb/Specialists.aspx?Page=Specialists/sp_area_index&area=MED>, viewed 12 February 2009.

¹⁹¹⁷ LIV, *Submission no. 20*, 15.

¹⁹¹⁸ LIV, *Professional conduct and practice rules 2005* (2005).

¹⁹¹⁹ LIV, *Ethics: Mediation and negotiation*, <<http://www.liv.asn.au/regulation/ethics/about/ethics-Common.html#Heading48>>, viewed 11 March 2009, which refers to the Law Council of Australia, *Ethical guidelines for mediators* (2006).

¹⁹²⁰ Law Council of Australia, *Guidelines for lawyers in mediations* (2007).

¹⁹²¹ LIV, *Submission no. 20*, 16

Table 4: Regulation of private ADR providers (continued)

ADR provider	Victorian Bar (Bar)
Regulation source	<i>Legal Profession Act 2004 (Vic)</i>
Training/ educational requirements for accreditation	<p>The Bar's accredited mediators must be legal practitioners under the <i>Legal Profession Act 2004 (Vic)</i> plus have complete approved mediation training.</p> <p>The Victorian Bar has become a Recognised Mediator Accreditation Body (RMAB) under the National Mediator Accreditation System (NMAS) as from 1 February 2008. On 30 June 2008 all accreditations under the old scheme ceased and only mediators accredited under NMAS appear as Victorian Bar accredited mediators on the Victorian Bar website.¹⁹²² The Bar has introduced a system for accrediting and identifying a new category of advanced mediators who are accredited under NMAS.¹⁹²³</p>
Accreditation	<p>The Bar provides a list of barristers who are accredited as mediators.¹⁹²⁴ Barristers who meet the Bar's prerequisites for advanced mediators may also apply for this accreditation.¹⁹²⁵ The Bar provides a list of advanced mediators.¹⁹²⁶</p> <p>As a condition of accreditation under NMAS, mediators must seek re-accreditation every two years and must comply with the NMAS Approval and Practice Standards.¹⁹²⁷</p>
Standards/ ethics	<p>Current standards for barrister mediators are comprised of organisational guidelines, codes of conduct and court rules.¹⁹²⁸</p> <p>For example, the Victorian Bar Practice Rules Inc – Rules of Conduct & Compulsory Legal Education Rules 2005.¹⁹²⁹</p>
Confidentiality and admissibility	Applicable court rules and mediation agreements.
Immunity	Immunity is dependent on the setting in which the barrister operates.

¹⁹²² The Bar, *Australian National Mediator Standards* (2008); The Bar, *Mediation*, <<http://www.vicbar.com.au/b.8.7.asp>>, viewed 18 February 2009; The Bar, *Submission no. 13S*, 1.

¹⁹²³ The Bar, *The Victorian Bar advanced mediator scheme*; The Bar, *Mediation*, <<http://www.vicbar.com.au/b.8.7.asp>>, viewed 18 February 2009.

¹⁹²⁴ The Bar, *Directories: Mediators*, <<http://www.vicbar.com.au/c.7.aspx>>, viewed 18 February 2009.

¹⁹²⁵ The Bar, *The Victorian Bar advanced mediator scheme*; The Bar, *Mediation*, above n 1922.

¹⁹²⁶ The Bar, *Directories: Advanced mediators*, <<http://www.vicbar.com.au/c.12.aspx>>, viewed 18 February 2009.

¹⁹²⁷ The Bar, *Australian National Mediator Standards* (2008); The Bar, *Mediation*, above n 1922.

¹⁹²⁸ The Bar, *Submission no. 13*, 10-11, 76, 84-85; Danielle Huntersmith, Vice Chair, Dispute Resolution Committee, Accredited Mediator, The Bar, *Transcript of evidence*, Melbourne, 10 December 2007, 5-7.

¹⁹²⁹ The Bar, *Practice rules, rules of conduct & compulsory continuing legal education rules* (2005).

Table 4: Regulation of private ADR providers (continued)

ADR provider	LEADR – Association of Dispute Resolvers (LEADR)
Regulation source	LEADR Constitution. ¹⁹³⁰ LEADR is a membership organisation governed by a Board of Directors who are elected from New Zealand and all Australian states in which LEADR has chapters. ¹⁹³¹
Training/ educational requirements for accreditation	LEADR is a Recognised Mediator Accreditation Body (RMAB) under the National Mediator Accreditation System (NMAS). Under the LEADR Accreditation Scheme, dispute resolution practitioners have their competency assessed objectively. Accreditation is at one or two levels. ‘Accredited’ means that the person has completed a LEADR dispute resolution workshop (such as the four or five-day workshop) or a comparable workshop. Alternatively, the person has completed a dispute resolution training program developed through a recognised institution of higher learning. To be ‘accredited’ the person must also demonstrate competency by conducting a simulated two-hour mediation which is videotaped and assessed or be able to provide other evidence of dispute resolution competency. ‘Advanced’ means that, in addition to the above requirements, the person has also carried out a minimum of 250 hours of practice with written evaluations attesting to their proficiency from at least 20 of the involved parties. ¹⁹³²
Accreditation	LEADR has two levels of accreditation: ‘accredited’ and ‘advanced.’ Re-accreditation is required every three years. ¹⁹³³ LEADR has a referral service to assist parties to look for mediators. ¹⁹³⁴
Standards/ ethics	LEADR Ethical Standards for Mediators, extracted from the Law Council of Australia Ethical Guidelines for Mediators ¹⁹³⁵ and adopted by the LEADR Board. ¹⁹³⁶
Confidentiality and admissibility	LEADR Ethical Standards for Mediators, clause 5. ¹⁹³⁷
Immunity	Immunity is dependent on the setting in which the ADR practitioner operates.

¹⁹³⁰ LEADR, *Constitution of LEADR* (2002).

¹⁹³¹ See LEADR, *About LEADR*, <<http://www.leadr.com.au/aboutleadr.htm>>, viewed 13 February 2009; LEADR, *Constitution of LEADR* (2002), clause 50.

¹⁹³² LEADR, *Accreditation*, <<http://www.leadr.com.au/accreditation.htm>>, viewed 13 February 2009; Fiona Hollier, Chief Executive Officer, LEADR, *Transcript of evidence*, Melbourne, 4 March 2008, 6.

¹⁹³³ LEADR, *Accreditation*, above n 1932.

¹⁹³⁴ LEADR, *Find a mediator or other dispute resolution practitioner*, <<http://www.leadr.com.au/findpractitioner/index.php>>, viewed 13 February 2009.

¹⁹³⁵ Law Council of Australia, above n 1920.

¹⁹³⁶ LEADR, *Ethical standards for mediators*.

¹⁹³⁷ *Ibid*, clause 5.

Table 4: Regulation of private ADR providers (continued)

ADR provider	Institute of Arbitrators & Mediators Australia (IAMA)
Regulation source	IAMA Constitution. ¹⁹³⁸ IAMA has a national council which is charged with policy development, management and direction of IAMA. ¹⁹³⁹
Training/ educational requirements for accreditation	IAMA is a Recognised Mediator Accreditation Body (RMAB) under the National Mediator Accreditation System (NMAS). Participants who successfully complete the assessment module of the Practitioner's Certificate in Mediation may apply for national accreditation through IAMA. ¹⁹⁴⁰ The Practitioners' Certificate in Mediation program is run in two modules comprising four days of instruction and two days of supervised coaching and assessment. It includes coverage of all issues required by NMAS including the dynamics of conflict and negotiation, the principles, stages and functions of mediation and the skills that make an effective mediator. It also includes examination of current legal and ethical issues relevant to professional mediators. The course format includes a mixture of lectures, discussions and practice. ¹⁹⁴¹ The Professional Certificate in Arbitration is offered as a joint venture between IAMA and the University of Adelaide. This course provides an appreciation and understanding of the role of arbitration, the process and the legislative framework. The course is designed for completion in two parts: a general course and an advanced course, over two university semesters. The course is available via online learning, and in face to face classes in capital cities with sufficient student demand. ¹⁹⁴²
Accreditation	Grading as an Arbitrator, ¹⁹⁴³ Accreditation as a Mediator ¹⁹⁴⁴ or Adjudicator. ¹⁹⁴⁵ IAMA has a policy that requires all graded arbitrators, accredited mediators and accredited adjudicators to undertake at least 75 hours of training every three years. ¹⁹⁴⁶ IAMA has a database of accredited or graded dispute resolvers. ¹⁹⁴⁷
Standards/ ethics	IAMA Conciliation Rules, ¹⁹⁴⁸ IAMA Mediation Rules, ¹⁹⁴⁹ IAMA Arbitration Rules, ¹⁹⁵⁰ IAMA Principles of Conduct for Mediators, ¹⁹⁵¹ IAMA Rules of Professional Conduct, ¹⁹⁵² IAMA Mediation and Conciliation Rules. ¹⁹⁵³

¹⁹³⁸ IAMA, *IAMA Constitution*.

¹⁹³⁹ IAMA, *National councillors*, <<http://www.iama.org.au/national.htm>>, viewed 13 February 2009; IAMA, *IAMA Constitution*, clause 9.

¹⁹⁴⁰ IAMA, *The Institute of Arbitrators & Mediators Australia*, <<http://www.iama.org.au/>>, viewed 13 February 2009.

¹⁹⁴¹ IAMA, *The practitioner's certificate in mediation*.

¹⁹⁴² IAMA, *Professional certificate in arbitration*.

¹⁹⁴³ See IAMA, *Policy for the registration of practising arbitrators*.

¹⁹⁴⁴ See IAMA, *Mediator accreditation policy*.

¹⁹⁴⁵ IAMA, *Policy on the accreditation and register of adjudicators*.

¹⁹⁴⁶ IAMA, *Accreditation and grading*, <<http://www.iama.org.au/accreditation.htm>>, viewed 13 February 2009.

¹⁹⁴⁷ IAMA, *Find a dispute resolver*, <<http://www.iama.org.au/directory.htm>>, viewed 13 February 2009.

¹⁹⁴⁸ IAMA, *Conciliation rules*.

¹⁹⁴⁹ IAMA, *Mediation rules* (2007).

¹⁹⁵⁰ IAMA, *The IAMA arbitration rules: Incorporating the IAMA fast track arbitration rules*.

¹⁹⁵¹ IAMA, *Principles of conduct for mediators*.

¹⁹⁵² IAMA, *Rules of professional conduct*.

¹⁹⁵³ IAMA, *Mediation and conciliation rules*.

Table 4: Regulation of private ADR providers (continued)

ADR provider	Institute of Arbitrators & Mediators Australia (IAMA) (continued)
Confidentiality and admissibility	For example, IAMA Rules of Professional Conduct, rule 5. ¹⁹⁵⁴ IAMA Mediation and Conciliation Rules, rules 4 and 11. ¹⁹⁵⁵
Immunity	Immunity is dependent on the setting in which the ADR practitioner works. See also, IAMA Mediation and Conciliation Rules, rule 13. ¹⁹⁵⁶ IAMA Arbitration Rules, rule 11.

¹⁹⁵⁴ IAMA, above n 1952, rule 5.

¹⁹⁵⁵ IAMA, above n 1953, rules 4 and 11.

¹⁹⁵⁶ IAMA, above n 1953, rule 13.

Bibliography

Articles, books and reports

Holy Bible, King James Version

'Professional code of conduct for mediators' (2001) October 2001 *Mediation News*, 2

Abney, Sherrie and Lind, Michael, 'History of collaborative law in the Western Hemisphere' (2006) 2(1) *Mediation Committee Newsletter*, 29

Access to Justice Advisory Committee, Commonwealth, *Access to justice: An action plan* (1994)

Alder, Christine, 'Young women offenders and the challenge for restorative justice', in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice: Philosophy to practice* (2000) Ashgate Publishing Company

Alexander, Nadja, 'Visualizing the ADR landscape' (2004) 7(3) *The ADR Bulletin*, 46

Alexander, Renata, 'Family mediation: Friend or foe for women?' (1997) 8 *Australian Dispute Resolution Journal*, 255

Altamore, Robert, 'Alternative dispute resolution and people with disabilities' (2005) 24(2) *The Arbitrator and Mediator*, 41

Altobelli, Tom, 'NSW Supreme Court makes mediation mandatory' (2000) 3(3) *ADR Bulletin*, 43

Astor, Hilary, 'Violence and family mediation policy' (1994) 8(1) *Australian Journal of Family Law*, 3

Astor, Hilary, 'Elizabeth's story: Mediation, violence and the legal academy' (1997) 2 *Flinders Journal of Law Reform*, 13

Astor, Hilary, 'Some contemporary theories of power in mediation: A primer for the puzzled practitioner' (2005) 16 *Australasian Dispute Resolution Journal*, 30

Astor, Hilary and Chinkin, Christine, *Dispute resolution in Australia* (2nd edition) (2002) Butterworths

Attorney-General, Victoria, *Attorney-General's justice statement: New directions for the Victorian justice system 2004-2014* (2004) Department of Justice, Victoria

Attorney-General, Victoria, *Attorney-General's justice statement 2: The next chapter* (2008) Department of Justice, Victoria

Attorney-General's Department, Commonwealth, *Federal civil justice strategy paper* (2003)

Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander social survey 2002* (2004)

Australian Bureau of Statistics, *Personal safety survey 2005, 4906.0* (2006)

Australian Bureau of Statistics, *National criminal justice statistical framework - Australia: Information paper* (2007)

Australian Bureau of Statistics, *Criminal courts 2006-07, 4513.0* (2008)

Australian Institute of Criminology, *What works in reducing young people's involvement in crime?: Review of current literature on youth crime prevention* (2002)

Australian Institute of Criminology, *Restorative justice as a crime prevention measure* (2004)

Australian Law Reform Commission, *The recognition of Aboriginal customary laws: volume 1* (1986)

Australian Law Reform Commission, *The recognition of Aboriginal customary laws: volume 2* (1986)

Australian Law Reform Commission, *Alternative or assisted dispute resolution: Adversarial background paper 2* (1996)

Australian Law Reform Commission, *ADR - Its role in federal dispute resolution: Issues paper 25* (1998)

Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system* (2000)

Australian Law Reform Commission, *Same crime, same time: Sentencing of federal offenders* (2006)

- Baffour, Tiffany D, 'Ethnic and gender differences in offending patterns: Examining family group conferencing interventions among at-risk adolescents' (2006) 23(5-6) *Child and Adolescent Social Work Journal*, 557
- Bakker, Leon, *Sycamore Tree Project impact evaluation for Prison Fellowship New Zealand*
- Balstad, Just, 'What do litigants really want? Comparing and evaluating adversarial negotiation and ADR' (2005) 16(4) *Australasian Dispute Resolution Journal*, 244
- Bargen, Jenny, 'Kids, cops, courts, conferencing and children's rights - A note on perspectives' (1996) 2(2) *Australian Journal of Human Rights*, 209
- Bargen, Jenny, Chan, Janet, Luke, Garth and Clancey, Garner, 'Regulating police discretion: An assessment of the impact of the New South Wales Young Offenders Act 1997' (2004) 28(2) *Criminal Law Journal*, 74
- Barnes, Bruce E, 'Conflict resolution education in the Asian Pacific' (2007) 25(1) *Conflict Resolution Quarterly*, 55
- Barrett, Jerome T and Barrett, Joseph P, *A history of alternative dispute resolution* (2004) Jossey-Bass
- Bauman, Toni, *Final report of the Indigenous Facilitation Mediation Project July 2003-June 2006: Research findings, recommendations and implementation* (2006) Australian Institute of Aboriginal and Torres Strait Islander Studies
- Baylis, Claire and Carroll, Robyn, 'The nature and importance of mechanisms for addressing power differences in statutory mediation' (2002) 14 *Bond Law Review*, 285
- Baylis, Claire and Carroll, Robyn, 'Power issues in mediation' (2005) 7(8) *The ADR Bulletin*, 133
- Bazemore, Gordon and Griffiths, Curt, 'Police reform, restorative justice and restorative policing' (2003) 4(4) *Police Practice and Research*, 335
- Bazemore, Gordon and Umbreit, Mark, 'A comparison of four restorative conferencing models' (2001) *Juvenile Justice Bulletin*, 1
- Bergseth, Kathleen J and Bouffard, Jeffrey A, 'The long-term impact of restorative justice programming for juvenile offenders' (2007) 35(4) *Journal of Criminal Justice*, 433
- Beven, Jaimie P, Hall, Guy, Froyland, Irene, Steels, Brian and Goulding, Dorothy, 'Restoration or renovation? Evaluating restorative justice outcomes' (2005) 12(1) *Psychiatry, Psychology and Law*, 194
- Blagg, Harry, 'A just measure of shame?' (1997) 37(4) *British Journal of Criminology*, 481
- Bluett-Boyd, Nicole Maree, Department of Criminology, University of Melbourne, *'In search of justice in family violence': Exploring alternative justice responses in the Victorian Indigenous Australian community* (2005) Victorian Aboriginal Legal Service
- Booth, Tracey, 'Altered perceptions of conflict in homicide matters: The role of victim-offender conferencing' (2003) 14 *Australasian Dispute Resolution Journal*, 290
- Boulle, Laurence, 'Minding the gaps - Reflecting on the story of Australian mediation' (1999) 11(2) *Bond Law Review*, 216
- Boulle, Laurence, *Mediation: Skills and techniques* (2001) Butterworths
- Boulle, Laurence, *Mediation: Principles, process, practice* (2nd edition) (2005) LexisNexis Butterworths
- Boulle, Laurence, 'On-line ADR' (2005) 24(2) *The Arbitrator and Mediator*, 9
- Bradshaw, William and Umbreit, Mark S, 'Crime victims meet juvenile offenders: Contributing factors to victim satisfaction with mediated dialogue' (1998) Summer *Juvenile and Family Court Journal*, 17
- Bradt, Lieve, Vettenburg, Nicole and Roose, Rudi, 'Relevant others in restorative practices for minors: For what purposes?' (2007) 40(3) *The Australian and New Zealand Journal of Criminology*, 291
- Braithwaite, John, *Crime, shame and reintegration* (1989) Cambridge University Press
- Braithwaite, John, *Restorative justice and responsive regulation* (2002) Oxford University Press

-
- Braithwaite, John, 'Setting standards for restorative justice' (2002) 42(3) *British Journal of Criminology*, 563
- Braithwaite, John, 'Principles of restorative justice', in von Hirsch, A, Roberts, J V, Bottoms, A E, Roach, K and Schiff, M (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) Hart Publishing
- Braithwaite, John, 'Encourage restorative justice' (2007) 6(4) *Criminology & Public Policy*, 689
- Braithwaite, John and Strang, Heather, 'Connecting philosophy and practice', in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice: Philosophy to practice* (2000) Ashgate Publishing Company
- Brigg, Morgan, 'Mediation, power and cultural difference' (2003) 20(3) *Conflict Resolution Quarterly*, 287
- Broad, Howard, 'Restorative policing', in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) Institute of Policy Studies
- Buck, Trevor, *Administrative justice and alternative dispute resolution: The Australian experience* (2005) Department for Constitutional Affairs
- Busch, Ruth, 'Domestic violence and restorative justice initiatives: Who pays if we get it wrong?' in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice and Family Violence* (2002)
- Bush, Robert A Baruch and Folger, Joseph P, *The promise of mediation: The transformative approach to conflict* (2005) John Wiley and Sons
- Butterworths, *Butterworths Concise Australian Legal Dictionary* (2nd edition) (1998)
- Cameron, Angela, *Restorative justice: A literature review* (2005) The British Columbia Institute Against Family Violence
- Cameron, Lisa and Thorsborne, Margaret, 'Restorative justice and school discipline: mutually exclusive?' in Braithwaite, John and Strang, Heather (eds.), *Restorative justice and civil society* (2001) Cambridge University Press
- Campbell, Christine, *A balanced approach to juvenile justice in Victoria* (2000)
- Cannon, Andrew, 'What is the proper role of judicial officers in ADR?' (2002) 13 *Australasian Dispute Resolution Journal*, 253
- Cappa, Clare, 'The social, political and theoretical context of drug courts' (2006) 32(1) *Monash University Law Review*, 145
- Cappellatti, Mauro and Garth, Bryan (eds.), *Access to justice: a world survey (vol. 1)* (1978) Slijthoff and Noordhoff
- Carroll, Milt, 'Implementational issues: Considering the options for Victoria', in Alder, Christine and Wundersitz, Joy (eds.), *Family Conferencing and Juvenile Justice: the way forward or misplaced optimism?* (1994) Australian Institute of Criminology
- Carroll, Robyn, 'Trends in mediation legislation: 'All for one and one for all' or 'one at all'?' (2002) 30(2) *Western Australian Law Review*, 167
- Carswell, Sue, *Process evaluation of the Christchurch Youth Drug Court Pilot* (2004) New Zealand Ministry of Justice
- Catholic Education Office Melbourne, *CEOM annual report 2007* (2007)
- Chan, Janet, Doran, Sally, Maloney, Elizabeth, Petkoska, Natasha, Barga, Jenny, Luke, Garth and Clancey, Garner, School of Social Science and Policy, University of New South Wales, *Reshaping juvenile justice: A study of the NSW Young Offenders Act 1997 (final report)* (2004)
- Chappell, Duncan and Wilson, Paul (eds.), *Crime and the criminal justice system in Australia: 2000 and beyond* (2000) Butterworths
- Chen, Shuling, Matruglio, Tania, Weatherburn, Don and Hua, Jiuzhao, 'The transition from juvenile to adult criminal careers' (2005) (86) *Crime and Justice Bulletin*, 1

- Children's Court of Victoria, *Annual report 2006-2007* (2008)
- Clarke, Sophie and Forell, Suzie, *Pathways to justice: The role of non-legal services* (2007) New South Wales Law and Justice Foundation Paper 1
- Coker, Donna, 'Transformative justice: Anti-subordination processes in cases of domestic violence', in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice and Family Violence* (2002)
- Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation* (1997)
- Community Solutions, La Trobe University, University of Western Sydney, *Review of the Financial Industry Complaints Service 2002: What are the issues?* (2002)
- Community Solutions, La Trobe University, University of Western Sydney, *Review of the Financial Industry Complaints Service 2002 - Final report* (2002)
- Condliffe, Peter, 'Arbitration: the forgotten ADR?' (2004) 78(8) *Law Institute Journal*, 42
- Condliffe, Peter, 'Putting the pieces together: The opportunity for restorative justice in Victoria' (2005) 79 *Law Institute Journal*, 54
- Condliffe, Peter and Douglas, Kathy, 'Reflections on conferencing practice: The need for accreditation and the dangerous debate?' (2007) 18(3) *Australasian Dispute Resolution Journal*, 140
- Conley Tyler, Melissa and Bornstein, Jackie, 'Court referral to ADR: Lessons from an intervention order mediation pilot' (2006) 16(1) *Journal of Judicial Administration*, 48
- Conley Tyler, Melissa and Bretherton, Di, *Research into online alternative dispute resolution: Exploration report prepared for the Department of Justice, Victoria* (2003) University of Melbourne
- Conley Tyler, Melissa and Bretherton, Di, 'Lessons for eGovernment: Online dispute resolution', in Chen, P J and Roberts, W (eds.), *The Australian Electronic Government Conference* (2004) The University of Melbourne - Centre for Public Policy
- Conley Tyler, Melissa, Bretherton, Di and Bastian, Brock, *Research into online alternative dispute resolution: Needs assessment prepared for the Department of Justice, Victoria* (2003) University of Melbourne
- Conley Tyler, Melissa, Bretherton, Di and Firth, Lucy, *Research into online alternative dispute resolution: Feasibility report prepared for the Department of Justice, Victoria* (2003) University of Melbourne
- Connellan, Greg, 'Access to justice' (2001) 13(3) *Legaldate*, 5
- Consumer Affairs Victoria, *Annual report 2005-06* (2006)
- Cook, Larry R, 'Collaborative law works' (2006) September *Journal of Accountancy*, 35
- Coumarelos, Christine, Wei, Zhigang and Zhou, Albert Z, *Justice made to measure: NSW legal needs survey in disadvantaged areas: Access to justice and legal needs volume 3* (2006) Law and Justice Foundation of New South Wales
- Crime and Justice Research Centre, Victoria University, and Triggs, Sue, Ministry of Justice, New Zealand, *New Zealand court-referred restorative justice pilot evaluation* (2005)
- Crime and Justice Research Centre, Victoria University, and Triggs, Sue, Ministry of Justice, New Zealand, 'A summary of: New Zealand court-referred restorative justice pilot: Evaluation' (2005) 39 (June 2005) *Just Published*, 1
- Crockett, Julia, 'Cross-cultural mediation and the multicultural/natural model' (2003) 14 *Australasian Dispute Resolution Journal*, 257
- Cumming, J Joy and Wilson, Janice M, Griffith University, *Literacy, numeracy and alternative dispute resolution* (2005) National Centre for Vocational Education Research
- Cumming, J Joy and Wilson, Janice M, Griffith University, *Literacy, numeracy and alternative dispute resolution: Support document* (2005) National Centre for Vocational Education Research
- Cunneen, Chris and Luke, Garth, 'Recidivism and the effectiveness of criminal justice interventions: Juvenile offenders and post release support' (2007) 19(2) *Current Issues in Criminal Justice*, 197

- Cunningham, Teresa, *Pre-court diversion in the Northern Territory: Impact on juvenile reoffending* (2007) Australian Institute of Criminology
- Curtis-Fawley, Sarah and Daly, Kathleen, 'Gendered violence and restorative justice: the views of victim advocates' (2005) 11(5) *Violence Against Women*, 603
- Daicoff, Susan, *Law as a healing profession: The "comprehensive law movement"* (2005) bepress Legal Series
- Daly, Kathleen, 'Revisiting the relationship between retributive and restorative justice', in Strang, Heather and Braithwaite, John (eds.), *Restorative justice: Philosophy to practice* (2000) Ashgate Publishing Company
- Daly, Kathleen, 'Conferencing in Australia and New Zealand: Variations, research findings, and prospects', in Morris, Allison and Maxwell, Gabrielle (eds.), *Restorative justice for juveniles: Conferencing, mediation and circles* (2001) Hart
- Daly, Kathleen, 'A tale of two studies: Restorative justice from a victim's perspective', in Elliott, E and Gordon, R (eds.), *Restorative Justice: Emerging Issues in Practice and Evaluation* (2004)
- Daly, Kathleen, 'Restorative justice and sexual assault: An archival study of court and conference cases' (2006) 46(2) *British Journal of Criminology*, 334
- Daly, Kathleen, Bouhours, Brigitte and Curtis-Fawley, Sarah, *In-depth study of sexual assault and family violence cases* (2007) South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing, Technical Report No. 4
- Daly, Kathleen, Bouhours, Brigitte, Curtis-Fawley, Sarah, Weber, Leanne and Scholl, Rita, *Sexual Assault Archival Study (SAAS): An archival study of sexual offence cases disposed in Youth Court and by conference and formal caution in South Australia* (2007) South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing, Technical Report No. 3
- Daly, Kathleen and Curtis-Fawley, Sarah, 'Restorative justice for victims of sexual assault', in Heimer, Karen and Kruttschnitt, Candace (eds.), *Gender and Crime: Patterns in Victimization and Offending* (2006) New York University Press
- Daly, Kathleen and Hayes, Hennessey, *Restorative justice and conferencing in Australia* (2001) Australian Institute of Criminology
- Daly, Kathleen and Immarigeon, Russ, 'The past, present and future of restorative justice: Some critical reflection' (1998) 1(1) *Contemporary Justice Review*, 21
- Davidson, Steve, 'Court annexed arbitration in the Sydney District Court: An evaluation of the effectiveness of court annexed arbitration in the disposal of cases in the Sydney Registry (Civil) of the District Court of New South Wales' (1995) 6(3) *Alternative Dispute Resolution Journal*, 195
- Davies, G and Raymond, K, 'Do current sentencing practices work' (2000) 24 *Criminal Law Journal*, 236
- Davis, Jenny B, 'Coming soon: International mediator certification' (2007) 93 *ABA Journal*, 11
- Delaney, Marie and Wright, Ted, *Plaintiffs' satisfaction with dispute resolution processes: Trial, arbitration, pre-trial conference and mediation* (1997) Justice Research Center
- de Lotbinière McDougall, Andrew, 'New EU mediation directive' (2008) 4(1) *Mediation Committee Newsletter*, 17
- Department for Constitutional Affairs, United Kingdom, *Annual report 2004/2005: Monitoring the effectiveness of the Government's commitment to using alternative dispute resolution* (2005)
- Department of Corrective Services, New South Wales, 'Participation in a victim offender conference presents offenders with a number of opportunities' (2008) April 2008 *Restorative Justice Unit Newsletter*, 1
- Department of Education & Training, Victoria, *Safe schools are effective schools: A resource for developing safe and supportive school environments* (2006)
- Department of Justice and Community Safety, Australian Capital Territory, *First phase review of restorative justice* (2006)

- Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement* (2000)
- Department of Justice, Victoria, *The Drug Court: An evaluation of the Victorian pilot program* (2006)
- Department of Justice, Victoria, *Overview of the Koori Court* (2006)
- Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A partnership between the Victorian Government and the Koori Community* (2006)
- Department of Justice, Victoria, *Alternative dispute resolution supplier survey 2006* (2007)
- Department of Justice, Victoria, *Government legal services annual report 2006-07* (2007)
- Department of Justice, Victoria, *Victorian perceptions of justice survey (2) October-December 2006* (2007)
- Department of Justice, Victoria, *Department of Justice annual report 2007-2008* (2008)
- Department of Juvenile Justice, New South Wales, *Conference convenor training program review*
- Department of Labour, New Zealand, *Current trends, process and practice in mediation and alternative dispute resolution* (2008)
- Department of Treasury and Finance, Victoria, *Victorian guide to regulation* (2nd edition) (2007)
- Dewdney, Micheline, 'Hybrid processes' (2006) 25(2) *The Arbitrator and Mediator*, 145
- Douglas, Kathy, 'National Mediation Accreditation System: In search of an inclusive definition of mediation' (2006) 25(1) *The Arbitrator and Mediator*, 1
- Douglas, Kathy, 'Therapeutic jurisprudence, restorative justice and the law' (2007) 32(2) *Alternative Law Journal*, 63
- Douglas, Kathy and Field, Rachael, 'Looking for answers to mediation's neutrality dilemma in therapeutic jurisprudence' (2006) 13(2) *Murdoch University eLaw Journal*, 177
- Douglas, Kathy and Martin, Jennifer, 'Policy considerations in family dispute resolution: Who's mediating the mediators?' (2007) 44 *Just Policy*, 23
- Edwards, Ian, 'Restorative justice, sentencing and the Court of Appeal' (2006) *Criminal Law Review*, 110
- Effective Change Pty Ltd, *Report on the juvenile justice group conferencing program* (2006) Department of Human Services, Victoria
- Family Law Council, *Collaborative practice in family law* (2006) Pearsons Australia
- Field, Chris, *Current issues in consumer law and policy* (2006)
- Field, Chris, Chris Field Consulting Pty Ltd, *Alternative dispute resolution in Victoria: Supply-side research project research report* (2007) Department of Justice, Victoria
- Field, Rachael, 'Family law mediation: Process imbalances women should be aware of before they take part' (1998) 14 *QUT Law Journal*, 23
- Field, Rachael, 'Federal family law reform in 2005: The problems and pitfalls for women and children of an increased emphasis on post-separation informal dispute resolution' (2005) 5(1) *QUT Law & Justice Journal*, 28
- Field, Rachael, 'A mediation profession in Australia: An improved framework for mediation ethics' (2007) 18 *Australasian Dispute Resolution Journal*, 178
- Field, Rachael and Brandon, Mieke, 'A conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women' (2007) 18 *Australasian Dispute Resolution Journal*, 27
- Field, Rachael and Crowe, Jonathan, 'The construction of rationality in Australian family dispute resolution: A feminist analysis' (2007) 27 *The Australian Feminist Law Journal*, 97
- Fields, Barry A, 'Restitution and restorative justice in juvenile justice and school discipline' (2003) 22(4) *Youth Studies Australia*, 44
- Fisher, Roger and Ury, William, *Getting to yes: Negotiating agreement without giving in* (1981) Penguin Books

-
- Fisher, Tom, Gutman, Judy and Martens, Erika, 'Why teach ADR to law students? Part 2: An empirical study' (2007) *Legal Education Review*, 67
- Fiss, Owen, 'Against settlement' (1984) 93 *Yale Law Journal*, 1073
- Ford, Juliette, 'Collaborative law: Family lawyering in the 21st century' (2006) 18(4) *Australian Family Lawyer*, 20
- Fraser, Graeme and Grice, Christine, 'The dispute resolution practitioner: Aiming for professionalism in a deregulated environment' (2008) 27(1) *The Arbitrator and Mediator*, 1
- Freiberg, Arie, The University of Melbourne, *Pathways to justice: Sentencing review 2002* (2002) Sentencing Advisory Committee
- Freiberg, Arie, 'Non-adversarial approaches to criminal justice' (2007) 16 *Journal of Judicial Administration*, 205
- French, Brendan, 'Dispute resolution in Australia: The movement from litigation to mediation' (2007) 18 *Australasian Dispute Resolution Journal*, 213
- Garby, Thierry, 'International Mediation Institute created to offer competency certification to mediators' (2007) 3(1) *Mediation Committee Newsletter*, 49
- Gee, Tony, 'Family mediation: A matter of informed personal choice' (1998) 9(3) *Australian Dispute Resolution Journal*, 179
- Gehm, John, 'Mediated victim-offender restitution agreements: An exploratory analysis of factors related to victim participation', in Galaway, Burt and Hudson, Joe (eds.), *Criminal justice, restitution and reconciliation* (1990) Sage
- Gelb, Karen, *Myths and misconceptions: Public opinion versus public judgment about sentencing* (2006) Sentencing Advisory Council
- Genn, Hazel, Fenn, Paul, Mason, Marc, Lane, Andrew, Bechau, Nadia, Gray, Lauren and Vencappa, Dev, *Twisting arms: Court referred and court linked mediation under judicial pressure* (2007) Ministry of Justice Research Series 1/07
- George, Patrick and Snowball, Shannan, 'Mandatory mediation' (2005) 1(1) *Mediation Committee Newsletter*, 5
- Gibbons, Thomas, 'When mediation goes wrong' (2007) July 2007 *New Zealand Law Journal*, 205
- Glanfield, Laurie, 'Access to justice: A perspective from the Director General' (1999) 37(6) *Law Society Journal*, 52
- Gleeson, Murray, 'Access to justice: A New South Wales perspective' (1998) 28(2) *University of Western Australia Law Review*, 192
- Golvan, George H, 'Pitfalls in mediation' (2001) 20(2) *The Arbitrator and Mediator*, 41
- Goulding, Dot and Steels, Brian, 'Developing, implementing and researching a communitarian model of restorative & transformative justice for adult offenders in Magistrates' Courts', in King, Michael S and Auty, Kate (eds.), *The therapeutic role of Magistrates' Courts* (2006) E Law Special Series - Volume 1
- Govey, Ian and Symes, David, 'Part II: Developments in alternative dispute resolution practice: Developments in commercial ADR: Attorney-General Department's perspective' (2001) 13 *Bond Law Review*, 413
- Gray, Bronwen, 'Mediation as a post-modern practice: A challenge to the cornerstones of mediation's legitimacy' (2006) 17(4) *Australasian Dispute Resolution Journal*, 208
- Gray, Ian L, 'Magistrates' Court: Pre-issue mediation: Practice Direction No 7 of 2007' (2007) 81(12) *Law Institute Journal*, 81
- Gribben, Susan, 'Violence and family mediation' (1994) 8(1) *Australian Journal of Family Law*, 22
- Gunning, Isabelle, 'Diversity issues in mediation: Controlling negative cultural myths' (1995) 55 *Journal of Dispute Resolution*, 83

- Gutman, Judy, Fisher, Tom and Martens, Erika, 'Why teach alternative dispute resolution to law students? Part one: Past and current practices and some unanswered questions' (2006) 16(1&2) *Legal Education Review*, 125
- Gutman, Judy, Fisher, Tom and Martens, Erika, 'Teaching ADR to Australian law students: Implications for legal practice in Australia' (2008) 19 *Australasian Dispute Resolution Journal*, 42
- Goldsmith, Andrew, Halsey, Mark, and Bamford, David, *Adult restorative justice conferencing pilot: An evaluation: Final report* (2005) South Australian Courts Administration Authority
- Harris, Mark, *Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) Department of Justice, Victoria
- Harris, Mark, 'The Koori Court and the promise of therapeutic jurisprudence', in King, Michael S and Auty, Kate (eds.), *The therapeutic role of Magistrates' Courts* (2006) E Law Special Series - Volume 1
- Harris, Nathan, National Child Protection Clearinghouse, *Family group conferencing in Australia 15 years on* (2008) Australian Institute of Family Studies
- Hayes, Hennessey, 'Assessing reoffending in restorative justice conferences' (2005) 38(1) *The Australian and New Zealand Journal of Criminology*, 77
- Hayes, Hennessey, 'Apologies and accounts in youth justice conferencing: Reinterpreting research outcomes' (2006) 9(4) *Contemporary Justice Review*, 369
- Hayes, Hennessey and Daly, Kathleen, 'Youth justice conferencing and reoffending' (2003) 20(4) *Justice Quarterly*, 725
- Hayes, Hennessey and Daly, Kathleen, 'Conferencing and re-offending in Queensland' (2004) 37(2) *The Australian and New Zealand Journal of Criminology*, 167
- Hayes, Hennessey, Prenzler, Tim and Wortley, Richard, *Making amends: Final evaluation of the Queensland Community Conferencing Pilot* (1998)
- Hedeem, Timothy, 'The evolution and evaluation of community mediation: Limited research suggests unlimited progress' (2004) 22(1-2) *Conflict Resolution Quarterly*, 101
- Hedeem, Tim, 'Institutionalising community mediation: Can dispute resolution "of, by and for the people" long endure?' (2004) 108(1) *Penn State Law Review*, 265
- Hedeem, Timothy and Coy, Patrick G, 'Community mediation and the court system: The ties that bind' (2000) 17(4) *Mediation Quarterly*, 351
- Heimer, Karen and Kruttschnitt, Candace (eds.), *Gender and crime: Patterns in victimization and offending* (2006) New York University Press
- Hinchey, John, 'Restorative justice in the Australian Capital Territory from apprehension to parole' (2006) 72 *Precedent*, 36
- Hoffman, David A, 'The future of ADR: Professionalization, spirituality and the Internet' (2008) 14 (3/4) *Dispute Resolution Magazine*, 6
- Hulls, Rob, 'Success of Victoria's first Neighbourhood Justice Centre' (2007) Autumn Edition 2007 (140) *Victorian Bar News*, 9
- Hunter, Rosemary, 'Through the looking glass: Clients' perceptions and experiences of Family Law litigation' (2002) 16 *Australian Journal of Family Law*, 7
- Hutchinson, Terry and Smandych, Russell, 'Juvenile justice in Queensland and Canada: New legislation reflecting new directions' (2005) 23(1) *Australasian Canadian Studies*, 101
- Ikpa, Tina S, 'Balancing restorative justice principles and due process rights in order to reform the criminal justice system' (2007) 24 *Journal of Law & Policy*, 301
- The Institute of Arbitrators & Mediators Australia (IAMA) and The Chartered Institute of Arbitrators (Australia) Ltd (CI Arb), *Civil justice review: Joint submission by IAMA and CI Arb in response to the VLRC consultation paper* (2006)
- International Conflict Resolution Centre, *Review of the DSCV Magistrates' Court Mediation Diversion (Intervention Order) Project* (2004)

-
- Ireland Law Reform Commission, *Alternative dispute resolution consultation paper* (2008)
- Jacobs, Paul, 'A recent comparative history of mandatory mediation vs voluntary mediation in Ontario, Canada' (2005) 1(1) *Mediation Committee Newsletter*, 12
- James, Laurie, 'New horizons: Launch of the IAMA Arbitration Rules (incorporating fast track arbitration rules)' (2007) 26(1) *The Arbitrator and Mediator*, 1
- Jesuit Social Services, *A policy discussion paper on the development of a young adult restorative justice conferencing program in Victoria* (2005)
- Jesuit Social Services, *Development of a young adult restorative justice conferencing proposal for Victoria: Final report* (2006)
- Johnston, Chris, Rosen, Bonnie, Speller, David and Riches, Libby, Context Pty Ltd, *Review of the DSCV - Local government and community organisation project: Evaluation report* (2004) Dispute Settlement Centre of Victoria
- Jolson, Henry, 'The wave of change: Developments and trends in mediation' (2006) 25(2) *The Arbitrator and Mediator*, 61
- Jones, Tricia S, 'Conflict resolution education: The field, the findings, and the future' (2004) 22(1-2) *Conflict Resolution Quarterly*, 233
- Judicial College of Victoria, *Annual report 2007-2008* (2008)
- Kelly, Loretta, 'Indigenous women's stories speak for themselves: The policing of apprehended violence orders' (1999) 4(25) *Indigenous Law Bulletin*, 4
- Kelly, Loretta, 'Mediation in Aboriginal communities: Familiar dilemmas, fresh developments' (2002) 5(14) *Indigenous Law Bulletin*, 7
- Kelly, Loretta, 'Using restorative justice principles to address family violence in Aboriginal communities', in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice and Family Violence* (2002) Cambridge University Press
- Kelly, Loretta, 'Community mediation services: towards good practice mediation for Aboriginal people' (2006) 8(10) *The ADR Bulletin*, 189
- Kelly, Loretta and Oxley, Elvina, 'A dingo in sheep's clothing? The rhetoric of youth justice conferencing and the Indigenous reality' (1999) 4(18) *Indigenous Law Bulletin*, 4
- Kent, Jaimie C, 'Getting the best of both worlds: Making partnerships between court and community ADR programs exemplary' (2005) 23(1) *Conflict Resolution Quarterly*, 71
- King, Julian, Fletcher, Bevan, Alberi, Silvia and Hales, Jim, *Process evaluation and policy & legislation review: Final report* (2004)
- King, Michael, 'Applying therapeutic jurisprudence from the Bench: Challenges and opportunities' (2003) 28(4) *Alternative Law Journal*, 172
- King, Michael S and Auty, Kate, 'Therapeutic jurisprudence: An emerging trend in courts of summary jurisdiction' (2005) 30(2) *Alternative Law Journal*, 69
- Kingi, Venezia, Paulin, Judy and Porima, Laurie, Crime and Justice Research Centre, Victoria University of Wellington, *Review of the delivery of restorative justice in family violence cases by providers funded by the Ministry of Justice* (2008) Ministry of Justice, New Zealand
- Kirkwood, Debbie, *Behind closed doors: Family dispute resolution and family violence - Discussion paper* (2007) Domestic Violence and Incest Resource Centre
- Lambeck, Fiona, 'Rental bond disputes: A comparison of different dispute resolution mechanisms for rental bond disputes in the Australian Capital Territory' (1997) 8(1) *Australian Dispute Resolution Journal*, 27
- Landerkin, Hugh F and Pirie, Andrew J, 'Judges as mediators: What's the problem with judicial dispute resolution in Canada?' (2003) 82(2) *Canadian Bar Review*, 249
- Latimer, Jeff, Dowden, Craig and Muise, Danielle, *The effectiveness of restorative justice practices: A meta-analysis* (2001) Department of Justice, Canada

- Latimer, Jeff and Kleinknecht, Steven, *The effects of restorative justice programming: A review of the empirical* (2000) Department of Justice, Canada
- Law Society of New South Wales, *Early Dispute Resolution (EDR) Task Force report*
- Laycock, Debbie, 'Restorative justice: Saves people, time & money' (2007) 20(1) *Law Society Bulletin*, 4
- Lee, Gavin, Department of the Parliamentary Library, Commonwealth of Australia, *Access to justice - an action plan* (1995)
- Leigh, Meredith, 'Taking another look at gender and mediation' (2002) 21(1) *The Arbitrator and Mediator*, 49
- Limbury, Alan L, 'How to resolve disputes online' (2002) October *Law Society Journal*, 60
- Lincoln, Bronwyn, 'The arbitrator as mediator' (2002) 76(4) *Law Institute Journal*, 85
- Lincoln, Bronwyn, 'Diversity of cultural perspectives on mediation: face-saving, attitudes, relationship to courts and other considerations: Mediation in Australia' (2007) 3(2) *Mediation Committee Newsletter*, 8
- Lopich, Lorraine, 'Collaborative practice: Collaborative law, collaborative divorce, a hybrid, or is it mediation?' (2007) 3 April 2007 *LEADR Update*
- Lucas, Nancy, 'Restitution, rehabilitation, prevention, and transformation: Victim-offender mediation for first-time non-violent youthful offenders' (2001) 29 *Hofstra Law Review*, 1365
- Luke, Garth and Lind, Bronwyn, 'Reducing juvenile crime: Conferencing versus Court' (2002) 69 *Crime and Justice Bulletin*, 1
- Lynch, Nessa, 'Respecting legal rights in the New Zealand Youth Justice Family Group Conference' (2007) 19(1) *Current Issues in Criminal Justice*, 75
- Mack, Kathy, 'Alternative dispute resolution and access to justice for women' (1995) 17(1) *Adelaide Law Review*, 123
- Mack, Kathy, *Court referral to ADR: Criteria and research* (2003) National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration
- Magistrates' Court of Victoria, *2007-08 Annual report* (2008)
- Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria, *Court-annexed mediation: Mobilising informal dispute resolution in the shadow of the court* (2007) Joint response to the Law Reform Commission of Victoria Enquiry on Civil Justice - Exposure Draft June 2007
- Mandala Consulting Services, *Review of the Dispute Settlement Centre of Victoria Koori program* (2002)
- Marchetti, Elena and Daly, Kathleen, *Indigenous courts and justice practices in Australia* (2004) Australian Institute of Criminology
- Marchetti, Elena and Daly, Kathleen, 'Indigenous Sentencing Courts: Towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review*, 415
- Markiewicz, Anne, *Juvenile justice group conferencing in Victoria: An evaluation of a pilot program* (1997) University of Melbourne
- Markiewicz, Anne, Lagay, Bruce, Murray, Helen and Campbell, Lynda, *Juvenile justice group conferencing in Victoria: An evaluation of a pilot program: Phase two* (1997) University of Melbourne
- Marshall, Margaret, *A consideration of the Sycamore Tree Programme and survey results from the perspective of a restorative justice practitioner*, Prison Fellowship New Zealand
- Marshall, Tony E, *Restorative justice: An overview* (1999) Home Office, United Kingdom
- Maughan, Jeanette and Daglis, Andrea, *An evaluation of pre-hearing conferences in the Family Division of the Children's Court of Victoria* (2005)

-
- Maxwell, Gabrielle, 'Diversionary policing of young people in New Zealand: A restorative approach', in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) Institute of Policy Studies
- Maxwell, Gabrielle, 'The youth justice system in New Zealand: Restorative justice delivered through the family group conference', in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative justice and practices in New Zealand: Towards a restorative society* (2007) Institute of Policy Studies
- Maxwell, Gabrielle and Hayes, Hennessey, 'Restorative justice developments in the Pacific region: A comprehensive survey' (2006) 9(2) *Contemporary Justice Review*, 127
- Maxwell, Gabrielle and Liu, James H (eds.), *Restorative justice and practices in New Zealand: Towards a restorative society* (2007) Institute of Policy Studies
- Maxwell, Gabrielle and Morris, Allison, 'Restorative justice and reoffending', in Strang, Heather and Braithwaite, John (eds.), *Restorative Justice: Philosophy to practice* (2000) Ashgate Publishing Company
- Maxwell, Gabrielle and Morris, Allison, 'Putting restorative justice into practice for adult offenders' (2001) 40(1) *The Howard Journal*, 55
- Maxwell, Gabrielle and Morris, Allison, 'Family group conferences and reoffending', in Maxwell, Gabrielle and Morris, Allison (eds.), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2002)
- Maxwell, Gabrielle and Morris, Allison, 'Youth justice in New Zealand: Restorative justice in practice?' (2006) 62(2) *Journal of Social Issues*, 239
- Mayer, Bernard, 'The dynamics of power in mediation and negotiation' (1987) 16 *Mediation Quarterly*, 75
- McConnell, John A, *Mindful mediation: A handbook for Buddhist peacemakers* (1995) Buddhist Research Institute and Manachula Buddhist University
- McElrea, F W M, 'Restorative justice: The New Zealand Youth Court: A model for development in other courts' (1994) 4(1) *Journal of Judicial Administration*, 33
- McElrea, Frederick W M, 'The New Zealand Youth Court: A model for use with adults', in Galaway, Burt and Hudson, Joe (eds.), *Restorative Justice: International Perspectives* (1996) Kugler Publications
- McElrea, F W M, 'Restorative justice for adult offenders: Practice in New Zealand today', in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative justice and practices in New Zealand: Towards a restorative society* (2007) Institute of Policy Studies
- Menkel-Meadow, Carrie, 'The many ways of mediation: The transformation of traditions, ideologies, paradigms and practices' (1995) 11 *Negotiation Journal*, 217
- Menkel-Meadow, Carrie, 'Do the haves come out ahead in alternative judicial systems? Repeat players in ADR' (1999) 15 *Ohio State Journal on Dispute Resolution*, 19
- Ministry of Justice, New Zealand, *Restorative justice in New Zealand: Best practice* (2004)
- Ministry of Justice, New Zealand, *Restorative justice: Facilitator selection toolkit* (2008)
- Ministry of Justice, New Zealand, *Restorative justice: Facilitator induction training and accreditation*
- Ministry of Justice, United Kingdom, *The annual pledge report 2006/07* (2007)
- Moffitt, Michael L, 'Before the big bang: The making of an ADR pioneer' (2006) 22 *Negotiation Journal*, 437
- Moore, Christopher, *The mediation process: Practical strategies for resolving conflict* (2nd edition) (1996)
- Moore, D, 'Managing social conflict: The evolution of a practical theory' (2004) 21(1) *Journal of Sociology and Social Welfare*, 72
- Moore, D and O'Connell, T, 'Family conferencing in Wagga Wagga: A communitarian model of justice', in Adler, Christine and Wundersitz, Joy (eds.), *Family conferencing and juvenile justice: The way forward or misplaced optimism?* (1994) Australian Institute of Criminology

- Moore, Michael, 'Judges as mediators: A Chapter III prohibition or accommodation?' (2003) 14 *Australian Dispute Resolution Journal*, 188
- Nadeau, Jason, *Critical analysis of the United Nations declaration of basic principles on the use of restorative justice programs in criminal matters* (2001)
- Nader, Laura and Todd, Harry (eds.), *The disputing process: Law in ten societies* (1978)
- Nadler, Janice, 'In practice: Electronically-mediated dispute resolution and e-commerce' (2001) 17(4) *Negotiation Journal*, 333
- National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution: Discussion paper* (1997)
- National Alternative Dispute Resolution Advisory Council, *Primary dispute resolution in family law: A report to the Attorney-General on Part 5 of the Family Law Regulations* (1997)
- National Alternative Dispute Resolution Advisory Council, *A fair say: Managing differences in mediation and conciliation: A guide for all involved* (1999)
- National Alternative Dispute Resolution Advisory Council, *The development of standards for ADR: Discussion paper* (2000)
- National Alternative Dispute Resolution Advisory Council, *A framework for ADR standards: Report to the Commonwealth Attorney-General* (2001)
- National Alternative Dispute Resolution Advisory Council, *On-line ADR: Background paper* (2001)
- National Alternative Dispute Resolution Advisory Council, *ADR terminology: A discussion paper* (2002)
- National Alternative Dispute Resolution Advisory Council, *ADR statistics: Published statistics on alternative dispute resolution in Australia* (2003)
- National Alternative Dispute Resolution Advisory Council, *ADR terminology: Responses to NADRAC discussion paper* (2003)
- National Alternative Dispute Resolution Advisory Council, *Dispute resolution terms: The use of terms in (alternative) dispute resolution* (2003)
- National Alternative Dispute Resolution Advisory Council, *ADR research: A resource paper* (2004)
- National Alternative Dispute Resolution Advisory Council, *Who can refer to, or conduct, mediation?* (2004)
- National Alternative Dispute Resolution Advisory Council, *Who says you're a mediator? Towards a national system for accrediting mediators* (2004)
- National Alternative Dispute Resolution Advisory Council, *Indigenous dispute resolution and conflict management* (2006)
- National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for Government policy-makers and legal drafters* (2006)
- National Alternative Dispute Resolution Advisory Council, *A new accreditation system: Family dispute resolution practitioners* (2007)
- Neighbourhood Justice Centre, 'Neighbourhood News' (2008) Issue 2
- Neighbourhood Justice Centre Project Team, *The Neighbourhood Justice Centre: Community justice in action in Victoria* (2007) Department of Justice, Victoria
- Neighbourhood Justice Centre Project Team, *Restorative justice: Background and discussion paper* (2007) Department of Justice, Victoria
- New South Wales Law Reform Commission, *Alternative dispute resolution: Training and accreditation of mediators: Discussion paper 21* (1989)
- New South Wales Law Reform Commission, *Training and accreditation of mediators: Report 67* (1991)
- New South Wales Law Reform Commission, *Community Justice Centres: Issues Paper 23* (2003)

-
- Newell, Tim, 'Building restorative prisons' (2003) June 20 *Restorative Practices EForum*, 1
- Nolan, Christine, 'Alternative dispute resolution in Aboriginal and Islander communities: The Community Justice Program's experience', in Chappell, Duncan and Egger, Sandra J (eds.), *Australian violence: contemporary perspectives II* (1995) Australian Institute of Criminology
- Noone, Mary Anne, 'Access to justice research in Australia' (2006) 31(1) *Alternative Law Journal*, 30
- NSW Attorney General's Department, *Report on the review of the Young Offenders Act 1997* (2002)
- Office of Best Practice Regulation, Commonwealth, *Best practice regulation handbook* (2006)
- Office of the Victorian Small Business Commissioner, *Annual report 2004-05* (2005)
- Office of the Victorian Small Business Commissioner, *Forming and maintaining winning business relationships* (2007)
- O'Mahony, David and Doak, Jonathan, 'Restorative justice - Is more better? The experience of police-led restorative cautioning pilots in Northern Ireland' (2004) 43(5) *The Howard Journal*, 484
- O'Shea, Paul, 'The lion's question applied to industry-based consumer dispute resolution schemes' (2006) 25(1) *The Arbitrator and Mediator*, 63
- Partington, Martin, 'Alternative dispute resolution: Recent developments, future challenges' (2004) 23 *Civil Justice Quarterly*, 99
- Peacock, Graeme, Bondjakov, Preslav and Okerstrom, Erik, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Community survey 2007* (2007) Department of Justice, Victoria
- Peacock, Graeme, Bondjakov, Preslav and Okerstrom, Erik, Ipsos Australia Pty Ltd, *Dispute resolution in Victoria: Small business survey 2007* (2007) Department of Justice, Victoria
- People, Julie and Trimboli, Lily, *An evaluation of the NSW Community Conferencing for Young Adults pilot program* (2007) NSW Bureau of Crime Statistics and Research
- Piazza, Marco, 'Mandatory victim offender mediation - Valuable fruit or rotten tomato' (2006) 17 *Australian Dispute Resolution Journal*, 233
- Polk, Kenneth, 'Part B: Criminal justice reform in Australia', in Chappell, Duncan Chappell and Paul Wilson and Wilson, Paul (eds.) *The Australian criminal justice system - The mid 1990s* (1994) Butterworths
- Polk, Kenneth, Adler, Christine, Muller, Damon and Rechtman, Katherine, National Crime Prevention, *Early intervention: Diversion and youth conferencing - a national profile and review of current approaches to diverting juveniles from the criminal justice system* (2003) Australian Government Attorney-General's Department
- Pollard, Charles, 'Victims and the criminal justice system: A new vision' (2000) *Criminal Law Review*, 5
- Pollard, John, 'Collaborative law: Gaining momentum' (2007) 46(4) *Law Society Journal (NSW)*, 68
- Porter, Abbey J, 'Restorative conferences reduce trauma from crime, study shows' (2006) August (15) *Restorative Practices EForum*, 1
- Potas, Ivan, Smart, Jane, Brignell, Georgia, Thomas, Brendan and Lawrie, Rowena, *Circle sentencing in New South Wales: A review and evaluation* (2003) Judicial Commission of New South Wales and NSW Aboriginal Justice Advisory Council
- Pritchard, Bill, 'A reflective evaluation of Indigenous mediation services provided by NSW Community Justice Centres' (2006) 6(21) *Indigenous Law Bulletin*, 13
- Pyrles, Michael, 'Overview of international arbitration in Australia' (2006) 25(1) *The Arbitrator and Mediator*, 51
- Ralph, Stephen, 'Family Court mediation and Indigenous families' (2004) 6(5) *Indigenous Law Bulletin*, 10
- Ravindra, Geetha, 'Reflections on institutionalizing mediation' (2008) 14(3/4) *Dispute Resolution Magazine*, 28

- Redfern, Michael, 'A place for the courts in the dispute resolution process' (2005) 16(1) *Australasian Dispute Resolution Journal*, 79
- Reinhardt, Greg and Cannon, Andrew (eds.), *Transforming legal processes in court and beyond: A collection of refereed papers from the 3rd International Conference on Therapeutic Jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7-9 June 2006* (2007) The Australasian Institute of Judicial Administration
- Resnick, Judith, 'Managerial judges' (1982-83) 96 *Harvard Law Review*, 374
- Resnick, Judith, 'Many doors? Closing doors? Alternative dispute resolution and adjudication' (1995) 10 *Ohio State Journal on Dispute Resolution*, 211
- Reuben, Richard, 'Public justice: Towards a state action theory of alternative dispute resolution' (1997) 85 *California Law Review*, 579
- Riskin, Leonard L, 'Understanding mediators' orientation, strategies and techniques: A grid for the perplexed' (1996) 1 *Harvard Law Review*, 7
- Riskin, Leonard L, 'Decision making in mediation: The new old grid and the new new grid system' (2003) 79(1) *Notre Dame Law Review*, 1
- Ristovski, Adela and Wertheim, Eleanor H, 'Investigation of compensation source, trait empathy, satisfaction with outcome and forgiveness in the criminal context' (2005) 40(1) *Australian Psychologist*, 63
- Roberts, Julian and Hough, Mike, 'Sentencing young offenders: Public opinion in England and Wales' (2005) 5(3) *Criminal Justice*, 211
- Robertson, Andrew, 'Compulsion, delegation and disclosure: Changing forces in commercial mediation' (2006) 25(2) *The Arbitrator and Mediator*, 91
- Roche, Declan, 'Dimensions of restorative justice' (2006) 62(2) *Journal of Social Issues*, 217
- Roebuck, Derek, *Ancient Greek arbitration* (2001) The Arbitration Press
- Roebuck, Derek, *Early English arbitration* (2008) The Arbitration Press
- Roebuck, Derek and De Fumichon, Bruno, *Roman arbitration* (2004) The Arbitration Press
- Royal Commission into Aboriginal Deaths In Custody, *National report* (1991)
- Ruddock, Philip, 'Towards a less litigious Australia: The Australian Government's alternative dispute resolution initiatives' (2004) 23(1) *The Arbitrator and Mediator*, 1
- Sander, Frank, 'Varieties of dispute processing' (1976) 77 *Federal Rules Decision*, 111
- Sander, Frank and Goldberg, Stephen, 'Fitting the forum to the fuss: A user friendly guide to selecting an ADR procedure' (1994) 10 *Negotiation Journal*, 49
- Sauve, Madeleine, 'Mediation: Towards an Aboriginal conceptualisation' (1996) 3(80) *Indigenous Law Bulletin*, 10
- Schmid, Donald, 'Restorative justice: A new paradigm for criminal justice policy' (2003) 34(1) *Victoria University of Wellington Law Review*, 91
- Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria* (2008)
- Shapland, Joanna, Atkinson, Anne, Atkinson, Helen, Chapman, Becca, Colledge, Emily, Dignan, James, Howes, Marie, Johnstone, Jennifer, Robinson, Gwen and Sorsby, Angela, Home Office UK, *Restorative justice in practice: Findings from the second phase of the evaluation of three schemes* (2006)
- Shapland, Joanna, Atkinson, Anne, Atkinson, Helen, Chapman, Becca, Dignan, James, Howes, Marie, Johnstone, Jennifer, Robinson, Gwen and Sorsby, Angela, Centre for Criminological Research, University of Sheffield, *Restorative justice: The views of victims and offenders: The third report from the evaluation of three schemes* (2007) Ministry of Justice, United Kingdom
- Shapland, Joanna, Atkinson, Anne, Atkinson, Helen, Dignan, James, Edwards, Lucy, Hibbert, Jeremy, Howes, Marie, Johnstone, Jennifer, Robinson, Gwen and Sorsby, Angela, Ministry of Justice, United

- Kingdom, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes* (2008)
- Shaw, Gary and Wierenga, Ani, *Restorative practices/community conferencing pilot 2002 evaluation: Final report* (2002) University of Melbourne
- Sheehan, Rosemary, 'Alternative dispute resolution in child protection matters: The Victorian experience' (2006) 59(2) *Australian Social Work*, 157
- Sherman, Lawrence W and Barnes, Geoffrey C, *Restorative justice and offenders' respect for the law* (1997) Australian Institute of Criminology, RISE Working Papers, no. 3
- Sherman, Lawrence W and Strang, Heather, *Restorative justice: The evidence* (2007) The Smith Institute
- Sherman, Lawrence W, Strang, Heather, Angel, Caroline, Woods, Daniel, Barnes, Geoffrey C, Bennett, Sarah and Inkpen, Nova, 'Effects of face-to-face restorative justice on victims of crime in four randomized, controlled trials' (2005) 1 *Journal of Experimental Criminology*, 367
- Sherman, Lawrence, Strang, Heather and Woods, Daniel, *Recidivism patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (2000)
- Simpson, Jim, 'Guarded participation: Alternative dispute resolution and people with disabilities' (2003) 14 *Australasian Dispute Resolution Journal*, 31
- Singer, Linda R and Lewis, Michael K, 'Looking forward in mediation: Today's successes and tomorrow's challenges' (2008) 14(3/4) *Dispute Resolution Magazine*, 15
- Sivasubramaniam, Diane and Goodman-Delahunty, Jane, 'Trust and power-distance: A psychological perspective on fairness in restorative justice conferences' (2006) 13(2) *Psychiatry, Psychology and Law*, 203
- Snowball, Lucy, *Diversion of Indigenous juvenile offenders* (2008) Australian Institute of Criminology
- Sourdin, Tania, *ADR strategies and proposals for the future: Recommendations of the ADR Steering Committee of the Supreme Court of NSW* (1995) Supreme Court of NSW
- Sourdin, Tania, 'Legislative referral to alternative dispute resolution processes' (2001) 12 *Australasian Dispute Resolution Journal*, 180
- Sourdin, Tania, 'ADR and technologically supported negotiation - AI' (2006) 25(1) *The Arbitrator and Mediator*, 33
- Sourdin, Tania, 'An alternative for who? Access to ADR processes' (2007) 10(2) *ADR Bulletin*, 26
- Sourdin, Tania, *Australian National Mediator Accreditation System: Report on project* (2007)
- Sourdin, Tania, *Dispute resolution process for credit consumers* (2007) La Trobe University
- Sourdin, Tania, *Alternative dispute resolution* (3rd edition) (2008) Lawbook Co.
- Sourdin, Tania and Balvin, Nikola, *Interim evaluation of Dispute Settlement Centre Victoria projects: The Neighbourhood Justice Centre project; The Corio/Norlane community mediation project* (2008) Australian Centre for Peace and Conflict Studies, The University of Queensland
- Sourdin, Tania and Matruglio, Tania, *Evaluating mediation: New South Wales Settlement Scheme 2002* (2002)
- Sourdin, Tania and Thorpe, Louise, 'Consumer perceptions of dispute resolution processes' (2008) 15 *Competition & Consumer Law Journal*, 337
- Sourdin, Tania and Thorpe, Louise, 'How do financial services consumers access complaints and dispute resolution processes?' (2008) 18 *Australasian Dispute Resolution Journal*, 25
- Spencer, David, 'Liability of lawyers to advise on alternative dispute resolution options' (1998) 9(4) *Australian Dispute Resolution Journal*, 292
- Spigelman, James, 'Keynote address: Access to justice and human rights treaties' (2000) 22(1) *Sydney Law Review*, 141
- Spigelman, J, 'Mediation and the court' (2001) 39(2) *Law Society Journal*, 63

- Standing Committee on Education Training and Young People, ACT, *Restorative justice principles in youth settings: Final report* (2008) Parliament of the Australian Capital Territory
- Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: Key indicators 2007* (2007) Productivity Commission
- Steering Committee for the Review of Government Service Provision, *Report on government services 2007: Indigenous compendium* (2007) Productivity Commission
- Steering Committee for the Review of Government Service Provision, *Report on government services 2009* (2009) Productivity Commission
- Stempel, Jeffrey, 'Reflections on judicial ADR and the multi-door courthouse at twenty: Fait accompli, failed overture or fledging adulthood' (1996) 11 *Ohio State Journal on Dispute Resolution*, 297
- Stewart, Anna Louise and Smith, Frances, 'Youth justice conferencing and police referrals: The gatekeeping role of police in Queensland, Australia' (2004) 32 *Journal of Criminal Justice* 345
- Stokes, Helen and Shaw, Gary, *Restorative practices pilot in Victorian schools: Evaluation report* (2005) Youth Research Centre, University of Melbourne
- Strang, Heather, 'The future of restorative justice', in Chappell, Duncan and Wilson, Paul (eds.), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) Butterworths
- Strang, Heather, *Restorative justice programs in Australia: A report to the Criminology Research Council* (2001)
- Strang, Heather, Barnes, Geoffrey C, Braithwaite, John and Sherman, Lawrence, Research School of Social Sciences, Institute of Advanced Studies, Australian National University, *Experiments in restorative policing: A progress report on the Canberra Reintegrative Shaming Experiments (RISE)* (1999)
- Strang, Heather and Braithwaite, John (eds.), *Restorative justice: Philosophy to practice* (2000) Ashgate Publishing Company
- Strang, Heather and Sherman, Lawrence W, *Reintegrative Shaming Experiments (RISE): The victim's perspective* (1997) Australian Institute of Criminology, RISE Working Papers, no. 2
- Strang, Heather, Sherman, Lawrence, Angel, Caroline M, Woods, Daniel J, Bennett, Sarah, Newbury-Birch, Dorothy and Inkpen, Nova, 'Victim evaluations of face-to-face restorative justice conferences: A quasi-experimental analysis' (2006) 62(2) *Journal of Social Issues*, 281
- Stubbs, Julie, *Restorative justice, domestic violence and family violence: Issues paper 9* (2004) Australian Domestic & Family Violence Clearinghouse
- Stubbs, Julie, 'Beyond apology? Domestic violence and critical questions for restorative justice' (2007) 7(2) *Criminology & Criminal Justice*, 169
- Stuhmcke, Anita, 'The relevance of industry ombudsmen' (2002) March *Law Society Journal*, 73
- Stuhmcke, Anita, 'Resolving consumer disputes: Out of the courts and into private industry' (2003) 31 *Australian Business Law Review*, 48
- Success Works Pty Ltd, *Juvenile justice group conferencing project evaluation* (1999)
- Supreme Court of Victoria, *Annual report 2005-2006* (2006)
- Tillett, Gregory, 'Terminology in dispute resolution: A review of issues and literature' (2004) 15 *Australian Dispute Resolution Journal*, 178
- Training and Accreditation Policy Group, *Best practice guidance for restorative practitioners and their case supervisors and line managers; and conclusions and recommendations of the training and accreditation policy group* (2004)
- Transformation Management Services, *Court-annexed mediation: Broadmeadows pilot - evaluation* (2008)
- Triggs, Sue, *New Zealand court-referred restorative justice pilot: Two year follow-up of reoffending* (2005) Ministry of Justice, New Zealand

-
- Umbreit, Mark S, 'Violent offenders and their victims', in Wright, Martin and Galaway, Burt (eds.), *Mediation and criminal justice: Victims, offenders and community* (1989)
- Umbreit, Mark, Bradshaw, William and Coates, Robert B, 'Victims of severe violence meet the offender: Restorative justice through dialogue' (1999) 6(4) *International Review of Victimology*, 321
- Umbreit, Mark and Vos, Betty, 'Homicide survivors meet the offender prior to execution: Restorative justice through dialogue' (2000) 4(1) *Homicide Studies*, 63
- Umbreit, Mark, Vos, B and Coates, R B, *Restorative justice dialogue: Evidence-based practice* (2006) Center for Restorative Justice and Peacemaking
- United Nations Economic and Social Council, 'Basic principles on the use of restorative justice programmes in criminal matters (Resolution 2002/12)', in United Nations Office on Drugs and Crime, *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006)
- United Nations Office on Drugs and Crime, *Handbook on restorative justice programmes* (2006)
- Venus, Paul, 'Court directed compulsory mediation - Attendance or participation' (2004) 15(1) *Australasian Dispute Resolution Journal*, 29
- Victoria Police, 'Magistrates' Court diversion', in *Victoria Police Manual* (2007)
- Victoria Police, 'Police cautioning and drug diversion programs', in *Victoria Police Manual* (2007)
- Victoria Police, *Victoria Police crime statistics 2006/07* (2007)
- Victorian Civil and Administrative Tribunal, *Annual report 2007-2008* (2008)
- Victorian Competition & Efficiency Commission, *Is regulation working? Annual report 2007-08* (2008)
- Victorian Law Reform Commission, *Review of family violence laws: Consultation paper* (2004)
- Victorian Law Reform Commission, *Sexual offences: Final report* (2004)
- Victorian Law Reform Commission, *Review of family violence laws: Report* (2006)
- Victorian Law Reform Commission, *Civil justice review: Report* (2008)
- Victorian Parliament Law Reform Committee, *Alternative dispute resolution: Discussion paper* (2007)
- Victorian Parliament Law Reform Committee, *Inquiry into vexatious litigants: Final report* (2008)
- Vignaendra, Sumitra and Fitzgerald, Jacqueline, 'Reoffending among young people cautioned by police or who participated in a youth justice conference' (2006) 103 *Crime and Justice Bulletin*, 1
- Wachtel, Joshua, International Institute for Restorative Practices, *RJ in the Land of the Long White Cloud: New Zealand embraces restorative justice for adult offenders* (2007)
- Wachtel, Ted and Mirsky, Laura, 'Restorative conferencing for serious offenses: An exploration' (2006) December (5) *Restorative Practices EForum*, 1
- Wade, John, 'Current trends in dispute resolution in Australia' (2004) 18 *Bond Dispute Resolution News*, 12
- Washington State Institute for Public Policy, *Evidence-based adult corrections programs: What works and what does not* (2006)
- Washington State Institute for Public Policy, *Evidence-based public policy options to reduce future prison construction, criminal justice costs, and crime rates* (2006)
- Webb-Pullman, Julie, 'Towards human rights based juvenile justice: group conferencing' (2001) *Australasian Dispute Resolution Journal*, 146
- Weitz, Daniel M, 'Renovations to the multidoor courthouse' (2007) 14(1) *Dispute Resolution Magazine*, 21
- Wilcox, Aidan, Young, Richard and Hoyle, Carolyn, Home Office UK, *Two-year resanctioning study: A comparison of restorative and traditional cautions* (2004)
- Winford, Stan, 'Just for the rich: Legal aid and access to justice in Australia' (2006) 185 *Overland*, 34

Winick, Bruce J and Wexler, David, 'Introduction', in Winick, Bruce J and Wexler, David (eds.), *Judging in a therapeutic key: Therapeutic jurisprudence and the courts* (2003)

Winkworth, Gail and McArthur, Morag, Family Relationship Centre, *Framework for screening, assessment and referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008) Attorney-General's Department, Commonwealth

Woolf, Lord H K, Master of the Rolls, *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) Department for Constitutional Affairs

Workman, Kim, 'Resolving conflict and restoring relationships: Experiments in community justice within a New Zealand faith-based prison', in Maxwell, Gabrielle and Liu, James H (eds.), *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) Institute of Policy Studies

Wundersitz, Joy, 'Pre court diversion: The Australian experience', in Borowski, A and O'Connor, I (eds.), *Juvenile crime, justice and corrections* (1997) Addison, Wesley Longman

Wundersitz, Joy, Doherty, Justine, Gardner, Julie and Mannik, Maire, *The South Australian Juvenile Justice System: A review of its operation* (1996) Office of Crime Statistics, South Australian Attorney-General's Department

Youth Justice Board for England and Wales, *National evaluation of the Restorative Justice in Schools programme* (2004)

Youth Justice Board for England and Wales, *Restorative justice: Key elements of effective practice* (2008)

Zariski, Archie, 'SCRAM competition: pilot year in WA' (2002) 5(5) *ADR Bulletin*, 84

Zariski, Archie and Styles, Irene, Murdoch University, *The SCRAM program for conflict resolution education in Western Australian secondary schools* (2004) SCRAM

Zehr, Howard, *Changing lenses* (1995) Herald Press

Zehr, Howard, *The little book of restorative justice* (2002) Good Books

Case law

Amalgamated Television Services Pty Ltd v Marsden (No 2) [2003] NSWCA 186

Azmin Firoz Daya v CAN Reinsurance Co Ltd [2004] NSWSC 795

Browning v Crowley [2004] NSWSC 128

Duke Group (in liq) v Alamain Investments Ltd [2003] SASC 272

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 427

Legislation

Victoria

Accident Compensation Act 1985 (Vic)

Associations Incorporation Act 1981 (Vic)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Children and Young Persons Act 1989 (Vic)

Children, Youth and Families Act 2005 (Vic)

Commercial Arbitration Act 1984 (Vic)

Consumer Credit (Victoria) and Other Acts Amendment Act 2008 (Vic)

County Court Act 1958 (Vic)
County Court Civil Procedure Rules 2008 (Vic)
Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)
Fair Trading Act 1999 (Vic)
Information Privacy Act 2000 (Vic)
Legal Profession Act 2004 (Vic)
Magistrates' Court Act 1989 (Vic)
Magistrates' Court Civil Procedure Rules 1999 (Vic)
Owner Drivers and Forestry Contractors Act 2005 (Vic)
Retail Leases Act 2003 (Vic)
Sentencing Act 1991 (Vic)
Small Business Commissioner Act 2003 (Vic)
Supreme Court Act 1986 (Vic)
Supreme Court (General Civil Procedure) Rules 2005 (Vic)
Victorian Civil and Administrative Tribunal Act 1998 (Vic)

Commonwealth

Administrative Appeals Tribunal Act 1975 (Cth)
Commonwealth of Australia Constitution Act 1900
Family Law Act 1975 (Cth)
Family Law Regulations 1984 (Cth)
Family Law Rules 2004 (Cth)
Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)
Federal Court of Australia Act 1976 (Cth)
Legal Services Amendment Directions 2008 (Cth)
Legal Services Directions 2005 (Cth)
Privacy Act 1988 (Cth)

Australian Capital Territory

Children and Young People Act 2008 (ACT)
Court Procedure Rules 2006 (ACT)
Crimes (Restorative Justice) Act 2004 (ACT)
Mediation Act 1997 (ACT)

New South Wales

Civil Procedure Act 2005 (NSW)
Consumer Trader and Tenancy Tribunal Act 2001 (NSW)
Criminal Procedure Act 1986 (NSW)
Criminal Procedure Regulation 2005 (NSW)
Farm Debt Mediation Act 1994 (NSW)
Young Offenders Act 1997 (NSW)

Northern Territory

Youth Justice Act 2005 (NT)

Queensland

Criminal Code Act 1899 (Qld)

Dispute Resolution Centres Act 1990 (Qld)

Justices Act 1886 (Qld)

Juvenile Justice Act 1992 (Qld)

South Australia

District Court Act 1991 (SA)

Magistrates Court Act 1991 (SA)

Supreme Court Act 1935 (SA)

Young Offenders Act 1993 (SA)

Tasmania

Alternative Dispute Resolution Act 2001 (Tas)

Supreme Court Rules 2000 (Tas)

Youth Justice Act 1997 (Tas)

Western Australia

Sentencing Act 1995 (WA)

Young Offenders Act 1994 (WA)

New Zealand

Children, Young Persons, and Their Families Act 1989 (NZ)

Parole Act 2002 (NZ)

Sentencing Act 2002 (NZ)

Victims' Rights Act 2002 (NZ)

Other sources

Australian National Mediator Standards: Approval standards (2007)

Australian National Mediator Standards: Practice standards (2007)

Abdullah, Abu Haniffa Mohamed, 'Amicable resolution of civil litigation in Malaysia' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, Malaysia, 16-18 June 2008)

Accident Compensation Conciliation Service, *Privacy policy* (2002)

Accident Compensation Conciliation Service, *Code of conduct*

Adult Parole Board, *Board Members Manual* (2005)

Alder, Christine, 'Young women and the criminal justice system' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road Map for the Future Conference, Sydney, 1-2 December 2003)

Alexander, Nadja, 'The mediation meta model: Understanding practice around the world' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008)

- Alexander, Nadja, 'What's law got to do with it? How the world is regulating mediation' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008)
- American Bar Association, American Arbitration Association and Association for Conflict Resolution, *Model standards of conduct for mediators* (2005)
- Ardagh, David, 'Is mediation now a profession?' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)
- Astor, Hilary, 'Transforming the landscape of mediation' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)
- Attorney-General, Victoria, *Guidelines on the State of Victoria's obligation to act as a model litigant* (2001)
- Australian and New Zealand Ombudsman Association, *About ANZOA*, <<http://www.anzoa.com.au/docs/about.html>>, viewed 16 February 2009
- Australian and New Zealand Ombudsman Association, *Australian and New Zealand Ombudsman Association*, <<http://www.anzoa.com.au/>>, viewed 16 February 2009
- Australian and New Zealand Ombudsman Association, *Ombudsman services in Australia: Fair, independent, impartial and free*
- Australian Centre for International Commercial Arbitration, *About ACICA*, <<http://www.acica.org.au/about.html>>, viewed 10 February 2009
- Australian Commercial Disputes Centre, *ACDC's history*, <<https://www.acdcltd.com.au/about-us/history-of-acdc>>, viewed 10 February 2009
- Australian Government Attorney-General's Department, *Explanatory statement: Legal Services Directions* (2008)
- Australian Government Attorney-General's Department, *Family dispute resolution*, <<http://www.ag.gov.au/fdrproviders>>, viewed 2 January 2009
- Australian Government Attorney-General's Department, *For Family Dispute Resolution practitioners*, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForFamilyDisputeResolutionPractitioners>, viewed 11 March 2009
- Australian Government Attorney-General's Department, *Registration process for Family Dispute Resolution providers*
- Australian Institute of Criminology, *Restorative justice in Australia: Reintegrative Shaming Experiments (RISE)*, <<http://www.aic.gov.au/rjustice/rise/>>, viewed 26 February 2009
- Australian Securities & Investments Commission, *Regulatory guide 139: Approval of external complaints resolution schemes* (1999)
- Bagshaw, Dale, 'Innocents abroad? An examination of the relevance and effects of Western mediation education and training on dispute resolution practices in the Asia Pacific (Keynote Paper)' (Paper presented at the 3rd Asia-Pacific Mediation Forum, Suva, Fiji, 26-30 June 2006)
- Beckingham, Ann and Cyngler, Jim, 'The involvement of lawyers, accountants and other professionals when attending their clients' mediations' (Paper presented at the 4th National Mediation Conference, Melbourne, 4-8 April 1998)
- Becroft, Andrew, 'Youth justice - The New Zealand experience: Past lessons and future challenges' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003)
- Bickerdike, Andrew, 'Long-term satisfaction with and durability of family mediation outcomes' (Paper presented at the Third National Alternative Dispute Resolution Research Forum, Melbourne, 13-14 July 2007)
- Bolkas, Arthur, 'Lives in Transition: A model for change: A reason to hope' (Paper presented at the Victorian Association for Restorative Justice: Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008)

Bond University, *Dispute Resolution Centre courses*, <http://www.bond.edu.au/study-areas/law/centres/drc/drc_courses.html>, viewed 19 February 2009

Bond University Dispute Resolution Centre, *Mediator assessment course*

Bouheraoua, Said, 'Foundation of mediation in Islamic law and its contemporary application' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008)

Braithwaite, John, 'Standards for restorative justice' (Paper presented at the United Nations Crime Congress, Ancillary Meeting, Vienna, 2000)

Cameron, Bob, Minister for Corrections, letter to Chair, Victorian Parliament Law Reform Committee, 31 July 2008

Centre for Justice and Reconciliation, *Evaluations of the Sycamore Tree Project*®, <<http://www.pficjr.org/programs/stp/report>>, viewed 26 February 2009

The Centre for Restorative Justice, South Australia, *Welcome to the Centre for Restorative Justice web site*, <<http://www.restorativejustice.com.au/>>, viewed 11 March 2009

Children Youth and Women's Health Service, Government of South Australia, *Adolescent Sexual Abuse Prevention Program*, <<http://www.wch.sa.gov.au/services/az/divisions/mentalhealth/asapp/index.html>>, viewed 16 January 2009

Children's Court of Victoria, *Guidelines for dispute resolution conferences* (2007)

Children's Court of Victoria, *Criminal Division: Group conferencing*, <<http://www.childrenscourt.vic.gov.au/CA256CA800014B4A/page/Criminal+Division-Group+Conferencing?OpenDocument&1=30-Criminal+Division~&2=30Group+Conferencing~&3=~>>>, viewed 10 March 2009

Children's Court of Victoria, *Criminal Division: Sentencing*, <<http://www.childrenscourt.vic.gov.au/CA256CA800014B4A/page/Criminal+Division-Sentencing?OpenDocument&1=30-Criminal+Division~&2=20-Sentencing~&3=~>>>, viewed 10 March 2009

Children's Court of Victoria, *Family Division: Dispute resolution conferences*, <<http://www.childrenscourt.vic.gov.au/CA256CA800017845/page/Family+Division-Dispute+Resolution+Conferences?OpenDocument&1=20-Family+Division~&2=80-Dispute+Resolution+Conferences~&3=~>>>, viewed 3 March 2009

Collaborative Professionals Victoria, *Welcome to Collaborative Professionals Victoria (CPV)*, <<http://www.liv.asn.au/collablaw/index.html>>, viewed 10 February 2009

Conley Tyler, Melissa and Bretherton, Di, 'Developing an online mediation culture: The fourth generation of online ADR' (Paper presented at the 2nd Asia-Pacific Mediation Forum: Developing a Mediation Culture, Singapore, 19-22 November 2003)

Consumer Affairs Victoria, *Finance brokers*, <<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Credit+%26+Debt-Finance+and+Mortgage+Brokers-Finance+Brokers?OpenDocument&1=80-Credit+%26+Debt~&2=20-Finance+and+Mortgage+Brokers~&3=10-Finance+Brokers~>>>, viewed 2 March 2009

Consumer Affairs Victoria, *New credit provider registration scheme*, <<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Credit+%26+Debt-Changes+to+the+Credit+Provider++Registration+Scheme?OpenDocument&1=80-Credit+%26+Debt~&2=15-Changes+to+the+Credit+Provider++Registration+Scheme~&3=~>>>, viewed 9 February 2009

Corbell, Simon, Attorney-General, ACT, 'Review finds restorative justice scheme "first class"' (Media release, 17 October 2001)

Cornish, Jodi, Community Engagement and Volunteer Coordinator, Neighbourhood Justice Centre, letter to Research Officer, Victorian Parliament Law Reform Committee, 7 April 2008

County Court of Victoria, *Mediation*, <<http://www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Support+Services-Mediation?OpenDocument&1=70-Support+Services~&2=0-Mediation~&3=~>>>, viewed 12 February 2009

Cousins, Dr David, Executive Director, Consumer Affairs Victoria, letter to Chair, Victorian Parliament Law Reform Committee, 7 April 2008

-
- Crime Prevention Division, Attorney General's Department of NSW, *Crime prevention: Circle sentencing* (2007)
- Department for Correctional Services, Government of South Australia, *Restorative justice*, <<http://www.corrections.sa.gov.au/corporate/restore.htm>>, viewed 10 March 2009
- Department of Communities, Queensland, *Youth Justice Conferencing practice manual* (2008)
- Department of Communities, Queensland, *Position description: Service leader, Youth Justice Conferencing*, <http://smartjobs.qld.gov.au/jobtools/b_fileupload.proc_download?in_file_id=6040003&in_servicecode=CUSTOMSEARCH&in_organid=14904&in_sessionid=0&in_hash_key=5BD4C327968B74BF>, viewed 25 February 2009
- Department of Communities, Queensland, *Youth justice conferencing convenor*, <<http://www.communities.qld.gov.au/department/employment/youth-justice-conferencing-convenor.html>>, viewed 25 July 2008
- Department of Communities, Queensland, *Youth justice conferencing convenor: Approval and reapproval*
- Department of Corrective Services, Government of Western Australia, *Offender mediation*, <<http://www.correctiveservices.wa.gov.au/O/offendermediation.aspx?uid=2962-8899-4263-3116>>, viewed 19 February 2009
- Department of Corrective Services, Government of Western Australia, *Reparative mediation: General information*, <<http://www.correctiveservices.wa.gov.au/R/reparativemediation.aspx?uid=0976-6788-3446-1791>>, viewed 6 March 2009
- Department of Corrective Services, Government of Western Australia, *Reparative mediation: Information for victims*
- Department of Corrective Services, New South Wales, *The NSW Department of Corrective Services Restorative Justice Unit*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/index.asp>, viewed 4 March 2009
- Department of Corrective Services, New South Wales, *Restorative Justice Unit: Information brochure*
- Department of Corrective Services, New South Wales, *Victim offender mediation: Information for participants*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/victim_offender_mediation.asp>, viewed 10 March 2009
- Department of Corrective Services, New South Wales, *What is restorative justice?*, <http://www.dcs.nsw.gov.au/offender_management/restorative_justice/what_is_restorative_justice.asp>, viewed 10 March 2009
- Department of Human Services, Victoria, *Youth justice group conferencing: An introduction DVD* (2007)
- Department of Human Services, Victoria, *Youth justice group conferencing: Information for legal representatives* (2007)
- Department of Human Services, Victoria, *Youth justice group conferencing: Information for police* (2007)
- Department of Human Services, Victoria, *Youth justice group conferencing: Information for victims* (2007)
- Department of Human Services, Victoria, *Youth Justice Group Conferencing Program guidelines* (2007)
- Department of Human Services, Victoria, *Youth justice group conferencing: Youth justice fact sheet* (2007)
- Department of Human Services, Victoria, *Youth justice group conferencing program: Suitability assessment guide* (2008)
- Department of Human Services, Victoria, *Child Protection and Family Services: Children Youth and Families: Children's Court Dispute Resolution Conference: Program data*, supplementary evidence received 22 February 2008

Department of Human Services, Victoria, *Victorian Youth Justice Group Conferencing program: Program data*, supplementary evidence received 22 February 2008

Department of Human Services, Victoria, *Youth justice group conferencing: Information for the young person - fact sheet*

Department of Human Services, Victoria, *Youth justice group conferencing: Information for young people*

Department of Industry, Science and Tourism, Commonwealth, *Benchmarks for industry-based customer dispute resolution schemes* (1997)

Department of Justice, Tasmania, *Victim Support Services: Victim/offender mediation*, <<http://www.justice.tas.gov.au/victims/mediation>>, viewed 20 February 2009

Department of Justice, Victoria, *Model litigant guidelines* (2004) State Government of Victoria

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

Department of Justice, Victoria, *ADR Strategic Planning Conference* (2007)

Department of Justice, Victoria, *disputeinfo*, <<http://www.justice.vic.gov.au/disputeinfo>>, viewed 10 March 2009

Department of Justice, Victoria, *Information about Dispute Settlement Centre Victoria training courses*, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/JUSTICE++Information+About+Dispute+Settlement+Centre+Victoria+Training+Courses%28PDF%29>>, viewed 12 February 2009

Department of Justice, Victoria, *Koori Court*, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/Victorian+Courts/JUSTICE++Koori+Court>>, viewed 2 March 2009

Department of Justice, Victoria, *Mediation at the Neighbourhood Justice Centre*, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Neighbourhood+Justice/JUSTICE-Mediation+at+the+Neighbourhood+Justice+Centre>>, viewed 11 March 2009

Department of Justice and Attorney-General, Queensland Government, *Justice mediation*, <<http://www.justice.qld.gov.au/mediation/about/D05justice.htm>>, viewed 11 March 2009

Department of Justice and Attorney-General, Queensland Government, *Justice mediation: How justice mediation works*, <<http://www.justice.qld.gov.au/1061.htm>>, viewed 6 March 2009

Department of Justice and Attorney-General, Queensland Government, *Justice mediation: If you are a defendant*, <<http://www.justice.qld.gov.au/1058.htm>>, viewed 6 March 2009

Department of Justice and Community Safety, Australian Capital Territory, *Ngambra Circle Sentencing Court: Final interim practice direction* (2004)

Department of Justice and Community Safety, Australian Capital Territory, *Ngambra Circle Sentencing Court: Community information for Aboriginal and Torres Strait Islander people in the ACT*

Department of Justice and Community Safety, Australian Capital Territory, *Referral process*, <<http://www.jcs.act.gov.au/restorativejustice/ReferralProcess.htm>>, viewed 6 March 2009

Department of Justice and Community Safety, Australian Capital Territory, *Restorative justice*, <<http://www.jcs.act.gov.au/restorativejustice/RestorativeJustice.htm>>, viewed 27 January 2009

Department of Justice and Community Safety, Australian Capital Territory, *Restorative Justice Unit*, <<http://www.jcs.act.gov.au/restorativejustice/Home.htm>>, viewed 5 March 2009

Department of Juvenile Justice, New South Wales, *Policy and procedures for the resolution of client complaints* (2002)

Department of Juvenile Justice, New South Wales, *Youth justice conferencing policy and procedures manual* (2005)

Department of Juvenile Justice, New South Wales, *Conferencing: History*, <http://www.djj.nsw.gov.au/conferencing_history.htm>, viewed 10 March 2009

-
- Department of Juvenile Justice, New South Wales, *Recognition of current competency: For conference convenors: Policy & procedure*
- Deputy Premier and Attorney-General, Victoria, 'Higher courts' mediation reducing costs and delay' (Media release, 1 April 2009)
- Disability Services Commissioner, *It's OK to complain: Plain English brochure with pictures*
- Dispute Settlement Centre of Victoria, *Mediation training program: Your questions answered*
- Edith Cowan University, *SCRAM: Mediation for secondary school students*
- Energy and Water Ombudsman (Victoria), *Constitution of Energy and Water Ombudsman (Victoria) Limited* (2006)
- Energy and Water Ombudsman (Victoria), *Energy and Water Ombudsman Charter* (2006)
- Energy and Water Ombudsman (Victoria), *Privacy policy*, <<http://www.ewov.com.au/html/Privacy.htm>>, viewed 12 February 2009
- Family Relationships Online, *Family Relationships Online*, <<http://www.familyrelationships.gov.au/>>, viewed 3 February 2009
- Field, Rachael, 'Victim-offender conferencing: Issues of power imbalance for women juvenile participants' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003)
- Financial Ombudsman Service, *About us*, <http://www.fos.org.au/centric/home_page/about_us.jsp>, viewed 10 February 2009
- Financial Ombudsman Service, *Financial Ombudsman Service*, <http://www.fos.org.au/centric/home_page.jsp>, viewed 10 February 2009
- Gleeson, Murray, 'Opening speech' (Speech delivered at the National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006)
- Gleeson, Murray, 'The state of the judiciary' (Paper presented at the 35th Australian Legal Convention, Sydney, 22-25 March 2007)
- Grant, Paul, President, Children's Court of Victoria, *The Children's Koori Court (Criminal Division)*, supplementary evidence received 10 December 2007
- Harman, Joe, 'Leading horses to water and making them drink: Compulsory dispute resolution in the Australian context' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)
- Hatzistergos, John, Attorney-General, New South Wales, 'Victims of crime have a say in sentencing' (Media release, 4 June 2008)
- Hinchey, John, Manager, Restorative Justice Unit, Department of Justice and Community Safety, Australian Capital Territory, *Transcript of evidence* for the Inquiry into Restorative Justice, Standing Committee on Education, Training and Young People, Legislative Assembly for the Australian Capital Territory, Canberra, 25 October 2007
- Hollier, Fiona, Chief Executive Officer, LEADR - Association of Dispute Resolvers, letter to Victorian Parliament Law Reform Committee, 16 February 2009
- Hulls, Rob, Attorney-General, Victoria, letter to Chair, Victorian Parliament Law Reform Committee, 8 February 2008
- Hulls, Rob, Attorney-General, Victoria, 'Hulls launches young adult conferencing program' (Media release, 4 March 2008)
- Hulls, Rob, Attorney-General, Victoria, 'Hulls opens Law Week restorative justice conference' (Media release, 14 May 2008)
- Hulls, Rob, Attorney-General, Victoria, 'Mediation an appropriate resolution for Broadmeadows civil disputes' (Media release, 13 August 2008)
- Hulls, Rob, Attorney-General, Victoria, 'Roadmap of reform for Victoria's justice system' (Media release, 14 October 2008)

Hulls, Rob, Attorney-General, Victoria, 'Gippsland first stop for dispute resolution expansion' (Media release, 30 January 2009)

Ingleby, Richard, *Standards for court-connected mediation in Victoria: Approved by the Dispute Resolution Committee of the Victorian Bar and by the Law Institute of Victoria* (1994) Victoria Law Foundation

The Institute of Arbitrators & Mediators Australia (IAMA), *Mediation rules* (2007)

The Institute of Arbitrators & Mediators Australia (IAMA), *Accreditation and grading*, <<http://www.iama.org.au/accreditation.htm>>, viewed 13 February 2009

The Institute of Arbitrators & Mediators Australia (IAMA), *Conciliation rules*

The Institute of Arbitrators & Mediators Australia (IAMA), *Find a dispute resolver*, <<http://www.iama.org.au/directory.htm>>, viewed 13 February 2009

The Institute of Arbitrators & Mediators Australia (IAMA), *IAMA constitution*

The Institute of Arbitrators & Mediators Australia (IAMA), *Mediation and conciliation rules*

The Institute of Arbitrators & Mediators Australia (IAMA), *Mediator accreditation policy*

The Institute of Arbitrators & Mediators Australia (IAMA), *National councillors*, <<http://www.iama.org.au/national.htm>>, viewed 13 February 2009

The Institute of Arbitrators & Mediators Australia (IAMA), *Policy for the registration of practising arbitrators*

The Institute of Arbitrators & Mediators Australia (IAMA), *Policy on the accreditation and register of adjudicators*

The Institute of Arbitrators & Mediators Australia (IAMA), *Principles of conduct for mediators*

The Institute of Arbitrators & Mediators Australia (IAMA), *Professional certificate in arbitration*

The Institute of Arbitrators & Mediators Australia (IAMA), *Rules of professional conduct*

The Institute of Arbitrators & Mediators Australia (IAMA), *The IAMA arbitration rules: Incorporating the IAMA fast track arbitration rules*

The Institute of Arbitrators & Mediators Australia (IAMA), *The Institute of Arbitrators & Mediators Australia*, <<http://www.iama.org.au/>>, viewed 13 February 2009

The Institute of Arbitrators & Mediators Australia (IAMA), *The practitioner's certificate in mediation*

International Institute for Conflict Prevention and Resolution, *CPR law firm policy statement on alternatives to litigation* (1991)

International Institute for Conflict Prevention and Resolution, *Why sign the pledge: FAQs*, <<http://www.cpradr.org/AboutCPR/ADRpledge/WhySignThePledgeFAQ/tabid/163/Default.aspx>>, viewed 9 February 2009

International Mediation Institute, *About IMI*, <http://www.imimmediation.org/about_imi.html>, viewed 16 February 2009

International Mediation Institute, *IMI code of professional conduct*, <http://www.imimmediation.org/code_professional_conduct-.html>, viewed 16 February 2009

International Mediation Institute, *Quick guide to becoming IMI certified via the experience qualification path*, <http://www.imimmediation.org/becoming_certified.html>, viewed 16 February 2009

International Mediation Institute, *Quote unquote*, <http://www.imimmediation.org/quote_unquote.html>, viewed 16 February 2009

International Network on Therapeutic Jurisprudence, *International Network on Therapeutic Jurisprudence* (2007), <<http://www.law.arizona.edu/depts/upr-intj/>>, viewed 5 March 2009

Judicial College of Victoria, *2009 prospectus: Excellence in judicial education* (2009)

Kellam, Murray, 'Transforming the professional landscape - mediation accreditation' (Speech delivered at the 9th National Mediation Conference, Perth, 12 September 2008)

-
- Keshavjee, Mohamed M, 'Alternative dispute resolution: Its resonance in Muslim thought and future directions' (Paper presented at the Ismaili Centre Lecture Series, Ismaili Centre, London, 2 April 2002)
- King, Michael S, 'Towards a more comprehensive resolution of conflict: The role of restorative justice' (Paper presented at the Restorative Justice: Bringing Justice and Community Together Conference, Melbourne, 14 May 2008)
- Laeuchli, Urs Martin, *Negotiations and other ADR with the Chinese* (2002), <<http://www.mediate.com/articles/Laeuchli.cfm>>, viewed 18 February 2009
- Landerkin, Hugh F and Pirie, Andrew, 'Judicial dispute resolution 2001: A Canadian perspective' (Paper presented at the Asia-Pacific Mediation Forum, Adelaide, 29 November-1 December 2001)
- Law Council of Australia, *Law Council policy on alternative dispute resolution* (1989)
- Law Council of Australia, *Model rules of professional conduct and practice* (2002)
- Law Council of Australia, *Ethical guidelines for mediators* (2006)
- Law Council of Australia, *Guidelines for lawyers in mediations* (2007)
- Law Council of Australia, *Welcome to the Online Mediation Platform for Law Council of Australia*, <<http://v2.theclaimroom.com/?host=280>>, viewed 11 March 2009
- Law Institute of Victoria, *Professional conduct and practice rules 2005* (2005)
- Law Institute of Victoria, *Specialisation scheme rules* (2006)
- Law Institute of Victoria, *Accredited specialists directory*, <http://members.liv.asn.au/livweb/Specialists.aspx?Page=Specialists/sp_area_index&area=MED>, viewed 12 February 2009
- Law Institute of Victoria, *Ethics: Mediation and negotiation*, <<http://www.liv.asn.au/regulation/ethics/about/ethics-Common.html#Heading48>>, viewed 11 March 2009
- Law Institute of Victoria, *Law Institute of Victoria*, <<http://www.liv.asn.au/>>, viewed 11 March 2009
- Law Institute of Victoria, *Mediation*, <<http://www.cpd.liv.asn.au/categories.asp?cID=77&c=123314>>, viewed 12 February 2009
- Law Institute of Victoria, *Mediators directory*, <<http://members.liv.asn.au/livweb/Mediators.aspx>>, viewed 12 February 2009
- Law Institute of Victoria, *Why become an accredited specialist?*, <<http://www.cpd.liv.asn.au/categories.asp?cID=66&c=185336>>, viewed 18 February 2009
- Law Society of New South Wales, *Professional conduct and practice rules* (1995)
- Laycock, Debbie, *Causing death by dangerous driving: A restorative justice case study* (2006) Centre for Restorative Justice
- LEADR - Association of Dispute Resolvers, *Constitution of LEADR* (2002)
- LEADR - Association of Dispute Resolvers, *Scheme for LEADR accreditation of alternative dispute resolution practitioners* (2002)
- LEADR - Association of Dispute Resolvers, *About LEADR*, <<http://www.leadr.com.au/aboutleadr.htm>>, viewed 13 February 2009
- LEADR - Association of Dispute Resolvers, *Accreditation*, <<http://www.leadr.com.au/accreditation.htm>>, viewed 13 February 2009
- LEADR - Association of Dispute Resolvers, *Alternative dispute resolution*, <<http://www.leadr.com.au/adr.htm>>, viewed 10 February 2009
- LEADR - Association of Dispute Resolvers, *Ethical standards for mediators*
- LEADR - Association of Dispute Resolvers, *Find a mediator or other dispute resolution practitioner*, <<http://www.leadr.com.au/findpractitioner/index.php>>, viewed 13 February 2009
- LEADR - Association of Dispute Resolvers, *LEADR - Association of Dispute Resolvers*, <<http://www.leadr.com.au/>>, viewed 16 February 2009

LEADR - Association of Dispute Resolvers, *Training*, <<http://www.leadr.com.au/training.htm>>, viewed 16 February 2009

Lee, Stephen, 'The State as model litigant' (Speech delivered at the Victorian Government Solicitor's Office Lunchtime Seminar Series, Melbourne, 28 September 2006)

Letter from grandmother of youth justice conference participant (name confidential), to Ms Chris Hammat, Team Leader, Community Justice, Anglicare Victoria, 28 August 2003

Lim, Hieng and Bassett, Louise, 'The Neighbourhood Justice Centre and restorative justice' (Paper presented at the Bringing Justice and Community Together Conference, Melbourne, 14 May 2008)

Lopich, Robert, 'Collaborative law overview - Towards collaborative problem solving in business' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)

Madden, Shane, 'The Circle Court in the ACT - An overview and its future' (Paper presented at the AIJA Indigenous Courts conference, Mildura, 4-7 September 2007)

Magistrates' Court of Victoria, *Guide to court support & diversion services* (2007)

Magistrates' Court of Victoria, *Civil and money matters*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Civil+and+Money+Matters/>>, viewed 3 March 2009

Magistrates' Court of Victoria, *Criminal Justice Diversion Program*

Magistrates' Court of Victoria, *Drug Court*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Drug+Court/>>, viewed 10 March 2009

Magistrates' Court of Victoria, *Information about court-annexed mediation*

Magistrates' Court of Victoria, *Intervention orders*, <<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Intervention+Orders-Intervention+Orders?OpenDocument&1=37-Intervention+Orders~&2=10-Intervention+Orders~&3=~>>>, viewed 7 February 2009

Magistrates' Court of Victoria, *Koori Court - FAQs*, <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/Koori+Court/MAGISTRATES+-+Koori+Court++FAQs>>, viewed 10 March 2009

Magistrates' Court of Victoria, *Mediation for neighbourhood disputes*, <<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Intervention+Orders-Mediation?OpenDocument&1=37-Intervention+Orders~&2=70-Mediation~&3=~>>>, viewed 7 February 2009

Magistrates' Court of Victoria, *Mediation pilot programme: Practice direction no. 1 of 2009* (2009)

Marshall, Tracey and Di Biase, Belinda, 'Victim-offender mediation in WA' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)

McClelland, Robert, Attorney-General, Commonwealth, (Speech delivered at the ADR in Government Forum, Canberra, 4 June 2008)

McClelland, Robert, Attorney-General, Commonwealth, (Speech delivered at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 10 September 2008)

McCold, Paul, 'Police-facilitated restorative conferencing: What the data show' (Paper presented at the 2nd Annual International Conference on Restorative Justice for Juveniles, Florida, 7-9 November 2008)

McCrimmon, Les and Lewis, Melissa, 'The role of ADR processes in the criminal justice system: A view from Australia' (Paper presented at the Association of Law Reform Agencies for Eastern and Southern Africa Conference, Uganda, 6 September 2005)

McElrea, F W M, 'Address to inter-disciplinary conference' (Paper presented at the RAPE: Ten Years' Progress? Conference, Wellington, 29 March 1996)

McElrea, F W M, 'Restorative corrections?' (Paper presented at the International Corrections and Prisons Association Conference, Noodwijkerhout, Netherlands, 19-23 October 2002)

-
- McElrea, F W M, 'Restorative justice and sexual abuse - A New Zealand perspective' (Paper presented at the Australian & New Zealand Association for the Treatment of Sexual Abusers Conference, Auckland, 17 April 2004)
- McElrea, F W M, 'Restorative justice - The long view' (Paper presented at the Beyond Retribution: Advancing the Law and Order Debate Conference, Silverstream, New Zealand, 12-14 May 2006)
- McElrea, F W M, 'Restorative justice as a procedural revolution: some lessons from the adversary system' (Paper presented at the 4th International Winchester Restorative Justice Conference, Winchester, United Kingdom, 10 October 2007)
- McLeod, Fiona, Maynard, Alison, Marles, Victoria, Carmody, Diane, Benvenuti, Jo and Hardham, Peter, 'Resolving customer disputes: Case studies and current issues' (Paper presented at the ADR - A Better Way to do Business Conference, Sydney, 4-5 September 2003)
- Minister for WorkCover, Victoria, *Ministerial Guidelines for the arrangement of the business of conciliation officers*
- Ministry of Justice, New Zealand, *Crime Prevention Unit: Restorative Justice: Restorative justice provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002*, <<http://www.justice.govt.nz/cpu/restorative-justice/restorative-justice-paper.html>>, viewed 30 January 2009
- Ministry of Justice, New Zealand, *Facilitator training manual*, <<http://www.justice.govt.nz/crj/manual/>>, viewed 30 January 2009
- Myers, Paul, 'Research findings and strategic implications' (Paper presented at the ADR Strategic Planning Conference, Melbourne, 22 June 2007)
- National Alternative Dispute Resolution Advisory Council, *About NADRAC - NADRAC's Charter*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/About_NADRACCharter>, viewed 27 February 2009
- National Alternative Dispute Resolution Advisory Council, *Accreditation of family dispute resolution practitioners*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_FamilyDisputeResolution_AccreditationofFamilyDisputeResolutionPractitioners>, viewed 20 March 2009
- National Alternative Dispute Resolution Advisory Council, *ADR and civil proceedings reference*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference>, viewed 29 January 2009
- National Alternative Dispute Resolution Advisory Council, *ADR providers*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADR_Providers>, viewed 12 February 2009
- National Alternative Dispute Resolution Advisory Council, *Family dispute resolution*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRFamily_Dispute_Resolution>, viewed 20 March 2009
- National Alternative Dispute Resolution Advisory Council, *How can my organisation become an RMAB?*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_HowcanmyorganisationbecomeanRMAB>, viewed 16 February 2009
- National Alternative Dispute Resolution Advisory Council, *National Mediator Accreditation System*, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem>, viewed 16 February 2009
- National Mediator Accreditation Committee, *Inaugural meeting: Minutes 5 March 2008* (2008)
- Neave, Marcia, 'Restorative justice: When is it appropriate?' (Paper presented at the Restorative Justice Forum, Melbourne, 6 October 2004)
- Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program at the Neighbourhood Justice Centre: Operating guidelines (Draft 2 December 2008)* (2008)
- Neighbourhood Justice Centre, *Restorative justice group conferencing at Neighbourhood Justice Centre: Introductory information for police in City of Yarra*
- Neighbourhood Justice Centre, *Restorative justice group conferencing program: Information for someone who has been affected by offending behaviour*

Neighbourhood Justice Centre, *Restorative justice group conferencing program: What happens at a restorative justice group conference?*

Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing program: Information for a young adult who is appearing at the Neighbourhood Justice Centre*

Neighbourhood Justice Centre, *The Young Adult Restorative Justice Group Conferencing program: Summary of guidelines*

Neighbourhood Justice Centre, *Young Adult Restorative Justice Group Conferencing: Suitability assessment criteria*

Nelson, Rob, *Adapting ADR to different cultures*, <<http://www.gowlings.com/resources/publications.asp?pubid=776>>, viewed 17 February 2009

New Zealand Police, *Police Adult Diversion Scheme policy*, <<http://www.police.govt.nz/service/diversion/policy.html>>, viewed 10 March 2009

Noblett, Jan, Director, Youth Services and Youth Justice, Department of Human Services, Victoria, letter to Executive Officer, Victorian Parliament Law Reform Committee, 6 February 2009

Northern Territory Police, *Juvenile pre-court diversion scheme FAQs*, <<http://www.nt.gov.au/pfes/index.cfm?fuseaction=page&p=141&m=25&sm=80&ssm=23>>, viewed 19 February 2009

NSW Attorney General's Department, *Forum sentencing: Facing up to crime*

Pike, Bronwyn, Minister for Education, letter to Chair, Victorian Parliament Law Reform Committee, 25 July 2008

Public Transport Ombudsman Victoria, *Public Transport Ombudsman Limited Charter* (2007)

Public Transport Ombudsman Victoria, *Constitution of Public Transport Ombudsman Limited* (2008)

Public Transport Ombudsman Victoria, *CDRS guidelines*, <<http://www.ptovic.com.au/content/guidelines.html>>, viewed 12 February 2009

Public Transport Ombudsman Victoria, *Privacy statements*, <<http://www.ptovic.com.au/content/privacy.html>>, viewed 12 February 2009

Public Transport Ombudsman Victoria, *What is the Public Transport Ombudsman Scheme*, <<http://www.ptovic.com.au/content/whatispto.html>>, viewed 12 February 2009

Queensland Corrective Services, *Procedure - Justice mediation*, <http://www.dcs.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmprovicoffmed.shtml>, viewed 4 March 2009

Ralogaivau, Ratu Filimone, 'Blending traditional approaches to dispute resolution in Fiji with rule of law: The best of both worlds' (Paper presented at the 3rd Asia-Pacific Mediation Forum Conference, Suva, Fiji, 26-30 June 2006)

Rashid, Syed Khalid, 'Peculiarities and religious underlining of ADR in Islamic law' (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008)

Restorative Justice Aotearoa, *Projects in progress* (2007), <<http://www.restorativejustice.aotearoa.org.nz/node/24>>, viewed 27 January 2009

Restorative Justice Consortium, *Introduction to RJC voluntary code of practice for trainers and training organisations of restorative practices facilitator training and the associated RJC complaints procedure* (2007)

Restorative Justice Consortium, *Regulating RJ*, <http://www.restorativejustice.org.uk/?RJ_in_the_UK:Regulating_RJ>, viewed 27 January 2009

Restorative Practices International, *2nd Restorative Practices International Conference*, <<http://restorativepracticesinternational.org/9.html>>, viewed 27 January 2009

Ruddock, Philip, 'Alternative dispute resolution gets a boost' (Media release, 25 October 2006)

Rundle, Olivia, 'Transforming lawyer perspectives of their client's role in mediation: What mediators should know' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)

- Sackville, Ronald, 'Access to justice: Assumptions and reality checks' (Paper presented at the Law & Justice Foundation of New South Wales Access to Justice Workshop, Sydney, 10 July 2002)
- Sackville, Ronald, 'Some thoughts on access to justice' (Paper presented at the 1st Annual Conference on the Primary Functions of Government, Wellington, New Zealand, 28-29 November 2003)
- Schools Conflict Resolution and Mediation (SCRAM), *Schools Conflict Resolution And Mediation competition manual*
- Schools Conflict Resolution and Mediation (SCRAM), *SCRAM: Schools Conflict Resolution And Mediation competition handbook*
- The Scottish Government, *Best practice guidance for restorative justice practitioners and their case supervisors and line managers (Scotland)*, <<http://www.scotland.gov.uk/Publications/2008/06/10144026/1>>, viewed 27 January 2009
- Shone, Margaret A, 'Law reform and ADR: Pulling strands in the civil justice web' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004)
- Sivasubramaniam, Diane and Goodman-Delahunty, Jane, 'Perceptions of justice among minority cultures: Implications for youth justice conferencing' (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road Map for the Future Conference, Sydney, 1-2 December 2003)
- Skills for Justice, *National occupational standards for restorative practice* (2006)
- Sourdin, Tania, 'From accreditation to quality mediation practice - Next steps?' (Paper presented at the 9th National Mediation Conference - Mediation: Transforming the Landscape, Perth, 9-12 September 2008)
- Standards Australia, *Dispute management systems AS 4608-2004* (2004)
- Standards Australia, *Customer satisfaction - Guidelines for complaints handling in organizations AS 10002-2006* (2006)
- Standing Committee of Attorneys General, *Communique: 25 July 2008* (2008), <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_25July2008-Communique-StandingCommitteeofAttorneys-General>, viewed 27 January 2009
- Standing Committee of Attorneys-General, *SCAG summary of decisions - July 2008* (2008)
- State Bar of California, *ADR pledge*
- Street, Laurence, *ADR: a generic, holistic concept* (2003), <<http://www.laurencestreet.com.au/pub01.htm>>, viewed 2 March 2009
- Street, Laurence, *The mediation evolution - its moral validity and social origin* (2003), <<http://www.laurencestreet.com.au/pub03.htm>>, viewed 2 March 2009
- Supreme Court of Victoria, *Court of Appeal practice statement no. 1 of 2006* (2006)
- Supreme Court of Victoria, *Mediation*, <<http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Support+Services/Mediation/>>, viewed 12 February 2009
- Telecommunications Industry Ombudsman, *How the Telecommunications Industry Ombudsman handles complaints* (2008), <<http://www.tio.com.au/FAQ/Adr.htm>>, viewed 10 February 2009
- Telecommunications Industry Ombudsman, *The TIO's Disability Action Plan: Fact sheet*
- Twist, Neil, Acting Director, Appropriate Dispute Resolution, Department of Justice, Victoria, letter to Executive Officer, Victorian Parliament Law Reform Committee, 11 February 2009
- United Nations Office on Drugs and Crime, *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006)
- United Nations Office on Drugs and Crime, *Training manual on alternative dispute resolution and restorative justice* (2007)
- Van Ness, Daniel W, 'An overview of restorative justice around the world' (Paper presented at the 11th United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18-25 April 2005)

Victorian Association for Restorative Justice (VARJ), *News & events*, <<http://www.varj.asn.au/news.htm>>, viewed 27 January 2009

Victorian Association for Restorative Justice (VARJ), *Restorative practices in education*, <<http://www.varj.asn.au/rp/education.htm>>, viewed 23 January 2009

Victorian Association for Restorative Justice (VARJ), *VARJ colloquium (16 July 2008): Discussion outcomes*, <www.varj.asn.au/pdf/080716_PrioritiesNotes.pdf>, viewed 10 February 2009

Victorian Association for Restorative Justice (VARJ), *The Victorian Association for Restorative Justice*, <<http://varj.asn.au/>>, viewed 27 February 2009

The Victorian Bar, *Practice rules, rules of conduct & compulsory continuing legal education rules (2005)*

The Victorian Bar, *Australian National Mediator Standards (2008)*

The Victorian Bar, *Directories: Advanced mediators*, <<http://www.vicbar.com.au/c.12.aspx>>, viewed 18 February 2009

The Victorian Bar, *Directories: Mediators*, <<http://www.vicbar.com.au/c.7.aspx>>, viewed 18 February 2009

The Victorian Bar, *Mediation*, <<http://www.vicbar.com.au/b.8.7.asp>>, viewed 18 February 2009

The Victorian Bar, *The Victorian Bar*, <<http://www.vicbar.com.au/>>, viewed 18 February 2009

The Victorian Bar, *The Victorian Bar advanced mediator scheme*

Victorian Civil and Administrative Tribunal, *Code of conduct*, <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation-Code+of+Conduct?OpenDocument&1=30-Mediation~&2=10-Code+of+Conduct~&3=~>>, viewed 12 February 2009

Victorian Civil and Administrative Tribunal, *Mediation*, <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation?OpenDocument&1=30-Mediation~&2=~&3=~>>, viewed 12 February 2009

Victorian Civil and Administrative Tribunal, *Victorian Civil and Administrative Tribunal*, <<http://www.vcat.vic.gov.au/>>, viewed 12 February 2009

**INQUIRY INTO
ALTERNATIVE
DISPUTE RESOLUTION
AND RESTORATIVE
JUSTICE**

Minority Report

27 April 2009

Introduction

Chapter 12 of the Committee's report deals with possible expansions of the use of restorative justice in Victoria.

Restorative justice approaches are currently used in Victoria in a limited range of circumstances. Whilst restorative justice has been used in other Australian jurisdictions and in other parts of the common law world, research and conclusions about the merits or otherwise of various restorative justice approaches are still limited.

The minority members of the Committee consider that some of these approaches may have potential for greater use than at present. However, we are concerned that restorative justice approaches also run the risk of focussing excessively on the situation of the offender, to the neglect of the victim and the interests of the broader community.

We believe it is unsound and dangerous to extend the use of restorative justice to adult offenders and to serious offenders in the way recommended by the majority, without clear evidence that such extensions would be beneficial to the community and can be implemented in a manner that results in sentences and other outcomes that deter crime and protect the community.

Chapter 6 of the Committee's report looks at ways of resolving more disputes through Alternative Dispute Resolution (ADR). One recommendation is to require all defended civil disputes in the Magistrates' Court, of up to either \$10,000 or \$40,000, to be referred for compulsory mediation, based on a pilot program that has been conducted in the Broadmeadows Magistrates' Court (Recommendation 39).

We consider that this recommendation is premature because the evaluation of the pilot program is based on limited data and does not provide an adequate costing of the program or resolve how the costs of a State-wide rollout would be met.

Restorative Justice - the Majority View

The majority of the Committee recommend that the Victorian Government should:

1. subject to the findings of the evaluation of the Young Adult Restorative Justice Group Conferencing (YARJGC) Program,

implement a staged rollout of a group conferencing program for all suitable adult offenders (Recommendation 69);

2. as part of this, conduct a pilot for more serious offences, including serious violent offences, but excluding family violence and sexual offences (Recommendation 71);
3. implement a pilot restorative justice program for more serious offences for young offenders within the Youth Justice Group Conferencing Program (YJGCP), including violent offences, but excluding family violence and sexual offences (Recommendation 70);

We do not agree with these recommendations, for the reasons we set out below.

Expansion of Restorative Justice to Adult Offenders

The Committee received evidence from a number of stakeholders that restorative justice should be expanded to adult offenders.

However, we note that Victoria's first Group Conferencing Program for young adult offenders aged between 18 and 25 at the Neighbourhood House Centre was launched as recently as March last year.¹ This program is a two year pilot.

The majority of the committee at 12.1.1 of the report state:

“The Committee commends the pilot YARJGC Program at the NJC and believes the evaluation of that program will be an important starting point for informing the further expansion of adult restorative justice programs in Victoria.”

We agree that this pilot program, now that it has commenced, may provide worthwhile information about the benefits or otherwise of restorative justice for young adult offenders. However, to make recommendations at this early juncture pre-empts the purpose and results of the pilot.

Furthermore, making a recommendation that is conditional on the findings of the evaluation of the pilot program, as the majority have done, means

¹ Media Release – The Hon Rob Hulls MLA, Attorney General “Hulls Launches Young Adult Conferencing Program” Tuesday, 4th March, 2008

that the Committee is in fact not forming a clear conclusion of its own at all, but rather is leaving the outcome to a future assessment by others.

The then Chief Commissioner, Christine Nixon, has written to the inquiry saying:

“Victoria Police support restorative justice but note it should be applied consistently and be subject to evaluation. Victoria Police is aware of the Restorative Justice Pilot for young adults within the Neighbourhood Justice Centre. There may be a need to conduct a further pilot for adults to evaluate data on the category of offence, demographics of the offender, and history of re-offending, between proposed ADR and current practise, including victim satisfaction surveys.”²

In our opinion, any decision on a general extension of restorative justice to young adult offenders should wait until proper evaluation of the current pilot.

Furthermore, as this pilot applies only to offenders aged up to 25 years, it will not provide adequate evidence on which to base any extension of restorative justice to offenders aged over the age of 25 years.

Expansion of Restorative Justice to Include Crimes of Serious Violence

The evidence received by the Committee on the expansion of restorative justice to crimes of a more serious nature was varied. Anglicare, amongst others, stated that restorative justice could be applied to a wide range of crimes. The Reverend Jonathon Chambers from Anglicare stated that, *“I do not see any reason why restorative justice should be restricted to the bottom end...”³*

However, both Victoria Police and the Crime Victims Support Association expressed apprehension about the expansion of restorative justice to more serious crimes, as noted at 12.1.2 of the Committee report. The Victoria Police submission to the inquiry responded to the Committee’s question regarding the possible extension of restorative justice to serious offences as follows:

² Victorian Police *Submission no.12*, Chief Commissioner Christine Nixon APM, *Covering letter*, 12 November 2007, p.1

³ Jonathan Chambers, Senior Chaplain, Anglican Criminal Justice Ministry, Anglicare Victoria, *Transcript of evidence*, Melbourne, 25 February 2008, p.7

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?...

*(a) It is difficult to support this initiative without data.*⁴

We consider that the majority of the Committee has been pre-emptive in recommending that a pilot for serious offences be implemented.

The primary consideration with regard to any expansion of the use of restorative justice approaches has to be whether the overall interests of justice are best advanced. The more serious the crime, the more important it is that sentences provide adequate general deterrence and adequate protection of the community against repeat offences. It is also important that participation in restorative justice is truly beneficial to victims, rather than having victim participation being sought primarily as an element of a program focussed on the offender.

While these objectives are not necessarily incompatible with some forms of restorative justice, we believe they have not been given adequate attention. Unless and until that is done, any extension of restorative justice to more serious offences creates unacceptable risks for the community.

Restorative Justice - Conclusion

There is a great deal of concern within the community that the criminal justice system is not delivering appropriate sentences for criminal behaviour.

Whilst there may be potential for greater use of restorative justice, restorative justice can take many forms. The available evidence is limited as to what forms are likely to work and under what conditions and circumstances. If not carefully implemented, further extensions of the use of restorative justice run the risk of not adequately protecting the community and of further undermining public confidence in the criminal justice system.

We consider that unless and until such time as there is clear evidence supported by adequate data that any expansion can be achieved in a manner that is beneficial to the community, expansion of restorative justice to adults or to more serious offences is not appropriate.

⁴ Victorian Police *Submission no. 12, 23(a)*, p.4

Magistrates' Court ADR – the Broadmeadows Pilot

The pilot mediation program conducted at Broadmeadows Magistrates' Court has been the subject of an evaluation report that made encouraging findings.

However, the report was based on relatively limited evidence. For example, only 18 responses were received out of more than 300 evaluation survey forms sent to participants. Furthermore, the evaluation report does not contain a clear assessment of the costs of the program compared with its potential savings and benefits. The report also contains a suggestion that, if the program is expanded, the availability of free mediation could or should be subject to means test. This could dramatically alter the effectiveness of the scheme and user attitudes towards it.

We note that, following receipt of the evaluation report, the Attorney-General has chosen not to extend the program to other Magistrates Courts, but rather to continue the pilot program at Broadmeadows for a further twelve months.

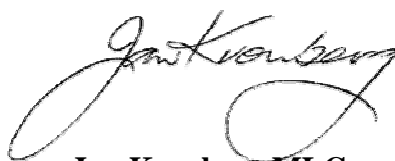
Magistrates' Court ADR - Conclusion

The minority members of the Committee wish the Broadmeadows pilot program well. We hope that further evaluation confirms that the pilot program has in fact achieved significant net benefits, and that the program is capable of being extended State-wide in a manner that achieves the same or a greater level of net benefits as the pilot.

However, we believe that it is premature to reach that conclusion on the basis of the evidence available to date.



Robert Clark MLA
Deputy Chair



Jan Kronberg MLC
Committee Member



Edward O'Donohue MLC
Committee Member

Extract from the minutes of proceedings

Thursday 2 April 2009

The minutes of the proceedings of the Committee show the following divisions which took place during the consideration of the draft report.

Motion

That the Executive Summary, as amended, stand part of the report.

Moved: Martin Foley

Seconded: Luke Donnellan

The Committee divided on the question:

Ayes: 3

Luke Donnellan MP

Martin Foley MP

Johan Scheffer MLC (deliberative vote exercised)

Noes: 3

Robert Clark MP

Jan Kronberg MLC

Edward O'Donohue MLC

There being an equality of votes, the Chair cast his vote with the Ayes.

Carried.

Motion

That section 6.4.1 stand part of the report.

Moved: Martin Foley

Seconded: Colin Brooks

The Committee divided on the question:

Ayes: 4

Colin Brooks MP

Luke Donnellan MP

Martin Foley MP

Johan Scheffer MLC

Noes: 3

Robert Clark MP

Jan Kronberg MLC

Edward O'Donohue MLC

Carried.

Motion

That Chapter Twelve stand part of the report.

Moved: Colin Brooks

Seconded: Martin Foley

The Committee divided on the question:

Ayes: 4

Colin Brooks MP

Luke Donnellan MP

Martin Foley MP

Johan Scheffer MLC

Noes: 3

Robert Clark MP

Jan Kronberg MLC

Edward O'Donohue MLC

Carried.

