



18 January 2012

Mr John Corker  
Director  
National Pro Bono Resource Centre

By email: corker@nationalprobono.org.au

Dear Mr Corker,

### **Alternative Dispute Resolution and the possible role of pro-bono lawyers**

1. Women's Legal Services NSW (WLS NSW) thanks the National Pro Bon Resource Centre for the opportunity to respond to questions on ADR and the possible role of pro-bono lawyers.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. We provide the following responses to your questions for comment:

#### **Question 1: What is the extent of ADR use in the CLC sector?**

4. Within our service, our main experience in using ADR is through a partnership with Penrith and Blacktown Family Relationship Centres (FRCs) to provide lawyer-assisted Family Dispute Resolution (FDR). Upon referral from the FRC, we assist female FDR participants who are victims of domestic violence. We also provide regular advice clinics at the FRCs to women who are taking part in FDR. Our discussion of ADR is therefore focused on FDR and we have used the two terms interchangeably.

#### **Question 2: What types of ADR are most useful for disadvantaged and low-income clients?**

5. Affordability of representation is a major issue for many women wishing to resolve legal disputes. Many clients cannot afford to pay a private solicitor and FDR through the Family Relationship Centre is a very accessible and cost effective option for them. However, many clients need the assistance of a lawyer within the mediation process.



**Women's Legal Services NSW PO Box 206 Lidcombe NSW 1825**

**Administration: (02) 8745 6900 Fax: (02) 9749 4433 Website: [www.womenslegalnsw.asn.au](http://www.womenslegalnsw.asn.au)**

**Women's Legal Resources Limited ACN: 002 387 699 ABN: 88 002 387 699**

Lawyer assisted mediation is available through Legal Aid and in some circumstances through family relationship centres in conjunction with community legal centres. This option offers victims of domestic violence a safer and more structured way of resolving their family law matters. The involvement of a solicitor also facilitates drafting of consent orders so that the client is afforded legally binding outcome and the need for further action is minimised. Clients benefit from being able to resolve their matters before they escalate.

6. In delivering services to disadvantaged clients, it is important that ADR is delivered as part of a model that incorporates various support services. The Co-ordinated Family Dispute Resolution (CFDR) Project is a pilot project auspiced by the Commonwealth Attorney General's Department and co-ordinated between family dispute resolution practitioners, community legal centres, domestic violence services and men's services. It also draws on additional support services where appropriate for example, for CALD and ATSI clients. The project aims to provide a safe option for resolving family law issues where there is a history of family violence. It is significant that the issue of family violence itself is not mediated, as this is not appropriate. Instead, CFDR provides an opportunity for clients to mediate family law issues involving children where there is a context involving a history of family violence. CFDR prioritises the safety of children and their families and there will be circumstances where it is not appropriate to use CFDR because it would be unsafe or dangerous.
7. CFDR involves active case management with cooperation and information sharing between the agencies involved in any particular case. Clients are assisted in accessing counseling and other support as necessary. Each case is subjected to thorough risk assessment at intake and throughout the process which encompasses stages of preparation, mediation and follow-up. Victims are assisted to develop a safety plan and perpetrators are assisted in addressing their behaviour. Information sessions can help participants understand the mediation process and develop strategies.

**Question 3: Is Conflict Management a process where pro bono lawyers could be usefully involved?**

8. We do not have any direct experience with this process.

**Question 4: Can unequal bargaining power be overcome with legal representation and/or a skilled ADR professional?**

9. Part of the role of an ADR practitioner and legal representatives involved in mediation is to address inequalities in bargaining power. Family Dispute Resolution has been considered by many as an unfavourable option for victims of family violence. Without proper safeguards in place, the process can be used by perpetrators as a further abuse of power. The capacity of the victim to engage in the FDR process effectively is diminished. They may lack confidence to articulate the issues that are important for them and unable to influence the agenda. As a result, there have been many instances where women have agreed to arrangements that are not in the best interests of the children or lead to further exposure to family violence.
10. Despite the potential difficulties ADR presents for women who are victims of violence, it may nonetheless be a preferable alternative to family law proceedings which can be protracted, isolating and unpredictable. Some victims of domestic violence find FDR empowering and an opportunity to re-assert control. It offers an opportunity to tell their story in a supported context. The value of supported models of family dispute resolution is

discussed above.

11. In supported FDR models, the concepts of “neutrality” or “impartiality” need not prevent practitioners from intervening to manage power imbalances or seeking to promote the best interests of the children. For example the Co-ordinated Family Dispute Resolution program (CFDR) involves the FDRP explicitly acknowledging the history of violence and stating that they will intervene to address any imbalances. Parties are asked to respect the process, including not interrupting, and ensure that the process remains as non-adversarial as possible. The FDRP is able to use questioning, reframing and summarising as one way of redressing the imbalance and can provide encouragement and support to both parties.
12. The mediation process itself can incorporate measures that support victims to negotiate effectively with the perpetrator. There is flexibility in the way in which FDR is delivered, for example, by telephone or shuttle (parties in separate rooms). The process can be structured to include breaks and private sessions. Safety concerns can be monitored throughout the mediation and the FDRP can terminate the mediation if it becomes unsafe. The FDRP can utilise the FDR process in order to redress imbalances, for example, by controlling when and for how long the participants speak.
13. The role of legal and non-legal advocates is also very important in supporting the redressing the power imbalances through the way they support the process and in explaining and/or advising the client. The legal practitioner must be free to intervene if their client's interests are not being met.
14. Both ADR practitioners and representatives need to have specialised skills specific to the legal context in which they are operating. In particular, Family Law practitioners are required to complete a graduate diploma in FDR to become accredited as an FDRP. Further skills and knowledge are necessary to conduct FDR where there is family violence. Practitioners must have demonstrated understanding of the dynamics of domestic violence and how the power imbalance impacts on the conduct of ADR. Understanding how clients experience different types of disadvantage is also essential.

**Question 5: Where a pro bono lawyer is acting as an ADR practitioner, should the service be provided free of charge to one or both parties if one has the capacity to pay?**

15. In a context where it can be difficult to secure co-operation of parties, a payment requirement may act as a disincentive. However, an option may be to require a financially advantaged party to make a financial contribution to the costs of the mediation as distinct from that party engaging and paying the practitioner themselves.

**Question 6: Is the impartiality of the ADR practitioner compromised if they act as both an advocate for a client and ADR practitioner in the same matter?**

16. While both provide support to participants in the ADR process, the roles of ADR practitioner and advocate are distinct. Advocacy roles are most appropriately performed by the client's legal and non-legal representatives. Whilst advocates focus on providing personalised advice to the client about the content of their matter, the ADR practitioners focus is on upholding the ADR process. As discussed above, an effective ADR practitioner can nonetheless safeguard the interests of a vulnerable client the way that they conduct the mediation in ways that do not amount to providing advocacy.

**Question 7: Are the areas/projects identified in Section 7 of this paper appropriate for pro bono?**

17. Family Law has not traditionally been an area of high involvement by pro-bono lawyers. However as demonstrated by the Co-ordinated Family Dispute Resolution Pilot, there is a role for solicitors employed by community legal centres to be involved in Family Dispute Resolution with other services providers. This model could potentially extend to include the involvement of pro-bono solicitors.

**Question 8: What additional areas/projects might be appropriate?**

18. Pro-bono lawyers who are not FDRPs can provide assistance to clients participating in FDR by providing legal advice, assisting with preparing opening statements, explaining the process. There is also scope for conducting community legal education to provide information about the FDR process.

**Question 9: Is there enough need/demand for lawyers to act as mediators on a pro bono basis to justify the resources required for lawyers to be trained and maintain their accreditation?**

19. A shortage of accredited Family Dispute Resolution Practitioners has contributed to delays in people resolving their family law matters. Waiting lists in FRCs can be prohibitive for some clients and not all clients are eligible for legal aid. In other circumstances FRCs or other FDR providers may not be willing or equipped to take on matters where there is a history of violence. Lawyers wishing to work as FDR practitioners are required to complete the FDRP training and accreditation. In the family law context, completion of the training is likely to be justified by the demand. However, it is difficult for us to comment on the extent to which this would be the case in other areas of law.

**Question 10: Are there any other issues relating to the use of ADR for people experiencing disadvantage and the involvement of pro bono legal service providers in ADR?**

20. The limitations to ADR need to be acknowledged, particularly in relation to FDR. There will always be a proportion of family law matters for which FDR is not appropriate. Sometimes the circumstances are such that a client will need to apply directly to court and seek an exemption from participating in FDR. These circumstances include: where there is a child protection investigation, criminal charges pending against the violent party, where no contact is the only safe outcome and when the matter is urgent, for example a recovery order. In other cases, it may be difficult to secure the cooperation of perpetrators of violence where this means acknowledging their violent behaviour. Patterns of coercive and controlling behaviour are at odds with the child-focused and consensual co-operative approach.
21. ADR cannot be provided in isolation to disadvantaged clients but must be delivered in conjunction with appropriate support services. Where ADR cannot take place, appropriate and effective referrals must be made. There needs to be a high degree of co-operation between inter-disciplinary practitioners, and this is occurring in the family law area with projects such as the Co-ordinated Family Dispute Resolution pilot. It may be that similar levels of co-operation are possible in other areas of law but we do not have any direct experience.

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22. Access to the courts to resolve disputes is essential for people who experience disadvantage. However, ADR is also an appropriate early intervention mechanism which can assist resolve disputes before they escalate, and also essential for people who experience disadvantage in their access to the legal system. Involving pro-bono lawyers in making ADR fairer and more accessible is worthwhile. WLS NSW supports approaching the development of this pro-bono work in an informed way to ensure proper selection, training and support of appropriate practitioners, and to include evaluation and reflection on the practice to enhance its success.
23. If you would like to discuss any aspect of this submission, please contact me or Edwina MacDonald, Law Reform and Policy Coordinator.

Yours sincerely,

Janet Loughman  
Principal Solicitor